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

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

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

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

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

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

CONNECTICUT REPORTS

Vol. 326

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

ANTHONY A. *v.* COMMISSIONER OF CORRECTION* (SC 19565)

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

Syllabus

The petitioner sought a writ of habeas corpus, claiming that the respondent Commissioner of Correction had incorrectly classified him as a sex offender without providing procedural due process as required under the federal constitution. The petitioner had been convicted of unlawful restraint in the first degree, failure to appear and violation of probation. Prior to the petitioner's incarceration, the state entered a nolle prosequi as to a charge of sexual assault in a spousal relationship after the petitioner's wife recanted her statement to the police that the petitioner had sexually assaulted her during the same incident that formed the basis for the charges of which he was convicted. Thereafter, the respondent classified the petitioner as a sex offender, even though the petitioner was never convicted of a sex offense and had no prior history as a sex offender. As a result of that classification, the Department of Correction required the petitioner to participate in sex offender treatment or risk forfeiture of supervised community release, parole and the opportunity to earn risk reduction earned credit. The petitioner refused to participate in treatment. The habeas court dismissed the petition, concluding that, because the petitioner failed to allege a protected liberty interest, the court lacked subject matter jurisdiction. On the granting of certification, the petitioner appealed to the Appellate Court, which reversed the habeas court's judgment and remanded the case for a hearing on the merits. The Appellate Court concluded that the petitioner's allegations established a protected liberty interest under the stigma plus test applied by the federal courts to determine whether an inmate who challenges, inter alia, his allegedly wrongful classification as a sex offender has established such an interest. On the granting of certification, the respondent appealed to this court. *Held* that the petitioner's allegations in the habeas petition, which this court was required to accept as true, were sufficient to allege a protected liberty interest that conferred jurisdiction on the habeas court, and, accordingly, the Appellate Court properly reversed the habeas court's judgment; the petitioner satisfied his burden

* In accordance with our policy of protecting the privacy interests of victims of sexual assault, we decline to identify the alleged victim or others through whom her identity may be ascertained. See General Statutes § 54-86e.

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

of establishing a protected liberty interest under the applicable stigma plus test, as the petitioner's allegation that the respondent had improperly classified him a sex offender established stigma, and his allegation that he was required to participate in sex offender treatment or risk forfeiting parole eligibility, community release, and good time credits established that he suffered negative consequences as a result of that allegedly erroneous classification in that the consequences were qualitatively different from the punishments usually suffered by inmates such that they constituted a major change in the conditions of confinement that amounted to a grievous loss.

Argued February 23—officially released August 29, 2017

Procedural History

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 dismissing the petition, from which the petitioner, on the granting of certification, appealed to the Appellate Court, *Alvord*, *Sheldon* and *Norcott*, *Js.*, which reversed the habeas court's judgment and remanded the case for further proceedings, and the respondent, on the granting of certification, appealed to this court. *Affirmed.*

Edward Wilson, *Jr.*, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Terrence M. O'Neill* and *Steven R. Strom*, assistant attorneys general, for the appellant (respondent).

Richard E. Condon, *Jr.*, senior assistant public defender, for the appellee (petitioner).

Opinion

ESPINOSA, J. The present appeal requires us to determine the appropriate test for resolving whether an inmate's prison classification implicates a protected liberty interest. The respondent, the Commissioner of Correction, appeals from the judgment of the Appellate Court reversing the judgment of the habeas court, which dismissed the petition for a writ of habeas corpus filed

by the petitioner, Anthony A., for lack of subject matter jurisdiction.[1] *Anthony A.* v. *Commissioner of Correction*, 159 Conn. App. 226, 242, 122 A.3d 730 (2015). The respondent claims that, contrary to the conclusion of the Appellate Court, the habeas court properly dismissed the petition on the basis that the petitioner failed to allege a protected liberty interest. The petitioner responds that the allegations in the petition, which claim that he was incorrectly classified as a sex offender and that he suffered negative consequences as a result of that erroneous classification, sufficiently alleged a cognizable liberty interest to confer jurisdiction on the court. We agree with the petitioner and affirm the judgment of the Appellate Court.

