CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXIX No. 4 July 25, 2017 462 Pages

Table of Contents

CONNECTICUT REPORTS

James E. *v.* Commissioner of Correction, 326 C 388 60
Habeas corpus; assault of elderly person first degree; reckless endangerment first degree; risk of injury to child; whether habeas court properly dismissed writ of habeas corpus for lack of subject matter jurisdiction; claim that amendment to statute (§ 54-125a [b] [2]) that repealed provision advancing certain inmates' parole eligibility dates by earned risk reduction credit violated ex post facto clause of federal constitution; claim that proper comparison for ex post facto analysis is between provision in effect at time of sentencing and subsequently enacted provision; facts of Lynce *v.* Mathis *(519 U.S. 433), distinguished; decision and reasoning in* Perez *v.* Commissioner of Correction *(326 Conn. 357), controlling.*

Machado *v.* Taylor, 326 C 396 68
Motor vehicle negligence action; statutory provision (§ 52-556) providing injured motorist right of action against state for injuries resulting from negligent operation of state owned and insured motor vehicle by state employee; motion for judgment of dismissal; claim that action should be dismissed for plaintiff's failure to offer evidence at trial to establish vehicle was insured by state, placing claim outside purview of waiver of sovereign immunity; rules of practice (§§ 10-30 [a] [1] and 15-8), distinguished; motion to open evidence; claim that trial court improperly denied motion to dismiss alleging lack of subject matter jurisdiction on basis of delay and doctrine of laches.

Perez *v.* Commissioner of Correction, 326 C 357 29
Habeas corpus; manslaughter first degree with firearm; carrying pistol without permit; whether 2013 amendments (P.A. 13-3 and P.A. 13-247) to statute ([Rev. to 2013] § 54-125a) eliminating earned risk reduction credit from calculation of violent offender's parole eligibility date, when such credit was not allowed at time that offense was committed, and eliminating requirement of parole hearing, violated petitioner's right to due process under federal and state constitutions and right to personal liberty pursuant to state constitution; whether retroactive application to petitioner of 2013 amendments, when he committed offense and was sentenced prior to amendments' effective date, violated ex post facto clause of federal constitution; claim that, in conducting ex post facto inquiry, habeas court was not limited to comparing challenged statute with statute in effect at time that offense was committed but may consider statute in effect at time of plea and sentencing; claim that application of 2013 amendment to parole eligibility provision of § 54-125a (b) (2) by Board of Pardons and Paroles violated doctrine of separation of powers in that it converted legislatively determined parole eligible offense into offense which, by virtue of executive action, was rendered parole ineligible; claim that 2013 amendment, as applied to petitioner, violated equal protection clause of federal constitution; claim that statute (§ 18-98e), pursuant to which respondent Commissioner of Correction was vested with discretion to award risk reduction credit toward reduction of inmate's sentence, facially violated equal protection clause; claim that proper interpretation of 2013 amendments would limit application of those provisions to those inmates who began serving sentences after effective date of provisions.

State *v.* Houghtaling, 326 C 330 2
Possession of marijuana with intent to sell; possession of more than four ounces of marijuana; motion to suppress; conditional plea of nolo contendere; certification from Appellate Court; whether Appellate Court correctly concluded that defendant

(continued on next page)

lacked standing to challenge warrantless search of property because he lacked subjective expectation of privacy; proper standard for determining whether defendant has subjective expectation of privacy in property subject to warrantless search, discussed; claim that defendant's confession to police was fruit of unlawful stop of defendant in his vehicle and his subsequent warrantless arrest; whether police had reasonable and articulable suspicion that defendant was involved in marijuana grow operation on property; whether police had probable cause to arrest defendant after stop of his vehicle; State *v.* Boyd *(57 Conn. App. 176), to extent that it requires defendant, in order to establish subjective expectation of privacy, to show certain facts pertaining to his relationship with property and that he maintained property in private manner, overruled.*

Volume 326 Cumulative Table of Cases 79

CONNECTICUT APPELLATE REPORTS

Bank of New York, Trustee *v.* Savvidis, 174 CA 843 . . . . . 5A

Foreclosure; bankruptcy; motion to reenter judgment of strict foreclosure and to reset law days; claim that trial court improperly relied on certain affidavit in calculating outstanding debt; whether defendants demonstrated that they were substantially prejudiced by court's decision; whether court abused its discretion in declining to conduct evidentiary hearing on issue of its reliance on subject affidavit in calculating outstanding debt.

DiGiuseppe *v.* DiGiuseppe, 174 CA 855. . . . . 17A

Dissolution of marriage; motion for contempt; reviewability of claim that trial court erred in not finding latent ambiguity in provision of separation agreement concerning college expenses; reviewability of claim that trial court erred in determining that defendant was responsible for all of children's college expenses; failure to distinctly raise claim at trial.

Hampton *v.* Commissioner of Correction, 174 CA 867 . . . . . 29A

Habeas corpus; claim that petitioner was prejudiced by trial counsel's deficient performance in failing to object to trial court's improper jury instructions that petitioner could be convicted as principal or accessory with respect to count of information that charged petitioner as accessory; claim that defense counsel's deficient performance permitted jury to return nonunanimous verdict of guilty in that it was unclear whether jury found petitioner guilty as principal or accessory; whether habeas court properly determined that precise harm that petitioner asserted by defense counsel's deficient performance was not so significant that there was reasonable probability that outcome of trial with respect to count at issue would have been different.

Marciano *v.* Olde Oak Village Condominium Assn., Inc., 174 CA 851. . . . . 13A

Negligence; premises liability; claim that trial court erroneously concluded that there was no genuine issue of material fact that defendant condominium association did not have possession and control over area where plaintiff unit owner fell; whether plaintiff was deemed to have admitted that area where she fell was her

(continued on next page)

CONNECTICUT LAW JOURNAL
(ISSN 87500973)

Published by the State of Connecticut in accordance with the provisions of General Statutes § 51-216a.

Commission on Official Legal Publications
Office of Production and Distribution
111 Phoenix Avenue, Enfield, Connecticut 06082-4453
Tel. (860) 741-3027, FAX (860) 745-2178
www.jud.ct.gov

RICHARD J. HEMENWAY, *Publications Director*

Published Weekly – Available at http://www.jud.ct.gov/lawjournal

Syllabuses and Indices of court opinions by
MICHAEL A. GENTILE, *Acting Reporter of Judicial Decisions*
Tel. (860) 757-2250

The deadline for material to be published in the Connecticut Law Journal is Wednesday at noon for publication on the Tuesday six days later. When a holiday falls within the six day period, the deadline will be noon on Tuesday.

responsibility to maintain by failing to respond to defendant's requests for admissions.

Singh *v.* CVS, 174 CA 841 . . . . . 3A
Workers' compensation; whether plaintiff was entitled to benefits for total incapacity from compensable injury under applicable statute (§ 31-307).

State*v.* Purcell (replacement pages), 174 CA 407–408 v
Volume 174 Cumulative Table of Cases 49A

Cadle Co. *v.* Ogalin, 175 CA 1 . . . . . 59A
Summary judgment; action to enforce judgment; whether trial court improperly granted motion to strike second special defense alleging that action was duplicative, unfair, inequitable, vexatious and oppressive; whether allegation of nonpayment is sufficient reason for initiating action; whether defendant established claim that action was unfair and duplicative due to fact that active collection proceedings remained pending before trial court; whether trial court properly granted motion for summary judgment; whether trial court properly determined that special defense of laches was equitable defense and not applicable to action for monetary damages that was filed within relevant statute of limitations (§ 52-598); whether defendant alleged facts to create genuine issue of material fact as to whether he was prejudiced by any delay in enforcement; claim that trial court improperly awarded postjudgment interest; failure to specifically plead issue of res judicata as special defense; reviewability of claim raised for first time on appeal.

Hosein *v.* Edman, 175 CA 13 . . . . . 69A
Negligence; personal injury; claim that trial court erred in discrediting and effectively precluding testimony of accident reconstructionist witness without affording plaintiff evidentiary hearing; whether it was within province of trial court, as trier of fact, to decide what weight, if any, to afford testimony of expert witness.

Hynes *v.* Jones, 175 CA 80 . . . . . 136A
Probate; whether Superior Court properly dismissed appeal from Probate Court's denial of motion to dismiss guardianship proceedings; claim that Probate Court lacked subject matter jurisdiction pursuant to statute (§ 45a-629 [a]); claim that the Superior Court improperly determined that minor child was resident of probate district when she became entitled to share of award from victim compensation fund.

State *v.* Franklin, 175 CA 22 . . . . . 78A
Murder; attempt to commit robbery in first degree; conspiracy to commit robbery in first degree; criminal possession of firearm; whether evidence was sufficient to support conviction of murder; whether evidence was sufficient to support conviction of criminal possession of firearm; claim that trial court abused discretion when it admitted certain uncharged misconduct evidence; claim that prosecutor's allegedly improper comments during closing argument to jury violated defendant's right to fair trial.

Village Mortgage Co. *v.* Veneziano, 175 CA 59 . . . . . 115A
Injunction; alleged misappropriation of corporate funds through conversion, statutory theft, and embezzlement; statute of limitations; claim that trial court's factual findings were clearly erroneous; reviewability of claims challenging discovery rulings of trial court; credibility determinations; whether trial court improperly denied motion for discovery of information; claim that trial court improperly failed to conclude that plaintiff intentionally spoliated evidence or engaged in discovery misconduct; claim that trial court improperly concluded that three year statute of limitations (§ 52-577) was not tolled by doctrine of fraudulent concealment; claim that knowledge of corporation can only be imputed through board of directors.

Volume 175 Cumulative Table of Cases 165A

SUPREME COURT PENDING CASES

Summaries 1B

CONNECTICUT CODE OF EVIDENCE

Revisions to the Connecticut Code of Evidence Being Considered by the Supreme Court 1C

NOTICES OF CONNECTICUT STATE AGENCIES

Housing, Department of 1D

MISCELLANEOUS

Small Claims Decentralization 1E

engaged in a discussion with the victim about his sexuality.[5] The victim's father asked if the victim liked girls or boys, to which the victim replied that he liked girls. The victim's father explained that, in the eyes of the Catholic Church, it is bad and a sin to like boys and that sex should occur between a man and a woman. The victim then acknowledged that he had started to like and think about boys but maintained, "[i]t's not my fault." The victim told his father that the defendant "has been having sex with me."

The following Monday, September 30, 2013, after the victim left for school, the victim's parents went to the police station to report his allegation. While at the police station, the victim's parents received a phone call from the victim's school social worker informing them that the victim told him that his "Uncle Robert" was having sex with him.

The defendant was subsequently arrested on the basis of the victim's allegations. The operative long form information charged the defendant with seven offenses in connection with four separate incidents. Relative to the August, 2010 incident, the defendant was charged with risk of injury to a child in violation of § 53-21 (a) (1). Relative to the December, 2011 incident, the defendant was charged with sexual assault in the first degree in violation of § 53a-70 (a) (1) and risk of injury to a child in violation of § 53-21 (a) (2). Relative to an incident that allegedly occurred in April, 2012, the defendant was charged with sexual assault in the second degree in violation of § 53a-71 (a) (1) and risk of

[5] At trial, the victim's father maintained that he spoke to the victim about his sexuality because his wife found pictures of penises on the victim's Nintendo DS. In his statement to the police on September 30, 2013, however, he stated that he spoke to the victim about his sexuality because his wife found pictures of his stomach on the victim's Nintendo DS and the victim was always rubbing and touching his stomach. The victim's father did not mention in his police statement that his wife had found pictures of penises on the victim's Nintendo DS.

injury to a child in violation of § 53-21 (a) (2). Finally, relative to the August, 2013 incident, the defendant was charged with sexual assault in the second degree in violation of § 53a-71 (a) (1) and risk of injury to a child in violation of § 53-21 (a) (2).

After a trial, a jury found the defendant guilty of the risk of injury counts with respect to the August, 2010, the December, 2011, and the August, 2013 incidents. The jury found the defendant not guilty of all counts of sexual assault and not guilty of the risk of injury count relative to the alleged incident in April, 2012. The defendant was sentenced to a total effective term of sixteen years of imprisonment, execution suspended after nine years, and ten years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

We begin with the defendant's claims pertaining to the PTSD testimony. The defendant claims that the PTSD testimony was hearsay and constituted a harmful nonconstitutional evidentiary error, and, therefore, the court abused its discretion by denying his motion for a mistrial. In particular, the defendant argues that the PTSD testimony "constituted an [improper] endorsement or confirmation of [the victim's] credibility—and the defendant's guilt," and improperly embraced an ultimate issue in the case, i.e., whether some or all of the events the victim described actually happened, thereby causing his PTSD. The defendant argues that the prejudicial nature of this evidence was beyond the curative powers of the court because the PTSD diagnosis related to the victim's credibility, which was crucial to a successful prosecution because the state's case lacked physical evidence of sexual assault and portions of the victim's testimony "were highly implausible." The state responds that the court's "clear and forceful curative instructions . . . expressly broke any link between the

CONNECTICUT REPORTS

Vol. 326

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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

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

Syllabus

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

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

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

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

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

Argued March 29—officially released July 25, 2017

Procedural History

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

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

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

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

Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the [trial court's] memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 222, 100 A.3d 821 (2014). Accordingly, although we must defer to the trial court's factual findings, determining whether those findings establish standing is a question of law, over which we exercise plenary review. See, e.g., *State* v. *Gonzalez*, 278 Conn. 341, 348, 898 A.2d 149 (2006).

I

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

A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II

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

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

A

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

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

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

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

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

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

B

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

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

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

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

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

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

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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

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

Syllabus

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

Argued April 6—officially released July 25, 2017

Procedural History

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

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

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

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

Opinion

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

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

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

I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II

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

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

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

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

Practice Book § 23-29 provides: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction; (2) the petition, or a count thereof, fails

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

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

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

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

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

A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C

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

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

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

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

D

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

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

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

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

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

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

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

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

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

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

E

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

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

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

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

The judgment is affirmed.

In this opinion the other justices concurred.

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

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

Syllabus

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

* In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. General Statutes § 54-86e.

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

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

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

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

Argued April 6—officially released July 25, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Cobb*, *J.*, granted the respondent's motion to dismiss and rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed. *Affirmed.*

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

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

Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The judgment is affirmed.

In this opinion the other justices concurred.

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

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

Syllabus

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

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

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

Argued March 28—officially released July 25, 2017

Procedural History

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

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

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

Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

never stated that delay or laches precludes a jurisdictional challenge.

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

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

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

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

In this opinion the other justices concurred.

Cumulative Table of Cases
Connecticut Reports
Volume 326

(Replaces Prior Cumulative Table)

Abreu *v.* Commissioner of Correction (Order) . . . 901
Antwon W. *v.* Commissioner of Correction (Order) . . . 909
Barton *v.* Norwalk . . . 139
Inverse condemnation; certification from Appellate Court; whether defendant city's condemnation of parking lot used by tenants substantially destroyed plaintiff property owner's use and enjoyment of subject property; whether claim of highest and best use in previous direct condemnation proceeding barred claim of inverse condemnation predicated on different use under doctrine of judicial estoppel.
Brenmor Properties, LLC *v.* Planning & Zoning Commission . . . 55
Zoning; certification from Appellate Court; whether Appellate Court correctly concluded that trial court properly sustained plaintiff developer's administrative appeal from defendant planning and zoning commission's denial of application for affordable housing subdivision pursuant to statute (§ 8-30g); whether, in light of commission's concession regarding applicable standard of review, trial court abused its discretion by remanding matter with direction to approve plaintiff's application as presented; standard of review applicable to trial court's affordable housing remedy under § 8-30g, discussed.
Brian S. *v.* Commissioner of Correction (Order) . . . 904
Brown *v.* Njoku (Order) . . . 901
Channing Real Estate, LLC *v.* Gates . . . 123
Action to recover on promissory notes; motion to preclude certain evidence; claim that, although Appellate Court properly concluded that parol evidence rule barred introduction of extrinsic evidence to vary terms of notes, that court improperly remanded case for new trial rather than directing judgment for plaintiff and restricting proceedings on remand to hearing in damages; parol evidence rule, discussed; claim that defendant lacked standing to pursue claim alleging violation of Connecticut Unfair Trade Practices Act (§ 42-110a et seq.); whether member of limited liability company has standing to bring action on basis of injury allegedly suffered by limited liability company.
DeEsso *v.* Litzie (Order) . . . 913
Fairfield Merrittview Ltd. Partnership *v.* Norwalk (Order) . . . 901
Federal National Mortgage Assn. *v.* Lawson (Order) . . . 902
Federal National Mortgage Assn. *v.* Morneau (Order) . . . 913
Giuca *v.* Commissioner of Correction (Order) . . . 903
Green *v.* Commissioner of Correction (Order) . . . 907
Hull *v.* Hull (Order) . . . 909
James E. *v.* Commissioner of Correction . . . 388
Habeas corpus; assault of elderly person first degree; reckless endangerment first degree; risk of injury to child; whether habeas court properly dismissed writ of habeas corpus for lack of subject matter jurisdiction; claim that amendment to statute (§ 54-125a [b] [2]) that repealed provision advancing certain inmates' parole eligibility dates by earned risk reduction credit violated ex post facto clause of federal constitution; claim that proper comparison for ex post facto analysis is between provision in effect at time of sentencing and subsequently enacted provision; facts of Lynce *v.* Mathis *(519 U.S. 433), distinguished; decision and reasoning in* Perez *v.* Commissioner of Correction *(326 Conn. 357), controlling.*
Keller *v.* Keller (Order) . . . 912
Machado *v.* Taylor . . . 396
Motor vehicle negligence action; statutory provision (§ 52-556) providing injured motorist right of action against state for injuries resulting from negligent operation of state owned and insured motor vehicle by state employee; motion for judgment of dismissal; claim that action should be dismissed for plaintiff's failure to offer evidence at trial to establish vehicle was insured by state, placing claim outside purview of waiver of sovereign immunity; rules of practice (§§ 10-

30 [a] [1] and 15-8), distinguished; motion to open evidence; claim that trial court improperly denied motion to dismiss alleging lack of subject matter jurisdiction on basis of delay and doctrine of laches.

Maturo *v.* State Employees Retirement Commission 160

Administrative appeal; whether defendant State Employees Retirement Commission properly interpreted statutory provision (§ 7-438 [b]) of Municipal Employees' Retirement Act (§ 7-425 et seq.) to bar retired member from collecting pension while he was reemployed by municipality in nonparticipating position; statutory framework of act establishing and governing municipal employees retirement system, discussed; claim that position of mayor of East Haven did not constitute employment and mayor was not employee for purposes of act; claim that § 7-438 (b) evidences legislative intent to preclude member from receiving pension only while reemployed in position designated by town as participating in retirement system; whether statute (§ 7-432 [g]) providing for application to medical examining board for reconsideration of eligibility for disability retirement was applicable to plaintiff's claim; claim that legislature acquiesced in defendant's prior interpretation of act; claim that trial court should have deferred to nonbinding opinion letter of attorney general recommending that defendant not deviate from prior interpretation of act, specifically its interpretation of § 7-438 (b), in absence of further legislative direction.

Micek-Holt *v.* Papageorge (Order). 915

Middlebury *v.* Connecticut Siting Council 40

Administrative appeal; whether trial court properly dismissed plaintiffs' appeal from decision of defendant siting council granting petition to open and modify certificate for operation of electric generating facility; whether trial court improperly determined that council adequately had considered neighborhood concerns as required by statute (§ 16-50p [c] [1]) in granting petition; statutory construction, discussed; claim that trial court improperly concluded that plaintiffs had abandoned their due process and substantial evidence claims due to inadequate briefing; whether plaintiffs' claim that trial court improperly concluded that plaintiffs had abandoned due process and substantial evidence claims due to inadequate briefing was moot because plaintiffs failed to challenge on appeal trial court's alternative conclusions rejecting those claims on merits.

MYM Realty, LLC *v.* Doe (Order) 905

New Haven Parking Authority *v.* Long Wharf Realty Corp. (Order) 912

O'Brien *v.* O'Brien 81

Marital dissolution; motion for contempt for plaintiff's purported violation of court's automatic orders effective during pendency of dissolution proceeding and appeal from judgment of dissolution on basis of certain stock transactions that plaintiff executed without defendant's consent or court order; certification from Appellate Court; whether Appellate Court incorrectly concluded that trial court improperly had considered, in making its financial orders, plaintiff's violations of automatic orders stemming from his decision to conduct certain stock transactions; whether court may remedy harm caused by another party's violation of court order, even without finding of contempt; claim that trial court's financial award was erroneous because it was excessive and based on improper method for valuing loss to marital estate; whether court had discretion to consider value that stocks and options would have had at time of remand trial; claim, as alternative ground for affirming Appellate Court's judgment, that plaintiff's stock transactions did not violate automatic orders because those transactions were made in usual course of business; whether trial court's conclusion that stock options plaintiff exercised were marital property subject to distribution between parties was clearly erroneous; claim, as alternative ground for affirming Appellate Court's judgment, that trial court's award of retroactive alimony was improper because it purportedly required plaintiff to pay arrearage out his share of marital assets, thereby effectively reducing his share of property distribution.

Perez *v.* Commissioner of Correction. 357

Habeas corpus; manslaughter first degree with firearm; carrying pistol without permit; whether 2013 amendments (P.A. 13-3 and P.A. 13-247) to statute ([Rev. to 2013] § 54-125a) eliminating earned risk reduction credit from calculation of violent offender's parole eligibility date, when such credit was not allowed at time that offense was committed, and eliminating requirement of parole hearing, violated petitioner's right to due process under federal and state constitutions and right to personal liberty pursuant to state constitution; whether retroactive application to petitioner of 2013 amendments, when he committed offense and

was sentenced prior to amendments' effective date, violated ex post facto clause of federal constitution; claim that, in conducting ex post facto inquiry, habeas court was not limited to comparing challenged statute with statute in effect at time that offense was committed but may consider statute in effect at time of plea and sentencing; claim that application of 2013 amendment to parole eligibility provision of § 54-125a (b) (2) by Board of Pardons and Paroles violated doctrine of separation of powers in that it converted legislatively determined parole eligible offense into offense which, by virtue of executive action, was rendered parole ineligible; claim that 2013 amendment, as applied to petitioner, violated equal protection clause of federal constitution; claim that statute (§ 18-98e), pursuant to which respondent Commissioner of Correction was vested with discretion to award risk reduction credit toward reduction of inmate's sentence, facially violated equal protection clause; claim that proper interpretation of 2013 amendments would limit application of those provisions to those inmates who began serving sentences after effective date of provisions.

PMG Land Associates, L.P. *v.* Harbour Landing Condominium Assn. (Order). 911
Reese *v.* Commissioner of Correction (Order). 907
Rosa *v.* Commissioner of Correction (Order) 905
Shipman *v.* Commissioner of Correction (Order) 908
Spiotti *v.* Wolcott 190

Employment discrimination; whether plaintiff's claims previously decided adversely to her by State Board of Mediation and Arbitration pursuant to collective bargaining agreement barred by doctrine of collateral estoppel; whether this court should overrule Genovese *v.* Gallo Wine Merchants, Inc. *(226 Conn. 475); claim that* Genovese *should be overruled because it relied on legislative history to interpret statute (§ 31-51bb) pertaining to right of employee covered by collective bargaining agreement to pursue cause of action, and legislature subsequently enacted statute (§ 1-2z) requiring courts to interpret statutes pursuant to plain meaning rule; claim that this court should depart from principles of stare decisis and overrule* Genovese.

State *v.* Baccala 232

Breach of peace second degree; claim that, because evidence was insufficient to support conviction of breach of peace second degree on basis of words that did not fall within narrow category of unprotected fighting words, conviction constituted violation of first amendment to federal constitution; scope and application of fighting words exception to protections of first amendment, discussed; whether words spoken by defendant under circumstances in which they were uttered were likely to provoke violent response.

State *v.* Bonds (Order) 907
State *v.* Caballero (Order) 903
State *v.* Chankar (Order) 914
State *v.* Crenshaw (Order) 911
State *v.* Henderson (Order) 914
State *v.* Henry D. (Order). 912
State *v.* Houghtaling. 330

Possession of marijuana with intent to sell; possession of more than four ounces of marijuana; motion to suppress; conditional plea of nolo contendere; certification from Appellate Court; whether Appellate Court correctly concluded that defendant lacked standing to challenge warrantless search of property because he lacked subjective expectation of privacy; proper standard for determining whether defendant has subjective expectation of privacy in property subject to warrantless search, discussed; claim that defendant's confession to police was fruit of unlawful stop of defendant in his vehicle and his subsequent warrantless arrest; whether police had reasonable and articulable suspicion that defendant was involved in marijuana grow operation on property; whether police had probable cause to arrest defendant after stop of his vehicle; State *v.* Boyd *(57 Conn. App. 176), to extent that it requires defendant, in order to establish subjective expectation of privacy, to show certain facts pertaining to his relationship with property and that he maintained property in private manner, overruled.*

State *v.* Jerzy G. 206

Application for pretrial program of accelerated rehabilitation pursuant to statute (§ 54-56e); sexual assault fourth degree; motion to dismiss; certification from Appellate Court; mootness; whether Appellate Court properly dismissed deported defendant's appeal as moot; State *v.* Aquino *(279 Conn. 293), distinguished; collateral consequences doctrine, discussed; whether there was reasonable possi-*

bility of prejudicial collateral consequences resulting from trial court's orders terminating accelerated rehabilitation and ordering rearrrest; claim that defendant must evince intention to reenter country in order to raise existence of collateral consequences above mere speculation.

State *v.* Kallberg 1

Larceny third degree as accessory; conspiracy to commit larceny third degree; motion to dismiss; certification to appeal; whether Appellate Court correctly concluded that trial court improperly denied defendant's motion to dismiss charges; whether Appellate Court improperly concluded that trial court's factual finding as to parties' intent was clearly erroneous; whether Appellate Court properly reversed judgment of conviction on ground that prosecution of defendant was barred because nolle prosequi that had been entered on larceny charges had been part of global disposition agreement supported by consideration; unilateral entry of nolle prosequi and bilateral agreement involving entry of nolle prosequi, distinguished; claim that ambiguity in agreement between state and defendant must be construed against state.

State *v.* Killiebrew (Order) 909
State *v.* Linder (Order) 902
State *v.* Morel (Order) 911
State *v.* Navarro (Orders). 910
State *v.* Perez (Order). 908
State *v.* Petion (Order) 906
State *v.* Schovanec 310

Identity theft third degree; illegal use of credit card; credit card theft; larceny sixth degree; whether trial court improperly denied defendant's request for jury instruction on third-party culpability and excluded references to third-party culpability from argument; unpreserved claim that certain of defendant's convictions violated constitutional prohibition against double jeopardy.

State *v.* Seeley 65

Forgery second degree; supervisory authority over administration of justice; claim that waiver rule should be abandoned in context of bench trials; whether state presented sufficient evidence that defendant forged signature during purchase of automobile; whether state presented sufficient evidence that defendant acted with intent to deceive.

State *v.* Sinclair (Order) 904
State *v.* Snowden (Order) 903
State *v.* Williams (Order) 913
State *v.* Williams-Bey (Order) 920
U.S. Bank National Assn. *v.* Nelson (Order) 908
U.S. Bank, National Assn. *v.* Walbert (Order) 902
Wells Fargo Bank *v.* Braca (Order) 914
Wells Fargo Bank, N.A. *v.* Monaco (Order) 905
William Raveis Real Estate, Inc. *v.* Zajaczkowski (Order) 906

CONNECTICUT APPELLATE REPORTS

Vol. 174

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

HARMINDER SINGH *v.* CVS ET AL.
(AC 39484)

Alvord, Mullins and Bear, Js.

Syllabus

The plaintiff appealed from the decision of the Workers' Compensation Review Board affirming the decision of the Workers' Compensation Commissioner, who concluded that the plaintiff had reached maximum medical improvement for a compensable toe injury and that he was not entitled to benefits for total incapacity from that injury under the applicable statute (§ 31-307). *Held* that there was no merit to the plaintiff's claim that the board improperly affirmed the commissioner's determination, as the commissioner's conclusion that the plaintiff's chronic and degenerative medical condition was not caused by his compensable toe injury was sustained by the underlying facts in the record.

Argued April 20—officially released July 25, 2017

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Fourth District denying and dismissing the claim for certain benefits and granting in part the plaintiff's motion to correct, brought to the Workers' Compensation Review Board, which affirmed

the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

Andrew E. Wallace, for the appellant (plaintiff).

James T. Baldwin, for the appellee (named defendant).

Opinion

PER CURIAM. The plaintiff, Harminder Singh, appeals from the decision of the Workers' Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner (commissioner), who concluded that the plaintiff had reached maximum medical improvement for a compensable toe injury and that he was not entitled to benefits for total incapacity from that injury under General Statutes § 31-307.[1] The board affirmed the commissioner's determination on the ground that the plaintiff's medical condition was the result of degenerative processes unrelated to the compensable injury. The board concluded that evidence in the record found persuasive and credible by the commissioner supported that determination. On appeal, the plaintiff claims that the commissioner improperly failed to (1) apply credible evidence in accordance with the applicable law, specifically General Statutes § 31-349, and (2) perform an analysis of the plaintiff's total disability consistent with the precedent in *Osterlund* v. *State*, 135 Conn. 498, 66 A.2d 363 (1949), and, therefore, the board improperly affirmed the decision of the commissioner.

After careful review of the record, including the board's well reasoned decision, and the parties' appellate briefs, we conclude that the plaintiff's claims on appeal are without merit. The board properly affirmed

[1] The defendants to this appeal are the named defendant, CVS, which was the plaintiff's employer, and Gallagher Bassett Services, Inc., the insurance administrator.

the commissioner's determination that the plaintiff's chronic and degenerative medical condition was not caused by his compensable toe injury. "[O]ur role is to determine whether the review [board's] decision results from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them . . . . [Therefore, we ask] whether the commissioner's conclusion can be sustained by the underlying facts." (Internal quotation marks omitted.) *Jodlowski* v. *Stanley Works*, 169 Conn. App. 103, 108, 147 A.3d 741 (2016). In this case, the answer to that question is yes, the commissioner's conclusion can be sustained by such facts.

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

BANK OF NEW YORK, TRUSTEE *v.* ATHINA SAVVIDIS ET AL.
(AC 39080)

DiPentima, C. J., and Keller and Graham, Js.

Syllabus

The plaintiff bank, as trustee, sought to foreclose a mortgage on certain real property owned by the defendant mortgagors. Following the trial court's rendering of a judgment of strict foreclosure, the plaintiff filed a notice with the court that the defendants had commenced a bankruptcy proceeding, thereby staying the judgment. Thereafter, the bankruptcy court issued an order granting the plaintiff relief from the automatic stay, and the plaintiff filed a motion with the trial court to reenter the judgment and to reset the law days. In support of its motion, the plaintiff submitted an updated calculation of debt with an attached affidavit of debt from its servicing agent, B. The calculation of debt was less than the calculation of debt that the plaintiff previously had submitted approximately two years earlier, despite the accrual of interest. At the hearing on the plaintiff's motion, the defendants' counsel argued that the court should not rely on B's affidavit in calculating the outstanding debt. The trial court inquired of counsel as to how the defendants were harmed by the more advantageous updated calculation of debt, and whether counsel had any basis on which to challenge B's affidavit. In response,

counsel stated that B's affidavit was inconsistent with the prior affidavit and he requested an evidentiary hearing on the matter, but indicated that he would not offer any evidence to contradict B's affidavit. Thereafter, the trial court declined counsel's request for an evidentiary hearing, reentered the judgment of strict foreclosure, reset the law days, and calculated the outstanding debt relying on B's affidavit. On appeal, the defendants challenged the trial court's reliance on B's affidavit in calculating their outstanding debt. *Held* that the trial court properly relied on B's affidavit in calculating the outstanding debt, the defendants on appeal having failed to articulate any colorable claim of prejudice by the court's decision: although the updated calculation of debt with B's attached affidavit was inconsistent with the one that the plaintiff previously had submitted, the updated calculation of debt was less than the prior calculation of debt, and the defendants did not rebut the plaintiff's contention that there was effectively no harm to them; moreover, the trial court did not abuse its discretion in declining to conduct an evidentiary hearing on the matter in light of the defendants' affirmation that they would not offer any additional evidence to challenge the figures set forth in B's affidavit.

Argued April 25—officially released July 25, 2017

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendants were defaulted for failure to plead; thereafter, the court, *Adams*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered a judgment of foreclosure by sale; subsequently, the court, *Mintz*, *J.*, granted the motion to open the judgment filed by the named defendant et al. and rendered a judgment of strict foreclosure; thereafter, the court, *Povodator*, *J.*, granted the plaintiff's motion to reenter the judgment and to reset the law days, and the named defendant et al. appealed to this court. *Affirmed.*

Joseph DaSilva, *Jr.*, with whom, on the brief, was *Marc J. Grenier*, for the appellants (named defendant et al.).

Jonathan A. Adamec, for the appellee (plaintiff).

Opinion

GRAHAM, J. The defendants Athina Savvidis and Anastasios Savvidis[1] appeal from the judgment of strict foreclosure reentered by the trial court in favor of the plaintiff, Bank of New York, as trustee,[2] following the lifting of a bankruptcy stay. On appeal, the defendants contend that the trial court improperly relied on an affidavit furnished by the plaintiff in calculating the outstanding debt. We affirm the judgment of the trial court.

This appeal concerns real property owned by the defendants and known as 106B Comstock Hill Avenue in Norwalk (property). On April 14, 2003, the defendants executed a promissory note (note) in favor of America's Wholesale Lender[3] in the principal amount of $550,000. The note was secured by a mortgage deed on the property (mortgage).

On October 3, 2006, the plaintiff commenced this foreclosure action in its capacity as owner and holder of the note and mortgage. The operative complaint, the plaintiff's January 31, 2007 amended complaint, alleged in relevant part that the note was in default, that the defendants had been provided written notice thereof, and that the defendants had failed to cure that default. Accordingly, the plaintiff sought to "declare [the] note to be due in full and to foreclose the mortgage securing said note." Over the next decade, multiple judgments

[1] Although Sophia Savvidis, Progressive Credit Union, and Norwalk Hospital also were named as defendants in the plaintiff's complaint, none of those defendants have appealed from the judgment of the trial court. We, therefore, refer to Athina Savvidis and Anastasios Savvidis as the defendants in this opinion.

[2] The plaintiff is the trustee of the Certificate Holders of CHL Mortgage Pass-Through Trust 2003-15.

[3] America's Wholesaler Lender is the trade name of Countrywide Home Loans, Inc. *America's Wholesale Lender* v. *Pagano*, 87 Conn. App. 474, 475, 866 A.2d 698 (2005).

of foreclosure were entered by the trial court, only to be stayed by the filing of bankruptcy petitions by the defendants under title 11, chapter 13, of the United States Code. See *U.S. Bank National Assn., Trustee* v. *Works*, 160 Conn. App. 49, 52, 124 A.3d 935 (filing of bankruptcy petition pursuant to title 11 operates "as an automatic stay of the plaintiff's foreclosure action"), cert. denied, 320 Conn. 904, 127 A.3d 188 (2015).

Relevant to this appeal are the events subsequent to the rendering of a judgment of strict foreclosure by the court on June 8, 2015. On September 9, 2015, the plaintiff, in accordance with General Statutes § 49-15 (b),[4] filed a notice that the defendants had commenced yet another bankruptcy proceeding, thereby staying the judgment of foreclosure recently reentered by the trial court. On January 7, 2016, the United States Bankruptcy Court for the District of Connecticut issued an order granting relief from that automatic stay "to permit the [plaintiff] to exercise [its] rights, if any, with respect to [the property] in accordance with applicable non-bankruptcy law." The plaintiff thereafter filed a motion to reset the law days and to reenter the judgment on the ground that the June 8, 2015 judgment of strict foreclosure had been opened and the law days vacated pursuant to § 49-15 (b).

In support of that motion, the plaintiff submitted an updated calculation of debt dated March 9, 2016. That

[4] General Statutes § 49-15 (b) provides in relevant part: "Upon the filing of a bankruptcy petition by a mortgagor under Title 11 . . . any judgment against the mortgagor foreclosing the title to real estate by strict foreclosure shall be opened automatically without action by any party or the court, provided, the provisions of such judgment, other than the establishment of law days, shall not be set aside under this subsection, provided no such judgment shall be opened after the title has become absolute in any encumbrancer or the mortgagee, or any person claiming under such encumbrancer or mortgagee. The mortgagor shall file a copy of the bankruptcy petition, or an affidavit setting forth the date the bankruptcy petition was filed, with the clerk of the court in which the foreclosure matter is pending. . . ."

filing stated that the total due as of February 18, 2016 was $794,608.66. Attached to that filing was an affidavit of debt dated March 3, 2016, and signed under oath by Tina Marie Braune, a "Document Execution Specialist of Nationstar Mortgage LLC," which was the plaintiff's servicing agent at that time. In her affidavit, Braune provided a detailed breakdown of the various components of that calculation, including unpaid principal, interest, and property tax and hazard insurance advances.

The parties appeared before the court on March 14, 2016, at which time the court indicated that it had "a couple of questions or problems with some of the numbers that don't make sense" in comparison to the calculation of debt submitted by the plaintiff two years earlier. The plaintiff previously had filed a calculation of debt dated February 11, 2014 (2014 calculation), which indicated that the total due to February 18, 2014 was $801,528.16. That filing was accompanied by an affidavit of debt dated November 12, 2013, and signed under oath by Kimberly Gina Harvey, an assistant vice president at Bank of America N.A.[5] Comparing the 2014 calculation to the one presently before it, the court observed that "[t]he total debt has actually gone down which doesn't make sense since you're dealing with a substantial increase in interest." The court then noted a significant discrepancy with respect to the property tax and hazard insurance advances detailed in the respective affidavits, "that seems to be the source . . . of why notwithstanding increased interest over time the aggregate actually has gone down somewhat." The parties requested a one week continuance to review the matter, which the court granted.

The parties returned to court on March 21, 2016. The plaintiff had filed an additional calculation of debt dated

[5] In her affidavit, Harvey indicated that Bank of America N.A. was "the plaintiff's servicing agent for the subject loan . . . ."

March 18, 2016, which was identical in all material respects to the March 9, 2016 calculation, save for the inclusion of $2328.81 in additional interest that recently had accrued. The defendants' counsel indicated that he had "no problem" with that additional interest but remained "deeply concerned" that the 2014 calculation was higher than the one presently before the court. In response, the court inquired whether the defendants had any reason or evidentiary basis for the court to doubt the accuracy of the updated calculation of debt furnished by the plaintiff, which the court noted was "more advantageous" to the defendants. The defendants' counsel offered no such reason, apart from the fact that the plaintiffs had introduced inconsistent affidavits. The plaintiff's counsel confirmed that the Braune "numbers are correct for the affidavit of debt."

The defendants' counsel nonetheless argued that the court should not rely on Braune's affidavit because "the plaintiff . . . is now seeking to collect roughly half of what it allegedly" paid in property tax and hazard insurance advances. The court noted that it had two alternatives: accept the updated calculation of debt predicated on Braune's affidavit or conduct an evidentiary hearing. The defendants' counsel stated that he did not want an evidentiary hearing, but an explanation for why the numbers had decreased.

The court inquired of the defendants' counsel how the defendants were harmed by the present calculation of debt, and whether he had "any basis" on which to challenge Braune's affidavit. In response, counsel pointed only to its inconsistency with the prior affidavit. The court responded that "there is a presumptive quality to what is being submitted. Absent a request for an ability to challenge the evidentiary value and weight to be given presumptively, I rely on unchallenged submissions such as this affidavit." The defendants' counsel then requested an evidentiary hearing but indicated that

he would not be offering any evidence to contradict the affidavit.

The court then ruled in relevant part: "Absent any proffer of evidence that challenges the validity or accuracy of the most recent affidavit . . . I believe I am entitled to and should proceed on the basis of the affidavit as submitted absent a claim that you're going to be offering evidence to challenge those numbers." The court issued an order reentering the judgment of strict foreclosure, in which it reset the law days and found the outstanding debt to be $796,922.47.[6]

On appeal, the defendants claim that the court improperly relied on Braune's March 3, 2016 affidavit in calculating the debt. In response, the plaintiff argues that, irrespective of the merits of that claim, the defendants cannot demonstrate that they were substantially prejudiced by the court's evidentiary ruling. We agree with the plaintiff.

The standard governing such claims is well established. "Our standard of review regarding challenges to a trial court's evidentiary rulings is that these rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice. . . . Additionally, it is well settled that even if the evidence was improperly admitted, the [defendant] must also establish that the ruling was harmful and likely to affect the result of the trial." (Internal quotation marks omitted.) *National City Mortgage Co.* v. *Stoecker*, 92 Conn. App. 787, 797, 888 A.2d 95, cert. denied, 277 Conn. 925, 895 A.2d 799 (2006).

The record reflects that the trial court rendered a judgment of strict foreclosure on June 8, 2015. At that

[6] That figure is $4575.69 less than the debt set by the court nine months earlier.

time, the court, without objection by the defendants, determined the outstanding debt to be $801,498.16. Ultimately, the defendants' filing of a bankruptcy petition precluded that foreclosure from proceeding.

Following the January 7, 2016 order of the bankruptcy court granting the plaintiff relief to exercise its right to foreclose on the property, the plaintiff moved for a reentry of the judgment of strict foreclosure, which necessitated a resetting of the law days and a recalculation of the debt. Although more than nine months had passed, during which additional interest had accrued, the plaintiff nonetheless submitted an updated calculation of debt and an accompanying affidavit that set forth a total due that was thousands of dollars *less* than the debt previously set by the court. When pressed by the court as to how that reduction in the amount owed to the plaintiff prejudiced the defendants, the defendants' counsel provided no answer. Furthermore, although the court considered conducting an evidentiary hearing on the matter, it declined to do so in light of the defendants' affirmation that they would not be offering any additional evidence to challenge the figures set forth in Braune's affidavit.

On appeal, the defendants have articulated no colorable claim of prejudice. Although the plaintiff argued in its appellate brief that "[t]here was effectively no harm to the defendants by the trial court's decision," the defendants did not rebut that contention. On our review of the record, we can discern no substantial prejudice to the defendants. Moreover, we are mindful that "[a] foreclosure action is an equitable proceeding . . . [and the] determination of what equity requires is a matter for the discretion of the trial court." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Angle*, 284 Conn. 322, 326, 933 A.2d 1143

(2007). We conclude that the defendants have not demonstrated that the trial court abused its discretion in the present case.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

MARY MARCIANO *v.* OLDE OAK VILLAGE CONDOMINIUM ASSOCIATION, INC.
(AC 38543)

Lavine, Sheldon and Flynn, Js.

Syllabus

The plaintiff condominium owner sought to recover damages from the defendant condominium association under a theory of premises liability after she sustained personal injuries from a fall while exiting the rear of her condominium unit. The plaintiff alleged in her complaint that the defendant had possession and control over the premises where she fell. The condominium association declaration provided that each condominium owner was responsible for the maintenance, repair, and replacement of the area three feet parallel to the rear boundary of his or her unit. The plaintiff failed to respond to the defendant's requests for admissions that, inter alia, the location where she fell was less than three feet from the rear boundary of her condominium unit. The trial court granted the defendant's motion for summary judgment and concluded that, by virtue of the plaintiff's failure to respond to the defendant's requests for admissions, she was deemed to have admitted that the maintenance of the area where she fell was her responsibility, and that the defendant was not in possession or control of that area. On the plaintiff's appeal from the summary judgment rendered in favor of the defendant, *held* that the trial court properly concluded that there was no genuine issue of material fact that the defendant did not have possession and control over the area on which she fell and that the defendant was entitled to judgment as a matter of law; by failing to respond to the defendant's requests for admissions, the plaintiff was deemed to have admitted that she was responsible for maintaining the area where she fell, which defeated her assertion that the defendant had a duty to maintain the site of the incident.

Argued May 16—officially released July 25, 2017

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, brought to the Superior Court in the judicial district of New Haven, where the court, *Alander*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Robert J. Santoro, with whom, on the brief, was *Andrew S. Knott*, for the appellant (plaintiff).

Leah M. Nollenberger, with whom was *Robert G. Clemente* and, on the brief, *Lorinda S. Coon*, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Mary Marciano, appeals from the grant of summary judgment by the trial court in favor of the defendant, Olde Oak Village Condominium Association, Inc. The plaintiff had sought damages from the defendant for its alleged negligence after she suffered personal injuries from a fall on April 14, 2012, while exiting her condominium unit from a rear entrance. The plaintiff alleged in her complaint that the defendant had possession and control over the premises where her fall took place. On appeal, the plaintiff claims that the court erroneously concluded that there was no genuine issue of material fact that the defendant did not have possession and control over the area on which she fell. We affirm the judgment of the trial court.

Our standard of review is set forth in Practice Book § 17-49, which provides in relevant part that summary judgment "shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "[T]he scope of our review of the trial court's decision

to grant the plaintiff's motion for summary judgment is plenary." (Internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 116, 49 A.3d 951 (2012).

Our resolution of the plaintiff's claim hinges on our examination of her complaint, which alleges that the defendant was responsible for the upkeep of the lawn on which the plaintiff fell and that her fall was due to the "negligence and carelessness of the defendant" due to its failure to maintain the area in which the plaintiff fell and warn the plaintiff of a dangerous condition.

As the trial court noted in its October 20, 2015 memorandum of decision granting the defendant's motion for summary judgment, the parties were in agreement "that the defendant had the duty to use reasonable care to maintain in a reasonably safe condition those areas of the premises over which it exercised control." The court also noted that the condominium association declaration, which was admitted into evidence in support of the defendant's motion for summary judgment, provided that each condominium owner shall be responsible for the maintenance, repair, and replacement of certain limited common elements, which included the area three feet parallel to the rear boundary of the unit.

The plaintiff failed to timely answer the defendant's requests for admissions and did not file any objection to the requests or seek to further extend the March 1, 2014 deadline set by the court for the plaintiff's answer. Those requests stated, inter alia, "[y]our fall occurred when you stepped on a rock on the ground at the bottom of your rear deck stairs," and that "[t]he location of the rock on the ground where you fell is less than three feet from the rear boundary of your unit."[1] The court

[1] In addition, by virtue of her failure to timely respond to the defendant's requests for admissions, the plaintiff is deemed to have admitted that she was "responsible for the maintenance of the area" in which she fell pursuant to the condominium declaration, and that the defendant "was not responsible for maintaining the area three feet parallel to the rear boundary of [the plaintiff's] unit."

concluded that, by virtue of the plaintiff's failure to respond to these requests for admissions, the plaintiff was deemed to have admitted that maintenance of the area in which the plaintiff fell was the responsibility of the unit owner and the defendant was not in possession and control of the area of the fall.

"Liability for injuries caused by defective premises . . . does not depend on who holds legal title, but rather on who has possession and control of the property. . . . Thus, the dispositive issue in deciding whether a duty exists is whether the [defendant] has any right to possession and control of the property." (Citation omitted; internal quotation marks omitted.) *Sweeney* v. *Friends of Hammonasset*, 140 Conn. App. 40, 50, 58 A.3d 293 (2013). When a party has not timely responded or objected to a request for admission or sought to amend or withdraw that admission, then "any presumption of truth in the plaintiff's assertion in her complaint that the defendant had a duty to maintain the site of the incident [is] defeated." *Filipek* v. *Burns*, 76 Conn. App. 165, 168, 818 A.2d 866 (2003); see also Practice Book § 13-24 (a) ("[a]ny matter admitted under this section is conclusively established unless the judicial authority on motion permits withdrawal or amendment of the admission"). In light of the facts the plaintiff is deemed to have admitted, the court properly concluded that there was no genuine issue of material fact and that the defendant was entitled to judgment as a matter of law.

The judgment is affirmed.

ELIZABETH G. DIGIUSEPPE *v.* VINCENT J. DIGIUSEPPE
(AC 38679)

Lavine, Sheldon and Keller, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court denying the plaintiff's motion for contempt and ordering the defendant to pay what he owed for the college expenses of his two minor children. As part of their separation agreement, the parties had agreed that should certain education accounts for each child become insufficient, the defendant would be solely responsible for the additional college education expenses. When the defendant failed to pay for the children's college expenses, the plaintiff filed the motion for contempt. *Held*:

1. This court declined to review the defendant's claim that the trial court erred in not finding a latent ambiguity in the college expenses provision of the parties' agreement when examining it in conjunction with another document that was signed by the parties regarding education support orders under statute (§ 46b-56c), the defendant having failed to distinctly raise the claim at trial; a careful review of the record demonstrated that the defendant did not assert before the trial court any claim concerning a latent ambiguity in the agreement created by the other document that was executed by the parties, but rather that he based his objection to the plaintiff's motion for contempt on two entirely different arguments, and this court was under no obligation to consider a claim that was not distinctly raised at the trial level.
2. The defendant's claim that the trial court erred in finding that he was responsible for all of his children's college expenses was not reviewable; although the defendant claimed on appeal that the parties' agreement was unenforceable because it contained no reasonable limitations on his liability for the college expenses, he did not inquire of the trial court as to the exact limits of the college expenses for which he was liable, nor did he argue that the provision in the agreement for the payment of college expenses was so uncertain and indefinite as to be unenforceable, and, therefore, he failed to preserve the claim by distinctly raising it before the trial court.

Argued March 22—officially released July 25, 2017

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *Ginocchio*, *J.*, rendered judgment dissolving the marriage and granting

certain relief in accordance with the parties' separation agreement; thereafter, the court, *Hon. Elizabeth A. Gallagher*, judge trial referee, denied the plaintiff's motion for contempt and issued certain orders, and the defendant appealed to this court. *Affirmed.*

Steven H. Levy, for the appellant (defendant).

Campbell D. Barrett, with whom were *Johanna S. Katz* and, on the brief, *Jon T. Kukucka*, for the appellee (plaintiff).

Opinion

KELLER, J. The defendant, Vincent J. DiGiuseppe, appeals from the judgment of the trial court rendered when it denied a postdissolution motion for contempt filed by the plaintiff, Elizabeth G. DiGiuseppe, and ordered him to pay what he owed for his children's college expenses. The issue on appeal concerns the extent of the defendant's obligation to pay for the college expenses of the parties' two children beyond what is covered by Connecticut Higher Education Trust (CHET) accounts that the parties had established for each of them. The defendant claims that the court erred in (1) not finding a latent ambiguity in the provision of the parties' separation agreement (agreement) regarding college expenses when examining it in conjunction with another document signed by the parties entitled "Education Support Orders [General Statutes § 46b-56c]" (form), which would render the agreement unenforceable, and (2) its determination that the defendant is responsible for 100 percent of college expenses of the two children without limitation. We conclude that the defendant failed to preserve either of his claims before the trial court, and, therefore, we decline to review them.

The following facts, as found by the court in its written memorandum of decision, and procedural history

are relevant to this appeal: "The parties were divorced on June 25, 2013. Their [agreement] contained a provision for the payment of the educational expenses of their two children, who are currently [nineteen] and [eighteen] years old. [The plaintiff] has moved for contempt based on [the defendant's] failure to pay the children's college expenses. . . .

"The parties do not communicate. When [the plaintiff] learned that [the defendant] was refusing to pay the children's college expenses, [the plaintiff] attempted to contact [the defendant], but he refused to communicate with her.

"At the time of the hearing on the motion for contempt, the parties' son was entering his second year at Bentley College, and their daughter was hoping to begin her freshman year at Syracuse University. The provisions for the postmajority educational expenses are set forth in paragraph 8 of the parties' [separation] agreement.

"Paragraph 8.1 of the parties' separation agreement provides: 'The parties established CHET accounts for the benefit of each of their children. These CHET accounts shall be used for the college education of both children. Should the CHET accounts be insufficient to educate both of the parties' children, the [defendant] shall be solely responsible for the additional college education expenses for the benefit of the parties' children.'

"Paragraph 8.2 provides: 'In the event there is a balance in the CHET accounts after the children have completed their college educations, the parties may divide any remaining balance equally. However, in the event the [defendant] contributes any additional funds to these accounts after the date of dissolution, the

[defendant] shall be entitled to a refund of these contributions if all of the CHET account funds are not used for the college education of the parties' children.'

"The parties had engaged a mediator, Attorney Jeannine Talbot, to assist them in settling the issues arising from the impending dissolution of their marriage. . . . As she does in every mediation where the parties have a child under the age of [twenty-three], Attorney Talbot advised the parties concerning the provisions of . . . General Statutes [§] 46b-56c.[1] The language that the parties chose to put in their agreement did not reference the statute.

[1] General Statutes § 46b-56c provides in relevant part: "(a) For purposes of this section, an educational support order is an order entered by a court requiring a parent to provide support for a child or children to attend for up to a total of four full academic years an institution of higher education . . . for the purpose of attaining a bachelor's or other undergraduate degree . . . . An educational support order may be entered with respect to any child who has not attained twenty-three years of age and shall terminate not later than the date on which the child attains twenty-three years of age.

"(b) (1) On motion or petition of a parent, the court may enter an educational support order at the time of entry of a decree of dissolution . . . and no educational support order may be entered thereafter unless the decree explicitly provides that a motion or petition for an educational support order may be filed by either parent at a subsequent date. If no educational support order is entered at the time of entry of a decree of dissolution . . . and the parents have a child who has not attained twenty-three years of age, the court shall inform the parents that no educational support order may be entered thereafter. The court may accept a parent's waiver of the right to file a motion or petition for an educational support order upon a finding that the parent fully understands the consequences of such waiver. . . .

"(c) The court may not enter an educational support order pursuant to this section unless the court finds as a matter of fact that it is more likely than not that the parents would have provided support to the child for higher education . . . if the family were intact. . . .

"(f) The educational support order may include support for any necessary educational expense, including room, board, dues, tuition, fees, registration and application costs, but such expenses shall not be more than the amount charged by The University of Connecticut for a full-time in-state student at the time the child for whom educational support is being ordered matriculates, except this limit may be exceeded by agreement of the parents. An educational support order may also include the cost of books and medical insurance for such child."

"Since Attorney Talbot did not, as mediator, represent either party, she advised them that they had an opportunity to take their proposed agreement to their own attorney in order to have it reviewed. There is no evidence that [the defendant] engaged an attorney for that purpose. [The plaintiff] did take the proposed agreement to her own attorney to review. The proposed agreement reviewed by [the plaintiff's] attorney did not include any reference to . . . [§] 46b-56c; nor did it include any document other than the proposed agreement.

"A document which was produced and distributed by the Litchfield Superior Court clerk's office concerning educational support orders pursuant to . . . [§] 46b-56c was given to the parties for their signature by Attorney Talbot on June 4, 2013. The box requesting the court to enter an educational support order was checked. Attorney Talbot told the parties that, by signing the form, they were asking the court to enter an educational support order.

"[The plaintiff] did not remember being told anything about the statute in connection with the agreement about educational expenses. She does not recall [the] University of Connecticut being mentioned at all. She did not recall any discussion about the terms of the statute. . . .

"In entering judgment after the dissolution hearing, the court, *Ginocchio*, *J.*, did not enter an educational support order pursuant to . . . [§] 46b-56c. Rather, finding the agreement to be fair and equitable to both sides, the court incorporated the entire agreement of the parties into its judgment dissolving the parties' marriage." (Footnote added.)

The court continued: "It is further clear that neither party requested such an order, nor did the court at the

time of dissolution make the predicate findings necessary to issue such an order. . . .[2] Although the mediator had the parties sign the form provided by the Litchfield Superior Court clerk's office, the credible evidence demonstrates that the parties did not request it; nor did the court enter an order in accordance with or sign the form." (Footnote added.)

The court found that the language of paragraph 8 of the parties' agreement is clear and unambiguous, as it contains no limiting language and no language referencing § 46b-56c. To the contrary, the court found that the language of paragraph 8.2 clearly states that the CHET accounts will be used for the children's educational expenses and further anticipates that more funds might be required of the defendant. The court concluded that paragraph 8 clearly and unequivocally imposes on the defendant the sole obligation to pay for the educational expenses of the parties' children and did not grant him sole decision-making authority with respect to college selection or allow him to stop paying tuition based on lack of communication between him and his son.

In ruling on the plaintiff's motion for contempt, the court, "[b]ased on the somewhat adequate evidence [that the defendant] offered to explain his failure to honor the order of the court," declined to hold the defendant in contempt, but concluded that "there is no reason for any refusal or delay on the part of the defendant in honoring his contractual obligations. Accordingly, [the defendant] is ordered to pay whatever amounts he owes for his children's college expenses within ten days of notice of this decision."

Additional facts and procedural history will be set forth as necessary.

[2] See General Statutes § 46b-56c (c), set forth in footnote 1 of this opinion.

I

The defendant's first claim is that the court erred in not finding a latent ambiguity in the provision of the parties' agreement regarding college expenses when examining it in conjunction with the form signed by the parties, which would render the agreement unenforceable.[3] The plaintiff argues that we should decline

[3] Upon our examination of the form utilized by the Litchfield Superior Court, we disagree that it is intended to constitute an agreement to an educational support order subject to all the provisions and limitations of § 46b-56c at the time of a judgment of dissolution, as the defendant claims. The form is an advisement of rights and waiver form intended to comply with the provisions of § 46b-56 (b) (1), which mandates that the court assure that the parties seeking a dissolution understand the consequences of not requesting an educational support order be issued at the time of the dissolution. The form notifies divorcing parties that if they wish to request the inclusion of an educational support order as part of their divorce decree, they must so notify the court at the time of the dissolution. It allows for the parties to advise the court that they are waiving their right to request an educational support order, requesting the court to retain jurisdiction to consider the issue at a future time, or asking the court to enter an educational support order on that day. It is insufficient to inform the court as to the precise nature of the educational support order the parties desire, as even a statutory order may vary in its terms. See General Statutes § 46b-56c (f) and (g).

The box the parties checked reads: "I ask the court to enter an Educational Support Order today." Neither the court nor the clerk signed it. The judgment file incorporated the parties' agreement and made its provisions an order of the court, which encompassed the parties' agreement as to college expenses. A box on the judgment file reflecting any further order regarding educational support is not checked. We further note that the preamble to the parties' agreement provides that the execution of the agreement reflected their "intention that henceforth there shall be as between them only such rights and obligations as are specifically provided in this Agreement." In section 11, they further agreed that their agreement "contains the entire understanding of the parties. There are no representations, promises, warranties, covenants or undertakings other than those expressly set forth herein."

Moreover, the educational support order statute contemplates that such orders may be entered pursuant to any other provision of the general statutes authorizing the court to make an order of support for a child. See § 46b-56c (b) (4). Indeed, pursuant to General Statutes § 46b-66 (a), which governs orders of postmajority support, the parties to a dissolution may enter into any written agreement that "provides for the care, *education*, maintenance or support of a child beyond the age of eighteen . . . ." (Emphasis added.) See also *Hirtle* v. *Hirtle*, 217 Conn. 394, 399–400, 586 A.2d 578 (1991).

to review this claim because it is unpreserved. After a thorough and independent review of the record, we agree with the plaintiff.

In the present case, the defendant's claim of a latent ambiguity in the parties' agreement was not distinctly raised at trial. In the defendant's principal brief and reply brief, although he refers to the admission of extrinsic evidence that may have supported his newly raised theory, notably, his and Talbot's testimony and the form, he fails to identify where in the transcript of the contempt proceeding he requested that the court apply this particular principle of contract law and, more specifically, the manner in which he asked the court to determine that a latent ambiguity in the agreement existed.

Instead, the defendant based his objection to the plaintiff's motion for contempt arguments on two entirely different arguments. First, he argued that, at the time he entered into the parties' agreement, he understood that § 46b-56c governed his college expense obligation. He claimed that his understanding of the agreement was due to representations made to him by Talbot during the parties' mediation and to the submission of the signed form at the time of the judgment of dissolution, which Talbot indicated would limit his college expense obligations to those that may be imposed under § 46b-56c. He further argued that the form was incorporated into the judgment by agreement.[4]

[4] The court noted, however, that "[a]s [the defendant] has pointed out, unilateral mistake is not a defense to a breach of contract claim." The court found that the parties did not request the form nor did the dissolution court enter an order in accordance with any representations made on the form or sign the form, nor was the form attached to the agreement or incorporated into the judgment. The judge who presided over the dissolution did not check the box contained in the judgment form that provides for the entry of an educational support order; rather, the court found only that the parties' agreement was fair and equitable and incorporated it into the judgment of dissolution. Furthermore, in the canvasses conducted of both parties by

Second, and primarily, the defendant argued that as a matter of law, § 46b-56c governed his college expense obligation because he did not specifically waive its provisions.

That these were the defendant's only claims raised before the trial court is indisputable upon review of the following excerpts from the transcript of the contempt hearing. The court, in addressing the plaintiff's counsel, stated:

"The Court: [The defendant's] position is he's—the only reason he—he signed that because he thought he was limited, the tuition was limited to whatever the tuition at [the University of Connecticut] was.

"And—and his position further is, I believe, that any agreement made in this state about the college education is subject to [§ 46b-56c], unless it is explicitly waived. And therefore, since it was not explicitly waived, then he doesn't have to pay the entire tuition for Syracuse. He only has to pay it up to the amount that he would have to pay at [the University of Connecticut]. That's his position. . . . I understand it's not relevant to your position, but it may be relevant to his position.

"[The Defendant's Counsel]: And you very succinctly reiterated my position, Your Honor."

A careful review of the record demonstrates that the defendant did not assert before the trial court a claim that the form executed by the parties and submitted to the court at the time of judgment created a latent ambiguity between the agreement and the court form, and, therefore, the court could not enforce section 8 of the agreement.

Talbot during the dissolution hearing, there is no reference to the court form, and she asked each of them only if they wished to have their agreement incorporated into the judgment.

It is well established that an appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. See Practice Book § 60-5; see also *Burnham* v. *Karl & Gelb*, *P.C.*, 252 Conn. 153, 170–71, 745 A.2d 178 (2000). "The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked." (Emphasis in original; internal quotation marks omitted.) *State* v. *Colon*, 82 Conn. App. 658, 659, 847 A.2d 315, cert. denied, 269 Conn. 915, 852 A.2d 745 (2004). "We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . ." (Internal quotation marks omitted.) *State* v. *Agron*, 323 Conn. 629, 633 n.2, 148 A.3d 1052 (2016). "We will not promote a Kafkaesque academic test by which [a trial judge] may be determined on appeal to have failed because of questions never asked of [her] or issues never clearly presented to [her]." (Internal quotation marks omitted.) *Burnham* v. *Karl & Gelb*, *P.C.*, supra, 171. Therefore, we decline to review the defendant's first claim because it was not distinctly raised at the contempt hearing.

II

The defendant's second claim is that the court erred in its determination that the defendant is responsible for 100 percent of college expenses of the two children without limitation. The defendant notes that the court, despite his request for an articulation pursuant to Practice Book § 66-5, failed to determine the specific college expenses that he is responsible to pay. The court denied the motion for articulation, stating: "The court's memorandum of decision speaks for itself. The issue before the court was whether the parties' agreement and the judgment of the court mandated that the financial responsibility of the defendant for the college education

of the parties' children was limited by . . . [§] 46b-56c."[5]

The defendant now argues on appeal that if § 46b-56c, with its limits on the nature of college expenditures that can be ordered, is inapplicable because the court correctly determined that the parties arrived at their own educational support order, paragraph 8 of the agreement nevertheless is unenforceable because it contains no reasonable limitations on the defendant's liability and, under well established contract law, a contract must be definite and certain as to its terms and requirements. See *Bender* v. *Bender*, 292 Conn. 696, 728, 975 A.2d 636 (2009).

The plaintiff argues that, like the claim we addressed in part I of this opinion, this claim was not raised before the court and is accordingly not preserved for appeal. Our review of the record reflects that the defendant did not make any inquiry of the court as to the exact limits of the college expenses for which he was liable, nor did he argue that the provision in the agreement for the payment of college expenses was so uncertain and indefinite as to be unenforceable. The only issue before the trial court was whether his failure to pay tuition, room, and board for the parties' children was justified.[6] Thus, we agree with the plaintiff and decline to reach the merits of this claim.

[5] This court granted the defendant's motion for review of the trial court's denial of the motion for articulation filed on June 8, 2016, but denied the relief he requested. "[A]n articulation elaborates upon, or explains, a matter that the trial court decided." *State* v. *Walker*, 319 Conn. 668, 680, 126 A.3d 1087 (2015). The rule regarding motions for articulation cannot be used to "import into the record matters that were never presented to the trial court . . . ." (Citations omitted.) W. Horton & K. Bartschi, Connecticut Practice Series: Connecticut Rules of Appellate Procedure (2016–2017 Ed.) § 66-5, comment 5, p. 190; see also *State* v. *Brunetti*, 279 Conn. 39, 55 n.27, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007).

[6] The defendant asserts that there is an expansive list of possible college related expenses for which he could be held responsible. In his brief, the defendant poses a number of "what if" questions with respect to possible

As we noted previously in part I of this opinion, it is well established that an appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. The court noted in its denial of the defendant's motion for articulation that this particular issue was not presented during the contempt hearing, and a thorough and independent review of the record reveals that the defendant never sought a precise designation of all other college expenses for which he might be liable in the future.[7] The plaintiff sought only to have the defendant held in contempt for failing to provide payment for tuition, room, and board related to the two undergraduate colleges in which the children, ages eighteen and nineteen, had enrolled. The defendant did not dispute that tuition, room, and board may not be reasonably encompassed by the term "college expenses," in the parties' agreement. Accordingly, we also decline to consider the defendant's second claim.

The judgment is affirmed.

In this opinion the other judges concurred.

future requests for a variety of arguably college related expenses, e.g., first-class airfare, study abroad, and graduate school, which were not the subject of the motion for contempt. "[C]ourts are called upon to determine existing controversies, and thus may not be used as a vehicle to obtain advisory judicial opinions on points of law. . . ." (Internal quotation marks omitted.) *State* v. *Preston*, 286 Conn. 367, 374, 944 A.2d 276 (2008).

[7] We note that, following Attorney Talbot's canvass of the defendant during the dissolution proceedings, the court, *Ginocchio*, *J.*, and the defendant engaged in the following colloquy:

"The Court: All right, I'm just—my only question is you have assets here, you have a substantial salary, you know the situation better than anyone, but you didn't take advantage of an opportunity to speak to a lawyer about this?

"The Witness: You know, the main purpose of what I went through was for my children, and that's what I feel based upon what our lifestyle has been, my children need that.

"The Court: All right, as long as you know if you start speaking to someone else or you do talk to a lawyer and someone might tell you perhaps you were overly generous or something to that extent, you will not be able to come back here and say, oh, I made a mistake or I probably should have been a little more careful about how I made the decisions. . . . I will give you the opportunity today if you wanted to speak with a lawyer, I will give you that opportunity. But if you're okay with it.

"The Witness: I'm fine with it."

TRAVIS HAMPTON *v.* COMMISSIONER OF CORRECTION
(AC 39280)

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

Syllabus

The petitioner, who had been convicted of various offenses with his accomplice, M, arising out of the sexual assault of the victim at gunpoint, sought a writ of habeas corpus alleging that defense counsel at his criminal trial had rendered ineffective assistance. The jury in the underlying criminal trial had acquitted the petitioner of count seven of the information, which charged him with sexual assault as a principal, but found him guilty under count eight of the information, which charged him with sexual assault as an accessory. In the instructions to the jury, the trial court erroneously stated that the petitioner could be convicted as a principal or accessory with respect to count eight. In the petitioner's direct appeal from his conviction, our Supreme Court determined that defense counsel had waived any claim that the jury had not been charged correctly as to count eight because he had acquiesced to the charge as given. The petitioner alleged in his petition for a writ of habeas corpus that he was prejudiced by defense counsel's deficient performance because the jury was permitted to return a nonunanimous verdict of guilty as to count eight, as it was unclear whether the jury found him guilty as a principal or as an accessory. The habeas court concluded that the petitioner was not prejudiced by any allegedly deficient performance because the petitioner had been acquitted of count seven, which charged him with sexual assault as a principal only, such that no juror logically could have found him guilty as a principal in count eight. The habeas court therefore concluded that the jury must have unanimously found him guilty under count eight as an accessory to M's assault of the victim. The habeas court rendered judgment denying the petition and, thereafter, granted the petition or certification to appeal, and this appeal followed. *Held* that the habeas court properly denied the petition for a writ of habeas corpus, that court having properly determined that the precise harm that the petitioner asserted by defense counsel's deficient performance was not so significant that there was a reasonable probability that the outcome of the trial with respect to count eight would have been different; there was no reasonable probability that some jurors could have convicted the petitioner of sexual assault as a principal on count eight while others could have convicted him as an accessory with respect to that same count, or that the verdict on count eight would have been different had the court not made the instructional mistake, as the jury had before it the amended information, which solely alleged in count eight that the petitioner intentionally aided M in sexually

assaulting the victim, the prosecutor had explained during his closing argument that count eight pertained to the petitioner's acts that helped M assault the victim, the jurors acquitted the petitioner of count seven, which had charged the petitioner as a principal only, and there was only a mere possibility that the court's improper instruction on count eight caused juror confusion, which was insufficient to meet the high burden of proving that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the trial as to count eight would have been different.

Argued April 12—officially released July 25, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Jade N. Baldwin, for the appellant (petitioner).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Travis Hampton, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that the habeas court improperly concluded that his claim of ineffective assistance of trial counsel fails on the prejudice prong of the test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Having thoroughly reviewed the record, we conclude that the habeas court properly denied the petition and, accordingly, affirm the judgment.

[1] The habeas court subsequently granted certification to appeal from the judgment pursuant to General Statutes § 52-470 (b).

The following facts, as set forth by our Supreme Court in the petitioner's direct criminal appeal, and procedural history are relevant to this appeal. "At approximately 1:30 a.m. on August 23, 2003, the [petitioner] was with his friend, James Mitchell, when Mitchell received a telephone call from the victim, a young woman he knew, asking for a ride to her home in East Hartford. Mitchell drove his car to the location of the victim and picked her up. The three then drove to a nearby restaurant. After entering the restaurant and remaining there for a while, the [petitioner] and the victim returned to the car, where Mitchell had remained. Mitchell told the victim that he would drive her home, but he did not. Instead, Mitchell began angrily questioning the victim as to the whereabouts of her brother, who, both Mitchell and the [petitioner] suspected, was involved in a romantic relationship with Mitchell's former girlfriend. The victim informed Mitchell and the [petitioner] that her brother was staying at her grandfather's house, but after driving there, Mitchell and the [petitioner] realized that the victim had lied to them. Mitchell then drove first to his mother's house in Hartford, and then to an apartment complex. The victim repeatedly pleaded with Mitchell to take her home, but he did not comply. Mitchell drove his car from the apartment complex and brought the victim and the [petitioner] to a closed gas station near Market Street in Hartford and parked behind the building, where it was dark. . . .

"Mitchell then told the victim to get out of the car because he wanted to talk to her. Mitchell, the [petitioner] and the victim exited the car. The victim, anticipating that 'something bad' was about to happen, started to walk away, but stopped when the [petitioner] took a shotgun out of the car and pointed it at her face. After the victim refused to tell Mitchell her brother's location, Mitchell became angry and ordered the victim

to take her clothes off. The victim removed her pants, and Mitchell sexually assaulted her by engaging in vaginal intercourse with her. The [petitioner] kept the shotgun pointed at the victim throughout the assault.

"Angry and scared, the victim pleaded with Mitchell and the [petitioner] to let her go. Mitchell then gave the victim the choice to climb into a nearby dumpster or attempt to run away. As the victim started running, Mitchell fired the shotgun hitting her in the stomach. The victim continued to run toward the front of the gas station, and Mitchell followed her in the car while the [petitioner] pursued her on foot, holding the shotgun. Despite the victim pleading with the [petitioner] to stop, he shot and wounded her in the right side. The victim, bleeding profusely, ran across Market Street and tried to hide behind some trees on the side of the road. The [petitioner] followed her and shot at her several more times, hitting her in the face and the upper thigh. The victim then dropped to the ground and pretended to be dead. The [petitioner] walked over to the victim, who was lying on the ground, and shot her one final time in her left arm. Thinking that the victim was dead, the [petitioner] got back into the car, which Mitchell was driving, and they drove away. They quickly returned, however, to verify that the victim was dead. The [petitioner] got out of the car, walked over to the motionless victim, kicked her once, and said, 'She's dead.' The [petitioner] and Mitchell then again drove away.

"The victim subsequently was discovered by a passerby and ultimately was taken to the hospital, where, after receiving medical attention, she informed authorities that Mitchell and a person that she did not know, later identified as the [petitioner], had sexually assaulted and shot her. Late in the evening of August 27, 2003, Mitchell and the [petitioner] were arrested."

(Footnotes omitted.) *State* v. *Hampton*, 293 Conn. 435, 438–41, 988 A.2d 167 (2009).

Thereafter, the petitioner was charged, via an amended information dated January 17, 2006, with attempt to commit murder in violation of General Statutes §§ 53a-49 (a) and 53a-54a, conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a, kidnapping in the first degree in violation of General Statutes §§ 53a-92 (a) (2) (A) and 53a-8, conspiracy to commit kidnapping in the first degree in violation of General Statutes §§ 53a-48 and 53a-92 (a) (2) (A), assault in the first degree with a firearm in violation of General Statutes §§ 53a-59 (a) (5) and 53a-8, conspiracy to commit assault in the first degree in violation of §§ 53a-48 (a) and 53a-59 (a) (5), sexual assault in the first degree as a principal in violation of General Statutes § 53a-70 (a) (1), sexual assault in the first degree as an accessory in violation of §§ 53a-70 (a) (1) and 53a-8, conspiracy to commit sexual assault in the first degree in violation of §§ 53a-48 and 53a-70 (a) (1), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). Id., 438.