Because this appeal arises from the habeas court's ruling dismissing the petition on the basis that the court lacked jurisdiction, we take the facts to be those alleged in the petition, including those facts necessarily implied from the allegations, construing them in favor of the petitioner for purposes of deciding whether the court had subject matter jurisdiction.[2] See *Dorry* v. *Garden*,

[1] We granted the respondent's petition for certification to appeal, limited to the following question: "Did the Appellate Court correctly reverse the trial court's judgment based on its determination that the trial court improperly held that it lacked jurisdiction over the petitioner's habeas petition challenging his prison classification of sexual treatment needs?" *Anthony A.* v. *Commissioner of Correction*, 319 Conn. 934, 125 A.3d 208 (2015).

[2] On appeal, the respondent now seeks to dispute the facts as alleged in the petition. For example, the respondent argues in his brief to this court that the petitioner was merely assigned a " 'sexual needs treatment score,' " which the respondent contends is not the equivalent of labeling the petitioner a sex offender. Even if we were not required on appeal to take the facts as alleged in the petition for purposes of determining whether the court had jurisdiction, the respondent waived this claim at the hearing on the petition. At that time, the respondent had the opportunity to contest the petitioner's allegation that he had been labeled a sex offender. The respondent failed to do so. Specifically, during the hearing, the court asked the respondent whether he had any objection to the court taking the facts from the allegations in the petition for the purpose of determining whether the petitioner had alleged a cognizable liberty interest, and the respondent answered: "No objection, Your Honor." Later, the court stated: "I'm prepared to rule on this matter and in my ruling I'm going to assume for purposes of this ruling

313 Conn. 516, 521, 98 A.3d 55 (2014). The allegations in the petition and attachments thereto establish that the petitioner is an inmate who was convicted after pleading guilty to unlawful restraint in the first degree, failure to appear and violation of probation. Initially, the victim, the petitioner's wife, also told the police that the petitioner had sexually assaulted her, but she subsequently recanted that statement, and the state entered a nolle prosequi as to the charge of sexual assault in a spousal relationship.

Upon the petitioner's incarceration, he was classified pursuant to an administrative directive of the Department of Correction (department), which provides in relevant part: "Each inmate under the custody of the Commissioner of Correction shall be classified to the most appropriate assignment for security and treatment needs to promote effective population management and preparation for release from confinement and supervision. . . ." Department of Correction, Administrative Directive 9.2 (1) (effective July 1, 2006) (Administrative Directive 9.2). An inmate's classification depends on his risks and needs scores, each of which is evaluated pursuant to specific factors. Administrative Directive 9.2 (8) (A) and (B).[3] Those scores and the resulting

that the factual allegations by [the petitioner] are correct, in that he has been classified as a sex offender when he was not really a sex offender." At that point, the respondent could have disputed the petitioner's allegation that the respondent had classified him as a sex offender, but he elected not to do so. Therefore, the respondent effectively has waived—at least for purposes of determining whether the court has jurisdiction—any disputes he may have as to the facts alleged in the petition.

[3] For the risk assessment, the following factors are considered: "(1) [h]istory of escape; (2) [s]everity/violence of the current offense; (3) [h]istory of violence; (4) [l]ength of sentence; (5) [p]resence of pending charges, bond amount and/or detainers; (6) [d]iscipline history; and, (7) [s]ecurity [r]isk [g]roup membership." Administrative Directive 9.2 (8) (A).

For the needs assessment, the following factors are considered: "(1) [m]edical and health care; (2) [m]ental health care; (3) [e]ducation; (4) [v]ocational training and work skills; (5) [s]ubstance abuse treatment; (6) [s]ex offender treatment; and, (7) [c]ommunity resources." Administrative Directive 9.2 (8) (B).

classification determine the inmate's "appropriate confinement location, treatment, programs and employment assignment whether in a facility or the community." Administrative Directive 9.2 (3) (A).