The petitioner's case was tried before a jury of six. See id., 448 n.12. During the trial, the state presented evidence of *three* separate sexual acts that the victim had been forced to engage in—vaginal intercourse with Mitchell, fellatio with the petitioner, and vaginal intercourse with the petitioner[2]—although the petitioner

[2] As summarized in its closing argument before the jury, the state theorized that the sexual assaults occurred as follows: "[The victim] told you that after James Mitchell forced her to engage in sexual intercourse, this [petitioner] was sitting there holding a shotgun basically between his legs while he relaxed on the backseat of the car and watched James Mitchell force her . . . to engage in penile-vaginal intercourse. . . . [The victim] told you that while she had a shotgun pointed at her head she did put her mouth once, twice down on [the petitioner's] penis. . . . [The petitioner] did not ejaculate, but . . . he then gave the shotgun over to Mr. Mitchell, and [the petitioner] then attempted to have penile-vaginal intercourse with [the victim]. In fact, he did place his penis . . . into her vagina briefly."

only was charged with *two* counts of first degree sexual assault in the amended information—one count encompassing the fellatio and vaginal intercourse allegedly committed by the petitioner personally, and one count encompassing the vaginal intercourse by Mitchell to which the petitioner allegedly was an accessory. More specifically, count seven alleged in relevant part that "the [petitioner] . . . did compel [the victim] . . . to engage in sexual intercourse by the threatened use of force against her which caused her to fear physical injury," and count eight alleged in relevant part that "the [petitioner] . . . did intentionally aid James Mitchell in compelling [the victim] . . . to engage in sexual intercourse by the threatened use of force against her which caused her to fear physical injury."

Notably, during trial, "the [petitioner] did not file a request to charge. Before it charged the jury, the trial court held a charging conference at which it reviewed, page by page, its written charge with the parties. The trial court gave both parties a printed copy of the jury instructions for their review. During the charging conference, with regard to counts seven and eight of the information . . . the trial court specifically inquired of the parties as to whether there would be a unanimity problem because the state had failed to allege in the information which specific acts of sexual intercourse had occurred. In response, the state pointed out that count eight of the information concerned the [petitioner's] participation in aiding Mitchell in Mitchell's sexual assault of the victim. Because the evidence supported a finding that Mitchell had engaged only in vaginal intercourse with the victim, the state noted that there would be only one factual basis upon which the jury could find the [petitioner] guilty, and, thus, there would be no unanimity problem." (Footnote omitted; emphasis omitted.) Id., 445–46.

With regard to unanimity on count seven, the court, the prosecutor, and the court officer engaged in the following colloquy:

"The Court: . . . But there's one sexual assault [charge] in which he's the principal it's alleged?

"[The Prosecutor]: Yes.

"The Court: Even though the testimony involved two sexual assaults?

"[The Prosecutor]: Right. . . .

"The Court: . . . But it's . . . alleged that [the petitioner] had sex with her in two different fashions. . . .

"[The Prosecutor]: She—it's just charged that [the petitioner] forced her to engage in sexual intercourse, and it's not distinguished as to what type.

"The Court: Well, then the question is, is there any requirement of specific unanimity on that? . . . We'll have to look that up. . . .

"The Court: . . . [M]y issue is particularly as far as the argument is concerned and the charge is concerned. Certainly the jury would not have to believe both.

"[The Prosecutor]: Right.

"The Court: But could you have three believing one type of sexual contact and three believing the other or five and one or whatever permutation you come up with? And that's—do you have any cases for me on that for me to decide on? Do you have any position on that, you can't add another count on sexual assault?

"[The Prosecutor]: No. And there was no request for a bill of particulars, so this is particularized. . . .

"[The Court Officer]: . . . I think it's going to be for the jury to sort it out. If three of them believe oral sex happened and three of them believe vaginal sex

happened by the [petitioner] as principal under count seven, then they find him guilty of count seven."

After the colloquy on unanimity, "the trial court solicited additional suggestions from the parties with regards to the jury charge. When the state responded that nothing else was required, the trial court explicitly asked defense counsel whether he had any further changes. Defense counsel responded that his 'only request' related to a conspiracy charge under *Pinkerton* liability.[3] After the trial court addressed that concern, it again directly asked defense counsel, 'Anything else?' to which defense counsel responded, 'No.' . . . After the parties reviewed [a copy of] the revised instructions, the trial court again directly solicited comments from both parties. Defense counsel stated that he had received and reviewed the instructions and that they 'appear[ed] to be in order.' " (Footnotes altered.) Id., 446–47.

Thereafter, in its final charge as to count seven, the court instructed the jury that "the [petitioner] is charged solely as a principal." With respect to count eight, despite the language in that count of the amended information charging the petitioner only as an accessory, the court instructed the jury that the offense "can be proven by the state in any one of the following ways: that the [petitioner] committed the crime as a principal; that the [petitioner] was an accessory to the crime; or, third, that the [petitioner] is guilty by way of the *Pinkerton* theory of vicarious liability."[4] The court

[3] See *Pinkerton* v. *United States*, 328 U.S. 640, 647–48, 66 S. Ct. 180, 90 L. Ed. 1489 (1946).

[4] In the petitioner's direct appeal, our Supreme Court commented on this aspect of the court's instructions as follows: "During the charging conference, the [petitioner], the state and the trial court discussed that, specifically as to count eight, the [petitioner] was charged and could be found liable as a principal, as an accessory, or under the *Pinkerton* doctrine of vicarious liability. . . . The trial court thus charged the jury in accordance with this discussion. This, however, was incorrect. Count eight of the information alleged *only* that the [petitioner] had acted as an accessory by aiding Mitchell

"instructed the jury that it did not have to be unanimous in deciding whether the [petitioner] was guilty as a principal or an accessory." Id., 447–48. In conjunction with the court's charge, a verdict form was submitted to the jury.

"At the end of its jury instructions, the trial court asked the parties whether either took exception to the charge, and neither party did. The jury ultimately acquitted the [petitioner] of count seven, which alleged sexual assault in the first degree as a principal, and convicted him of the remaining charges, including sexual assault in the first degree as charged in the eighth count." Id., 448. The verdict form indicated that, as to count eight, the petitioner was found "guilty by way of principal or accessory liability" as opposed to *Pinkerton* vicarious liability. He subsequently was sentenced to a total effective sentence of fifty-nine years imprisonment.

The petitioner appealed from the judgment of conviction. On direct appeal, he claimed "that the trial court improperly: (1) denied his motion to suppress a written confession that he had made after waiving his *Miranda*[5] rights; (2) failed to instruct the jurors that they had to agree unanimously on the factual basis [i.e., whether he acted as an accessory or as a principal] underlying the sexual assault charges against the [petitioner];[6] and

in sexually assaulting the victim. Accordingly, the trial court's jury instruction as to count eight was inconsistent with the crime charged in the information. Although [t]he trial court cannot by its instruction change the nature of the crime charged in the information . . . it is significant that neither the state nor the [petitioner] took exception to this instruction at trial, and that, on appeal, the [petitioner] has not challenged this specific aspect of the instruction. We therefore treat this claim as abandoned." (Citations omitted; emphasis altered; internal quotation marks omitted.) *State* v. *Hampton*, supra, 293 Conn. 446 n.9.

[5] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[6] With regard to this claim, the petitioner challenged the verdicts on both of the sexual assault charges, counts seven and eight. Because he was acquitted of the sexual assault charged in count seven of the information, however, our Supreme Court stated that he was not aggrieved by that

(3) failed to instruct the jurors adequately on the specific intent necessary to convict the [petitioner] as an accessory on the charges of attempt to commit murder, kidnapping in the first degree, assault in the first degree and sexual assault in the first degree." (Footnotes altered.) Id., 438. Our Supreme Court affirmed the judgment of conviction. In doing so, it specifically concluded that the petitioner had waived his second claim regarding nonunanimity as to count eight and, thus, declined to review it: "The record in the present case . . . demonstrates that defense counsel had been made aware of the issue regarding the unanimity charge not once, but twice, and in both instances, despite requests from the trial judge for any changes, additions or deletions, defense counsel stated that he had none, thus assenting to the charge that was given." Id., 450.

Subsequently, on November 19, 2015, the petitioner filed an amended petition for a writ of habeas corpus alleging ineffective assistance of trial counsel. The petitioner alleged that the performance of his trial counsel, Donald O'Brien, was constitutionally deficient because he failed to object to the jury instructions given by the court as to count eight of the amended information, thereby permitting the jury to reach a nonunanimous verdict on that count.[7] On March 29, 2016, the habeas court, *Sferrazza*, *J.*, held a trial in which it heard testimony from O'Brien and Dean Popkin, a Connecticut criminal defense attorney.

After trial, the habeas court denied the petition for a writ of habeas corpus. In its written memorandum of decision dated May 6, 2016, the court assumed,

verdict, and, thus, it reviewed this claim only as it applied to the petitioner's conviction on count eight. *State* v. *Hampton*, supra, 293 Conn. 444–45 n.7.

[7] The amended petition also included a second claim of ineffective assistance of trial counsel for "failure to impeach and/or cross-examine [the] victim with prior trial testimony." That claim, however, was withdrawn prior to the start of evidence at the habeas trial.

arguendo, that O'Brien had performed deficiently by failing to object to the court's error in instructing the jurors that they could find the petitioner guilty on count eight as a principal in light of the fact that the state had alleged only accessorial liability in that count of its amended information. The court concluded, however, that the petitioner had failed to establish prejudice, stating: "In order to return a not guilty verdict as a principal of the sexual assault charge alleged in count seven, the jury was clearly and properly instructed that the jury had to agree unanimously on that acquittal. By unanimously determining that the state had failed to prove the petitioner guilty as a principal, no juror logically could have then found him to be guilty of sexual assault as a principal in count eight. Such verdicts were mutually exclusive. The court draws the only reasonable conclusion that the jury must have unanimously found the petitioner guilty of sexual assault as an *accessory* to Mitchell's rape." (Emphasis in original.) This appeal followed.

As an initial matter, we set forth the applicable standard of review and principles of law. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . [T]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

"The petitioner's right to the effective assistance of counsel is assured by the sixth and fourteenth amendments to the federal constitution, and by article first, § 8, of the constitution of Connecticut." *Sanders* v.

Commissioner of Correction, 83 Conn. App. 543, 549, 851 A.2d 313, cert. denied, 271 Conn. 914, 859 A.2d 569 (2004). "To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a [petitioner] must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment [to the United States constitution]. . . . To satisfy the prejudice prong, a [petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied." (Citations omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner]." *Strickland* v. *Washington*, supra, 697.

In the present appeal, the precise nature of the petitioner's claim is somewhat unclear. In his brief, he appears to argue that his trial counsel's failure to object to the court's instruction on count eight was constitutionally deficient performance because he had not been charged as a principal in count eight of the amended information, yet the court nevertheless instructed the jury that it could find him guilty as a principal, as an accessory, or under the *Pinkerton* theory of vicarious liability. In light of the fact that (1) the habeas court assumed that the petitioner had met his burden to prove deficient performance, and (2) our Supreme Court, in the petitioner's direct appeal, indicated that the court

should not have instructed the jury on principal liability because it had not been pleaded in count eight of the information,[8] the question of whether counsel's performance was deficient is not truly in dispute.[9] Rather, the critical inquiry for this court is to focus on the precise harm that the petitioner asserts was created by this deficient performance and whether that harm is so significant that there is a reasonable probability that the outcome of the trial, with respect to count eight, would have been different.

[8] See footnote 4 of this opinion.

[9] It should be noted that the petitioner does not contend that his claim of ineffective assistance of trial counsel arose from O'Brien's failure to request a unanimity charge with respect to the underlying factual basis for count *seven*. More specifically, he does not claim that the possible lack of unanimity on count eight was due to the fact that the jurors should have been instructed that they could convict the petitioner of count seven only if they unanimously agreed that he personally committed a sexual assault against the victim by forcing her to perform fellatio *or* if they unanimously agreed that he personally committed the assault by forcing her to engage in vaginal intercourse.

Pursuant to *State* v. *Famiglietti*, 219 Conn. 605, 619–20, 595 A.2d 306 (1991), "[e]ven if the instructions at trial can be read to have sanctioned such a nonunanimous verdict . . . we will remand for a new trial only if (1) there is a conceptual distinction between the alternative acts with which the defendant has been charged, and (2) the state has presented evidence to support each alternative act with which the defendant has been charged." (Internal quotation marks omitted.) *State* v. *Jessie L. C.*, 148 Conn. App. 216, 232, 84 A.3d 936, cert. denied, 311 Conn. 937, 88 A.3d 551 (2014). Significantly, "case law provides that the alternative means of performing sexual intercourse are *not* conceptually distinct. See *State* v. *Anderson*, 211 Conn. 18, 35, 557 A.2d 917 (1989) ('[t]he several ways in which sexual intercourse may be committed under General Statutes § 53a-65 [2] are only one conceptual offense')." (Emphasis added.) *State* v. *Griffin*, 97 Conn. App. 169, 184 n.7, 903 A.2d 253, cert. denied, 280 Conn. 925, 908 A.2d 1088 (2006). Thus, this court held in *Griffin* that "the court's instruction that sexual intercourse included vaginal intercourse *or* cunnilingus did not constitute a nonunanimous instruction of two conceptually distinct alternatives." (Emphasis in original.) Id. Likewise, in the present case, the petitioner could not have prevailed on a claim that his counsel was deficient for failing to request a unanimity instruction as to whether the act of sexual intercourse underlying count seven was fellatio or vaginal intercourse, because the two acts are not two conceptually distinct alternatives for purposes of surmounting the first prong of *Famiglietti*.

In conducting this inquiry, we believe it is important, given that the alleged prejudice must flow from the precise claim of ineffective assistance being made, to note several points that are clear to us. First, the petitioner does not argue that he was prejudiced because the jury was permitted to consider a theory of liability of which he had not received notice.[10] In other words, he has not argued, in his attempt to establish prejudice, that had he known the state's true theory of liability for count eight, he would have defended the count differently, and that had he done so, there is a reasonable probability that he would have been acquitted of that count.

Second, in his attempt to establish that he was prejudiced by his trial counsel's deficient performance, the petitioner has not argued that the guilty verdict on count eight was factually and/or legally inconsistent with the verdict of acquittal on count seven. Even if his counsel's failure to object to the charge as given ultimately led to factually inconsistent verdicts on counts seven and eight, such a result, as a matter of law, would not constitute prejudice: "[I]t is well established that *factually* inconsistent verdicts are permissible. [When] the verdict could have been the result of compromise or mistake, we will not probe into the logic or reasoning of

[10] "[T]he United States Supreme Court has explained that [t]o uphold a conviction on a charge that was neither alleged in an [information] nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. . . . Reviewing courts, therefore, cannot affirm a criminal conviction based on a theory of guilt that was never presented to the jury in the underlying trial. . . . To rule otherwise would permit trial by ambuscade. . . . Whether a defendant has received constitutionally sufficient notice of the charges of which he was convicted may be determined by a review of the relevant charging document, the theory on which the case was tried and submitted to the jury, and the trial court's jury instructions regarding the charges." (Citations omitted; internal quotation marks omitted.) *State* v. *King*, 321 Conn. 135, 148–50, 136 A.3d 1210 (2016).

the jury's deliberations or open the door to interminable speculation." (Emphasis in original; internal quotation marks omitted.) *State* v. *Nash*, 316 Conn. 651, 659, 114 A.3d 128 (2015).

If the petitioner had attempted to argue that the verdicts are *legally* inconsistent, he would have met a similar lack of success. Claims regarding legally inconsistent verdicts generally are divided into two categories. "The first category involves cases in which it is claimed that two *convictions* are inconsistent with each other as a matter of law or are based on a legal impossibility. . . . Such convictions . . . are reviewable . . . . The second category involves cases in which the defendant claims that one or more guilty verdicts must be vacated because there is an inconsistency between those guilty verdicts and a verdict of *acquittal* on one or more counts, or an acquittal of a codefendant. . . . It is well established that such inconsistent verdicts are not reviewable and the defendant is not entitled to relief . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Anderson*, 158 Conn. App. 315, 332–33, 118 A.3d 728, cert. granted on other grounds, 319 Conn. 908, 123 A.3d 437 (2015) (appeal withdrawn May 4, 2016). Thus, even if the petitioner had argued that he was prejudiced by legally inconsistent verdicts on counts seven and eight, this result would not constitute prejudice, as a matter of law, because it is not proper for an appellate court to compare a verdict of acquittal on one count with a verdict of guilt on another count for purposes of determining legal consistency.

This brings us then to the petitioner's actual argument regarding prejudice.[11] In terms of what we can divine

[11] We note that the petitioner does not argue that his counsel's deficient performance or the court's instructional error was structural in nature and that he, therefore, is excused from demonstrating prejudice under the sixth amendment to prevail on his claim. "Structural [error] cases defy analysis by harmless error standard because the entire conduct of the trial, from

from his brief, the petitioner appears to argue that the court's instruction that the petitioner could be found guilty as a principal on count eight was prejudicial because it potentially sanctioned a nonunanimous verdict by creating a scenario under which the jury could convict him of the charge in count eight without all of the jurors agreeing that the petitioner assisted Mitchell by holding a gun to the victim's head so that Mitchell could commit the sexual assault. In other words, the petitioner argues that some jurors may have convicted him on the basis that the petitioner had held a gun to the victim's head so that Mitchell could commit a sexual assault, while others voted to convict on the basis that the petitioner, as a principal, had compelled the victim to perform fellatio or that he had penetrated her vaginally.[12]

beginning to end, is obviously affected . . . . These cases contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself . . . . Such errors infect the entire trial process . . . and necessarily render a trial fundamentally unfair . . . . Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally unfair." (Internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 645, 153 A.3d 1264 (2017). Because the petitioner does not make this assertion in his brief or cite to any structural error cases, he has the burden of demonstrating that prejudice resulted from his trial counsel's deficient performance in failing to object to the court's instructions on count eight.

[12] Our Supreme Court expressly has held, as a general matter, that principal and accessorial liability are *not* conceptually distinct from each other, and, thus, a jury verdict on a particular count should be regarded as unanimous even if some jurors concluded that the defendant was an aider and abetter, while other jurors concluded that he was the principal. *State* v. *Smith*, 212 Conn. 593, 605, 563 A.2d 671 (1989). In the present case, however, the state did not allege the occurrence of merely *one* act of sexual assault for which it would have been proper for half the jurors to believe the petitioner was guilty under a theory of principal liability and half the jurors to believe he was guilty under a theory of accessorial liability; rather, it alleged the occurrence of *three* separate acts of sexual assault. The petitioner thus appears to argue that, given the instructions on count eight, the jury could have believed it proper for each juror to individually determine that any one of the three acts of sexual assault, two alleging principal liability and

As previously discussed, "[t]o satisfy the prejudice prong, a [petitioner] 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.) *Small* v. *Commissioner of Correction*, supra, 286 Conn. 713. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.) *Apodaca* v. *Commissioner of Correction*, 167 Conn. App. 530, 535, 146 A.3d 42 (2016). Given this standard for prejudice, we are not persuaded that there is a reasonable probability that some members of the jury could have convicted him as a principal on count eight and that others could have convicted him as an accessory on that same count. More specifically, we agree with the habeas court's assessment that the verdict of acquittal as to count seven leads us to conclude that there is not a reasonable probability that the verdict on count eight would have been different had the court not made the instructional mistake.

The habeas court ruled as follows in its memorandum of decision: "In order to return a not guilty verdict as a principal of the sexual assault charge alleged in count seven, the jury was clearly and properly instructed that [it] had to agree unanimously on that acquittal. By unanimously determining that the state had failed to prove the petitioner guilty as a principal, no juror could logically have then found him to be guilty of sexual assault as a principal in count eight. Such verdicts were mutually exclusive. The court draws the only reasonable conclusion that the jury must have unanimously found the petitioner guilty of sexual assault as an *accessory* to Mitchell's rape." (Emphasis in original.)

one alleging accessorial liability, was proven beyond a reasonable doubt, resulting in a nonunanimous guilty verdict.

First, the habeas court inartfully used the phrase "mutually exclusive" to describe the verdict of acquittal on count seven and the verdict of guilt on count eight. The term "mutually exclusive," as used in our case law, refers to two *convictions* that are inconsistent with each other as a matter of law or are based on a legal impossibility. See *State* v. *Nash*, supra, 316 Conn. 659. As previously discussed herein, such convictions are reviewable and cannot withstand a challenge if "the existence of the essential elements for one offense negates the existence of [one or more] essential elements for another offense of which the defendant also stands convicted." (Internal quotation marks omitted.) Id. The present case, however, does not involve a claim contesting two legally inconsistent convictions; accordingly, the habeas court's use of the term here does not fit. Nevertheless, we find the remainder of its reasoning persuasive.

In count seven, the petitioner was charged with first degree sexual assault *as a principal only*, and the court properly instructed the jury accordingly, expressly stating that, for purposes of this case, the jury should consider sexual intercourse to be vaginal intercourse or fellatio. Because we presume the jury properly followed the trial court's instructions in the absence of evidence to the contrary; *State* v. *Peeler*, 271 Conn. 338, 371, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005); we assume that the jury did not limit its consideration of count seven to only one of the two possible acts of sexual assault allegedly perpetrated by the defendant as a principal. Rather, we presume that it considered *both* whether the petitioner principally compelled the victim to engage in vaginal intercourse with him *and* whether the petitioner principally compelled the victim to perform fellatio on him. Given that the jury acquitted the petitioner of count seven, we must, therefore, presume that it unanimously

concluded that the state failed to prove beyond a reasonable doubt either of the two sexual acts that the state alleged he committed as a principal.

Thus, if the jurors unanimously acquitted the petitioner of acting as the principal in committing the two separate acts of sexual assault alleged in count seven, this left only one act of sexual assault for them to consider in the context of count eight: vaginal penetration of the victim by Mitchell. Given this, and in light of the fact that the verdict form for count eight indicated that the petitioner was found guilty "as a principal or accessory," the most reasonable explanation for the verdict on count eight is that the jury found the petitioner guilty on a theory of accessorial liability for aiding Mitchell in sexually assaulting the victim.[13] The likelihood of this outcome becomes even greater considering the fact that the jury had before it both the amended information for count eight, which solely alleged that the petitioner "did intentionally aid James Mitchell" in sexually assaulting the victim, and the closing argument of the state, in which the prosecutor stated, "We're charging him [in count eight] . . . that he aided, that he helped Mr. Mitchell in engaging in sexual intercourse with [the victim]."[14]

Ultimately, the most that can be said of the petitioner's prejudice argument here is that it was merely *possi-*

[13] By so concluding, we do not mean to suggest or presume that the jury must have decided counts seven and eight in any particular order. The reality, however, is that, ultimately, the jury acquitted him of the two acts of sexual assault of which the state accused him as a principal, and found him guilty on count eight.

[14] Specifically, the prosecutor stated: "[L]et me go to count eight because we're going to talk about some of these things together. . . . We're charging him . . . that he aided, that he helped Mr. Mitchell in engaging in sexual intercourse with [the victim]. . . . The question for you is, looking at the facts here, did James Mitchell force [the victim] to engage in sexual intercourse when a shotgun was pointed at her and he told her to take off her clothes? . . . I submit to you that the [petitioner] had the gun when James Mitchell forced her to bend over and he placed his penis into her vagina . . . ."

ble that the court's improper instructions on count eight caused juror confusion as to whether some of the jurors could have decided that the state met its burden of proof with respect to one of the acts of sexual assault, while others could have decided that the state met its burden of proof with respect to another act of sexual assault. For the petitioner to prevail on the prejudice prong of his habeas claim of ineffective assistance of counsel, however, the high burden is on him to prove that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the trial as to count eight would have been different. The petitioner has failed to show that his theory of juror nonunanimity was anything more than speculative and, thus, has not undermined confidence in the outcome. We, therefore, conclude that the habeas court did not improperly conclude that the petitioner's claim of ineffective assistance of trial counsel fails on the prejudice prong of the *Strickland* test. Accordingly, we affirm the judgment of the habeas court.

The judgment is affirmed.

In this opinion the other judges concurred.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 174

(Replaces Prior Cumulative Table)

Access Agency, Inc. *v.* Second Consolidated Blimpie Connecticut Realty, Inc. 218
Contracts; landlord and tenant; whether trial court's findings that 2000 lease agreement had expired and that defendant was not guarantor of new lease executed in 2010 were clearly erroneous; whether trial court improperly used exhibit for substantive purposes rather than for limited purpose for which it had been admitted; harmless error.
American Express Bank, FSB *v.* Rutkowski 472
Breach of contractual credit agreement; whether trial court improperly granted motion for summary judgment; statute of frauds (§ 52-550 [a] [6]); whether credit card agreement constituted loan exceeding $50,000 for purposes of statute of frauds.
Avery *v.* Medina 507
Injunction; motion for contempt; claim that trial court, in granting motion for contempt, impermissibly modified substantive terms of judgment by converting mandatory injunction into prohibitive injunction that forbade any structure from being constructed in setback, not just permanent structure prohibited by language of restrictive covenant; whether judgment in prior appeal and order of trial court requiring defendants to remove all portions of stone wall within setback were ambiguous; claim that contempt finding deprived defendants of fundamental property right; reviewability of claim that trial court abused discretion by awarding plaintiffs $1500 in attorney's fees.
Bank of America, National Assn. *v.* Nino (Memorandum Decision) 901
Bank of America, N.A., Trustee *v.* Chainani 476
Mortgage foreclosure; rule of practice (§ 23-18 [a]) permitting proof of amount of mortgage debt by admission of affidavit of debt; standard of review to apply in § 23-18 (a) claims; claim that trial court erred in admitting affidavit into evidence under § 23-18 (a) when defendant disputed amount of debt; whether denial of default and averred insufficient knowledge to admit or deny amount of debt were sufficient to bar affidavit's admission under § 23-18 (a).
Bank of New York Mellon *v.* Talbot 377
Foreclosure; whether trial court abused discretion in granting second motion for judgment of strict foreclosure; whether, pursuant to applicable rule of practice (§ 17-20 [d]), default for failure to appear was automatically set aside by operation of law when counsel filed appearance; claim that default for failure to plead was void ab initio because it was entered after first foreclosure motion had been granted erroneously and was, thus, predicated on invalid entry of default; whether second foreclosure judgment was predicated on valid entry of default for failure to plead; whether first foreclosure judgment, which was void initio, had any legal effect or bearing on validity of subsequent default for failure to plead; whether, pursuant to applicable rule of practice (§ 17-32 [b]), default for failure to plead was not automatically set aside and trial court had discretion to deny motion to set aside default where defendant filed answer after plaintiff filed motion for judgment of strict foreclosure.
Bank of New York, Trustee *v.* Savvidis 843
Foreclosure; bankruptcy; motion to reenter judgment of strict foreclosure and to reset law days; claim that trial court improperly relied on certain affidavit in calculating outstanding debt; whether defendants demonstrated that they were substantially prejudiced by court's decision; whether court abused its discretion in declining to conduct evidentiary hearing on issue of its reliance on subject affidavit in calculating outstanding debt.
Cathedral Green, Inc. *v.* Hughes 608
Summary process; noncompliance with stipulated judgment; order of execution; claim that trial court improperly relied on facts not in evidence and not supported by record; claim that trial court failed to properly adjudicate defendant's equitable nonforfeiture defense.

Cimino *v.* Cimino 1
Dissolution of marriage; motion to open; abuse of discretion; motion to open judgment on basis of fraud; motion to open judgment on basis of intentional misrepresentation; postjudgment discovery; collateral attack on judgment; credibility of witness; whether dissolution court committed plain error in its valuation of defendant's pension; whether plaintiff's claim regarding valuation of defendant's pension is untimely collateral attack on judgment of dissolution court; whether trial court abused its discretion in denying plaintiff's motion to open, on basis of fraud or intentional misrepresentation, with respect to issue of defendant's pension; whether trial court abused its discretion in denying motion to open judgment, on basis of fraud, with respect to family monetary gifts.

Clinton S. *v.* Commissioner of Correction 821
Habeas corpus; whether habeas court abused discretion denying petition for certification to appeal; claim that defense counsel had rendered ineffective assistance at criminal trial when counsel failed to present certain evidence of conversation victim had with witness regarding petitioner's status as registered sex offender; claim that defense counsel failed to adequately investigate and present evidence of petitioner's employment history and that of victim's mother in support of defense that petitioner had no opportunity to assault victim; claim that habeas court applied wrong standard in determining whether petitioner was prejudiced by failure of defense counsel to produce employment records of victim's mother.

Crouse *v.* Cox 343
Fraud; motion to dismiss.

Crouse *v.* Sloat (Memorandum Decision) 901

Deutsche Bank AG *v.* Sebastian Holdings, Inc. 573
Enforcement of foreign judgment; claim seeking to pierce corporate veil; summary judgment; res judicata; collateral estoppel; claim that trial court improperly denied defendants' motion for summary judgment because plaintiff's corporate veil piercing claim arose out of same series of transactions as foreign action and should have been raised in that action; whether plaintiff's claim was barred by doctrine of res judicata; claim that trial court improperly denied plaintiff's motion for summary judgment because issue of whether individual defendant was alter ego of corporate defendant previously had been decided in foreign action; whether doctrine of collateral estoppel precluded defendants from relitigating alter ego issue in trial court; whether facts relevant to issues in foreign action and those in present action were identical for purposes of issue preclusion.

Diaz *v.* Commissioner of Correction 776
Habeas corpus; claim that petitioner's right to due process and fair trial were violated by prosecutor's failure to disclose material evidence that was favorable to defense; claim that counsel in prior habeas proceeding rendered ineffective assistance because they failed to identify, understand, research, raise, or argue that petitioner's rights to due process and fair trial were violated by prosecutor's failure to disclose material evidence that was favorable to defense.

DiGiuseppe *v.* DiGiuseppe 855
Dissolution of marriage; motion for contempt; reviewability of claim that trial court erred in not finding latent ambiguity in provision of separation agreement concerning college expenses; reviewability of claim that trial court erred in determining that defendant was responsible for all of children's college expenses; failure to distinctly raise claim at trial.

EH Investment Co., LLC *v.* Chappo LLC 344
Breach of contract; whether lease renewal with lessee was condition precedent to plaintiff lessor's contract with defendants to find lender willing to make commercial loan; claim that trial court improperly construed contract as including condition precedent that required defendants to return plaintiff's deposit; whether trial court gave proper deference to language of fully integrated contract; whether parties to contract failed to fully contemplate occurrence or nonoccurrence of lease extension; whether trial court properly shifted risk from plaintiff to defendants.

Freeman *v.* A Better Way Wholesale Autos, Inc. 649
Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.); Truth in Lending Act (15 U.S.C. § 1601 et seq.); (§ 42-110b-28 [b] [1]) of state regulations; fraudulent misrepresentation; whether trial court erred as matter of law in concluding that defendant violated CUTPA; criteria pursuant to federal cigarette rule for determining whether trade practice is unfair, set forth and discussed; whether trial court erred as matter of law in concluding that defendant committed

fraudulent misrepresentation by nondisclosure of material facts; whether trial court erred as matter of law in awarding punitive damages and attorney's fees.

Godaire *v.* Dept. of Social Services 385

Administrative appeal; appeal from judgment of trial court dismissing administrative appeal from decision of Department of Social Services discontinuing plaintiff's medical benefits; claim that plaintiff was denied access to court due to change of venue; whether court properly determined that there was authority for transfer of case to different judicial district pursuant to statute (§ 51-347b [a]); whether, under circumstances of case, hearing officer's decision was made upon unlawful procedure where plaintiff did not have meaningful opportunity to respond to corrected evidence presented by department; whether substantial rights of plaintiff were prejudiced; whether plaintiff, who had been informed by department that eligibility period had been extended, detrimentally relied on such information to meet corrected deadline for obtaining and presenting bill for dental work; whether plaintiff's preexisting eligibility through February, 2015, was required under doctrine of equitable tolling.

Grovenburg *v.* Rustle Meadow Associates, LLC 18

Injunction; planned communities; whether trial court improperly precluded defendants from presenting evidence concerning visual buffer area called green zone; whether evidence about green zone was relevant to determination of whether defendants reasonably exercised discretionary authority over design control matters under certain provisions in planned community's declaration (§§ 10.1 [k] and 13.1 [a]) in denying plaintiff owners' proposals to erect fence around swimming pool; court's failure to make certain factual findings to properly analyze reasonableness of defendants' determination under §§ 10.1 (k) and 13.1 (a); remand for new trial; claim that court improperly set aside fines that defendants assessed against plaintiffs for unauthorized landscaping activity and alleged removal of boundary marker; claim that defendants were entitled to award of attorney's fees for portion of counterclaim; whether court improperly declared null and void special assessment that defendants had levied against plaintiffs to cover legal expenses incurred during parties' controversy.

Hampton *v.* Commissioner of Correction. 867

Habeas corpus; claim that petitioner was prejudiced by trial counsel's deficient performance in failing to object to trial court's improper jury instructions that petitioner could be convicted as principal or accessory with respect to count of information that charged petitioner as accessory; claim that defense counsel's deficient performance permitted jury to return nonunanimous verdict of guilty in that it was unclear whether jury found petitioner guilty as principal or accessory; whether habeas court properly determined that precise harm that petitioner asserted by defense counsel's deficient performance was not so significant that there was reasonable probability that outcome of trial with respect to count at issue would have been different.

Healey *v.* Haymond Law Firm, P.C.. 230

Unpaid wages; induced error; jury instructions; plain error doctrine; entitlement to double damages and attorney's fees pursuant to statute (§ 31-72); claim that trial court should have instructed jury on repealed version of § 31-72, pursuant to which plaintiff may recover double damages if plaintiff proved that defendant withheld wages in bad faith, instead of instructing jury that, pursuant to amended version of § 31-72, it must award plaintiff double damages for unlawfully withheld wages unless defendant establishes that it withheld wages in good faith; whether defendant induced alleged instructional error of which it complained by affirmatively requesting language it challenged on appeal; claim that trial court's alleged error in determining that amended version of § 31-72 applied retroactively was plain error.

Johnson *v.* Preleski 285

Petition for new trial; statute of limitations; whether trial court properly dismissed petition as untimely; claim that action was timely pursuant to saving statute (§ 52-593a), which requires that process be personally delivered to marshal within limitation period, where there was evidence that fax of process was transmitted to marshal within limitation period, but no evidence as to when marshal came into physical possession of process to be served.

Kurisoo *v.* Ziegler 462

Negligence; action for personal injuries sustained in motor vehicle accident; duty of care; reasonably foreseeable risk; vicarious liability; motion for summary judgment; whether court improperly rendered summary judgment in favor of

defendant company on both of its motions because court based its rulings on ground not raised in defendant's summary judgment motions; claim that defendant company did not owe duty of care to plaintiff because defendant's alleged negligence did not create reasonably foreseeable risk that alleged harm would occur, as required under first prong of legal duty analysis; claim that vicarious liability could not be established because defendant driver was not acting as agent, servant or employee of defendant company at time of collision that caused plaintiff's injuries.

Lederle *v.* Spivey 592

Dissolution of marriage; whether trial court abused discretion in awarding attorney's fees pursuant to bad faith exception to general rule that attorney's fees are not allowed to successful party in absence of contractual or statutory exception; whether, in order to impose sanctions under bad faith exception pursuant to inherent authority, trial court must find both that litigant's claims were entirely without color and that litigant acted in bad faith; whether trial court's findings concerning bad faith exception must be supported with high degree of specificity; whether trial court failed to apply proper standard in awarding attorney's fees when court failed to delineate finding that defendant's prior appeal lacked any indicia of colorable claim with clear evidence and high degree of specificity; whether record demonstrated that trial court applied correct standard for colorability applicable to party, as opposed to attorney, and that it thus considered whether defendant's principal claim in previous appeal was so lacking in factual and legal support that reasonable person could not have concluded that basis of claim might be established.

Mahoney *v.* Storch Smith 639

Medical malpractice; motion to set aside verdict and for new trial; claim that defendants' use of video violated expert disclosure rules under rule of practice (§ 13-4), because video and related testimony from defendants' expert, were not disclosed pursuant to that provision; claim that video, and testimony of defendants' expert concerning it, were irrelevant, unduly cumulative, prejudicial and confusing to jury; claim that trial court improperly denied plaintiffs' motion to set aside verdict and for new trial in light of fact that trial court did not instruct jury that video was for demonstrative purposes only; claim that trial court abused its discretion by allegedly discouraging jury from rehearing expert medical testimony during jury's deliberations.

Maluccio *v.* Zoning Board of Appeals 750

Zoning appeal; whether decision of defendant zoning board of appeals was illegal and not supported by record; claim that trial court improperly found that recreation area designation on subdivision map created only private right or restriction unenforceable by zoning law; whether subdivision regulations required developer to designate property as recreation area; whether planning commission had required recreation area when approving subdivision; claim that trial court erred in determining that town was required to accept title to property to effectuate recreation area designation.

Marciano *v.* Olde Oak Village Condominium Assn., Inc. 851

Negligence; premises liability; claim that trial court erroneously concluded that there was no genuine issue of material fact that defendant condominium association did not have possession and control over area where plaintiff unit owner fell; whether plaintiff was deemed to have admitted that area where she fell was her responsibility to maintain by failing to respond to defendant's requests for admissions.

Marra *v.* Commissioner of Correction 440

Habeas corpus; withdrawal of action; deliberate bypass doctrine; claim that trial court improperly gave preclusive effect to ruling of prior habeas court that petitioner's withdrawal was with prejudice when no hearing on merits had commenced; claim that trial court improperly concluded that doctrine of deliberate bypass barred petitioner's habeas action; whether court's determination that habeas action withdrawn with prejudice implicated court's subject matter jurisdiction.

Pajor *v.* Administrator, Unemployment Compensation Act 157

Unemployment compensation; motion to correct; claim that appeals referee improperly dismissed plaintiff's appeal for failure to attend hearing on remand from prior appeal to Employment Security Board of Review; claim that board improperly refused to grant motion to correct seeking to correct its findings with respect to Polish language proficiency of plaintiff's attorney and whether plaintiff had

misunderstood counsel's instruction regarding hearing; whether board was required to admit as true certain facts that plaintiff claimed were undisputed and material to subsequent appeal; whether trial court properly dismissed plaintiff's appeal.

Pires *v.* Commissioner of Correction 121

Habeas corpus; whether habeas court improperly concluded that trial counsel did not render ineffective assistance in failing to adequately convey to trial court petitioner's desire to represent himself; whether petitioner made clear, unequivocal request for self-representation.

Pronovost *v.* Tierney 368

Negligence; personal jurisdiction; whether long arm statute (§ 52-59b [a] [3] [B]), which confers personal jurisdiction over nonresident individual with respect to cause of action arising from tortious act outside Connecticut that causes injury to person or property in Connecticut, provided jurisdiction over defendant; whether, in order to confer jurisdiction over defendant, § 52-59b (a) (3) (B) required that substantial revenue be derived from Connecticut.

Redding Life Care, LLC *v.* Redding 193

Writ of error; claim that trial court improperly denied plaintiff in error's motion for protective order seeking to prohibit deposition by defendant in error; whether Connecticut law prohibits compelling unretained expert testimony; whether absolute unretained expert privilege or qualified privilege that can be overcome by demonstrating compelling need existed under Connecticut law.

Reserve Realty, LLC *v.* BLT Reserve, LLC 150

Foreclosure; broker's lien; appeal from judgment discharging broker's lien; whether plaintiffs could establish probable cause to sustain validity of broker's lien as required by statute (§ 20-325e).

Reserve Realty, LLC *v.* Windemere Reserve, LLC 130

Breach of contract; antitrust; claim that plaintiffs could not recover brokerage fees under listing agreements because those agreements were product of illegal tying arrangement in violation of antitrust statute (§ 35-29); whether contracts conditioning sale of land on purchase of real estate brokerage services exclusively from plaintiffs constituted illegal tying arrangement; whether defendants were required to prove existence of relevant market in order to prevail on claim that seller of land had sufficient economic power to restrain competition; whether defendants demonstrated that substantial volume of commerce in tied product was restrained.

Reserve Realty, LLC *v.* Windemere Reserve, LLC 153

Foreclosure; broker's lien; appeal from judgment discharging broker's lien; whether plaintiffs could establish probable cause to sustain validity of broker's lien as required by statute (§ 20-325e).

Reyes *v.* Medina Loveras, LLC 804

Negligence; hearsay rule; statement by party opponent exception to hearsay rule; hospital records exception to hearsay rule; claim that trial court improperly admitted into evidence photograph of plaintiff's uninjured buttock because it was irrelevant; claim that trial court improperly admitted into evidence portion of plaintiff's hospital records because it was inadmissible hearsay.

Ring *v.* Litchfield Bancorp 813

Whether defendant violated Connecticut Unfair Trade Practices Act (§ 42-110 et seq.) by exercising right to setoff; claim that trial court erred in striking plaintiff's amended complaint by concluding that she failed to plead cognizable cause of action under act; whether plaintiff's claim on appeal was waived because amended complaint was not materially different from stricken original complaint; whether new factual allegations in amended complaint corrected deficiencies identified by trial court when it granted motion to strike original complaint.

Rogers *v.* Commissioner of Correction 120

Habeas corpus; due process; effective assistance of counsel; claim that habeas court erred in concluding that state did not violate petitioner's right to due process when it withheld third-party culpability evidence from defense in criminal trial; claim that habeas court erred in concluding that petitioner was not denied effective assistance of counsel.

Santander Bank, N.A. *v.* Godek 748

Foreclosure; foreclosure by sale; whether trial court committed reversible error.

Santos *v.* Zoning Board of Appeals 531

Inverse condemnation; unjust enrichment; whether trial court properly determined that plaintiff failed to prove claim for inverse condemnation; whether plaintiff

demonstrated that he had reasonable investment-backed expectation of use of property that was thwarted by defendants' regulations; claim that defendant town had been unjustly enriched by preventing plaintiff from developing property.

Singh *v.* CVS 841

Workers' compensation; whether plaintiff was entitled to benefits for total incapacity from compensable injury under applicable statute (§ 31-307).

State *v.* Carter 749

Motion to correct illegal sentence; claim that trial court should have denied, rather than dismissed, defendant's motion to correct illegal sentence alleging that imposition of consecutive sentences was not authorized by statute.

State *v.* Ellis 14

Motion to correct illegal sentence; claim that trial court improperly dismissed motion to correct; whether sentencing court violated defendant's federal constitutional right to be free from cruel and unusual punishment pursuant to Miller *v.* Alabama *(567 U.S. 460); claim that trial court should hold new sentencing hearing to determine parole eligibility pursuant to 2015 Public Act (P.A. 15-84) providing that certain juvenile offenders shall be eligible for parole.*

State *v.* Gansel 525

Larceny in first degree; embezzlement; claim that trial court abused discretion by admitting inculpatory e-mails into evidence; whether admission of e-mails was harmful; whether e-mails were cumulative of other properly admitted evidence that independently provided basis for conviction.

State *v.* Holley 488

Possession of narcotics with intent to sell by person who is not drug-dependent; mootness; claim that trial court's jury instruction concerning reasonable doubt diluted state's burden of proof; whether there was reasonable possibility that jury was misled by discrepancy between court's oral and written instructions regarding state's burden of proof; whether claim challenging denial of motion to suppress was moot where defendant failed to challenge independent basis that supported decision denying motion to suppress.

State *v.* Joseph 260

Sexual assault first degree; risk of injury to child; whether trial court violated defendant's statutory (§ 54-82m) right to speedy trial; reviewability of claim that court violated defendant's sixth amendment right to speedy trial; unpreserved claim that court denied defendant's right to procedural due process by failing to hold hearings on pro se motions for speedy trial; waiver of claim that court improperly instructed jury about constancy of accusation testimony; whether court committed plain error when it instructed jury about constancy of accusation evidence.

State *v.* O'Donnell 675

Bribery of witness; tampering with witness; whether evidence was sufficient to support conviction of bribery of witness; whether evidence was insufficient to prove charge of tampering with witness; reviewability of claim that "one-witness-plus-corroboration" rule applicable to perjury prosecutions should apply to conviction of tampering with witness; claim that trial court abused discretion in denying motion to set aside verdict; claim that court improperly failed to give jury instruction regarding "one-witness-plus-corroboration" rule; claim that court erred when it refused request that witness testify in proffer outside jury's presence and permitted witness to invoke fifth amendment privilege in front of jury; whether court abused discretion in granting motion to quash subpoena for information related to witness protection program.

State *v.* Patel 298

Petition for review; whether trial court improperly precluded petitioner from copying certain trial exhibits in custody of clerk's office; claim that court's orders that referenced sealing of documents and limited access to trial exhibits in custody of clerk's office were issued pursuant to rule of practice (§ 1-11C) applicable to media coverage of criminal proceedings; claim that orders that referenced sealing of documents and limited access to trial exhibits in custody of clerk's office were final and could not be challenged in petition for review; claim that court's orders that referenced sealing of documents and limited access to trial exhibits in custody of clerk's office were not subject to expedited review pursuant to statute (§ 51-164x [c]).

State *v.* Purcell 401

Risk of injury to child; whether trial court abused discretion in denying defendant's motion for mistrial; claim that jury verdict was substantially swayed by testi-

mony that victim had been diagnosed with post-traumatic stress disorder; claim that harmfulness of testimony that victim had been diagnosed with post-traumatic stress disorder could not be cured by court's instruction to jury; whether court improperly denied defendant's motion to suppress statements to police made during custodial interrogation; unpreserved claim that article first, § 8, of state constitution required police to cease questioning during custodial interrogation and to clarify defendant's ambiguous or equivocal references to counsel.

State *v.* Reddick 536
Assault in first degree; criminal possession of firearm; assault in third degree; claim that defendant's constitutional right to fair trial was violated when prosecutor stated to jury that defendant did not inform police that he acted in self-defense; claim that defendant was deprived of right to fair trial when prosecutor expressed opinion about witness' credibility and appealed to jurors' emotions.

State *v.* Sampson 624
Interfering with officer; claim that trial court violated defendant's constitutional right to confrontation by granting motion in limine to exclude certain evidence; whether excluded evidence related to ability or propensity of witness to tell truth; whether constitutional claim necessarily failed where trial court properly determined that evidence was not relevant; whether trial court abused discretion by finding inadmissible certain testimony; whether excluded testimony related to collateral issue that was not directly relevant to elements of crime charged, tended to prove or to disprove any element of charged offense, or was relevant to issue of reasonableness of use of force by police officer; whether defendant's right to present defense was violated.

State *v.* Smith 172
Sexual assault second degree; risk of injury to child; claim that defendant's conviction violated his right to due process under Connecticut constitution because police lost potentially exculpatory evidence; whether record adequate to review defendant's claim pursuant to State *v.* Golding *(213 Conn. 233) with respect to allegedly exculpatory evidence; claim that defendant's constitutional right against double jeopardy was violated by conviction of sexual assault second degree and risk of injury to child; whether defendant demonstrated that subject crimes constituted same offense for double jeopardy purposes under test set forth in* Blockburger *v.* United States *(284 U.S. 299).*

State *v.* Young 760
Assault in first degree; carrying pistol without permit; sufficiency of evidence; supplemental jury instruction; claim that there was insufficient evidence to support conviction of assault in first degree; claim that trial court abused discretion by admitting into evidence names of defendant's prior felony convictions; whether probative value of evidence of prior felony convictions outweighed its prejudicial effect; claim that court abused discretion by giving supplemental charge to jury in which it named prior felony convictions.

Stones Trail, LLC *v.* Weston 715
Inverse condemnation; ripeness; violation of constitutional rights; whether trial court improperly set aside jury verdict; whether court improperly dismissed action for lack of subject matter jurisdiction; claim that finality of judgments doctrine barred court from reconsidering whether it had subject matter jurisdiction; claim that law of case doctrine barred court from revisiting issue of ripeness; whether court properly determined that plaintiff did not have vested rights in its configuration of real property; claim that court improperly relied on prior decision of this court in determining that it lacked subject matter jurisdiction; whether court improperly rejected claim that it would have been futile to seek subdivision approval; claim that ripeness review did not apply to claims of violation of certain constitutional rights; claim that court materially changed its initial decision when it filed revised memorandum of decision.

Valley National Bank *v.* Marcano 206
Breach of contract; personal guarantee of line of credit; action to enforce debt owed by defendant as personal guarantor on line of credit; claim that plaintiff did not establish standing and proper chain of title regarding ownership of promissory note originally executed and personally guaranteed by defendant to other entity; claim that plaintiff submitted insufficient evidence to accurately establish loan balance claimed owed by defendant.

Ventres *v.* Cais (Memorandum Decision). 901
Wells Fargo Bank, N.A. *v.* Owen 102
Foreclosure; motion for default for failure to plead; whether trial court abused discretion in denying motion to open strict foreclosure judgment pursuant to statute (§ 49-15); whether defendants had good cause to open strict foreclosure judgment.
Williams Ground Services, Inc. *v.* Jordan. 247
Action for payment due for services rendered; whether trial court's finding that statute of limitations had been tolled by defendant's several acknowledgments of debt was clearly erroneous; whether claims concerning credibility of witnesses and weight of evidence were matters for trial court as trier of fact; claim that trial court abused discretion in admitting into evidence photocopies of invoices of defendant's monthly bills; claim that photocopies were not complete and accurate copies of originals sufficient to satisfy § 8-4 (c) of Connecticut Code of Evidence; whether plaintiff sought to admit reproductions of business records or original business records.

CONNECTICUT APPELLATE REPORTS

Vol. 175

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

THE CADLE COMPANY *v.* FRANK F. OGALIN
(AC 38635)

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

Syllabus

The plaintiff, the assignee of a judgment rendered against the defendant in 1994, brought this action in 2013 seeking, in a two count complaint, to enforce the 1994 judgment, which remained unsatisfied. After the trial court granted in part the plaintiff's motion to strike the defendant's special defenses directed at count one of the complaint, it granted the plaintiff's motion for summary judgment as to the first count of the complaint. Thereafter, the court issued an amended memorandum of decision rendering judgment in favor of the plaintiff as to count one and awarding the plaintiff postjudgment interest. Subsequently, the court granted the plaintiff's motion to withdraw the second count of the complaint, and the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly granted the plaintiff's motion to strike his second special defense to count one of the complaint, which alleged that because the plaintiff already had taken steps in 2013 to collect on the 1994 judgment via weekly payments, wage executions and property executions, the present action was duplicative, unfair, inequitable, vexatious and oppressive: although an action on a judgment is not favored as being generally vexatious and oppressive, our Supreme Court has determined previously that the weight of authority is that an allegation of nonpayment is sufficient reason for initiating an action, and the plaintiff here alleged nonpayment of the 1994 judgment; moreover, the defendant failed to

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

provide any authority in support of his claim that the present action was unfair and duplicative due to the fact that active collection proceedings remained pending before the trial court.

2. The trial court properly granted the plaintiff's motion for summary judgment as to count one of the complaint; that court properly determined that the defendant's special defense of laches, an equitable defense, was not applicable to the plaintiff's action for monetary damages, which was filed within the relevant limitation period pursuant to statute (§ 52-598), and that even if the doctrine of laches applied, the defendant had not alleged facts other than the mere lapse of time that would create a genuine issue of material fact as to whether he was prejudiced by any delay in enforcement, especially given that the action was brought within the period authorized by § 52-598, and, thus, it was presumed that there was no prejudice, and the doctrine of laches was not imputed to the plaintiff's claim.

3. This court declined to consider the defendant's claim, raised for the first time on appeal, that the trial court improperly awarded the plaintiff postjudgment interest; although the defendant claimed on appeal that because the 1994 judgment did not award postjudgment interest, it was res judicata as to the issue of postjudgment interest, the defendant failed to specifically plead the issue of res judicata as a special defense, nor was it mentioned in his opposition to the motion for summary judgment.

Argued March 9—officially released July 25, 2017

Procedural History

Action, inter alia, to enforce a judgment, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kamp*, *J.*, granted in part the plaintiff's motion to strike the defendant's special defenses; thereafter, the court, *Hon. Richard P. Gilardi*, judge trial referee, granted the plaintiff's motion for summary judgment; subsequently, the court, *Hon. Richard P. Gilardi*, judge trial referee, issued a corrected memorandum of decision and rendered summary judgment for the plaintiff; thereafter, the plaintiff withdrew the complaint in part, and the defendant appealed to this court. *Affirmed.*

Roy W. Moss, for the appellant (defendant).

Paul N. Gilmore, with whom, on the brief, was *Christopher A. Klepps*, for the appellee (plaintiff).

Opinion

DiPENTIMA, C. J. The defendant, Frank F. Ogalin, appeals from the judgment of the trial court rendered in favor of the plaintiff, The Cadle Company. On appeal, the defendant claims that the court improperly (1) granted the plaintiff's motion to strike his second special defense, (2) granted the plaintiff's motion for summary judgment and (3) awarded postjudgment interest to the plaintiff. We disagree, and, accordingly, affirm the judgment of trial court.

The following facts and procedural history are relevant to our discussion. On September 25, 2013, the plaintiff commenced the present action via a two count complaint alleging a common-law action on a judgment and an action on a judgment under principles of unjust enrichment.[1] Specifically, the complaint alleged that the plaintiff was the assignee of a judgment rendered against the defendant in the amount of $137,055.17 in a case titled *Great Country Bank* v. *Ogalin*, Superior Court, judicial district of Fairfield Docket No. CV-93-0303908-S, (March 15, 1994) (1994 judgment). The plaintiff claimed that the 1994 judgment remained unsatisfied and fully enforceable. The plaintiff sought the entry of a new judgment for the outstanding amount from the 1994 judgment, as well as postjudgment interest.

The defendant filed an answer and raised three special defenses with respect to the first count of the complaint. First, he claimed that the first count failed to

[1] "[A] party obtaining a judgment for money damages in Connecticut has two means to enforce that judgment; it may seek an execution of the judgment or it may initiate an independent action. See General Statutes § 52-598 (a); see also 30 Am. Jur. 2d 84, Executions and Enforcement of Judgments § 47 (2005) (distinguishing between execution and action on judgment). [As a general matter], under § 52-598 (a), a party has twenty years to execute the judgment and twenty-five years to enforce it through a separate action." *Investment Associates* v. *Summit Associates, Inc.*, 309 Conn. 840, 849, 74 A.3d 1192 (2013).

state a cognizable cause of action. Second, he alleged that "[i]n 2013 [the] plaintiff obtained an order of weekly payments and wage and property executions in the action referred to in the first count. By virtue of pending postjudgment motions and proceedings, [the] plaintiff is seeking to collect the prior judgment. Under the foregoing circumstances, this action is duplicative, unfair, inequitable, vexatious, and oppressive against [the] defendant." Third, the defendant claimed that the plaintiff had not sought an order of payment or execution on the 1994 judgment until more than eighteen years had passed, and, therefore, the doctrine of laches barred the present action.

The plaintiff moved to strike the special defenses directed at count one of the complaint. The defendant filed a memorandum of law in opposition to the motion to strike. The court, *Kamp, J.*, held a hearing on September 15, 2014, on the plaintiff's motion to strike and granted the plaintiff's motion with respect to the first and second special defenses to count one. It denied the motion as to the third special defense alleging laches.

On April 23, 2014, the plaintiff filed a motion for summary judgment as to the first count of the complaint. The court denied this motion, without prejudice, on July 7, 2014. The plaintiff filed a second motion for summary judgment as to the first count on December 22, 2014. The defendant filed a memorandum in opposition to this motion on February 11, 2015. On June 10, 2015, the court, *Hon. Richard P. Gilardi*, judge trial referee, issued a memorandum of decision granting the plaintiff's motion for summary judgment.

The court first concluded that General Statutes § 52-598 authorized the present action on the 1994 judgment and that the plaintiff had commenced it timely. Next, the court considered the question of whether the present action was vexatious and oppressive. It reasoned that

while a separate action on a judgment *may* be considered vexatious and oppressive, this type of action constituted a viable option for the plaintiff under our law. Additionally, the defendant had failed "to provide, nor has there been found, any support for the proposition that an action on a judgment is permitted only where a plaintiff establishes that the action is neither vexatious nor oppressive. To require otherwise would misconstrue the nature of an action on a judgment and place an additional burden on plaintiffs not contemplated by the law." Additionally, the court determined that the defense of laches did not apply to the present action because it was not a case brought in equity; further, even if laches did apply, the defendant failed to demonstrate an issue of fact as to whether he had been prejudiced by the lapse of time.

Finally, the court addressed the claim that postjudgment interest accrued from the 1994 judgment at the original contract rate of 9.75 percent. The defendant had countered that genuine issues of material fact existed as to whether the plaintiff was entitled to such interest. Relying on General Statutes § 37-1 and our Supreme Court's decision in *Sikorsky Financial Credit Union, Inc.* v. *Butts*, 315 Conn. 433, 438–45, 108 A.3d 228 (2015), the trial court concluded that postjudgment interest was mandatory at the statutory default rate of 8 percent.

On July 14, 2015, the court issued an "amended" memorandum of decision. It awarded the plaintiff $369,957.57, which consisted of the principal owed from the 1994 judgment in the amount of $137,055.17 and $232,902.40 in postjudgment interest, calculated from March 15, 1994 through June 15, 2015, at the statutory rate of 8 percent. Approximately five weeks later, the plaintiff moved for permission to withdraw count two of its complaint, which the court granted on October

29, 2015.[2] This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly granted the plaintiff's motion to strike his second special defense. This defense alleged that the plaintiff had taken steps, in 2013, to collect on the 1994 judgment via weekly payments, wage executions and property executions; the present action, therefore, was duplicative, unfair, inequitable, vexatious and oppressive. The plaintiff counters that the court properly struck the second special defense. We agree with the plaintiff.

We begin by setting forth our standard of review. "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling on [a motion to strike] is plenary. . . . A party wanting to contest the legal sufficiency of a special defense may do so by filing a motion to strike. The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . In ruling on a motion to strike, the court must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency." (Citations omitted; internal quotation marks omitted.) *Barasso* v. *Rear Still Hill Road, LLC*, 64 Conn. App. 9, 12–13, 779 A.2d 198 (2001); see also *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 398, 119 A.3d 462 (2015); *R.S. Silver Enterprises, Inc.* v. *Pascarella*, 163 Conn. App. 1, 20, 134 A.3d 662, cert. denied, 320 Conn. 929, 133 A.3d 460 (2016).

The defendant's second special defense alleged that "[i]n 2013 [the] plaintiff obtained an order of weekly

[2] See Practice Book §§ 61-1 and 61-2.

payments and wage and property executions in the action referred to in the first count. By virtue of pending postjudgment motions and proceedings, [the] plaintiff is seeking to collect the prior judgment. Under the foregoing circumstances, this action is duplicative, unfair, inequitable, vexatious, and oppressive against the defendant." In the memorandum of law opposing the motion to strike, the defendant argued that a second action on a judgment generally is considered vexatious and oppressive.

The plaintiff, in its motion to strike, claimed that this special defense was legally insufficient and was contrary to the controlling precedent from our Supreme Court. Specifically, the plaintiff alleged that the present case was not duplicative, vexatious, oppressive, unfair or inequitable, and that the passage of time statutorily had barred it from obtaining an execution on the 1994 judgment. The plaintiff also alleged that any pending motions from that case did not impact the propriety of the present action.

The sum of the defendant's appellate argument with respect to this issue is as follows: "The foregoing defense alleges facts that exemplify why a second action on a money judgment is generally considered vexatious and oppressive. *Garguilo* v. *Moore*, 156 Conn. 359 [242 A.2d 716] (1968). In the present case, as alleged in the second special defense, the action is duplicative and unfair, if for no other reason than the prior action remains pending with active collection proceedings before the court. For the foregoing reason, [the defendant's] second [special] defense as to the first count state[s] a valid defense. It was error to strike said defense."

The defendant's reliance on *Garguilo* is misplaced. In that case, our Supreme Court stated: "Although an action on a judgment is not favored as being generally

vexatious and oppressive, *the weight of authority is to the effect that an allegation of nonpayment is sufficient reason for instituting suit. Denison* v. *Williams*, 4 Conn. 402, 404 [(1822)] . . . ." (Emphasis added.) *Garguilo* v. *Moore*, supra, 156 Conn. 361. The plaintiff alleged nonpayment of the 1994 judgment; *Garguilo*, therefore, does not support the defendant's appellate argument herein.

With respect to the issue of the effect of the "active collection proceedings," the defendant failed to provide this court with any authority in support of his argument. We will not reverse the trial court on the basis of a party's bald assertion. "We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." (Internal quotation marks omitted.) *NRT New England, LLC* v. *Jones*, 162 Conn. App. 840, 856, 134 A.3d 632 (2016); see *Bernhard-Thomas Bluilding Systems, LLC* v. *Dunican*, 100 Conn. App. 63, 69–70 n.6, 918 A.2d 889 (2007), aff'd, 286 Conn. 548, 944 A.2d 329 (2008); see also *Quickpower International Corp.* v. *Danbury*, 69 Conn. App. 756, 759–60, 796 A.2d 622 (2002) (minds of appellate judges are swayed by thorough and rigorous legal analysis supported by citation to competent authority and, therefore, in order to prevail, appellant

must do more than assert unsubstantiated claims). Accordingly, we conclude that the defendant failed to persuade us that the court improperly granted the motion to strike his second special defense.[3]

II

The defendant next claims that the court improperly granted the plaintiff's motion for summary judgment. Specifically, he argues that a genuine issue of material fact existed with respect to his special defense of laches. We agree with the trial court that laches, an equitable defense, is inapplicable to the plaintiff's action for monetary damages, which was filed timely pursuant to the relevant statute of limitations, and that the defendant had failed to establish a genuine issue of material fact that he was prejudiced by the delay. The court, therefore, properly granted the plaintiff's motion for summary judgment.

As a preliminary matter, we set forth our standard of review and the relevant legal principles. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party

[3] The plaintiff, of course, is not entitled to recover under both the 1994 judgment and the present action. "As [our Supreme Court] has stated, [t]he rule precluding double recovery is a simple and time-honored maxim that [a] plaintiff may be compensated only once for his just damages for the same injury. . . . Connecticut courts consistently have upheld and endorsed the principle that a litigant may recover just damages for the same loss only once. The social policy behind this concept is that it is a waste of society's economic resources to do more than compensate an injured party for a loss and, therefore, that the judicial machinery should not be engaged in shifting a loss in order to create such an economic waste." (Citation omitted; internal quotation marks omitted.) *Carlson* v. *Waterbury Hospital*, 280 Conn. 125, 150–51 n.30, 905 A.2d 654 (2006); see also *Gionfriddo* v. *Gartenhaus Cafe*, 211 Conn. 67, 73, 557 A.2d 540 (1989) (double recovery foreclosed by rule that only one satisfaction may be obtained for loss that is subject of two or more judgments).

is entitled to judgment as a matter of law. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Rieffel* v. *Johnston-Foote*, 165 Conn. App. 391, 400, 139 A.3d 729, cert. denied, 322 Conn. 904, 138 A.3d 289 (2016); see *Capasso* v. *Christmann*, 163 Conn. App. 248, 257, 135 A.3d 733 (2016). Finally, we note that "because any valid special defense raised by the defendant ultimately would prevent the court from rendering judgment for the plaintiff, a motion for summary judgment should be denied when any [special] defense presents significant fact issues that should be tried." (Internal quotation marks omitted.) *Ulster Savings Bank* v. *28 Brynwood Lane, Ltd.*, 134 Conn. App. 699, 704, 41 A.3d 1077 (2012).

The following additional facts are necessary for our discussion. The third special defense alleged that the doctrine of laches barred the first count of the complaint.[4] The trial court rejected this defense for two

[4] Specifically, the defendant alleged: "No order of payments or execution on the judgment was sought until more than [eighteen] years elapsed from the date of entry of the judgment. No attempt was made to foreclose judgment liens lodged in connection with the judgment. This action is barred

reasons: "The plaintiff here is not seeking equitable relief from the court, but rather a judgment for money damages. The doctrine of laches is, therefore, inapplicable. Even assuming arguendo that the doctrine of laches was applicable, the defendant had not alleged facts other than the mere lapse of time which would create an issue of fact as to whether the defendant was prejudiced by any delay in enforcement. In fact, since the action was brought within the statutory period authorized by § 52-598, presumptively there is no prejudice and the doctrine should not be imputed to the plaintiff's claim. See *John H. Kolb & Sons, Inc.* v. *G & L Excavating, Inc.*, [76 Conn. App. 599, 613, 821 A.2d 774, cert. denied, 264 Conn. 919, 828 A.2d 617 (2003)]."

We recently explained that "[t]he defense of laches, if proven, bars a plaintiff from seeking equitable relief in a case in which there has been an inexcusable delay that has prejudiced the defendant. First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant. . . . We further noted that there must be unreasonable, inexcusable and prejudicial delay for the defense to apply. . . . [A] laches defense is not . . . a substantive right that can be asserted in both legal and equitable proceedings. *Laches is purely an equitable doctrine*, is largely governed by the circumstances, and *is not to be imputed to one who has brought an action at law within the statutory period.* . . . It is an equitable defense allowed at the discretion of the trial court in *cases brought in equity*." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 92, 103–104, 144 A.3d 530 (2016).

These statements from *Wiblyi* echoed those of our Supreme Court in *Doe* v. *Hartford Roman Catholic*

by [the] plaintiff's laches or other failure to take prompt action to enforce the judgment."

Diocesan Corp., supra, 317 Conn. 398–99. Two points from *Doe* and *Wiblyi* apply and directly control the present appeal; first, laches does not apply to an action at law brought within the statutory time period and second, for laches to apply, there must be an unduly prejudicial delay in bringing the action. Id.; *Wiblyi* v. *McDonald's Corp.*, supra, 168 Conn. App. 103–104. The trial court correctly applied these maxims in rejecting the defendant's special defense of laches in the present case. The defendant's appellate brief fails to address how the trial court misapplied these principles regarding laches. Accordingly, we reject this claim.[5]

III

The defendant's final claim is that the court improperly awarded the plaintiff postjudgment interest because genuine issues of material fact existed as to whether the plaintiff was entitled to interest. Specifically, he claimed that because the 1994 judgment did not award postjudgment interest, that judgment, devoid of such an award, "was res judicata as to the postjudgment interest." The plaintiff counters that the defendant failed to raise the issue of res judicata as a special defense and is barred from doing so for the first time on appeal. It further contends that the court properly awarded postjudgment interest from the 1994 judgment.[6] We agree with the plaintiff.

[5] As a result, we need not address the defendant's arguments regarding the plaintiff's purported use, in the proceedings before the trial court, of hearsay documents or the decision from the United States Bankruptcy Court.

[6] We note that our Supreme Court has held that § 37-1 applies to interest "as compensation for a loan (interest eo nomine) . . . ." *Sikorsky Financial Credit Union, Inc.* v *Butts*, supra, 315 Conn. 439. This statute sets a default rule that a loan of money is subject to interest eo nomine at a rate of 8 percent. Id., 440. "Under § 37-1 (b), unless the parties agree otherwise, postmaturity interest will accrue at the legal rate on the unpaid balance of the loan. Thus, if the parties fail to specify whether interest will accrue after maturity, or fail to specify the rate of postmaturity interest, § 37-1 (b) mandates that interest eo nomine shall continue to accrue after maturity at the legal rate. . . . *Furthermore, postmaturity interest under § 37-1 (b) continues to accrue even after the entry of judgment and until the*

"[R]es judicata and collateral estoppel are affirmative defenses that may be waived if not properly pleaded." *Singhaviroj* v. *Board of Education*, 124 Conn. App. 228, 233, 4 A.3d 851 (2010); see also *Red Buff Rita, Inc.* v. *Moutinho*, 151 Conn. App. 549, 558, 96 A.3d 581 (2014); Practice Book § 10-50. The defendant did not specifically plead the special defense of res judicata, nor was it mentioned in his opposition to the motion for summary judgment. We decline, therefore, to consider this argument that was raised for the first time on appeal. *Noonan* v. *Noonan*, 122 Conn. App. 184, 190–91, 998 A.2d 231, cert. denied, 298 Conn. 928, 5 A.3d 490 (2010).

The judgment is affirmed.

In this opinion the other judges concurred.

NERISSA HOSEIN *v.* SCOT EDMAN ET AL.
(AC 38472)

Sheldon, Keller and Prescott, Js.

Syllabus

The plaintiff sought to recover damages for personal injuries she sustained when her motor vehicle collided with a motor vehicle owned by the defendant Department of Transportation and operated by the defendant E, an employee of the department, in the course of his employment. In an amended complaint, the plaintiff alleged a claim against the department for vicarious liability, claiming that she was traveling southbound on a roadway in Meriden when the vehicle operated by E moved from a stopped position on the shoulder into the travel lane and suddenly, without warning, struck the plaintiff's vehicle from the right side. Despite the allegations in the amended complaint, the plaintiff testified at trial

---

outstanding balance is paid in full. . . . Consequently, an award of prejudgment and postjudgment interest on a loan that carries postmaturity interest is not discretionary; it is an integral part of enforcing the parties' bargain. . . . The trial court must, therefore, as part of any judgment enforcing a loan, allow prejudgment and postjudgment interest at the agreed rate, or the legal rate if no agreed rate is specified. The trial court is relieved of this obligation only if the parties disclaim any right to interest eo nomine after maturity." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 441–42.

that she never observed the department's vehicle move, while E testified that his vehicle was parked when it was struck from behind by the plaintiff's vehicle. Following a trial to the court, the trial court rendered judgment in favor of the department, and the plaintiff appealed to this court. She claimed that the trial court improperly discredited the testimony of her expert witness, C, an accident reconstructionist, and effectively precluded C's testimony without affording her an evidentiary hearing. *Held* that the plaintiff's claim that the trial court effectively precluded C's testimony was unavailing; although that court initially sustained several of the department's objections to C's testimony, it ultimately admitted his testimony in full and repeatedly stated to the parties that it was admitting all of C's testimony into evidence so that it could later decide what weight, if any, to afford C's testimony in deciding the issues before it, which was within the court's province to do as the trier of fact, and even though the trial court ultimately determined that C's testimony was based on conjecture and speculation and did not rely on it in deciding the issues presented, that statement was indicative of the court's weighing, considering, and ultimately rejecting the substance of C's testimony, not its preclusion of the testimony as evidence at trial.

Argued April 12—officially released July 25, 2017

Procedural History

Action to recover damages for the named defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Hon. Howard F. Zoarski*, judge trial referee; judgment for the defendant Department of Transportation; thereafter, the court, *Hon. Howard F. Zoarski*, judge trial referee, denied the plaintiff's motion for a new trial, motion to reargue, motion for articulation, and motion to set aside the verdict, and the plaintiff appealed to this court; subsequently, the court, *Hon. Howard F. Zoarski*, judge trial referee, issued a corrected memorandum of decision. *Affirmed*.

Daniel P. Scholfield, with whom, on the brief, was *Brendan J. Keefe*, for the appellant (plaintiff).

James E. Coyne, with whom, on the brief, were *Colleen D. Fries* and *Joseph M. Walsh*, for the appellee (defendant Department of Transportation).

Opinion

SHELDON, J. The plaintiff, Nerissa Hosein, commenced this action against the defendant Department of Transportation (department) to recover damages for injuries she allegedly suffered due to the department's vicarious negligence on December 14, 2011, in a motor vehicle collision between her personal automobile and a department owned vehicle. The plaintiff claimed that the collision and her resulting injuries were caused by the negligence of a department employee, Scot Edman, who was then operating the department's vehicle in the course of his employment duties.[1] After a bench trial, the court rendered judgment in favor of the department on the grounds that the plaintiff had failed to prove her claim of negligence by a preponderance of the evidence and, in fact, that the plaintiff's own negligence was the proximate cause of the collision and injuries, in that she had failed to keep a proper lookout and failed to keep her vehicle under proper control at or about the time of the collision.

The plaintiff's sole claim on appeal is that the trial court erred in completely discrediting the testimony of her expert witness, an accident reconstructionist, and thereby "effectively precluding" that witness' testimony, without affording her an evidentiary hearing pursuant to *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998). We conclude that the trial court did not preclude the testimony of the plaintiff's expert, but, rather, admitted that testimony in its entirety, before ultimately deciding not to afford it any weight. Accordingly, we affirm the judgment of the trial court.

[1] The plaintiff's initial complaint contained two counts, one against Edman directly for his negligence and another against the department claiming vicarious liability for Edman's negligence. Edman moved to strike the claim against him pursuant to General Statutes § 4-165. The plaintiff thereafter amended her complaint, deleting the count against Edman.

On December 14, 2011, at approximately 9:00 a.m., the plaintiff was traveling southbound on Frontage Road in Meriden, approaching the point where it turns into an on-ramp to Route 15, when she observed the department's vehicle, which was then being operated by Edman, parked on the grass on the right side of the roadway. As she was passing by the department's vehicle, she heard a loud noise, after which her vehicle flipped over onto its roof, and then began to slide forward and across the road. Although the plaintiff testified that her attention, as she was passing the department's vehicle, was focused forward instead of to her right, and thus she never saw the department's vehicle move, she alleged in her complaint that Edman "moved [the department's vehicle] from a stopped position on the shoulder [of the roadway and] into the [travel] lane, suddenly and without warning, and struck the [plaintiff's] motor vehicle . . . from the front right side . . . ."

The department denied the plaintiff's allegation that Edman had caused the collision between her vehicle and his department owned vehicle by suddenly moving into the travel lane of the roadway. Edman testified that, on the morning of the accident, he had been setting up construction signs along the roadway in preparation for landscaping work that was scheduled for that day. Edman testified that his vehicle was parked "two thirds in the grass" on the side of the road, that its flashing lights were activated, and that its wheels were "cocked" to the left pursuant to the department's policy, in order to prevent harm to workers who might be working on the side of the road, in the event that the vehicle was struck from behind. He placed a white sign along the side of the road that warned of construction ahead, then returned to his vehicle and fastened his seat belt. He recalled that he was just about to put his vehicle into drive when it was struck from behind. He had not

yet looked in his rearview mirror, so he did not see the plaintiff's vehicle approach or strike his vehicle. He testified that his vehicle was pushed twenty to thirty feet as a result of the impact from the collision. The right front of the plaintiff's vehicle impacted the left rear bumper of the department's vehicle.[2]

By way of special defense, the department alleged that the plaintiff's own negligence had proximately caused the collision between her vehicle and the department's vehicle. The department alleged, inter alia, that the plaintiff had been negligent in failing to keep a proper lookout, failing to keep her vehicle under reasonable and proper control and operating her vehicle at a rate of speed greater than what was reasonable in light of the width, traffic and use of the roadway. The plaintiff denied all of the allegations in the department's special defense.

On August 20, 2014, the plaintiff filed a disclosure of expert witness, pursuant to Practice Book § 13-4, in which she disclosed her intention to present at trial the testimony of Alfred Cipriani, an accident reconstructionist, who would opine that "the collision was caused by . . . Edman moving the [department's vehicle] from the shoulder of the road into the southbound travel lane and into the path of [the plaintiff's vehicle]." The department moved to preclude the testimony of Cipriani on the sole ground that the plaintiff's disclosure of him was untimely, and thus that it would not have an adequate opportunity to depose him before trial or to make a later determination as to whether to retain a defense expert. When, however, the trial was rescheduled for a later date, the parties were afforded adequate

[2] The court also noted: "The defense also presented an independent third-party witness, Kevin Gause, who had just passed the signs and . . . the [department's] vehicle was stopped and the sign was there in the placed position prior to the collision."

time to complete discovery and depose Cipriani. Therefore, the department did not pursue its motion to preclude or seek to preclude Cipriani's testimony on any other basis prior to trial.

The case was tried to the court on June 18 and 19, 2015. At trial, the plaintiff called, inter alios, Cipriani to testify on her behalf. During the direct examination of Cipriani, the department repeatedly objected to his testimony on the ground that it was speculative. Initially, the court sustained many of those objections. Later, however, upon reminding the parties of its ultimate role in the case as the fact finder, it advised the parties that it was going to permit Cipriani to testify fully as to his expert opinions, despite the department's objections, so it could hear everything the witness had to say before deciding what weight, if any, his testimony truly deserved. On that subject, the court explained its approach as follows: "[T]his is a court trial, and I think there are a lot of objections that have been made back and forth. And I think, ultimately, the issue regarding the weight to be given to any conclusion or opinions through this expert witness would be part of the decision the court has to make. So . . . at this time, I'm aware of the [department's] position about objecting to all of the testimony. But I'm going to permit it all to come in, and let me hear what it is, and that will be an ultimate decision for me to make in this matter."

When the plaintiff continued with her direct examination of Cipriani, the department again objected to the admission of his testimony on the ground that it was speculative. In response to that objection, the court reiterated: "As I indicated, I'm going to overrule the objection at this point, based on the statement I made at the beginning of this proceeding . . . . [Y]ou'll have the right to cross-examine the witness, and then ultimately it'll be the court's decision regarding the weight

to be given to the total testimony." The plaintiff then resumed her direct examination of Cipriani.

Despite the court's clear rulings rejecting the department's objections, the department again objected to Cipriani's testimony on the ground that it was "clearly speculative." In response, the court once again reiterated: "Well, again, for the reasons I've stated earlier, I'm going to overrule your [objection]. And, at this point, I'm going to continue to hear this witness' testimony." The court further stated: "I'm going to permit cross-examination by defense counsel at the appropriate time. But I want to hear your evidence on direct."

After Cipriani stated certain of his opinions, the department moved, repeatedly, that those opinions be stricken from the record on the ground that they were speculative. Each time, the court denied the department's motion, stating that it would hear all the challenged testimony, then determine, as the ultimate fact finder, what weight to give to that testimony. The court told the department, "I fully want to hear what it is [Cipriani] has to say and what his opinion is. . . . [I]t's for the court to determine the weight to be given to the opinion." The court thus admitted Cipriani's direct examination testimony in its entirety, after which the department was permitted to cross-examine him.

On July 9, 2015, after both parties filed posttrial briefs, the court filed a memorandum of decision rendering judgment in favor of the department. The court therein found, inter alia, that Cipriani's opinion "was based upon speculation and conjecture [and] was not necessary to assist [it] in deciding the issues." The court concluded its analysis of liability as follows: "This court finds that, based on the evidence, the plaintiff failed to prove her claims of [the department's] negligence by a fair preponderance of the evidence. The court also finds the plaintiff's negligence was the proximate cause of

this collision. The plaintiff failed to keep a proper lookout and failed to keep her vehicle under proper control."

The plaintiff thereafter filed motions for a new trial, to reargue and to set aside the verdict. The plaintiff also filed a motion for articulation and rectification. Each of those motions, to which the department objected, challenged the court's finding that Cipriani's opinion was based upon speculation and conjecture. The court held a hearing on September 21, 2015, during which it explained, inter alia: "I didn't feel I need[ed] that expert opinion's assistance to help me decide the merits or the—what decision should be made in this case. It was based upon the evidence that was presented [at] trial. And [I], then, drew reasonable legal conclusions, which is my job to do. So, the mere fact that I did not give any weight to the expert['s] [testimony] is not a basis for me to set aside this verdict." The court indicated that it "took all of the evidence [into consideration in order] to come to [its] findings of fact and [its] ultimate conclusion . . . ." The court denied the plaintiff's motions[3] and this appeal followed.

The plaintiff claims that the court erred by not relying at all upon Cipriani's testimony, by which, she claims, it effectively precluded such testimony without holding a *Porter* hearing. We disagree.

"It is well settled that [t]he trial court has wide discretion in ruling on the admissibility of expert testimony and, unless that discretion has been abused or the ruling involves a clear misconception of the law, the trial court's decision will not be disturbed." (Internal quotation marks omitted.) *Hicks* v. *State*, 287 Conn. 421, 444,

[3] The trial court denied the plaintiff's motion for articulation, from which the plaintiff sought review from this court. This court dismissed the plaintiff's motion for review, but sua sponte, ordered the trial court to rectify its July 9, 2015 memorandum of decision to indicate that the "plaintiff presented a purported accident reconstructionist . . . ."

948 A.2d 982 (2008). Similarly, "we give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses . . . ." (Internal quotation marks omitted.) *Wyszomierski* v. *Siracusa*, 290 Conn. 225, 237–38, 963 A.2d 943 (2009).

Here, the plaintiff's claim that the court precluded Cipriani's testimony is belied by the record. Although the court initially sustained several of the department's oral objections to Cipriani's testimony on the ground that it was speculative, it ultimately admitted his testimony in full. Thereafter, Cipriani testified extensively, over repeated defense objections. In overruling those objections, the court repeatedly stated that it was admitting all of Cipriani's testimony into evidence so that it could later decide what weight, if any, to give that testimony in deciding the issues before it. Having done so, the court was free to evaluate Cipriani's opinion testimony, and reject it in whole or in part, because "[t]he acceptance or rejection of the opinions of expert witnesses is a matter peculiarly within the province of the trier of fact and its determinations will be accorded great deference by this court. . . . In its consideration of the testimony of an expert witness, the [finder of fact] might weigh, as it sees fit, the expert's expertise, his opportunity to observe the defendant and to form an opinion, and his thoroughness. It might consider also the reasonableness of his judgments about the underlying facts and of the conclusions which he drew from them. . . . It is well settled that the trier of fact can disbelieve any or all of the evidence proffered . . . ." (Internal quotation marks omitted.) *State* v. *Washington*, 155 Conn. App. 582, 593–94, 110 A.3d 493 (2015). Although the court ultimately determined that Cipriani's testimony was based on conjecture and speculation, and that it was not necessary for the court to

rely on it in deciding the issues presented, that statement is indicative of the court's weighing, consideration, and ultimate rejection, of the substance of Cipriani's testimony, not its preclusion as evidence at trial.

Because the record does not support the plaintiff's contention that the court precluded her expert's testimony, but, rather, reveals that it admitted that testimony and then properly acted within its role as the finder of fact in weighing and rejecting that testimony, her claim on appeal must fail.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ZACHERY FRANKLIN (AC 39180)

DiPentima, C. J., and Keller and Beach, Js.

Syllabus

Convicted of multiple crimes as a result of the shooting death of the victim in the city of Waterbury, the defendant appealed, claiming, inter alia, that the evidence was insufficient to sustain his conviction of murder and criminal possession of a firearm, and that the trial court abused its discretion by admitting certain uncharged misconduct evidence. The defendant and another individual had exited a black Acura automobile, approached a motorcycle that was parked in a driveway, and, from a distance of about eight and one-half feet, shot its operator to death. The shooting continued as the motorcycle crashed into a stop sign. The next day, the defendant and another individual, S, who had been with the defendant in Waterbury the previous day, were seen in New Haven shooting handguns before driving off in a black Acura. Bullet evidence recovered there by the police matched bullet evidence that they recovered at the murder scene. S was later arrested and implicated the defendant in the murder. The police also developed evidence that during the events leading up to the murder, the defendant had a cell phone that was owned by S's sister, I. While the defendant was incarcerated and awaiting trial, he told another individual, H, who was incarcerated in the same correctional center and who testified at the defendant's trial,

that he had killed the victim for the purpose of stealing the victim's motorcycle and a neck chain that the victim wore. *Held*:

1. Contrary to the defendant's claim, the evidence was sufficient to support his conviction of murder: the evidence supported the jury's finding that the defendant was one of the individuals who exited the Acura and shot at the victim, as H testified that the defendant told him while they were incarcerated together that he exited the Acura and shot the victim in an attempt to rob him, and that the defendant stated that he was linked to the shooting as a result of both S's having spoken to the police, and the recovery by the police of video footage and firearms evidence, and the jury in turn credited H's testimony regarding the defendant's confession; furthermore, the jury's finding that the defendant possessed the intent to kill the victim was supported by evidence that the defendant wanted to rob the victim of the motorcycle and the chain that the victim wore, that the defendant fired several gunshots at the motorcycle from a distance of eight and one-half feet, and that he fled from the shooting scene without providing medical assistance to the victim and was in possession of false identification when he was detained by the police.
2. There was sufficient evidence to support the defendant's conviction of criminal possession of a firearm, the parties having stipulated at trial that the defendant had been convicted of a felony prior to the shooting of the victim, and the evidence having been sufficient for the jury to find that the defendant was one of the individuals who had exited the Acura and shot at the victim while he was on the motorcycle.
3. The trial court did not abuse its discretion when it admitted uncharged misconduct evidence, offered by the state to demonstrate that the defendant possessed a firearm that was used in the victim's shooting in Waterbury, that included a photograph of a crime scene in New Haven that depicted police tape and testimony that the defendant, on the day after the shooting in Waterbury, possessed and fired a weapon in the back of a building in New Haven: in light of the details of the crimes at issue in this case, evidence that the defendant possessed and discharged a firearm in the back of a building would not unduly arouse the emotions, hostility or sympathy of the jury, as the court heard oral argument from the parties, considered their motions and briefs, and prevented the jury from hearing the most inflammatory details of the uncharged misconduct evidence; furthermore, the probative value of the misconduct evidence outweighed its prejudicial effect because it helped identify the defendant as a shooter in Waterbury, the court instructed the jurors to refrain from considering the police tape in the photograph taken in New Haven, and there was ample testimony that the police investigated that location after a report that gunshots had been fired there.
4. The defendant could not prevail on his claim that his right to a fair trial was violated when the prosecutor made certain allegedly improper remarks during closing argument to the jury: although the prosecutor's

incorrect statement that a witness testified that two men approached the motorcycle after it crashed into a stop sign may have been improper, it did not appear to have been intentional, the defendant did not object to the comment when it was made, the comment was only a small part of the prosecutor's summation and was not related to a critical issue in the case, and the state's case against the defendant was strong; furthermore, the prosecutor's comments that the defendant possessed and used a certain phone belonging to I during the events leading up to the murder, and that H's testimony included an admission by the defendant that he shot the victim and took the victim's neck chain were based on evidence, and although the prosecutor's characterization of the neck chain was not part of the evidence, it did not violate the defendant's right to due process.

Argued February 6—officially released July 25, 2017

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder, attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Cremins*, *J.*; thereafter, the court sustained in part the defendant's objection to the admission of certain evidence; verdict of guilty; subsequently, the court denied the defendant's motion for a judgment of acquittal and for a new trial, and rendered judgment in accordance with the verdict; thereafter, the court vacated the conviction of felony murder, and the defendant appealed. *Affirmed.*

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

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *David A. Gulick*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Zachery Franklin, appeals from the judgment of conviction, following a

jury trial, of murder, in violation of General Statutes § 53a-54a, attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (2), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-8 (a) and 53a-134 (a) (2), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1).[1] On appeal, the defendant claims that (1) the evidence was insufficient to sustain his conviction of murder and criminal possession of a firearm, (2) the court abused its discretion by admitting certain uncharged misconduct evidence and (3) his right to a fair trial was violated as a result of prosecutorial impropriety. We disagree, and, accordingly, affirm the judgment of conviction.

The jury reasonably could have found the following facts. During the evening of July 7, 2011, James Beaulieu rode on a two seat, three-wheeled motorcycle known as a T-Rex[2] driven by the victim, Luis Cruz. The two returned to Boyden Street in Waterbury, where Beaulieu had parked his motorcycle. At approximately 1:30 a.m. on July 8, 2011, Adam Maringola, who was working in a nearby building, heard a loud noise and watched as the victim pulled into a driveway and stopped briefly.

[1] The jury also found the defendant guilty of felony murder in violation of General Statutes § 53a-54c. The trial court initially rendered judgment of conviction in accordance with the jury's verdict as to the felony murder count. After sentencing, the court vacated the conviction of felony murder, citing to our decision in *State* v. *Miranda*, 145 Conn. App. 494, 508, 75 A.3d 742 (2013), aff'd, 317 Conn. 741, 120 A.3d 490 (2015), in which this court stated: "Our Supreme Court, however, has specifically concluded that the legislature intended that intentional murder and felony murder are alternative means of committing the same offense and should be treated as a single crime for double jeopardy purposes. . . . Because . . . felony murder and intentional murder are the same offense for double jeopardy purposes . . . the vacatur remedy adopted in [*State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013)] must apply." (Citations omitted; internal quotation marks omitted.)

[2] Adam Maringola, a witness to the incident, described the T-Rex as a "custom vehicle" with two wheels in the front and one wheel in the back, and having two car seats.

Maringola observed a black Acura near the T-Rex. He then saw two people exit the Acura and walk toward the T-Rex. The victim became alarmed and backed out of the driveway. The two individuals from the Acura began shooting at the T-Rex from a distance of approximately eight and one-half feet. The shooting continued as the T-Rex crashed into a stop sign. Beaulieu pushed himself out of the T-Rex and ran up a hill. Maringola watched the two men from the Acura shoot at Beaulieu as he fled.

One of the men from the Acura approached the T-Rex and ordered the victim to exit. The victim replied that he was unable to do so and then was shot multiple times. This shooter continued to pull the trigger of the firearm even though he had discharged all of its ammunition. After the cessation of gunshots, another witness, Sade Canada, heard someone say, "just leave him, let's go," and the shooters returned to the Acura and drove off. Later that evening, the defendant was overheard telling his girlfriend, Isis Hargrove, that "we just did some hot shit," and appeared nervous.

After a brief period of time, Beaulieu returned to the T-Rex and saw that the victim had remained in it and was not moving. Waterbury police officers arrived and secured the area. At 1:37 a.m., paramedic Joshua Stokes was dispatched to the scene. He observed that the victim had lost a "copious" amount of blood, suffered multiple gunshot wounds and had no pulse or lung sounds. After consulting with a physician from Waterbury Hospital via telephone, the victim was pronounced dead at the scene.[3]

The next day, July 9, 2011, Antonio Lofton, a resident of New Haven, was in his backyard. Lofton observed

[3] Susan Williams, a pathologist with the state's chief medical examiner's office, who conducted the autopsy of the victim, concluded that the victim died as a result of suffering multiple gunshot wounds.

the defendant and Earl Simpson shoot handguns five or six times before driving off in a black Acura.[4] The noise from the firearms resulted in a report to the police, and Myra Nieves, a New Haven police detective, commenced an investigation. She recovered six bullet casings and one projectile from that area. These items were sent to the state forensics laboratory for testing.

At the location of the Waterbury shooting, Brian Juengst, a crime scene technician, participated in the recovery of thirteen shell casings and three intact projectiles.[5] Orlando Rivera, a detective with the Waterbury Police Department, investigated the homicide and learned that a dark-colored vehicle, later determined to be a black Acura, had been used by the shooters. Rivera obtained video from businesses located near the shooting. These videos showed the black Acura following the T-Rex until it pulled into the driveway on Boyden Street. Rivera also learned that the casings and projectiles found at the Waterbury crime scene were

[4] We note that the defendant was convicted of murder, felony murder, robbery or attempt to commit robbery in the first degree, carrying a pistol without a permit and criminal possession of a pistol or revolver as a result of this incident. See *State* v. *Franklin*, 162 Conn. App. 78, 81–82, 129 A.3d 770 (2015), cert. denied, 321 Conn. 905, 138 A.3d 281 (2016). The jury in the present case was unaware of these charges and the defendant's conviction.

[5] Juengst also explained the difference between a casing and a projectile: "Well, if you were to take a complete bullet, it consists of a projectile, which is what we normally associate with a bullet. It's usually a metal slug. Oftentimes, it may contain a jacket which is copper that covers or partially covers that slug, and the casing is what contains the gunpowder, the primer, and is capped off by the bullet." Juengst further indicated the method by which shell casings are left behind at the scene of a shooting. "[A] semiautomatic handgun will eject a casing after the gun has been fired and the bullet [has] left the casing through the chamber of the gun and eject the casing out of the gun. Whereas, with a revolver, if you were to fire a revolver, it would leave the casing insider the chamber of the revolver. It could be, of course, manually removed by the shooter and left behind at the scene. But those are the only two ways that a casing or a spent casing can be left behind at the scene of a shooting."

connected to a criminal investigation in New Haven.[6] Rivera communicated with investigators in New Haven and obtained the names of the defendant, Isis Hargrove, Simpson and Shaquan Armour. Hargrove, who was the girlfriend of the defendant and the sister of Simpson, owned the black Acura. Using this information, Rivera obtained a search warrant for the cell phone records of Simpson and Hargrove. These records established that Hargrove was in the area of the Waterbury shooting at the time of that incident. After successfully applying for a warrant on August 26, 2011, Rivera seized the Acura. Discolorations on this vehicle matched those that were visible on the videos from the night of the shooting.

On July 29, 2011, Rivera learned that Simpson had been arrested in North Carolina. Approximately six weeks later, Rivera interviewed Simpson, who provided a written statement regarding the events of July 8, 2011. Simpson admitted that he and the defendant were in the area of Boyden Street in Waterbury at the time of the shooting. As a result of the investigation, Rivera obtained an arrest warrant for the defendant, and he was taken into custody on November 16, 2011.[7]

During the defendant's pretrial incarceration, he spoke with Joshua Habib, who also was held at the New Haven Correctional Center. Habib offered to transport a letter from the defendant to Hargrove, who at that time was incarcerated with Habib's girlfriend in another correctional facility. During their conversation, the two men discussed the shooting in Waterbury. The defendant told Habib that the victim had been killed for

[6] James Stephenson, a state firearms and tool mark examiner, testified that two guns had fired all of the bullets at the Waterbury and New Haven locations.

[7] At the time he was arrested and taken into custody, the defendant possessed an identification card that listed a false name. When presented with documents containing his true name and photograph, the defendant "sighed heavily . . . dropped his head and nodded."

the purpose of stealing the T-Rex and a chain. The defendant provided specifics regarding the Waterbury shooting, telling Habib that "he got out of the car and shot [the victim], and they were attempting or he—intentions was to rob [the victim] for the [T-Rex] . . . ." The defendant also told Habib that the case against him was based on circumstantial evidence.

The jury found the defendant guilty on all charges. The court sentenced the defendant to seventy-five years incarceration, thirty-two of which were mandatory. On August 27, 2014, the court vacated the conviction of felony murder, but did not alter the length of the defendant's sentence.[8] This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the evidence was insufficient to sustain his conviction of murder and criminal possession of a firearm.[9] Specifically, he argues that the state failed to present sufficient evidence that he had fired the gun during the Waterbury shooting, and therefore, his conviction of murder and criminal possession of a firearm cannot stand. We are not persuaded.

As a preliminary matter, we note that the defendant preserved this claim by moving for a judgment of acquittal at the conclusion of the state's evidence, pursuant to Practice Book §§ 42-40 and 42-41.[10] See *State* v. *Taft*,

[8] See footnote 1 of this opinion.

[9] We begin with this claim because if the defendant prevails on the sufficiency claim, he is entitled to a directed judgment of acquittal on these charges, rather than to a new trial. See *State* v. *Moore*, 100 Conn. App. 122, 126 n.2, 917 A.2d 564 (2007); see also *State* v. *Badaracco*, 156 Conn. App. 650, 656 n.11, 114 A.3d 507 (2015).

[10] "Even if this claim had not been preserved, we would review it on appeal. Our Supreme Court has observed 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 [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989)]. . . . Accordingly, because there is no practical significance . . . for engaging in a *Golding*

306 Conn. 749, 753 n.6, 51 A.3d 988 (2012); *State* v. *Brown*, 118 Conn. App. 418, 422, 984 A.2d 86 (2009), cert. denied, 295 Conn. 901, 988 A.2d 877 (2010). Specifically, defense counsel argued that there was no evidence that he possessed a firearm on July 8, 2011. With respect to the murder charge, defense counsel contended that there was no evidence that the defendant had been one of the two shooters who had exited the black Acura. Additionally, defense counsel noted that two of the eyewitnesses had testified that the shooters had dark skin, but that the defendant had light skin. The court denied the defendant's motion. The defendant also filed a postverdict motion for a judgment of acquittal[11] that the court denied prior to sentencing.

Next, we set forth our standard of review and the legal principles relevant to a claim of evidentiary insufficiency. We recently iterated that "a defendant who asserts an insufficiency of the evidence claims bears an arduous burden." (Internal quotation marks omitted.) *State* v. *Leniart*, 166 Conn. App. 142, 169, 140 A.3d 1026, cert. granted on other grounds, 323 Conn. 918, 149 A.3d 499, 150 A.3d 1149 (2016). "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

analysis, we review an unpreserved sufficiency of the evidence claim as though it had been preserved. . . . *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)." (Internal quotation marks omitted.) *State* v. *Terry*, 161 Conn. App. 797, 804 n.4, 128 A.3d 958 (2015), cert. denied, 320 Conn. 916, 131 A.3d 751 (2016).

[11] See Practice Book § 42-51.

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Badaracco*, 156 Conn. App. 650, 657–58, 114 A.3d 507

(2015); see also *State* v. *Bush*, 325 Conn. 272, 285–86, 157 A.3d 586 (2017). Guided by these principles, we consider the defendant's appellate arguments in turn.

A

The defendant first argues that the evidence was insufficient to support his conviction of murder[12] because the "state presented no direct evidence that identified the defendant as one firing shots or one that solicited, requested, commanded, importuned or intentionally aided anyone in the shooting of the victim. The circumstantial evidence presented in this case was not sufficient to have found the defendant guilty of murder." Specifically, he contends that the state failed to prove that he was one of the individuals who fired a gun at the victim or that he had intended to kill the victim. We are not persuaded.

The operative information did not charge the defendant with murder as an accessory. It is not disputed, however, that he was tried as a principal or an accessory on the murder charge.[13] Thus, to convict the defendant,

[12] General Statutes § 53a-54a provides: "(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

[13] Our Supreme Court has stated that "consistent with well established underlying principles of accessorial liability, the state must prove that [a] defendant acted as an accessory by soliciting, requesting, commanding, importuning or intentionally aiding . . . in causing [a] victim's death. . . . This is because accessorial liability is designed to punish one who intentionally aids another in the commission of a crime and not one whose innocent acts in fact aid one who commits an offense. . . . Mere presence as an inactive companion, passive acquiescence, or the doing of innocent acts which may in fact aid the one who commits the crime must be distinguished

the state was required to prove that he was one of the two men, who, after exiting the Acura, shot at the victim in the T-Rex. See, e.g., *State* v. *Jackson*, 257 Conn. 198, 206, 777 A.2d 591 (2001) (question of identity of perpetrator of crime is question of fact for jury to resolve); *State* v. *Rodriguez*, 133 Conn. App. 721, 728, 36 A.3d 724 (2012) (same), aff'd, 311 Conn. 80, 83 A.3d 595 (2014). The state was not required, however, to prove that the defendant fired the fatal gunshot. *State* v. *Allen*, 289 Conn. 550, 559–60, 958 A.2d 1214 (2008); *State* v. *Hamlett*, 105 Conn. App. 862, 866–67, 939 A.2d 1256, cert. denied, 287 Conn. 901, 947 A.2d 343 (2008).

1

The defendant contends that there was no evidence that he exited the Acura and fired a gun at the victim. This claim, however, ignores the testimony of Habib, the individual who spoke with the defendant about the shooting while incarcerated at the New Haven Correctional Center. Habib initially testified that the defendant had told him that "*they* killed [the victim] for the—his chain, and *they* basically were going to rob [the victim] of the three-wheeler that he was riding and—which *they* ended up not taking. *They* just took his chain." (Emphasis added.) Habib then clarified his testimony

from the criminal intent and community of unlawful purpose shared by one who knowingly and wilfully assists the perpetrator of the offense in the acts which prepare for, facilitate or consummate it." (Citations omitted; internal quotation marks omitted.) *State* v. *Gonzalez*, 311 Conn. 408, 421, 87 A.3d 1101 (2014); see also General Statutes § 53a-8 (a).

We also note that the state did not charge the defendant with conspiracy to commit murder, and therefore did not attempt to convict the defendant under the *Pinkerton* doctrine. See *Pinkerton* v. *United States*, 328 U.S. 640, 647–48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). "[U]nder the *Pinkerton* doctrine, a conspirator may be found guilty of a crime that he or she did not commit if the state can establish that a coconspirator did commit the crime and that the crime was within the scope of the conspiracy, in furtherance of the conspiracy, and a reasonably foreseeable consequence of the conspiracy." (Internal quotation marks omitted.) *State* v. *VanDeusen*, 160 Conn. App. 815, 845, 126 A.3d 604, cert. denied, 320 Conn. 903, 127 A.3d 187 (2015).

as follows: "[The defendant] said that *he* got out of the car and shot [the victim] and they were attempting or *he*—intentions was to rob him for the three-wheeler they were riding or *he*—the . . . [*h*]*is* intentions were to rob the—the victim of the three-wheeler he was riding and whatever he may have had on him . . . ." (Emphasis added.)

Our Supreme Court has noted that "[w]here the authenticity and reliability of a confession are established, it is certainly true that we have before us the highest sort of evidence." (Internal quotation marks omitted.) *State* v. *Ruth*, 181 Conn. 187, 197, 435 A.2d 3 (1980). In *Ruth*, the court concluded that the defendant's confession, coupled with "more than ample evidence of the corpus delicti" and accomplice testimony constituted overwhelming evidence of guilt. Id., 199. In the present case, the state presented Habib's testimony in which the defendant admitted that he exited the Acura and then shot the victim. Contrary to the defendant's appellate argument, the state produced evidence that the defendant possessed the gun and shot the victim in Waterbury in the early hours of July 8, 2011.

Habib also testified that he never had lived in New Haven, and that he met the defendant for the first time while incarcerated at the New Haven Correctional Center in March, 2012. Specifically, Habib indicated that he "didn't know nothing" about the defendant at that time. The defendant told Habib that the case against him was based entirely on circumstantial evidence and that the only thing that linked him to death of the victim was that Simpson had spoken to the police following his arrest "down South." The defendant also stated to Habib that the video footage recovered by the police did not show the defendant's face or the license plates on Hargrove's Acura, but did include the bullet holes present on the vehicle. Finally, the defendant revealed

to Habib that some firearms evidence had been recovered from his home that linked him to the shooting of the victim. These additional details bolstered Habib's credibility, despite his status as a jailhouse informant.[14] The jury, in turn, credited Habib's testimony regarding the defendant's confession, which served as the link between the death of the victim and the defendant.[15] See *State* v. *Farnum*, 275 Conn. 26, 33, 878 A.2d 1095 (2005).

Construing the evidence in the light most favorable to sustaining the verdict, we conclude that the evidence in the present case was sufficient to support the jury's finding that the defendant was one of the individuals who exited the Acura and shot at the victim. Accordingly, we conclude that the defendant's claim to the contrary must fail.

[14] Habib met the definition of a jailhouse informant because he was incarcerated at the time of his testimony at the defendant's trial and his testimony was about a crime that he had not witnessed personally, but a confession or inculpatory statements made by the defendant during their incarceration. See *State* v. *Diaz*, 302 Conn. 93, 102–104, 25 A.3d 594 (2011); see also *State* v. *Arroyo*, 292 Conn. 558, 564–70, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010); *State* v. *Patterson*, 276 Conn. 452, 465, 886 A.2d 777 (2005); cf. *State* v. *Carattini*, 142 Conn. App. 516, 523–24, 73 A.3d 733 (witness was not jailhouse informant because he was not incarcerated at time of testimony and did not testify about confession or inculpatory statements made at time when both were incarcerated together), cert. denied, 309 Conn. 912, 69 A.3d 308 (2013).

Our Supreme Court has noted that "[t]estimony by a jailhouse informant about a jailhouse confession is inherently suspect because of the ease with which such testimony can be fabricated, the difficulty in subjecting witnesses who give such testimony to meaningful cross-examination and the great weight that juries tend to give to confession evidence. . . . In contrast, when a witness testifies about events surrounding the crime that the witness observed, the testimony can be compared with the testimony of other witnesses about those events, and the ability of the witness to observe and remember the events can be tested." (Citations omitted; internal quotation marks omitted.) *State* v. *Diaz*, 302 Conn. 93, 109–10, 25 A.3d 594 (2011). Nevertheless, the jury, properly instructed on informant testimony, remained free to accept and credit Habib's testimony, despite his status as a jailhouse informant.

[15] During its deliberations, the jury requested to rehear Habib's testimony.

The defendant next contends that the state failed to prove that he had intended to kill the victim. This contention is based, in large part, on the defendant's argument that there was insufficient evidence to prove that he was one of the men who exited the Acura and shot at the victim. Having rejected that underlying premise in part I A 1 of this opinion, we similarly are not persuaded by the defendant's contention that the state failed to produce sufficient evidence regarding the element of intent.

In order to convict the defendant of murder, the state was required to prove, beyond a reasonable doubt, that he had the intent to cause the death of another person. *State* v. *White*, 127 Conn. App. 846, 851–52, 17 A.3d 72, cert. denied, 302 Conn. 911, 27 A.3d 371 (2011). "Under . . . § 53a-54a (a), the state must prove that the defendant acted with the specific intent to cause the death of the victim. . . . Intent is a mental process which ordinarily can be proven only by circumstantial evidence. An intent to cause death may be inferred from circumstantial evidence such as the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the death. . . . The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . .

"Whether a criminal defendant possessed the specific intent to kill is a question for the trier of fact. . . . This court will not disturb the trier's determination if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . [I]n viewing evidence which could yield contrary inferences, the [fact finder] is not barred from

drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence. The rule is that the [fact finder's] function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Citation omitted; internal quotation marks omitted.) *State* v. *Ames*, 171 Conn. App. 486, 507, 157 A.3d 660 (2017); see also *State* v. *Medina*, 228 Conn. 281, 303, 636 A.2d 351 (1994) (defendant acts intentionally in causing death of another when he has conscious objective to cause another's death); *State* v. *Leniart*, supra, 166 Conn. App. 175–76 (same).

Our Supreme Court has recognized that "[i]ntent to cause death may be inferred from the type of weapon used, the manner which it was used, the type of wound inflicted and the events leading to and immediately following the death. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Internal quotation marks omitted.) *State* v. *Otto*, 305 Conn. 51, 66–67, 43 A.3d 629 (2012).

In the present case, there was evidence that the defendant wanted to rob the victim of the T-Rex vehicle and of a chain worn around his neck. After following the victim for a period of time, the defendant exited the Acura armed with a firearm. From a distance of approximately eight and one-half feet, the defendant aimed the firearm at the T-Rex and fired several rounds. He then fled without providing any medical assistance, and, when detained by law enforcement, possessed false identification. On the basis of these facts, we conclude that there was evidence for the jury to conclude that the defendant possessed the intent necessary to support his conviction of murder. See, e.g., *State* v. *Gary*, 273 Conn. 393, 408–409, 869 A.2d 1236 (2005); see also *State* v. *Floyd*, 253 Conn. 700, 720, 756 A.2d 799 (2000) (jury

could infer intent to cause victim's death where defendant fired multiple gunshots at victim as he lay on ground); *State* v. *Sanchez*, 166 Conn. App. 665, 679–80, 146 A.3d 344 (defendant's firing of series of gunshots at crowd and immediately leaving scene of shooting constituted evidence of specific intent to kill or injure another person), cert. denied, 323 Conn. 917, 149 A.3d 498 (2016); *State* v. *Leniart*, supra, 166 Conn. App. 177 (defendant's failure to obtain, or attempt to obtain, medical assistance for victim constituted evidence of intent to kill); *State* v. *Grant*, 149 Conn. App. 41, 50, 87 A.3d 1150 (consciousness of guilt evidence may be used to draw inference of intent to kill), cert. denied, 312 Conn. 907, 93 A.3d 158 (2014); *State* v. *Wright*, 77 Conn. App. 80, 93, 822 A.2d 940 (fleeing scene of shooting while in possession of gun indicative of intent to commit murder), cert. denied, 266 Conn. 913, 833 A.2d 466 (2003). We conclude, therefore, that sufficient evidence existed to support the jury's finding that the defendant possessed the intent necessary to find him guilty of murder.

B

The defendant also argues that the evidence was insufficient to support his conviction of criminal possession of a firearm. We note that this claim is based on the contention that the defendant was not one of the individuals who exited the Acura and shot at the victim on the T-Rex. In part I A of our opinion, we rejected that argument. We further conclude that the evidence was sufficient to support the defendant's conviction of criminal possession of a firearm in violation of § 53a-217.

Section 53a-217 (a) provides in relevant part that "[a] person is guilty of criminal possession of a firearm . . . when such person possesses a firearm, ammunition or an electronic defense weapon and (1) has been convicted of a felony committed prior to, on or after October 1, 2013 . . . ." See also *State* v. *Beavers*, 99 Conn.

App. 183, 189, 912 A.2d 1105, cert. denied, 281 Conn. 925, 918 A.2d 276 (2007). The term "firearm" is statutorily defined in General Statutes § 53a-3 (19) as "any sawed-off shotgun, machine gun, rifle, shotgun, pistol, revolver or other weapon, whether loaded or unloaded from which a shot may be discharged . . . ." (Emphasis in original; internal quotation marks omitted.) *State* v. *Beavers*, supra, 189.

In the present case, the parties stipulated that the defendant had been convicted of a felony prior to July 8, 2011. Additionally, we have concluded that there was sufficient evidence for the jury to find that he was one of the two individuals who exited the Acura and shot at the victim while he was on the T-Rex. Accordingly, we conclude that there was sufficient evidence to support the defendant's conviction of criminal possession of a firearm.

II

The defendant next claims that the court abused its discretion in admitting uncharged misconduct evidence. Specifically, he argues that the prejudicial impact of certain evidence from the New Haven crime scene outweighed its probative value. We are not persuaded.

The following additional facts are necessary for our discussion. On December 20, 2013, the state filed notice of its intent to offer into evidence uncharged acts of misconduct by the defendant.[16] Specifically, it sought

[16] The state set forth four acts of uncharged misconduct that it might seek to have admitted into evidence. The first act was that in June, 2011, the defendant possessed a firearm and threatened another person. The second act was that the day after the Waterbury shooting, the defendant shot and killed another victim in New Haven and that Simpson and the defendant were present at both crime scenes. The third act was that after the Waterbury and New Haven shootings, the defendant fled Connecticut and was subject to a traffic stop by a New Jersey state police officer. During this stop, the defendant provided the officer with a false name, and there were guns in the trunk of the automobile. The fourth act was that he possessed an

to present evidence that approximately sixteen and one-half hours after the Waterbury shooting, the defendant shot and killed another person during a robbery in New Haven. Further, the state sought to introduce evidence that the firearm was used in both the Waterbury and New Haven killings, and that Simpson was with the defendant during both crimes. The defendant objected to the uncharged misconduct evidence. During jury selection, the court directed counsel to review *State* v. *Collins*, 299 Conn. 567, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011), which was applicable, in the court's view, to the uncharged misconduct issue in the present case. At this point, the state noted that it intended to "sanitize" the evidence from the New Haven shooting to show only that the defendant had possessed a firearm used in the Waterbury shooting the previous day.

On May 13, 2014, the court ruled that the state would be permitted to present evidence that the defendant had possessed and fired a weapon in New Haven the day after the Waterbury shooting. On May 19, 2014, the state called Antonio Lofton as a witness. Prior to his testimony and outside of the presence of the jury, the court provided a cautionary warning where it instructed Lofton to refrain from mentioning the New Haven homicide and to limit his testimony to the fact that he had

identification card containing his picture and a different name at the time of his arrest.

For the limited purpose of demonstrating the defendant's consciousness of guilt, the court permitted the state to present evidence that the defendant had fled from Connecticut and had provided law enforcement in New Jersey with a false name. The defendant has not challenged that ruling in this appeal. The court also determined that the state could present evidence regarding the defendant's discharge of a firearm on the day following the Waterbury shooting, but not that he shot at a person. The court granted the motion in limine with respect to the first act of uncharged misconduct. Thus, we will not discuss in further detail the first, third and fourth alleged acts set forth in the state's pleading regarding uncharged misconduct.

observed the defendant possess and discharge a firearm on July 9, 2011.

Defense counsel also noted his objection to a photograph of the New Haven crime scene that included police tape. After a brief discussion, some of which was held off the record at sidebar, the court indicated that it would allow the photograph to be admitted into evidence. Defense counsel argued that the prejudicial impact of the police tape in the photograph outweighed its probative value. As Lofton took the witness stand, the court specifically instructed him to refrain from mentioning the homicide that had occurred in New Haven.[17]

Lofton testified that he lived in New Haven on July 9, 2011, and that his sister was pregnant with the defendant's child. In the early evening, Lofton was sitting in his backyard when he heard multiple gunshots coming from behind a nearby brick building. Lofton stated that he had observed the defendant and Simpson shoot handguns five or six times before driving off in a black Acura. The prosecutor presented a photograph, which was admitted into evidence over the defendant's objection. The court instructed the jury that it was not to consider the police tape depicted in the photograph.

During the trial, the state also presented evidence from Nieves, a New Haven police detective, and James Stephenson, a state firearms and tool mark examiner, regarding the bullets and casings recovered from the site of the New Haven shooting. These witnesses established that the two firearms used in the New Haven shooting were the same as those used in the Waterbury shooting.

[17] Specifically, the court stated: "Mr. Lofton, I want to go over something with you that's very important. As far as any testimony involving a homicide, somebody was actually shot at in New Haven, that's not any area that you can talk about. You can talk about the fact that you—what you saw, but that's it. Is that clear?"

We now turn to the relevant legal principles and our standard of review for claims that the court improperly admitted uncharged misconduct evidence. "Evidence of a defendant's uncharged misconduct is inadmissible to prove that the defendant committed the charged crime or to show the predisposition of the defendant to commit the charged crime. . . . Exceptions to this rule have been recognized, however, to render misconduct evidence admissible if, for example, the evidence is offered to prove intent, identity, malice, motive, a system of criminal activity or the elements of a crime. . . . To determine whether evidence of prior misconduct falls within an exception to the general rule prohibiting its admission, we have adopted a two-pronged analysis. . . . First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence. . . . Since the admission of uncharged misconduct evidence is a decision within the discretion of the trial court, we will draw every reasonable presumption in favor of the trial court's ruling. . . . We will reverse a trial court's decision only when it has abused its discretion or an injustice has occurred." (Internal quotation marks omitted.) *State* v. *Torres*, 168 Conn. App. 611, 619–20, 148 A.3d 238 (2016), cert. granted on other grounds, 325 Conn. 919, A.3d (2017); see also *State* v. *Pena*, 301 Conn. 669, 673–74, 22 A.3d 611 (2011); Conn. Code Evid. (2009) § 4-5 (b).[18]

In the present case, the court determined that the evidence from the New Haven shooting was probative of the defendant's "means" to commit the Waterbury

[18] Section 4-5 (b) of the 2009 edition of the Connecticut Code of Evidence provides in relevant part: "Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a) such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony."

shooting. "Evidence indicating that an accused possessed an article with which the particular crime charged may have been accomplished is generally relevant to show that the accused had the means to commit the crime. . . . The state does not have to connect a weapon directly to the defendant and the crime. It is necessary only that the weapon be suitable for the commission of the offense." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Franklin*, 162 Conn. App. 78, 96, 129 A.3d 770 (2015), cert. denied, 321 Conn. 905, 138 A.3d 281 (2016); see also *State* v. *Torres*, supra, 168 Conn. App. 620. In his brief to this court, the defendant focuses his appellate claim on the prejudice prong.[19]

"Although relevant, evidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jur[ors]. . . . The trial court . . . must determine whether the adverse impact of the challenged evidence outweighs its probative value. . . . Finally, [t]he trial court's discretionary determination

[19] To the extent that the defendant summarily claims that there was no probative value to the fact that Lofton observed the defendant discharging the firearm, and all that was necessary was that he "saw the defendant with a silver handgun and that [Lofton] heard gunshots," we disagree. The discharge of the gun by the defendant on July 9, 2011, directly connected the defendant to the Waterbury shooting and showed that he had the means to commit those crimes. See *State* v. *Blango*, 103 Conn. App. 100, 110, 927 A.2d 964, cert. denied, 284 Conn. 919, 933 A.2d 721 (2007); see also *State* v. *Stevenson*, 53 Conn. App. 551, 571–72, 733 A.2d 253, cert. denied, 250 Conn. 917, 734 A.2d 990 (1999); *State* v. *Sivri*, 46 Conn. App. 578, 584, 700 A.2d 96, cert. denied, 243 Conn. 938, 702 A.2d 644 (1997).

that the probative value of evidence is not outweighed by its prejudicial effect will not be disturbed on appeal unless a clear abuse of discretion is shown. . . . [B]ecause of the difficulties inherent in this balancing process . . . every reasonable presumption should be given in favor of the trial court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Torres*, supra, 168 Conn. App. 623–24; see also *State* v. *Rosario*, 99 Conn. App. 92, 104, 912 A.2d 1064, cert. denied, 281 Conn. 925, 918 A.2d 276 (2007).

The defendant argues that the uncharged misconduct evidence, specifically, that Lofton's testimony that he observed the defendant discharge a firearm,[20] aroused the emotions, hostility or sympathy of the members of the jury.[21] He further maintains that this evidence exceeded what was necessary to link the two crime scenes and made him, in the eyes of the jurors, "a person who acted violently, harmed or threatened to harm people and called into question his character." Finally, the defendant asserts that the admission into evidence of a photograph of the New Haven crime scene

[20] The defendant appears to agree that the admission into evidence of the collection of the bullets and casings from the New Haven crime scene and the matching of those items found in Waterbury the night before did not constitute an abuse of discretion.

[21] "Our Supreme Court has identified four factors relevant to determining whether the admission of otherwise probative evidence is unduly prejudicial. These are: (1) where the facts offered may unduly arouse the [jurors'] emotions, hostility or sympathy, (2) where the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) where the evidence offered and the counterproof will consume an undue amount of time, and (4) where the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it. . . . *State* v. *Hill*, 307 Conn. 689, 698, 59 A.3d 196 (2013)." (Internal quotation marks omitted.) *State* v. *Toro*, 172 Conn. App. 810, 816, A.3d (2017). The defendant's appellate argument pertains only to the first factor regarding the issue of undue prejudice; therefore, we confine our analysis and discussion accordingly.

that contained police tape was too prejudicial because the jury then knew of his conviction of crimes from that shooting.

The defendant was charged, inter alia, with shooting the victim during an attempted robbery. Given the details of the Waterbury crimes, evidence that he discharged a firearm behind a brick building would not unduly arouse the emotions of the jurors. See *State* v. *Estrella J.C.*, 169 Conn. App. 56, 99, 148 A.3d 594 (2016). The possession of a firearm likely would not cause an improper emotional response from the jury in a case where the defendant was charged, inter alia, with murder. See *State* v. *Collins*, supra, 299 Conn. 587–88; *State* v. *Torres*, supra, 168 Conn. App. 626; see generally *State* v. *Smith*, 313 Conn. 325, 342–43, 96 A.3d 1238 (2014) (prejudicial effect minimized by limited testimony to " 'bare bones' " account of misconduct); *State* v. *Morales*, 164 Conn. App. 143, 181, 136 A.3d 278 (when prior acts of misconduct were substantially less shocking than crimes charged, Appellate Court consistently has declined to conclude admission of evidence was unduly prejudicial), cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016). Moreover, the court considered the written motions and briefs of the parties, as well as extensive oral argument, and prevented the jury from hearing the most inflammatory details of the New Haven incident. See *State* v. *Torres*, supra, 625; *State* v. *Kantorowski*, 144 Conn. App. 477, 489–92, 72 A.3d 1228 (care used by trial court in sanitizing uncharged misconduct evidence militates against finding abuse of discretion), cert. denied, 310 Conn. 924, 77 A.3d 141 (2013). The court also directly instructed Lofton to refrain from mentioning the homicide that had occurred in New Haven involving the defendant and permitted leading questions to help the witnesses avoid mentioning the more inflammatory details of the New Haven events. See *State* v. *Collins*, supra, 589 (care taken by trial court

to devise measures to reduce any prejudicial impact militates against finding abuse of discretion). We further conclude that the presence of police tape in the photograph from the New Haven crime provided minimal prejudicial impact, as there was ample testimony that the police investigated that location following a report of gunshots fired. Finally, the court provided the jurors with a limiting instruction directing them to refrain from considering the police tape. See *State* v. *Gonzalez*, 167 Conn. App. 298, 310, 142 A.3d 1227, cert. denied, 323 Conn. 929, 149 A.3d 500 (2016); see also *State* v. *Collins*, supra, 590. Any prejudice was outweighed by the probative value of the evidence that helped identify the defendant as a shooter in Waterbury on July 8, 2011. See, e.g., *State* v. *Gonsalves*, 137 Conn. App. 237, 247–49, 47 A.3d 923, cert. denied, 307 Conn. 912, 53 A.3d 998 (2012). Affording due deference to the ruling of the trial court, we conclude that it did not abuse its discretion in determining that the probative value of the uncharged misconduct evidence outweighed its prejudicial impact.

III

The defendant's final claim is that his right to a fair trial was violated as a result of prosecutorial impropriety. Specifically, he argues that the prosecutor made several mistakes regarding the evidence during his closing arguments to the jury, and that as a result, he was denied his due process right to a fair trial. The state counters that none of the claimed mistakes constituted prosecutorial impropriety and, even if this court were to conclude otherwise, the defendant failed to establish that he had been denied a fair trial. We conclude that the defendant's right to a fair trial was not violated in this case.

The legal principles regarding a claim of prosecutorial impropriety are well established. "In analyzing claims

of prosecutorial impropriety, we engage in a two step process. . . . First, we must determine whether any impropriety in fact occurred; second, we must examine whether that impropriety, or the cumulative effect of multiple improprieties, deprived the defendant of his due process right to a fair trial. . . . To determine whether the defendant was deprived of his due process right to a fair trial, we must determine whether the sum total of [the prosecutor's] improprieties rendered the defendant's [trial] fundamentally unfair . . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety], therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties. . . . Accordingly, it is not the prosecutorial improprieties themselves but, rather, the nature and extent of the prejudice resulting therefrom that determines whether a defendant is entitled to a new trial. . . .

"To determine whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams* [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that [impropriety] was objected to at trial. . . . These factors include the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citations omitted; internal quotation marks omitted.) *State* v. *Rios*, 171 Conn. App. 1, 51–52, 156 A.3d 18, cert. denied, 325 Conn. 914, 159 A.3d 232 (2017); see also *State* v. *Jones*, 320 Conn. 22, 34–35, 128 A.3d 431 (2015). The defendant bears the burden of demonstrating both that the comments were improper and

that they were so egregious as to constitute a denial of due process. *State* v. *Payne*, 303 Conn. 538, 562–63, 34 A.3d 370 (2012).

Additionally, "[i]t is well settled that the prosecutor, as a public official seeking impartial justice on behalf of the people of this state, has a heightened duty to avoid argument [or questioning] that strays from the evidence or diverts the jury's attention from the facts of the case. . . . Nonetheless, in evaluating claims of impropriety during summation, we recognize that the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered . . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument." (Citations omitted; internal quotation marks omitted.) *State* v. *Bennett*, 324 Conn. 744, 778, 155 A.3d 188 (2017).

Finally, we note that although the defendant objected to only one comment by the prosecutor, we will review his claims of prosecutorial misconduct. "It is well established law . . . that a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test. . . . Our Supreme Court has explained that the defendant's failure to object at trial to . . . the [occurrence] that he now raises as [an instance] of prosecutorial impropriety, though relevant to our inquiry, is not fatal to review of his [claim]. . . . This does not mean, however, that the absence of an objection at trial does not play a

significant role in the determination of whether the challenged statements were, in fact, improper. . . . To the contrary, we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time." (Internal quotation marks omitted.) *State* v. *Fernandez*, 169 Conn. App. 855, 867–68, 153 A.3d 53 (2016). Guided by these principles, we consider each of the defendant's claims of prosecutorial impropriety in turn.

A

The defendant first argues that an impropriety occurred when the prosecutor misstated to the jury during closing arguments that Maringola had testified that two people exited from the Acura, shot at the victim, walked closer to the T-Rex and fired a second volley of gunshots at the victim. We conclude that even if the challenged statement constituted an impropriety, the defendant failed to meet his burden of showing that it violated his right to due process.

As part of his preliminary remarks to the jury during closing argument, the prosecutor noted that if he said something about the facts of the case that was different from what a member of the jury remembered, then "your memory prevails, not what I have said." During the course of his presentation, the prosecutor argued the following to the jury: "Now, you heard testimony from Adam Maringola, remember Adam Maringola, he was in the home on Hanover . . . he was cleaning the house, he was preparing to move in. At that point, he heard the T-Rex, T-Rex drives down Hanover Street, caught his attention, he looked out the window. Saw it pull into the driveway at the end of Hanover and the T intersection with Boyden Street. He saw a number of people get out of the car, not exactly sure how many.

But he saw two of them exit the black Acura and walk toward that T-Rex, parked in the driveway. At that time, he sees the T-Rex back out, sees the two guys shoot. As he testified, he's shooting at the left side of the car, same side as [the victim] was struck with [a] number of bullets. *The bike crashes. He saw two people walk up to the bike*, he heard somebody say to [the victim], get out of the bike. He then heard [the victim] say, I can't. More shots." (Emphasis added.)

Maringola, the first witness of the trial, testified that he had observed two or three individuals exit the Acura while the T-Rex was in the driveway. He then saw that "two people [were] walking toward the bike." When the T-Rex started to back out of the driveway, the two individuals began shooting. The T-Rex crashed and came to a stop, and the passenger jumped out and ran away. The two men from the Acura shot at the passenger. Maringola then stated that, at this point, someone went up to the T-Rex, but he was not sure whether it was just one of the individuals from the Acura or both, and instructed the driver of the T-Rex to "get out." Finally, the person who had ordered the victim to "get out" shot the victim multiple times. During cross-examination, however, Maringola agreed with defense counsel's statement that it was "two people that walked up to the bike . . . ." A review of the colloquy between Maringola and defense counsel leads to the conclusion that Maringola was referencing a time frame from when the two individuals exited the Acura, but before they started shooting for the first time.

We have recognized that "[p]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . [B]ecause closing arguments often have a rough and tumble quality about them, some leeway must be afforded to the advocates in offering arguments to the jury in final argument. [I]n addressing the jury, [c]ounsel must be allowed a

generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." (Internal quotation marks omitted.) *State* v. *Williams*, 172 Conn. App. 820, 834, A.3d , cert. denied, 326 Conn. 913, A.3d (2017); see also *State* v. *Bennett*, supra, 324 Conn. 778; *State* v. *Williams*, 102 Conn. App. 168, 193–94, 926 A.2d 7, cert. denied, 284 Conn. 906, 931 A.2d 267 (2007).

This latitude does not, however, permit a prosecutor to state, comment upon, or suggest an inference from facts not in evidence or present matters that the jury has no right to consider. *State* v. *Otto*, supra, 305 Conn. 76–77; *State* v. *Patterson*, 170 Conn. App. 768, 789, 156 A.3d 66, cert. denied, 325 Conn. 910, 158 A.3d 320 (2017); see also *State* v. *Ross*, 151 Conn. App. 687, 697–98, 95 A.3d 1208 (when prosecutor suggests fact not in evidence, there is risk that jury may conclude that he had independent knowledge of facts that could not be presented to jury), cert. denied, 314 Conn. 926, 101 A.3d 271, 272 (2014).

In the present case, the prosecutor incorrectly argued to the jury that Maringola had testified that two men approached the T-Rex after it crashed following the initial volley of gunshots. A review of his testimony reveals that Maringola did not make such a statement, either during direct examination or cross-examination. Although this mistake does not appear to have been made intentionally, the prosecutor did not include any type of qualifier with respect to Maringola's testimony. See, e.g., *State* v. *Rios*, supra, 171 Conn. App. 59 (use of phrase " 'something like that' " made it clear prosecutor was not attempting to mislead jury into believing those were precise words of defendant and mitigated impact of imprecision of words used); cf. *State* v. *Patterson*, supra, 170 Conn. App. 793 (prosecutor did not request

that jury make reasonable inference but mischaracterized identification testimony of witness); *State* v. *Sargent*, 87 Conn. App. 24, 39–40, 864 A.2d 20 (improper for prosecutor to convey that he was recounting actual testimony of witness and then mischaracterize it during closing argument), cert. denied, 273 Conn. 912, 870 A.2d 1082 (2005).

Assuming, without deciding, that the prosecutor's comment that two men approaching the T-Rex after it had crashed constituted prosecutorial impropriety, we nevertheless conclude that this comment did not deprive the defendant of his right to a fair trial. This conclusion is based on our consideration of the *Williams* factors. The defendant did not invite the challenged comment and thus the first factor weighs in his favor. The second factor, the severity of the impropriety, weighs in favor of the state because the defendant failed to object at the time of the comment. "[W]e consider it highly significant that defense counsel failed to object to any of the improper remarks, request curative instructions, or move for a mistrial. Defense counsel, therefore, presumably [did] not view the alleged impropriety as prejudicial enough to seriously jeopardize the defendant's right to a fair trial. . . . Given the defendant's failure to object, only instances of grossly egregious [impropriety] will be severe enough to mandate reversal." (Internal quotation marks omitted.) *State* v. *Patterson*, supra, 170 Conn. App. 797–98. Further, this relatively minor misstatement by the prosecutor does not rise to the level of a grossly egregious impropriety. Id., 798.

The third factor, the frequency of the comment, also weighs in favor of the state. The prosecutor's comment regarding Maringola's testimony was a small part of his summation of the evidence against the defendant and did not constitute the main theme that consistently was emphasized during closing argument. We also iterate

that counsel is afforded generous latitude during closing argument. See *State* v. *Williams*, supra, 172 Conn. App. 834. The fourth factor, whether the impropriety related to a critical issue in the case, also favors the state. While a significant issue during the trial was whether the defendant was one of the individuals who exited the Acura and shot at the T-Rex, the question of whether one or both approached the T-Rex after it had crashed was not significant to that determination. Once the jury had determined that the defendant was one of the two persons from the Acura and participated in the shooting, it had resolved the question of identity and the specifics of who approached the T-Rex after the crash was negligible.

The fifth factor, whether the court provided a curative instruction, favors the state. A request to disregard the incorrect statement of the prosecutor was not made by the defendant, and therefore the court did not provide such an instruction. It did, however, instruct the members of the jury that they were the "sole judges of the facts" and that they were to "recollect and weigh the evidence, and form [their] own conclusions as to what the ultimate facts are." The court also stated that jury's recollection of the facts prevailed because it was the exclusive trier of fact. The sixth factor, the strength of the state's case, also weighs in favor of the state. A great deal of circumstantial evidence placed the defendant at the scene of the crime, linked him to one of the firearms used and provided consciousness of guilt. The testimony of Habib, which the jury was free to credit despite his status as a jailhouse informant, directly identified the defendant as one of the shooters.

After a consideration of the *Williams* factors, we conclude that the prosecutor's statement regarding two men approaching the T-Rex after it had crashed, even if improper, did not deny the defendant of his due process right to a fair trial.

B

The defendant next argues that an impropriety occurred when the prosecutor misstated Habib's testimony regarding the defendant's inculpatory statements in the New Haven Correctional Center. We again conclude that the defendant failed to establish that his right to due process was violated.

The following additional facts are necessary for our discussion. During his closing argument, the prosecutor stated: "[O]nly two people have the guns. How do we know it's the defendant? His own words. Eight months, nine months later when he was in jail, he told Mr. Habib, *I only took the fool's chain.* Two people walked up that bike, two people had guns, two people walked back to the car, he had to be one of them, he took the chain; that's what he said. . . . Now, you'll find in the charge that the defendant's charged as a principal and an accessory to murder. The principal's a person who actually commits the act; accessory is one who aids or helps another person in that act. Again, you're gonna say, how do we know he's the shooter? *Again, by his own words. . . . We also know by his own words that he killed* [*the victim*]. *He stated to Joshua Habib that he killed* [*the victim*]." (Emphasis added.)

The prosecutor used similar language during his closing argument addressing the charge of felony murder. "Once again, we know the defendant was in possession of the gun at—on [July 8] because . . . two people walked out of that car with guns, two people walked up to the bike, two people shot . . . . *His own words, I took the fool's chain.* How would he take the fool's chain if he didn't walk up to that bike? It has to be one of the two people. And again, if he is, there are only two people shooting, he's one of the two people shooting." (Emphasis added.)

The defendant also challenges the remarks made near the conclusion of the closing argument where the prosecutor stated: "We also know that the defendant killed [the victim] because he told Mr. Habib—he told Mr. Habib that a person that he was with when he killed a guy talked to the police and gave a statement." Finally, the defendant points to the following statement during the prosecutor's rebuttal argument: "Now, let's talk about [Habib] for a few minutes. He [testified]—this guy right here told him the reason he got . . . arrested—let me change that—somebody he was with, when he killed the guy in Waterbury, he got arrested down South."

The defendant has raised two distinct claims of prosecutorial impropriety with respect to these excerpts from the closing arguments. First, he contends that the prosecutor improperly interpreted Habib's testimony as to contain a direct admission by the defendant that he shot the victim in Waterbury. As we set forth in part I A 1 of this opinion, Habib testified that the defendant had stated that "*he* got out of the car and shot him, and they were attempting or he—intentions was to rob him for the [T-Rex] . . . . His intentions were to rob the—the victim of the [T-Rex] he was riding and whatever else he may have had on him, but they ultimately just ended up taking his chain . . . ." The prosecutor's arguments to the jury that the defendant had directly admitted to shooting the victim and taking the chain were based on evidence. Therefore, the comments made by the prosecutor that Habib's testimony included a direct admission by the defendant were not improper. See *State* v. *Taft*, supra, 306 Conn. 767.

The defendant's second claim of prosecutorial impropriety with respect to the excerpts cited is that the prosecutor improperly argued that the defendant directly had admitted to taking "the fool's chain." We note that the phrase, "the fool's chain," was not part of the evidence in this case; no person testified that

the defendant had used that phrase. Further, contrary to the prosecutor's argument, Habib did not testify that the defendant had used the pronoun "I" rather than "they" with respect to describing who had taken the victim's chain. Therefore, for the reasons stated in part III A, we will assume, without deciding, that portion of the prosecutor's argument to the jury constituted an impropriety and proceed to the *Williams* factors.

As for the first *Williams* factor, we conclude that the comments regarding the chain were not invited, and therefore this factor weighs in favor of the defendant. The second factor weighs in favor of the state, as it was not severe. The defendant did not object, and the prosecutor's comments did not rise to the level of grossly egregious impropriety. See *State* v. *Patterson*, supra, 170 Conn. App. 798. The third factor, the frequency of the comments, favors the state. The fourth factor, whether the comment went to a central issue, also favors the state. These comments at issue constitute cumulative evidence as to the issue of identity. Finally, the fifth and sixth factors weigh in favor of the state for the reasons set forth in part III A of this opinion. Accordingly, we conclude that the defendant has failed to establish that his right to due process was violated as a result of any misstatements as to Habib's testimony.

C

The defendant finally argues that the prosecutor's misstatement during closing argument that the defendant had Isis Hargrove's phone constituted prosecutorial impropriety. Specifically, he contends that this statement was an improper comment on facts not in evidence. The state counters that this comment was a fair argument because it was based on a reasonable inference from the facts presented at the trial. We agree with the state.

During his rebuttal argument to the jury, the prosecutor stated: "Now, Shaina Moye—excuse me—she said—she testified that this defendant the entire night driving all the way from New Haven to Waterbury [had] Isis Hargrove's phone . . . . All the way up, all the way driving around Waterbury. Now, you remember 12:17 a.m. on July 8th, all three phones, Shaina Moye's, Earl Simpson's and Isis Hargrove's hit off the Waterbury tower for the first time. From that point until about 1:32 a.m., there are eighteen telephone calls from Shaina Moye's phone and Isis Hargrove's phone. They're not sitting next to each other in the front seat of the car calling each other, are they? No. He had Isis Hargrove's phone . . . ." At this point, defense counsel objected on the ground that there was no evidence that anyone had that phone. The prosecutor responded that his comments were based on Moye's testimony. The court allowed the argument as a comment on the evidence. The prosecutor then continued: "He had her phone. And the calls are going back and forth to the two cars; eighteen phone calls in that time frame."

Moye testified that she was a friend of Hargrove, who drove a black Acura in July, 2011. On July 7, 2011, Moye went to Waterbury to celebrate the defendant's birthday. Moye, accompanied by another woman, drove her tan Chevrolet Malibu to a gas station to meet up with the defendant, Simpson, Hargrove and another man. The three women, driving in the Malibu, followed the men, driving the Acura, to Waterbury. After picking up a friend of the defendant, the group went to a nightclub. When the nightclub closed, the three women went to a fast food restaurant in the Malibu, and she saw the four men leave in the Acura. Moye stated that Hargrove called the defendant, and Moye overheard the defendant state "we just did some hot shit." The Acura then arrived at the restaurant. Hargrove and the defendant switched cars, ending up in the Acura and Malibu

respectively. Both cars then left the restaurant, even though the women had ordered and paid for their food, but not yet received it. Moye followed Hargrove back to New Haven. During cross-examination, Moye stated that Hargrove had been using her phone that night.

The state also presented the testimony of Norman Ray Clark, a custodian of records employed by Sprint Nextel. He stated that there were sixteen phone calls between Moye's phone and Hargrove's phone between 11:54 p.m. on July 7, 2011, and 2:06 a.m. on July 8, 2011, and that cell tower information placed Hargrove's phone in Waterbury for nearly all of these calls.

The state presented evidence, therefore, that Hargrove spoke with the defendant during the time of the Waterbury shooting, and shortly thereafter. Additionally, there was evidence that Hargrove used Moye's phone, and thus it was likely that the defendant used Hargrove's phone. This inference is supported by Moye's testimony that she overhead the conversation between the defendant and Hargrove while Hargrove used Moye's phone, and the phone records detailing the phone calls between Hargrove's phone and Moye's phone during the relevant time periods. Cell phone towers confirmed that both of these phones were in the same area at the relevant time supports this scenario. In short, the prosecutor's argument that the defendant had used Hargrove's phone was based on the evidence and therefore did not constitute prosecutorial impropriety. See *State* v. *Taft*, supra, 306 Conn. 767.

The judgment is affirmed.

In this opinion the other judges concurred.

VILLAGE MORTGAGE COMPANY *v.* JAMES VENEZIANO
(AC 38824)

Alvord, Mullins and Beach, Js.

Syllabus

The plaintiff corporation brought this action against the defendant, who previously was a founding member, shareholder, officer and director of the plaintiff, seeking an injunction to preclude the defendant from accessing the plaintiff's premises and money damages for the defendant's alleged misappropriation of corporate funds through conversion, statutory theft, and embezzlement from January, 2004 through June, 2014. The defendant filed a counterclaim, which claimed, in relevant part, that the funds alleged to have been taken by him were funds owed to him for back pay, as well as funds he had invested in the plaintiff. The defendant also claimed, by way of special defense, that the plaintiff's causes of action for conversion, statutory theft, and embezzlement were barred by the applicable three year statute of limitations (§ 52-577). Following a trial to the court, the court rendered judgment in part for the plaintiff on the complaint and for the plaintiff on the defendant's counterclaim, from which the defendant appealed and the plaintiff cross appealed to this court. *Held*:

1. The trial court's factual findings rejecting the amount of claimed contributions made by the defendant to the plaintiff and finding that the advances and withdrawals made by the defendant were unauthorized were supported by the testimony and exhibits in the record and were not clearly erroneous: although the defendant contended that the trial court mistakenly relied on a forensic accountant's report in concluding that the defendant had misappropriated funds and in determining the amount of those funds, the trial court found the forensic accountant's report credible, and this court deferred to the trial court's credibility determinations; furthermore, the trial court also found the report of the plaintiff's chief financial officer accurate and reliable, and relied heavily on the chief financial officer's report and testimony at trial in reaching its determinations concerning the defendant's misappropriation of the plaintiff's funds, and the defendant did not raise a claim on appeal concerning the court's reliance on that report.
2. The defendant's challenges to certain of the trial court's discovery rulings were not reviewable, the defendant having failed to meet his burden of providing this court with an adequate record from which the alleged claims of error could be reviewed, and having failed to brief one of his claims adequately; moreover, although the defendant claimed that the trial court, in denying his motion for discovery of information, improperly accepted the representations of the plaintiff's counsel concerning

compliance and made credibility determinations without a hearing, the court expressly stated that if the defendant disagreed with the plaintiff's representation, he should file a motion to compel to bring the matter properly before the court, which he failed to do, and, therefore, the defendant was not deprived of an opportunity to seek compliance and he presented no evidence demonstrating that he was harmed by the court's ruling.

3. This court declined to review the defendant's claims that the trial court improperly failed to conclude that the plaintiff intentionally spoliated evidence or engaged in discovery misconduct, the defendant having failed to raise either claim before the trial court or in his posttrial brief.

4. The trial court properly concluded that the three year statute of limitations under § 52-577 was not tolled, pursuant to statute (§ 52-595), by the defendant's fraudulent concealment of his misconduct, and that the plaintiff, therefore, was precluded from recovering damages that accrued prior to October, 2009, which was three years before the commencement of this action; although the plaintiff claimed that it was unaware of the defendant's misappropriations until an investigation was done in 2012 and that, prior to 2012, the defendant had exclusive control over the plaintiff's finances and used that control to manipulate the accounting records to conceal his activities, the trial court found that there were other employees in the plaintiff's financial department who were inputting entries at the request of the defendant, that, since 2004, the employees were aware of the defendant's misappropriations, which were transparent, open and notorious, and, thus, that the knowledge of the bookkeepers and other financial employees of the defendant's activities could be imputed to the plaintiff, and the plaintiff cited no legal authority for the proposition that knowledge of a corporation can only be imputed through its board of directors.

Argued April 12—officially released July 25, 2017

Procedural History

Action for, inter alia, an injunction precluding the defendant from accessing the plaintiff's premises, and for other relief, brought to the Superior Court in the judicial district of Hartford and transferred to the judicial district of Litchfield, where the defendant filed a counterclaim; thereafter, the court, *Pickard*, *J.*, sustained the plaintiff's objections to the defendant's request for production; subsequently, the court, *J. Moore*, *J.*, denied the defendant's motion for order; thereafter, the court, *J. Moore*, *J.*, denied in part the

defendant's motions to compel and for sanctions; subsequently, the matter was tried to the court, *J. Moore*, *J.*; thereafter, the court, *J. Moore*, *J.*, granted the plaintiff's motion for a temporary injunction; subsequently, the court, *J. Moore*, *J.*, rendered judgment in part for the plaintiff on the complaint and for the plaintiff on the counterclaim; thereafter, the court, *J. Moore*, *J.*, denied the plaintiff's motion for reconsideration and issued an amended memorandum of decision, and the defendant appealed and the plaintiff cross appealed to this court. *Affirmed*.

Gregory T. Nolan, with whom, on the brief, was *Patsy M. Renzullo*, for the appellant-appellee (defendant).

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellee-appellant (plaintiff).

Opinion

ALVORD, J. The defendant, James Veneziano, appeals from the judgment of the trial court rendered in favor of the plaintiff, Village Mortgage Company (company), after a trial to the court, awarding the plaintiff $2,080,185.09 in damages for the defendant's misappropriation of corporate funds through conversion, statutory theft, and embezzlement. On appeal, the defendant claims that (1) the court's factual findings regarding statutory theft were clearly erroneous, (2) the court's discovery rulings on October 27, 2014, December 9, 2014, and January 16, 2015, "constitute reversible error," and (3) the court improperly failed to conclude that the plaintiff intentionally spoliated evidence or engaged in discovery misconduct. The plaintiff cross appeals from the judgment, claiming that the court improperly ruled in favor of the defendant on his statute of limitations special defense and barred its recovery for damages that occurred prior to October 16, 2009.

Specifically, the plaintiff argues that the court improperly failed to conclude that the defendant's fraudulent concealment of his misconduct tolled the applicable statute of limitations. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the defendant's appeal and the plaintiff's cross appeal. The plaintiff is a closely held stock corporation engaged in the mortgage origination business for residential properties. The defendant was a founding member, shareholder, officer and director of the plaintiff, which was incorporated on July 1, 1998. He has a bachelor's degree in business science and extensive experience in banking. Because of his financial services background, he directed, supervised, and controlled all of the financial aspects of the plaintiff from its inception until his retirement in mid to late 2010. The defendant had served as the plaintiff's vice president and treasurer, and he continued to assert his influence over financial matters until his removal from the board of directors in 2012. The plaintiff's cofounder, Laurel Caliendo, initially was the corporate secretary and subsequently became the plaintiff's president in 2000. She handled the processing, closing, funding, delivery, and servicing of the loans, as well as the selling of the loans in the secondary market.

At least as early as 2004, the defendant and Caliendo withdrew moneys from the plaintiff's corporate funds. These purported advances and loans were taken without approval from the board of directors. Sometime in 2012, following the defendant's retirement and continued involvement in the plaintiff's financial matters, the plaintiff promoted Justin Girolimon to the position of chief financial officer. Girolimon had worked for the plaintiff sporadically while he was in high school and college. Beginning in 2009, until he was named the chief

financial officer, Girolimon had reported to the defendant in the plaintiff's accounting and financial department. Girolimon had expressed concerns in 2010 about certain journal entries that the defendant had directed him to make. Sometime in 2012, after the defendant left the company, Girolimon performed a detailed investigation of the defendant's withdrawals from corporate funds. According to the plaintiff, it first became aware of the defendant's misappropriations at the time of Girolimon's 2012 investigation. The plaintiff filed the complaint in the present action on October 16, 2012.

The plaintiff's two count complaint sought injunctive relief[1] and damages for conversion, statutory theft, and embezzlement. The defendant filed an answer with four special defenses and a ten count counterclaim. The gravamen of the defendant's defenses and claims was that the funds alleged to have been taken by him were funds owed to him for back pay and funds he had invested in the company. The defendant also claimed that the plaintiff's cause of action was barred by the applicable three year statute of limitations, General Statutes § 52-577.[2]

During a twelve day trial, the court heard testimony from several witnesses and admitted 113 exhibits. The exhibits included, inter alia, a report by Richard Finkel, a forensic accountant; the plaintiff's yearly audited financial statements; copies of bank checks and withdrawal slips; and the defendant's personal financial statements. Following trial, the parties submitted extensive posttrial briefs summarizing their respective positions. On December 23, 2015, the court issued a

[1] The court denied the injunctive relief requested in count one of the complaint, and the plaintiff has not challenged that determination in its cross appeal.