The department classified the petitioner as a sex offender, despite the fact that he had not been convicted of a sex offense and had no prior history as a sex offender.[4] As a consequence of the erroneous classification, the petitioner was offered a choice. He could participate in "sex treatment" that was recommended by his offender accountability plan or risk forfeiture of supervised community release, parole and the opportunity to earn risk reduction earned credit (good time credits). He refused to participate in treatment.

The petitioner subsequently filed this petition, claiming that he had been classified as a sex offender without being provided procedural due process. At the hearing on the petition, the court first heard argument as to whether it had jurisdiction. The petitioner argued that he had alleged sufficient facts to establish a cognizable liberty interest. Specifically, he argued that the classification had been predicated on erroneous facts, stigmatized him, and that he had been materially burdened by the classification.

As to those material burdens, the petitioner alleged that he suffered several negative consequences as a result of the classification. He alleged a direct causal link between the classification and his increased security status. He alleged a contingent relationship between the classification, the recommended treatment plan and his eligibility for good time credits, parole and commu-

[4] It appears that, on July 7, 2012, a hearing was held to determine the petitioner's classification. The petitioner represents that he was not present at the hearing, as was his right pursuant to the department's Objective Classification Manual, and was informed of his classification as a sex offender only after the issue had been resolved.

nity release. That is, he claimed that the department had notified him that if he did not participate in the recommended sex offender treatment, he risked forfeiting all three of those benefits. That claim finds support in the department's offender accountability plan that was attached to the petition and provides: "Failure to comply with [the plan's] recommendations . . . *shall* negatively impact your earning of [good time credits] . . . and/or chances of [department] supervised community release and/or parole." (Emphasis added.) Finally, although the petitioner did not allege in the petition that he actually suffered harassment as a result of the classification, he did claim in an inmate administrative remedy form that he had submitted to the department that the sex offender classification had the "potential" to prejudice prison staff and other inmates against him.[5] The habeas court dismissed the petition, concluding that because the petitioner failed to allege any protected liberty interest, the court lacked subject matter jurisdiction. Upon the habeas court's grant of certification to appeal, the petitioner appealed from the judgment of dismissal to the Appellate Court.

The Appellate Court first considered whether the petition had been rendered moot by the petitioner's release from prison prior to oral argument. *Anthony A.* v. *Commissioner of Correction*, supra, 159 Conn. App. 232–33. The court observed that the petitioner had informed the court that, after his release, he had been arrested in connection with new charges and was being detained at New Haven Correctional Center. Id., 232. Because of the petitioner's new arrest, the Appellate Court reasoned that there was "a reasonable possibility that, should he return to prison, he will again be classified as being in need of sex offender treatment because

[5] In his trial brief, the petitioner claimed that he had been ostracized and harassed as a result of the erroneous classification. He conceded, however, that he could not prove that he had been harassed.

the department assigned him a sex offender treatment need score with a recommended sex offender treatment referral during his previous incarceration." Id., 234. The court concluded, therefore, that the collateral consequences exception to the mootness doctrine applied.[6] Id., 233.

Turning to the merits of the petitioner's claim, the Appellate Court reversed the judgment of the habeas court on the basis of its conclusion that the petitioner's allegations established a protected liberty interest under the stigma plus test applied by the federal courts, which it found to be appropriate under the facts of the present case. Id., 238–40. The court concluded that the petitioner's allegation that the department had falsely labeled him a sex offender established stigma, and that the petitioner's allegation that he had been coerced to participate in sex offender treatment on the basis of that erroneous classification established the "plus" element of the test. Id., 240–41. This certified appeal followed.