[2] The plaintiff does not dispute that § 52-577 is the applicable statute of limitations. Section 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

memorandum of decision in which it rendered judgment for the plaintiff on the second count of its complaint and on the defendant's ten count counterclaim. The court amended its memorandum of decision on December 31, 2015. The plaintiff filed a motion for reconsideration on January 7, 2016, which it amended on January 12, 2016. On January 27, 2016, the court issued a second amended memorandum of decision, ninety-four pages in length, in which it vacated all prior memoranda of decision. The court also issued a separate memorandum of decision on January 27, 2016, addressed to the plaintiff's motion for reconsideration.

In its comprehensive memorandum of decision, the court meticulously evaluated the evidence with respect to each of the parties' claims. With respect to the issues on appeal and cross appeal, the court made the following relevant findings and conclusions: (1) the defendant owed fiduciary duties to the plaintiff; (2) the defendant "offered virtually no resistance to the allegations" of the plaintiff's complaint; (3) the defendant claimed that the plaintiff improperly withheld documents that would have proven the financial investments he had made in the company, but the court gave "no credit" to that argument;[3] (4) Caliendo testified credibly that she had

[3] At trial, the defendant testified that all of his records, including the original general ledgers, were kept at the company and that the plaintiff failed to produce them when requested. During closing arguments, the defendant's counsel stated: "[I]sn't it convenient . . . that the records that would exonerate [the defendant] or at least show moneys that he put into the corporation are gone? Lots of documents that are in this—in the plaintiff's exhibits do have original ledger fingerprints. There are bits and pieces that come in here and there. But, unfortunately, the things that we need, the things that [the defendant] needs are gone. Water damage is what we heard, misplaced, couldn't verify. Isn't it convenient?"

The trial court responded that it understood that there had been discovery issues that had been "thoroughly argued" and ruled upon by various judges during the pendency of the action. The defendant's counsel stated that he had not been involved with this case at that point in time. He further stated that he would like to file a discovery motion addressed to "discovery violations," but he realized it was a problem because the trial had concluded. The court inquired: "I guess the point I wanted to make is there—there are,

acknowledged her inappropriate withdrawal of corporate funds after Girolimon's investigation and that she had entered into an agreement with the board of directors for the repayment of those funds; (5) "the defendant's credibility was impeached multiple times throughout the trial and in regard to almost every issue in this case"; (6) "the record is rife with examples of the defendant trying to categorize the [plaintiff's] financial records in dishonest fashion so as to mislead the directors, shareholders, or outside auditors"; (7) the defendant had the ultimate responsibility for the characterization of transactions and accounting entries, and he was responsible for working with the auditors and reviewing the plaintiff's audited financial statements; (8) except for one deposit made in 1998, the defendant failed to prove his claimed investments in the company; (9) the plaintiff's claim that it was unaware of the defendant's misappropriations until Girolimon's investigation in 2012 was not credible; (10) Girolimon credibly explained, in his testimony and in his written investigative report, how the defendant misappropriated the plaintiff's funds and the amount that he had misappropriated; (11) because the defendant lacked computer ability, the plaintiff's bookkeepers and other financial employees input the defendant's handwritten notes into the QuickBooks system, and they had actual knowledge of the defendant's inappropriate advances and withdrawals of company funds, beginning in 2004; (12) prior to 2004, when the plaintiff began to employ the QuickBooks system, the plaintiff's accounting records were handwritten; (13) the plaintiff submitted pre-2004 audited financial statements at trial that provided a baseline for its analysis, and none of those

as of right now, no written discovery motions pending?" The defendant's counsel confirmed there were no pending discovery motions, and the court stated: "So the fact of the matter is, at the present time, [there are] no pending discovery actions. And I guess, to—to make that argument in our final argument, is sort of unsupported by the—by the record at the present time."

statements showed any amount due from the plaintiff to the defendant; (14) Girolimon's written investigative report, which was admitted as a full exhibit, most accurately detailed the defendant's misappropriations from 2004 through 2014; (15) the defendant provided no credible evidence to contradict the conclusions in the reports submitted by Finkel and Girolimon; (16) the evidence "incontrovertibly established" that the defendant breached his fiduciary duty to the plaintiff "by engaging in self-dealing by taking [the plaintiff's] funds for his own personal use at his sole discretion without any regard to [the plaintiff] or its shareholders"; (17) the defendant did not produce any evidence that would establish fair dealing in those transactions; (18) the plaintiff sustained its burden of proving that the defendant committed conversion, statutory theft and embezzlement; (19) with respect to the defendant's special defense regarding the statute of limitations, § 52-577 was not tolled by the fraudulent concealment doctrine as claimed by the plaintiff; (20) the knowledge of the plaintiff's bookkeepers and other financial employees, with respect to the defendant's misappropriations, was imputed to the plaintiff, thereby limiting its recovery of damages to a three year period prior to the commencement of this action; (21) pursuant to General Statutes § 52-564,[4] the court trebled the damages that occurred subsequent to October 16, 2009; and (22) the defendant provided "no credible evidence" to support the allegations in his ten count counterclaim. Accordingly, the court rendered judgment in favor of the plaintiff with respect to its claims of conversion, statutory theft and embezzlement, and against the defendant on his ten count counterclaim. The court awarded the plaintiff $2,080,185.09 in damages.

[4] General Statutes § 52-564 provides: "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages."

In the court's memorandum of decision on the plaintiff's motion for reconsideration, the court responded to the plaintiff's request to reconsider its determination that the doctrine of fraudulent concealment did not operate to toll the statute of limitations. After citing the fraudulent concealment statute; General Statutes § 52-595;[5] and applicable case law, the court acknowledged that it had found numerous examples of the defendant "trying to camouflage, conceal, and even cover up inappropriate withdrawals of company funds." Nevertheless, the court concluded that the doctrine of fraudulent concealment did not apply under the circumstances of this case: "Under any burden of proof . . . and even if the burden were to be shifted to the defendant to disprove fraudulent concealment [as argued by the plaintiff], the court finds that the defendant openly and notoriously took company money, and therefore, could not have fraudulently concealed his wrongdoing." The court recounted the testimony of the plaintiff's two former bookkeepers, one employed from 2003 to 2005, and the other employed from August, 2007, through January, 2009, who testified as to the inappropriate entries made at the defendant's insistence and his request for company checks to purchase personal items. The court also noted that "the defendant relied upon others in the plaintiff's financial department to input the defendant's handwritten ledger sheets and financial notes into the QuickBooks system," beginning in 2004, and continuing thereafter. Consequently, the court imputed this knowledge of the bookkeepers and other employees in the financial department to the plaintiff and limited its recovery to damages for the

[5] General Statutes § 52-595 provides: "If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence."

defendant's misconduct that occurred after October 16, 2009. This appeal and cross appeal followed.

I

DEFENDANT'S APPEAL

In his appeal, the defendant claims that (1) the court's factual findings regarding statutory theft were clearly erroneous, (2) the court's discovery rulings on October 27, 2014, December 9, 2014, and January 16, 2015, "constitute reversible error," and (3) the court improperly failed to conclude that the plaintiff intentionally spoliated evidence or engaged in discovery misconduct.

A

Factual Findings

The defendant's first claim is that the court's factual findings, rejecting the amount of claimed contributions made by the defendant to the company and finding that the advances and withdrawals made by him were unauthorized, were clearly erroneous. The defendant argues that these erroneous factual findings led to the court's improper conclusion that the defendant committed statutory theft.

In particular, the defendant argues that the court mistakenly relied on Finkel's report in concluding that the defendant misappropriated funds and in determining the amount of those funds. The defendant claims that Finkel's report was "slanted" and "defective." He also argues that the court did not properly interpret the plaintiff's audited financial statements, failed to consider transactions dating back to the plaintiff's corporate formation, and failed to examine the plaintiff's standard practices with respect to payments of salaries and capital transactions involving corporate officers. We are not persuaded.

In a case tried before the court, the trial judge is the sole arbiter of the credibility of witnesses and the weight to be afforded to specific testimony. *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 171 Conn. App. 61, 166, 156 A.3d 539 (2017). "[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. . . . In other words, to the extent that the trial court has made findings of fact, our review is limited to deciding whether those 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 to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *BTS, USA, Inc.* v. *Executive Perspectives, LLC*, 166 Conn. App. 474, 493–94, 142 A.3d 342, cert. denied, 323 Conn. 919, 150 A.3d 1149 (2016).

"Where there is conflicting evidence . . . we do not retry the facts or pass upon the credibility of the witnesses. . . . The probative force of conflicting evidence is for the trier to determine. . . . It is well established that a reviewing court is not in the position to make credibility determinations. . . . 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." (Internal quotation marks omitted.) *Jones* v. *Dept. of Children & Families*, 172 Conn. App. 14, 33, 158 A.3d 356 (2017). "[T]he trial court

is privileged to adopt whatever testimony [it] reasonably believes to be credible." (Internal quotation marks omitted.) *Powers* v. *Olson*, 252 Conn. 98, 105, 742 A.2d 799 (2000). Thus, while we review the court's underlying factual determinations under the clearly erroneous standard, our standard of review requires us to defer to the court's evaluation of the credibility of the parties and witnesses. See *Emerick* v. *Emerick*, 170 Conn. App. 368, 379, 154 A.3d 1069 (2017).

In the present case, the court's challenged factual findings are supported by the testimony and exhibits in the record, and the court's explanation of its credibility determinations suffices under the deferential standard of review that we accord such determinations. Although the defendant characterizes Finkel's report as "slanted" and "defective," the court found Finkel's testimony at trial to be "credible" and that "his calculations were scientifically based and objectively verifiable." Significantly, however, the court found Girolimon's report more "accurate" and "reliable," and it relied heavily on Girolimon's report and testimony at trial in reaching its determinations as to how the defendant misappropriated the plaintiff's funds and the amount of the funds that were misappropriated. The defendant's appellate brief criticizes Finkel's report in several respects, yet he does not even mention the court's reliance on Girolimon's report. The defendant has provided no persuasive support for his argument that the court erred in its reliance on the plaintiff's financial reports and audited financial statements or that it misinterpreted those reports and statements. As stated numerous times in the court's ninety-four page memorandum of decision, the defendant presented little or no documentary evidence with respect to his claims, and the court found his testimony not credible. For all of these reasons, the defendant's first claim fails.

B

Discovery Rulings

The defendant next claims that discovery rulings made by the court on October 27, 2014, December 9, 2014, and January 16, 2015, "constitute reversible error." He argues that he filed timely requests for the production of the plaintiff's handwritten records from 1998 to 2004, and copies of the general ledger account due to corporate officers, but that the plaintiff failed to produce those documents and the court failed to require compliance. The defendant maintains that the requested documents "contain material facts that would have made a difference in the outcome of the case," and that they would have provided "supporting documentation" for his claims.

With respect to the October 27, 2014 ruling, the defendant claims that the court, *Pickard*, *J.*, erroneously issued an order sustaining the plaintiff's objections to the defendant's requests for production. A review of the trial court file reveals that Judge Pickard did issue an order on October 27, 2014, which provided: "Order: Sustained. All objections are sustained." There is no further explanation of the court's ruling. Further, the defendant has provided no transcript of any court proceeding that addresses the particular request for production at issue and the objections raised to that request, or an elucidation of the court's decision. This court, as a reviewing court, is left with nothing to review.

"It is well settled that [t]he granting or denial of a discovery request rests in the sound discretion of the court. . . . A court's discovery related orders are subject to reversal only if such an order constitutes an abuse of that discretion. . . . [I]t is only in rare instances that the trial court's decision will be disturbed." (Citations omitted; internal quotation marks

omitted.) *Deutsche Bank National Trust Co.* v. *Bertrand*, 140 Conn. App. 646, 653, 59 A.3d 864, cert. denied, 309 Conn. 905, 68 A.3d 661 (2013).

As the appellant, the defendant has the burden of providing this court with a record from which this court can review any alleged claims of error. See Practice Book § 61-10. "It is not an appropriate function of this court, when presented with an inadequate record, to speculate as to the reasoning of the trial court or to presume error from a silent record." *Atelier Constantin Popescu, LLC* v. *JC Corp.*, 134 Conn. App. 731, 758, 49 A.3d 1003 (2012). Accordingly, we decline to address this claim.

With respect to the December 9, 2014 ruling, the defendant claims that the court, *J. Moore, J.*, improperly denied his "Motion for Discovery of Information" that he filed on December 1, 2014. The plaintiff filed a reply to the defendant's motion on December 5, 2014, in which it stated that there already had been compliance, as previously ordered by the court. Judge Moore issued the following order on December 9, 2014: "Order: Denied. [The] plaintiff indicates that it has complied with this request. If [the] defendant disagrees, [the] defendant must properly present a motion to compel." The defendant argues that this ruling was improper because the court failed to hold an evidentiary hearing and thereby "violated the holding of *Magana* v. *Wells Fargo Bank, N.A.*, 164 Conn. App. 729, 138 A.3d 966 (2016)." This claim is without merit.

Although the defendant argues that the court accepted the representations of plaintiff's counsel with respect to compliance and made a credibility determination without a hearing, we disagree with the defendant's interpretation of the court's order. The court expressly stated that if the defendant disagreed with the plaintiff's representation, he should file a motion to compel to

bring the matter properly before the court. The defendant was not deprived of an opportunity to seek compliance, and he has presented no evidence demonstrating that he was harmed by this ruling. "The burden is on the appellant to prove harmful error." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Bertrand*, supra, 140 Conn. App. 653–54.

With respect to the January 16, 2015 rulings by Judge Moore, the defendant claims that he filed a motion to compel and a motion for sanctions pursuant to the court's December 9, 2014 ruling. The plaintiff filed an objection to the motions and, on January 16, 2015, the court denied the motion for sanctions and denied the motion to compel, except for requiring the plaintiff to produce a designated disc. The defendant claims that the rulings are improper, but, except for setting forth this procedural history, he provides no analysis as to why these rulings were erroneous. "It is well settled that [w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Internal quotation marks omitted.) *State* v. *Raffone*, 163 Conn. App. 410, 417 n.6, 136 A.3d 647 (2016).

Further, we have no transcript or other documentation that discloses the court's reasons for its rulings. Again, without a record demonstrating that the court abused its discretion, we are left to speculate as to possible error. It is not our role to guess at possibilities, and we will presume that the court acted properly. See *McCarthy* v. *Cadlerock Properties Joint Venture, L.P.*, 132 Conn. App. 110, 118, 30 A.3d 753 (2011). Accordingly, we decline to review this claim.

C

Spoliation of Evidence and Discovery Misconduct

The defendant's final claim on appeal is that the court improperly failed to conclude that the plaintiff intentionally spoliated evidence or engaged in discovery misconduct. Specifically, the defendant's discovery misconduct claim is based on his allegations that he filed discovery requests at the appropriate time, that he was diligent in pursuing those requests, that some of the documents requested do exist, and that the plaintiff intentionally destroyed some of those documents. The defendant's claim of spoliation of evidence is based on the same allegations.

It is not necessary to set forth the legal principles governing the claims of discovery misconduct or spoliation of evidence for the reason that neither claim was raised before the trial court. Although the defendant's counsel commented "isn't it convenient" that certain records were not available; see footnote 3 of this opinion; there was no argument before the court that the requested documents were intentionally destroyed or that the plaintiff had engaged in discovery misconduct. The defendant's posttrial brief, which is fifty pages in length, does not allege that the plaintiff's conduct constituted discovery misconduct or that it intentionally spoliated evidence. There is no analysis whatsoever with respect to those particular issues that the defendant now raises on appeal.

"Practice Book § 60-5 provides in relevant part: 'The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court. . . .' Indeed, 'it is the appellant's responsibility to present such a claim clearly to the trial court so that the trial court may consider it and, if it is meritorious,

take appropriate action. That is the basis for the requirement that ordinarily [the appellant] must raise in the trial court the issues that he intends to raise on appeal. . . . For us [t]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge.' " *Jarvis* v. *Lieder*, 117 Conn. App. 129, 140–41, 978 A.2d 106 (2009). Thus, we will not address the defendant's claims of discovery misconduct and intentional spoliation of evidence.

II

PLAINTIFF'S CROSS APPEAL

In its cross appeal, the plaintiff claims that the court improperly failed to conclude that the defendant's fraudulent concealment of his misconduct operated to toll the three year statute of limitations for tort actions. The plaintiff argues that the court erroneously limited its recovery to the three year period prior to the commencement of this action. In particular, the plaintiff claims that it was improper to impute the knowledge of the plaintiff's bookkeepers and other financial employees to the corporate plaintiff.[6]

"The question of whether a party's claim is barred by the statute of limitations is a question of law, which this court reviews de novo. . . . The factual findings that underpin that question of law, however, will not

[6] Although Caliendo, a corporate officer, clearly was aware of the defendant's misconduct prior to 2009, the trial court did not determine whether her knowledge should be imputed to the company. The plaintiff had argued that her interest was adverse to the plaintiff at that time because she, too, was making withdrawals from corporate funds for personal use. "The general rule is that knowledge of an agent will not ordinarily be imputed to his principal where the agent is acting adversely to the latter's interest." *Mutual Assurance Co.* v. *Norwich Savings Society*, 128 Conn. 510, 513, 24 A.2d 477 (1942). Instead, the court concluded that the knowledge of the plaintiff's bookkeepers and other financial employees could be imputed to the company.

be disturbed unless shown to be clearly erroneous." (Citation omitted; internal quotation marks omitted.) *Jarvis* v. *Lieder*, supra, 117 Conn. App. 146. Because the plaintiff claims that the statute of limitations was tolled by the defendant's fraudulent concealment of his misconduct, we look to § 52-595, the fraudulent concealment statute, and the case law interpreting that statute.

Section 52-595 provides that "[i]f any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence." Our Supreme Court has stated that "to toll a statute of limitations by way of our fraudulent concealment statute, a plaintiff must present evidence that a defendant: (1) had actual awareness, rather than imputed knowledge, of the facts necessary to establish the [plaintiff's] cause of action; (2) intentionally concealed these facts from the [plaintiff]; and (3) concealed the facts for the purpose of obtaining delay on the [plaintiff's] part in filing a complaint on their cause of action." (Internal quotation marks omitted.) *Iacurci* v. *Sax*, 313 Conn. 786, 799–800, 99 A.3d 1145 (2014).

"The purposes of statutes of limitation include finality, repose and avoidance of stale claims and stale evidence. . . . These statutes represent a legislative judgment about the balance of equities in a situation involving a tardy assertion of otherwise valid rights: [t]he theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." (Internal quotation marks omitted.) Id., 806–807.

In the present case, the plaintiff seeks to recover damages for the defendant's misconduct from January, 2004, the time when the plaintiff began using the QuickBooks system, through June 15, 2014. The plaintiff did not commence this action until October 19, 2012. Unless the three year limitation period of § 52-577 is tolled, the plaintiff would be precluded from recovering damages that accrued prior to October, 2009.

The plaintiff claims that it was unaware of the defendant's misappropriations until Girolimon conducted his investigation in 2012. Prior to 2012, the plaintiff argues that the defendant had exclusive control over the plaintiff's finances and used that control to manipulate the accounting records to conceal his activities. According to the plaintiff, the knowledge of its bookkeepers could not be imputed to the company because the board of directors was not apprised of the defendant's misconduct until 2012.

In addressing the plaintiff's tolling claim, the court made several determinations in both memoranda of decision filed on January 27, 2016. In applying the relevant statutes and case law to the evidence presented at trial, the court made the following factual findings and legal conclusions: (1) the plaintiff's claim that it was unaware of the defendant's misappropriations until Girolimon's investigation in 2012 was not credible; (2) because the defendant lacked computer ability, the plaintiff's bookkeepers and other employees input the defendant's handwritten notes into the QuickBooks system, and they had actual knowledge of the defendant's inappropriate advances and withdrawals of company funds, beginning in 2004; (3) the knowledge of the plaintiff's bookkeepers and other financial employees, with respect to the defendant's misappropriations, could be imputed to the plaintiff, thereby limiting its recovery of damages to a three year period prior to the commencement of this action; (4) the defendant "openly and

notoriously" took company money; (5) the defendant "transparently treated company funds as his own," and testified that when he "need[ed] some of [his] moneys, [he] would withdraw" from those funds; (6) the defendant's attitude demonstrated that he was not trying to fraudulently conceal his intentions or "bury a secret"; (7) two of the plaintiff's bookkeepers had knowledge of the defendant's misuse of company funds long before Girolimon's investigation; (8) Linda Kerr, a bookkeeper employed by the plaintiff from 2003 to 2005, testified that the defendant would publicly, in front of other employees, ask her to give him company checks to buy and sell coins at large coin shows; (9) the plaintiff's business did not include the purchase and sale of coins; (10) Alesia Warner, the plaintiff's bookkeeper from August, 2007, through January, 2009, took issue with certain bookkeeping entries that the defendant instructed her to make, including advances to corporate officers; (11) Warner was so concerned about those entries that she refused to sign financials for the plaintiff; (12) beginning in 2004, the defendant relied on others in the plaintiff's financial department to input his handwritten ledger sheets and financial notes into the QuickBooks system, and those entries are reflected in Girolimon's report; and (13) Girolimon's report reflects that those employees input the defendant's inappropriate withdrawals, including, inter alia, charges pertaining to personal credit cards, coin purchases, personal automobile expenses, and commissions.[7]

For these reasons, the court found: "In reviewing the nature and extent of these entries, the inescapable conclusion is that, while financial employees of the company were placing these entries onto QuickBooks, they knew that the defendant was taking unauthorized withdrawals from the company, treating, as he put it,

[7] The defendant, in his position at the company, was not entitled to collect any commissions.

the company's funds as 'my moneys.' " Accordingly, the court concluded: "Under our law and the facts of the present case, the court finds that knowledge of the bookkeepers and other financial employees of the defendant's defalcations is imputed to the plaintiff corporation."

The plaintiff concedes "that it is not disputing the trial court's factual determinations that [the] plaintiff's bookkeepers were aware that [the] defendant was taking corporate funds for his own personal use. Instead, [the] plaintiff disputes that such knowledge may be imputed to the corporate plaintiff." The plaintiff overlooks the court's factual finding that there were other employees in the plaintiff's financial department who were inputting entries at the request of the defendant. Further, other significant findings include the facts that the employees were aware of the defendant's misappropriations since 2004, and that the defendant's activities were "transparent" and "open and notorious."

Although the plaintiff emphasizes that the board of directors was not aware of the defendant's misappropriations prior to 2012, it cites no legal authority for the proposition that knowledge of a corporation can only be imputed through its board of directors.[8] The plaintiff's position is too restrictive to accommodate the facts of this case. Moreover, there is case law rejecting the claim

[8] Although no Connecticut appellate authority is directly on point, our Supreme Court has held that the knowledge of an agent who sold an insurance policy to the insured could be imputed to the insurer: "When an agent acting within the scope of his authority obtains knowledge of a fact relevant to the transaction in which he is engaged, ordinarily that knowledge is imputed to his principal." *Reardon* v. *Mutual Life Ins. Co.*, 138 Conn. 510, 516, 86 A.2d 570 (1952). Also, in *E. Udolf, Inc.* v. *Aetna Casualty & Surety Co.*, 214 Conn. 741, 573 A.2d 1211 (1990), our Supreme Court held that the knowledge of a store manager and bookkeeper of an employee's prior misappropriations of corporate funds could be imputed to the plaintiff corporation for purposes of certain employee dishonesty insurance policies. Id., 748-50.

of fraudulent concealment in situations where the "intensely public nature of [the] process" precludes an evidentiary finding of an intent to conceal; *Bound Brook Assn.* v. *Norwalk*, 198 Conn. 660, 669, 504 A.2d 1047, cert. denied, 479 U.S. 819, 107 S. Ct. 81, 93 L. Ed. 2d 36 (1986); and where expressed concerns would direct a plaintiff of ordinary prudence to make reasonable efforts to discover information leading to the discovery of a cause of action. *Mountaindale Condominium Assn., Inc.* v. *Zappone*, 59 Conn. App. 311, 322, 327, 757 A.2d 608, cert. denied, 254 Conn. 947, 762 A.2d 903 (2000).

For all of the foregoing reasons, we conclude that, under the circumstances of this case, the trial court properly concluded that the three year statute of limitations was not tolled by the doctrine of fraudulent concealment.

The judgment is affirmed.

In this opinion the other judges concurred.

CAROLYNE Y. HYNES *v.* SHARON M. JONES
(AC 38630)

Sheldon, Beach and Flynn, Js.*

Syllabus

The plaintiff, the administratrix of her decedent husband's estate, appealed to this court from the judgment of the Superior Court after it dismissed her appeal from the decree of the Norwalk-Wilton Probate Court entered in connection with a payment made to her for the benefit of the decedent's and the plaintiff's minor child through a federally sponsored victim compensation fund. The decedent had died intestate in the September 11, 2001 terrorist attack in New York. At the time of the decedent's death, he and the plaintiff resided in Norwalk. After the plaintiff received payments from the fund for herself and for the child, she and the child relocated to a town in a different probate district but did not seek to

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

transfer the probate proceedings there from the Norwalk-Wilton Probate Court. The Probate Court thereafter appointed the plaintiff as the guardian of the child's estate but did not allow her to use any of the child's award from the compensation fund for the child's support. The plaintiff did not appeal from that ruling but subsequently moved to dismiss the guardianship proceedings on the ground that the court lacked subject matter jurisdiction pursuant to statute (§ 45a-629 [a]) because the child no longer resided in that probate district when the proceedings began and because the child's award was paid to the plaintiff in the plaintiff's capacity as a representative payee. The Probate Court denied the plaintiff's motion to dismiss, concluding that it had subject matter jurisdiction over the guardianship proceedings and because the award from the compensation fund was intended to be part of the decedent's estate. The court further concluded that it had jurisdiction over the decedent's estate because the decedent was domiciled in Norwalk at the time of his death and the child's share of the award was part of that estate. In dismissing the plaintiff's appeal to the Superior Court, that court determined that, under § 45a-629 (a), the Norwalk-Wilton Probate Court had jurisdiction to appoint the plaintiff as the guardian of the child's estate because the child was a resident of Norwalk when she first became entitled to the award. The court further determined that the child's relocation to another probate district did not deprive the Norwalk-Wilton Probate Court of continuing jurisdiction over the child's estate because the plaintiff could have sought to transfer the proceedings but did not do so. The court also concluded that payment of the award to the plaintiff in her capacity as a representative payee did not exempt the award from the statutory protection afforded to the property of minors. On appeal to this court, the plaintiff claimed, inter alia, that the Superior Court incorrectly concluded that the Probate Court had jurisdiction under § 45a-629 (a) to appoint a guardian of the child's estate. *Held*:

1. The Superior Court correctly concluded that the Probate Court had jurisdiction to appoint a guardian of the child's estate pursuant to § 45a-629 (a) as part of its jurisdiction over the administration of the decedent's intestate estate; the statutes (§§ 45a-303 [a] [1], 45a-98 [a] [1] and [3], and 45a-132 [a] [1]) governing Probate Court jurisdiction and the authority of the Probate Court to determine property rights and to appoint guardians for minors who may have an interest in the probate proceedings provided the Probate Court with jurisdiction to appoint a guardian to protect the child's interests, the distribution of money from the compensation fund to the child, who was a beneficiary thereunder, justified the Probate Court's decision to appoint a guardian of the child's estate, and, because the decedent's estate was in the Norwalk-Wilton probate district, it had jurisdiction over that estate and an obligation to see that what was awarded to the child as the beneficiary was rightfully distributed to her under the laws of intestacy.

2. The plaintiff could not prevail on her claim that, because only a probate court in the district in which the minor resides has jurisdiction to appoint a guardian for that minor's estate, and because the child did not reside in the Norwalk-Wilton probate district, the Norwalk-Wilton Probate Court lacked jurisdiction to appoint a guardian under § 45a-629: the award from the compensation fund for the benefit of the child was a form of property to which the child was entitled, the child was a resident of the Norwalk-Wilton probate district when her entitlement to that award occurred, the plaintiff's duty to apply for a guardianship became mandatory at the time of that occurrence, and the Probate Court in which the guardian was originally appointed retains jurisdiction to protect a minor child's interests unless and until the guardian files a motion to transfer the proceedings to another district and the transferring court finds that it is in the best interest of the child and orders the transfer; moreover, the award from the compensation fund to the plaintiff in her capacity as a representative payee did not permit her to bypass the statutory protections afforded to the child's property, and there was no indication that those protections were preempted by federal law.

Argued March 6—officially released July 25, 2017

Procedural History

Appeal from the order of the Probate Court for the district of Norwalk-Wilton denying the plaintiff's motion to dismiss the application to appoint a guardian for the estate of her minor child, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. David R. Tobin*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

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

Opinion

FLYNN, J. Following the two devastating terrorist attacks on Washington and New York and a third thwarted by air passengers who died over Pennsylvania on September 11, 2001, Congress enacted the September 11th Victim Compensation Fund of 2001 (fund) as part of the Air Transportation Safety and System Stabilization Act[1] to indemnify the surviving families of those

[1] See 49 U.S.C. § 40101.

who died or were injured in the air and on the ground that day. The appeal before us from a judgment of the Superior Court dismissing the appeal of the plaintiff, Carolyne Y. Hynes, from a decree of the Norwalk Probate Court,[2] arises out of a separate payment of $1,271,940.12 made from the fund to the plaintiff as "representative payee" for the benefit of her daughter, Olivia T. Hynes. Olivia is a minor child, who was born after her father, Thomas Hynes, a business executive, was killed in the attack on the World Trade Center in New York. At issue is whether the Probate Court for the district of Norwalk had jurisdiction to appoint the plaintiff as guardian of Olivia's estate and to appoint the defendant, Sharon M. Jones, as Olivia's successor guardian ad litem under the authority granted to the Probate Court under the General Statutes, despite the fact that Olivia ceased to reside in the District of Norwalk at the time of the appointment. A second issue is whether the Probate Court lacked jurisdiction to institute the guardianship proceedings because the $1,271,940.12 was later paid directly to Olivia's mother from the fund as "representative payee." We first conclude that because Thomas Hynes was domiciled in Norwalk at the time he died intestate, our General Statutes gave the Norwalk Probate Court authority to supervise the settlement of his estate, determine its distribution, and protect the interests of his minor heir. Pursuant to General Statutes §§ 45a-303 (a),[3] 45a-98,[4]

[2] The Norwalk Probate Court has long served the towns of Norwalk and Wilton. In 2011, the name of that court was changed to the Norwalk-Wilton Probate Court. For purposes of clarity, we refer to that court as the Norwalk Probate Court throughout this opinion.

[3] General Statutes § 45a-303 (a) (1) provides: "When any person domiciled in this state dies intestate, the court of probate in the district in which the deceased was domiciled at his death shall have jurisdiction to grant letters of administration."

[4] General Statutes § 45a-98 (a) provides in relevant part: "Probate Courts in their respective districts shall have the power to (1) grant administration of intestate estates of persons who have died domiciled in their districts . . . (3) except as provided in section 45a-98a or as limited by an applicable

and 45a-438,[5] there were grounds to justify the Probate Court's exercise of jurisdiction as part of its supervision of the administration and distribution of Thomas Hynes' estate, and the Probate Court's and Superior Court's denials of the plaintiff's motion to dismiss. We further conclude that General Statutes §§ 45a-629 (a),[6] 45a-437,[7] and 45a-631[8] authorized appointment of a guardian because Olivia was entitled to share one half of any award of damages resulting from her father's death, and Olivia was domiciled in Norwalk at the time she became entitled to an award under the fund. Finally, we conclude that the plaintiff's later decision to receive Olivia's award in 2004 as a representative payee did not serve to exempt the $1,271,940.12 that the fund paid on behalf of Olivia from Connecticut's statutory protections for minors' property. We therefore conclude that

statute of limitations, determine title or rights of possession and use in and to any real, tangible or intangible property that constitutes, or may constitute, all or part of . . . any decedent's estate, or any estate under control of a guardian or conservator, which . . . estate is otherwise subject to the jurisdiction of the Probate Court, including the rights and obligations of any beneficiary of the . . . estate . . . ."

[5] General Statutes § 45a-438 (a) provides in relevant part: "After distribution has been made of the intestate estate to the surviving spouse . . . the residue of the real and personal estate shall be distributed equally, according to its value at the time of distribution, among the children, including children born after the death of the decedent . . . ."

[6] General Statutes § 45a-629 (a) provides in relevant part: "When a minor is entitled to property, the court of probate for the district in which the minor resides may assign a time and place for a hearing on the appointment of a guardian of the estate of the minor. . . ."

[7] General Statutes § 45a-437 (a) provides in relevant part: "If there is no will . . . the portion of the intestate estate of the decedent . . . which the surviving spouse shall take is . . . (3) If there are surviving issue of the decedent all of whom are also issue of the surviving spouse, the first one hundred thousand dollars plus one-half of the balance of the intestate estate absolutely . . . ."

[8] General Statutes § 45a-631 provides in relevant part: "(a) A parent of a minor, guardian of the person of a minor or spouse of a minor shall not receive or use any property belonging to the minor in an amount exceeding ten thousand dollars in value unless appointed guardian of the estate of the minor . . . ."

the Norwalk Probate Court had such jurisdiction and affirm the judgment of the Superior Court acting as the Probate Court on appeal from probate.

The following procedural history, factual findings from the Norwalk Probate Court proceeding, findings made by the Superior Court, and undisputed facts inform our review. The plaintiff's husband, Thomas Hynes, was killed in the September 11, 2001 terrorist attacks on the World Trade Center in New York. At the time of Thomas' death, he and the plaintiff resided together in Norwalk, a city located in the probate district of Norwalk. Their daughter, Olivia, was born a few months later on March 28, 2002. Thomas died intestate. On April 24, 2003, the plaintiff filed an application with the Probate Court for the District of Norwalk to be appointed administrator of Thomas' estate. Obtaining appointment of an administrator of Thomas' estate was a prerequisite to filing a claim with the fund. See 49 U.S.C. § 405 (c) (2) (C). The Probate Court granted the plaintiff's application, and appointed Attorney Brock T. Dubin as guardian ad litem for Olivia, who served without fee until he resigned in September, 2008. After the plaintiff was appointed administrator of Thomas' estate, she filed a claim for compensation with the fund. By letter dated June 3, 2004, Special Master Kenneth R. Feinberg[9] stated that the plaintiff's claim had been approved for a total award of $2,425,321.70, with the plaintiff as the "beneficiary" of $1,153,381.58, and Olivia as the "beneficiary" of the remaining $1,271,940.12. Feinberg's letter stated that Olivia's share of the award would be paid to the plaintiff as Olivia's "representative payee," and indicated to the plaintiff that, as representative payee, "you are obliged—like a trustee—to ensure

[9] The fund required the United States attorney general to appoint a special master to promulgate regulations to implement the provisions of the fund; see 49 U.S.C. § 404; and to determine claimants' eligibility for compensation under the fund. See 49 U.S.C. § 405. Kenneth Feinberg was appointed the special master.

that funds are used in the minor['s] best interest. You assume full responsibility for ensuring that the award[s] paid to you as representative payee are used for the minor['s] current needs or, if not currently needed, are saved for his or her future needs. This includes a duty to prudently invest funds, maintain separate accounts for [Olivia], and maintain complete records. In addition, upon reaching [eighteen] years of age . . . [Olivia is] entitled to receive the award paid to you as representative payee. Thus, at such time, you must distribute the award to [Olivia] unless [she] otherwise willingly consent[s]." Olivia's funds were wired to the plaintiff's personal bank account.

In April, 2005, the plaintiff and Olivia relocated to Weston, a town within the probate district of Westport. The plaintiff did not seek to transfer the probate proceedings from the Norwalk Probate Court. In its decree denying the plaintiff's motion to dismiss the guardianship proceedings, the Probate Court found that, in late 2006, the plaintiff filed a final accounting with the Norwalk Probate Court showing the fund award, but that when it came to distributing to Olivia her share of the proceeds, the plaintiff "balked at the statutory requirement of the guardian of the estate of a minor or the suggestion that the fund proceeds go into a trust for the benefit of the minor." The Probate Court further found that the plaintiff "remain[ed] steadfast in her contention that the money awarded to [Olivia] was to be used at the [plaintiff's] discretion, contending that it was given to her individually and/or as representative payee for [Olivia], but in either event, subject neither to the jurisdiction of this court nor the statutes of this state." The Probate Court further found that, "[a]cting in accordance with [this] belief, [the plaintiff] placed all of the proceeds from the fund in one account, in direct violation of the federal mandate, which calls for

representative payees to 'prudently invest funds, maintain separate accounts, and maintain complete records.' " The Probate Court further found that "[f]rom this co-mingled account, the [plaintiff] withdrew money to purchase a home for approximately $884,000 and spent an additional $150,000 in renovations."

On July 31, 2008, the Norwalk Probate Court appointed the defendant as Olivia's successor guardian ad litem in the estate administration proceedings. The Probate Court found that, in 2009, "at the court's insistence, the [plaintiff] placed the funds intended for [Olivia] in a separate account, after which the court was able to observe that approximately $385,000 of [Olivia's] funds had been expended in her first seven years. Prudently, the court ordered the [plaintiff] to account." While the Probate Court was able to make certain findings as to where some of the monies went, it went on to find that "[a] more detailed analysis of how this $385,000 was spent remains doubtful, as the [plaintiff] refused, neglected or otherwise failed to keep or produce any accounting records. Nevertheless, the sums before us establish that not only had the money been co-mingled, but that it was being spent at an alarming rate and for purposes most of which are the [plaintiff's] obligations. Further aggravating the issue were the thousands of dollars apparently being lost on exorbitant management fees and market losses. These factors require the court to act before the remaining principal quickly disappears."

On June 9, 2010, the plaintiff filed an application to be appointed guardian of the estate for Olivia, which the Norwalk Probate Court granted. After granting the application, however, the Probate Court refused to allow the plaintiff to utilize Olivia's funds to pay for certain expenses. The Probate Court reasoned that, while the expenses benefited Olivia, her assets should not be used for her support because the plaintiff was

already legally obligated to support her. The plaintiff took issue with the Probate Court's reasoning that none of Olivia's award from the fund could be used for her support, but did not appeal from that decree.

Although General Statutes § 45a-186 (a) permits appeal to Superior Court from any "order, denial or decree" of a court of probate, the plaintiff took no appeal from that ruling of the Probate Court, which might have resolved the issue of whether the fund award to Olivia could have properly been used for the child's support. However, even if it were determined that it could be so utilized, on appeal it might not have resolved the issue of whether the Probate Court had jurisdiction to monitor these expenditures to ensure that the child's award was not used for expenditures that misused or misspent the funds. The plaintiff's position was that Olivia's award from the fund specifically provided that the award could be used for the child's current needs and that she did not need to deplete her personal funds to satisfy the current needs of her child, and that the Probate Court had no continuing jurisdiction to require her to account for how the funds were expended.

Instead, on August 21, 2013, the plaintiff moved to dismiss the guardianship proceedings, asserting that the Norwalk Probate Court lacked subject matter jurisdiction over the guardianship proceedings under § 45a-629 (a) because Olivia no longer resided in that district when the proceedings began. Alternatively, the plaintiff argued that no Connecticut Probate Court had jurisdiction to institute guardianship proceedings because Olivia's share of the fund award was paid to the plaintiff as Olivia's "representative payee," placing the funds "beyond our state's control or supervision." It is clear from the record provided to us that the plaintiff moved to dismiss her own appointment as guardian of Olivia's estate. However, if some of the plaintiff's contentions were accepted, it is also clear that the Norwalk Probate

Court also would lack authority to appoint a guardian ad litem.

The Probate Court found the issues at hand to be whether (1) the court "lacks subject matter jurisdiction over the guardianship proceeding under . . . General Statutes § 45a-629 because [Olivia] no longer resides in the district," and (2) whether "a guardianship is not appropriate in any Connecticut Probate Court because the payment from the fund was to the [plaintiff] as the [Olivia's] 'representative payee,' placing it beyond our state's control or supervision."

In the Probate Court proceeding, the defendant objected to the motion to dismiss, argued that the court has jurisdiction, and that Connecticut statutes such as § 45a-629 are directed to venue rather than jurisdiction. She further argued that nothing in the federal statute creating the fund was intended to preempt state law.

The Norwalk Probate Court denied the plaintiff's motion to dismiss in a decree dated June 3, 2014. Rather than addressing the plaintiff's statutory argument regarding § 45a-629 (a), the Norwalk Probate Court determined that it had subject matter jurisdiction over the guardianship proceedings because an award by the fund was intended to be a substitute for a wrongful death claim and was therefore part of Thomas' estate. The Norwalk Probate Court reasoned that it had jurisdiction over Thomas' estate because Thomas was domiciled in Norwalk at the time of his death on September 11, 2001, and Olivia's share in the award was part of that estate. Therefore, noting that General Statutes § 45a-631 provides that minors who receive property in excess of $10,000 "must have a guardian of the estate appointed," the Norwalk Probate Court concluded that it had jurisdiction over the guardianship proceedings.

The plaintiff then took an appeal to the Superior Court. Because no transcription record was made in

the Probate Court proceedings, the matter was heard de novo by the court, *Hon. David R. Tobin*, judge trial referee, on September 24, 2015, pursuant to § 45a-186 (a). Although the defendant guardian ad litem personally appeared in the Superior Court proceeding, her counsel did not, and the plaintiff's counsel represented to the court that neither the defendant nor her counsel now objected to dismissal for lack of jurisdiction because of what the plaintiff's counsel termed a "private agreement" made to set up a trust for Olivia and pay the guardian's and her counsel's fees.

The Superior Court dismissed the appeal in a memorandum of decision filed November 6, 2015, albeit on different grounds from that of the Norwalk Probate Court. Construing the plain text of § 45a-629 (a), along with other relevant statutes, the court determined that jurisdiction to appoint a guardian of the estate of a minor is conferred upon the Probate Court for the district in which the minor resides at the time the minor first becomes entitled to property, rather than at the time the application for guardianship is filed. Thus, the Superior Court concluded that the Norwalk Probate Court had jurisdiction because Olivia was a resident of Norwalk when she first became entitled to the award in June, 2004. Additionally, the Superior Court held that Olivia's subsequent move to Weston did not deprive the Norwalk Probate Court of continuing jurisdiction over her estate because the plaintiff could have moved to transfer the proceedings to the Westport Probate District pursuant to General Statutes § 45a-599, but declined to do so. Finally, the court ruled that the plaintiff's election to have Special Master Feinberg make payment to the plaintiff directly as representative payee did not serve to exempt the award from the statutory protection afforded to the property of minors. This appeal followed.

On appeal, the plaintiff claims that the Superior Court's conclusion that the Norwalk Probate Court had jurisdiction to appoint a guardian of the estate for Olivia was based upon an improper construction of § 45a-629 (a). Specifically, the plaintiff argues that, under the plain text of § 45a-629 (a), jurisdiction is conferred upon the Probate Court for the district in which the minor resides at the time the application for guardianship is filed, not at the time the minor becomes entitled to property. Alternatively, the plaintiff argues that Olivia was not "entitled" to the funds when she resided in Norwalk because she could not access the funds until she reached eighteen years of age. The plaintiff's brief does not address the reasoning underlying the Probate Court's decision.

The defendant filed no brief in this court and did not appear, either by herself or through counsel, for oral argument. On March 8, 2017, this court issued the following order: "The plaintiff's appeal to the Appellate Court was heard on March 6, 2017. The defendant Sharon Jones and her counsel Attorney Grant P. Haskell have appeared in this appeal pursuant to Practice Book § 62-8. The defendant did not file a brief or participate in oral argument. The defendant is hereby ordered, sua sponte, to file in writing with the clerk of the Appellate Court, a concise statement of her position regarding the pending appeal by no later than March 23, 2017. The statement should indicate whether she opposes the plaintiff's position, concurs with it, or takes no position on behalf of her ward and herself." On March 26, 2017, the defendant's counsel filed the following response with the clerk of the Appellate Court: "In response to the order of the [c]ourt of March 8, 2017, in the above-referenced appeal, I write as counsel to defendant Jones to inform the [c]ourt that defendant and her ward take no position in this appeal."

At the outset, we note that this appeal raises two claims of error. The first challenges the jurisdiction of the Norwalk Probate Court and the Superior Court hearing the case de novo. The second challenges the court's award of the defendant guardian ad litem's fees and the fees she incurred for legal counsel. The plaintiff's brief does not address its appeal of the fees awarded and we therefore deem that challenge to the fees awarded abandoned. See *Lareau* v. *Burrows*, 90 Conn. App. 779, 780, 881 A.2d 411 (2005).

As explained subsequently in this opinion, we disagree that the Norwalk Probate Court lacked subject matter jurisdiction to appoint a guardian of Olivia's estate to protect her interests. First, we agree with the Norwalk Probate Court that an award under the fund is a substitute for a wrongful death claim and, thus, was part of Thomas' estate. Because Thomas died while domiciled in Norwalk, the Norwalk Probate Court had jurisdiction to appoint a guardian ad litem to protect Olivia's interests in Thomas' estate, including the award from the fund. Moreover, we agree with the Superior Court and reject the statutory argument advanced by the plaintiff. We conclude that § 45a-629 (a) conferred jurisdiction on the Norwalk Probate Court because Olivia became entitled to property while she was domiciled in that district.

I

We begin by addressing the Probate Court's reasoning that because Thomas died while domiciled in Norwalk, the Norwalk Probate Court had jurisdiction to appoint a guardian of Olivia's estate as part of its jurisdiction over the administration of Thomas' intestate estate.

We first set forth our standard of review. "An appeal from a Probate Court to the Superior Court is not an ordinary civil action. . . . When entertaining an appeal from an order or decree of a Probate Court, the Superior

Court takes the place of and sits as the court of probate. . . . In ruling on a probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or common law jurisdiction, but of a Probate Court." (Internal quotation marks omitted.) *Silverstein* v. *Laschever*, 113 Conn. App. 404, 409, 970 A.2d 123 (2009). Where, as in the present case, no record was made of the probate proceedings, the Superior Court was required to undertake a de novo review of the Probate Court's decision. See *Andrews* v. *Gorby*, 237 Conn. 12, 15–16, 675 A.2d 449 (1996); General Statutes § 45a-186 (a).

Although our case law is replete with citations as to the review standard of the Superior Court sitting de novo on an appeal from probate, we find no exposition of the standard to be employed by the appellate tribunal hearing an appeal from probate as opposed to any other case decided by the Superior Court. Accordingly we treat our scope of review as we would with any other Superior Court proceeding. Where the court has made factual findings, we defer to it unless those findings are clearly erroneous. However, in matters of law such as the jurisdictional challenge made here, our review is plenary. See *In re Michaela Lee R.*, 253 Conn. 570, 583, 756 A.2d 214 (2000).

Because our review is plenary, we look to whether the General Assembly conferred authority on the Probate Court to appoint the plaintiff as guardian of the estate of Olivia and to appoint the defendant as guardian ad litem. Although the plaintiff has not briefed the question of the court's authority arising out of its clear statutory charge to preside over Thomas Hynes' estate settlement and duty to protect minor children entitled under the laws of intestacy to share in the proceeds of his estate, these statutes underpinned the Norwalk Probate Court's denial of the plaintiff's motion to dismiss. They

are independent grounds supporting the Superior Court's conclusion that jurisdiction did exist.

We first observe that probate courts "are strictly statutory tribunals. . . . As such, they have only such powers as are either expressly or impliedly conferred upon them by statute. . . . Ordinarily, therefore, whether a Probate Court has jurisdiction to enter a given order depends upon the interpretation of a statute." (Citations omitted.) *Potter* v. *Alcorn*, 140 Conn. 96, 100, 99 A.2d 97 (1953).

Probate courts in this state are provided with broad authority over the administration of intestate estates, including the authority to appoint guardians of the estate to protect minors' interests. Section 45a-303 (a) (1) provides that "[w]hen any person domiciled in this state dies intestate, the court of probate in the district in which the deceased was domiciled at his death shall have jurisdiction to grant letters of administration." Section 45a-98 sets forth the general jurisdictional powers of the Probate Court. Section 45a-98 (a) (1) gives the court jurisdictional power to grant administration of intestate estates of those who die domiciled in their districts. Section 45a-98 (a) (3) gives the Probate Court power to "determine title or rights of possession and use in and to any real or tangible, or intangible property that constitutes, or may constitute, all or part of . . . any decedent's estate, or any estate under control of a guardian or conservator, which . . . estate is otherwise subject to the jurisdiction of the Probate Court, including the rights and obligations of any beneficiary of the . . . estate . . . ." General Statutes § 45a-132 (a) (1) provides that, subject to exceptions that are not relevant here, "in any proceeding before a court of probate . . . the judge . . . may appoint a guardian ad litem for any minor . . . if it appears to the judge . . . that one or more persons . . . have or may have

an interest in the proceedings, and that one or more of them are minors . . . at the time of the proceeding."

These statutes provided the Norwalk Probate Court with jurisdiction to appoint a guardian of the estate to protect Olivia's interests. Under the laws of intestacy where there is both a surviving spouse and a surviving child of that marriage, § 45a-437 (3) provides that the surviving spouse shall take the first $100,000 plus one half of the intestate estate absolutely. Section 45a-438 (a) provides that, in that same intestate situation, after distribution to the surviving spouse, the residue of the real and personal estate shall be distributed equally among the children of the deceased. Olivia was Thomas' only child. Section 45a-631 (a) provides in relevant part that "[a] parent of a minor, guardian of the person of a minor . . . shall not receive or use any property belonging to the minor in an amount exceeding ten thousand dollars in value unless appointed guardian of the estate of a minor . . . ." The distribution of $1,271,940.12 from the fund to Olivia, whom Special Master Feinberg termed a "beneficiary" in his letter of distribution, justified the Probate Court's decision to appoint a guardian of the estate for Olivia. The Probate Court found that when the plaintiff filed her first accounting, on September 14, 2006, she sought to distribute the entire award, plus other sums, "exclusively to herself alone, with nothing to be distributed to the minor," although $1,271,940.12 of that sum was separately awarded to her daughter as "beneficiary" under the fund. The Probate Court found that that distribution scheme would result in a distribution "contrary to law" that the court could not allow. That accounting was not approved, was withdrawn, and resulted in an amended inventory and accounting indicating that the minor was awarded $1,271,940.12 from the fund, which was approved. We agree with the conclusion of the Probate Court that Thomas' estate was in the Norwalk probate

district and that the Norwalk Probate Court had jurisdiction over that estate and an obligation to see that what was awarded to Olivia as beneficiary, a minor child who was a statutorily protected person, was rightfully distributed to her as beneficiary under the laws of intestacy. Accordingly, the Norwalk Probate Court had subject matter jurisdiction over the guardianship proceedings.

II

Although our analysis in part I of this opinion resolves the issue of whether the Norwalk Probate Court had jurisdiction, we next address the plaintiff's claim that, under § 45a-629, only the Probate Court for the district in which the minor resides may appoint a guardian of the minor's estate. The plaintiff contends that Olivia did not reside within the Norwalk probate district at the time the guardianship was created by the Norwalk Probate Court but instead resided in Weston in the Westport probate district. She further contends that because probate courts are courts of limited jurisdiction rather than general jurisdiction, a Probate Court has no authority under § 45a-629 to appoint a guardian for a minor who does not reside in that district. Section 45a-629 (a) provides in relevant part: "When a minor is entitled to property, the court of probate for the district in which the minor resides may assign a time and place for a hearing on the appointment of a guardian of the estate of the minor . . . ."

In its memorandum of decision, the Superior Court held that "[w]hen Olivia became entitled to her award from the [fund], she resided in Norwalk, and the court accordingly finds that the Probate Court in Norwalk had jurisdiction over [the plaintiff's] application to be appointed Olivia's guardian, and in the absence of an application to transfer the guardianship to the probate district in which Olivia now resides, retains jurisdiction

over the guardianship." Our assessment of the propriety of this ruling implicates a question of statutory construction over which our review is plenary. See *In re Bachand*, 306 Conn. 37, 41–42, 49 A.3d 166 (2012).

The question hinges in part on whether the award to Olivia constituted property and if so, when Olivia became "entitled to property." Section 45a-629 (a) provides in relevant part: "When a minor is entitled to property, the court of probate for the district in which the minor resides may assign a time and place for a hearing on the appointment of a guardian of the estate of the minor . . . ." As a child of Thomas Hynes, who died intestate, Olivia was an heir at law of Thomas.

The court decided that the award to Olivia is property. Citing *Lopiano* v. *Lopiano*, 247 Conn. 356, 364–65, 752 A.2d 1000 (1998), the Superior Court adopted the broad definition of property found in Black's Law Dictionary (6th Ed. 1990). In *Lopiano*, our Supreme Court held that a personal injury award in favor of one spouse was "property" subject to equitable distribution in a divorce case pursuant to General Statutes § 46b-81. Id., 362, 371. Because neither § 46b-81 nor any other closely related statute defines property or identifies the types of property subject to equitable distribution, the court looked to the "common understanding expressed in the law and in dictionaries." Id., 364. The *Lopiano* court then noted that Black's Law Dictionary defines property as the term "commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate." (Internal quotation marks omitted.) Id., 365. The *Lopiano* court then noted that General Statutes § 52-278a (e), the attachment statute, defines property to mean "any present or future interest in real or personal property . . . ." (Internal quotation marks omitted.) Id. Both

§§ 45a-629 (a) and 45a-631 are at issue here. The first requires appointment of a guardian of the estate of a minor "when a minor is entitled to property." The second provides that a parent of a minor "shall not receive or use any property belonging to the minor in an amount exceeding ten thousand dollars in value unless appointed guardian of the estate of the minor . . . ." As in *Lopiano*, neither of these two statutes defines property, and therefore use of the broad dictionary definition is appropriate here. Under that broad definition, the Superior Court properly determined that the $1,271,940.12 payment made from the fund for the benefit of Olivia was property.

We next analyze whether the award for Olivia's loss was a form of property to which she was "entitled," thereby requiring appointment of a guardian of her estate pursuant to § 45a-629. We conclude, as did the court, that it was property to which she was entitled.

When Thomas Hynes died intestate as a result of airliners being crashed into the twin towers of the World Trade Center, he possessed[10] a right to bring a wrongful death action against the airlines operating those airplanes, which could be commenced by his administrator, as he died without a will. Under § 45a-437, which governs intestacy, since Thomas left the plaintiff as surviving spouse and Olivia, who was the child of Thomas and the plaintiff, born after his untimely death, Olivia was entitled to one half of the intestate estate after the first $100,000 was distributed to her mother, the plaintiff, Thomas' surviving spouse. Olivia's entitlement to that portion vested at the time of her birth.

[10] "[T]he statutory right of action [for wrongful death] belongs, in effect, to the decedent, and to the decedent alone, and damages are recoverable for the death . . . as for one of the consequences of the wrong inflicted upon the decedent." (Internal quotation marks omitted.) *Foran* v. *Carangelo*, 153 Conn. 356, 360, 216 A.2d 638 (1966).

The Superior Court found that, at the time of that entitlement, she resided in Norwalk. That entitlement included her right to share proceeds of any wrongful death action against an airline or that right's statutory alternative, namely, the federally sponsored victim compensation fund. The statutory right of action under General Statutes § 52-555 for wrongful death belongs, in effect, to the decedent, and damages are recoverable for the death as one of the consequences of the wrong inflicted on the decedent. The cause of action is a continuance of a right of action that the decedent could have asserted if he had lived and to which the death may be added as an element of damages. *Foran* v. *Carangelo*, 153 Conn. 356, 360, 216 A.2d 638 (1966). The right of action comes to a personal representative by survival. *Floyd* v. *Fruit Industries, Inc.*, 144 Conn. 659, 668, 136 A.2d 918 (1957). The creation of a special victim's fund by the United States government, funded by taxpayers, provides an alternative to bringing such a wrongful death action.[11] In the case of an individual killed in the attacks, the fund permits only their personal representative to file a claim on his behalf. 49 U.S.C. § 405 (c) (2) (C). In Connecticut, that personal representative is an executor or administrator of the estate of the decedent. The plaintiff applied to the fund after being duly appointed as administrator of her late husband's estate on her application to the Norwalk Probate Court. That the entitlement had not ripened into a fixed amount at the time of Olivia's entitlement did not diminish her right. As our Supreme Court noted in *Lopiano*, in viewing how other statutes governing distinct procedures defined property, the attachment statute, § 52-278a (e), defines property to mean "any present or future interest in . . . personal property . . . ." (Internal quotation

[11] Individuals eligible for compensation under the fund are entitled to an award only if they waive their right to file a civil action against the airlines or other defendants. 49 U.S.C. § 405 (c) (3) (B).

marks omitted.) *Lopiano* v. *Lopiano*, supra, 247 Conn. 365. Olivia was entitled to share in the proceeds of any wrongful death action arising out of her father's death, and her right could be asserted on her behalf when she was born, whether that right was a wrongful death action or a claim made to the fund provided by Congress.

We therefore reject the plaintiff's contention that the requirement of § 45a-629 (a) that residence within the probate district was a precondition to appointment of a guardian did not relate to her entitlement to her property right in the proceeds of a wrongful death action or its alternative, an application to the fund, and conclude that the Superior Court properly determined that she was a resident of Norwalk when that entitlement to property occurred.

The Superior Court properly determined that the plaintiff's duty to apply for a guardianship became mandatory "when . . . the minor child first becomes [en]titled to property." (Internal quotation marks omitted.) The court held that the plaintiff's "obligation to make application to the Probate Court began when Olivia became entitled to her award in June, 2004, while still residing in Norwalk, and continued until she filed her application on June 9, 2010, six years later."

The only purpose for the appointment of a guardian pursuant to § 45a-629 (a) is for protection of the property interests of a minor. That duty is triggered at the point when a minor acquires a property right to be protected. As an heir at law, the ward in this case acquired the right to bring a wrongful death action as soon as she was born after her father's death. She became entitled under the laws of intestacy, more particularly, to share in one half of the proceeds of any such wrongful death action brought against the airlines. That legal standing was also a necessary precondition

to filing a claim with the victim compensation fund. The statutory purpose of the fund is "to provide full compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001, or the rescue and recovery efforts during the immediate aftermath of such crashes." 49 U.S.C. § 40101.

The plaintiff further argues that, even if the Norwalk Probate Court originally had jurisdiction, it could be divested of that jurisdiction once Olivia moved into a town located in the probate district of Westport. We are not persuaded. The plaintiff cites no authority for that proposition. To the contrary, § 45a-599 provides in relevant part: "When any minor for whom a guardian has been appointed becomes a resident of any town in the state in a probate district other than the one in which a guardian was appointed, such court in that district may, upon motion of any person deemed by the court to have sufficient interest in the welfare of the respondent . . . transfer the file to the probate district in which the minor under guardianship resides at the time of the application, provided the transfer is in the best interest of the minor. . . . When the transfer is made, the court of probate in which the minor under guardianship resides at the time of transfer shall thereupon assume jurisdiction over the guardianship and all further accounts shall be filed with such court." That section leads us to conclude that our statutory scheme is not one in which a vacuum is created every time a minor child subject to a guardianship of her estate moves to a new district. Rather, § 45a-599 recognizes that, unless and until the guardian, or other person the court deems to have a sufficient interest in the welfare of the child, files a motion to transfer the proceedings to another district, and the transferring Probate Court finds that it is in the best interest of the minor and

orders the transfer, the probate district in which the guardianship was originally appointed retains jurisdiction to protect that child's interests. The plaintiff never moved to transfer the guardianship proceedings. As the Superior Court found, it was up to the plaintiff to move to change the venue to Westport for future proceedings if she believed that was appropriate. The court would then decide if the venue change was in the minor's best interest. The plaintiff was in the best position to know when Olivia changed her residence from Norwalk.

In interpreting statutes, we presume that the legislature did not intend an absurd result. See *In re Bachand*, supra, 306 Conn. 42. The obvious purpose of the enactment of § 45a-629 is to give minor children protections in their property during their period of minority. Changes of address that have the consequence of moving from one probate district to another should not elutriate those protections by suspension of any Probate Court supervision after the move when no motion has been made and granted to change the venue to a court district serving the new address. The plaintiff argues that the court should in effect put a gloss on the statute to require that the residency in the district exist at the time of making the appointment, as is expressly required by General Statutes § 45a-648 (a),[12] regulating the appointment of involuntary representatives. However, as the Superior Court pointed out, § 45a-629 (a) contains no similar restriction tying the residency required to the date of application for the guardianship. The involuntary representation enabling statute has as its purpose the protection of the interests

[12] General Statutes § 45a-648 (a) provides: "An application for involuntary representation may be filed by any person alleging that a respondent is incapable of managing his or her affairs or incapable of caring for himself or herself and stating the reasons for the alleged incapability. The application shall be filed in the Probate Court in the district in which the respondent resides, is domiciled or is located *at the time of the filing of the application*." (Emphasis added.)

of persons who have reached their majority but are no longer competent to handle their own affairs. The legislature has enacted a specific requirement that the application for involuntary representation, for someone no longer capable, be made in the probate district in which he or she resides at the time of application. Section 45a-629 (a) concerns minors who are, in the eyes of the law, infants and lack legal status to conduct their own affairs at any time from birth through their entire period of minority, but have entitlement to an interest in property and whose entitlement triggers the need for protection of their property entitlement. Each statute is consistent in its rationale, and each statute requires that the operative petition concerning a ward be made in the district in which he or she resides when the ward's rights first require the ward's protection. In the case of a person deemed incapable and needing the law's protection, § 45a-648 (a) requires that the petition be filed in the probate district in which he or she resides at the time he or she is no longer capable of handling his or her affairs. In a case of the minor who lacks legal status to handle his or her own affairs, and needs the law's protection of his or her property, the law requires that a petition for guardianship be filed in the district in which the child lives at the time he or she becomes entitled to property.

We next address the plaintiff's second contention that, because Special Master Feinberg paid the $1,271,940.12 allocable to Olivia's claim to her as representative payee, no guardianship or Probate Court supervision of the minor's estate was necessary. We reject the plaintiff's contention that she could somehow bypass the statutory protections afforded to a minor's property in the state of Connecticut by electing to recover payment of Olivia's award as a representative payee. As the court stated in its memorandum of decision, there is no indication that federal law in any way

preempted Connecticut laws for the protection of minors.

Olivia was no less entitled to funds paid for her benefit simply because her mother elected to have them paid to her as representative payee. We reject the plaintiff's contention that payment of Olivia's award to the plaintiff as representative payee avoided creation of any entitlement or property interest in Olivia. The $1,271,940.12 paid to the plaintiff as a representative payee for Olivia was related to Olivia's loss of her father and the damages that she as his child suffered. This award was in lieu of pursuit of a wrongful death action in which the child under the laws of intestacy would have received one half of any resulting damages. To conclude that the child has no property interest or entitlement in and to this award, which merits statutory protection for minors, is without any authority under our law. This argument would, if accepted, defeat the whole purpose for our statutory protections of minors' property. That statutory purpose is to discourage misuse or misappropriation of such assets of minors, and to protect such assets so that they are safeguarded for that day when a minor child reaches her majority and is then entitled at age eighteen to use and direct expenditure and investment of such assets herself.[13] The plaintiff points to no provision of federal law or regulation that would preempt Connecticut's laws for the protection of minors. Special Master Feinberg's precatory language indicating the adoption of this representative payee language, designed to mollify those who wished

[13] We do not decide the substantial issue of whether the traditional Connecticut common-law rule that a parent must first use his or her own resources for the support of a child must bow to the purpose of the Victim Compensation Fund to provide full compensation for relatives of the deceased and Special Master Feinberg's letter to the plaintiff enclosing the award indicating intent to provide monies for the support of the minor and that monies not needed for that purpose were to be saved. These issues are not before the court in this appeal.

an alternative to avoid supervision of New York's surrogate's courts, not tied to federal statute or regulations officially adopted under its authority, cannot abrogate Connecticut law.[14]

The judgment is affirmed.

In this opinion the other judges concurred.

---

[14] See Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001, p. 60.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 175

Cadle Co. *v.* Ogalin 1
Summary judgment; action to enforce judgment; whether trial court improperly granted motion to strike second special defense alleging that action was duplicative, unfair, inequitable, vexatious and oppressive; whether allegation of nonpayment is sufficient reason for initiating action; whether defendant established claim that action was unfair and duplicative due to fact that active collection proceedings remained pending before trial court; whether trial court properly granted motion for summary judgment; whether trial court properly determined that special defense of laches was equitable defense and not applicable to action for monetary damages that was filed within relevant statute of limitations (§ 52-598); whether defendant alleged facts to create genuine issue of material fact as to whether he was prejudiced by any delay in enforcement; claim that trial court improperly awarded postjudgment interest; failure to specifically plead issue of res judicata as special defense; reviewability of claim raised for first time on appeal.

Hosein *v.* Edman 13
Negligence; personal injury; claim that trial court erred in discrediting and effectively precluding testimony of accident reconstructionist witness without affording plaintiff evidentiary hearing; whether it was within province of trial court, as trier of fact, to decide what weight, if any, to afford testimony of expert witness.

Hynes *v.* Jones 80
Probate; whether Superior Court properly dismissed appeal from Probate Court's denial of motion to dismiss guardianship proceedings; claim that Probate Court lacked subject matter jurisdiction pursuant to statute (§ 45a-629 [a]); claim that the Superior Court improperly determined that minor child was resident of probate district when she became entitled to share of award from victim compensation fund.

State *v.* Franklin 22
Murder; attempt to commit robbery in first degree; conspiracy to commit robbery in first degree; criminal possession of firearm; whether evidence was sufficient to support conviction of murder; whether evidence was sufficient to support conviction of criminal possession of firearm; claim that trial court abused discretion when it admitted certain uncharged misconduct evidence; claim that prosecutor's allegedly improper comments during closing argument to jury violated defendant's right to fair trial.

Village Mortgage Co. *v.* Veneziano 59
Injunction; alleged misappropriation of corporate funds through conversion, statutory theft, and embezzlement; statute of limitations; claim that trial court's factual findings were clearly erroneous; reviewability of claims challenging discovery rulings of trial court; credibility determinations; whether trial court improperly denied motion for discovery of information; claim that trial court improperly failed to conclude that plaintiff intentionally spoliated evidence or engaged in discovery misconduct; claim that trial court improperly concluded that three year statute of limitations (§ 52-577) was not tolled by doctrine of fraudulent concealment; claim that knowledge of corporation can only be imputed through board of directors.

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

CONNECTICUT COALITION FOR JUSTICE IN EDUCATION FUNDING, INC., et al. *v.* M. JODI RELL et al., SC 19768
Judicial District of Hartford

Education; Whether Plaintiffs Have Standing to Claim that Public School Students are Being Deprived of a Constitutionally Adequate Education; Whether Present System of Funding Public Education Denies Students Right to Receive Suitable and Substantially Equal Educational Opportunities. The plaintiffs are public school students and their parents and the Connecticut Coalition for Justice in Education Funding, Inc. They brought this action against state officials alleging that the state's present system of funding public education deprives public school students of their right to receive suitable and substantially equal educational opportunities. The defendants argued that the plaintiffs lacked standing to bring the action and that their claims were meritless. The trial court determined that, as public school students and their parents, the individual plaintiffs had standing to bring this lawsuit because they alleged that the students are being deprived of a constitutionally adequate education. The court also decided that the plaintiff nonprofit organization had standing to bring this action because its members had standing to sue in their own right. As to the merits of the plaintiffs' claims, the trial court determined that the plaintiffs failed to prove that the state has not provided minimally adequate educational resources as required by the state constitution. It also found that the plaintiffs failed to establish that state funding supporting educational opportunities is distributed inequitably or in violation of equal protection requirements. The court reasoned that the state provides greater funding to the neediest districts than it does to the wealthiest. It nevertheless determined that the state's education spending and policies were required to be "rationally, substantially, and verifiably" connected to the creation of educational opportunities and that the state failed to meet that standard. It found that the state is defaulting on its constitutional duty to provide adequate public school opportunities because it has no rational, substantial, and verifiable plan to distribute money for education aid and school construction. The trial court ordered the state to: (1) create a new educational aid formula; (2) define elementary and secondary education objectively; (3) create new standards for hiring, firing, evaluating, and paying education professionals; and (4) end arbitrary spending

on special education. Upon certification by the Chief Justice pursuant to General Statutes § 52-265a that a matter of substantial public interest is at issue, the defendants appeal, arguing that the plaintiffs lacked standing to bring this action and that the trial court should have rendered judgment in their favor once it determined that the plaintiffs failed to prove that the state's schools do not offer minimally adequate educational resources or that state funding is not equitably distributed. The plaintiffs cross appeal, claiming that the court improperly found that the state was providing a bare minimum of educational resources and that there was no equal protection violation.

GREGORY LEIGH *v.* DANIEL SCHWARTZ, M.D., et al., SC 19793
Judicial District of New Haven

Medical Malpractice; Whether Plaintiff Improperly Permitted to Present Res Ipsa Loquitor Theory Through Expert Testimony; Whether Trial Court Improperly Admitted Prior Patient Injury Evidence; Whether Court Erred in Denying Remittitur of $4.25 Million Verdict. The plaintiff brought this medical malpractice action claiming that the defendant surgeon negligently damaged his spinal accessory nerve while operating to excise a lymph node. The case was tried to a jury, which returned a $4.25 million verdict in favor of the plaintiff. The defendants appeal, claiming that the trial court wrongly upheld the verdict where the plaintiff's expert, a surgeon, had testified that he inferred from the very occurrence of the injury to the plaintiff's spinal accessory nerve that the defendant surgeon had been negligent. Res ipsa loquitor is an evidentiary principle that permits a jury to infer negligence when no direct evidence of negligence has been introduced, and the defendants claim that, through the plaintiff's expert witness, the plaintiff was wrongly permitted to present res ipsa loquitor evidence in this medical malpractice case. The defendants also claim that the trial court improperly permitted the plaintiff to introduce evidence that the defendant surgeon had once before damaged a patient's spinal accessory nerve while performing the same procedure on concluding that the defendant had opened the door to the evidence by arguing about the risk inherent in the procedure that had been performed on the plaintiff. The defendants argue that the court thereby violated the general rule, codified in the Connecticut Code of Evidence, that evidence of prior wrongs or acts is inadmissible to prove propensity. Finally, the defendants claim that the plaintiff was wrongly permitted to present evidence that the plaintiff's surgery had been unnecessary where the plaintiff had not raised that claim in

his complaint and that the trial court erred in denying the defendants' motion for remittitur of the $4.25 million dollar verdict.

MACDERMID INCORPORATED *v.* STEPHEN LEONETTI, SC 19817
Judicial District of Waterbury

Torts; Workers' Compensation; Whether Employer's Unjust Enrichment Claim Barred by Collateral Estoppel or Res Judicata or as Improper Attempt to Circumvent Requirement that Agreements in Workers' Compensation Cases be Approved by Commissioner. When MacDermid Incorporated (the employer) discharged Stephen Leonetti from his employment, it proposed a termination agreement in which it offered to pay him twenty-seven weeks of severance pay, amounting to $70,228.51, in exchange for his promise to release the employer from all claims—including workers' compensation claims—that he might have against it. Leonetti did not want to release a preexisting workers' compensation claim, and he asked that the provision be removed. The employer refused, and Leonetti requested that the workers' compensation commission convene a hearing to address the propriety of the employer's attempt to obtain a waiver of his workers' compensation claim. Prior to the hearing, Leonetti received a letter from the employer stating that the offer would be withdrawn if he did not sign the termination agreement within ten days. Leonetti thereafter signed the termination agreement and the employer gave him $70,228.51. The trial commissioner subsequently determined that the waiver of Leonetti's workers' compensation claim was unenforceable because it had not been approved by the workers' compensation commission as required by General Statutes § 31-296 and because it was not supported by adequate consideration. The commissioner's decision was affirmed by the Compensation Review Board and by the Supreme Court in *Leonetti* v. *MacDermid, Inc.*, 310 Conn. 195 (2013). The employer then brought this action seeking to recover the money it had paid Leonetti based on a theory of unjust enrichment, alleging that Leonetti signed the termination agreement and took the money despite having no intention of honoring the release of his workers' compensation claim. A jury found in favor of the employer and awarded it $70,228.51 in damages, and the trial court rendered judgment on the verdict. Leonetti appeals, claiming that the employer's unjust enrichment claim is barred by the doctrines of collateral estoppel and res judicata because it was finally determined in *Leonetti* v. *MacDermid, Inc.* that the workers' compensation release on which this action is premised is unenforceable. Leonetti also argues

that the unjust enrichment claim must fail because it is an improper attempt to circumvent the approval requirements of § 31-296 and that the employer should not be allowed to recover based on allegations that he failed to honor an invalid agreement. Leonetti also claims that the trial court erred in its jury instructions and in making certain evidentiary rulings.

DONNA L. SOTO, ADMINISTRATRIX (ESTATE OF VICTORIA L. SOTO) et al. *v.* BUSHMASTER FIREARMS INTERNATIONAL, LLC, et al.SC 19832/19833

Judicial District of Bridgeport

Torts; Whether Trial Court Properly Struck Negligent Entrustment and CUTPA Claims Brought Against Manufacturer and Sellers of Firearm. Adam Lanza used a Bushmaster rifle to fatally shoot twenty-six people, including the plaintiffs' decedents, at Sandy Hook Elementary School in Newtown. The plaintiffs brought this action against the manufacturer and sellers of the Bushmaster rifle, claiming that they had violated the Connecticut Unfair Trade Practices Act (CUTPA) and seeking recovery under a theory of negligent entrustment. The plaintiffs alleged that the defendants were negligent in marketing and selling the rifle to the general public when they knew that members of the general public are unfit to operate the rifle, which the plaintiffs claimed was designed for military use and expressly engineered to kill quickly and efficiently. The trial court stuck the complaint and rendered judgment for the defendants, finding that they were immune from liability for the plaintiffs' claims under the federal Protection of Lawful Commerce in Arms Act (PLCAA), which prohibits lawsuits against manufacturers, distributors and dealers of firearms for harm caused by their products. The court noted that, while the PLCAA provides an exception for negligent entrustment claims, the plaintiffs had failed to state a legally sufficient claim of negligent entrustment under Connecticut common law or as contemplated by the federal exception. The plaintiffs appeal, claiming that the trial court wrongly ruled that they had failed to state any cognizable claim against the defendants. They claim that they adequately stated a common-law negligent entrustment claim in their complaint and that the trial court wrongly ruled that they lacked standing to pursue their CUTPA claim because they failed to allege that they had a consumer, competitor, or other commercial relationship with the defendants.

TOWN OF GLASTONBURY *v.* METROPOLITAN DISTRICT COMMISSION, SC 19843

Judicial District of Hartford

Utilities; Whether Action Alleging Illegal Nonmember Town Surcharge Rendered Moot by Special Act Authorizing that Surcharge; Whether Genuine Issue of Material Fact Existed as to Laches Special Defense; Whether Trial Court Properly Denied Motion to Strike for Failure to Join Indispensable Parties. The defendant is a political subdivision of the state that provides drinking water to "member towns" and "nonmember towns" in the greater Hartford area. The plaintiff is a nonmember town and brought this declaratory judgment action alleging that the defendant had imposed excessive nonmember town surcharges between 2011 and 2014 that were not authorized by the defendant's charter, which consists of the special acts of the General Assembly that created and govern the defendant. The defendant moved to strike the complaint, citing the plaintiff's failure to join other nonmember towns as indispensable parties, and the trial court denied that motion. While this action was pending before the trial court, the General Assembly passed Special Act 14-21, which became effective in 2015 and amended the defendant's charter to provide that "[a]ny nonmember town surcharge imposed . . . shall not exceed the amount of the customer service charge." The charter previously had not contained any express reference to a nonmember town surcharge. The defendant thereafter filed a motion to dismiss on the ground that the special act rendered this action moot by clarifying its existing right to impose a nonmember town surcharge and therefore resolving the issue of whether the surcharges imposed between 2011 and 2014 were illegal. The trial court denied the motion to dismiss and held that the surcharge language could not be interpreted to apply retroactively and subsequently granted the plaintiff's motion for summary judgment, concluding that the nonmember town surcharges imposed by the defendant were illegal as a matter of law. The defendant appeals, claiming that (1) Special Act 14-21 rendered this action moot because it clarified that the defendant has always had a right to impose a nonmember town surcharge, (2) the trial court wrongly determined that there was no genuine issue of material fact as to its special defense of laches, and (3) the trial court wrongly denied its motion to strike the plaintiff's complaint for failure to join the other nonmember towns as indispensable parties.

MEADOWBROOK CENTER, INC. *v.* ROBERT BUCHMAN, SC 19878

Judicial District of Hartford

Attorney's Fees; Whether Appellate Court Properly Held that Thirty Day Time Limitation in Practice Book § 11-21 for Filing Motions for Attorney's Fees is Directory Rather than Mandatory. The plaintiff nursing care facility brought this action to recover damages from the defendant for breach of a contract that related to the care of his mother. The agreement provided that the plaintiff would collect reasonable attorney's fees should it prevail in its collection efforts. The trial court rendered judgment in favor of the defendant and, thirty-five days later, the defendant filed a motion seeking attorney's fees pursuant to General Statutes § 42-150bb, which allows a consumer to collect attorney's fees from a commercial party when the consumer successfully defends an action based on a contract that provides for attorney's fees for the commercial party. The trial court denied the motion for attorney's fees, concluding that it was untimely under Practice Book § 11-21, which provides that "[m]otions for attorney's fees shall be filed within thirty days following the date on which the final judgment of the trial court was rendered." The Appellate Court (169 Conn. App. 527) reversed and remanded the case to the trial court for a hearing on the defendant's motion for attorney's fees, ruling that the trial court improperly failed to exercise its discretion to determine whether strict adherence to the thirty day limitation in § 11-21 would work a surprise or injustice. It reasoned that the thirty day limitation is procedural and intended to facilitate the progress of the case since the timing of the motion does not go to the essence of the right to reasonable attorney's fees. It also determined that the purpose of the timing provision is to avoid a long period of delay between the judgment and a request for attorney's fees. It therefore concluded that because the timing provision of Practice Book § 11-21 is a matter of procedure, it is directory and not mandatory. The court opined that to hold otherwise would undermine the objective of § 42-150bb to award attorney's fees to a consumer who successfully defends an action brought by a commercial party. The plaintiff appeals, and the Supreme Court will decide whether the Appellate Court properly determined that the thirty day limitation in § 11-21 is directory and not mandatory.

FIRSTLIGHT HYDRO GENERATING COMPANY *v.*
ALLAN STEWART et al., SC 19891
Judicial District of Danbury

Trespass; Whether Trial Court Properly Concluded that Plaintiff Proved That it Owned the Land on Which Defendants had Constructed Improvements; Whether Trial Court Properly Ordered that Defendants' Improvements be Removed. The plaintiff operates a hydroelectric power generating facility on Candlewood Lake and owns the shoreline surrounding the lake. The defendants own property that is directly adjacent to the shoreline. The plaintiff brought this action claiming that the defendants had trespassed on its property by constructing improvements on the plaintiff's land. The trial court ruled in favor of the plaintiff, finding that the plaintiff had proved that it owns all the property immediately contiguous to the southerly border of the defendants' property and that the defendants had wrongfully intruded onto the plaintiff's property by constructing permanent improvements that are located partially or entirely on the plaintiff's land. The court granted the plaintiff relief in the form of a permanent injunction requiring the defendants to remove, among other improvements, a patio and a retaining wall. The defendants appeal, claiming that the trial court wrongly determined that they had trespassed because the plaintiff failed to prove that it is the owner of all property immediately contiguous to the southerly border of the defendants' property. The defendants also claim that the injunctive relief ordered by the trial court is overbroad in that it exceeds the relief sought by the plaintiff and in that it is inequitable under the facts here.

STATE *v.* DELANO JOSEPHS, SC 19900
Judicial District of New Britain

Criminal; Animal Cruelty; Whether General Statutes § 53-247 (a), Which Proscribes Unjustifiably Injuring an Animal, Requires Specific Intent to Injure; Whether Unjustifiably Injuring Language Unconstitutionally Vague. The defendant was charged with cruelty to an animal in violation of § 53-247 (a) in connection with the allegation that he shot his neighbor's cat, Wiggles, with a BB gun and injured the cat. Section 53-247 (a) prohibits any person from "unjustifiably injur[ing]" any animal, and the state's charging document alleged that the defendant had intentionally discharged the BB gun and unjustifiably injured the cat. The case was tried to the court and, after the state had presented its case, the defendant moved

for a judgment of acquittal, claiming that § 53-247 (a) required the state to prove that he had the specific intent to injure the animal and that the state had failed to prove that element of the crime beyond a reasonable doubt. The trial court denied the defendant's motion, ruling that the state was not required to prove that the defendant intended to injure the cat but, rather, that the state bore only the burden of proving that the defendant intentionally discharged the BB gun, that the cat was injured as a result, and that the injury was not justified. The defendant was subsequently convicted of cruelty to an animal in violation of § 53-247 (a). He appeals, claiming that the trial court improperly construed the "unjustifiably injures" language of § 53-247 (a) as requiring the state to prove only the general intent to engage in the action that resulted in an animal's injury. He points out that § 53-247 (a) is silent as to the applicable mental state, or mens rea, required for the offense, and that a look to the broader animal cruelty statutory scheme supports his contention that unjustifiably injuring an animal is a specific intent crime. For example, the defendant points to § 53-247 (b), which prohibits a person from "maliciously and intentionally wounding" an animal, as a clearly delineated specific intent crime and posits that the legislature did not intend to establish two different standards of proof for what is essentially the same conduct. The defendant also claims that § 53-247 (a) is unconstitutionally vague because it does not indicate when an injury to an animal is unjustifiable and thereby give fair warning to the public as to what conduct is prohibited, leading to arbitrary and standardless law enforcement. Finally, the defendant claims that the evidence presented at trial was insufficient to support his conviction of cruelty to an animal in violation of § 53-247 (a). He claims that none of the state's witnesses saw him shoot Wiggles or any other cat and that the state failed to connect the BB that hit Wiggles to the BB gun owned by the defendant.

IN RE MARIAM E., et al., SC 19913
IN RE EGYPT E., et al., SC 19914
Judicial District of Middlesex, Juvenile Matters, Child Protection Session

Termination of Parental Rights; Whether Parents' Rights Properly Terminated under General Statutes § 17a-112 (j) (3) (C); Whether Termination in Best Interests of Children; Whether There was Clear and Convincing Evidence of Reasonable Reunification Efforts. The respondent mother and father brought their minor daughter Mariam to the hospital for a swollen

shoulder, and a medical examination revealed that she had six recent fractures. When the parents were unable to explain the cause of the injuries to investigating authorities, the petitioner, the Department of Children and Families (DCF), filed neglect petitions and termination petitions with respect to Mariam and the parents' other minor child, Egypt. The trial court consolidated the neglect petitions and the termination petitions and granted them after a trial. In *In re Egypt E.*, 322 Conn. 231 (2016), the Supreme Court reversed the trial court's judgment as to the termination petitions and remanded the matters for a new trial on the ground that a clerical error by the trial court implicated the parents' due process rights to appeal from the termination judgments. After a trial on remand, the trial court again granted the termination petitions. It found that the most likely explanation for Mariam's injuries was that the father had hurt her. It further found that DCF had proven that the parents' rights to their children should be terminated under General Statutes § 17a-112 (j) (3) (C), which provides that a termination petition may be granted when a child has been denied the care, guidance, or control necessary for his or her well-being by acts of parental commission or omission. In terminating the parents' rights as to Egypt under § 17a-112 (j) (3) (C), the trial court incorporated its findings as to Mariam, determined that Egypt was "similarly situated" to Mariam, and concluded that Egypt had been denied the care, guidance, or control necessary for her well-being by virtue of the father's "failure to . . . admit fully what he did" and the mother's "failure to come to terms with what has happened to [Mariam] and [the father's] culpability." The parents now bring these appeals. The Supreme Court will decide whether the trial court properly terminated the parents' parental rights to Egypt under § 17a-112 (j) (3) (C) where the parents argue that there was no evidence that Egypt had suffered actual harm and that the trial court improperly shifted the burden of proof to them after finding that they had denied Egypt the care, guidance, or control necessary for her well-being. The Supreme Court will also decide whether the trial court erred in finding that terminating the parents' rights was in Mariam and Egypt's best interests. Finally, the Supreme Court will decide whether the trial court properly terminated the mother's parental rights to Mariam and Egypt where the mother claims that there was no clear and convincing evidence of reasonable efforts by DCF to reunify her with the children as required under General Statutes § 17a-112 (j) (1).

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

JILL K. LEVIN, ADMINISTRATRIX OF THE ESTATE OF MARGARET ROHNER *v.* STATE OF CONNECTICUT, SC 19935

Judicial District of Hartford

Negligence; Medical Malpractice; Whether Trial Court Properly Struck Non-Patient's Claim Against State-Operated Mental Health Facility on Ground that it Sounded in Medical Malpractice and not Ordinary Common-Law Negligence. Margaret Rohner was stabbed to death by her son, Robert Rankin, during his release on a visitation pass from a mental health residential treatment facility operated by the state of Connecticut. Rohner's estate brought this wrongful death action against the state claiming that the facility's employees were negligent in their care and treatment of Robert Rankin in that, among other things, they permitted him to visit his mother without supervision even though they knew that he was severely mentally ill and presented a danger to her and to others. The state moved to strike the complaint, citing Connecticut law establishing that a non-patient plaintiff cannot recover against a health care provider in medical malpractice. The plaintiff countered that she was not asserting a medical malpractice claim, but rather one sounding in ordinary common-law negligence. The trial court granted the motion to strike and rendered judgment for the state, noting that the plaintiff specifically alleged that the state was negligent in its diagnosis and treatment of Rankin and that it failed to exercise the standard of care that is exercised by similar health care providers. It determined that the language of the complaint reflected that the state was being sued as a health care professional, that there was a medical professional-patient relationship between the state and Rankin, and that the negligence arose out of and was substantially related to the state's diagnosis and treatment of Rankin. The court also noted that, in permitting the plaintiff to sue the state, the claims commissioner specifically limited the action to the plaintiff's medical malpractice claim. The court thus decided that, had the complaint had actually asserted an ordinary common-law negligence claim, it would have been without subject matter jurisdiction to consider it because the claims commissioner had not authorized the plaintiff to bring such a claim against the state. The plaintiff appeals, and the Supreme Court will determine whether the trial court properly granted the state's motion to strike.

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

NOTICE

Public Comments on Revisions to the Connecticut Code of Evidence Being Considered by the Supreme Court

The following proposed revisions to the Connecticut Code of Evidence are being considered by the Supreme Court and are published here for public comment.

Comments may be submitted to the Code of Evidence Oversight Committee of the Supreme Court by email to Lori.Petruzzelli@jud.ct.gov or may be forwarded to the Code of Evidence Oversight Committee of the Supreme Court at the following address:

Code of Evidence Oversight Committee of the Supreme Court
Attn: Lori Petruzzelli, Counsel
P.O. Box 150474
Hartford, CT 06115-0474

Comments should be received **no later than August 15, 2017**.

Hon. Chase T. Rogers
Chief Justice, Supreme Court

INTRODUCTION

The following are amendments that are being considered to the Connecticut Code of Evidence, including revisions to the Commentaries. The amendments are indicated by brackets for deletions and underlines for added language, with the exception that the bracketed titles to the subsections in Section 8-4 are an editing convention and do not indicate an intention to delete language. The designation ''New'' is printed with the title of each new rule.

Supreme Court

PROPOSSED AMENDMENTS TO THE CONNECTICUT CODE OF EVIDENCE ARTICLES AND SECTION HEADINGS

ARTICLE I—GENERAL PROVISIONS

Sec.
1-1. Short Title; Application
1-2. Purposes and Construction
1-3. Preliminary Questions
1-4. Limited Admissibility
1-5. Remainder of Statements

ARTICLE II—JUDICIAL NOTICE

Sec.
2-1. Judicial Notice of Adjudicative Facts
2-2. Notice and Opportunity To Be Heard

ARTICLE III—PRESUMPTIONS

Sec.
3-1. General Rule

ARTICLE IV—RELEVANCY

Sec.
4-1. Definition of Relevant Evidence
4-2. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible
4-3. Exclusion of Evidence on Grounds of Prejudice, Confusion or Waste of Time
4-4. Character Evidence Not Admissible To Prove Conduct; Exceptions; Methods of Proof; Cross-Examination of a Character Witness
4-5. Evidence of Other Crimes, Wrongs or Acts Generally Inadmissible
4-6. Habit; Routine Practice
4-7. Subsequent Remedial Measures

4-8. Offers To Compromise
4-8A. (New) Pleas, Plea Discussions, and Related Statements
4-9. Payment of Medical and Similar Expenses
4-10. Liability Insurance
4-11. Admissibility of Evidence of Sexual Conduct

ARTICLE V—PRIVILEGES

Sec.
5-1. General Rule
5-2. (New) Attorney-Client Privilege
5-3. (New) Marital Privileges

ARTICLE VI—WITNESSES

Sec.
6-1. General Rule of Competency
6-2. Oath or Affirmation
6-3. Incompetencies
6-4. Who May Impeach
6-5. Evidence of Bias, Prejudice or Interest
6-6. Evidence of Character and Conduct of Witness
6-7. Evidence of Conviction of Crime
6-8. Scope of Cross-Examination and Subsequent Examinations; Leading Questions
6-9. Object or Writing Used To Refresh Memory
6-10. Prior Inconsistent Statements of Witnesses
6-11. Prior Consistent Statements of Witnesses; Constancy of Accusation by a Sexual Assault [Victim] Complainant

ARTICLE VII—OPINIONS AND EXPERT TESTIMONY

Sec.
7-1. Opinion Testimony by Lay Witnesses
7-2. Testimony by Experts
7-3. Opinion on Ultimate Issue
7-4. Opinion Testimony by Experts; Bases of Opinion Testimony by Experts; Hypothetical Questions

ARTICLE VIII—HEARSAY

Sec.
8-1. Definitions
8-2. Hearsay Rule
8-3. Hearsay Exceptions: Availability of Declarant Immaterial
8-4. Admissibility of Business Entries and Photographic Copies: Availability of Declarant Immaterial
8-5. Hearsay Exceptions: Declarant Must Be Available
8-6. Hearsay Exceptions: Declarant Must Be Unavailable
8-7. Hearsay within Hearsay
8-8. Impeaching and Supporting Credibility of Declarant
8-9. Residual Exception
8-10. Hearsay Exception: Tender Years

ARTICLE IX—AUTHENTICATION

Sec.
9-1. Requirement of Authentication
9-2. Authentication of Ancient Documents
9-3. Authentication of Public Records
9-4. Subscribing Witness' Testimony

ARTICLE X—CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

Sec.
10-1. General Rule
10-2. Admissibility of Copies
10-3. Admissibility of Other Evidence of Contents
10-4. Public Records
10-5. Summaries
10-6. Admissions of a Party

PROPOSSED AMENDMENTS TO THE CONNECTICUT CODE OF EVIDENCE

ARTICLE I—GENERAL PROVISIONS

Sec. 1-1. Short Title; Application

(a) Short title. These rules shall be known and may be cited as the Code of Evidence. The Code of Evidence is hereinafter referred to as the ''Code.''

(b) Application of the Code. The Code and the commentary **[**applies**]** apply to all proceedings in the superior court in which facts in dispute are found, except as otherwise provided by the Code, the General Statutes or any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code.

(c) Rules of privilege. Privileges shall apply at all stages of all proceedings in the court.

(d) The Code inapplicable. The Code, other than with respect to privileges, does not apply in proceedings such as, but not limited to, the following:

(1) Proceedings before investigatory grand juries, as provided for in General Statutes §§ 54-47b through 54-47f.

(2) Proceedings involving questions of fact preliminary to admissibility of evidence pursuant to Section 1-3 of the Code.

(3) Proceedings involving sentencing.

(4) Proceedings involving probation.

(5) Proceedings involving small claims matters.

(6) Proceedings involving summary contempt.

(7) Certain pretrial criminal proceedings in which it has been determined as a matter of statute or decisional law that the rules of evidence do not apply.

(Amended June 20, 2011, to take effect Jan. 1, 2012.)

COMMENTARY

(b) Application of the Code.

[The Connecticut Code of Evidence was adopted by the Judges of the Superior Court. In *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008), the Connecticut Supreme Court held that it is not bound by a code adopted by the Judges of the Superior Court.**]** When the Code was initially adopted by the judges of the Superior Court in 1999 and then readopted by the Supreme Court in 2014, the adoption included both the rules and the commentary, thereby making both equally applicable. See *State* v. *Pierre*, 277 Conn. 42, 60, 890 A.2d 474 (2006).

The Code is broadly applicable. The Code applies to all civil and criminal bench or jury trials in the superior court. The Probate Assembly adopted Probate Rule 62.1, effective July 1, 2013, making the Code applicable to all issues in which facts are in dispute. The Code applies, for example, to the following proceedings:

(1) court-ordered fact-finding proceedings conducted pursuant to General Statutes § 52-549n and Practice Book § 23-53; see General Statutes § 52-549r;

(2) probable cause hearings conducted pursuant to General Statutes § 54-46a excepting certain matters exempted under General Statutes § 54-46a (b); see *State* v. *Conn.*, 234 Conn. 97, 110, 662 A.2d 68 (1995); *In re Ralph M.*, 211 Conn. 289, 305–306, 559 A.2d 179 (1989);

(3) juvenile transfer hearings conducted pursuant to General Statutes § 46b-127 as provided in subsection (b) of that provision; *In re Michael B.*, 36 Conn. App. 364, 381, 650 A.2d 1251 (1994); *In re Jose M.*, 30 Conn. App. 381, 384–85, 620 A.2d 804, cert. denied, 225 Conn. 921, 625 A.2d 821 (1993);

(4) juvenile proceedings; however, adoption of subsection (b) is not intended to abrogate the well established rule that the court may relax its strict application of the formal rules of evidence to reflect the informal nature of juvenile proceedings provided the fundamental rights of the parties are preserved; *In re Juvenile Appeal (85-2)*, 3 Conn. App. 184, 190, 485 A.2d 1362 (1986); see *Anonymous* v. *Norton*, 168 Conn. 421, 425, 362 A.2d 532, cert. denied, 423 U.S. 925, 96 S. Ct. 294, 46 L. Ed. 2d 268 (1975); Practice Book **[**§ 34-2(a)**]** 32a-2 (a); and

(5) proceedings involving family relations matters enumerated under General Statutes § 46b-1.

[Because the Code is applicable only to proceedings in the court, the Code does not apply to: (1) matters before probate courts; see *Prince* v. *Sheffield*, 158 Conn. 286, 293, 259 A.2d 621 (1968); although the Code applies to appeals from probate courts that are before the court in which a trial de novo is conducted; see *Thomas* v. *Arefeh*, 174 Conn. 464, 470, 391 A.2d 133 (1978); and (2) administrative hearings conducted pursuant to General Statutes § 4-176e; see General Statutes § 4-178; *Jutkowitz* v. *Dept. of Health Services*, 220 Conn. 86, 108, 596 A.2d 394 (1991); *Lawrence* v. *Kozlowski*, 171 Conn. 705, 710, 372 A.2d 110 (1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2930, 53 L. Ed. 2d 1066 (1977); or administrative hearings conducted by

agencies that are exempt from the Uniform Administrative Procedure Act, General Statutes §§ 4-166 through 4-189.**]**

[An example of a provision within subsection (b)'s ''except as otherwise provided'' language is Practice Book § 23-12, which states that the court ''shall not be bound by the technical rules of evidence'' when trying cases placed on the expedited process track pursuant to General Statutes § 52-195b.**]**

The Code is not intended to apply to matters to which the technical rules of evidence traditionally have not applied. Thus, for example, the Code would be inapplicable to hearings on the issuance of bench warrants of arrest or search warrants conducted pursuant to General Statutes §§ 54-2a and 54-33a, respectively; see *State* v. *DeNegris*, 153 Conn. 5, 9, 212 A.2d 894 (1965); *State* v. *Caponigro*, 4 Conn. Cir. Ct. 603, 609, 238 A.2d 434 (1967).

Matters to which the Code specifically is inapplicable are set forth in subsection (d).

(c) Rules of privilege.

Subsection (c) addresses the recognition of evidentiary privileges only with respect to proceedings in the court. See Article V—Privileges. It does not address the recognition of evidentiary privileges in any other proceedings outside the court, whether legislative, administrative or quasi-judicial, in which testimony may be compelled.

(d) The Code inapplicable.

Subsection (d) specifically states the proceedings to which the Code, other than with respect to evidentiary privileges, is inapplicable. The list is intended to be illustrative rather than exhaustive and subsection

(d) should be read in conjunction with subsection (b) in determining the applicability or inapplicability of the Code. The removal of these matters from the purview of the Code generally is supported by case law, the General Statutes or the Practice Book. They include:

(1) proceedings before investigatory grand juries; e.g., *State* v. *Avcollie*, 188 Conn. 626, 630–31, 453 A.2d 418 (1982), cert. denied, 461 U.S. 928, 103 S. Ct. 2088, 77 L. Ed. 2d 299 (1983);

(2) preliminary determinations of questions of fact by the court made pursuant to Section 1-3 (a); although there is no Connecticut authority specifically stating this inapplicability, it is generally the prevailing view. E.g., Fed. R. Evid. 104 (a); Unif. R. Evid. 104 (a), 13A U.L.A. **[**93–94 (1994)**]** 16–17 (1999); **[**1 C. McCormick, Evidence (5th Ed. 1999) § 53, p. 234**]**;

(3) sentencing proceedings following trial; e.g., *State* v. *Huey*, 199 Conn. 121, 126, 505 A.2d 1242 (1986); *State* v. *Pena*, 301 Conn. 669, 680–83, 22 A.3d 611 (2011) (in sentencing, trial judge may rely on evidence bearing on charges for which defendant was acquitted). The Code, however, does apply to sentencing proceedings that constitutionally require that a certain fact be found by the trier of fact beyond a reasonable doubt before the defendant is deemed eligible for a particular sentence. See, e.g., *Bullington* v. *Missouri*, 451 U.S. 430, 446, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981) (''many of the protections available to a defendant at a criminal trial also are available at a sentencing hearing . . . in a capital case''); *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (''[o]ther than the fact of a prior conviction, any fact that increases the penalty

for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt'');

(4) hearings involving the violation of probation conducted pursuant to General Statutes § 53a-32 (a); *State* v. *White*, 169 Conn. 223, 239–40, 363 A.2d 143, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 399 (1975); *In re Marius M.*, 34 Conn. App. 535, 536, 642 A.2d 733 (1994);

(5) proceedings involving small claims matters; General Statutes § 52-549c (a); see Practice Book § 24-23; **[**and**]**

(6) summary contempt proceedings; see generally Practice Book § 1-16**[.]**;

(7) certain criminal pretrial proceedings; see, e.g., *State* v. *Fernando A.*, 294 Conn. 1, 26–30, 981 A.2d 427 (2009); General Statutes § 54-64f (b) (hearing on revocation of release).

Nothing in subdivision **[**(1)**]** (d) (2) abrogates the common-law rule that in determining preliminary questions of fact upon which the application of certain exceptions to the hearsay rule depends, the court may not consider the declarant's out-of-court statements themselves in determining those preliminary questions. E.g., *State* v. *Vessichio*, 197 Conn. 644, 655, 500 A.2d 1311 (1985), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986) (court may not consider coconspirator statements in determining preliminary questions of fact relating to admissibility of those statements under coconspirator statement exception to hearsay rule; see Section 8-3 [1] [D]); *Robles* v. *Lavin*, 176 Conn. 281, 284, 407 A.2d 958 (1978) (in determining whether authorized admissions against party opponent exception to

hearsay rule applies, authority to speak must be established before alleged agent's declarations can be introduced; see Section 8-3 [1] [C]); *Ferguson* v. *Smazer,* 151 Conn. 226, 231, 196 A.2d 432 (1963) (in determining whether hearsay exception for statements of pedigree and family relationships applies, declarant's relationship to person to whom statement relates must be established without reference to declarant's statements; see Section 8-6 [7]).

Sec. 1-2. Purposes and Construction

(a) Purposes of the Code. The purposes of the Code are to adopt Connecticut case law regarding rules of evidence as rules of court and to promote the growth and development of the law of evidence through interpretation of the Code and through judicial rule making to the end that the truth may be ascertained and proceedings justly determined.

(b) Saving clause. Where the Code does not prescribe a rule governing the admissibility of evidence, the court shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience, except as otherwise required by the constitution of the United States, the constitution of this state, the General Statutes or the Practice Book. The provisions of the Code shall not be construed as precluding any court from recognizing other evidentiary rules not inconsistent with such provisions.

(c) Writing. Any reference in the Code to a writing or any other medium of evidence includes electronically stored information.

(Amended May 20, 2015, to take effect August 1, 2015.)

COMMENTARY

(a) Purposes of the Code.

Subsection (a) provides a general statement of the purposes of the Code. Case-by-case adjudication is integral to the growth and development of evidentiary law and, thus, future definition of the Code will be effected primarily through interpretation of the Code and through judicial rule making.

One of the goals of drafting the Code was to place common-law rules of evidence and certain identified statutory rules of evidence into a readily accessible body of rules to which the legal profession conveniently may refer. The Code sometimes states common-law evidentiary principles in language different from that of the cases from which these principles were derived. Because the Code was intended to maintain the status quo, i.e., preserve the common-law rules of evidence as they existed prior to adoption of the Code, its adoption is not intended to modify any prior common-law interpretation of those rules. Nor is the Code intended to change the common-law interpretation of certain incorporated statutory rules of evidence as it existed prior to the Code's adoption.

In some instances, the Code embraces rules or principles for which no Connecticut case law presently exists, or for which the case law is indeterminate. In such instances, these rules or principles were formulated with due consideration of the recognized practice in Connecticut courts and the policies underlying existing common law, statutes and the Practice Book.

Although the Code follows the general format and sometimes the language of the Federal Rules of Evidence, the Code does not adopt the Federal Rules of Evidence or cases interpreting those rules. Cf. *State* v. *Vilalastra*, 207 Conn. 35, 39–40, 540 A.2d 42 (1988) (Federal Rules of Evidence influential in shaping Connecticut evidentiary rules, but not binding).

Unlike the Federal Rules of Evidence, which govern both the admissibility of evidence at trial and issues concerning the court's role in administering and controlling the trial process, the Code was developed with the intention that it would address issues concerning the admissibility of evidence and competency of witnesses, leaving trial management issues to common law, the Practice Book and the discretion of the court.

(b) Saving clause.

Subsection (b) addresses the situation in which courts are faced with evidentiary issues not expressly covered by the Code. Although the Code will address most evidentiary matters, it cannot possibly address every evidentiary issue that might arise during trial. Subsection (b) sets forth the standard by which courts are to be guided in such instances.

Precisely because it cannot address every evidentiary issue, the Code is not intended to be the exclusive set of rules governing the admissibility of evidence. Thus, subsection (b) makes clear that a court is not precluded from recognizing other evidentiary rules not inconsistent with the Code's provisions.

(c) Writing.

The rules and principles in the Code are intended to govern evidence in any form or medium, including without limitation, written and printed material, photographs, video and sound recordings, and electronically stored information. As a result of advances in technology, the widespread availability and use of electronic devices for storage and communication, and the proliferation of social media, courts are frequently called upon to rule on the admissibility of electronically stored information. That term, as used in the Code, refers to information that is stored in an electronic medium and is retrievable in perceivable form. See Practice Book § 13-1 (a) (5).

Sec. 1-3. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification and competence of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court.

(b) Admissibility conditioned on fact. When the admissibility of evidence depends upon connecting facts, the court may admit the evidence upon proof of the connecting facts or subject to later proof of the connecting facts.

(Amended May 20, 2015, to take effect August 1, 2015.)

COMMENTARY

(a) Questions of admissibility generally

The admissibility of evidence, qualification of a witness, authentication of evidence or assertion of a privilege often is conditioned on a disputed fact. Was the declarant's statement made under the stress

of excitement? Is the alleged expert a qualified social worker? Was a third party present during a conversation between husband and wife? In each of these examples, the admissibility of evidence, qualification of the witness or assertion of a privilege will turn upon the answer to these questions of fact. Subsection (a) makes it the responsibility of the court to determine these types of preliminary questions of fact. E.g., *State* v. *Stange*, 212 Conn. 612, 617, 563 A.2d 681 (1989); *Manning* v. *Michael*, 188 Conn. 607, 610, 453 A.2d 1157 (1982); *D'Amato* v. *Johnston*, 140 Conn. 54, 61–62, 97 A.2d 893 (1953).

As it relates to authentication, this Section operates in conjunction with Section 1-1 (d) (2) and Article IX of the Code. The preliminary issue, decided by the court, is whether the proponent has offered a satisfactory foundation from which the finder of fact could reasonably determine that the evidence is what it purports to be. The court makes this preliminary determination in light of the authentication requirements of Article IX. Once a prima facie showing of authenticity has been made to the court, the evidence, if otherwise admissible, goes to the fact finder, and it is for the fact finder ultimately to resolve whether evidence submitted for its consideration is what the proponent claims it to be. *State* v. *Carpenter*, 275 Conn. 785, 856–57, 882 A.2d 604 (2005); *State* v. *Colon*, 272 Conn. 106, 188–89, 864 A.2d 666 (2004); *State* v. *Shah*, 134 Conn. App. 581, 593, 39 A.3d 1165 (2012).

Pursuant to Section 1-1 (d) (2), courts are not bound by the Code in determining preliminary questions of fact under subsection (a), except with respect to evidentiary privileges.

(b) Admissibility conditioned on fact.

Frequently, the admissibility of a particular fact or item of evidence depends upon proof of another fact or other facts, i.e., connecting facts. For example, the relevancy of a witness' testimony that the witness observed a truck swerving in and out of the designated lane at a given point depends upon other testimony identifying the truck the witness observed as the defendant's. Similarly, the probative value of evidence that *A* warned *B* that the machine *B* was using had a tendency to vibrate depends upon other evidence establishing that *B* actually heard the warning. When the admissibility of evidence depends upon proof of connecting facts, subsection (b) authorizes the court to admit the evidence upon proof of the connecting facts or admit the evidence subject to later proof of the connecting facts. See, e.g., *State* v. *Anonymous (83-FG)*, 190 Conn. 715, 724–25, 463 A.2d 533 (1983); *Steiber* v. *Bridgeport*, 145 Conn. 363, 366–67, 143 A.2d 434 (1958); see also *Finch* v. *Weiner*, 109 Conn. 616, 618, 145 A. 31 (1929) (when admissibility of evidence depends upon connecting facts, order of proof is subject to discretion of court).

If the proponent fails to introduce evidence sufficient to prove the connecting facts, the court may instruct the jury to disregard the evidence or order the earlier testimony stricken. *State* v. *Ferraro*, 160 Conn. 42, 45, 273 A.2d 694 (1970); *State* v. *Johnson*, 160 Conn. 28, 32–33, 273 A.2d 702 (1970).

Sec. 1-4. Limited Admissibility

Evidence that is admissible as to one party but not as to another, or for one purpose but not for another, is admissible as to that party

or for that purpose. The court may, and upon request shall, restrict the evidence to its proper scope.

COMMENTARY

Section 1-4 is consistent with Connecticut law. See *Blanchard* v. *Bridgeport*, 190 Conn. 798, 805, 463 A.2d 553 (1983); *State* v. *Tryon*, 145 Conn. 304, 309, 142 A.2d 54 (1958).

Absent a party's request for a limiting instruction, upon the admission of evidence, the court is encouraged to instruct the jury on the proper scope of the evidence or inquire whether counsel desires a limiting instruction to be given. See *Rokus* v. *Bridgeport*, 191 Conn. 62, 67, 463 A.2d 252 (1983); cf. *State* v. *Cox*, 7 Conn. App. 377, 389, 509 A.2d 36 (1986). Nothing precludes a court from excluding evidence offered for a limited purpose or taking other action it deems appropriate when a limiting instruction will not adequately protect the rights of the parties. See *Blanchard* v. *Bridgeport*, supra, 190 Conn. 805.

Sec. 1-5. Remainder of Statements

(a) Contemporaneous introduction by proponent. When a statement is introduced by a party, the court may, and upon request shall, require the proponent at that time to introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered contemporaneously with it.

(b) Introduction by another party. When a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible, that the court determines, consid-

ering the context of the first part of the statement, ought in fairness to be considered with it.

COMMENTARY

(a) Contemporaneous introduction by proponent.

Subsection (a) recognizes the principle of completeness. Sometimes, one part of a statement may be so related to another that, in fairness, both should be considered contemporaneously. Subsection (a) details the circumstances under which a court may or shall require a proponent of one part of a statement to contemporaneously introduce the other part. See *Clark* v. *Smith*, 10 Conn. 1, 5 (1833); *Ives* v. *Bartholomew*, 9 Conn. 309, 312–13 (1832); see also Practice Book § 13-31 (a) (5) (depositions); cf. *Walter* v. *Sperry*, 86 Conn. 474, 480, 85 A. 739 (1912).

The basis for the rule is that matters taken out of context can create misleading impressions or inaccuracies**[**,**]** and that waiting until later in the trial to clear them up can be ineffectual. **[**See 1 C. McCormick, Evidence (5th Ed. 1999) § 56, pp. 248–49; C. Tait & J. LaPlante, Connecticut Evidence (Sup. 1999) § 8.1.4, p. 151.**]** See *State* v. *Arthur S.*, 109 Conn. App. 135, 140–41, 950 A.2d 615, cert. denied, 289 Conn. 925, 958 A.2d 153 (2008).

''Statement,'' as used in this subsection, includes written, recorded and oral statements. Because the other part of the statement is introduced for the purpose of placing the first part into context, the other part need not be independently admissible. See *State* v. *Tropiano*, 158 Conn. 412, 420, 262 A.2d 147 (1969), cert. denied, 398 U.S. 949, 90 S. Ct. 1866, 26 L. Ed. 2d 288 (1970).

(b) Introduction by another party.

Unlike subsection (a), subsection (b) does not involve the contemporaneous introduction of evidence. Rather, it recognizes the right of a party to subsequently introduce another part or the remainder of a statement previously introduced in part by the opposing party under the conditions prescribed in the rule. See *State* v. *Paulino*, 223 Conn. 461, 468–69, 613 A.2d 720 (1992); *State* v. *Castonguay*, 218 Conn. 486, 496–97, 590 A.2d 901 (1991); *Rokus* v. *Bridgeport*, 191 Conn. 62, 69, 463 A.2d 252 (1983); see also Practice Book § 13-31 (a) (5) (depositions).

Although the cases upon which subsection (b) is based deal only with the admissibility of oral conversations or statements, the rule logically extends to written and recorded statements. Thus, like subsection (a), subsection (b)'s use of the word ''statement'' includes oral, written and recorded statements. In addition, because the other part of the statement is introduced under subsection (b) for the purpose of putting the first part into context, the other part need not be independently admissible. See *State* v. *Paulino*, supra, 223 Conn. 468–69; *State* v. *Castonguay*, supra, 218 Conn. 496; cf. *Starzec* v. *Kida*, 183 Conn. 41, 47 n.6, 438 A.2d 1157 (1981).

ARTICLE II—JUDICIAL NOTICE

Sec. 2-1. Judicial Notice of Adjudicative Facts

(a) Scope of section. This section governs only judicial notice of adjudicative facts.

(b) Taking of judicial notice. A court may, but is not required to, take notice of matters of fact, in accordance with subsection (c).

(c) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) within the knowledge of people generally in the ordinary course of human experience, or (2) generally accepted as true and capable of ready and unquestionable demonstration.

(d) Time of taking judicial notice. Judicial notice may be taken at any stage of the proceeding.

(Amended June 29, 2007, to take effect Jan. 1, 2008.)

COMMENTARY

(a) Scope of section.

Section 2-1 addresses the principle of judicial notice, which relieves a party from producing formal evidence to prove a fact. E.g., *Beardsley* v. *Irving*, 81 Conn. 489, 491, 71 A. 580 (1909); *Federal Deposit Ins. Corp.* v. *Napert-Boyer Partnership*, 40 Conn. App. 434, 441, 671 A.2d 1303 (1996). Section 2-1 deals only with judicial notice of ''adjudicative'' facts. Adjudicative facts are the facts of a particular case or those facts that relate to the activities or events giving rise to the particular controversy. See *Moore* v. *Moore*, 173 Conn. 120, 122, 376 A.2d 1085 (1977); K. Davis, ''Judicial Notice,'' 55 Colum. L. Rev. 945, 952 (1955).

This section does not deal with judicial notice of ''legislative'' facts, i.e., facts that do not necessarily concern the parties in a particular case but that courts consider in determining the constitutionality or interpretation of statutes or issues of public policy upon which the application of a common-law rule depends. See *Moore* v. *Moore*, supra, 173 Conn. 122; K. Davis, supra, 55 Colum. L. Rev. 952. The Code leaves judicial notice of legislative facts to common law.

(b) Taking of judicial notice.

Subsection (b) expresses the common-law view that "[c]ourts are not bound to take judicial notice of matters of fact." *DeLuca* v. *Park Commissioners*, 94 Conn. 7, 10, 107 A. 611 (1919).

(c) Kinds of facts.

Subsection (c) is consistent with common-law principles of judicial notice. See, e.g., *West Hartford* v. *Freedom of Information Commission*, 218 Conn. 256, 264, 588 A.2d 1368 (1991); *State* v. *Tomanelli*, 153 Conn. 365, 369, 216 A.2d 625 (1966).

Both the fact that raw pork must be cooked thoroughly to kill parasites; see *Silverman* v. *Swift & Co.*, 141 Conn. 450, 458, 107 A.2d 277 (1954); and the fact that the normal period of human gestation is nine months; *Melanson* v. *Rogers*, 38 Conn. Supp. 484, 490–91, 451 A.2d 825 (1982); constitute examples of facts subject to judicial notice under category (1). Examples of category (2) facts include: scientific tests or principles; *State* v. *Tomanelli*, supra, 153 Conn. 370–71; geographical data; e.g., *Nesko Corp.* v. *Fontaine*, 19 Conn. Supp. 160, 162, 110 A.2d 631 (1954); historical facts; *Gannon* v. *Gannon*, 130 Conn. 449, 452, 35 A.2d 204 (1943); and times and dates. E.g., *Patterson* v. *Dempsey*, 152 Conn. 431, 435, 207 A.2d 739 (1965).

Within category (2), the court may take judicial notice of the existence, content and legal effect of a court file, or of a specific entry in a court file if that specific entry is brought to the attention of the court, subject to the provisions of Section 2-2. Judicial notice of a court file or a specific entry in a court file does not establish the truth of any fact stated in that court file. The rules governing hearsay and its

exceptions determine the admissibility of court records for the truth of their content. See *Fox* v. *Schaeffer*, 131 Conn. 439, 447, 41 A.2d 46 (1944); see also *O'Connor* v. *Larocque*, 302 Conn. 562, 568 n.6, 31 A.3d 1 (2011).

(d) Time of taking judicial notice.

Subsection (d) adheres to common-law principles. *Drabik* v. *East Lyme*, 234 Conn. 390, 398, 662 A.2d 118 (1995); *State* v. *Allen*, 205 Conn. 370, 382, 533 A.2d 559 (1987). **[**Because t**]** The Code **[**is intended to govern the admissibility of evidence in the court, subsection (d)**]** does not govern the taking of judicial notice on appeal.

[(e) Instructing jury (provision deleted)

The 2000 edition of the Code contained a subsection (e), which provided:

''(e) Instructing jury. The court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.'' The commentary contained the following text:

''(e) Instructing jury.

''In accordance with common law, whether the case is civil or criminal, the court shall instruct the jury that it may, but need not, accept the judicially noticed fact as conclusive. See, e.g., *State* v. *Tomanelli*, supra, 153 Conn. 369; cf. Fed. R. Evid. 201 (g). Because the jury need not accept the fact as conclusive, other parties may offer evidence in disproof of a fact judicially noticed. *State* v. *Tomanelli*, supra, 369; *Federal Deposit Ins. Corp.* v. *Napert-Boyer Partnership*, supra, 40 Conn. App. 441.'' This subsection was deleted with the recognition that the Code is not the appropriate repository for jury instructions.**]**

Sec. 2-2. Notice and Opportunity To Be Heard

(a) Request of party. A party requesting the court to take judicial notice of a fact shall give timely notice of the request to all other parties. Before the court determines whether to take the requested judicial notice, any party shall have an opportunity to be heard.

(b) Court's initiative. The court may take judicial notice without a request of a party to do so. Parties are entitled to receive notice and have an opportunity to be heard for matters susceptible of explanation or contradiction, but not for matters of established fact, the accuracy of which cannot be questioned.

COMMENTARY

(a) Request of party.

Subsection (a) states what appeared to be the preferred practice at common law. *Drabik* v. *East Lyme*, 234 Conn. 390, 398, 662 A.2d 118 (1995); *State ex rel. Capurso* v. *Flis*, 144 Conn. 473, 477–78, 133 A.2d 901 (1957); *Nichols* v. *Nichols*, 126 Conn. 614, 622, 13 A.2d 591 (1940).

(b) Court's initiative.

The first sentence is consistent with existing Connecticut law. E.g., *Connecticut Bank & Trust Co.* v. *Rivkin*, 150 Conn. 618, 622, 192 A.2d 539 (1963). The dichotomous rule in the second sentence represents the common-law view as expressed in *Moore* v. *Moore*, 173 Conn. 120, 121–22, 376 A.2d 1085 (1977). Although the court in *Moore* suggested that ''it may be the better practice to give parties an opportunity to be heard'' on the propriety of taking judicial notice

of accurate and established facts; id., 122; it did not so require. Accord *Guerriero* v. *Galasso*, 144 Conn. 600, 605, 136 A.2d 497 (1957).

ARTICLE III—PRESUMPTIONS

Sec. 3-1. General Rule

Except as otherwise required by the constitution of the United States, the constitution of this state, the General Statutes or **[**the**]** any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code, presumptions shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience.

COMMENTARY

See Section 1-2 (b) and the commentary thereto.

ARTICLE IV—RELEVANCY

Sec. 4-1. Definition of Relevant Evidence

''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.

COMMENTARY

Section 4-1 embodies the two separate components of relevant evidence recognized at common law: (1) probative value; and (2) materiality. *State* v. *Jeffrey*, 220 Conn. 698, 709, 601 A.2d 993 (1991); *State* v. *Dabkowski*, 199 Conn. 193, 206, 506 A.2d 118 (1986).

Section 4-1 incorporates the requirement of probative value by providing that the proffered evidence must tend ''to make the existence

of any fact . . . more probable or less probable than it would be without the evidence.'' See, e.g., *State* v. *Prioleau*, 235 Conn. 274, 305, 664 A.2d 793 (1995); *State* v. *Briggs*, 179 Conn. 328, 332, 426 A.2d 298 (1979), cert. denied, 447 U.S. 912, 100 S. Ct. 3000, 64 L. Ed. 2d 862 (1980). Section 4-1's ''more probable or less probable than it would be without the evidence'' standard of probative worth is consistent with Connecticut law. See, e.g., *State* v. *Rinaldi*, 220 Conn. 345, 353, 599 A.2d 1 (1991) (''[t]o be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion, *even to a slight degree*'' [emphasis added]); *State* v. *Miller*, 202 Conn. 463, 482, 522 A.2d 249 (1987) (''[e]vidence is not inadmissible because it is not conclusive; it is admissible if it has a tendency to support a fact relevant to the issues *if only in a slight degree*'' [emphasis added]). Thus, it is not necessary that the evidence, by itself, conclusively establish the fact for which it is offered or render the fact more probable than not.

Section 4-1 expressly requires materiality as a condition to relevancy in providing that the factual proposition for which the evidence is offered must be ''material to the determination of the proceeding . . . .'' See *State* v. *Marra*, 222 Conn. 506, 521, 610 A.2d 1113 (1992); *State* v. *Corchado*, 188 Conn. 653, 668, 453 A.2d 427 (1982). The materiality of evidence turns upon what is at issue in the case, which generally will be determined by the pleadings and the applicable substantive law. See *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 570, 657 A.2d 212 (1995). **[**; C. Tait & J. LaPlante Connecticut Evidence (2d Ed. 1988) § 8.1.2, pp. 226–27.**]**

Sec. 4-2. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the constitution of the United States, the constitution of **[**this state**]** the State of Connecticut, the Code**[**,**]** or the General Statutes or the common law. Evidence that is not relevant is inadmissible.

COMMENTARY

Section 4-2 recognizes two fundamental common-law principles: (1) all relevant evidence is admissible unless otherwise excluded; e.g., *Delmore* v. *Polinsky*, 132 Conn. 28, 31, 42 A.2d 349 (1945); see *Federated Dept. Stores, Inc.* v. *Board of Tax Review*, 162 Conn. 77, 82–83, 291 A.2d 715 (1971); and (2) irrelevant evidence is inadmissible. *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 569, 657 A.2d 212 (1995); see *State* v. *Mastropetre*, 175 Conn. 512, 521, 400 A.2d 276 (1978).

Reference in Section 4-2 to the federal and state constitutions includes **[**, by implication,**]** judicially created remedies designed to preserve constitutional rights, such as the **[**fourth amendment**]** exclusionary rule. See *State* v. *Marsala*, 216 Conn. 150, 161, 579 A.2d 58 (1990) (construing exclusionary rule under Connecticut constitution).

Sec. 4-3. Exclusion of Evidence on Grounds of Prejudice, Confusion or Waste of Time

Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

COMMENTARY

Section 4-3 establishes a balancing test under which the probative value of proffered evidence is weighed against the harm likely to result from its admission. See, e.g., *State* v. *Rinaldi*, 220 Conn. 345, 356, 599 A.2d 1 (1991); *Farrell* v. *St. Vincent's Hospital*, 203 Conn. 554, 563, 525 A.2d 954 (1987); *State* v. *DeMatteo*, 186 Conn. 696, 702–703, 443 A.2d 915 (1982). The task of striking this balance is relegated to the court's discretion. E.g., *State* v. *Paulino*, 223 Conn. 461, 477, 613 A.2d 720 (1992).

The discretion of a trial court to exclude relevant evidence on the basis of unfair prejudice is well established. E.g., *State* v. *Higgins*, 201 Conn. 462, 469, 518 A.2d 631 (1986). All evidence adverse to an opposing party is inherently prejudicial because it is damaging to that party's case. *Berry* v. *Loiseau*, 223 Conn. 786, 806, 614 A.2d 414 (1992); *Chouinard* v. *Marjani*, 21 Conn. App. 572, 576, 575 A.2d 238 (1990). For exclusion, however, the prejudice must be ''unfair'' in the sense that it ''unduly arouse[s] the jury's emotions of prejudice, hostility or sympathy''; *State* v. *Wilson*, 180 Conn. 481, 490, 429 A.2d 931 (1980); or ''tends to have some adverse effect upon [the party against whom the evidence is offered] beyond tending to prove the fact or issue that justified its admission into evidence.'' *State* v. *Graham*, 200 Conn. 9, 12, 509 A.2d 493 (1986), quoting *United States* v. *Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980).

Common law recognized unfair surprise as a factor to be weighed against the probative value of the evidence. See, e.g., *State* v. *Higgins*, supra, 201 Conn. 469; *State* v. *DeMatteo*, supra, 186 Conn. 703.

When dangers of unfair surprise are claimed to outweigh probative value, nothing precludes the court from fashioning a remedy other than exclusion, e.g., continuance, when that remedy will adequately cure the harm suffered by the opposing party.

Section 4-3 also recognizes the court's authority to exclude relevant evidence when its probative value is outweighed by factors such as confusion of the issues or misleading the jury; *Farrell* v. *St. Vincent's Hospital*, supra, 203 Conn. 563; see *State* v. *Gaynor*, 182 Conn. 501, 511, 438 A.2d 749 (1980); *State* v. *Sebastian*, 81 Conn. 1, 4, 69 A. 1054 (1908); or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. See, e.g., *State* v. *Parris*, 219 Conn. 283, 293, 592 A.2d 943 (1991); *State* v. *DeMatteo*, supra, 186 Conn. 702–703; *Hydro-Centrifugals, Inc.* v. *Crawford Laundry Co.*, 110 Conn. 49, 54–55, 147 A. 31 (1929).

Sec. 4-4. Character Evidence Not Admissible To Prove Conduct; Exceptions; Methods of Proof; Cross-Examination of a Character Witness

(a) Character evidence generally. Evidence of a trait of character of a person is inadmissible for the purpose of proving that the person acted in conformity with the character trait on a particular occasion, except that the following is admissible:

(1) Character of the accused. Evidence of a specific trait of character of the accused relevant to an element of the crime charged offered by an accused, or by the prosecution to rebut such evidence introduced by the accused.

(2) Character of the victim in a homicide or criminal assault case. Evidence offered by an accused in a homicide or criminal assault case, after laying a foundation that the accused acted in self-defense, of the violent character of the victim to prove that the victim was the aggressor, or by the prosecution to rebut such evidence introduced by the accused.

(3) Character of a witness for truthfulness or untruthfulness. Evidence of the character of a witness for truthfulness or untruthfulness to impeach or support the credibility of the witness.

(4) Character of a person to support a third-party culpability defense.

(b) Methods of proof. In all cases in which evidence of a trait of character of a person is admissible to prove that the person acted in conformity with the character trait, proof may be made by testimony as to reputation or in the form of an opinion. In cases in which the accused in a homicide or criminal assault case may introduce evidence of the violent character of the victim, the victim's character may also be proved by evidence of the victim's conviction of a crime of violence.

(c) Specific instances of conduct on cross-examination of a character witness. A character witness may be asked, in good faith, on cross-examination about specific instances of conduct relevant to the trait of character to which the witness testified to test the basis of the witness' opinion.

COMMENTARY

(a) Character evidence generally.

Subsection (a) adopts the well established principle that evidence of a trait of character generally is inadmissible to show conforming

conduct. See, e.g., *Berry* v. *Loiseau*, 223 Conn. 786, 805, 614 A.2d 414 (1992) (civil cases); *State* v. *Moye*, 177 Conn. 487, 500, 418 A.2d 870, vacated on other grounds, 444 U.S. 893, 100 S. Ct. 199, 62 L. Ed. 2d 129 (1979) (criminal cases, character traits of defendant); *State* v. *Miranda*, 176 Conn. 107, 109, 405 A.2d 622 (1978) (criminal cases, character traits of victim).

Subsection (a) enumerates **[**three**]** four exceptions to the general rule. Subdivision (1) restates the rule from cases such as *State* v. *Martin*, 170 Conn. 161, 163, 365 A.2d 104 (1976). The language in subdivision (1), ''relevant to an element of the crime charged,'' reflects a prerequisite to the introduction of character traits evidence recognized at common law. E.g., *State* v. *Blake*, 157 Conn. 99, 103–104, 249 A.2d 232 (1968); *State* v. *Campbell*, 93 Conn. 3, 10, 104 A. 653 (1918).

Subdivision (2) restates the rule announced in *State* v. *Miranda*, supra, 176 Conn. 109–11, and affirmed in its progeny. See, e.g., *State* v. *Smith*, 222 Conn. 1, 17, 608 A.2d 63, cert. denied, 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d 293 (1992); *State* v. *Gooch*, 186 Conn. 17, 21, 438 A.2d 867 (1982). Subdivision (2) limits the admissibility of evidence of the victim's violent character to homicide and assault prosecutions in accordance with Connecticut law. E.g., *State* v. *Carter*, 228 Conn. 412, 422–23, 636 A.2d 821 (1994) (homicide cases), overruled on other grounds by *Label Systems Corp.* v. *Aghamohammadi*, 270 Conn. 291, 313, 852 A.2d 703 (2004) **[**(homicide cases)**]**; *State* v. *Webley*, 17 Conn. App. 200, 206, 551 A.2d 428 (1988) (criminal assault cases); see also *State* v. *Gooch*, supra, 21 (assuming without

deciding that evidence of victim's violent character is admissible in assault prosecutions to prove victim was aggressor).

Subdivision (2) does not address the admissibility of evidence of the victim's violent character offered to prove the accused's state of mind, where the accused's knowledge of the victim's violent character would be necessary. See *State* v. *Smith*, supra, 222 Conn. 17; *State* v. *Padula*, 106 Conn. 454, 456–57, 138 A. 456 (1927). The admissibility of such evidence is left to common-law development.

Subdivision (3) authorizes the court to admit evidence of a witness' character for untruthfulness or truthfulness to attack or support that witness' credibility. See, e.g., *State* v. *George*, 194 Conn. 361, 368, 481 A.2d 1068 (1984), cert. denied, 469 U.S. 1191, 105 S. Ct. 963, 83 L. Ed. 2d 968 (1985). Section 6-6 addresses the admissibility of such evidence and the appropriate methods of proof.

Subdivision (4) concerns proof of third-party culpability. See *State* v. *Hedge*, 297 Conn. 621, 648, 1 A.3d 1051 (2010) (once third-party evidence is allowed, evidence introduced by accused could include evidence of third person's character, past criminal convictions or other prior bad acts).

Subsection (a) does not preclude the admissibility of character evidence when a person's character is directly in issue as an element to a charge, claim or defense. See, e.g., *Smith* v. *Hall*, 69 Conn. 651, 665, 38 A. 386 (1897). When a person's character or trait of character constitutes an essential element to a charge, claim or defense, Section 4-5 (c) authorizes proof by evidence of specific instances of conduct.

Character traits evidence admissible under subsection (a) nevertheless is subject to the relevancy standards and balancing test set forth in Sections 4-1 and 4-3, respectively. See *State* v. *Martin*, supra, 170 Conn. 165–66.

(b) Methods of proof.

Subsection (b) adopts the recognized methods of proving evidence of a trait of character. E.g., *State* v. *Martin*, supra, 170 Conn. 163; *State* v. *Blake*, supra, 157 Conn. 104–105.

Generally, neither the accused nor the prosecution may prove a character trait by introducing evidence of specific instances of conduct. *State* v. *Gooch*, supra, 186 Conn. 21; *State* v. *Miranda*, supra, 176 Conn. 112. However, subsection (b) must be read in conjunction with subsection (c), which authorizes, during cross-examination of a character witness, the introduction of specific instances of conduct relevant to the character trait to which the witness testified in order to test the basis of the witness' opinion. See *State* v. *McGraw*, 204 Conn. 441, 446–47, 528 A.2d 821 (1987); *State* v. *DeAngelis*, 200 Conn. 224, 236–37, 511 A.2d 310 (1986).

Notwithstanding the general exclusion of evidence of specific instances of conduct to prove a person's trait of character, subsection (b) sets forth one narrow exception recognized in *State* v. *Miranda*, supra, 176 Conn. 113–14, and its progeny. See *State* v. *Webley*, supra, 17 Conn. App. 206 (criminal assault cases). The convictions that form the basis of the evidence introduced under this exception must be convictions for violent acts. *State* v. *Miranda*, supra, 114.

Evidence of violent acts not having resulted in conviction is not admissible. *State* v. *Smith*, supra, 222 Conn. 18.

(c) Specific instances of conduct on cross-examination of a character witness.

Subsection (c) is based on the rule set forth in *State* v. *Martin*, supra, 170 Conn. 165, which permits the cross-examiner to ask a character witness about relevant instances of conduct to explore the basis of the character witness' direct examination testimony. Accord *State* v. *DeAngelis*, supra, 200 Conn. 236–37. The conduct inquired into on cross-examination must relate to the trait that formed the subject of the character witness' testimony on direct. *State* v. *Turcio*, 178 Conn. 116, 127, 422 A.2d 749 (1979), cert. denied, 444 U.S. 1013, 100 S. Ct. 661, 62 L. Ed. 2d 642 (1980); *State* v. *Martin*, supra, 165–66. Moreover, inquiries must be undertaken in good faith.

A court, in its discretion, may limit or proscribe such inquiries where the probative value of the specific instance evidence is outweighed by unfair prejudice or other competing concerns. *State* v. *Turcio*, supra, 178 Conn. 128; see Section 4-3.

Where the term ''victim'' is used in this section and elsewhere in the Code, the term includes an alleged victim in those circumstances in which a person's status as a victim is subject to proof.

Sec. 4-5. Evidence of Other Crimes, Wrongs or Acts Generally Inadmissible

(a) General Rule. Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b):

(b) When evidence of other sexual misconduct is admissible to prove propensity. Evidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct if: (1) the case involves aberrant and compulsive sexual misconduct; (2) the trial court finds that the evidence is relevant to a charged offense in that the other sexual misconduct is not too remote in time, was allegedly committed upon a person similar to the alleged victim, and was otherwise similar in nature and circumstances to the aberrant and compulsive sexual misconduct at issue in the case; and (3) the trial court finds that the probative value of the evidence outweighs its prejudicial effect.

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

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

(Amended June 20, 2011, to take effect Jan. 1, 2012.)

COMMENTARY

(a) Evidence of other crimes, wrongs or acts generally inadmissible.

Subsection (a) is consistent with Connecticut common law. E.g., *State* v. *Santiago*, 224 Conn. 325, 338, 618 A.2d 32 (1992); *State* v. *Ibraimov*, 187 Conn. 348, 352, 446 A.2d 332 (1982). Other crimes, wrongs or acts evidence may be admissible for other purposes as specified in subsections (b) and (c), Section 4-4 (a) (4) and Section 4-5. Cf. *State* v. *Hedge*, 297 Conn. 621, 650–52, 1 A.3d 1051 (2010); see Section 4-4 (a) (4), commentary. Although the issue typically arises in the context of a criminal proceeding; see *State* v. *McCarthy*, 179 Conn. 1, 22, 425 A.2d 924 (1979); subsection (a)'s exclusion applies in both criminal and civil cases. See, e.g., *Russell* v. *Dean Witter Reynolds, Inc.*, 200 Conn. 172, 191–92, 510 A.2d 972 (1986).

(b) When evidence of other sexual misconduct is admissible to prove propensity.

Subsection (a) specifically prohibits the use of other crimes, wrongs or acts evidence to prove a person's propensity to engage in the misconduct with which **[**he**]** the defendant has been charged. However, the court may admit evidence of a defendant's uncharged sexual misconduct to prove that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual behavior**[**;**]**. See *State* v. *DeJesus,* 288 Conn. 418, 953 A.2d 45 (2008)*; State v. Snelgrove,* 288 Conn. 742, 954 A.2d 165 (2008); *State* v. *Johnson,* 289 Conn. 437, 958 A.2d 713 (2008); see also *State* v. *Smith*, 313 Conn. 325, 337–38, 96 A.3d 1238 (2014); State v. *George A.*, 308 Conn. 274, 63

A.3d 918 (2013) (evidence of uncharged sexual misconduct committed by defendant against minor victim's mother held admissible); but see *State* v. *Gupta*, 297 Conn. 211, 998 A.2d 1085 (2010) (evidence that defendant physician had fondled other patients too dissimilar to be admissible). Although *State* v. *DeJesus* involved a sexual assault charge, later, the Supreme Court, in *State* v. *Snelgrove*, made it clear that the *DeJesus* propensity rule is not limited to cases in which the defendant is charged with a sex offense. In *State* v. *Snelgrove*, the court stated: ''We conclude that this rationale for the exception to the rule barring propensity evidence applies whenever the evidence establishes that both the prior misconduct and the offense with which the defendant is charged were driven by an aberrant sexual compulsion, regardless of whether the prior misconduct or the conduct at issue resulted in sexual offense charges.'' **[**288 Conn. 760.**]** *State* v. *Snelgrove*, supra, 760. The admission of the evidence of a defendant's uncharged sexual misconduct to prove that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual behavior should be accompanied by an appropriate cautionary instruction limiting the purpose for which it may properly be used. *State* v. *DeJesus,* supra**, [**at**]** 474**[.]**; *State* v. *George A.*, supra, 294–95.

(c) When evidence of other crimes, wrongs or acts is admissible.

Subsection (a) specifically prohibits the use of other crimes, wrongs or acts evidence to prove a person's bad character or criminal tendencies. Subsection (c) however, authorizes the court, in its discretion,

to admit other crimes, wrongs or acts evidence for other purposes, such as to prove:

(1) intent; e.g., *State* v. *Lizzi*, 199 Conn. 462, 468–69, 508 A.2d 16 (1986);

(2) identity; e.g., *State* v. *Pollitt*, 205 Conn. 61, 69, 530 A.2d 155 (1987);

(3) malice; e.g., *State* v. *Barlow*, 177 Conn. 391, 393, 418 A.2d 46 (1979);

(4) motive; e.g., *State* v. *James*, 211 Conn. 555, 578, 560 A.2d 426 (1989);

(5) a common plan or scheme; e.g., *State* v. *Randolph*, 284 Conn. 328, 356, 933 A.2d 1158 (2007); *State* v. *Morowitz*, 200 Conn. 440, 442–44, 512 A.2d 175 (1986);

(6) absence of mistake or accident; e.g., *State* v. *Tucker*, 181 Conn. 406, 415–16, 435 A.2d 986 (1980);

(7) knowledge; e.g., *State* v. *Fredericks*, 149 Conn. 121, 124, 176 A.2d 581 (1961);

(8) a system of criminal activity; e.g., *State* v. *Vessichio*, 197 Conn. 644, 664–65, 500 A.2d 1311 (1985), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986);

(9) an element of the crime charged; e.g., **[***State* v. *Jenkins*, 158 Conn. 149, 152–53, 256 A.2d 223 (1969)**]** *State* v. *Torres*, 57 Conn. App. 614, 622–23, 749 A.2d 1210, cert. denied, 253 Conn. 927, 754 A.2d 799 (2000); **[**or**]**

(10) to corroborate crucial prosecution testimony; e.g., *State* v. *Mooney*, 218 Conn. 85, 126–27, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991);**[.]** or

(11) third-party culpability by defendant's proffer of third party's other crimes, wrongs or acts; *State* v. *Hedge*, supra, 297 Conn. 650–52.

Admissibility of other crimes, wrongs or acts evidence is contingent on satisfying the relevancy standards and balancing test set forth in Sections 4-1 and 4-3, respectively. For other crimes, wrongs or acts evidence to be admissible, the court must determine that the evidence is probative of one or more of the enumerated purposes for which it is offered**[,]** and that its probative value outweighs its prejudicial effect. E.g., *State* v. *Figueroa*, 235 Conn. 145, 162, 665 A.2d 63 (1995); *State* v. *Cooper*, 227 Conn. 417, 425–28, 630 A.2d 1043 (1993).

The purposes enumerated in subsection (c) for which other crimes, wrongs or acts evidence may be admitted are intended to be illustrative rather than exhaustive. Neither subsection (a) nor subsection (c) precludes a court from recognizing other appropriate purposes for which other crimes, wrongs or acts evidence may be admitted, provided the evidence is not introduced to prove a person's bad character or criminal tendencies, and the probative value of its admission is not outweighed by any of the Section 4-3 balancing factors.

(d) Specific instances of conduct when character in issue.

Subsection (d) finds support in Connecticut case law. See *State* v. *Miranda*, 176 Conn. 107, 112, 365 A.2d 104 (1978); *Norton* v. *Warner*, 9 Conn. 172, 174 (1832).

Sec. 4-6. Habit; Routine Practice

Evidence of the habit of a person or the routine practice of an organization is admissible to prove that the conduct of the person or the organization on a particular occasion was in conformity with the habit or routine practice.

COMMENTARY

While Section 4-4 generally precludes the use of evidence of a trait of character to prove conforming behavior, Section 4-6 admits evidence of a person's habit or an organization's routine practice to prove conformity therewith on a particular occasion. See, e.g., *Birkhamshaw* v. *Socha*, 156 Conn. App. 453, 471, 115 A.3d 1 (2015); *Caslowitz* v. *Roosevelt Mills, Inc.*, 138 Conn. 121, 125–26, 82 A.2d 808 (1951); *State* v. *Williams*, 90 Conn. 126, 130, 96 A. 370 (1916); *Moffitt* v. *Connecticut Co.*, 86 Conn. 527, 530–31, 86 A. 16 (1913); *State* v. *Hubbard*, 32 Conn. App. 178, 185, 628 A.2d 626, cert. denied, 228 Conn. 902, 634 A.2d 296 (1993). The distinction between habit or routine practice and ''trait of character'' is, therefore, dispositive. See *State* v. *Whitford*, 260 Conn. 610, 641–42, 799 A.2d 1034 (2002) (victim's violent acts inadmissible as habit evidence to establish defendant's claim of self-defense in criminal assault case). ''Our case law concerning this type of evidence, although sparse, suggests that habit is not relevant to prove willful or deliberate acts.'' Id., 642.

''Whereas a trait of character entails a generalized description of one's disposition as to a particular trait, such as honesty, peacefulness or carelessness, habit is a person's regular practice of responding to a particular kind of situation with a specific type of conduct. . . .''

(Citations omitted; internal quotation marks omitted.) *Birkhamshaw* v. *Socha*, supra, 156 Conn. App. 472 **[**1 C. McCormick, Evidence (5th Ed. 1999) § 195, p. 686; see also C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 8.6.1, p. 252("[h]abit . . . refer[s] to a course of conduct that is fixed, invariable, unthinking, and generally pertain[s] to a very specific set of repetitive circumstances").**]**; see *State* v. *Whitford*, supra, 260 Conn. 641. "Habit and custom refer to a course of conduct that is fixed, invariable, and unthinking, and generally pertain to a very specific set of repetitive circumstances." (Internal quotation marks omitted.) *Birkhamshaw* v. *Socha*, supra, 472. "Testimony as to the habit or practice of doing a certain thing in a certain way is evidence of what actually occurred under similar circumstances or conditions. . . . Evidence of *a regular practice* permits an inference that the practice was followed on a given occasion." (Emphasis in original; internal quotation marks omitted.) Id. Routine practice of an organization sometimes referred to as a business custom or customary practice is equivalent to a habit of an individual for purposes of the foregoing standards. See *Maynard* v. *Sena*, 158 Conn. App. 509, 518, 125 A.3d 541, cert. denied, 319 Conn. 910, 123 A.3d 436 (2015).

Sec. 4-7. Subsequent Remedial Measures

(a) General rule. Except as provided in subsection (b), evidence of measures taken after an event, which if taken before the event would have made injury or damage less likely to result, is inadmissible to prove negligence or culpable conduct in connection with the event. Evidence of those measures is admissible when offered to prove

controverted issues such as ownership, control or feasibility of precautionary measures.

(b) Strict product liability of goods. Where a theory of liability relied on by a party is strict product liability, evidence of such measures taken after an event is admissible.

COMMENTARY

(a) General rule.

Subsection (a) reflects the general rule announced in *Nalley* v. *Hartford Carpet Co.*, 51 Conn. 524, 532 (1884), and its progeny. E.g., *Hall* v. *Burns*, 213 Conn. 446, 456–57, 569 A.2d 10 (1990); *Rokus* v. *Bridgeport*, 191 Conn. 62, 65, 463 A.2d 252 (1983); *Carrington* v. *Bobb*, 121 Conn. 258, 262, 184 A. 591 (1936).

The rationale behind this exclusionary rule is twofold. First, evidence of subsequent remedial measures is of relatively slight probative value on the issue of negligence or culpable conduct at the time of the event. E.g., *Hall* v. *Burns*, supra, 213 Conn. 457–59 & n.3; *Waterbury* v. *Waterbury Traction Co.*, 74 Conn. 152, 169, 50 A. 3 (1901). Second, the rule reflects a social policy of encouraging potential defendants to take corrective measures without fear of having their corrective measures used as evidence against them. *Hall* v. *Burns*, supra, 457; see *Waterbury* v. *Waterbury Traction Co.*, supra, 169.

Evidence of subsequent remedial measures may be admissible for purposes other than proving negligence or culpable conduct. Such evidence is admissible as proof on issues such as ownership, control or feasibility of precautionary measures. See, e.g., *Williams* v. *Milner Hotels Co.*, 130 Conn. 507, 509–10, 36 A.2d 20 (1944) (control); *Quinn*

v. *New York, N.H. & H. R. Co.*, 56 Conn. 44, 53–54, 12 A. 97 (1887) (feasibility). These issues must be ''controverted,'' however, before evidence of subsequent remedial measures is admissible. See *Wright* v. *Coe & Anderson, Inc.*, 156 Conn. 145, 155, 239 A.2d 493 (1968); *Haffey* v. *Lemieux*, 154 Conn. 185, 193, 224 A.2d 551 (1966).

The list in subsection (a) of other purposes for which evidence of subsequent remedial measures may be offered is meant to be illustrative rather than exhaustive. See *Rokus* v. *Bridgeport*, supra, 191 Conn. 66. So long as the evidence is not offered to prove negligence or culpable conduct, it may be admitted subject to the court's discretion. See id., 66–67 (post-accident photograph of accident scene at which subsequent remedial measures had been implemented admissible when photograph was offered solely to show configuration and layout of streets and sidewalks to acquaint jury with accident scene); see **[**also**]** *Baldwin* v. *Norwalk*, 96 Conn. 1, 8, 112 A. 660 (1921) (subsequent remedial measures evidence also may be offered for impeachment purposes); see also *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 60 A.3d 222 (2013) (post-accident photograph of subsequent remedial measure improperly admitted for impeachment purposes in absence of balancing probative value against prejudicial effect).

(b) Strict product liability of goods.

Subsection (b) adopts the rule announced in *Sanderson* v. *Steve Snyder Enterprises, Inc.*, 196 Conn. 134, 146–148, 491 A.2d 389 (1985). In *Sanderson*, the court stated two reasons for rendering the general exclusionary rule inapplicable in strict product liability cases.

First, the court reasoned that the danger of discouraging subsequent corrective measures is not a chief concern in strict product liability cases: ''The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability . . . .'' Id., 146. **[**, quoting *Ault* v. *International Harvester Co.*, 13 Cal. 3d 113, 120, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974).**]**

Second, it reasoned that because the **[**product's**]** defectiveness of mass produced goods is at issue in a strict product liability case, rather than the producer/defendant's negligence or culpable conduct, the probative value of the evidence is high. Id., 147. **[***Sanderson* v. *Steve Snyder Enterprises, Inc.*, supra, 196 Conn. 147. Specifically, subsequent remedial measure evidence in strict product liability cases is probative of the issue of product defectiveness because it gives the fact finder a safer alternative design against which to compare the previous design. Id. Because the evidence is offered for purposes other than to prove negligence or culpable conduct, the policy for exclusion does not exist. See id.**]**

[*Sanderson* leaves open the question whether the rule is limited to cases involving remedial measures taken with respect to mass produced products or whether it extends to all products, regardless of production volume. Because of the uncertainty surrounding the issue,

subsection (b) takes no position and leaves the issue for common-law development.**]**

Sec. 4-8. Offers To Compromise

(a) General rule. Evidence of an offer to compromise or settle a disputed claim is inadmissible on the issues of liability and the amount of the claim.