"In order to state a claim for a denial of procedural due process . . . a prisoner must allege that he possessed a protected liberty interest, and was not afforded the requisite process before being deprived of that liberty interest. . . . A petitioner has no right to due process . . . unless a liberty interest has been deprived . . . ." (Citations omitted; internal quotation marks omitted.) *Coleman* v. *Commissioner of Correction*, 111 Conn. App. 138, 141, 958 A.2d 790 (2008), cert. denied,

[6] The petitioner's current status is not clear from the record. That is, the record does not reveal whether the petitioner was convicted of the new charges, and, if so, whether he was sentenced to a term of incarceration and once again classified as a sex offender. It remains possible, however, that the respondent could, if the petitioner is again incarcerated, classify him as a sex offender because the previous classification establishes that he now has a prior history as an alleged sex offender. Accordingly, we agree with the Appellate Court that the collateral consequences exception to the mootness doctrine applies.

290 Conn. 905, 962 A.2d 793 (2009). Our first inquiry, therefore, is whether the petitioner has alleged a protected liberty interest. That question implicates the subject matter jurisdiction of the habeas court. See *Baker* v. *Commissioner of Correction*, 281 Conn. 241, 261–62, 914 A.2d 1034 (2007) (holding that habeas court lacked subject matter jurisdiction because inmate did not have cognizable liberty interest in parole eligibility status).

The parties disagree as to the applicable test to determine whether the petitioner's allegations are sufficient to establish that the respondent's actions implicated a protected liberty interest. The respondent, relying on this court's decision in *Wheway* v. *Warden*, 215 Conn. 418, 431, 576 A.2d 494 (1990), argues that because he enjoys full discretion in assigning classification and needs scores to inmates, such classifications cannot, as a matter of law, give rise to a protected liberty interest. The petitioner contends that because the classification stigmatized him and because he suffered negative consequences, he has satisfied his burden of establishing a protected liberty interest under the stigma plus test. We agree with the petitioner that the stigma plus test applies under the circumstances of the case, and we conclude that his allegations sufficiently allege a protected liberty interest.

In *Sandin* v. *Conner*, 515 U.S. 472, 477–84, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995), the United States Supreme Court reviewed its earlier decisions that had considered under what circumstances allegations by inmates were sufficient to establish that state action had implicated a protected liberty interest. In the earliest case in that line of cases, *Morrissey* v. *Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), the court addressed whether the revocation of parole implicated a liberty interest. The court rejected the traditional view that the question turned on whether parole was a vested right or a privilege. Id., 481–82. The inquiry,

the court stated, should instead center on both the weight of the loss and the nature of the interest implicated. Id., 481. That is, only state action that threatens to inflict a "grievous loss" to an interest that falls within the parameters of the " 'liberty or property' language of the [f]ourteenth [a]mendment" will trigger the right to procedural due process. Id., 481–82. Because revocation of parole satisfied both of those criteria, the court reasoned, it called for "some orderly process, however informal." Id., 482.

In its next decision addressing inmates' due process rights, the court shifted the inquiry away from the nature of the interest affected to the nature of the state action taken. In *Wolff* v. *McDonnell*, 418 U.S. 539, 554, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), Nebraska inmates challenged disciplinary sanctions withholding good time credits. The applicable state statutes specified that good time credits were to "be forfeited *only for serious misbehavior*." (Emphasis added.) Id., 557. The court recognized that the due process clause does not *directly* guarantee a prisoner good time credits. Id. By expressly limiting the withholding of good time credits to instances of "major misconduct," however, Nebraska's statute had given rise to a "state-created" liberty interest that was protected by the due process clause. Id.

The court elaborated on both the grievous loss and state created liberty interest inquiries in *Meachum* v. *Fano*, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976), in which the court rejected the prisoners' claim that a transfer to a Massachusetts prison with less favorable conditions implicated a protected liberty interest. The court acknowledged that the transfers had a "substantial adverse impact" on the prisoners. Id., 224. Whether the prisoners had suffered a grievous loss of liberty due to the transfers, however, must be understood in the context of their status as individuals who have been incarcerated following a conviction. Because

prisoners have already had their liberty greatly curtailed, such transfers do not constitute a *grievous* loss. Id. The court further observed that the federal constitution does not require a state to have more than one prison, nor does it guarantee placement in a particular prison. Id. The transfers, therefore, fell within the "normal limits or range of custody which the conviction has authorized the [s]tate to impose." Id., 225. If the court were to afford due process protection to *every* substantial deprivation suffered by prisoners, it reasoned, that would risk subjecting "to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." Id. As to whether a state statute had created a liberty interest, in dictum, the court relied on the broad discretion that Massachusetts prison officials had to transfer an inmate "for whatever reason or no reason at all" to reject the proposition that the prisoners had a state created due process right in avoiding the transfers. Id., 228. In contrast to the facts of *Wolff*, the court observed, there were no state laws that circumscribed that discretion or subjected it to any conditions. Id., 226.

The court's subsequent decisions had picked up on the theme sounded in the *Meachum* dictum, focusing the inquiry on the extent to which state laws had cabined the discretion of state actors. The court in *Sandin* viewed this line of cases as a digression from the proper inquiry—into the nature of the interest and the extent of the loss suffered—in favor of an unhelpful, "mechanical dichotomy" of mandatory versus discretionary decisions. *Sandin* v. *Connor*, supra, 515 U.S. 479. For example, in *Greenholtz* v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 11–12, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979), the court concluded that the applicable state statute, which provided that the board of parole "shall" order a prisoner's release on parole

"unless" it found one of four exceptions to be proven, created an "expectancy of release" in the inmates that gave rise to a liberty interest. The fixation on this dichotomy resulted in prisoners "comb[ing] regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." *Sandin* v. *Connor*, supra, 481. Courts responded accordingly, centering their due process analyses entirely on the language of state statutes and regulations. Id.; see, e.g., *Hewitt* v. *Helms*, 459 U.S. 460, 468, 470–71, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983) (relying on mandatory language in state regulations to conclude that administrative segregation implicated protected liberty interest, despite also concluding that such confinement fell within conditions "ordinarily contemplated by a prison sentence"). This approach was particularly problematic in light of the fact that prison regulations, on which both litigants and the courts were relying to infer state created rights, were not "designed to confer rights on inmates," but, rather, were "primarily designed to guide correctional officials in the administration of a prison." *Sandin* v. *Connor*, supra, 481–82. As a result, the mandatory versus discretionary approach to identifying inmates' liberty interests created a disincentive for states to enact regulations and encouraged courts to micromanage prisons. Id., 482.

Sandin represented the court's return to the original focus of the liberty interest inquiry—the nature of the interest involved and the extent of the loss suffered. The prisoner in *Sandin* alleged that being placed in administrative segregation for misconduct implicated his right to due process. Id., 476. The decision articulated two separate inquiries for determining whether a prisoner has alleged a protected liberty interest, either one created directly by the due process clause itself, or indirectly as a state created right. An independent federal constitutional interest is implicated when condi-

tions are imposed on an inmate that "[exceed] the sentence in such an unexpected manner as to give rise to protection by the [d]ue [p]rocess [c]lause of its own force . . . ." Id., 484. State created constitutional interests are "limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Id.

Sandin also acknowledged that, in "certain situations," a different inquiry is appropriate to determine whether the due process clause directly "confers a liberty interest" on inmates. Id., 479 n.4. Specifically, the court cited to its decision in *Vitek* v. *Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980), for the proposition that where a state action has " 'stigmatizing consequences' " for a prisoner and results in a punishment that is " 'qualitatively different' " from that "characteristically suffered by a person convicted of crime," the protected liberty interest arises from the due process clause directly. *Sandin* v. *Conner*, supra, 479 n.4. In *Vitek*, the court held that an inmate who had challenged his involuntary transfer to a mental hospital had a cognizable liberty interest in not being transferred to the hospital and subjected to mandatory psychiatric treatments without adequate due process. *Vitek* v. *Jones*, supra, 494. The court recognized that the stigma suffered by persons committed to a mental institution—as well as the accompanying, significant, negative social consequences—is indisputable. Id., 492. Involuntary commitment to a mental hospital, moreover, was "qualitatively different" from the punishments usually suffered by prisoners. Id., 493. The transfer, therefore "constituted a major change in the conditions of confinement amounting to a grievous loss . . . ."[7] (Internal quotation marks omitted.) Id., 488; see also id., 492.