(b) Exceptions. This rule does not require the exclusion of:

(1) Evidence that is offered for another purpose, such as proving bias or prejudice of a witness, refuting a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution, or

(2) statements of fact or admissions of liability made by a party.

COMMENTARY

(a) General rule.

It is well established that evidence of an offer to compromise or settle a disputed claim is inadmissible to prove the validity or invalidity of the claim or its amount. See, e.g., *Jutkowitz* v. *Dept. of Health Services*, 220 Conn. 86, 97, 596 A.2d 374 (1991); *Simone Corp.* v. *Connecticut Light & Power Co.*, 187 Conn. 487, 490, 446 A.2d 1071 (1982); *Evans Products Co.* v. *Clinton Building Supply, Inc.*, 174 Conn. 512, 517, 391 A.2d 157 (1978); *Fowles* v. *Allen*, 64 Conn. 350, 351–52, 30 A. 144 (1894); *Stranahan* v. *East Haddam*, 11 Conn. 507, 514 (1836)**[.]**; cf. *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, 267 Conn. 279, 332–33, 838 A.2d 135 (2004) (e-mail containing settlement discussion between defendant and third party admissible because Section 4-8 precludes only admission of evidence of settlement between parties at trial, not third parties).

The purpose of the rule is twofold. First, an offer to compromise or settle is of slight probative value on the issues of liability or the amount of the claim since a party, by attempting to settle, merely may be buying peace instead of conceding the merits of the disputed claim. *Stranahan* v. *East Haddam*, supra, 11 Conn. 514. **[**; 29 Am. Jur. 2d 589, Evidence § 508 (1994).**]**

Second, the rule supports the policy of encouraging parties to pursue settlement negotiations by assuring parties that evidence of settlement offers will not be introduced into evidence to prove liability or a lack thereof if a trial ultimately ensues. See *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, 221 Conn. 194, 198, 602 A.2d 1011 (1992); *Miko* v. *Commission on Human Rights & Opportunities*, 220 Conn. 192, 209, 596 A.2d 396 (1991). **[**; C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 11.5.4 (b), p. 336.**]**

(b) Exceptions.

Subdivision (1) recognizes the admissibility of evidence of settlement offers when introduced for some purpose other than to prove or disprove liability or damages. See *State* v. *Milum*, 197 Conn. 602, 613, 500 A.2d 555 (1986) (to show bias and effort to obstruct criminal prosecution). Section 4-8's list of purposes for which such evidence may be introduced is intended to be illustrative rather than exhaustive. See *Lynch* v. *Granby Holdings, Inc.*, 32 Conn. App. 574, 583–84, 630 A.2d 609 (1993), rev'd on other grounds, 230 Conn. 95, 644 A.2d 325 (1994) (evidence of offer to compromise admissible to show that parties attempted to resolve problem concerning placement of sign when

trial court instructed jury that evidence did not indicate assumption of liability).

Subdivision (2) preserves the common-law rule permitting admissibility of statements made by a party in the course of settlement negotiations that constitute statements of fact or admissions of liability. See, e.g., *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, supra, 221 Conn. 198; *Hall* v. *Sera*, 112 Conn. 291, 298, 152 A. 148 (1930); *Hartford Bridge Co.* v. *Granger*, 4 Conn. 142, 148 (1822). A statement made in the course of settlement negotiations that contains an admission of fact is admissible ''where the statement was intended to state a fact.'' (Internal quotation marks omitted.) *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, supra, 198, quoting *Simone Corp.* v. *Connecticut Light & Power Co.*, supra, 187 Conn. 490. However, if the party making the statement merely ''intended to concede a fact hypothetically for the purpose of effecting a compromise''; *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, supra, 198, quoting *Evans Products Co.* v. *Clinton Building Supply, Inc.*, supra, 174 Conn. 517; the factual admission is inadmissible as an offer to compromise. See *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, supra, 198. If, considering the statement and surrounding circumstances, it is unclear whether the statement was intended to further a compromise or as a factual admission, the statement must be excluded. E.g., id., 199; *Simone Corp.* v. *Connecticut Light & Power Co.*, supra, 490. **[**; C. Tait & J. LaPlante, supra, § 11.5.4 (b), p. 337.**]**

(New) Sec. 4-8A. Pleas, Plea Discussions, and Related Statements

(a) Prohibited Uses. Evidence of the following shall not be admissible in a civil or criminal case against a person who has entered a plea of guilty or nolo contendere in a criminal case or participated in plea negotiations in such case, whether or not a plea has been entered:

(1) a guilty plea that was later withdrawn or rejected or any statement made in conjunction with such a plea;

(2) a plea of nolo contendere or a guilty plea entered under the *Alford* doctrine or any statement made in conjunction with such a plea;

(3) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in subsection (a):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if, in fairness, the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

COMMENTARY

(a) Prohibited Uses.

Section 4-8A is consistent with Connecticut law. See *Lawrence* v. *Kozlowski*, 171 Conn. 705, 711–12 and 711 n.4, 372 A.2d 110 (1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2930, 53 L. Ed. 2d 1066 (1977);

see also *State* v. *Gary*, 211 Conn. 101, 105–107, 558 A.2d 654 (1989); *State* v. *Ankerman*, 81 Conn. App. 503, 514 n.10, 840 A.2d 1182, cert. denied, 270 Conn. 901, 853 A.2d 520, cert. denied, 543 U.S. 944, 125 S. Ct. 372, 160 L. Ed. 2d 256 (2004); *State* v. *Anonymous*, 30 Conn. Supp. 181, 182,186, 307 A.2d 785 (1973). This rule is also in accordance with Practice Book § 39-25, which provides for the inadmissibility of rejected pleas of guilty or nolo contendere or pleas which are later withdrawn. See *U.S.* v. *Roberts*, 660 F.3d 149, 157 (2d Cir. 2011), cert. denied, 565 U.S 1238, 132 S. Ct. 1640, 182 L. Ed. 2d 239 (2012) (discussion of Fed. R. Evid. 410 and waiver of such rights).

Further, the rule is consistent with Fed. R. Evid. 410. Excluding offers to plead guilty or nolo contendere promotes the disposition of criminal cases by compromise. ''Effective criminal law administration . . . would hardly be possible if a large proportion of the charges were not disposed of by such compromises.'' (Internal quotation marks omitted.) Fed. R. Evid. 410, advisory committee's notes.

In *Kercheval* v. *United States*, 274 U.S. 220, 47 S. Ct. 582, 71 L. Ed. 1009 (1927), withdrawn pleas of guilty were held inadmissible in federal prosecutions. The Court stated that ''[w]hen the plea was annulled it ceased to be evidence. . . . As a practical matter, [the withdrawn plea] could not be received as evidence without putting the petitioner in a dilemma utterly inconsistent with the determination of the court awarding him a trial.'' (Citation omitted.) Id., 224.

As the Advisory Committee Notes indicate, rule 410 of the Federal Rules of Evidence ''gives effect to the principal traditional characteristic

of the nolo plea, i.e. avoiding the admission of guilt which is inherent in pleas of guilty. This position . . . recogniz[es] the inconclusive and compromise nature of judgments based on nolo pleas.'' Fed. R. Evid. 410, advisory committee's notes. Similarly, a plea under *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), is viewed as the functional equivalent of a plea of nolo contendere. See *State* v. *Palmer,* 196 Conn. 157, 169 n.3, 491 A.2d 1075 (1985).

A statement made during an *Alford* plea is not necessarily inadmissible in every situation. See, e.g., *State* v. *Simms*, 211 Conn. 1, 7, 557 A.2d 914, cert. denied, 493 U.S. 843, 110 S. Ct. 133, 107 L. Ed. 2d 93 (1989) (admissibility of *Alford* plea canvass upheld under unique circumstances where witness used *Alford* plea to strike bargain for himself and later changed position to benefit defendant).

(b) Exceptions.

The rule permits the use of such statements for the limited purposes of subsequent perjury or false statement prosecutions. Cf. *State* v. *Rodriguez*, 280 N.J. Super. Ct. App. Div. 590, 598, 656 A.2d 53 (1995) (construing state rule of evidence analogous to Fed. R. Evid. 410); *State* v. *Bennett*, 179 W. Va. 464, 469, 370 S.E.2d 120 (1988). Thus, the rule is inapplicable to a statement made in court on the record in the presence of counsel when the statement is offered in a subsequent prosecution of the declarant for perjury or false statement. See Fed. R. Evid. 410, advisory committee's notes.

Sec. 4-9. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital or similar expenses occasioned by an injury is inadmissible to prove liability for the injury.

COMMENTARY

Section 4-9 is consistent with Connecticut law. *Danahy* v. *Cuneo*, 130 Conn. 213, 216, 33 A.2d 132 (1943); see *Prosser* v. *Richman*, 133 Conn. 253, 257, 50 A.2d 85 (1946); *Sokolowski* v. *Medi Mart, Inc.*, 24 Conn. App. 276, 280, 587 A.2d 1056 (1991).

The two considerations upon which Section 4-9 is premised are similar to those underlying Sections 4-7 and 4-8. First, such evidence is of questionable relevancy on the issue of liability because an offer to pay or actual payment of medical or similar expenses may be intended as an ''act of mere benevolence'' rather than an admission of liability. *Danahy* v. *Cuneo*, supra, 130 Conn. 216; accord *Murphy* v. *Ossola*, 124 Conn. 366, 377, 199 A. 648 (1938). Second, the rule fosters the public policy of encouraging assistance to an injured party by eliminating the possibility that evidence of such assistance could be offered as an admission of liability at trial. See *Danahy* v. *Cuneo*, supra, 217.

Section 4-9 covers the situation addressed by General Statutes § 52-184b (c), which provides that evidence of any advance payment for medical bills made by a health care provider or by the insurer of such provider is inadmissible on the issue of liability in any action brought against the health care provider for malpractice in connection with the provision of health care or professional services. Section 4-

9's exclusion goes further by excluding offers or promises to pay in addition to actual payments.

Section 4-9, by its terms, excludes evidence of a promise or offer to pay or a furnishing of medical, hospital or similar expenses, but not admissions of fact accompanying the promise, offer or payment. Furthermore, nothing in Section 4-9 precludes admissibility when such evidence is offered to prove something other than liability for the injury.

Unlike Section 4-8, Section 4-9 does not expressly require the existence of a disputed claim as to liability or damages when the offer or promise to pay, or actual payment, is made, for the exclusion to apply.

Sec. 4-10. Liability Insurance

(a) General rule. Evidence that a person was or was not insured against liability is inadmissible upon the issue of whether the person acted negligently or otherwise wrongfully.

(b) Exception. This section does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

COMMENTARY

(a) General rule.

Section 4-10 is consistent with Connecticut law. See, e.g., *Magnon* v. *Glickman*, 185 Conn. 234, 242, 440 A.2d 909 (1981); *Walker* v. *New Haven Hotel Co.*, 95 Conn. 231, 235, 111 A. 59 (1920); *Nesbitt* v. *Mulligan*, 11 Conn. App. 348, 358–59, 527 A.2d 1195 (1987).

The exclusion of such evidence is premised on two grounds. First, the evidence is of slight probative value on the issue of fault because

the fact that a person does or does not carry liability insurance does not imply that that person is more or less likely to act negligently. *Walker* v. *New Haven Hotel Co.*, supra, 95 Conn. 235–36. Second, Section 4-10, by excluding evidence of a person's liability coverage or lack thereof, prevents the jury from improperly rendering a decision or award based upon the existence or nonexistence of liability coverage rather than upon the merits of the case. See id., 235.

(b) Exception.

In accordance with common law, Section 4-10 permits evidence of liability coverage or the lack thereof to be admitted if offered for a purpose other than to prove negligent or wrongful conduct. *Muraszki* v. *William L. Clifford, Inc.*, 129 Conn. 123, 128, 26 A.2d 578 (1942) (to show agency or employment relationship); *Nesbitt* v. *Mulligan*, supra, 11 Conn. App. 358–60 (to show motive or bias of witness); see *Holbrook* v. *Casazza*, 204 Conn. 336, 355–56, 528 A.2d 774 (1987) (same), cert. denied, 484 U.S. 1006, 108 S. Ct. 699, 98 L. Ed. 2d 651 (1988); see also *Vasquez* v. *Rocco*, 267 Conn. 59, 68, 836 A.2d 1158 (2003) (evidence of insurance admissible to prove ''substantial connection'' between insurer and witness). The list of purposes for which evidence of insurance coverage may be offered is meant to be illustrative rather than exhaustive.

Sec. 4-11. Admissibility of Evidence of Sexual Conduct

''In any prosecution for sexual assault under sections 53a-70, 53a-70a, and 53a-71 to 53a-73a, inclusive, no evidence of the sexual conduct of the victim may be admissible unless such evidence is (1) offered by the defendant on the issue of whether the defendant was,

with respect to the victim, the source of semen, disease, pregnancy or injury, or (2) offered by the defendant on the issue of credibility of the victim, provided the victim has testified on direct examination as to his or her sexual conduct, or (3) any evidence of sexual conduct with the defendant offered by the defendant on the issue of consent by the victim, when consent is raised as a defense by the defendant, or (4) otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights. Such evidence shall be admissible only after **[**a**]** an in camera hearing on a motion to offer such evidence containing an offer of proof. **[**On motion of either party the court may order such hearing held in camera, subject to the provisions of [General Statutes §] 51-164x.**]** If the proceeding is a trial with a jury, such hearing shall be held in the absence of the jury. If, after a hearing, the court finds that the evidence meets the requirements of this section and that the probative value of the evidence outweighs its prejudicial effect on the victim, the court may grant the motion. The testimony of the defendant during a hearing on a motion to offer evidence under this section may not be used against the defendant during the trial if such motion is denied, except that such testimony may be admissible to impeach the credibility of the defendant if the defendant elects to testify as part of the defense.'' General Statutes § 54-86f (a).

COMMENTARY

Section 4-11 quotes General Statutes § 54-86f (a), which covers the admissibility of evidence of a victim's sexual conduct in prosecutions for sexual assault and includes a procedural framework for admit-

ting such evidence. In 2015, § 54-86f was amended by adding subsections (b) through (d). Those subsections address procedural matters, rather than admissibility and, therefore, are not included in Section 4-11. See General Statutes § 54-86f (b) through (d), as amended by No. 15-207, § 2 of the 2015 Public Acts (concerning, inter alia, sealing transcripts and motions filed in association with hearing under § 54-86f and limiting disclosure by defense of state disclosed evidence).

Although Section 4-11, by its terms, is limited to criminal prosecutions for certain enumerated sexual assault offenses, the Supreme Court has applied the exclusionary principles of § 54-86f to prosecutions for risk of injury to a child brought under General Statutes § 53-21, at least when the prosecution also presents sexual assault charges under one or more of the statutes enumerated in § 54-86f. See *State* v. *Kulmac*, 230 Conn. 43, 54, 644 A.2d 887 (1994). The court reasoned that the policies underlying the rape shield statute were equally applicable when allegations of sexual assault and abuse form the basis of both the risk of injury and sexual assault charges. See id., 53–54. Although the Code [takes] expresses no position on the issue, Section 4-11 does not preclude application of the rape shield statute's general precepts, as a matter of common law, to other situations in which the policies underlying the rape shield statute apply. See *State* v. *Rolon*, 257 Conn. 156, 183–85, 777 A.2d 604 (2001) (five part test for determining the admissibility of evidence of child's previous sexual abuse to show alternate source of child's sexual knowledge).

ARTICLE V—PRIVILEGES

Sec. 5-1. General Rule

[Except as otherwise required by the constitution of the United States, the constitution of this state, the General Statutes or the Practice Book, privileges shall be governed by the principles of the common law].

A person may not be compelled to testify or to produce other evidence that he or she is privileged or obligated by privilege not to divulge by the constitution of the United States, the constitution of Connecticut, relevant federal statutes, the General Statutes, or any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code.

COMMENTARY

[See Section 1-2 (b) and the commentary thereto.]

The rules in Article V retain Connecticut law concerning privileges. All constitutional, statutory, and common-law privileges remain in force, subject to change by due course of law.

As the rules of privilege inhibit the fact-finding process, they ''must be applied . . . cautiously and with circumspection. . . .'' (Internal quotation marks omitted.) *State* v. *Christian*, 267 Conn. 710, 727, 841 A.2d 1158 (2004); see *Harrington* v. *Freedom of Information Commission*, 323 Conn. 1, 12–13, 144 A.3d 405 (2016). The person asserting a privilege has the burden of establishing its foundation. See *State* v. *Mark R.*, 300 Conn. 590, 598, 17 A.3d 1 (2011); *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, 267 Conn. 279, 330, 838 A.2d 135 (2004); *State* v. *Hanna*, 150 Conn. 457, 466, 191 A.2d 124 (1963).

Whether a claimed privilege covers particular testimony or other evidence as to which it is asserted is a preliminary question to be determined by the court. Section 1-3 (a). Privileges shall apply at all stages of all proceedings in the court. Section 1-1 (c).

In addition to evidentiary privileges recognized at common law, many privileges have been created or codified by Connecticut statute. The General Statutes and the common law should be reviewed for additional evidentiary privileges. Further, evidentiary privileges and confidential matters can have different meanings and legal effects. See *State* v. *Kemah*, 289 Conn. 411, 417 n.7, 957 A.2d 852 (2008); see generally *State* v. *Orr*, 291 Conn. 642, 673–74, 969 A.2d 750 (2009) (*Palmer, J.*, concurring). ''Evidentiary privileges should be sharply distinguished from information that is protected from public disclosure because the information was obtained under statute or procedure that made it confidential.'' (Internal quotation marks omitted.) C. Tait & E. Prescott, Tait's Handbook of Connecticut Evidence (5th Ed. 2014) § 5.2, p. 248. What follows is a brief, nonexhaustive description of several privileges that are most commonly invoked and honored in courts of this state.

Healthcare Provider Privileges.

In Connecticut, there is no common-law physician-patient privilege. Rather, a form of physician-patient privilege has been enacted in General Statutes § 52-146o (a). It should be noted that the provisions of § 52-146o apply to civil actions, but not to criminal prosecutions. See *State* v. *Anderson*, 74 Conn. App. 633, 653–54, 813 A.2d 1039, cert. denied, 263 Conn. 901, 819 A.2d 837 (2003); see also *State* v.

Legrand, 129 Conn. App. 239, 262–63, 20 A.3d 521, cert. denied, 302 Conn. 912, 27 A.3d 371 (2011).

The General Assembly has also enacted analogous privileges for communication with certain other health care providers, counselors or social workers. These include privileges for psychiatrist-patient; General Statutes §§ 52-146d and 52-146e; psychologist-patient; General Statutes § 52-146c (b); domestic violence/sexual assault counselor-victim; General Statutes § 52-146k; see *In re Robert H.*, 199 Conn. 693, 706, 509 A.2d 475 (1986); marital/family therapist communications; General Statutes § 52-146p (b); and licensed professional counselor communications. General Statutes § 52-146s (b). Each of these statutes has their own provisions governing the assertion or the waiver of the privilege and should be consulted.

Privileged Communications Made to Clergy.

While Connecticut common law does not recognize privileged communications to clergy; *State* v. *Mark R.*, 300 Conn. 590, 597, 17 A.3d 1 (2011); see generally *Cox* v. *Miller*, 296 F.3d 89, 102 (2d Cir. 2002), cert. denied, 537 U.S. 1192, 123 S. Ct. 1273, 154 L. Ed. 2d 1026 (2003); a related privilege has been codified in General Statutes § 52-146b. That statute protects from disclosure, in any civil or criminal case, or in any administrative or legislative proceeding, confidential communications made to a member of the clergy of any ''religious denomination'' who is accredited by ''the religious body to which he belongs, who is settled in the work of the ministry . . . .'' General Statutes § 52-146b. For such a privilege to apply, the person asserting it must establish that there was a communication, that the communica-

tion was confidential, that the communication was made to a member of the clergy within the meaning of § 52-146b, that it was made to the clergy member in his or her professional capacity, that the disclosure was sought as part of a criminal or civil case, and with a showing that the communication was meant to be confidential and that the privilege was not waived. *State* v. *Mark R.*, supra, 597–98; *State* v. *Rizzo*, 266 Conn. 171, 283, 833 A.2d 363 (2003).

Privilege against Self-Incrimination.

The fifth and fourteenth amendments to the constitution of the United States, article first, § 8, of the constitution of Connecticut and General Statutes § § 51-35 (b) and 52-199 all protect a person from being compelled to give potentially incriminating evidence against himself or herself that would expose such person to criminal liability. A criminal defendant cannot be forced to testify as a witness in his or her own case to invoke the privilege. U.S. Const., amends. V, XIV; Conn. Const., art. I, § 8; see General Statutes § 46-137 (b) (juvenile proceedings); see generally C. Tait & E. Prescott, Tait's Handbook of Connecticut Evidence (5th Ed. 2014) § 5.5.2, pp. 251–53.

The privilege against self-incrimination "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." (Internal quotation marks omitted.) *Olin Corp.* v. *Castells*, 180 Conn. 49, 53, 428 A.2d 319 (1980); see *Garrity* v. *New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967) (public

employees' self-incriminating statements obtained during investigation by threat of discharge cannot be used against them in subsequent criminal proceeding). The privilege ''extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute. . . . [I]f the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is . . . asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.'' (Internal quotation marks omitted.) *Malloy* v. *Hogan*, 378 U.S. 1, 11–12, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

This privilege, however, protects only natural persons and not corporations. *Lieberman* v. *Reliable Refuse Co.*, 212 Conn. 661, 672–76, 563 A.2d 1013 (1989). Because the statute embodying the privilege, § 52-199, serves only to codify the common law and constitutional limitations, corporations in Connecticut do not enjoy a privilege against self-incrimination. Id., 672. Corporate officers and agents, however, can claim the privilege against self-incrimination on their own behalf ''when summoned to testify or produce documentary material in connection with a suit in which his [or her] corporation is a party.'' Id., 674.

Additionally, while the privilege against self-incrimination is absolute, unless waived, when it is invoked in a civil proceeding, its invocation may have adverse consequences for the person asserting it. See,

e.g., *Pavlinko* v. *Yale-New Haven Hospital*, 192 Conn. 138, 470 A.2d 246 (1984) (plaintiff who invokes privilege at deposition in civil action risks dismissal of complaint); *Olin Corp.* v. *Castells*, supra, 180 Conn. 53–54 (adverse inference may be drawn against party in civil action when such party invokes privilege); cf. *In re Samantha C.*, 268 Conn. 614, 663, 847 A.2d 883 (2004) (when respondent invokes rule of practice instead of constitutional privilege, adverse inference may be drawn in termination of parental rights proceeding, if prior notice of adverse inference is given); see *Greenan* v. *Greenan*, 150 Conn. App. 289, 298 n.8, 91 A.3d 909 (noting exceptions to drawing adverse inference in General Statutes §§ 46b-138a and 52-146k [f]), cert. denied, 314 Conn. 902, 99 A.3d 1167 (2014). This rule is extended to the invocation of the privilege by a nonparty, assuming that the court determines that the ''probative value of admitting the evidence exceeds the prejudice to the party against whom it will be used . . . .'' *Rhode* v. *Milla*, 287 Conn. 731, 738, 949 A.2d 1227 (2008); see Section 4-3. A defendant may always waive this privilege and choose to testify. *James* v. *Commissioner of Correction*, 74 Conn. App. 13, 20, 810 A.2d 290 (2002), cert. denied, 262 Conn. 946, 815 A.2d 675 (2003).

Settlement, Mediation and Negotiation Privilege.

Privileges related to specific negotiation and mediation processes are recognized by statute, elsewhere in this Code, and by the rules of practice. See General Statutes § § 52-235d (b) (civil action mediation); 46b-53 (c) (Superior Court family mediation program); 31-96 (mediators appointed by Labor Commission); 46a-84 (e) (mediation and set-

tlement efforts involving human rights discrimination claims); Practice Book §§ 11-20A (i), 25-59A (g) and 42-49A (h); see also Section 4-8; *Tomasso Bros., Inc.* v. *October Twenty-Fourth, Inc.*, 221 Conn. 194, 198, 602 A.2d 1011 (1992). No evidence of guilty pleas, guilty pleas entered under the *Alford* doctrine, nolo contendere pleas or statements made in proceedings at which a plea was offered but not accepted by the judicial authority can be received at the trial of that case. Section 4-8A; Practice Book § 39-25. With limited exceptions, no statement made during plea discussions of a criminal case can be admitted at the trial of the case. Section 4-8A.

(New) Sec. 5-2. Attorney-Client Privilege

Communications when made in confidence between a client and an attorney for the purpose of seeking or giving legal advice are privileged.

COMMENTARY

The attorney-client privilege is a privilege protecting confidential communications between an attorney and client for the purpose of seeking or giving legal advice. *Blumenthal* v. *Kimber Mfg. Inc.*, 265 Conn. 1, 10, 826 A.2d 1088 (2003); *Doyle* v. *Reeves*, 112 Conn. 521, 523, 152 A. 882 (1931); *Goddard* v. *Gardner*, 28 Conn. 172, 175 (1859). The term ''client'' also includes prospective clients. See Rules of Professional Conduct 1.18. ''Because the application of the attorney-client privilege tends to prevent the full disclosure of information and the true state of affairs, it is both narrowly applied and strictly construed.'' *Harrington* v. *Freedom of Information Commission*, 323 Conn. 1, 12–13, 144 A.3d 405 (2016); see also *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, 267 Conn. 279, 330, 838 A.2d 135 (2004).

The privilege protects both the confidential giving of advice by an attorney and the providing of information to the attorney by the client or the client's agent. *Metro Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 249 Conn. 36, 52, 730 A.2d 51 (1999); *State* v. *Cascone*, 195 Conn. 183, 186–87, 487 A.2d 186 (1985). To be protected, the communications must be in connection with and necessary for the seeking or giving of legal advice. *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, supra, 267 Conn. 329; *Ullman* v. *State*, 230 Conn. 698, 713, 647 A.2d 324 (1994). The privilege belongs to the client and usually can only be waived with the client's consent. See Rules of Professional Conduct 1.6; but see *Olson* v. *Accessory Controls & Equipment Corp.*, 254 Conn. 145, 171, 757 A.2d 14 (2000) (discussion of crime fraud exception contained in Rule 1.6 of Rules of Professional Conduct).

The privilege does not protect communications made in the presence of or made available to third parties. *State* v. *Burak*, 201 Conn. 517, 526, 518 A.2d 639 (1986); *State* v. *Gordon*, 197 Conn. 413, 423–24, 504 A.2d 1020 (1985). There are various exceptions to this rule where communications to or in the presence of a third party will be protected by the privilege. This includes: where the third party is deemed to be an agent or employee of the client or attorney who is involved with or necessary to the giving or effectuating of the legal advice; *State* v. *Gordon*, supra, 424; communications made to or in the presence of employees of the attorney (paralegals, secretaries, clerks); *Goddard* v. *Gardner*, supra, 28 Conn. 175; or experts retained by counsel; *State* v. *Taste*, 178 Conn. 626, 628, 424 A.2d 293 (1979); *Stanley Works*

v. *New Britain Development Agency*, 155 Conn. 86, 94–95, 230 A.2d 9 (1967); or certain officers and employees of the client, including in-house counsel. *Shew* v. *Freedom of Information Commission*, 245 Conn. 149, 158 n.11, 714 A.2d 664 (1998). Also, communications made to other clients or counsel who have an established common interest in the prosecution or defense of an action can be protected. *State* v. *Cascone*, supra, 195 Conn. 186.

Also, confidential communications with a governmental attorney in connection with civil or criminal cases or legislative and administrative proceedings are privileged. General Statutes § 52-146r. The privilege can be waived when a party specifically pleads reliance on an attorney's advice as an element of a claim or defense, voluntarily testifies regarding portions of the attorney-client communication or specifically places in issue some matter concerning the attorney-client relationship (e.g., claim of malpractice). See *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 249 Conn. 36, 52–53, 730 A.2d 51 (1999); *Pierce* v. *Norton*, 82 Conn. 441, 445–47, 74 A. 686 (1909); see also Rules of Professional Conduct 1.6 (d). If the privileged communication is later disclosed to a third party, the privilege is waived unless the disclosure is shown to be inadvertent. See *Harp* v. *King*, 266 Conn. 747, 767–70, 835 A.2d 953 (2003).

The common law has long recognized that making of a statement through an interpreter to one's own attorney does not waive or abrogate the attorney-client privilege due to the presence of the interpreter. See *State* v. *Christian*, 267 Conn. 710, 749, 841 A.2d 1158 (2004); *Olson*

v. *Accessory Controls & Equipment Corp.*, supra, 265 Conn. 1; *Goddard* v. *Gardner*, supra, 28 Conn. 175–76.

There is nothing in the law that would indicate that this definition of the privilege is not applicable to other common-law or statutory privileges. Thus, whenever a deaf or non-English speaking person communicates through an interpreter to any person under such circumstances that the underlying communication would be privileged, such person should not be compelled to testify as to the communications. Nor should the interpreter be allowed to testify as to the communication unless the privilege has been waived.

(New) Sec. 5-3. Marital Privileges

(a) A person in a criminal proceeding may refuse to testify against his or her lawful spouse unless the criminal proceeding involves criminal conduct jointly undertaken by both spouses or a claim of bodily injury, sexual assault or other violence attempted, committed or threatened against the other spouse or minor child of, or in the custody or care of, either spouse, including risk of injury to such minor child. See General Statutes § 54-84a.

(b) A spouse may not be compelled to testify, or be allowed to testify, if the other spouse objects, about confidential communications made during the marriage unless the confidential communication is in a criminal proceeding involving joint participation in criminal conduct or conspiracy to commit a crime at the time of the communication, or a claim of bodily injury, sexual assault or other violence attempted, committed or threatened against the other spouse or any minor child,

of or in the custody or care of, either spouse, including risk of injury to such minor child. See General Statutes § 54-84b.

COMMENTARY

There are two separate, distinct privileges pertaining to one spouse testifying in court against the other spouse: the adverse spousal testimony privilege and the marital communications privilege. Under the adverse spousal testimony privilege, the witness spouse in a criminal prosecution has the privilege to refuse to testify against the other spouse, as long as they are still married at the time of the action. General Statutes § 54-84a; *State* v. *Christian,* 267 Conn. 710, 724, 725, 841 A.2d 1158 (2004). The privilege does not apply if the proceeding involves the claims enumerated in § 54-84a (b) (e.g., joint criminal participation, personal violence against spouse or child of either spouse). See also General Statutes § 52-146. The spouse still may invoke other applicable privileges available to any witness (e.g., self-incrimination).

The marital communications privilege ''permits an individual to refuse to testify, and to prevent a spouse or former spouse from testifying, as to any confidential communication made by the individual to the spouse during their marriage.'' *State* v. *Christian*, supra, 267 Conn. 725. Section 54-84b of the General Statutes embodies the common-law requirements for recognizing the privilege and adds the requirement that the communication must be ''induced by the affection, confidence, loyalty and integrity of the marital relationship.'' General Statutes § 54-84b (a); (internal quotation marks omitted) *State* v. *Davalloo*, 320 Conn. 123, 140, 128 A.3d 492 (2016). Like the adverse

spousal testimony privilege, the testimony of the witness spouse may, however, be compelled under the marital communications privilege for any of the reasons enumerated in § 54-84b (c).

While § 54-84b (b) codified and amended the common-law spousal privilege as it relates to criminal prosecutions, the privilege, when invoked in a civil matter, is still defined by common law. See generally *State* v. *Christian*, supra, 267 Conn. 728–30; *State* v. *Saia*, 172 Conn. 37, 43, 372 A.2d 144 (1976).

ARTICLE VI—WITNESSES

Sec. 6-1. General Rule of Competency

Except as otherwise provided by the Code, every person is presumed competent to be a witness.

COMMENTARY

Section 6-1 establishes a general presumption of competency subject to exceptions. Cf. *State* v. *Weinberg*, 215 Conn. 231, 243–44, 575 A.2d 1003, cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 413 (1990). Consequently, a status or attribute of a person that early common law recognized as a per se ground for disqualification; e.g., *Lucas* v. *State*, 23 Conn. 18, 19–20 (1854) (wife of accused incompetent to testify in criminal proceeding); *State* v. *Gardner*, 1 Root (Conn.) 485, 485 (1793) (person convicted of theft incompetent to testify); is now merely a factor bearing on that person's credibility as a witness. **[**C. Tait & J. LaPlante, Connecticut Evidence (Sup. 1999) § 7.1, p. 83.**]**

Section 6-1 is consistent with the development of state statutory law, which has eliminated several automatic grounds for witness

incompetency. E.g., General Statutes § 52-145 (no person is disqualified as witness because of his or her interest in outcome of litigation, disbelief in existence of supreme being or prior criminal conviction); General Statutes § 54-84a (one spouse is competent to testify for or against other spouse in criminal proceeding); General Statutes § 54-86h (no child is automatically incompetent to testify because of age).

The determination of a witness' competency is a preliminary question for the court. E.g., *Manning* v. *Michael*, 188 Conn. 607, 610, 452 A.2d 1157 (1982); *State* v. *Brigandi*, 186 Conn. 521, 534, 442 A.2d 927 (1982); see Section 1-3 (a).

Sec. 6-2. Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

COMMENTARY

The rule that every witness must declare that he or she will testify truthfully by oath or affirmation before testifying is well established. *State* v. *Dudicoff*, 109 Conn. 711, 721, 145 A. 655 (1929); **[***Cologne* v. *Westfarms Associates*, 197 Conn. 141, 152–53, 496 A.2d 476 (1985);**]** *Curtiss* v. *Strong*, 4 Day (Conn.) 51, 55, 56 (1809); see Practice Book § 5-3. Section 6-2 recognizes, in accordance with Connecticut law, that a witness may declare that he or she will testify truthfully by either swearing an oath or affirming that he or she will testify truthfully. General Statutes § 1-23**[**; see also *State* v. *Dudicoff*, 109 Conn. 711, 721, 145 A. 655 (1929)**]**.

The standard forms of oaths and affirmations for witnesses are set forth in General Statutes § 1-25. Section 6-2 recognizes that there will be exceptional circumstances in which the court may need to deviate from the standard forms set forth in § 1-25. See General Statutes § 1-22. In such circumstances, the oath or affirmation shall conform to the general standards set forth in Section 6-2.

Sec. 6-3. Incompetencies

(a) Incapable of understanding the duty to tell the truth. A person may not testify if the court finds the person incapable of understanding the duty to tell the truth, or if the person refuses to testify truthfully.

(b) Incapable of sensing, remembering or expressing oneself. A person may not testify if the court finds the person incapable of receiving correct sensory impressions, or of remembering such impressions, or of expressing himself or herself concerning the matter so as to be understood by the trier of fact either directly or through interpretation by one who can understand the person.

COMMENTARY

Subsections (a) and (b) collectively state the general grounds for witness incompetency recognized at common law. See, e.g., *State* v. *Paolella*, 211 Conn. 672, 689, 561 A.2d 111 (1989); *State* v. *Boulay*, 189 Conn. 106, 108–109, 454 A.2d 724 (1983); *State* v. *Siberon*, 166 Conn. 455, 457–58, 352 A.2d 285 (1974). Although the cases do not expressly mention subsection (a)'s alternative ground for incompetency, namely, ''if the person refuses to testify truthfully,'' it flows from the requirement found in Section 6-2 that a witness declare by oath or affirmation that he or she will testify truthfully.

The Supreme Court has **[**recently**]** outlined the procedure courts shall follow in determining a witness' competency when one of the Section 6-3 grounds of incompetency is raised. See generally *State* v. *Weinberg*, 215 Conn. 231, 242–44, 575 A.2d 1003, cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 413 (1990). When a party raises an objection with respect to the competency of a witness, the court, as a threshold matter, shall determine whether the witness is ''minimally credible'': whether the witness is minimally capable of understanding the duty to tell the truth and sensing, remembering and communicating the events to which the witness will testify. See id., 243. If the court determines the witness ''passes the test of minimum credibility . . . the [witness'] testimony is admissible and the weight to be accorded it, in light of the witness' incapacity, is a question for the trier of fact.'' Id., 243–44. Thus, a witness' credibility may still be subject to impeachment on those grounds enumerated in Section 6-3 notwithstanding the court's finding that the witness is competent to testify.

Sec. 6-4. Who May Impeach

The credibility of a witness may be impeached by any party, including the party calling the witness, unless the court determines that a party's impeachment of its own witness is primarily for the purpose of introducing otherwise inadmissible evidence.

COMMENTARY

Section 6-4 reflects the rule announced in *State* v. *Graham*, 200 Conn. 9, 17–18, 509 A.2d 493 (1986). In *Graham*, the Supreme Court abandoned the common-law ''voucher'' rule; id., 17; which provided

that a party could not impeach its own witness except upon a showing of surprise, hostility or adversity, or when the court permitted impeachment in situations in which a witness' in-court testimony was inconsistent with his or her prior out-of-court statements. See, e.g., *State* v. *McCarthy*, 197 Conn. 166, 177, 496 A.2d 190 (1985); *Schmeltz* v. *Tracy*, 119 Conn. 492, 498, 177 A. 520 (1935).

In *Graham* and subsequent decisions; e.g., *State* v. *Williams*, 204 Conn. 523, 531, 529 A.2d 653 (1987); *State* v. *Jasper*, 200 Conn. 30, 34, 508 A.2d 1387 (1986); the court has supplied a two-pronged test for determining whether impeachment serves as a mere subterfuge for introducing substantively inadmissible evidence. A party's impeachment of a witness it calls by using the witness' prior inconsistent statements is improper when: (1) the primary purpose of calling the witness is to impeach the witness; and (2) the party introduces the statement in hope that the jury will use it substantively. E.g., *State* v. *Graham*, supra, 200 Conn. 18. The court in *Graham* instructed trial courts to prohibit impeachment when both prongs are met. Id. Note, however, that if the prior inconsistent statement is substantively admissible under *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986); see Section 8-5 (1); or under <u>any</u> other exceptions to the hearsay rule, the limitation on impeachment will not apply because impeachment with the prior inconsistent statement cannot result in introducing otherwise inadmissible evidence. Cf. *State* v. *Whelan*, supra, 753 n.8.

Section 6-4 applies to all parties in both criminal and civil cases and applies to all methods of impeachment authorized by the Code.

Sec. 6-5. Evidence of Bias, Prejudice or Interest

The credibility of a witness may be impeached by evidence showing bias for, prejudice against, or interest in any person or matter that might cause the witness to testify falsely.

COMMENTARY

Section 6-5 **[**embodies**]** reflects **[**well**]** established law. E.g., *State* v. *Alvarez*, 216 Conn. 301, 318–19, 579 A.2d 515 (1990); *Fordiani's Petition for Naturalization*, 99 Conn. 551, 560–62, 121 A. 796 (1923); see General Statutes § 52-145 (b) (''[a] person's interest in the outcome of [an] action . . . may be shown for the purpose of affecting his [or her] credibility''); see also *State* v. *Bova*, 240 Conn. 210, 224–26, 690 A.2d 1370 (1997); *State* v. *Barnes*, 232 Conn. 740, 745–47, 657 A.2d 611 (1995).

While a party's inquiry into facts tending to establish a witness' bias, prejudice or interest is generally a matter of right, the scope of examination and extent of proof on these matters are subject to judicial discretion. E.g., *State* v. *Mahmood*, 158 Conn. 536, 540, 265 A.2d 83 (1969); see also Section 4-3.

The range of matters potentially giving rise to bias, prejudice or interest is virtually endless. See *State* v. *Cruz*, 212 Conn. 351, 360, 562 A.2d 1071 (1989). A witness may be biased by having a friendly feeling toward a person or by favoring a certain position based upon a familial or employment relationship. E.g., *State* v. *Santiago*, 224 Conn. 325, 332, 618 A.2d 32 (1992); *State* v. *Asherman*, 193 Conn. 695, 719–20, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985). A witness may be prejudiced

against a person or position based upon a prior quarrel with the person against whom the witness testifies; see *Beardsley* v. *Wildman*, 41 Conn. 515, 517 (1874); or by virtue of the witness' animus toward a class of persons. *Jacek* v. *Bacote*, 135 Conn. 702, 706, 68 A.2d 144 (1949). A witness may have an interest in the outcome of the case independent of any bias or prejudice when, for example, he or she has a financial stake in its outcome; see *State* v. *Colton*, 227 Conn. 231, 250–51, 630 A.2d 577 (1993); or when the witness has filed a civil suit arising out of the same events giving rise to the criminal trial at which the witness testifies against the defendant. *State* v. *Arline*, 223 Conn. 52, 61, 612 A.2d 755 (1992).

Because evidence tending to show a witness' bias, prejudice or interest is never collateral; e.g., *State* v. *Chance*, 236 Conn. 31, 58, 671 A.2d 323 (1996); impeachment of a witness on these matters may be accomplished through the introduction of extrinsic evidence, in addition to examining the witness directly. See, e.g., *State* v. *Bova*, supra, 240 Conn. 219; *Fairbanks* v. *State*, 143 Conn. 653, 657, 124 A.2d 893 (1956). The scope and extent of proof through the use of extrinsic evidence is subject to the court's discretion, however; *State* v. *Colton*, supra, 227 Conn. 249; *State* v. *Shipman*, 195 Conn. 160, 163, 486 A.2d 1130 (1985); and whether extrinsic evidence may be admitted to show bias, prejudice or interest without a foundation is also within the court's discretion. E.g., *State* v. *Townsend*, 167 Conn. 539, 560, 356 A.2d 125, cert. denied, 423 U.S. 846, 96 S. Ct. 84, 46 L. Ed. 2d 67 (1975); *State* v. *Crowley*, 22 Conn. App. 557, 559, 578 A.2d 157, cert. denied, 216 Conn. 816, 580 A.2d 62 (1990).

The offering party must establish the relevancy of impeachment evidence by laying a proper foundation; *State* v. *Barnes*, supra, 232 Conn. 747; which may be established in one of three ways: (1) by making an offer of proof; (2) the record independently may establish the relevance of the proffered evidence; or (3) ''stating a 'good faith belief' that there is an adequate factual basis for [the] inquiry.'' Id.

Sec. 6-6. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be impeached or supported by evidence of character for truthfulness or untruthfulness in the form of opinion or reputation. Evidence of truthful character is admissible only after the character of the witness for truthfulness has been impeached.

(b) Specific instances of conduct.

(1) General rule. A witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness.

(2) Extrinsic evidence. Specific instances of the conduct of a witness, for the purpose of impeaching the witness' credibility under subdivision (1), may not be proved by extrinsic evidence.

(c) Inquiry of character witness. A witness who has testified about the character of another witness for truthfulness or untruthfulness may be asked on cross-examination, in good faith, about specific instances of conduct of the other witness if probative of the other witness' character for truthfulness or untruthfulness.

COMMENTARY

Section 4-4 (a) (3) **[**bars the admission of character evidence when offered to prove that a person acted in conformity therewith, but is

subject to exceptions. One exception is evidence bearing on a witness' character for truthfulness or untruthfulness when offered on the issue of credibility. See Section 4-4 (a) (3)**]** provides for the admission of evidence addressing the character of a witness for truthfulness or untruthfulness to support or impeach the credibility of such witness. Section 6-6 **[**regulates the admissibility of such evidence and the means by which such evidence, if admissible, may be introduced**]** addresses when such evidence is admissible and the appropriate methods of proof.

(a) Opinion and reputation evidence of character.

The first sentence of subsection (a) reflects common law. See, e.g., *State* v. *Gould*, 241 Conn. 1, 19, 695 A.2d 1022 (1997); *State* v. *Gelinas*, 160 Conn. 366, 367–68, 279 A.2d 552 (1971); *State* v. *Pettersen*, 17 Conn. App. 174, 181, 551 A.2d 763 (1988). Evidence admitted under subsection (a) must relate to the witness' character for truthfulness and thus general character evidence is inadmissible. **[**C. Tait & J. LaPlante**,** Connecticut Evidence (2d Ed. 1988) § 7.23.1, p. 205; s**]**See, e.g., *Dore* v. *Babcock*, 74 Conn. 425, 429–30, 50 A. 1016 (1902).

The second sentence of subsection (a) also adopts common law. See *State* v. *Ward*, 49 Conn. 429, 442 (1881); *Rogers* v. *Moore*, 10 Conn. 13, 16–17 (1833); see also *State* v. *Suckley*, 26 Conn. App. 65, 72, 597 A.2d 1285 (1991).

A foundation establishing personal contacts with the witness or knowledge of the witness' reputation in the community is a prerequisite to the introduction of opinion or reputation testimony bearing on a

witness' character for truthfulness. See, e.g., *State* v. *Gould*, supra, 241 Conn. 19–20; *State* v. *George*, 194 Conn. 361, 368–69, 481 A.2d 1068 (1984), cert. denied, 469 U.S. 1191, 105 S. Ct. 963, 83 L. Ed. 2d 968 (1985). Whether an adequate foundation has been laid is a matter within the discretion of the court. E.g., *State* v. *Gould*, supra, 19; *State* v. *George*, supra, 368; see Section 1-3 (a).

(b) Specific instances of conduct.

Under subdivision (1), a witness may be asked about his or her specific instances of conduct that, while not resulting in criminal conviction, are probative of the witness' character for untruthfulness. See, e.g., *State* v. *Chance*, 236 Conn. 31, 60, 671 A.2d 323 (1996); *State* v. *Roma*, 199 Conn. 110, 116–17, 513 A.2d 116 (1986); *Martyn* v. *Donlin*, 151 Conn. 402, 408, 198 A.2d 700 (1964). Such inquiries must be made in good faith. See *State* v. *Chance*, supra, 60; *Marsh* v. *Washburn*, 11 Conn. App. 447, 452–53, 528 A.2d 382 (1987). The misconduct evidence sought to be admitted must be probative of the witness' character for untruthfulness, not merely general bad character. E.g., *Demers* v. *State*, 209 Conn. 143, 156, 547 A.2d 28 (1988); *Vogel* v. *Sylvester*, 148 Conn. 666, 675, 174 A.2d 122 (1961).

Impeachment through the use of specific instance evidence under subdivision (1) is committed to the trial court's discretionary authority. *State* v. *Vitale*, 197 Conn. 396, 401, 497 A.2d 956 (1985). The trial court must, however, exercise its discretionary authority by determining whether the specific instance evidence is probative of the witness' character for untruthfulness, and whether its probative value is out-

weighed by any of the Section 4-3 balancing factors. *State* v. *Martin*, 201 Conn. 74, 88–89, 513 A.2d 116 (1986); see Section 4-3.

Inquiry into specific instances of conduct bearing on the witness' character for untruthfulness is not limited to cross-examination; such inquiry may be initiated on direct examination, redirect or recross. See *Vogel* v. *Sylvester*, supra, 148 Conn. 675 (direct examination). Although inquiry often will occur during cross-examination, subsection (b) contemplates inquiry on direct or redirect examination when, for example, a calling party impeaches its own witness pursuant to Section 6-4, or anticipates impeachment by explaining the witness' untruthful conduct or portraying it in a favorable light.

Subdivision (1) only covers inquiries into specific instances of conduct bearing on a witness' character for untruthfulness. It does not cover inquiries into conduct relating to a witness' character for truthfulness, inasmuch as prior cases addressing the issue have been limited to the former situation. See, e.g., *State* v. *Dolphin*, 195 Conn. 444, 459, 488 A.2d 812 (1985). Nothing in subsection (b) precludes a court, in its discretion, from allowing inquiries into specific instances of conduct reflecting a witness' character for truthfulness when the admissibility of such evidence is not precluded under this or other provisions of the Code.

Subdivision (2) recognizes well settled law. E.g., *State* v. *Chance*, supra, 236 Conn. 60; *State* v. *Martin*, supra, 201 Conn. 86; *Shailer* v. *Bullock*, 78 Conn. 65, 69, 70, 61 A. 65 (1905). The effect of subdivision (2) is that the examiner must introduce the witness' untruthful conduct solely through examination of the witness himself or herself. *State* v.

Chance, supra, 61; *State* v. *Horton*, 8 Conn. App. 376, 380, 513 A.2d 168, cert. denied, 201 Conn. 813, 517 A.2d 631 (1986).

(c) Inquiry of character witness.

Subsection (c) provides a means by which the basis of a character witness' testimony may be explored and is consistent with common law. *State* v. *McGraw*, 204 Conn. 441, 446–47, 528 A.2d 821 (1987); see *State* v. *DeAngelis*, 200 Conn. 224, 236–37, 511 A.2d 310 (1986); *State* v. *Martin*, 170 Conn. 161, 165, 365 A.2d 104 (1976). Subsection (c) is a particularized application of Section 4-4 (c), which authorizes a cross-examiner to ask a character witness about specific instances of conduct that relate to a particular character trait of the person about which the witness previously testified. As with subsection (b), subsection (c) requires that inquiries be made in good faith.

The cross-examiner's function in asking the character witness about the principal witness' truthful or untruthful conduct is not to prove that the conduct did in fact occur; *State* v. *Turcio*, 178 Conn. 116, 126, 422 A.2d 749 (1979), cert. denied, 444 U.S. 1013, 100 S. Ct. 661, 62 L. Ed. 2d 642 (1980); or to support or attack the principal witness' character for truthfulness; *State* v. *McGraw*, supra, 204 Conn. 447; but to test the soundness of the character witness' testimony "by ascertaining [the character witness'] good faith, his [or her] source and amount of information and his [or her] accuracy." *State* v. *Martin*, supra, 170 Conn. 165.

Because extrinsic evidence of untruthful or truthful conduct is inadmissible to support or attack a witness' character for truthfulness; e.g., *State* v. *McGraw*, supra, 204 Conn. 446; questions directed to the

character witness on cross-examination concerning the principal witness' conduct should not embrace any details surrounding the conduct. *State* v. *Martin*, supra, 170 Conn. 165; accord *State* v. *Turcio*, supra, 178 Conn. 126. The accepted practice is to ask the character witness whether he or she knows or has heard of the principal witness' truthful or untruthful conduct. See *State* v. *McGraw*, supra, 447. **[**; C. Tait & J. LaPlante, supra, § 8.3.6, pp. 240–41.**]**

Sec. 6-7. Evidence of Conviction of Crime

(a) General rule. For the purpose of impeaching the credibility of a witness, evidence that a witness has been convicted of a crime is admissible if the crime was punishable by imprisonment for more than one year. In determining whether to admit evidence of a conviction, the court shall consider:

(1) the extent of the prejudice likely to arise**[**,**]**;

(2) the significance of the particular crime in indicating untruthfulness**[**,**]**; and

(3) the remoteness in time of the conviction.

(b) Methods of proof. Evidence that a witness has been convicted of a crime may be introduced by the following methods:

(1) examination of the witness as to the conviction**[**,**]**; or

(2) introduction of a certified copy of the record of conviction into evidence, after the witness has been identified as the person named in the record.

(c) Matters subject to proof. If, 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 and when and where the conviction was rendered, except that (1) the court may exclude evidence of the name of the crime and (2) if the witness denies the conviction, the court may permit evidence of the punishment imposed.

(d) Pendency of appeal. The pendency of an appeal from a conviction does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

COMMENTARY

(a) General rule.

Subsection (a) recognizes the trial court's discretionary authority to admit prior crimes evidence; e.g., **[***State* v. *Sauris*, 227 Conn. 389, 409, 631 A.2d 238 (1993)**]** *State* v. *Skakel*, 276 Conn. 633, 738, 888 A.2d 985 (2006); *Heating Acceptance Corp.* v. *Patterson*, 152 Conn. 467, 472, 208 A.2d 341 (1965); see General Statutes § 52-145 (b); subject to consideration of the three factors set forth in the rule. *State* v. *Nardini*, 187 Conn. 513, 522, 447 A.2d 396 (1982); accord **[***State* v. *Carter*, 228 Conn. 412, 430, 636 A.2d 821 (1994)**]** *State* v. *Skakel*, supra, 738; *State* v. *Cooper*, 227 Conn. 417, 434–35, 630 A.2d 1043 (1993).

A determination of youthful offender status pursuant to chapter 960a of the General Statutes does not constitute a conviction for purposes of subsection (a). *State* v. *Keiser*, 196 Conn. 122, 127–28, 491 A.2d 382 (1985); see General Statutes § 54-76k.

The trial court must balance the probative value of the conviction evidence against its prejudicial impact. *State* v. *Harrell*, 199 Conn. 255, 262, 506 A.2d 1041 (1986); see Section 4-3; see also *Label*

Systems, Inc. v. *Aghamohammadi*, 270 Conn. 291, 313, 852 A.2d 703 (2004) (trial court must weigh ''[1] the potential for the evidence to cause prejudice, [2] its significance to indicate untruthfulness, and [3] its remoteness in time''). The balancing test applies whether the witness against whom the conviction evidence is being offered is the accused or someone other than the accused. See *State* v. *Cooper*, supra, 227 Conn. 435; *State* v. *Pinnock*, 220 Conn. 765, 780–81, 601 A.2d 521 (1992). The party objecting to the admission of conviction evidence bears the burden of showing the prejudice likely to arise from its admission. E.g., *State* v. *Harrell*, supra, 262; *State* v. *Binet*, 192 Conn. 618, 624, 473 A.2d 1200 (1984).

The Supreme Court has established no absolute time limit that would bar the admissibility of certain convictions, although it has suggested a ten year limit on admissibility measured from the later of the date of conviction or the date of the witness' release from the confinement imposed for the conviction. **[***State* v. *Carter*, supra, 228 Conn. 431; *State* v. *Sauris*, supra, 227 Conn. 409–10**]** *Label Systems, Inc.* v. *Aghamohammadi*, supra, 270 Conn. 309; *State* v. *Nardini*, supra, 187 Conn. 526. The court has noted, however, that those ''convictions having . . . special significance upon the issue of veracity [may] surmount the standard bar of ten years. . . .'' *State* v. *Nardini*, supra, 526; accord **[***State* v. *Carter*, supra, 431**]** *Label Systems, Inc.* v. *Aghamohammadi*, supra, 309 (''unless a conviction had some special significance to untruthfulness, the fact that it was more than ten years old would most likely preclude its admission under *our balancing test*'' [emphasis in original]). Ultimately, the trial court retains discretion to

determine whether the remoteness of a particular conviction will call for its exclusion. See **[***State* v. *Sauris*, supra, 409**]** *Label Systems, Inc.* v. *Aghamohammadi*, supra, 313; *State* v. *Nardini*, supra, 526.

A conviction that qualifies under the rule may be admitted to attack credibility, whether the conviction was rendered in this state or another jurisdiction. *State* v. *Perelli*, 128 Conn. 172, 180, 21 A.2d 389 (1941); see *State* v. *Grady*, 153 Conn. 26, 30, 211 A.2d 674 (1965). When a conviction from a jurisdiction other than Connecticut is used, choice of law principles govern whether, for purposes of the ''more than one year'' requirement, the source of the time limitation derives from the law of the jurisdiction under which the witness was convicted or from an analogous provision in the General Statutes. See *State* v. *Perelli*, supra, 180. **[**Thus, the Code takes no position on this issue.**]**

(b) Methods of proof.

Subsection (b) restates the two common-law methods of proving a witness' criminal conviction. E.g., **[***State* v. *Sauris*, supra, 227 Conn. 411;**]** *State* v. *Denby*, 198 Conn. 23, 29–30, 501 A.2d 1206 (1985), cert. denied, 475 U.S. 1097, 106 S. Ct. 1497, 89 L. Ed. 2d 898 (1986); *State* v. *English*, 132 Conn. 573, 581–82, 46 A.2d 121 (1946). Although these are the traditional methods of proving a witness' criminal conviction, nothing in subsection (b) precludes other methods of proof when resort to the traditional methods prove to be unavailing.

Use of the disjunctive ''or'' is not intended to preclude resort to one method of proof merely because the other method of proof already has been attempted.

(c) Matters subject to proof.

Subsection (c) is consistent with common law. *State* v. *Robinson*, 227 Conn. 711, 736, 631 A.2d 288 (1993) (name of crime and date and place of conviction); *State* v. *Dobson*, 221 Conn. 128, 138, 602 A.2d 977 (1992) (date and place of conviction); *State* v. *Pinnock*, supra, 220 Conn. 780 (name of crime and date of conviction). Inquiry into other details and circumstances surrounding the crime for which the witness was convicted is impermissible. See *State* v. *Denby*, supra, 198 Conn. 30; *State* v. *Marino*, 23 Conn. App. 392, 403, 580 A.2d 990, cert. denied, 216 Conn. 818, 580 A.2d 63 (1990).

The rule preserves the court's common-law discretion to limit the matters subject to proof. See, e.g., *State* v. *Dobson*, supra, 221 Conn. 138; *State* v. *Pinnock*, supra, 220 Conn. 780. The court's discretion to exclude the name of the crime generally has been limited to those situations in which the prior conviction does not reflect directly on veracity. See, e.g., *State* v. *Pinnock*, supra, 780, 782. When the court orders the name of the crime excluded, the examiner may refer to the fact that the witness was convicted for the commission of an unspecified crime that was punishable by imprisonment for more than one year. See *State* v. *Dobson*, supra, 138; *State* v. *Geyer*, supra, 194 Conn. 16.

The rule also reflects the holding in *State* v. *Robinson*, supra, 227 Conn. 736. If the witness admits the fact of conviction, the punishment or sentence imposed for that conviction is inadmissible. *State* v. *McClain*, 23 Conn. App. 83, 87–88, 579 A.2d 564 (1990).

(d) Pendency of appeal.

Subsection (d) restates the rule from cases such as *State* v. *Varszegi*, 36 Conn. App. 680, 685–86, 653 A.2d 201 (1995), aff'd on other grounds, 236 Conn. 266, 673 A.2d 90 (1996), and *State* v. *Schroff*, 3 Conn. App. 684, 689, 492 A.2d 190 (1985).

Sec. 6-8. Scope of Cross-Examination and Subsequent Examinations; Leading Questions

(a) Scope of cross-examination and subsequent examinations. Cross-examination and subsequent examinations shall be limited to the subject matter of the preceding examination and matters affecting the credibility of the witness, except in the discretion of the court.

(b) Leading questions. Leading questions shall not be used on the direct or redirect examination of a witness, except that the court may permit leading questions, in its discretion, in circumstances such as, but not limited to, the following:

(1) when a party calls a hostile witness or a witness identified with an adverse party,

(2) when a witness testifies so as to work a surprise or deceit on the examiner,

(3) when necessary to develop a witness' testimony, or

(4) when necessary to establish preliminary matters.

COMMENTARY

(a) Scope of cross-examination and subsequent examinations.

Subsection (a) is in accord with common law. E.g., *State* v. *Ireland*, 218 Conn. 447, 452, 590 A.2d 106 (1991) (scope of cross-examination); *Mendez* v. *Dorman*, 151 Conn. 193, 198, 195 A.2d 561 (1963)

(same); see *State* v. *Jones*, 205 Conn. 638, 666, 534 A.2d 1199 (1987) (scope of redirect examination); *Grievance Committee* v. *Dacey*, 154 Conn. 129, 151–52, 222 A.2d 220 (1966), appeal dismissed, 386 U.S. 683, 87 S. Ct. 1325, 18 L. Ed. 2d 404 (1967) (same). The trial court is vested with discretion in determining whether evidence offered on cross-examination or during a subsequent examination relates to subject matter brought out during the preceding examination. See *Canton Motorcar Works, Inc.* v. *DiMartino*, 6 Conn. App. 447, 458, 505 A.2d 1255 (1986); *Larensen* v. *Karp*, 1 Conn. App. 228, 230, 470 A.2d 715 (1984).

Subsection (a) recognizes the discretion afforded the trial judge in determining the scope of cross-examination and subsequent examinations. E.g., *State* v. *Prioleau*, 235 Conn. 274, 302, 664 A.2d 793 (1995) (cross-examination); see *State* v. *Conrod*, 198 Conn. 592, 596, 504 A.2d 494 (1986) (redirect examination). Thus, subsection (a) does not preclude a trial judge from permitting a broader scope of inquiry in certain circumstances, such as when a witness could be substantially inconvenienced by having to testify on two different occasions.

(b) Leading questions.

Subsection (b) addresses the use of leading questions on direct or redirect examination. A leading question is a question that suggests the answer desired by the examiner in accord with the examiner's view of the facts. E.g., *Hulk* v. *Aishberg*, 126 Conn. 360, 363, 11 A.2d 380 (1940); *State* v. *McNally*, 39 Conn. App. 419, 423, 665 A.2d 137 (1995). **[**; C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 7.12.1, p. 159.**]**

Subsection (b) restates the common-law rule. See *Mendez* v. *Dorman*, supra, 151 Conn. 198; *Bradbury* v. *South Norwalk*, 80 Conn. 298, 302–303, 68 A. 321 (1907). The court is vested with discretion in determining whether leading questions should be permitted on direct or redirect examination. E.g., *Hulk* v. *Aishberg*, supra, 126 Conn. 363; *State* v. *Russell*, 29 Conn. App. 59, 67, 612 A.2d 471, cert. denied, 224 Conn. 908, 615 A.2d 1049 (1992).

Subsection (b) sets forth illustrative exceptions to the general rule that are discretionary with the court. Exceptions (1) and (2) are well established. *Mendez* v. *Dorman*, supra, 151 Conn. 197–98; *State* v. *Stevens*, 65 Conn. 93, 98–99, 31 A. 496 (1894); *Stratford* v. *Sanford*, 9 Conn. 275, 284 (1832). For purposes of exception (1), ''a witness identified with an adverse party'' also includes the adverse party.

Under exception (3), the court may allow the calling party to put leading questions to a young witness who is apprehensive or reticent; e.g., *State* v. *Salamon*, 287 Conn. 509, 559–60, 949 A.2d 1092 (2008) (excessively nervous minor victim of assault); *State* v. *Hydock*, 51 Conn. App. 753, 765, 725 A.2d 379 (minor victim who ''evinced fear and hesitancy to testify''), cert. denied, 248 Conn. 929, 733 A.2d 845 (1999); *State* v. *Parsons*, 28 Conn. App. 91, 104, 612 A.2d 73, cert. denied, 223 Conn. 920, 614 A.2d 829 (1992); or to a witness who has trouble communicating. **[**, by virtue of either a disability or language deficiency; C. Tait & J. LaPlante, supra, § 7.12.2, p. 161; or**]** See *State* v. *Salamon*, supra, 560 (native French speaker with substantial difficulty testifying in English). The court may also allow the calling party to put leading questions to a witness whose recollection is

exhausted. See *State* v. *Palm*, 123 Conn. 666, 675–76, 197 A.2d 168 (1938).

Under exception (4), the court has discretion to allow a calling party to use leading questions to develop preliminary matters in order to expedite the trial. *State* v. *Russell*, supra, 29 Conn. App. 68; see *State* v. *Castelli*, 92 Conn. 58, 65–66, 101 A.2d 476 (1917).

It is intended that subsection (b) will coexist with General Statutes § 52-178. That statute allows any party in a civil action to call an adverse party, or certain persons identified with an adverse party, to testify as a witness, and to examine that person ''to the same extent as an adverse witness.'' The statute has been interpreted to allow the calling party to elicit testimony from the witness using leading questions. See *Fasanelli* v. *Terzo*, 150 Conn. 349, 359, 189 A.2d 500 (1963)**[.]**; see also *Mendez* v. *Dorman*, supra, 151 Conn. 196–98. **[**To the extent that the facts in a particular case place the examination of a witness within the ambit of § 52-178, the use of leading questions is not discretionary with the court, notwithstanding the provisions of subsection (b).**]**

Sec. 6-9. Object or Writing Used To Refresh Memory

(a) While testifying. Any object or writing may be used by a witness to refresh the witness' memory while testifying. If, while a witness is testifying, an object or writing is used by the witness to refresh the witness' memory, any party may inspect the object or writing and cross-examine the witness on it. Any party may introduce the object or writing in evidence if it is otherwise admissible under the Code.

(b) Before testifying. If a witness, before testifying, uses an object or writing to refresh the witness' memory for the purpose of testifying, the object or writing need not be produced for inspection unless the court, in its discretion, so orders. Any party may introduce the object or writing in evidence if it is otherwise admissible under the Code.

COMMENTARY

(a) While testifying.

Subsection (a) recognizes the practice of refreshing a witness' recollection while testifying. If, while testifying, a witness has difficulty recalling a fact or event the witness once perceived, the witness may be shown any object or writing, regardless of authorship, time of making or originality, to refresh the witness' memory. See, e.g., *State* v. *Rado*, 172 Conn. 74, 79, 372 A.2d 159 (1976), cert. denied, 430 U.S. 918, 97 S. Ct. 1335, 51 L. Ed. 2d 598 (1977); *Henowitz* v. *Rockville Savings Bank*, 118 Conn. 527, 529–30, 173 A. 221 (1934); *Neff* v. *Neff*, 96 Conn. 273, 278, 114 A. 126 (1921). The object or writing need not be admissible because the witness will testify from his or her refreshed recollection, not from the object or writing that was used to refresh his or her recollection. See *Krupp* v. *Sataline*, 151 Conn. 707, 708, 200 A.2d 475 (1964); *Neff* v. *Neff*, supra, 279**[.]**; see also *Doyle* v. *Kamm*, 133 Conn. App. 25, 40, 35 A.3d 308 (2012) (item used to refresh witness' recollection need not be admissible).

The trial court is afforded discretion in controlling the admissibility of refreshed testimony. Specifically, the court is vested with the authority to determine whether the witness' recollection needs to be refreshed, whether the object or writing will refresh the witness' recol-

lection and whether the witness' recollection has been refreshed. See, e.g., *State* v. *Grimes*, 154 Conn. 314, 322, 228 A.2d 141 (1966); see also Section 1-3 (a).

Subsection (a) confers on any party the right to inspect the object or writing used to refresh the witness' recollection while testifying and to cross-examine the witness thereon. E.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Cole*, 189 Conn. 518, 526, 457 A.2d 656 (1983); *State* v. *Grimes*, supra, 154 Conn. 323; *Neff* v. *Neff*, supra, 96 Conn. 280–81. This protection affords the party the opportunity to verify whether the witness' recollection genuinely has been refreshed and, if applicable, to shed light upon any inconsistencies between the writing and the refreshed testimony. See *State* v. *Masse*, 24 Conn. Supp. 45, 56, 186 A.2d 553 (1962); 1 C. McCormick, Evidence **[**(5th Ed. 1999) § 9, p. 36**]** (7th Ed. 2013) § 9, pp. 54–56.

Any party may introduce into evidence the object or writing used to stimulate the witness' recollection if the object or writing is otherwise admissible under other provisions of the Code. **[**See C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 7.14.1 (b), p. 166; cf. *Erie Preserving Co.* v. *Miller*, 52 Conn. 444, 446 (1885)**]** Cf. *Palmer* v. *Hartford Dredging Co.*, 73 Conn. 182, 187–88, 47 A. 125 (1900). Section 6-9 does not, however, create an independent exception to the hearsay rule or other exclusionary provisions in the Code. Cf. id. Contrast this rule with Section 8-3 (6), which recognizes a past recollection recorded exception to the hearsay rule.

(b) Before testifying.

Unlike the situation contemplated in subsection (a), in which the witness uses an object or writing to refresh recollection while testifying, subsection (b) covers the situation in which the witness has used an object or writing before taking the stand to refresh his or her memory for the purpose of testifying at trial. In accordance with common law, subsection (b) establishes a presumption against production of the object or writing for inspection in this situation, but vests the court with discretion to order production. *State* v. *Cosgrove*, 181 Conn. 562, 588–89, 436 A.2d 33 (1980); *State* v. *Watson*, 165 Conn. 577, 593, 345 A.2d 532 (1973), cert. denied, 416 U.S. 960, 94 S. Ct. 1977, 40 L. Ed. 2d 311 (1974).

Assuming the court exercises its discretion in favor of production, subsection (b) does not contemplate production of all objects or writings used by a witness prior to testifying at trial. Rather, it contemplates production of only those objects or writings a witness uses before testifying to refresh the witness' memory of facts or events the witness previously perceived.

As with subsection (a), subsection (b) authorizes any party to introduce the object or writing in evidence if it is independently admissible under other provisions of the Code.

For purposes of Section 6-9, a writing may include, but is not limited to, communications recorded in any tangible form.

Sec. 6-10. Prior Inconsistent Statements of Witnesses

(a) Prior inconsistent statements generally. The credibility of a witness may be impeached by evidence of a prior inconsistent statement made by the witness.

(b) Examining witness concerning prior inconsistent statement. In examining a witness concerning a prior inconsistent statement, whether written or not, made by the witness, the statement should be shown to or the contents of the statement disclosed to the witness at that time.

(c) Extrinsic evidence of prior inconsistent statement of witness. If a prior inconsistent statement made by a witness is shown to or if the contents of the statement are disclosed to the witness at the time the witness testifies, and if the witness admits to making the statement, extrinsic evidence of the statement is inadmissible, except in the discretion of the court. If a prior inconsistent statement made by a witness is not shown to or if the contents of the statement are not disclosed to the witness at the time the witness testifies, extrinsic evidence of the statement is inadmissible, except in the discretion of the court.

COMMENTARY

(a) Prior inconsistent statements generally.

Subsection (a) embraces a familiar common-law principle. *State* v. *Avis*, 209 Conn. 290, 302, 551 A.2d 26, cert. denied, 489 U.S. 1097, 109 S. Ct. 1570, 103 L. Ed. 2d 937 (1989); *G & R Tire Distributors, Inc.* v. *Allstate Ins. Co.*, 177 Conn. 58, 60–61, 411 A.2d 31 (1979); *Beardsley* v. *Wildman*, 41 Conn. 515, 516 (1874).

Impeachment of a witness' in-court testimony with the witness' prior inconsistent statements is proper only if the prior statements are in fact ''inconsistent'' with the witness' testimony. E.g., *State* v. *Richardson*, 214 Conn. 752, 763, 574 A.2d 182 (1990); *State* v. *Reed*, 174 Conn. 287, 302–303, 386 A.2d 243 (1978). A finding of a statement's inconsistency ''is not limited to cases in which diametrically opposed assertions have been made.'' *State* v. *Whelan*, 200 Conn. 743, 749 n.4, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). Inconsistencies can be found in omissions, changes of position, denials of recollection or evasive answers. Id., 748–49 n.4. The determination whether an ''inconsistency'' exists lies within the discretion of the court. *State* v. *Avis*, supra, 209 Conn. 302.

The substantive admissibility of prior inconsistent statements is treated elsewhere in the Code. See Section 8-5 (1).

(b) Examining witness concerning prior inconsistent statement.

Subsection (b) addresses the necessity of laying a foundation as a precondition to examining the witness about his or her prior inconsistent statement. It adopts the rule of *State* v. *Saia*, 172 Conn. 37, 46, 372 A.2d 144 (1976). Accord *State* v. *Butler*, 207 Conn. 619, 626, 543 A.2d 270 (1988); *State* v. *Williams*, 204 Conn. 523, 534, 529 A.2d 653 (1987).

Although Connecticut favors the laying of a foundation; see *State* v. *Saia*, supra, 172 Conn. 46; it consistently has maintained that there is ''no inflexible rule regarding the necessity of calling the attention of a witness on cross-examination to [the] alleged prior inconsistent statement before . . . questioning him [or her] on the subject. . . .''

Id.; see *Adams* v. *Herald Publishing Co.*, 82 Conn. 448, 452–53, 74 A. 755 (1909).

(c) Extrinsic evidence of prior inconsistent statement of witness.

The first sentence is consistent with common law. See *G & R Tire Distributors, Inc.* v. *Allstate Ins. Co.*, supra, 177 Conn. 61; see also *Barlow Bros. Co.* v. *Parsons*, 73 Conn. 696, 702–703, 49 A. 205 (1901) (finding extrinsic proof of prior inconsistent statement unnecessary when witness admits to making statement); *State* v. *Graham*, 21 Conn. App. 688, 704, 575 A.2d 1057 (same), cert. denied, 216 Conn. 805, 577 A.2d 1063 (1990); cf. *State* v. *Butler*, supra, 207 Conn. 626 (where witness denies or states that he or she does not recall having made prior statement, extrinsic evidence establishing making of that statement may be admitted). Notwithstanding the general rule, subsection (c) recognizes the court's discretion to admit extrinsic evidence of a witness' prior inconsistent statement even when the examiner lays a foundation and the witness admits making the statement. See *G & R Tire Distributors, Inc.* v. *Allstate Ins. Co.*, supra, 61.

The second sentence reconciles two interrelated principles: the preference for laying a foundation when examining a witness concerning prior inconsistent statements; see subsection (b); and the discretion afforded the trial court in determining the admissibility of extrinsic evidence of a witness' prior inconsistent statements where no foundation has been laid. *State* v. *Saia*, supra, 172 Conn. 46.

Case law forbids the introduction of extrinsic evidence of a witness' prior inconsistent statement when the witness' statement involves a

collateral matter, i.e., a matter not directly relevant and material to the merits of the case. E.g., *State* v. *Diaz*, 237 Conn. 518, 548, 679 A.2d 902 (1996); *Johnson* v. *Palomba Co.*, 114 Conn. 108, 115–16, 157 A. 902 (1932).

Sec. 6-11. Prior Consistent Statements of Witnesses; Constancy of Accusation by a Sexual Assault [Victim] Complainant

(a) General rule. Except as provided in this section, the credibility of a witness may not be supported by evidence of a prior consistent statement made by the witness.

(b) Prior consistent statement of a witness. If the credibility of a witness is impeached by (1) a prior inconsistent statement of the witness, (2) a suggestion of bias, interest or improper motive that was not present at the time the witness made the prior consistent statement, or (3) a suggestion of recent contrivance, evidence of a prior consistent statement made by the witness is admissible, in the discretion of the court, to rebut the impeachment.

(c) Constancy of accusation by a sexual assault [victim] complainant.

(1) If the defense impeaches the credibility of a sexual assault complainant regarding any out-of-court complaints or delayed reporting of the alleged sexual assault, the state shall be permitted to call constancy of accusation witnesses. **[**A person to whom a sexual assault victim has reported the alleged assault**]** Such witnesses may testify that the allegation was made and when it was made, provided that the **[**victim**]** complainant has testified to the facts of the alleged

assault and to the identity of the person or persons to whom the alleged assault was reported. Any testimony by the witnesses about details of the alleged assault shall be limited to those details necessary to associate the **[**victim's**]** complainant's allegations with the pending charge. The testimony of the witnesses is admissible only **[**to corroborate the victim's testimony and not for substantive purposes**]** with regard to whether the complaint was made and not to corroborate the substance of the complaint.

(2) If the complainant's credibility is not impeached by the defense regarding any out-of-court complaints or delayed reporting of the alleged sexual assault, constancy of accusation testimony shall not be permitted, but, rather, the trial court shall provide appropriate instructions to the jury regarding delayed reporting.

COMMENTARY

(a) General rule.

Connecticut's rule on the admissibility of prior consistent statements is phrased in terms of a general prohibition subject to exceptions. E.g., *State* v. *Valentine*, 240 Conn. 395, 412–13, 692 A.2d 727 (1997); *State* v. *Dolphin*, 178 Conn. 564, 568–69, 424 A.2d 266 (1979). Exceptions to the general prohibition are set forth in subsections (b) and (c).

(b) Prior consistent statement of a witness.

Common law permits the use of a witness' prior statement consistent with the witness' in-court testimony to rehabilitate the witness' credibility after it has been impeached via one of the three forms of impeachment listed in the rule. E.g., *State* v. *Valentine*, supra, 240 Conn. 413; *State* v. *Brown*, 187 Conn. 602, 607–608, 447 A.2d 734 (1982). The

cases sometimes list a fourth form of impeachment—a claim of inaccurate memory—under which prior consistent statements could be admitted to repair credibility. E.g., *State* v. *Valentine*, supra, 413; *State* v. *Anonymous* (83-FG), 190 Conn. 715, 729, 463 A.2d 533 (1983). This form of impeachment is not included because it is subsumed under the ''impeachment by prior inconsistent statements'' category. The only conceivable situation in which a prior consistent statement could be admitted to counter a claim of inaccurate memory involves: (1) impeachment by a prior inconsistent statement made some time after the event when the witness' memory had faded; and (2) support of the witness' in-court testimony by showing a prior consistent statement made shortly after the event when the witness' memory was fresh. Cf., e.g., *Brown* v. *Rahr*, 149 Conn. 743, 743–44, 182 A.2d 629 (1962); *Thomas* v. *Ganezer*, 137 Conn. 415, 418–21, 78 A.2d 539 (1951).

Although Connecticut has no per se requirement that the prior consistent statement precede the prior inconsistent statement used to attack the witness' credibility; see *State* v. *McCarthy*, 179 Conn. 1, 18, 425 A.2d 924 (1979); the trial court may consider the timing of the prior consistent statement as a factor in assessing its probative value.

Prior consistent statements introduced under subsection (b) are admissible for the limited purpose of repairing credibility and are not substantive evidence. E.g., *State* v. *Brown*, supra, 187 Conn. 607; *Thomas* v. *Ganezer*, supra, 137 Conn. 421.

In stating that evidence of a witness' prior consistent statement is admissible ''in the discretion of the court,'' Section 6-11 stresses the broad discretion afforded the trial judge in admitting this type of evi-

dence. See *Thomas* v. *Ganezer*, supra, 137 Conn. 420; cf. *State* v. *Mitchell*, 169 Conn. 161, 168, 362 A.2d 808 (1975), overruled in part on other grounds by *State* v. *Higgins*, 201 Conn. 462, 472, 518 A.2d 631 (1986).

(c) Constancy of accusation by a sexual assault [victim] complainant.

Subsection (c) reflects the supreme court's recent modification of the constancy of accusation rule **[**in *State* v. *Troupe*, 237 Conn. 284, 304, 677 A.2d 917 (1996)**]** in *State* v. *Daniel W.E.*, 322 Conn. 593, 142 A.3d 265 (2016).

Evidence introduced under subsection (c) is admissible **[**for corroborative purposes only**]** ''only for the purpose of negating any inference that, because there was a delay in reporting the offense, the offense did not occur, and, therefore, such evidence may only be used in considering whether the complaint was made, and not to corroborate the substance of the complaint.'' *State* v. *Daniel W.E.*, supra, 322 Conn. 616. The admissibility of constancy of accusation testimony under *State* v. *Daniel W.E.* is subject to the limitations established in *State* v. *Troupe*, 237 Conn. 284, 304, 677 A.2d 917 (1996) (testimony of constancy witness strictly limited to details necessary to associate complaint with pending charge, such as time and place of alleged assault and identity of alleged assailant). See *State* v. *Daniel W.E.*, supra, 629. Evidence may be introduced substantively only where permitted elsewhere in the Code. E.g., Section 8-3 (2) (spontaneous utterance hearsay exception); see *State* v. *Troupe*, supra, 304 n.19.

[Admissibility is contingent on satisfying the relevancy and balancing standards found in Sections 4-1 and 4-3, respectively. See id., 305 & n.20.]

Upon request, the court shall give a limiting instruction prior to the admission of constancy of accusation testimony from any of the individuals to whom a complainant had reported the alleged sexual assaults. *State* v. *Salazar*, 151 Conn. App. 463, 475–76, 93 A.3d 1192 (2014).

If defense counsel does not challenge the complainant's credibility regarding out-of-court complaints or delayed reporting, constancy evidence is not admissible, but the court shall instruct the jury that: (1) there are many reasons why sexual assault victims may delay officially reporting the offense, and (2) to the extent that the complainant delayed reporting the alleged offense, the delay should not be considered by the jury in evaluating the complainant's credibility. See *State* v. *Daniel W.E.*, supra, 322 Conn. 629; Connecticut Criminal Jury Instructions § 7.2-1, available at http://www.jud.ct.gov/JI/Criminal/Criminal.pdf.

ARTICLE VII—OPINIONS AND EXPERT TESTIMONY

Sec. 7-1. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, the witness may not testify in the form of an opinion, unless the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

COMMENTARY

Section 7-1 sets forth standards for the admissibility of nonexpert opinion testimony. Section 7-1 is based on the traditional rule that

witnesses who did not testify as experts generally were required to limit their testimony to an account of the facts and, with but a few exceptions, could not state an opinion or conclusion. E.g., *Robinson* v. *Faulkner*, 163 Conn. 365, 371–72, 306 A.2d 857 (1972); *Stephanofsky* v. *Hill*, 136 Conn. 379, 382, 71 A.2d 560 (1950); *Sydleman* v. *Beckwith*, 43 Conn. 9, 11 (1875). Section 7-1 attempts to preserve the common-law preference for testimony of facts but recognizes there may be situations in which opinion testimony will be more helpful to the fact finder than a rendition of the observed facts only.

In some situations, a witness may not be able to convey sufficiently his or her sensory impressions to the fact finder by a mere report of the facts upon which those impressions were based and, instead, may use language in the form of a summary characterization that is effectively an opinion about his or her observation. **[**For example, a witness' testimony that a person appeared to be frightened or nervous would be much more likely to evoke a vivid impression in the fact finder's mind than a lengthy description of that person's outward manifestations.**]** See *State* v. *McGinnis*, 158 Conn. 124, 130–31, 256 A.2d 241 (1969). As a matter of practical necessity, this type of nonexpert opinion testimony may be admitted because the facts upon which the witness' opinion is based ''are so numerous or so complicated as to be incapable of separation, or so evanescent in character [that] they cannot be fully recollected or detailed, or described, or reproduced so as to give the trier the impression they gave the witness . . . .'' *Atwood* v. *Atwood*, 84 Conn. 169, 173, 79 A. 59 (1911); accord *State* v. *Spigarolo*, 210 Conn. 359, 371, 556 A.2d 112, cert. denied, 493 U.S. 933,

110 S. Ct. 322, 107 L. Ed. 2d 312 (1989); *Stephanofsky* v. *Hill*, supra, 136 Conn. 382; *Sydleman* v. *Beckwith*, supra, 43 Conn. 12.

Some of the matters upon which nonexpert opinion testimony has been held admissible include: the market value of property where the witness is the owner of the property; *Misisco* v. *LaMaita*, 150 Conn. 680, 684, 192 A.2d 891 (1963); the appearance of persons or things; *State* v. *McGinnis*, **[**supra,**]** 158 Conn. 124, 130–31, 256 A.2d 241 (1969); *MacLaren* v. *Bishop*, 113 Conn. 312, 313–14, 155 A.2d 210 (1931); sound; *Johnson* v. *Newell*, 160 Conn. 269, 277–78, 278 A.2d 776 (1971); the speed of an automobile; *Acampora* v. *Asselin*, 179 Conn. 425, 427, 426 A.2d 797 (1980); *Stephanofsky* v. *Hill*, supra, 136 Conn. 382–83; physical or mental condition of others**[.]**; *Atwood* v. *Atwood*, supra, 84 Conn. 172–74; and safety of common outdoor objects, such as a fence, or the state of repair of a road. See *Czajkowski* v. *YMCA of Metropolitan Hartford, Inc.*, 149 Conn. App. 436, 446–47, 89 A.3d 904 (2014) (citing cases). In other contexts, however, nonexpert opinion testimony has been held inadmissible. See, e.g., *Pickel* v. *Automated Waste Disposal, Inc.*, 65 Conn. App. 176, 190, 782 A.2d 231 (2001) (trial court properly excluded lay opinion regarding cause of accident).

Whether nonexpert opinion testimony is admissible is a preliminary question for the court. See Section 1-3 (a); see also, e.g., *Turbert* v. *Mather Motors, Inc.*, 165 Conn. 422, 434, 334 A.2d 903 (1973) (admissibility of nonexpert opinion testimony within court's discretion).

Sec. 7-2. Testimony by Experts

A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue.

COMMENTARY

[Section 7-2 imposes two conditions on the admissibility of expert testimony. First, the witness must be qualified as an expert. See, e.g., *State* v. *Wilson*, 188 Conn. 715, 722, 453 A.2d 765 (1982); see also, e.g., *State* v. *Girolamo*, 197 Conn. 201, 215, 496 A.2d 948 (1985) (bases for qualification). Whether a witness is sufficiently qualified to testify as an expert depends on whether, by virtue of the witness' knowledge, skill, experience, etc., his or her testimony will ''assist'' the trier of fact. See *Weinstein* v. *Weinstein*, 18 Conn. App. 622, 631, 561 A.2d 443 (1989); see also, e.g., *State* v. *Douglas*, 203 Conn. 445, 453, 525 A.2d 101 (1987) (''to be admissible, the proffered expert's knowledge must be directly applicable to the matter specifically in issue''). The sufficiency of an expert witness' qualifications is a preliminary question for the court. E.g., *Blanchard* v. *Bridgeport*, 190 Conn. 798, 808, 463 A.2d 553 (1983); see Section 1-3 (a).**]**

[Second, the expert witness' testimony must assist the trier of fact in understanding the evidence or determining a fact in issue. See, e.g., *State* v. *Hasan*, 205 Conn. 485, 488, 534 A.2d 877 (1987); *Schomer* v. *Shilepsky*, 169 Conn. 186, 191–92, 363 A.2d 128 (1975). Crucial to this inquiry is a determination that the scientific, technical or specialized

knowledge upon which the expert's testimony is based goes beyond the common knowledge and comprehension, i.e., ''beyond the ken,'' of the average juror. See *State* v. *George*, 194 Conn. 361, 373, 481 A.2d 1068 (1984), cert. denied, 469 U.S. 1191, 105 S. Ct. 963, 105 L. Ed. 2d 968 (1985); *State* v. *Grayton*, 163 Conn. 104, 111, 302 A.2d 246, cert. denied, 409 U.S. 1045, 93 S. Ct. 542, 34 L. Ed. 2d 495 (1972); cf. State v. Kemp, 199 Conn. 473, 476–77, 507 A.2d 1387 (1986).**]**

The subject matter upon which expert witnesses may testify is not limited to the scientific or technical fields, but extends to all areas of specialized knowledge. See *State* v. *Edwards*, 325 Conn. 97, 127–28, 156 A.3d 506 (2017) (explaining what qualifies as expert testimony); see, e.g., *State* v. *Correa*, 241 Conn. 322, 355, 696 A.2d 944 (1997) (FBI agent **[**may**]** permitted to testify about local cocaine distribution and its connection with violence); *State* v. *Hasan*, 205 Conn. 485, 494–95, 534 A.2d 877 (1987) (podiatrist permitted to testify about physical match between shoe and defendant's foot).

Section 7-2 requires a party offering expert testimony, in any form, to show that the witness is qualified and that the testimony will be of assistance to the trier of fact. A three part test is used to determine whether these requirements are met. See, e.g., *Sullivan* v. *Metro-North Commuter R. Co.*, 292 Conn. 150, 158–59, 971 A.2d 676 (2009). First, the expert must possess knowledge, skill, experience, training, education or some other source of learning directly applicable to a matter in issue. See, e.g., *Weaver* v. *McKnight*, 313 Conn. 393, 406–409, 97 A.3d 920 (2014); *State* v. *Borrelli*, 227 Conn. 153, 166–67, 629 A.2d 1105 (1993), State v. *Girolamo*, 197 Conn. 201, 214–15,

496 A.2d 948 (1985). Second, the witness' skill or knowledge must not be common to the average person. See, e.g., *State* v. *Guilbert*, 306 Conn. 218, 234–42, 49 A.3d 705 (2012); *State* v. *Borrelli*, supra, 167–172. Third, the testimony must be helpful to the fact finder in considering the issues. See, e.g., *State* v. *Hasan*, supra, 205 Conn. 494 ("[t]he value of [the witness'] expertise lay in its assistance to the jury in reviewing and evaluating the evidence"). The inquiry is often summarized in the following terms: "The true test of the admissibility of [expert] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or jury in determining the questions at issue." (Internal quotation marks omitted.) *Going* v. *Pagani*, 172 Conn. 29, 35, 372 A.2d 516 (1976).

The case law imposes an additional admissibility requirement with respect to some—but not all—types of scientific expert testimony. **[**In**]** This additional requirement derives from *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), which **[**the state Supreme Court directed**]** directs trial judges, in **[**admitting**]** considering the admission of certain types of scientific **[**evidence**]** expert testimony, to serve a gatekeeper function in determining whether such evidence will assist the trier of fact. Id., 73. **[**In**]** *Porter* **[**, the court opted for**]** adopted an approach similar to that taken by the United States Supreme Court

in construing the [relevant] analogous federal rule of evidence in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). *State* v. *Porter*, supra, 61, 68. For scientific expert testimony subject to *Porter*, the three part test discussed above is supplemented by a fourth threshold requirement. Id., 81; see *Maher* v. *Quest Diagnostics, Inc.*, 269 Conn.154, 168, 847 A.2d 978 (2004); *Weaver* v. *McKnight*, supra, 313 Conn. 414–15. [In accordance with *Porter*] This fourth requirement itself has two parts. *State* v. *Porter*, supra, 63–64; see, e.g., *Weaver* v. *McKnight*, supra, 413–14.[, t] The [trial judge] proffering party first must [determine] establish that the [proffered] scientific [evidence] expert testimony is reliable. [Id.,] *State* v. *Porter*, supra, 64. Scientific [evidence] expert testimony is reliable if the underlying reasoning or methodology [underlying the evidence] is scientifically valid. Id. [In addition to reliability, the trial judge also must determine that the proffered scientific evidence is relevant, meaning that the reasoning or methodology underlying the scientific theory or technique in question properly can be applied to the facts in issue. Id. In] The *Porter* [the court listed] decision identifies several factors that should be considered by a trial judge [should consider in deciding] to help decide whether scientific [evidence] expert testimony is reliable. Id., 84–86. This list of factors is not exclusive; id., 84; and the operation of each factor varies depending on the specific context in each case. Id., 86–87. The second part of the *Porter* analysis requires the trial judge to determine that the proffered scientific evidence is relevant to the case at hand, meaning that the reasoning or methodology underlying the scientific theory or technique

in question properly can be applied to the facts in issue. Id. ''In other words, proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply valid in the abstract.'' Id., 65; see *Weaver* v. *McKnight*, supra, 414. This is sometimes called the ''fit requirement'' of *Porter*. *State* v. *Guilbert*, supra, 306 Conn. 232; see *State* v. *Porter*, supra, 83. The relevance and prejudice analysis under Article IV of the Code also remains fully applicable to scientific expert testimony. See *State* v. *Kelly*, 256 Conn. 23, 74–76, 770 A.2d 908 (2001).

The *Porter* analysis applies only to certain types of scientific expert testimony. *State* v. *Reid*, 254 Conn. 540, 546, 757 A.2d 482 (2000); see *Maher* v. *Quest Diagnostics, Inc.*, supra, 269 Conn. 170 n.22 (''certain types of evidence, although ostensibly rooted in scientific principles and presented by expert witnesses with scientific training, are not 'scientific' for the purposes of our admissibility standard for scientific evidence, either before or after *Porter*''). The cases have articulated two categories of scientific expert testimony that are not subject to the additional analysis required under *Porter*. The first category reflects the fact that ''some scientific principles have become so well established [in the scientific community] that an explicit *Daubert* analysis is not necessary for admission of evidence thereunder.'' *State* v. *Porter*, supra, 241 Conn. 85 n.30 (''a very few scientific principles are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics'' [internal quotation marks omitted]); see *State* v. *Kirsch*, 263 Conn. 390, 402–403, 820 A.2d 236 (2003). The second type of scientific expert testimony exempt from

the *Porter* analysis is evidence that leaves the jury ''in a position to weigh the probative value of the [expert] testimony without abandoning common sense and sacrificing independent judgment to the expert's assertions based on his special skill or knowledge.'' *State* v. *Hasan*, supra, 205 Conn. 491; see *State* v. *Reid*, supra, 546–47. This exception recognizes that certain expert testimony, though scientific in nature, may be presented in a manner, or involve a subject matter, such that its admission does not risk supplanting the role of ''lay jurors awed by an aura of mystic infallibility surrounding scientific techniques, experts and the fancy devices employed.'' (Internal quotation marks omitted.) *State* v. *Hasan*, supra, 490.

[Subsequent to both *Daubert* and *Porter*, t**]**The United States Supreme Court **[**decided that, with respect to Fed. R. Evid. 702,**]** has held that the trial judge's gatekeeping function under Fed. R. Evid. 702 applies not only to testimony based on scientific knowledge, but also to testimony based on technical and other specialized knowledge, and that the trial judge may consider one or more of the *Daubert* factors if doing so will aid in determining the reliability of the testimony. *Kumho Tire Co., Ltd.* v. *Carmichael*, 526 U.S. 137, 147–49, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). The Code takes no position on **[**such**]** an application of *Porter* to testimony based on technical and other specialized knowledge. Thus, Section 7- 2 should not be read either as including or precluding the *Kumho Tire* rule. See *State* v. *West*, 274 Conn. 605, 638 n.37, 877 A.2d 787, cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005) (declining to decide issue).

In cases involving claims of professional negligence or other issues beyond the field of the ordinary knowledge and experience of judges or jurors, expert testimony may be required to establish one or more elements of a claim. See, e.g., *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 567, 864 A.2d 1 (2005) (medical malpractice); *Davis* v. *Margolis*, 215 Conn. 408, 415–16, 576 A.2d 489 (1990) (legal malpractice); see *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 377–78, 119 A.2d 462 (2015) (holding that expert testimony not required to assess risk of relapse of alcoholic priest, known to defendant as child molester, whose tendencies were exacerbated by alcohol); *LePage* v. *Home*, 262 Conn. 116, 125–26, 809 A.2d 505 (2002) (expert testimony required in case involving consideration of risk factors for sudden infant death syndrome).

Sec. 7-3. Opinion on Ultimate Issue

(a) General rule. Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue.

(b) Mental state or condition of defendant in a criminal case. "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto, except that such expert witness may state his diagnosis of the mental state or condition of the defendant. The ultimate issue as

to whether the defendant was criminally responsible for the crime charged is a matter for the trier of fact alone.'' General Statutes § 54-86i.

COMMENTARY

(a) General rule.

An ultimate issue is one that cannot ''reasonably be separated from the essence of the matter to be decided [by the trier of fact].'' (Internal quotation marks omitted.) *State* v. *Finan*, 275 Conn. 60, 66, 881 A.2d 187 (2005). The common-law rule concerning the admissibility of a witness' opinion on the ultimate issue is phrased in terms of a general prohibition subject to numerous exceptions. E.g., *State* v. *Spigarolo*, 210 Conn. 353, 37**[**2**]**3, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989); *State* v. *Vilalastra*, 207 Conn. 35, 41, 540 A.2d 42 (1988). Subsection (a) adopts the general bar to the admission of nonexpert and expert opinion testimony that embraces an ultimate issue.

Subsection (a)**[**, however,**]** recognizes an exception to the general rule for expert witnesses in circumstances where the jury needs expert assistance in deciding the ultimate issue. A common example is cases involving claims of professional negligence. See, e.g., *Pisel* v. *Stamford Hospital*, 180 Conn. 314, 328–29, 430 A.2d 1 (1980). Where there is particular concern about invading the province of the fact finder, courts may allow the expert to testify regarding common behavioral characteristics of certain types of individuals; *State* v. *Vilalastra*, supra, 207 Conn. 41–43 (behavior of drug dealers); but will prohibit the expert from opining as to whether a particular individual exhibited that behav-

ior. See, e.g., *State* v. *Taylor G.*, 315 Conn. 734, 762–63, 110 A.3d 338 (2015) (behavior of child victim of sexual abuse). **[**See, e.g., *State* v. *Rodgers*, 207 Conn. 646, 652, 542 A.2d 1136 (1988); *State* v. *Vilalastra*, supra, 207 Conn. 41–43; *State* v. *Johnson*, 140 Conn. 560, 562–63, 102 A.2d 359 (1954); cf. *Pisel* v. *Stamford Hospital*, 180 Conn. 314, 328–29, 430 A.2d 1 (1980). This exception for expert opinion embracing an ultimate issue is subject to the limitations set forth in subsection (b).**]** Expert opinion on the ultimate issue **[**otherwise**]** admissible under subsection (a) **[**nevertheless**]** also must satisfy the **[**general**]** admissibility requirements **[**for the admissibility of**]**, applicable to all expert **[**opinion**]** testimony, set forth in Sections 7-2 and 7-4.

[The cases have sometimes used the term ''ultimate issue'' imprecisely. One example is *State* v. *Spigarolo*, supra, 210 Conn. 372–74, in which the court appeared to relax the general restriction on the admissibility of nonexpert opinion testimony that embraces an ultimate issue. At issue was whether a non-expert witness could render an opinion on whether the testimony of a child sexual assault victim would be less candid if the victim were required to testify in the presence of the accused. Id., 370–71. The court identified this issue as an ''ultimate issue'' for purposes of the case. See generally id., 372–74.**]**

[In drafting the Code, however, the issue in *Spigarolo* was deemed an important factual issue, not an ultimate one. Thus, *Spigarolo* was regarded as a case properly analyzed under Section 7-1. To the extent that *Spigarolo* recognized an exception to the inadmissibility of nonexpert opinion testimony that embraces an ultimate issue, it is rejected

in favor of a complete ban on the admissibility of such testimony. See, e.g., *LaFrance* v. *LaFrance*, 127 Conn. 149, 155, 14 A.2d 739 (1940).**]**

(b) Mental state or condition of defendant in a criminal case.

[The term ''opinion or inference'' appears in subsection (b) by virtue of the verbatim incorporation of the language of General Statutes § 54-86i.**]** Subsection (b), including its use of the term ''opinion or inference,'' is taken verbatim from General Statutes § 54-86i. The Code **[**draws no distinction**]** attributes no significance to the difference between the term ''opinion or inference,'' as used in subsection (b), and the term ''opinion'' or ''opinions,'' without the accompanying ''or inference'' language **[**, the latter term appearing**]** used in other provisions of Article VII of the Code.

Sec. 7-4. Opinion Testimony by Experts; Bases of Opinion Testimony by Experts; Hypothetical Questions

(a) Opinion testimony by experts. An expert may testify in the form of an opinion and give reasons therefor, provided sufficient facts are shown as the foundation for the expert's opinion.

(b) Bases of opinion testimony by experts. The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. The facts relied on pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence.

(c) Hypothetical questions. An expert may give an opinion in response to a hypothetical question provided that the hypothetical

question: (1) presents the facts in such a manner that they bear a true and fair relationship to each other and to the evidence in the case**[,]**; (2) is not worded so as to mislead or confuse the jury**[,]**; and (3) is not so lacking in the essential facts as to be without value in the decision of the case. A hypothetical question need not contain all of the facts in evidence.

COMMENTARY

(a) Opinion testimony by experts.

Connecticut case law requires disclosure of the ''factual basis'' underlying an expert witness' opinion before the expert witness may render that opinion. See *Borkowski* v. *Borkowski*, 228 Conn. 729, 742, 638 A.2d 1060 (1994); *State* v. *John*, 210 Conn. 652, 677, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989); *State* v. *Asherman*, 193 Conn. 695, 716, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985); see also Practice Book § 13-4 (b) (1); *Going* v. *Pagani*, 172 Conn. 29, 34, 372 A.2d 516 (1976). Subsection (a) incorporates this principle by requiring **[**that sufficient facts on which the expert's opinion is based be shown as the foundation for the opinion**]** the party offering the evidence to show that the expert's opinion rests upon an adequate factual foundation. This requirement applies whether the expert's opinion is based on personal knowledge or secondhand facts made known to the expert at or before trial. E.g., *State* v. *John*, supra, 676–78 (secondhand data customarily relied on by other experts); *Going* v. *Pagani*, supra, 32 (firsthand observation); *Floyd* v. *Fruit Industries,*

Inc., 144 Conn. 659, 666, 136 A.2d 918 (1957) (secondhand facts made known to expert through use of hypothetical question).

Subsection (a) contemplates that disclosure of the ''foundational'' facts will, in most cases, occur during the examination undertaken by the party calling the expert and before the expert states his or her opinion. The requirement of preliminary disclosure, however, is subject to the trial court's discretionary authority to admit evidence upon proof of connecting facts**[**,**]** or subject to later proof of connecting facts. Section 1-3 (b); see *Schaefer & Co.* v. *Ely*, 84 Conn. 501, 509, 80 A. 775 (1911). Nothing in subsection (a) precludes further exploration into the factual basis for the expert's opinion during cross-examination of the expert. Whether sufficient facts are shown as the foundation for the expert's opinion is a preliminary question to be decided by the trial court. *Liskiewicz* v. *LeBlanc*, 5 Conn. App. 136, 141, 497 A.2d 86 (1985); see Section 1-3 (a).

The admissibility of expert testimony rendered by a physician—whether a treating or nontreating physician—is governed by the same evidentiary standard **[**governing**]** applied to the testimony of expert witnesses generally. *George* v. *Ericson*, 250 Conn. 312, 317, 736 A.2d 889 (1999), overruling *Brown* v. *Blauvelt*, 152 Conn. 272, 274, 205 A.2d 773 (1964).

(b) Bases of opinion testimony by experts.

Subsection (b) allows an expert witness to base his or her opinion on ''facts'' derived from one or more of three possible sources. First, the expert's opinion may be based on facts ''perceived by'' the expert **[**''perceived''**]** at or before trial, in other words, facts the expert observes

firsthand. E.g., *State* v. *Conroy*, 194 Conn. 623, 628–29, 484 A.2d 448 (1984); *Donch* v. *Kardos*, 149 Conn. 196, 201, 177 A.2d 801 (1962); *Wilhelm* v. *Czuczka*, 19 Conn. App. 36, 42, 561 A.2d 146 (1989). For example, a treating physician often will base an expert opinion on observations made by the physician [made] while examining the patient. See generally *State* v. *McClary*, 207 Conn. 233, 236–38, 541 A.2d 96 (1988).

Second, the expert's opinion may be based on facts ''made known'' to the expert at trial. This [second variety] category includes facts learned by the expert [learns of when the expert attends] while attending the trial and listen[s]ing to the testimony of other witnesses prior to rendering his or her own opinion. See *DiBiase* v. *Garnsey*, 106 Conn. 86, 89, 136 A. 871 (1927). It also includes facts presented to the expert in the form of a hypothetical question. See, e.g., *Keeney* v. *L & S Construction*, 226 Conn. 205, 213, 626 A.2d 1299 (1993); *State* v. *Auclair*, 33 Conn. Supp. 704, 713, 368 A.2d 235 (1976).

Finally, the expert's opinion may be based on facts, of which the expert has no firsthand knowledge, made known to the expert before trial [and of which the expert has no firsthand knowledge], regardless of the admissibility of those facts themselves. See, e.g., *State* v. *Gonzalez*, 206 Conn. 391, 408, 538 A.2d 210 (1988) (expert's opinion based on autopsy report of another medical examiner); *State* v. *Cosgrove*, 181 Conn. 562, 584, 436 A.2d 33 (1981) (expert's opinion derived from reports that included observations of other toxicologists).

Although [facts derived from] the factual basis for expert opinions resting on the first two sources of information [—] (i.e., facts gleaned

from firsthand observation [and] or facts made known to the expert at trial[—often will be admissible and admitted in evidence]) normally do not encounter obstacles to admissibility, case law is inconsistent [as] with respect to the admissibility of expert opinion [when] based on facts [made known to the expert before trial and of] in the last category (i.e., facts themselves inadmissible at trial and as to which the expert has no firsthand knowledge). In accordance with the modern trend in Connecticut, subsection (b) provides that [the facts upon which an expert bases his or her] an expert may offer an opinion [need not be] based on facts that are not themselves admissible if those facts are of a type customarily relied on by experts in the particular field in forming their opinions. E.g., *George* v. *Ericson*, supra, 250 Conn. 324–25; *State* v. *Gonzalez*, supra, 206 Conn. 408; *State* v. *Cuvelier*, 175 Conn. 100, 107–108, 436 A.2d 33 (1978). [For purposes of subsection (b), inadmissible "facts" upon which experts customarily rely in forming opinions can be derived] Facts of this nature may come from sources such as conversations, informal opinions, written reports and data compilations. Whether [inadmissible] these facts are of a type customarily relied on by experts in forming opinions is a preliminary question to be decided by the trial court. See Section 1-3 (a).

In a criminal case, when an expert opinion is based on facts not in evidence, the court and parties should be aware of constitutional concerns. See *State* v. *Singh*, 59 Conn. App. 638, 652, 757 A.2d 1175 (2000) (opinion based on information provided by others does not violate confrontation clause if expert is available for cross-examination concerning nature and reasonableness of reliance), rev'd on other

grounds, 259 Conn. 693, 793 A.2d 226 (2002); cf. *In re Barbara J.*, 215 Conn. 31, 43–44, 574 A.2d 203 (1990) (termination of parental rights). This added requirement, which is not included in subsection (b) as an independent prerequisite under the Code, has been mentioned in dicta in civil cases as well. See *R.I. Pools, Inc.* v. *Paramount Concrete, Inc.*, 149 Conn. App. 839, 849, 89 A.3d 993 ("expert may give an opinion based on sources not in themselves admissible in evidence, provided [1] the facts or data not in evidence are of a type reasonably relied on by experts in the particular field, and [2] the expert is available for cross-examination concerning his or her opinion" [internal quotation marks omitted]), cert. denied, 312 Conn. 920, 94 A.3d 1200 (2014); *Birkhamshaw* v. *Socha*, 156 Conn. App. 453, 484, 115 A.3d 1, cert. denied, 317 Conn. 913, 116 A.3d 812 (2015).

Subsection (b) expressly **[**forbids**]** states that the facts **[**upon which the expert based his or her opinion to be admitted for their truth**]** forming the basis of the expert opinion are not thereby made admissible as substantive evidence (i.e., for their truth) unless otherwise **[**substantively**]** admissible as such under other provisions of the Code. See *Millíun* v. *New Milford Hospital*, 310 Conn. 711, 726–28, 80 A.3d 887 (2013). Thus, subsection (b) does not constitute an exception to the hearsay rule or any other exclusionary provision of the Code. However, because subsection (a) requires disclosure of a sufficient factual basis for the expert's opinion, and because the cross-examiner often will want to explore the expert's factual basis further, subsection (b) does not preclude the trial court, in its discretion, from admitting the underlying facts relied on by the expert for the limited purpose of explaining

the factual basis for the expert's opinion. **[**See, e.g., 2 C. McCormick, Evidence (5th Ed. 1999) § 324.3, p. 356.**]** *DeNunzio* v. *DeNunzio*, 151 Conn. App. 403, 413, 95 A.3d 557, (2014), aff'd on other grounds, 320 Conn. 178, 128 A.3d 901 (2016).

(c) Hypothetical questions.

Subsection (c) embraces the common-law rule concerning the admissibility of a hypothetical question and, necessarily, the admissibility of the ensuing expert's opinion in response to the hypothetical question. *Floyd* v. *Fruit Industries, Inc.*, supra, 144 Conn. 666; accord *Shelnitz* v. *Greenberg*, 200 Conn. 58, 77, 509 A.2d 1023 (1986); *Schwartz* v. *Westport*, 170 Conn. 223, 225, 365 A.2d 1151 (1976). In accordance with case law, subsection (c) recognizes that the hypothetical question must contain the essential facts of the case; see *State* v. *Gaynor*, 182 Conn. 501, 509–10, 438 A.2d 739 (1980); see also *Keeney* v. *L & S Construction*, supra, 226 Conn. 213 (''the stated assumptions on which a hypothetical question is based must be the essential facts established by the evidence''); but need not contain all the facts in evidence. E.g., *Donch* v. *Kardos*, supra, 149 Conn. 201; *Stephanofsky* v. *Hill*, 136 Conn. 379, 384, 71 A.2d 560 (1950).

Subsection (c) states the rule concerning the framing of hypothetical questions on direct examination. See, e.g., *Schwartz* v. *Westport*, supra, 170 Conn. 224–25. The rules governing the framing of hypothetical questions on direct examination and for the purpose of introducing substantive evidence are applied with increased liberality when the hypothetical question is framed on cross-examination and for the purpose of impeaching and testing the accuracy of the expert's opinion

testimony given on direct examination. See, e.g., *State* v. *Gaynor*, supra, 182 Conn. 510–11; *Kirchner* v. *Yale University*, 150 Conn. 623, 629, 192 A.2d 641 (1963); *Livingstone* v. *New Haven*, 125 Conn. 123, 127–28, 3 A.2d 836 (1939); *Rice* v. *Dowling*, 23 Conn. App. 460, 465, 581 A.2d 1061 (1990), cert. denied, 217 Conn. 805, 584 A.2d 1190 (1991). Common law shall continue to govern the use of hypothetical questions on cross-examination.

ARTICLE VIII—HEARSAY

Sec. 8-1. Definitions

As used in this Article:

(1) ''Statement'' means (A) an oral or written assertion or (B) nonverbal conduct of a person, if it is intended by the person as an assertion.

(2) ''Declarant'' means a person who makes a statement.

(3) ''Hearsay'' means a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted.

COMMENTARY

(1) ''Statement''

The definition of ''statement'' takes on significance when read in conjunction with the definition of ''hearsay'' in subdivision (3). The definition of ''statement'' includes both oral and written assertions; see *Rompe* v. *King*, 185 Conn. 426, 428, 441 A.2d 114 (1981); *Cherniske* v. *Jajer*, 171 Conn. 372, 376, 370 A.2d 981 (1976); and nonverbal conduct of a person intended as an assertion. *State* v. *King*, 249 Conn. 645, 670, 735 A.2d 267 (1999) (person nodding or shaking head in response to question is form of nonverbal conduct intended as

assertion)*;State* v. *Blades*, 225 Conn. 609, 632, 626 A.2d 273 (1993); *Heritage Village Master Assn., Inc.* v. *Heritage Village Water Co.*, 30 Conn. App. 693, 702, 622 A.2d 578 (1993)**[***;* see also C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 11.2, p. 319 (person nodding or shaking head in response to question is form of nonverbal conduct intended as assertion)**]**. The effect of this definition is to exclude from the hearsay rule's purview nonassertive verbalizations and nonassertive, nonverbal conduct. See *State* v. *Hull*, 210 Conn. 481, 498–99, 556 A.2d 154 (1989) (''[i]f the statement is not an assertion . . . it is not hearsay'' [internal quotation marks omitted]); *State* v. *Thomas*, 205 Conn. 279, 285, 533 A.2d 553 (1987) (''[n]onassertive conduct such as running to hide, or shaking and trembling, is not hearsay'').

The definition of ''statement'' in Section 8-1 is used solely in conjunction with the definition of hearsay and the operation of the hearsay rule and its exceptions. See generally Art. VIII of the Code. The definition does not apply in other contexts or affect definitions of ''statement'' in other provisions of the General Statutes or Practice Book. See, e.g., General Statutes § 53-441 (a); Practice Book §§ 13-1 and 40-15.

(2) ''Declarant''

The definition of ''declarant'' is consistent with the longstanding common-law recognition of that term. See, e.g., *State* v. *Jarzbek*, 204 Conn. 683, 696 n.7, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988); *State* v. *Barlow*, 177 Conn. 391, 396, 418 A.2d 46 (1979). Numerous courts have held that data generated by a computer solely as a product of a computerized

system or process are not made by a ''declarant'' and, therefore, not hearsay. See *State* v. *Buckland*, 313 Conn. 205, 216–221, 96 A.3d 1163 (2014) (agreeing with federal cases holding that ''raw data'' generated by breath test machine is not hearsay because machine is not declarant), cert. denied, U.S. , 135 S. Ct. 992, 190 L. Ed. 2d 837 (2015); *State* v. *Gojcaj*, 151 Conn. App. 183, 195, 200–202, 92 A.3d 1056 **[**(2014)**]** (holding that there was no declarant making computer-generated log, which was created automatically to record date and time whenever any person entered passcode to activate or deactivate security system), cert. denied, 314 Conn. 924, 100 A.3d 854 (2014); see also *Lorraine* v. *Markel American Ins. Co.*, 241 F.R.D. 534, 564–65 (D. Md. 2007) (making same point, using fax ''header'' as example). In certain forms, this type of computer-generated information is known as ''metadata.'' The term ''metadata'' has been defined as ''data about data''; (internal quotation marks omitted) *Lorraine* v. *Markel American Ins. Co.,* supra, 547; and refers to computer-generated information describing the history, tracking or management of electronically stored information. See id. *Gojcaj* recognized that a party seeking to introduce computer-generated data and records, even if not hearsay, must establish that the computer system reliably and accurately produces records or data of the type that is being offered. *State* v. *Gojcaj*, supra, 202 n.12.

(3) ''Hearsay''

Subdivision (3)'s definition of ''hearsay'' finds support in the cases. E.g., *State* v. *Crafts*, 226 Conn. 237, 253, 627 A.2d 877 (1993); *State* v. *Esposito*, 223 Conn. 299, 315, 613 A.2d 242 (1992); *Obermeier* v.

Nielsen, 158 Conn. 8, 11, 255 A.2d 819 (1969). The purpose for which the statement is offered is crucial; if it is offered for a purpose other than to establish the truth of the matter asserted, the statement is not hearsay. E.g., *State* v. *Esposito*, supra, 315; *State* v. *Hull*, supra, 210 Conn. 498–99; *State* v. *Ober*, 24 Conn. App. 347, 357, 588 A.2d 1080, cert. denied, 219 Conn. 909, 593 A.2d 134, cert. denied, 502 U.S. 915, 112 S. Ct. 319, 116 L. Ed. 2d 26 (1991).

(Amended May 20, 2015, to take effect August 1, 2015.)

Sec. 8-2. Hearsay Rule

(a) General Rule. Hearsay is inadmissible, except as provided in the Code, the General Statutes or **[**the**]** any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code.

(b) Testimonial Statements and Constitutional Right of Confrontation. In criminal cases, hearsay statements which might otherwise be admissible under one of the exceptions in this Article may be inadmissible if the admission of such statements is in violation of the constitutional right of confrontation.

COMMENTARY

(a) General Rule.

Section 8-2 is consistent with common law. See *State* v. *Oquendo*, 223 Conn. 635, 664, 613 A.2d 1300 (1992); *State* v. *Acquin*, 187 Conn. 647, 680, 448 A.2d 163 (1982), cert. denied, 463 U.S. 1229, 103 S. Ct. 3570, 77 L. Ed. 2d 1411 (1983), overruled in part on other grounds by *Davis* v. *United States*, 512 U.S. 452, 114 S. Ct. 2350,

129 L. Ed. 2d 362 (1994); *General Motors Acceptance Corp.* v. *Capitol Garage Inc.*, 154 Conn. 593, 597, 227 A.2d 548 (1967).

In a few instances, the Practice Book contains rules of evidence that may ostensibly conflict with Code provisions. The Supreme Court has resolved any such conflicts either through decisional law or by formally adopting certain hearsay exceptions embodied in the rules of practice, adopted before June 18, 2014, the date on which the Court adopted the Code. See, e.g., Practice Book §§ 13-31 (a) (2) (depositions of certain health care providers admissible, availability immaterial); 13-31 (a) (3) (deposition of party or officer, director, managing agent or employee on behalf of corporation, partnership or government agency, admissible when used by adverse party for any purpose); 13-31 (a) (4) (deposition admissible, inter alia, if witness is thirty miles or more from place of trial); 25-60 (c) (reports of evaluation or study in family matters prepared under Practice Book §§ 25-60A and 25-61, admissible if author subject to cross-examination); 35a-9 (reports in dispositional phase of child neglect proceedings admissible, if author subject to cross-examination); see also *Hibbard* v. *Hibbard*, 139 Conn. App. 10, 15, 55 A.3d 301 (2012) (report and hearsay statements contained therein admissible under Practice Book § 25-60).

(b) Testimonial Statements and Constitutional Right of Confrontation.

This subsection reflects the federal constitutional principle announced in *Crawford* v. *Washington*, 541 U.S. 36, 68–69, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which holds that testimonial

hearsay statements may be admitted as evidence against an accused at a criminal trial only when: (1) the declarant does not testify and (2) the defendant has had a prior opportunity to cross-examine the declarant. See U.S. Const., amend. VI; Conn. Const., art. I, § 8.

Sec. 8-3. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Statement by a party opponent. A statement that is being offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, (B) a statement that the party has adopted or approved, (C) a statement by a person authorized by the party to make a statement concerning the subject, (D) a statement by the party's agent, servant or employee, concerning a matter within the scope of the agency or employment, and made during the existence of the relationship; (E) a statement by a coconspirator of a party while the conspiracy is ongoing and in furtherance of the conspiracy, **[**(E)**]** (F) in an action for a debt for which the party was surety, a statement by the party's principal relating to the principal's obligations, or **[**(F)**]** (G) a statement made by a predecessor in title of the party, provided the declarant and the party are sufficiently in privity that the statement of the declarant would affect the party's interest in the property in question.

The hearsay statement itself may not be considered to establish the declarant's authority under (C), the existence or scope of the

relationship under (D), or the existence of the conspiracy or participation in it under (E).

(2) Spontaneous utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Statement of then existing physical condition. A statement of the declarant's then-existing physical condition provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed.

(4) Statement of then-existing mental or emotional condition. A statement of the declarant's then-existing mental or emotional condition, including a statement indicating a present intention to do a particular act in the immediate future, provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed.

(5) Statement for purposes of obtaining medical diagnosis or treatment. A statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment.

(6) Recorded recollection. A memorandum or record concerning an event about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness at or about the time of the event recorded and to reflect that knowledge correctly.

(7) Public records and reports. Records, reports, statements or data compilations, in any form, of public offices or agencies, provided (A) the record, report, statement or data compilation was made by a public official under a duty to make it, (B) the record, report, statement or data compilation was made in the course of his or her official duties, and (C) the official or someone with a duty to transmit information to the official had personal knowledge of the matters contained in the record, report, statement or data compilation.

(8) Statement in learned treatises. To the extent called to the attention of an expert witness on cross-examination or relied on by the expert witness in direct examination, a statement contained in a published treatise, periodical or pamphlet on a subject of history, medicine, or other science or art, recognized as a standard authority in the field by the witness, other expert witness or judicial notice.

(9) Statement in ancient documents. A statement in a document in existence for more than thirty years if it is produced from proper custody and otherwise free from suspicion.

(10) Published compilations. Market quotations, tabulations, lists, directories or other published compilations, that are recognized authority on the subject, or are otherwise trustworthy.

(11) Statement in family bible. A statement of fact concerning personal or family history contained in a family bible.

(12) Personal identification. Testimony by a witness of his or her own name or age.

(Amended June 29, 2007, to take effect Jan. 1, 2008; amended May 20, 2015, to take effect August 1, 2015.)

COMMENTARY

(1) Statement by party opponent.

Section 8-3 (1) sets forth six categories of party opponent admissions that were excepted from the hearsay rule at common law **[**:**]** and adds one more category which has been adopted in the Federal Rules of Evidence and a majority of other states.

(A) The first category excepts from the hearsay rule a party's own statement when offered against him or her. E.g., *In re Zoarski*, 227 Conn. 784, 796, 632 A.2d 1114 (1993); *State* v. *Woodson*, 227 Conn. 1, 15, 629 A.2d 386 (1993). Under Section 8-3 (1) (A), a statement is admissible against its maker, whether he or she was acting in an individual or representative capacity when the statement was made. **[**Although there apparently are no Connecticut cases that support extending the exception to statements made by and offered against those serving in a representative capacity, t**]**The rule is in accord with the modern trend. E.g., Fed. R. Evid. 801 (d) (2) (A). **[**Connecticut excepts party admissions from the usual requirement that**]** A party statement is admissible under Section 8-3 (1), regardless of whether the person making the statement **[**have**]** has personal knowledge of the facts stated therein. *Dreir* v. *Upjohn Co.*, 196 Conn. 242, 249, 492 A.2d 164 (1985). If the statement at issue was made by the party opponent in a deposition, the statement is admissible in accordance with Practice Book § 13-31 (a) (3). That provision permits an adverse party to use at trial, for any purpose, the deposition of a party, or a person who at the time of the deposition was an officer, director, or managing agent of a party, or a person designated under Practice

Book § 13-27 (h) to testify on behalf of a public or private corporation, partnership, association or government agency. This rule of practice was deemed ''analogous'' to Section 8-3 (1) in *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 238 n.11, 654 A.2d 342 (1995) (construing Practice Book § 248 [1] [c], predecessor to Practice Book § 13-31 [a] [3]).

(B) The second category recognizes the common-law hearsay exception for ''adoptive admissions.'' See, e.g., *State* v. *John*, 210 Conn. 652, 682–83, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989); *Falker* v. *Samperi*, 190 Conn. 412, 426, 461 A.2d 681 (1983). Because adoption or approval may be implicit; see, e.g., *State* v. *Moye*, 199 Conn. 389, 393–94, 507 A.2d 1001 (1986); the common-law hearsay exception for tacit admissions, under which silence or a failure to respond to another person's statement may constitute an admission; e.g., *State* v. *Morrill*, 197 Conn. 507, 535, 498 A.2d 76 (1985); *Obermeier* v. *Nielsen*, 158 Conn. 8, 11–12, 255 A.2d 819 (1969); is carried forward in Section 8-3 (1) (B). The admissibility of tacit admissions in criminal cases is subject to the evidentiary limitations on the use of an accused's postarrest silence; see *State* v. *Ferrone*, 97 Conn. 258, 266, 116 A. 336 (1922); and the constitutional limitations on the use of the accused's post-*Miranda* warning silence. *Doyle* v. *Ohio*, 426 U.S. 610, 617–19, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); see, e.g., *State* v. *Zeko*, 177 Conn. 545, 554, 418 A.2d 917 (1977).

(C) The third category restates the common-law hearsay exception for ''authorized admissions.'' See, e.g., *Presta* v. *Monnier*, 145 Conn. 694, 699, 146 A.2d 404 (1958); *Collins* v. *Lewis*, 111 Conn. 299,

305–306, 149 A. 668 (1930). For this exception to apply, **[**T**]**the speaker must have **[**speaking**]** actual or apparent authority to speak concerning the subject upon which he or she speaks in the declaration at issue; a mere agency relationship (e.g., employer-employee), without more, is not enough to confer **[**speaking**]** such authority. E.g., *Liebman* v. *Society of Our Lady of Mount St. Carmel, Inc.*, 151 Conn. 582, 586, 200 A.2d 721 (1964); *Munson* v. *United Technologies Corp.*, 28 Conn. App. 184, 188, 609 A.2d 1066, cert. denied, 200 Conn. 805, 510 A.2d 192 (1992); cf. *Graham* v. *Wilkins*, 145 Conn. 34, 40–41, 138 A.2d 705 (1958); *Haywood* v. *Hamm*, 77 Conn. 158, 159, 58 A. 695 (1904). The proponent need not, however, show that the speaker was authorized to make the particular statement sought to be introduced. The existence of **[**speaking**]** authority to speak for the principal is to be determined by reference to the substantive law of agency. See, e.g., *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 508–12, 4 A.3d 288 (2010) (applying principles of agency law to conclude that attorney had authority to bind client to settlement). Although not expressly mentioned in the exception, the Code in no way abrogates the common-law rule that speaking authority must be established without reference to the purported agent's out-of-court statements, save when those statements are independently admissible. See Section 1-1 (d) **[**(1)**]** (2). See generally *Robles* v. *Lavin*, 176 Conn. 281, 284, 407 A.2d 957 (1978). **[**Because partners are considered agents of the partnership for the purpose of its business; General Statutes § 34-322 (1); a partner's declarations in furtherance of partnership business ordinarily are admissible against the partnership under Sec-

tion 8-3 (1) (C) principles. See 2 C. McCormick, Evidence (5th Ed. 1999) § 259, p. 156; cf. *Munson* v. *Wickwire*, 21 Conn. 513, 517 (1852).**]**

(D) The fourth category encompasses the exception set forth in Fed. R. Evid. 801 (d) (2) and adopted in a majority of state jurisdictions. The notes of the federal advisory committee on the 1972 proposed rules express ''dissatisfaction'' with the traditional rule requiring proof that the agent had actual authority to make the offered statement on behalf of the principal. The advisory committee notes cite to a ''substantial trend [which] favors admitting statements relating to a matter within the scope of the agency or employment. *Grayson* v. *Williams*, 256 F.2d 61 (10th Cir. 1958); *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines* v. *Tuller*, 110 U.S. App. D.C. 282, 292 F.2d 775, 784 [(D.C. Cir.), cert. denied, 368 U.S. 921, 82 S. Ct. 243, 7 L. Ed 2d 136] (1961); *Martin* v. *Savage Truck Lines, Inc.*, 121 F. Supp. 417 (D.D.C. 1954), and numerous state court decisions collected in 4 Wigmore, 1964 Supp., 66–73 . . . .'' Fed. R. Evid. 801 (d) (2) (D) advisory committee note. This trend has continued since then. See, e.g., *B & K Rentals & Sales Co.* v. *Universal Leaf Tobacco Co.*, 324 Md. 147, 158, 596 A.2d 640 (1991) (adopting federal approach and observing ''[t]he authorities, both courts and commentators, have almost universally condemned the strict common law rule in favor of the . . . rule set forth in [Fed. R. Evid. 801 (d) (2)]''). Id., 645. Connecticut now adopts the modern rule as well and, in doing so, overrules the line of cases adhering to the common law by requiring proof that the declarant was authorized to speak on behalf of the

employer or principal. See *Cascella* v. *Jay James Camera Shop, Inc.*, 147 Conn. 337, 341, 160 A.2d 899 (1960); *Wade* v. *Yale University*, 129 Conn. 615, 617, 30 A.2d 545 (1943).

[(D)**]** (E) The **[**fourth**]** fifth category encompasses the hearsay exception for statements of coconspirators. E.g., *State* v. *Peeler*, 267 Conn. 611, 628–34, 841 A.2d 181 (2004); *State* v. *Couture*, 218 Conn. 309, 322, 589 A.2d 343 (1991); *State* v. *Pelletier*, 209 Conn. 564, 577, 552 A.2d 805 (1989); see also *State* v. *Vessichio*, 197 Conn. 644, 654–55, 500 A.2d 1311 (1985) (additional foundational elements include existence of conspiracy and participation therein by both declarant and party against whom statement is offered), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986). The exception is applicable in civil and criminal cases alike. See *Cooke* v. *Weed*, 90 Conn. 544, 548, 97 A. 765 (1916). The proponent must prove the foundational elements by a preponderance of the evidence and independently of the hearsay statements sought to be introduced. *State* v. *Carpenter*, 275 Conn. 785, 838, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006); *State* v. *Vessichio*, supra, 655; *State* v. *Haggood*, 36 Conn. App. 753, 767, 653 A.2d 216, cert. denied, 233 Conn. 904, 657 A.2d 644 (1995).

[(E)**]** (F) The **[**fifth**]** sixth category of party opponent admissions is derived from *Agricultural Ins. Co.* v. *Keeler*, 44 Conn. 161, 162–64 (1876). **[**See generally C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 11.5.6 (d), p. 347; 4 J. Wigmore, Evidence (4th Ed. 1972) § 1077.**]**

[(F)**]** (G) The final category incorporates the common-law hearsay exception applied in *Pierce* v. *Roberts*, 57 Conn. 31, 40–41, 17 A. 275 (1889), and *Ramsbottom* v. *Phelps*, 18 Conn. 278, 285 (1847).

(2) Spontaneous utterance.

The hearsay exception for spontaneous utterances is well established. See, e.g., *State* v. *Stange*, 212 Conn. 612, 616–17, 563 A.2d 681 (1989); *Cascella* v. *Jay James Camera Shop, Inc.*, 147 Conn. 337, 341–42, 160 A.2d 899 (1960); *Perry* v. *Haritos*, 100 Conn. 476, 483–84, 124 A. 44 (1924). Although the language of Section 8-3 (2) **[**states the exception in terms different from that of the case law on which the exception is based**]** is not identical to the language used in pre-Code cases to describe the exception; cf. *State* v. *Stange*, supra, 616–17; *Rockhill* v. *White Line Bus Co.*, 109 Conn. 706, 709, 145 A. 504 (1929); *Perry* v. *Haritos*, supra, 484; *State* v. *Guess*, 44 Conn. App. 790, 803, 692 A.2d 849 (1997), aff'd, 244 Conn. 761, 751 A.2d 643 (1998); the **[**rule**]** provision **[**assumes incorporation of**]** incorporates the **[**case law**]** same principles **[**underlying the exception**]**. See, e.g., *State* v. *Kirby*, 280 Conn. 361, 374–77, 908 A.2d 506 (2006).

The event or condition triggering the utterance must be sufficiently startling, so ''as to produce nervous excitement in the declarant and render [the declarant's] utterances spontaneous and unreflective.'' *State* v. *Rinaldi*, 220 Conn. 345, 359, 599 A.2d 1 (1991) **[**, quoting C. Tait & J. LaPlante, § 11.11.2, pp. 373–74; accord 2 C. McCormick, supra, § 272, p. 204**]**.

(3) Statement of then-existing physical condition.

Section 8-3 (3) embraces the hearsay exception for statements of then-existing physical condition. *Martin* v. *Sherwood*, 74 Conn. 475, 481–82, 51 A. 526 (1902); *State* v. *Dart,* 29 Conn. 153, 155 (1860); see *McCarrick* v. *Kealy*, 70 Conn. 642, 645, 40 A. 603 (1898).

The exception is limited to statements of *then-existing* physical condition, whereby the declarant describes how the declarant feels **[**as**]** at the time the declarant **[**speaks**]** makes the hearsay statement. Statements concerning past physical condition; *Martin* v. *Sherwood*, supra, 74 Conn. 482; *State* v. *Dart*, supra, 29 Conn. 155; or the events leading up to or the cause of a present condition; *McCarrick* v. *Kealy*, supra, 70 Conn. 645; are not admissible under this exception. Cf. Section 8-3 (5) (exception for statements made to physician for purpose of obtaining medical treatment or advice and describing *past* or present bodily condition or cause thereof).

(4) Statement of then-existing mental or emotional condition.

Section 8-3 (4) embodies what is frequently referred to as the ''state-of-mind'' exception to the hearsay rule. See, e.g., *State* v. *Periere*, 186 Conn. 599, 605–606, 442 A.2d 1345 (1982).

The exception allows the admission of a declarant's statement describing his or her then-existing mental or emotional condition when the declarant's mental or emotional condition is a **[**factual**]** relevant issue in the case. E.g., *State* v. *Perkins*, 271 Conn. 218, 256–259, 856 A.2d 917 (2004) (defendant's state-of-mind at time of hearsay statement not relevant to any issue in case); *State* v. *Periere*, supra, 186 Conn. 606–607 (relevant to show declarant's fear)**[**; *Kearney* v.

Farrell, 28 Conn. 317, 320–21 (1859) (to show declarant's ''mental feeling'')**]**. Only statements describing *then-existing* mental or emotional condition, i.e., that existing when the statement is made, are admissible.

The exception also covers a declarant's statement of present intention to perform a subsequent act as an inference that the subsequent act actually occurred. E.g., *State* v. *Rinaldi*, 220 Conn. 345, 358 n.7, 599 A.2d 1 (1991); *State* v. *Santangelo*, 205 Conn. 578, 592, 534 A.2d 1175 (1987); *State* v. *Journey*, 115 Conn. 344, 351, 161 A.2d 515 (1932). The inference drawn from the statement of present intention that the act actually occurred is a matter of relevancy rather than a hearsay concern.

When a statement describes the declarant's intention to do a future act in concert with another person, e.g., ''I am going to meet Ralph at the store at ten,'' the case law does not prohibit admissibility. See *State* v. *Santangelo*, supra, 205 Conn. 592. But the declaration can be admitted only to prove the declarant's subsequent conduct, not to show what the other person ultimately did. *State* v. *Perelli*, 125 Conn. 321, 325, 5 A.2d 705 (1939). Thus, in the example above, the declarant's statement could be used to infer that the declarant actually did go to meet Ralph at the store at ten, but not to show that Ralph went to the store at ten to meet the declarant.

Placement of Section 8-3 (4) in the ''availability of the declarant immaterial'' category of hearsay exceptions confirms that the admissibility of statements of present intention to show future acts is not conditioned on any requirement that the declarant be unavailable. See

State v. *Santangelo*, supra, 205 Conn. 592 (dictum suggesting that declarant's unavailability is precondition to admissibility).

While statements of present intention looking forward to the doing of some future act are admissible under the exception, backward-looking statements of memory or belief offered to prove the act or event remembered or believed are inadmissible. See *Wade* v. *Yale University*, 129 Conn. 615, 618–19, 30 A.2d 545 (1943). But see *State* v. *Santangelo*, supra, 205 Conn. 592–93. As the advisory committee note to the corresponding federal rule suggests, ''[t]he exclusion of 'statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.'' Fed. R. Evid. 803 (3) advisory committee note, citing *Shepard* v. *United States*, 290 U.S. 96, 54 S. Ct. 22, 78 L. Ed. 196 (1933). For cases dealing with the admissibility of statements of memory or belief in will cases, see *Spencer's Appeal*, 77 Conn. 638, 643, 60 A. 289 (1905); *Vivian Appeal*, 74 Conn. 257, 260–62, 50 A. 797 (1901); *Comstock* v. *Hadlyme Ecclesiastical Society*, 8 Conn. 254, 263–64 (1830). Cf. *Babcock* v. *Johnson*, 127 Conn. 643, 644, 19 A.2d 416 (1941) (statements admissible only as circumstantial evidence of state of mind and not for truth of matter asserted); *In re Johnson's Will*, 40 Conn. 587, 588 (1873) (same).

(5) Statement for purposes of obtaining medical diagnosis or treatment.

Statements made in furtherance of obtaining a medical diagnosis or treatment are excepted from the hearsay rule. E.g., *State* v. *DePas-*

tino, 228 Conn. 552, 565, 638 A.2d 578 (1994). This is true even if diagnosis or treatment is not the primary purpose of the medical examination or the principal motivation for the statement; *State* v. *Griswold*, 160 Conn. App. 528, 553, 557, 127 A.3d 189 (statements made during forensic interview in child sexual abuse context), cert. denied, 320 Conn. 907, 128 A.3d 952 (2015); as long as the statement is ''reasonably pertinent'' to obtaining diagnosis or treatment. Id.

It is intended that the term ''medical'' be read broadly so that the exception would cover statements made for the purpose of obtaining diagnosis or treatment for both somatic and psychological maladies and conditions. See *State* v. *Wood*, 208 Conn. 125, 133–34, 545 A.2d 1026, cert. denied, 488 U.S. 895, 109 S. Ct. 235, 102 L. Ed. 2d 225 (1988).

Statements concerning the cause of an injury or condition traditionally were inadmissible under the exception. See *Smith* v. *Hausdorf*, 92 Conn. 579, 582, 103 A. 939 (1918). **[**Recent**]** Subsequent cases recognize that, in some instances, causation may be pertinent to medical diagnosis or treatment. See *State* v. *Daniels*, 13 Conn. App. 133, 135, 534 A.2d 1253 (1987); cf. *State* v. *DePastino*, supra, 228 Conn. 565. Section 8-3 (5), thus, excepts from the hearsay rule statements describing ''the inception or general character of the cause or external source'' of an injury or condition when reasonably pertinent to medical diagnosis or treatment.

Statements as to causation that include the identity of the person responsible for the injury or condition ordinarily are neither relevant to nor in furtherance of the patient's medical treatment. *State* v. *DePas-*

tino, supra, 228 Conn. 565; *State* v. *Dollinger*, 20 Conn. App. 530, 534, 568 A.2d 1058, cert. denied, 215 Conn. 805, 574 A.2d 220 (1990). Both the Supreme and Appellate Courts have recognized an exception to this principle in cases of domestic child abuse. *State* v. *DePastino*, supra, 565; *State* v. *Dollinger*, supra, 534–35; *State* v. *Maldonado*, 13 Conn. App. 368, 372–74, 536 A.2d 600, cert. denied, 207 Conn. 808, 541 A.2d 1239 (1988)**[***;* see C. Tait & J. LaPlante, supra, (Sup. 1999) § 11.12.3, p. 233**]**. The courts reason that ''[i]n cases of sexual abuse in the home, hearsay statements made in the course of medical treatment which reveal the identity of the abuser, are reasonably pertinent to treatment and are admissible. . . . If the sexual abuser is a member of the child victim's immediate household, it is reasonable for a physician to ascertain the identity of the abuser to prevent recurrences and to facilitate the treatment of psychological and physical injuries.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Dollinger*, supra, 535, quoting *State* v. *Maldonado*, supra, 374; accord *State* v. *DePastino*, supra, 565. In 2001, this reasoning was extended to apply the exception to *adult* victims of sexual abuse as well. *State* v. *Kelly*, 256 Conn. 23, 45, 770 A.2d 908 (2001). ''In *any* sexual assault, the identity of the perpetrator undoubtedly is relevant to the physician to facilitate the treatment of psychological and physical injuries.'' (Emphasis added; internal quotation marks omitted.) Id.

Traditionally, the exception seemingly required that the statement be made to a physician. See, e.g., *Wilson* v. *Granby*, 47 Conn. 59, 76 (1879). Statements qualifying under Section 8-3 (5), however, may be those made not only to a physician, but to other persons involved

in the treatment of the patient, such as a nurse, a paramedic, an interpreter or even a family member. This approach is in accord with the modern trend. See *State* v. *Maldonado*, supra, 13 Conn. App. 369, 374 n.3 (statement by child abuse victim who spoke only Spanish made to Spanish speaking hospital security guard enlisted by treating physician as translator).

Common-law cases address the admissibility of statements made only by the patient. E.g., *Gilmore* v. *American Tube & Stamping Co.*, 79 Conn. 498, 504, 66 A. 4 (1907). Section 8-3 (5) does not, by its terms, restrict statements admissible under the exception to those made by the patient. For example, if a parent were to bring his or her unconscious child into an emergency room, statements made by the parent to a health care provider for the purpose of obtaining treatment and pertinent to that treatment fall within the scope of the exception.

Early common law distinguished between statements made to physicians consulted for the purpose of treatment and statements made to physicians consulted solely for the purpose of **[**qualifying**]** testifying as an expert witness **[**to testify at trial**]**. Statements made to these so-called ''nontreating'' physicians were not accorded substantive effect. See, e.g., *Zawisza* v. *Quality Name Plate, Inc.*, 149 Conn. 115, 119, 176 A.2d 578 (1961); *Rowland* v. *Phila., Wilm. & Baltimore R. Co.*, 63 Conn. 415, 418–19, 28 A. 102 (1893). This distinction was **[**virtually**]** eliminated by the court in *George* v. *Ericson*, 250 Conn. 312, 324–25, 736 A.2d 889 (1999), which held that nontreating physician could rely on such statements. The distinction between admission only as foundation for the expert's opinion and admission for all purposes was

considered too inconsequential to maintain. Accordingly, the word ''diagnosis'' was added to, and the phrase ''advice pertaining thereto'' was deleted from, the phrase ''medical treatment or advice pertaining thereto'' in Section 8-3 (5) of the 2000 edition of the Code.

(6) Recorded recollection.

The hearsay exception for past recollection recorded requires four foundational requirements. First, the witness must have had personal knowledge of the event recorded in the memorandum or record. *Papas* v. *Aetna Ins. Co.*, 111 Conn. 415, 420, 150 A. 310 (1930); *Jackiewicz* v. *United Illuminating Co.*, 106 Conn. 302, 309, 138 A. 147 (1927); *Neff* v. *Neff*, 96 Conn. 273, 278, 114 A. 126 (1921).

Second, the witness' present recollection must be insufficient to enable the witness to testify fully and accurately about the event recorded. *State* v. *Boucino*, 199 Conn. 207, 230, 506 A.2d 125 (1986). The rule thus does not require the witness' memory to be totally exhausted. See id. Earlier cases to the contrary, such as *Katsonas* v. *W.M. Sutherland Building & Contracting Co.*, 104 Conn. 54, 69, 132 A. 553 (1926), apparently have been rejected. See *State* v. *Boucino*, supra, 230. ''Insufficient recollection'' may be established by demonstrating that an attempt to refresh the witness' recollection pursuant to Section 6-9 (a) was unsuccessful. See *Katsonas* v. *W.M. Sutherland Building & Contracting Co.*, supra, 69.

Third, the memorandum or record must have been made or adopted by the witness ''at or about the time'' the event was recorded. *Gigliotti* v. *United Illuminating Co.*, 151 Conn. 114, 124, 193 A.2d 718 (1963);

Neff v. *Neff*, supra, 96 Conn. 278; *State* v. *Day*, 12 Conn. App. 129, 134, 529 A.2d 1333 (1987).

Finally, the memorandum or record must accurately reflect **[**correctly**]** the witness' knowledge of the event as it existed at the time of the memorandum's or record's making or adoption. See *State* v. *Vennard*, 159 Conn. 385, 397, 270 A.2d 837 (1970), cert. denied, 400 U.S. 1011, 91 S. Ct. 576, 27 L. Ed. 2d 625 (1971), overruled on other grounds by *State* v. *Ferrell*, 191 Conn. 37, 43 n.6, 463 A.2d 573 (1983) ; *Capone* v. *Sloan*, 149 Conn. 538, 543, 182 A.2d 414 (1962); *Hawken* v. *Dailey*, 85 Conn. 16, 19, 81 A. 1053 (1911); *State* v. *Juan V.*, 109 Conn. App. 431, 441 n.9, 951 A.2d 651 ("[p]roving the record was accurate when made is an essential element of this exception"), cert. denied, 289 Conn. 931, 958 A.2d 161 (2008).

A memorandum or record admissible under the exception may be read into evidence and received as an exhibit. *Katsonas* v. *W.M. Sutherland Building & Contracting Co.*, supra, 104 Conn. 69; see *Neff* v. *Neff*, supra, 96 Conn. 278–79. Because a memorandum or record introduced under the exception is being offered to prove its contents, the original must be produced pursuant to Section 10-1, unless its production is excused. See Sections 10-3 through 10-6; cf. *Neff* v. *Neff*, supra, 278.

Multiple person involvement in recordation and observation of the event recorded is contemplated by the exception. For example, *A* reports to *B* an event *A* has just observed. *B* immediately writes down what *A* reported to him. *A* then examines the writing and adopts it as accurate close to the time of its making. *A* is now testifying and has

forgotten the event. *A* may independently establish the foundational requirements for the admission of the writing under Section 8-3 (6). Cf. **[**C. Tait & J. LaPlante, supra, § 11.21, p. 408, citing**]** *Curtis* v. *Bradley*, 65 Conn. 99, 31 A. 591 (1894).

The past recollection recorded exception to the hearsay rule is to be distinguished from the procedure for refreshing recollection, which is covered in Section 6-9.

(7) Public records and reports.

Section 8-3 (7) sets forth a hearsay exception for certain public records and reports. The exception is derived primarily from common law although public records and reports remain the subject of numerous statutes. See, e.g., General Statutes §§ 12-39bb, 19a-412.

Although Connecticut has neither precisely nor consistently defined the elements comprising the common-law public records exception to the hearsay rule; cf. *Hing Wan Wong* v. *Liquor Control Commission*, 160 Conn. 1, 9, 273 A.2d 709 (1970), cert. denied, 401 U.S. 938, 91 S. Ct. 931, 28 L. Ed. 2d 218 (1971); Section 8-3 (7) gleans from case law three distinct requirements for substantive admissibility. Proviso (A) is found in cases such as *Hing Wan Wong* v. *Liquor Control Commission*, supra, 9, *Russo* v. *Metropolitan Life Ins. Co.*, 125 Conn. 132, 139, 3 A.2d 844 (1939), and *Ezzo* v. *Geremiah*, 107 Conn. 670, 679–80, 142 A. 461 (1928). Proviso (B) comes from cases such as *Gett* v. *Isaacson*, 98 Conn. 539, 543–44, 120 A. 156 (1923), and *Enfield* v. *Ellington*, 67 Conn. 459, 462, 34 A. 818 (1896). Proviso (C) is derived from *Heritage Village Master Assn., Inc.* v. *Heritage Village Water Co.*, 30 Conn. App. 693, 701, 622 A.2d 578 (1993), and from

cases in which public records had been admitted under the business records exception. See, e.g., *State* v. *Palozie*, 165 Conn. 288, 294–95, 334 A.2d 458 (1973); *Mucci* v. *LeMonte*, 157 Conn. 566, 569, 254 A.2d 879 (1969).

The ''duty'' under which public officials act, as contemplated by proviso (A), often is one imposed by statute. See, e.g., *Lawrence* v. *Kozlowski*, 171 Conn. 705, 717–18, 372 A.2d 110 (1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2930, 53 L. Ed. 2d 1066 (1977); *Hing Wan Wong* v. *Liquor Control Commission*, supra, 160 Conn. 8–10. Nevertheless, Section 8-3 (7) does not preclude the recognition of other sources of duties.

Proviso (C) anticipates the likelihood that more than one individual may be involved in the making of the public record. By analogy to the personal knowledge requirement imposed in the business records context; e.g., *In re Barbara J.*, 215 Conn. 31, 40, 574 A.2d 203 (1990); proviso (C) demands that the public record be made upon the personal knowledge of either the public official who made the record or someone, such as a subordinate, whose duty it was to relay that information to the public official. See, e.g., *State* v. *Palozie*, supra, 165 Conn. 294–95 (public record introduced under business records exception).

(8) Statement in learned treatises.

Exception (8) explicitly permits the substantive use of statements contained in published treatises, periodicals or pamphlets on direct examination or cross-examination under the circumstances prescribed in the rule. In the case of a journal article, the requirement that the treatise is recognized as a ''standard authority in the field''; (internal

quotation marks omitted) *Filippelli* v. *Saint Mary's Hospital*, 319 Conn. 113, 136, 124 A.3d 501 (2015); generally requires proof that the specific article at issue is so recognized. See id., 137–38; *Musorofiti* v. *Vlcek*, 65 Conn. App. 365, 382–83, 783 A.2d 36, cert. denied, 258 Conn. 938, 786 A.2d 426 (2001). There may be situations, however, in which a journal is so highly regarded that a presumption of authoritativeness will arise with respect to an article selected for publication in that journal without any additional showing. See *Filippelli* v. *Saint Mary's Hospital*, supra, 138.

Although most of the earlier decisions concerned the use of medical treatises; e.g., *Cross* v. *Huttenlocher*, 185 Conn. 390, 395, 440 A.2d 952 (1981); *Perez* v. *Mount Sinai Hospital*, 7 Conn. App. 514, 520, 509 A.2d 552 (1986); Section 8-3 (8), by its terms, is not limited to that one subject matter or format. *Ames* v. *Sears, Roebuck & Co.*, 8 Conn. App. 642, 650–51, 514 A.2d 352 (1986) (published technical papers on design and operation of riding lawnmowers), cert. denied, 201 Conn. 809, 515 A.2d 378 (1986).

Connecticut allows the jury to receive the treatise, or portion thereof, as a full exhibit. *Cross* v. *Huttenlocher*, supra, 185 Conn. 395–96; see *State* v. *Gupta*, 297 Conn. 211, 239, 998 A.2d 1085 (2010). If admitted, the excerpts from the published work may be read into evidence or received as an exhibit, as the court permits. See **[**id.**]** *Cross* v. *Huttenlocher*, supra, 395–96; see also *Filippelli* v. *Saint Mary's Hospital*, supra, 319 Conn. 139–41 (trial court has discretion to require redaction so that only portion of article admitted as full exhibit).

(9) Statement in ancient documents.

The hearsay exception for statements in ancient documents is well established. *Jarboe* v. *Home Bank & Trust Co.*, 91 Conn. 265, 270–71, 99 A. 563 (1917); *New York, N.H. & H. R. Co.* v. *Cella*, 88 Conn. 515, 520, 91 A. 972 (1914); see *Clark* v. *Drska*, 1 Conn. App. 481, 489, 473 A.2d 325 (1984).

The exception, by its terms, applies to all kinds of documents, including documents produced by electronic means, and electronically stored information, and is not limited to documents affecting an interest in property. See *Petroman* v. *Anderson*, 105 Conn. 366, 369–70, 135 A. 391 (1926) (ancient map introduced under exception)**[**; C. Tait & J. LaPlante, supra, § 11.18, p. 405**]**.

''[M]ore than thirty years'' means any instant of time beyond the point in time at which the document has been in existence for thirty years.

(10) Published compilations.

Connecticut cases have recognized an exception to the hearsay rule—or at least have assumed an exception exists for these items. *Henry* v. *Kopf*, 104 Conn. 73, 80–81, 131 A. 412 (1925) (market reports); see *State* v. *Pambianchi*, 139 Conn. 543, 548, 95 A.2d 695 (1953) (compilation of used automobile prices); *Donoghue* v. *Smith*, 114 Conn. 64, 66, 157 A. 415 (1931) (mortality tables).

(11) Statement in family bible.

Connecticut has recognized, at least in dictum, an exception to the hearsay rule for factual statements concerning personal or family history contained in family bibles. See *Eva* v. *Gough*, 93 Conn. 38, 46, 104 A. 238 (1918).

(12) Personal identification.

A witness' in-court statement of his or her own name or age is admissible, even though knowledge of this information often is based on hearsay. *Blanchard* v. *Bridgeport*, 190 Conn. 798, 806, 463 A.2d 553 (1983) (name); *Toletti* v. *Bidizcki*, 118 Conn. 531, 534, 173 A. 223 (1934) (name), overruled on other grounds by *Petrillo* v. *Maiuri*, 138 Conn. 557, 563, 86 A.2d 869 (1952); *State* v. *Hyatt*, 9 Conn. App. 426, 429, 519 A.2d 612 (1987) (age); see *Creer* v. *Active Auto Exchange, Inc.*, 99 Conn. 266, 276, 121 A. 888 (1923) (age). **[**It is unclear whether case law supports the admissibility of a declarant's out-of-court statement concerning his or her own name or age when offered independently of existing hearsay exceptions, such as the exception for statements made by a party opponent.**]**

Please Note: The bracketed titles of the subsections in Section 8-4 are part of the original text of the Code. For this particular rule, the brackets do not indicate an intention to delete material.

Sec. 8-4. Admissibility of Business Entries and Photographic Copies: Availability of Declarant Immaterial

''(a) [Business records admissible.] 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.

‘‘**(b) [Witness need not be available.]** The writing or record shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) the party's failure to show that such persons are unavailable as witnesses. Either of such facts and all other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of the evidence, but not to affect its admissibility.

‘‘**(c) [Reproductions admissible.]** Except as provided in the Freedom of Information Act, as defined in [General Statutes §] 1-200, if any person in the regular course of business has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of them to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is otherwise required by statute. The reproduction, when satisfactorily identified, shall be as admissible in evidence as the original in any judicial or administrative proceeding, whether the original is in existence or not, and an enlargement or facsimile of the reproduction shall be likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The

introduction of a reproduced record, enlargement or facsimile shall not preclude admission of the original.

''**(d) [Definition.]** The term 'business' shall include business, profession, occupation and calling of every kind.'' General Statutes § 52-180.

COMMENTARY

Section 8-4 sets forth what is commonly known as the business records or business entries exception to the hearsay rule. Section 8-4 quotes General Statutes § 52-180, which embraces modified versions of the 1927 Model Act for Proof of Business Transactions and the Photographic Copies of Business and Public Records as Evidence Act.

Subsection (a) describes the foundational elements a court must find for a business record to qualify under the exception. E.g., *River Dock & Pile, Inc.* v. *O & G Industries, Inc.*, 219 Conn. 787, 793–94, 595 A.2d 839 (1991); *Emhart Industries, Inc.* v. *Amalgamated Local Union 376, U.A.W.*, 190 Conn. 371, 383–84, 461 A.2d 442 (1983). The Supreme Court has interpreted § 52-180 to embrace an additional foundational requirement not found in the express terms of the exception: that the source of the information recorded be the entrant's own observations or the observations of an informant who had a business duty to furnish the information to the entrant. E.g., *In re Barbara J.*, 215 Conn. 31, 40, 574 A.2d 203 (1990); *State* v. *Milner*, 206 Conn. 512, 521, 539 A.2d 80 (1988); *Mucci* v. *LeMonte*, 157 Conn. 566, 569, 254 A.2d 879 (1969). If this requirement is not met, ''it adds another level of hearsay [to the document] which necessitates a separate exception to the hearsay rule. . . .'' (Internal quotation marks omitted.)

State v. *George J.*, 280 Conn. 551, 593–94, 910 A.2d. 931 (2006), cert. denied, 549 U.S. 1326, 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007).

Business records increasingly are created, stored or produced by computer. Section 8-4 is applicable to electronically stored information, and, properly authenticated, such records are admissible if the elements of Section 8-4 (a) have been met. See *Federal Deposit Ins. Corp.* v. *Carabetta*, 55 Conn. App. 369, 376–77, 739 A.2d 301, cert. denied, 251 Conn. 927, 742 A.2d 362 (1999). In addition to satisfying the standard requirements of the business record exception to the hearsay rule, a proponent offering computerized business records will be required to establish that the computer system reliably and accurately produces records or data of the type that is being offered. See generally *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 116–18, 956 A.2d 1145 (2008) (computer printout and letter containing results of electricity meter testing); *American Oil Co.* v. *Valenti*, 179 Conn. 349, 360–61, 426 A.2d 305 (1979) (computer records of loan account); *Silicon Valley Bank* v. *Miracle Faith World Outreach, Inc.*, 140 Conn. App. 827, 836–37, 60 A.3d 343 (computer screenshots of loan transaction history), cert. denied, 308 Conn. 930, 64 A.3d 119 (2013); see also *State* v. *Polanco*, 69 Conn. App. 169, 186, 797 A.2d 523 (2002) (proponent of computer generated business records required to establish the accuracy and reliability of computer system). **[**Depending on the circumstances, t**]**The court may also require evidence establishing that the **[**system adequately protects the integrity of the records**]** circumstances surrounding the creation and maintenance of the records adequately ensures their trustworthiness and

reliability. See *Emigrant Mortgage Co.* v. *D'Agostino*, 94 Conn. App. 793, 809–812, 896 A.2d 814, cert. denied, 278 Conn. 919, 901 A.2d 43 (2006).

Computer printouts created in anticipation of litigation are admissible under the business records exception if the underlying computer-based data is produced in the regular course of business and satisfies the requirements of General Statutes § 52-180. See *Ninth RMA Partners, L.P.* v. *Krass*, 57 Conn. App. 1, 10–12, 746 A.2d 826, cert. denied, 253 Conn. 918, 755 A.2d 215 (2000).

(Amended May 20, 2015, to take effect August 1, 2015.)

Sec. 8-5. Hearsay Exceptions: Declarant Must Be Available

The following are not excluded by the hearsay rule, provided the declarant is available for cross-examination at trial:

(1) Prior inconsistent statement. A prior inconsistent statement of a witness, provided (A) the statement is in writing or otherwise recorded by audiotape, videotape or some other equally reliable medium, (B) the writing or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement.

(2) Identification of a person. The identification of a person made by a declarant prior to trial where the identification is reliable.

(Amended June 29, 2007, to take effect Jan. 1, 2008)

COMMENTARY

(1) Prior inconsistent statement.

Section 8-5 (1) incorporates the rule 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), and later developments and clarifications. *State* v. *Simpson*, 286 Conn. 634, 641–42, 945 A.2d 449 (2008)**[.]**; **[**E.**]**e.g., *State* v. *Hopkins*, 222 Conn. 117, 126, 609 A.2d 236 (1992) (prior inconsistent statement must be made under circumstances assuring reliability, which is to be determined on case-by-case basis); *State* v. *Holloway*, 209 Conn. 636, 649, 553 A.2d 166 (tape-recorded statement admissible under *Whelan*), cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989); *State* v. *Luis F.*, 85 Conn. App. 264, 271, 856 A.2d 522 (2004) (videotaped statement admissible); see also *State* v. *Woodson*, 227 Conn. 1, 21, 629 A.2d 386 (1993) (signature of witness unnecessary when tape-recorded statement offered under *Whelan*).

Use of the word ''witness'' in Section 8-5 (1) assumes that the declarant has testified at the proceeding in question, as required by the *Whelan* rule.

As to the requirements of authentication, see Section 9-1 of the Code.

(2) Identifications of a person.

Section 8-5 (2) incorporates the hearsay exception recognized in *State* v. *McClendon*, 199 Conn. 5, 11, 505 A.2d 685 (1986), and reaffirmed in subsequent cases. See *State* v. *Outlaw*, 216 Conn. 492, 497–98, 582 A.2d 751 (1990); *State* v. *Townsend*, 206 Conn. 621, 624, 539 A.2d 114 (1988); *State* v. *Weidenhof*, 205 Conn. 262, 274, 533 A.2d 545 (1987). Although this hearsay exception appears to have been the subject of criminal cases exclusively, Section 8-5 (2) is not so limited, and applies in civil cases as well.

Either the declarant or another witness present when the declarant makes the identification, such as a police officer, can testify at trial as to the identification. Compare *State* v. *McClendon*, supra, 199 Conn. 8 (declarants testified at trial about their prior out-of-court identifications) with *State* v. *Weidenhof*, supra, 205 Conn. 274 (police officer who showed declarant photographic array was called as witness at trial to testify concerning declarant's prior out-of-court identification). Even when it is another witness who testifies as to the declarant's identification, the declarant must be available for cross-examination at trial for the identification to be admissible. But cf. *State* v. *Outlaw*, supra, 216 Conn. 498 (dictum suggesting that declarant must be available for cross-examination either at trial or at prior proceeding in which out-of-court identification is offered).

Constitutional infirmities in the admission of first-time identifications, whether pretrial or in-court, **[**identifications**]** are the subject of separate inquiries and constitute independent grounds for exclusion. See, e.g., *State* v. *Dickson*, 322 Conn. 410, 423–31, 141 A.3d 810 (2016); see also id., 445–47 (requiring state to seek permission from trial court prior to presenting first time in-court identification and establishing that trial court may grant permission only if no factual dispute as to identity of perpetrator or ability of eyewitness to identify defendant). **[***State* v. *White*, 229 Conn. 125, 161, 640 A.2d 572 (1994); *State* v. *Lee*, 177 Conn. 335, 339, 417 A.2d 354 (1979).**]**

General Statutes § 54-1p prescribes numerous rules regarding eyewitness identification procedures used by law enforcement. The statute is silent on the remedy for noncompliance. See *State* v. *Grant*, 154

Conn. App. 293, 312 n.10, 112 A.3d 175 (2014) (procedures in § 54-1p are ''best practices'' and ''not constitutionally mandated''), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015); see also *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012); *State* v. *Ledbetter*, 275 Conn. 534, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

Sec. 8-6. Hearsay Exceptions: Declarant Must Be Unavailable

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.

(2) Dying declaration. In a prosecution in which the death of the declarant is the subject of the charge, a statement made by the declarant, while the declarant was conscious of his or her impending death, concerning the cause of or the circumstances surrounding the death.

(3) Statement against civil interest. A trust-worthy statement that, at the time of its making, was against the declarant's pecuniary or proprietary interest, or that so far tended to subject the declarant to civil liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In determining the trustworthiness of such a statement the court shall

consider whether safeguards reasonably equivalent to the oath taken by a witness and the test of cross-examination exist.

(4) Statement against penal interest. A trustworthy statement against penal interest that, at the time of its making, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest.

(5) Statement concerning ancient private boundaries. A statement, made before the controversy arose, as to the location of ancient private boundaries if the declarant had peculiar means of knowing the boundary and had no interest to misrepresent the truth in making the statement.

(6) Reputation of a past generation. Reputation of a past generation concerning facts of public or general interest or affecting public or private rights as to ancient rights of which the declarant is presumed or shown to have had competent knowledge and which matters are incapable of proof in the ordinary way by available witnesses.

(7) Statement of pedigree and family relationships. A statement concerning pedigree and family relationships, provided (A) the statement was made before the controversy arose, (B) the declarant had no interest to misrepresent in making the statement, and (C) the declarant,

because of a close relationship with the family to which the statement relates, had special knowledge of the subject matter of the statement.

(8) Forfeiture by wrongdoing. A statement offered against a party who has engaged in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(Amended June 29, 2007, to take effect Jan. 1, 2008)

COMMENTARY

The **[**common thread running through**]** fundamental threshold requirement of all Section 8-6 hearsay exceptions is **[**the requirement**]** that the declarant be unavailable as a witness. At common law, the definition of unavailability has varied with the **[**individual**]** particular hearsay exception at issue. For example, the Supreme Court has recognized death as the only form of unavailability for the dying declaration and ancient private boundary hearsay exceptions. See, e.g., *Rompe* v. *King*, 185 Conn. 426, 429, 441 A.2d 114 (1981) (boundaries); *State* v. *Manganella*, 113 Conn. 209, 215–16, 155 A. 74 (1931) (dying declarations). **[**But i**]**In *State* v. *Frye*, 182 Conn. 476, 481–82, 438 A.2d 735 (1980), the court adopted the federal rule's uniform definition of unavailability set forth in Fed. R. Evid. 804 (a), though only for the limited purpose of determining unavailability for the statement against penal interest exception**[**; id., 481–82; thereby recognizing other forms of unavailability such as testimonial privilege and lack of memory. See Fed. R. Evid. 804 (a); s**]**.See also *State* v. *Schiappa*, 248 Conn. 132, 14**[**2**]**1–45, 728 A.2d 466 (1999). **[**The court has yet to determine whether the definition of unavailability recognized in *Frye* applies to other hearsay exceptions requiring the unavailability of the declarant.**]**

The Rule 804 (a) definition has also been applied to determine unavailability for purposes of the former testimony exception covered by Section 8-6 (1). See *State* v. *Lapointe*, 237 Conn. 694, 736–38, 678 A.2d 942, cert. denied, 519 U.S. 994, 117 S. Ct. 484, 136 L. Ed. 2d 378 (1996); *State* v. *Wright*, 107 Conn. App. 85, 89–90, 943 A.2d 1159, cert. denied, 287 Conn. 914, 950 A.2d 1291 (2008).

[In keeping with the common law,**]** At this point, however, Section 8-6 **[**eschews a**]** contains no uniform definition of unavailability. **[**Reference should be made to common-law cases addressing the particular hearsay exception.**]**

The proponent of evidence offered under Section 8-6 carries the burden of proving the declarant's unavailability. E.g., *State* v. *Aillon*, 202 Conn. 385, 390 (1987); *State* v. *Rivera*, 220 Conn. 408, 411, 599 A.2d 1060 (1991). To satisfy this burden, the proponent must show that a good faith, genuine effort was made to procure the declarant's attendance by process or other reasonable means. ''[S]ubstantial diligence'' is required; *State* v. *Lopez*, 239 Conn. 56, 75, 681 A.2d 950 (1996); but the proponent is not required to do ''everything conceivable'' to secure the witness' presence. (Internal quotation marks omitted.) *State* v. *Wright*, supra, 107 Conn. App. 89–90.

With respect to deposition testimony, Practice Book § 13-31 (a) (4) expands the scope of Section 8-6 by permitting the admissibility of depositions in certain circumstances where the deponent is deemed unavailable for purposes of that rule. Among other things, the rule covers situations where a deponent is dead, at a greater distance than thirty miles from the trial or hearing, out of state until the trial or

hearing terminates, or unable to attend due to age, illness, infirmity, or imprisonment; where the party offering the deposition is unable to procure the attendance of the deponent by subpoena; or under exceptional circumstances in the interest of justice. See *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 238 n.11, 654 A.2d 342 (1995) (observing that Practice Book § 248 [d], now § 13-31 [a], ''broadens the rules of evidence by permitting otherwise inadmissible evidence to be admitted''). See Section 8-2 (a) and the commentary thereto regarding situations where the Code contains provisions that may have conflicted with the Practice Book.

Numerous statutes also provide for the admissibility of former deposition or trial testimony under specified circumstances. See General Statutes §§ 52-149a, 52-152 (a), 52-159, and 52-160.

(1) Former testimony.

Connecticut cases recognize the admissibility of a witness' former testimony as an exception to the hearsay rule when the witness subsequently becomes unavailable. E.g., *State* v. *Parker*, 161 Conn. 500, 504, 289 A.2d 894 (1971); *Atwood* v. *Atwood*, 86 Conn. 579, 584, 86 A. 29 (1913); *State* v. *Malone*, 40 Conn. App. 470, 475–78, 671 A.2d 1321, cert. denied, 237 Conn. 904, 674 A.2d 1332 (1996).

In addition to showing unavailability; e.g., *Crochiere* v. *Board of Education*, 227 Conn. 333, 356, 630 A.2d 1027 (1993); *State* v. *Aillon*, supra, 202 Conn. 391**[**, 521 A.2d 555 (1991)**]**; the proponent must establish two foundational elements. First, the proponent must show that the issues in the proceeding in which the witness testified and the proceeding in which the witness' former testimony is offered are

the same or substantially similar. E.g., *State* v. *Parker*, supra, 161 Conn. 504; *In re Durant*, 80 Conn. 140, 152, 67 A. 497 (1907); *Perez* v. *D & L Tractor Trailer School*, 117 Conn. App. 680, 690, 981 A.2d 497 (2009), cert. denied, 294 Conn. 923, 985 A.2d 1062 (2010). The similarity of issues is required primarily as a means of ensuring that the party against whom the former testimony is offered had a motive and interest to adequately examine the witness in the former proceeding. See *Atwood* v. *Atwood*, supra, 86 Conn. 584.

Second, the proponent must show that the party against whom the former testimony is offered had an opportunity to develop the testimony in the former proceeding. E.g., *State* v. *Parker*, supra, 161 Conn. 504; *Lane* v. *Brainerd*, 30 Conn. 565, 579 (1862). This second foundational requirement simply requires the opportunity to develop the witness' testimony; the use made of that opportunity is irrelevant to a determination of admissibility. See *State* v. *Parker*, supra, 504; *State* v. *Crump*, 43 Conn. App. 252, 264, 683 A.2d 402, cert. denied, 239 Conn. 941, 684 A.2d 712 (1996).

The common law generally stated this second foundational element in terms of an opportunity for cross-examination; e.g., *State* v. *Weinrib*, 140 Conn. 247, 252, 99 A.2d 145 (1953); probably because the cases involved the introduction of former testimony against the party against whom it previously was offered. Section 8-6 (1), however, supposes development of a witness' testimony through direct or redirect examination, in addition to cross-examination; cf. *Lane* v. *Brainerd*, supra, 30 Conn. 579; thus recognizing the possibility of former testimony being offered against its original proponent. The rules allowing a party

to impeach its own witness; Section 6-4; and authorizing leading questions during direct or redirect examination of hostile or forgetful witnesses, for example; Section 6-8 (b); provide added justification for this approach.

Section 8-6 (1), **[**in harmony**]** consistent with the modern trend, abandons the traditional requirement of mutuality, i.e., that the identity of the parties in the former and current proceedings be the same; see *Atwood* v. *Atwood*, supra, 86 Conn. 584; *Lane* v. *Brainerd*, supra, 30 Conn. 579; in favor of requiring merely that the party against whom the former testimony is offered have had an opportunity to develop the witness' testimony in the former proceeding. See **[**5 J. Wigmore, Evidence (4th Ed. 1974) § 1388, p. 111; cf.**]** *In re Durant*, supra, 80 Conn. 152.

(2) Dying declaration.

Section 8-6 (2) recognizes Connecticut's common-law dying declaration hearsay exception. E.g., *State* v. *Onofrio*, 179 Conn. 23, 43–44, 425 A.2d 560 (1979); *State* v. *Manganella*, 113 Conn. 209, 215–16, 155 A. 74 (1931); *State* v. *Smith*, 49 Conn. 376, 379 (1881). The exception is limited to criminal prosecutions for homicide. See, e.g., *State* v. *Yochelman*, 107 Conn. 148, 154–55, 139 A. 632 (1927); *Daily* v. *New York & New Haven R. Co.*, 32 Conn. 356, 358 (1865). Furthermore, by demanding that ''the death of the declarant [be] the subject of the charge,'' Section 8-6 (2) retains the requirement that the declarant be the victim of the homicide that serves as the basis for the prosecution in which the statement is offered. See, e.g., *State*

v. *Yochelman*, supra, 155; *Daily* v. *New York & New Haven R. Co.*, supra, 358**[**;see also C. Tait & J. LaPlante, supra, § 11.7.2, p. 353**]**.

Section 8-6 (2), in accordance with common law, limits the exception to statements concerning the cause of or circumstances surrounding what the declarant considered to be his or her impending death. *State* v. *Onofrio*, supra, 179 Conn. 43–44; see *State* v. *Smith*, supra, 49 Conn. 379. A declarant is ''conscious of his or her impending death'' within the meaning of the rule when the declarant believes that his or her death is imminent and abandons all hope of recovery. See *State* v. *Onofrio*, supra, 44; *State* v. *Cronin*, 64 Conn. 293, 304, 29 A. 536 (1894). This belief may be established by reference to the declarant's own statements or circumstantial evidence such as the administration of last rites, a physician's prognosis made known to the declarant or the severity of the declarant's wounds. *State* v. *Onofrio*, supra, 44–45; *State* v. *Swift*, 57 Conn. 496, 505–506, 18 A. 664 (1888); *In re Jose M.*, 30 Conn. App. 381, 393, 620 A.2d 804, cert. denied, 225 Conn. 921, 625 A.2d 821 (1993). Dying declarations in the form of an opinion are subject to the limitations on lay opinion testimony set forth in Section 7-1. See *State* v. *Manganella*, supra, 113 Conn. 216.

(3) Statement against civil interest.

Section 8-6 (3) restates the rule from *Ferguson* v. *Smazer*, 151 Conn. 226, 232–34, 196 A.2d 432 (1963).

(4) Statement against penal interest.

In *State* v. *DeFreitas*, 179 Conn. 431, 449–52, 426 A.2d 799 (1980), the Supreme Court recognized a hearsay exception for statements against penal interest, abandoning the traditional rule rendering such

statements inadmissible. See, e.g., *State* v. *Stallings*, 154 Conn. 272, 287, 224 A.2d 718 (1966). Section 8-6 (4) embodies the hearsay exception recognized in *DeFreitas* and affirmed in its progeny. E.g., *State* v. *Lopez*, 239 Conn. 56, 70–71, 681 A.2d 950 (1996); *State* v. *Mayette*, 204 Conn. 571, 576–77, 529 A.2d 673 (1987). The exception applies in both criminal and civil cases. See *Reilly* v. *DiBianco*, 6 Conn. App. 556, 563–64, 507 A.2d 106, cert. denied, 200 Conn. 804, 510 A.2d 193 (1986).

Recognizing the possible unreliability of this type of evidence, admissibility is conditioned on the statement's trustworthiness. E.g., *State* v. *Hernandez*, 204 Conn. 377, 390, 528 A.2d 794 (1987). Section 8-6 (4) sets forth three factors a court shall consider in determining a statement's trustworthiness, factors well entrenched in the common-law analysis. E.g., *State* v. *Rivera*, 221 Conn. 58, 69, 602 A.2d 571 (1992). Although the cases often cite a fourth factor, namely, the availability of the declarant as a witness; e.g., *State* v. *Lopez*, supra, 239 Conn. 71; *State* v. *Rosado*, 218 Conn. 239, 244, 588 A.2d 1066 (1991); this factor has been eliminated because the unavailability of the declarant is always required, and, thus, the factor does nothing to change the equation from case to case. Cf. *State* v. *Gold*, 180 Conn. 619, 637, 431 A.2d 501 (''application of the fourth factor, availability of the declarant as a witness, does not bolster the reliability of the [statement] inasmuch as [the declarant] was unavailable at the time of trial''), cert. denied, 449 U.S. 920, 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980).

Section 8-6 (4) preserves the common-law definition of ''against penal interest'' in providing that the statement be one that ''so far tend[s] to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.'' Thus, statements other than outright confessions of guilt may qualify under the exception as well. *State* v. *Bryant*, 202 Conn. 676, 695, 523 A.2d 451 (1987); *State* v. *Savage*, 34 Conn. App. 166, 172, 640 A.2d 637, cert. denied, 229 Conn. 922, 642 A.2d 1216 (1994). A statement is not made against the declarant's penal interest if made at a time when the declarant had already been convicted and sentenced for the conduct that is the subject of the statement. *State* v. *Collins*, 147 Conn. App. 584, 590–91, 82 A.3d 1208, cert. denied, 311 Conn. 929, 86 A.3d 1057 (2014).

The usual scenario involves the defendant's use of a statement that implicates the declarant**[,]** but exculpates the defendant. Connecticut case law, however, makes no distinction between statements that inculpate the declarant but exculpate the defendant, and statements that inculpate both the declarant and the defendant. Connecticut law supports the admissibility of this so-called ''dual-inculpatory'' statement, provided that corroborating circumstances clearly indicate its trustworthiness. *State* v. *Camacho*, 282 Conn. 328, 359–62, 924 A.2d 99 (2007); *State* v. *Schiappa*, supra, 248 Conn. 154–55.

When a narrative contains both disserving statements and collateral, self-serving or neutral statements, the Connecticut rule admits the entire narrative, letting the ''trier of fact assess its evidentiary quality

in the complete context.'' *State* v. *Bryant*, supra, 202 Conn. 697; accord *State* v. *Savage*, supra, 34 Conn. App. 173–74.

Connecticut has adopted the Federal Rule's definition of unavailability, as set forth in Fed. R. Evid. 804 (a), for determining a declarant's unavailability under this exception. *State* v. *Frye*, 182 Conn. 476, 481–82 & n.3, 438 A.2d 735 (1980); accord *State* v. *Schiappa*, supra, 248 Conn. 141–42.

(5) Statement concerning ancient private boundaries.

Section 8-6 (5) reflects the common law concerning private boundaries. See *Porter* v. *Warner*, 2 Root (Conn.) 22, 23 (1793). Section 8-6 (5) captures the exception in its current form. *Wildwood Associates, Ltd.* v. *Esposito*, 211 Conn. 36, 44, 557 A.2d 1241 (1989); *DiMaggio* v. *Cannon*, 165 Conn. 19, 22–23, 327 A.2d 561 (1973); *Koennicke* v. *Maiorano*, 43 Conn. App. 1, 13, 682 A.2d 1046 (1996).

''Unavailability,'' for purposes of this hearsay exception, is limited to the declarant's death. See *Wildwood Associates, Ltd.* v. *Esposito*, supra, 211 Conn. 44; *Rompe* v. *King*, 185 Conn. 426, 429, 441 A.2d 114 (1981)**[***;* C. Tait & J. LaPlante, supra, § 11.10.2, p. 371**]**.

The requirement that the declarant have ''peculiar means of knowing the boundary'' is part of the broader common-law requirement that the declarant qualify as a witness as if he were testifying at trial. E.g., *Wildwood Associates, Ltd.* v. *Esposito*, supra, 211 Conn. 44; *Putnam, Coffin & Burr, Inc.* v. *Halpern*, 154 Conn. 507, 514, 227 A.2d 83 (1967). It is intended that this general requirement remain in effect, even though not expressed in the text of the exception. Thus, statements otherwise qualifying for admission under the text of Section 8-6 (5),

nevertheless, may be excluded if the court finds that the declarant would not qualify as a witness had he testified in court.

Although the cases generally speak of ''ancient'' private boundaries; e.g., *Wildwood Associates, Ltd.* v. *Esposito*, supra, 211 Conn. 44; *Putnam, Coffin & Burr, Inc.* v. *Halpern*, supra, 154 Conn. 514; but see, e.g., *DiMaggio* v. *Cannon*, supra, 165 Conn. 22–23; no case actually defines ''ancient'' or decides what limitation that term places, if any, on the admission of evidence under this exception.

(6) Reputation of a past generation.

Section 8-6 (6) recognizes the common-law hearsay exception for reputation, or what commonly was referred to as ''traditionary'' evidence, to prove public and private boundaries or facts of public or general interest. E.g., *Hartford* v. *Maslen*, 76 Conn. 599, 615, 57 A. 740 (1904); Wooster v. Butler, 13 Conn. 309, 316 (1839). **[**See generally C. Tait & J. LaPlante, supra, § 11.17.**]**

Section 8-6 (6) retains both the common-law requirement that the reputation be that of a past generation; *Kempf* v. *Wooster*, 99 Conn. 418, 422, 121 A. 881 (1923); *Dawson* v. *Orange*, 78 Conn. 96, 108, 61 A. 101 (1905); and the common-law requirement of antiquity. See *Hartford* v. *Maslen*, supra, 76 Conn. 616.

Because the hearsay exception for reputation or traditionary evidence was disfavored at common law; id., 615; Section 8-6 (6) is not intended to expand the limited application of this common-law exception.

(7) Statement of pedigree and family relationships.

Out-of-court declarations describing pedigree and family relationships have long been excepted from the hearsay rule. *Ferguson* v.

Smazer, 151 Conn. 226, 230–31, 196 A.2d 432 (1963); *Shea* v. *Hyde*, 107 Conn. 287, 289, 140 A. 486 (1928); *Chapman* v. *Chapman*, 2 Conn. 347, 349 (1817). Statements admissible under the exception include not only those concerning genealogy, but those revealing facts about birth, death, marriage and the like. See *Chapman* v. *Chapman*, supra, 349.

Dicta in cases suggest that forms of unavailability besides death may qualify a declarant's statement for admission under this exception. See *Carter* v. *Girasuolo*, 34 Conn. Supp. 507, 511, 373 A.2d 560 (1976); cf. *Ferguson* v. *Smazer*, supra, 151 Conn. 230 n.2.

The declarant's relationship to the family or person to whom the hearsay statement refers must be established independently of the statement. *Ferguson* v. *Smazer*, supra, 151 Conn. 231.

(8) Forfeiture by wrongdoing.

This provision has roots extending far back in English and American common law. See, e.g., *Lord Morley's Case*, 6 Howell State Trials 769, 770–71 (H.L. 1666); *Reynolds* v. *United States*, 98 U.S. 145, 158–59, 25 L. Ed. 244 (1878). ''The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong. . . .'' *Reynolds* v. *United States*, supra, 159; see also *State* v. *Henry*, 76 Conn. App. 515, 534–39, 820 A.2d 1076, cert. denied, 264 Conn. 908, 826 A.2d 178 (2003). Section 8-6 (8) represents a departure from Rule 804 (b) (6) of the Federal Rules of Evidence, which provides a hearsay exception for statements by unavailable witnesses where the party against whom the statement is offered ''engaged or acquiesced in wrongdoing that was intended to, and did,

procure the unavailability of the declarant as a witness.'' Section 8-6 (8) requires more than mere acquiescence.

The preponderance of evidence standard should be employed in determining whether a defendant has procured the unavailability of a witness for purposes of this exception. See *State* v. *Thompson*, 305 Conn. 412, 425, 45 A.3d 605 (2012), cert. denied, U.S. , 133 S. Ct. 988, 184 L. Ed. 2d 767 (2013). A defendant who wrongfully procures the unavailability of a witness forfeits any confrontation clause claims with respect to statements made by that witness. See id., 422–23.

Sec. 8-7. Hearsay within Hearsay

Hearsay within hearsay is admissible only if each part of the combined statements is independently admissible under a hearsay exception.

COMMENTARY

Section 8-7 applies to situations in which a hearsay statement contains within it another level of hearsay, forming what is frequently referred to as ''[h]earsay within hearsay. . . .'' (Internal quotation marks omitted.) *Dinan* v. *Marchand*, 279 Conn. 558, 571, 903 A.2d 201 (2006). The rule finds support in the case law. See *State* v. *Williams*, 231 Conn. 235, 249, 645 A.2d 999 (1994); *State* v. *Buster*, 224 Conn. 546, 560 n.8, 620 A.2d 110 (1993).

Section 8-7 in no way abrogates the court's discretion to exclude hearsay within hearsay otherwise admissible when its probative value is outweighed by its prejudicial effect arising from the unreliability sometimes found in multiple levels of hearsay. See Section 4-3; cf.

State v. *Green*, 16 Conn. App. 390, 399–400, 547 A.2d 916, cert. denied, 210 Conn. 802, 553 A.2d 616 (1988). As the levels of hearsay increase, so should the potential for exclusion under Section 4-3.

A familiar example of hearsay within hearsay is the writing, which qualifies under the business records exception; see Section 8-4; and which contains information derived from individuals under no business duty to provide information. See, e.g., *O'Shea* v. *Mignone*, 35 Conn. App. 828, 831–32, 647 A.2d 37 (1994) (police officer's report containing hearsay statement of bystander). The informant's statements independently must fall within another hearsay exception for the writing to be admissible. See *State* v. *Sharpe*, 195 Conn. 651, 663–64, 491 A.2d 345 (1985); *State* v. *Palozie*, 165 Conn. 288, 294–95, 334 A.2d 468 (1973); see also *State* v. *Torelli*, 103 Conn. App. 646, 659–62, 931 A.2d 337 (2007) (statement to 911 operator by motorist observing defendant admissible as spontaneous utterance contained in business record).

Sec. 8-8. Impeaching and Supporting Credibility of Declarant

When hearsay has been admitted in evidence, the credibility of the declarant may be impeached, and if impeached may be supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement of the declarant made at any time, inconsistent with the declarant's hearsay statement, need not be shown to or the contents of the statement disclosed to the declarant.

COMMENTARY

The weight a fact finder gives a witness' in-court testimony often depends on the witness' credibility. So too can a declarant's credibility

affect the weight accorded that declarant's hearsay statement admitted at trial. Consequently, Section 8-8 permits the credibility of a declarant, whose hearsay statement has been admitted in evidence, to be attacked or supported as if the declarant had taken the stand and testified. **[**No Connecticut case law directly supports this rule.**]** See *State* v. *Calabrese*, 279 Conn. 393, 409–10, 902 A.2d 1044 (2006) (evidence tending to show bias, prejudice or interest); *State* v. *Mills*, 80 Conn. App. 662, 667–68, 837 A.2d 808 (2003) (evidence of prior criminal convictions), cert. denied, 268 Conn. 914, 847 A.2d 311 (2004); **[**But see**]** cf. *State* v. *Torres*, 210 Conn. 631, 640, 556 A.2d 1013 (1989) **[**(impeachment of hearsay declarant's probable cause hearing testimony, which was admitted at trial, achieved through introduction of declarant's inconsistent statements)*;* cf.**]**; *State* v. *Onofrio*, 179 Conn. 23, 35, 425 A.2d 560 (1979); *State* v. *Segar*, 96 Conn. 428, 440–43, 114 A. 389 (1921). **[**Nevertheless, given the breadth of hearsay exceptions available to litigants; see Sections 8-3 through 8-6; and the corresponding amount of hearsay evidence ultimately admitted at trial, Section 8-8 is seen as a logical and fair extension of the evidentiary rules governing the impeachment and rehabilitation of in-court witnesses.**]**

Treating the hearsay declarant the same as an in-court witness would seem to pose a problem when impeachment by inconsistent statements is employed. Section 6-10 (b) provides that when examining a witness about a prior inconsistent statement, ''the statement should be shown . . . or [its] contents . . . disclosed to the witness at that time.'' **[**The hearsay declarant often will not be a witness, or

at least, on the stand when the hearsay statement is offered and thus s**]**Showing or disclosing the contents of the inconsistent statement to the declarant will usually be **[**infeasible, if not**]** impossible or impracticable because the declarant may not be a witness at trial (or may not be on the witness stand at the time the hearsay statement is offered). **[**Thus, t**]**The second sentence in Section 8-8 relieves the examiner from complying with **[**the common-law rule; see**]** Section 6-10 (b).**[**; that gives the court discretion to exclude the inconsistent statement when the examiner fails to lay a foundation by failing to first show the statement or disclose its contents to the witness. E.g., *State* v. *Butler*, 207 Conn. 619, 626, 543 A.2d 270 (1988). The effect is to remove that discretion in the Section 8-8 context.**]**

By using the terminology ''[e]vidence of a statement . . . *made at any time*''; (emphasis added); Section 8-8 recognizes the possibility that impeachment of a hearsay declarant may involve the use of a subsequent inconsistent statement**[**s—when the**]** (i.e., an inconsistent statement **[**is**]** made after the hearsay declaration statement to be impeached)**[**—rather than the more common use of prior inconsistent statements**]**. See generally *State* v. *Torres*, supra, 210 Conn. 635–40 (statements made subsequent to and inconsistent with probable cause hearing testimony, which was admitted at trial, were used to impeach hearsay declarant).

Sec. 8-9. Residual Exception

A statement that is not admissible under any of the foregoing exceptions is admissible if the court determines that (1) there is a reasonable necessity for the admission of the statement, and (2) the statement

is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule.

COMMENTARY

Section 8-9 recognizes that the Code's enumerated hearsay exceptions will not cover every situation in which an extrajudicial statement may be deemed reliable and essential enough to justify its admission. In the spirit of the Code's purpose, as stated in Section 1-2 (a), of promoting ''the growth and development of the law of evidence,'' Section 8-9 provides the court with discretion to admit, under limited circumstances; see *State* v. *Dollinger*, 20 Conn. App. 530, 540, 568 A.2d 1058, cert. denied, 215 Conn. 805, 574 A.2d 220 (1990); a hearsay statement not admissible under other exceptions enumerated in the Code. Section 8-9 sets forth what is commonly known as the residual or catch-all exception to the hearsay rule. E.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 390–95, 119 A.3d 462 (2015). The exception traces its roots to cases such as *State* v. *Sharpe*, 195 Conn. 651, 664, 491 A.2d 345 (1985), and of more recent vintage, *State* v. *Oquendo*, 223 Conn. 635, 664, 613 A.2d 1300 (1992). See also *Goodno* v. *Hotchkiss*, 88 Conn. 655, 669, 92 A. 419 (1914) (necessity and trustworthiness are hallmarks underlying exceptions to hearsay rule).

''Reasonable necessity'' is established by showing that ''unless the hearsay statement is admitted, the facts it contains may be lost, either because the declarant is dead or otherwise unavailable, or because the assertion is of such a nature that evidence of the same value

cannot be obtained from the same or other sources.'' *State* v. *Sharpe*, supra, 195 Conn. 665; accord *State* v. *Alvarez*, 216 Conn. 301, 307 n.3, 579 A.2d 515 (1990); *In re Jason S.*, 9 Conn. App. 98, 106, 516 A.2d 1352 (1986). A minor child may be deemed unavailable under this exception upon competent proof that the child will suffer psychological harm from testifying. See *In re Tayler F.*, 296 Conn. 524, 544, 995 A.2d 611 (2010).

In determining whether the statement is supported by guarantees of trustworthiness and reliability, Connecticut courts have considered factors such as the length of time between the event to which the statement relates and the making of the statement; e.g., *State* v. *Outlaw*, 216 Conn. 492, 499, 582 A.2d 751 (1990); the declarant's motive to tell the truth or falsify; e.g., *State* v. *Oquendo*, supra, 223 Conn. 667; and the declarant's availability for cross-examination at trial. E.g., id., 668; *O'Shea* v. *Mignone*, 35 Conn. App. 828, 838, 647 A.2d 37, cert. denied, 231 Conn. 938, 651 A.2d 263 (1994).

Section 8-9 takes no position on whether a statement that comes close but fails to satisfy a hearsay exception enumerated in the Code nevertheless can be admitted under the residual exception. Connecticut courts so far have **[**not addressed definitively**]** not taken a uniform approach to the ''near miss'' problem**[**, although some cases would seem to sanction the practice of applying the residual exception to near misses**]**. **[**See**]** Compare *State* v. *Dollinger*, supra, 20 Conn. App. 537–42 (admissibility of statement rejected under spontaneous utterance exception; see Section 8-3 [2]; but upheld under residual exception) with *Eubanks* v. *Commissioner of Correction*, 166 Conn.

App. 1, 15 and 15 n.12, 140 A.3d 402 (2016) (suggesting that residual exception would be unavailable to hearsay statement deemed inadmissible under *Whelan* exception; see Section 8-5 [1]); cf., e.g., *State* v. *Outlaw*, supra, 216 Conn. 497–500 (admissibility of statement rejected under hearsay exception for extrajudicial identifications; see Section 8-5 [2]; then analyzed and rejected under residual exception).

Sec. 8-10. Hearsay Exception: Tender Years

''**[**Admissibility in criminal and juvenile proceedings of statement by child under thirteen relating to sexual offense or offense involving physical abuse against child.**]** (a) Notwithstanding any other rule of evidence or provision of law, a statement by a child under thirteen years of age relating to a sexual offense committed against that child**,** or an offense involving physical abuse committed against that child by a person or persons who had authority or apparent authority over the child, shall be admissible in a criminal or juvenile proceeding if: (1) The court finds, in a hearing conducted outside the presence of the jury, if any, that the circumstances of the statement, including its timing and content, provide particularized guarantees of its trustworthiness, (2) the statement was not made in preparation for a legal proceeding, (3) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement including the content of the statement, the approximate time, date and location of the statement, the person to whom the statement was made and the circumstances surrounding the statement that indicate its trustworthiness, at such time as to provide the adverse party with a fair opportunity to prepare to meet it, and (4) either (A)

the child testifies and is subject to cross-examination at the proceeding, or (B) the child is unavailable as a witness and (i) there is independent nontestimonial corroborative evidence of the alleged act, and (ii) the statement was made prior to the defendant's arrest or institution of juvenile proceedings in connection with the act described in the statement.

''(b) Nothing in this section shall be construed to (1) prevent the admission of any statement under another hearsay exception, (2) allow broader definitions in other hearsay exceptions for statements made by children under thirteen years of age at the time of the statement concerning any alleged act described in subsection (a) of this section than is done for other declarants, or (3) allow the admission pursuant to the residual hearsay exception of a statement described in subsection (a) of this section.'' General Statutes § 54-86*l*.

(Adopted June 30, 2008, to take effect Jan. 1, 2009; amended June 21, 2010, to take effect Jan. 1, 2011.)

COMMENTARY

This section, which parallels General Statutes § 54-86*l*, addresses the unique and limited area of statements made by children concerning alleged acts of sexual assault or other sexual misconduct against the child, or other alleged acts of physical abuse against the child by a parent, guardian or other person with like authority over the child at the time of the alleged act. Subsection (a) sets forth the factors that must be applied in considering the admissibility of such a statement. See *State* v. *Maguire*, 310 Conn. 535, 565, 78 A.3d 828 (2013); *State*

v. *Griswold*, 160 Conn. App. 528, 537–50, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015).

[The section was amended to harmonize it with the general statutes. As amended, and to be consistent with the 2009 amendment to General Statutes § 54-86*l*, it no longer explicitly provides that the cross-examination of the child may be by video telecommunication or by submitting to a recorded video deposition for that purpose; it does not require the proponent to provide the adverse party a copy of the statement in writing or in whatever other medium the original statement is in and is intended to be proffered in; and, it does not provide a good cause exception to the obligation to provide the adverse party with advance notice sufficient to permit the adverse party to prepare to meet the statement. These changes do not limit the discretion of the court to impose such requirements.**]**

ARTICLE IX—AUTHENTICATION

Sec. 9-1. Requirement of Authentication

(a) Requirement of authentication. The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be.

(b) Self-authentication. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required if the offered evidence is self-authenticating in accordance with applicable law.

COMMENTARY

(a) Requirement of authentication.

Before an item of evidence may be admitted, there must be a preliminary showing of its genuineness, i.e., that the proffered item of evi-

dence is what its proponent claims it to be. The requirement of authentication applies to all types of evidence, including writings, sound recordings, electronically stored information, real evidence such as a weapon used in the commission of a crime, demonstrative evidence such as a photograph depicting an accident scene, and the like. E.g., *State* v. *Bruno*, 236 Conn. 514, 551, 673 A.2d 1117 (1996) (real evidence); *Shulman* v. *Shulman*, 150 Conn. 651, 657, 193 A.2d 525 (1963) (documentary evidence); *State* v. *Lorain*, 141 Conn. 694, 700–701, 109 A.2d 504 (1954) (sound recordings); *Hurlburt* v. *Bussemey*, 101 Conn. 406, 414, 126 A. 273 (1924) (demonstrative evidence). The category of evidence known as electronically stored information can take various forms. It includes, by way of example only, e-mails, Internet website postings, text messages and ''chat room'' content, computer-stored records, **[**and**]** data, metadata and computer generated or enhanced animations and simulations. As with any other form of evidence, a party may use any appropriate method, or combination of methods, described in this Commentary, or any other proof to demonstrate that the proffer is what the proponent claims it to be, to authenticate any particular item of electronically stored information. *Lorraine* v. *Markel American Ins. Co.*, 241 F.R.D. 534, 545–46 (D. Md. 2007).

The proponent need only advance ''evidence sufficient to support a finding'' that the proffered evidence is what it is claimed to be. Once this prima facie showing is made, the evidence may be admitted and the ultimate determination of authenticity rests with the fact finder. See, e.g., *State* v. *Bruno*, supra, 236 Conn. 551–53; *Neil* v. *Miller*, 2

Root (Conn.) 117, 118 (1794); see also *Shulman* v. *Shulman*, supra, 150 Conn. 657. Consequently, compliance with Section 9-1 (a) does not automatically guarantee that the fact finder will accept the proffered evidence as genuine. The opposing party may still offer evidence to discredit the proponent's prima facie showing. *Shulman* v. *Shulman*, supra, 659–60.

Evidence may be authenticated in a variety of ways. They include, but are not limited to, the following:

(1) A witness with personal knowledge may testify that the offered evidence is what its proponent claims it to be. See, e.g., *State* v. *Conroy*, 194 Conn. 623, 625–26, 484 A.2d 448 (1984) (establishing chain of custody); *Pepe* v. *Aceto*, 119 Conn. 282, 287–88, 175 A. 775 (1934) (authenticating documents); *Booker* v. *Stern*, 19 Conn. App. 322, 333, 563 A.2d 305 (1989) (authenticating photographs); *Lorraine* v. *Markel American Ins. Co.*, supra, 241 F.R.D. 544–45 (electronically stored information);

(2) A person with sufficient familiarity with the handwriting of another person may give an opinion concerning the genuineness of that other person's purported writing or signature. E.g., *Lyon* v. *Lyman*, 9 Conn. 55, 59 (1831);

(3) **[**The trier of fact or an expert witness can authenticate a**]** A contested item of evidence may be authenticated by comparing it with a preauthenticated specimen**[**s**]**. See, e.g., *State* v. *Ralls*, 167 Conn. 408, 417, 356 A.2d 147 (1974) (fingerprints, experts), overruled on other grounds by *State* v. *Rutan*, 194 Conn. 438, 441, 479 A.2d 1209 (1984); *Tyler* v. *Todd*, 36 Conn. 218, 222 (1869) (handwriting, experts

or triers of fact); *Lorraine* v. *Markel American Ins. Co.*, supra, 241 F.R.D. 546 (electronically stored information);

(4) The distinctive characteristics of an object, writing or other communication, when considered in conjunction with the surrounding circumstances, may provide sufficient circumstantial evidence of authenticity. See *International Brotherhood of Electrical Workers Local 35* v. *Commission on Civil Rights*, 140 Conn. 537, 547, 102 A.2d 366 (1953) (telephone conversations); 2 C. McCormick, Evidence **[**(5th Ed. 1999) § 225, p. 50**]** (7th Ed. 2013) § 224, pp. 94–96 (''reply letter'' doctrine, under which letter *B* is authenticated merely by reference to its content and circumstances suggesting it was in reply to earlier letter *A* and sent by addressee of letter *A*); C. Tait & E. Prescott, Tait's Handbook of Connecticut Evidence (5th Ed. 2014) § 9.7, pp. 694–95 (same); *Lorraine* v. *Markel American Ins. Co.*, supra, 241 F.R.D. 546–48 (electronically stored information); see also *State* v. *Jackson*, 150 Conn. App. 323, 332–35, 90 A.3d 1031 (unsigned letter), cert. denied, 312 Conn. 919, 94 A.3d 641 (2014); *State* v. *John L.*, 85 Conn. App. 291, 302, 856 A.2d 1032 (computer-stored letters), cert. denied, 272 Conn. 903, 863 A.2d 695 (2004).

(5) Any person having sufficient familiarity with another person's voice, whether acquired from hearing the person's voice firsthand or through mechanical or electronic means, can identify that person's voice or authenticate a conversation in which the person participated. See *State* v. *Jonas*, 169 Conn. 566, 576–77, 363 A.2d 1378 (1975), cert. denied, 424 U.S. 923, 96 S. Ct. 1132, 47 L. Ed. 2d 331 (1976);

State v. *Marsala*, 43 Conn. App. 527, 531, 684 A.2d 1199 (1996), cert. denied, 239 Conn. 957, 688 A.2d 329 (1997);

(6) Evidence describing a process or a system used to produce a result and showing that the process or system produces an accurate result. This method of authentication, modeled on rule 901 (b) (9) of the Federal Rules of Evidence, was used **[**by the Connecticut Supreme Court**]** in *State* v. *Swinton*, 268 Conn. 781, 811–13, 847 A.2d 921 (2004), to establish the standard used to determine the admissibility of computer simulations or animations. The particular requirements applied in *Swinton* were ''fairly stringent''; id., 818; because that case involved relatively sophisticated computer enhancements using specialized software. In other cases when a proponent seeks to use this method to authenticate electronically stored information, the nature of the evidence establishing the accuracy of the system or process may be less demanding. See *U-Haul International, Inc.* v. *Lubermens Mutual Casualty Co.*, 576 F.3d 1040, 1045 (9th Cir. 2009) (authentication of computer generated summaries of payments of insurance claims by manager familiar with process of how summaries were made held to be adequate); see also *State* v. *Melendez*, 291 Conn. 693, 709–710, 970 A.2d 64 (2009) (admission of unmodified footage of drug transaction on DVD not subject to heightened *Swinton* standard)**[**.**]**; cf. *State* v. *Shah*, 134 Conn. App. 581, 39 A.3d 1165 (2012) (chat room transcripts not computer generated evidence and therefore not subject to heightened *Swinton* standard).

(7) Outgoing telephone calls may be authenticated by proof that: (1) the caller properly placed the telephone call; and (2) the answering

party identified himself or herself as the person to whom the conversation is to be linked. *Hartford National Bank & Trust Co.* v. *DiFazio*, 6 Conn. App. 576, 585, 506 A.2d 1069, cert. denied, 200 Conn. 805, 510 A.2d 192 (1986);

(8) Stipulations or admissions prior to or during trial provide two other means of authentication. See *Stanton* v. *Grigley*, 177 Conn. 558, 559, 418 A.2d 923 (1979); see also Practice Book §§ 13-22 through 13-24 (in requests for admission); Practice Book § 14-13 (4) (at pretrial session);

(9) Sections 9-2 and 9-3 (authentication of ancient documents and public records, respectively), provide additional methods of authentication.

(b) Self-authentication.

Both case law and statutes identify certain kinds of writings or documents as self-authenticating. A self-authenticating document's genuineness is taken as sufficiently established without resort to extrinsic evidence, such as a witness' foundational testimony. **[**See 2 C. McCormick, supra, § 228, p. 57**]** *State* v. *Howell*, 98 Conn. App. 369, 379–80, 908 A.2d 1145 (2006). Subsection (b) continues the principle of self-authentication, but leaves the particular instances under which self-authentication is permitted to the dictates of common law and the General Statutes.

Self-authentication in no way precludes the opponent from coming forward with evidence contesting authenticity; see *Atlantic Industrial Bank* v. *Centonze*, 130 Conn. 18, 19, 31 A.2d 392 (1943); *Griswold* v. *Pitcairn*, 2 Conn. 85, 91 (1816); as the fact finder ultimately decides

whether a writing or document is authentic. In addition, self-authenticating evidence remains vulnerable to exclusion or admissibility for limited purposes under other provisions of the Code or the General Statutes.

Common-law examples of self-authenticating writings or documents include:

(1) writings or documents carrying the impression of certain official seals. E.g., *Atlantic Industrial Bank* v. *Centonze*, supra, 130 Conn. 19–20; *Barber* v. *International Co. of Mexico*, 73 Conn. 587, 602, 603, 48 A. 758 (1901); *Griswold* v. *Pitcairn*, supra, 2 Conn. 90–91; and

(2) marriage certificates signed by the person officiating the ceremony. E.g., *Northrop* v. *Knowles*, 52 Conn. 522, 525–26, 2 A. 395 (1885).

Familiar statutory examples of self-authenticating writings or documents include:

(1) acknowledgments made or taken in accordance with the Uniform Acknowledgment Act, General Statutes §§ 1-28 through 1-41; see General Statutes § 1-36; and the Uniform Recognition of Acknowledgments Act, General Statutes §§ 1- 57 through 1-65; see General Statutes § 1-58;

(2) copies of records or documents required by law to be filed with the secretary of state and certified in accordance with General Statutes § 3-98;

(3) birth certificates certified in accordance with General Statutes § 7-55;

(4) certain third-party documents authorized or required by an existing contract and subject to the Uniform Commercial Code; General Statutes § **[**42a-1-202**]** 42a-1-307; see also General Statutes § 42a-8-114 (2) (signatures on certain negotiable instruments);

(5) marriage certificates issued pursuant to General Statutes § 46b-34; see General Statutes § 46b-35; and

(6) copies of certificates filed by a corporation with the secretary of the state in accordance with law and certified in accordance with General Statutes § 52-167.

It should be noted that the foregoing examples do not constitute an exhaustive list of self-authenticating writings or documents. Of course, writings or documents that do not qualify under subsection (b) may be authenticated under the principles announced in subsection (a) or elsewhere in Article IX of the Code.

(Amended May 20, 2015, to take effect August 1, 2015.)

Sec. 9-2. Authentication of Ancient Documents

The requirement of authentication as a condition precedent to admitting a document in any form into evidence shall be satisfied upon proof that the document (A) has been in existence for more than thirty years, (B) was produced from proper custody, and (C) is otherwise free from suspicion.

COMMENTARY

Section 9-2 embraces the common-law ancient document rule. See, e.g., *Jarboe* v. *Home Bank & Trust Co.*, 91 Conn. 265, 269, 99 A. 563 (1917). Documents that satisfy the foundational requirements are authenticated without more. See id., 270. Thus, Section 9-2 dispenses

with any requirement that the document's proponent produce attesting witnesses. *Borden* v. *Westport*, 112 Conn. 152, 161, 151 A. 512 (1930); *Jarboe* v. *Home Bank & Trust Co.*, supra, 269, 270.

Although common-law application of the rule mainly involved dispositive instruments, such as wills and deeds; e.g., *Jarboe* v. *Home Bank & Trust Co.*, supra, 91 Conn. 269 (will); *Borden* v. *Westport*, supra, 112 Conn. 161 (deed); but see, e.g., *Petro-man* v. *Anderson*, 105 Conn. 366, 369–70, 135 A. 391 (1926) (ancient map); the current rule applies to all documents, in any form, including those stored electronically.

Ancient documents are the subject of a hearsay exception with foundational requirements identical to those found in Section 9-2. See Section 8-3 (9).

Sec. 9-3. Authentication of Public Records

The requirement of authentication as a condition precedent to admitting into evidence a record, report, statement or data compilation, in any form, is satisfied by evidence that (A) the record, report, statement or data compilation authorized by law to be recorded or filed in a public office has been recorded or filed in that public office, **[**or**]** (B) the record, report, statement or data compilation, purporting to be a public record, report, statement or data compilation, is from the public office where items of this nature are maintained, or (C) the record, report, statement or data compilation, purporting to be a public record, report, statement or data compilation, is made available in electronic form by a public authority.

(Amended May 20, 2015, to take effect August 1, 2015.)

COMMENTARY

[The law in Connecticut with respect to the authentication of public records without a public official's certification or official seal is unclear. Cf., e.g., *Whalen* v. *Gleason*, 81 Conn. 638, 644, 71 A. 908 (1909); *Barber* v. *International Co. of Mexico*, 73 Conn. 587, 602, 48 A. 758 (1901). Nevertheless, i**]**It generally is recognized that **[**such**]** a public record may be authenticated simply by showing that the record purports to be a public record and comes from the custody of the proper public office. **[**2 C. McCormick, Evidence (5th Ed. 1999) § 224, p. 47; C. Tait & J. LaPlante, Connecticut Evidence **(**2d Ed. 1988) § 10.4.3, p. 294; 7 J. Wigmore, Evidence (4th Ed. 1978) § 2159, pp. 775–76.**]** See *State* v. *Calderon*, 82 Conn. App. 315, 322, 844 A.2d 866, cert. denied, 270 Conn. 905, 853 A.2d 523, cert. denied, 543 U.S. 982, 125 S. Ct. 487, 160 L. Ed. 2d 361 (2004); *Whalen* v. *Gleeson*, 81 Conn. 638, 644, 71 A. 908 (1909); *Barber* v. *International Co. of Mexico*, 73 Conn. 587, 602, 48 A. 758 (1901). Thus, although certified copies of most public records are ''self-authenticating'' in accordance with other provisions of the General Statutes; see, e.g., General Statutes § 7-55 (birth certificates); certification is not the exclusive means by which to authenticate a public record. The rule extends the common-law principle to public records, including electronically stored information.

Proviso (A) assumes that documents authorized by law to be recorded or filed in a public office e.g., tax returns, wills or deeds are public records for purposes of authentication. Cf. *Kelsey* v. *Hanmer*, 18 Conn. 310, 319 (1847) (deed). Proviso (B) covers reports, records,

statements or data compilations prepared and maintained by the public official or public office, whether local, state, federal or foreign.

Sec. 9-4. Subscribing Witness' Testimony

If a document is required by law to be attested to by witnesses to its execution, at least one subscribing witness must be called to authenticate the document. If no attesting witness is available, the document then may be authenticated in the same manner as any other document. Documents that are authenticated under Section 9-2 need not be authenticated by an attesting witness.

COMMENTARY

Certain documents, such as wills and deeds, are required by law to be attested to by witnesses. See General Statutes § 45a-251 (wills); § 47-5 (deeds). At common law, the proponent, in order to authenticate such a document, must have called at least one of the attesting witnesses or satisfactorily have explained the absence of all of the attesting witnesses.

Thereafter, the proponent could authenticate the document through the testimony of nonattesting witnesses. **[**2 C. McCormick, Evidence (5th Ed. 1999) § 220, p. 40; C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 10.3.1, p. 290;**]**. **[**s**]**See e.g., *Loewenberg* v. *Wallace*, 147 Conn. 689, 696, 166 A.2d 150 (1960); *Kelsey* v. *Hanmer*, 18 Conn. 311, 317–18 (1847).

The rule requiring attesting witnesses to be produced or accounted for applies only when proving the fact of valid execution, i.e., genuineness, not when proving other things such as the document's delivery or contents. 4 J. Wigmore, Evidence (4th Ed. 1972) § 1293, pp. 709–10.

Section 9-4 exempts ancient documents from the general rule on the theory that the genuineness of a document more than thirty years old is established simply by showing proper custody and suspicionless appearance; see Section 9-2; without more. **[**4 J. Wigmore, supra, § 1312, p. 742; s**]**See, e.g., *Borden* v. *Westport*, 112 Conn. 152, 161, 151 A. 512 (1930); *Jarboe* v. *Home Bank & Trust Co.*, 91 Conn. 265, 269, 99 A. 563 (1917).

Dicta in two Connecticut cases suggest that it is unnecessary to call subscribing witnesses or explain their absence when the document at issue is only collaterally involved in the case. *Great Hill Lake, Inc.* v. *Caswell*, 126 Conn. 364, 369, 11 A.2d 396 (1940); see *Pepe* v. *Aceto*, 119 Conn. 282, 287–88, 175 A. 775 (1934). **[**; 4 J. Wigmore, supra, § 1291, p. 705.**]** Another case suggests the same exemption for certified copies of recorded deeds. See *Loewenberg* v. *Wallace*, supra, 147 Conn. 696. Although these exemptions, unlike the one for ancient documents, were not included in the text of the rule, they are intended to survive adoption of Section 9-4.

ARTICLE X—CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

Sec. 10-1. General Rule

To prove the content of a writing, recording or photograph, the original writing, recording or photograph must be admitted in evidence, except as otherwise provided by the Code, the General Statutes or **[**the**]** any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code. An original of electronically stored information includes evidence in the form of a printout

or other output, readable by sight or otherwise shown to reflect the data accurately.

(Amended May 20, 2015, to take effect August 1, 2015.)

COMMENTARY

Section 10-1 adopts Connecticut's best evidence rule. The rule embraces two interrelated concepts. First, the proponent must produce the original of a writing, as defined in Section 1-2 (c), recording or photograph when attempting to prove the contents thereof, unless production is excused. E.g., *Shelnitz* v. *Greenberg*, 200 Conn. 58, 78, 509 A.2d 1023 (1986). Second, to prove the contents of the proffer, the original must be admitted in evidence. Thus, for example, the contents of a document cannot be proved by the testimony of a witness referring to the document while testifying.

The cases generally have restricted the best evidence rule to writings or documents. See *Brookfield* v. *Candlewood Shores Estates, Inc.*, 201 Conn. 1, 11, 513 A.2d 1218 (1986). In extending the rule to recordings and photographs, Section 10-1 recognizes the growing reliance on modern technologies for the recording and storage of information.

Section 10-1 applies only when the proponent seeks to prove contents. E.g., *Hotchkiss* v. *Hotchkiss*, 143 Conn. 443, 447, 123 A.2d 174 (1956) (proving terms of contract); cf. *Dyer* v. *Smith*, 12 Conn. 384, 391 (1837) (proving fact about writing, such as its existence or delivery, is not proving contents).

The fact that a written record or recording of a transaction or event is made does not mean that the transaction or event must be proved

by production of the written record or recording. When the transaction or event itself rather than the contents of the written record or recording is sought to be proved, the best evidence rule has no application. E.g., *State* v. *Moynahan*, 164 Conn. 560, 583, 325 A.2d 199, cert. denied, 414 U.S. 976, 94 S. Ct. 291, 38 L. Ed. 2d 219 (1973); *State* v. *Tomanelli*, 153 Conn. 365, 374, 216 A.2d 625 (1966).

What constitutes an ''original'' will be clear in most situations. ''Duplicate originals,'' such as a contract executed in duplicate, that are intended by the contracting parties to have the same effect as the original, qualify as originals under the rule. **[**2 C. McCormick, Evidence (5th Ed. 1999) § 236, p. 73–74; C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 10.10, p. 305; c**]** Cf. *Lorch* v. *Page*, 97 Conn. 66, 69, 115 A. 681 (1921); *Colburn's Appeal*, 74 Conn. 463, 467, 51 A. 139 (1902).

The definition of ''original'' explicitly includes printouts or other forms of electronically stored information that are readable. The proponent must show only that the printed or readable version is an accurate (i.e., unaltered and unmodified) depiction of the electronically stored information. See *Lorraine* v. *Markel American Ins. Co.*, 241 F.R.D. 534, 577–78 (D. Md. 2007) (under federal rules, original of information stored in computer is ''readable display of the information on the computer screen, the hard drive or other source where it is stored, as well as any printout or output that may be read, so long as it accurately reflects the data''). **[**A printout generated for litigation purposes may nevertheless be admissible if the computer stored information otherwise comports with the business entry rule.**]** Although a printout or

other physical manifestation of computer data is considered the original for purposes of the best evidence rule, the underlying data itself is significant for assessing admissibility under exceptions to the hearsay rule. See *Ninth RMA Partners, L.P.* v. *Krass*, 57 Conn. App. 1, 10–11, 746 A.2d 826, cert. denied, 253 Conn. 918, 755 A.2d 215 (2000) (business entry exception to hearsay); see also *Federal Deposit Ins. Corp.* v. *Carabetta*, 55 Conn. App. 384, 398–99, 739 A.2d 311, cert. denied, 251 Conn. 928, 742 A.2d 362 (1999) (same).

The second sentence in Section 10-1 is modeled on rule 1001 of the Federal Rules of Evidence and on parallel provisions of numerous states' rules from around the country.

Sec. 10-2. Admissibility of Copies

A copy of a writing, recording or photograph, is admissible to the same extent as an original unless (A) a genuine question is raised as to the authenticity of the original or the accuracy of the copy, or (B) under the circumstances it would be unfair to admit the copy in lieu of the original.

COMMENTARY

By permitting a copy of an original writing, recording or photograph to be admitted without requiring the proponent to account for the original, Section 10-2 represents a departure from common law. See, e.g., *British American Ins. Co.* v. *Wilson*, 77 Conn. 559, 564, 60 A. 293 (1905). Nevertheless, in light of the reliability of modern reproduction devices, this section recognizes that a copy derived therefrom often will serve equally as well as the original when proof of its contents is required.

''[C]opy,'' as used in Section 10-2, should be distinguished from a ''duplicate original,'' such as a carbon copy of a contract, which the executing or issuing party intends to have the same effect as the original. See commentary to Section 10-1.

Sec. 10-3. Admissibility of Other Evidence of Contents

The original of a writing, recording or photograph is not required, and other evidence of the contents of such writing, recording or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent destroyed or otherwise failed to produce the originals for the purpose of avoiding production of an original; or

(2) Original not obtainable. No original can be obtained by any reasonably available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom it is offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the proceeding, and that party does not produce the original at the proceeding; or

(4) Collateral matters. The contents relate to a collateral matter.

COMMENTARY

The best evidence rule evolved as a rule of preference rather than one of exclusion. E.g., *Brookfield* v. *Candlewood Shores Estates, Inc.*, 201 Conn. 1, 12, 513 A.2d 1218 (1986). If the proponent adequately explains the failure to produce the original, ''secondary'' evidence of its contents then may be admitted. Section 10-3 describes the situations

under which production of the original is excused and the admission of secondary evidence is permissible.

Although the issue has yet to be directly addressed, the cases do not appear to recognize degrees of secondary evidence, such as a preference for handwritten copies over oral testimony. See *Sears* v. *Howe*, 80 Conn. 414, 416–17, 68 A. 983 (1908). **[**See generally C. Tait & J. LaPlante Connecticut Evidence (2d Ed. 1988) § 10.12, pp. 307–308.**]** Section 10-3 recognizes no degrees of secondary evidence and thus any available evidence otherwise admissible may be utilized in proving contents once production of the original is excused under Section 10-3.

(1) Originals lost or destroyed.

Subdivision (1) reflects the rule in *Woicicky* v. *Anderson*, 95 Conn. 534, 536, 111 A. 896 (1920). A proponent ordinarily proves loss or destruction by demonstrating a diligent but fruitless search for the lost item; see *State* v. *Castelli*, 92 Conn. 58, 69–70, 101 A. 476 (1917); *Elwell* v. *Mersick*, 50 Conn. 272, 275–76 (1882); see also *Host America Corp.* v. *Ramsey*, 107 Conn. App. 849, 855–56, 947 A.2d 957, cert. denied, 289 Conn. 904, 957 A.2d 870 (2008); or by producing a witness with personal knowledge of destruction. See *Richter* v. *Drenckhahn*, 147 Conn. 496, 502, 163 A.2d 109 (1960).

The proponent is not precluded from offering secondary evidence when the purpose in losing or destroying the original is not to avoid production thereof. *Mahoney* v. *Hartford Investment Corp.*, 82 Conn. 280, 287, 73 A. 766 (1909); *Bank of the United States* v. *Sill*, 5 Conn. 106, 111 (1823).

(2) Original not obtainable.

Subdivision (2) covers the situation in which a person not a party to the litigation possesses the original and is beyond reasonably available judicial process or procedure. See, e.g., *Shepard* v. *Giddings*, 22 Conn. 282, 283–84 (1853); *Townsend* v. *Atwater*, 5 Day (Conn.) 298, 306 (1812).

(3) Original in possession of opponent.

Common law excuses the proponent from producing the original when an opposing party in possession of the original is put on notice and fails to produce the original at trial. See, e.g., *Richter* v. *Drenckhahn*, supra, 147 Conn. 501; *City Bank of New Haven* v. *Thorp*, 78 Conn. 211, 218, 61 A. 428 (1905). Notice need not compel the opponent to produce the original, but merely provides the option to produce the original or face the prospect of the proponent's offer of secondary evidence. Whether notice is formal or informal, it must be reasonable. See *British American Ins. Co.* v. *Wilson*, 77 Conn. 559, 564, 60 A. 293 (1905).

(4) Collateral matters.

Subdivision (4) is consistent with Connecticut law. *Misisco* v. *LaMaita*, 150 Conn. 680, 685, 192 A.2d 891 (1963); *Farr* v. *Zoning Board of Appeals*, 139 Conn. 577, 582, 95 A.2d 792 (1953).

Sec. 10-4. Public Records

The contents of a record, report, statement or data compilation recorded or filed in a public office may be proved by a copy, certified in accordance with applicable law or testified to be correct by a witness who has compared it with the original.

COMMENTARY

Section 10-4 recognizes an exception to Section 10-1's requirement of an original for certified or compared copies of certain public records. Based on the impracticability and inconvenience involved in removing original public records from their place of keeping; see *Brookfield* v. *Candlewood Shores Estates, Inc.*, 201 Conn. 1, 12, 513 A.2d 1218 (1986); *Gray* v. *Davis*, 27 Conn. 447, 454 (1858); Connecticut cases have allowed the contents of these documents to be proved by certified copies. E.g., *Brown* v. *Connecticut Light & Power Co.*, 145 Conn. 290, 295–96, 141 A.2d 634 (1958); *Lomas & Nettleton Co.* v. *Waterbury*, 122 Conn. 228, 234–35, 188 A. 433 (1936). Allowing proof of contents by compared copies represents a departure from prior case law that is in accord with the modern trend. E.g., Fed. R. Evid. 1005.

In addition to this Section, statutory provisions address the use of copies to prove the contents of public records. See, e.g., General Statutes § 52-181.

Sec. 10-5. Summaries

The contents of voluminous writings, recordings or photographs, otherwise admissible, that cannot be conveniently examined in court, may be admitted in the form of a chart, summary or calculation, provided that the originals or copies are available upon request for examination or copying, or both, by other parties at a reasonable time and place.

COMMENTARY

Case law permits the use of summaries to prove the contents of voluminous writings that cannot be conveniently examined in court.

Brookfield v. *Candlewood Shores Estates, Inc.*, 201 Conn. 1, 12–13, 513 A.2d 1218 (1986); *McCann* v. *Gould*, 71 Conn. 629, 631–32, 42 A. 1002 (1899). Section 10-5 extends the rule to voluminous recordings and photographs in conformity with other provisions of Article X.

The summarized originals or copies must be made available to other parties upon request for examination or copying, or both, at a reasonable time and place. See *Customers Bank* v. *Tomonto Industries, LLC,* 156 Conn. App. 441, 445 n.3, 112 A.3d 853 (2015); see also *McCann* v. *Gould*, supra, 71 Conn. 632; cf. *Brookfield* v. *Candlewood Shores Estates, Inc.*, supra, 201 Conn. 13.

Sec. 10-6. Admissions of a Party

The contents of a writing, recording or photograph may be proved by the admission of a party against whom it is offered that relates to the contents of the writing, recording or photograph.

COMMENTARY

Section 10-6 recognizes the exception to the best evidence rule for admissions of a party relating to the contents of a writing when offered against the party to prove the contents thereof. *Morey* v. *Hoyt*, 62 Conn. 542, 557, 26 A. 127 (1893). Section 10-6 extends the exception to recordings and photographs in conformity with other provisions of Article X.

NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF HOUSING

Notice of Issuance of a Certificate of Affordable Housing Completion in the Town of Brookfield

In accordance with C.G.S. 8-30g, the Department of Housing (DOH) has issued a Certificate of Affordable Housing Completion. This certificate entitles the Town of Brookfield to a Moratorium of Applicability with regard to said statute. The effective date of this moratorium is on the date of publication in the Connecticut Law Journal, and will remain in effect, unless revoked in accordance with the statute for a four year period. For additional information, please call or write to Michael C. Santoro, Community Development Specialist, DOH, 505 Hudson Street, Hartford, CT 06106, (860) 270-8171.

NOTICE

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.