[7] The court also concluded that the relevant Nebraska statutes had given rise to a state created liberty interest. *Vitek* v. *Jones*, supra, 445 U.S. 488–91.That analysis is not relevant to the present case.

Courts have referred to this third inquiry as the " 'stigma plus' " test. See, e.g., *Vega* v. *Lantz*, 596 F.3d 77, 81 (2d Cir. 2010). It does not appear that the prisoner in *Vitek* challenged the determination that he was mentally ill, and, accordingly, the court did not consider the veracity of that classification in concluding that he had alleged a protected liberty interest. We agree with the lower federal courts, however, that an inmate raising a due process claim pursuant to the stigma plus test in *Vitek* also must allege the falsehood of the stigmatizing label or classification.[8] Id. Under the facts of the present case—where the petitioner has alleged that he was stigmatized when the respondent wrongfully classified him as a sex offender, and alleges as the "plus" that he suffered various negative consequences, including being compelled to participate in treatment or risk forfeiting good time credits and parole eligibility—the stigma plus test is the best fit. Our inquiry, therefore, focuses on whether the allegations of the petition dem-

[8] Those courts have imported that requirement from *Paul* v. *Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), in which the court first set forth the stigma plus test, albeit in a different context. See, e.g., *Vega* v. *Lantz*, supra, 596 F.3d 81 (citing to decisions, including *Paul*, for proposition that "[t]o establish a stigma plus claim, a plaintiff must show (1) the utterance of a statement sufficiently derogatory to injure his or her reputation, that is *capable of being proved false, and that he or she claims is false*, and (2) a material state-imposed burden or state-imposed alteration of the plaintiff's status or rights." [Emphasis added; internal quotation marks omitted.])

In *Paul*, an individual's name and photograph appeared on a law enforcement flyer that was captioned " 'Active Shoplifters' " and distributed by the police to local retailers. *Paul* v. *Davis*, supra, 695. The court, holding that the individual's due process claim against the police was not cognizable, explained that an individual alleging defamation type claims against public officials must prove not only stigma, but also the "plus," i.e., that a "right or status previously recognized by state law was distinctly altered or extinguished" in connection with the alleged defamation. Id., 711–12. Because the case arose in the defamation context, litigants asserting a stigma plus claim pursuant to *Paul* have been required to allege the falsity of the governmental statements or classifications. See, e.g., *O'Connor* v. *Pierson*, 426 F.3d 187, 195 (2d Cir. 2005) (requiring plaintiff to allege government action imposing tangible and material burden, in connection with *false* statement that damaged reputation).

onstrate that the classification was wrongful and stigmatized the petitioner, and that the consequences suffered by the petitioner were "qualitatively different" from the punishments usually suffered by prisoners, so that they constituted a major change in the conditions of confinement amounting to a grievous loss.

The federal courts of appeals have arrived at the same conclusion, applying the stigma plus test to determine whether a prisoner who challenges his allegedly wrongful classification as a sex offender has established a protected liberty interest. We agree with the federal courts that the first part of the test—whether it is stigmatizing to be classified as a sex offender—may be dispatched with ease and relatively little analysis. That classification is uniquely stigmatizing. As the United States Court of Appeals for the Ninth Circuit explained: "We can hardly conceive of a state's action bearing more stigmatizing consequences than the labeling of a prison inmate as a sex offender. . . . One need only look to the increasingly popular Megan's Laws, whereby states require sex offenders to register with law enforcement officials who are then authorized to release information about the sex offender to the public, to comprehend the stigmatizing consequences of being labeled a sex offender." (Footnote omitted; internal quotation marks omitted.) *Neal* v. *Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997). As far as the petitioner's burden to demonstrate that the classification is wrongful, for purposes of jurisdiction, that requirement is satisfied by effective pleading and verified in a threshold inquiry—the petitioner simply must claim that the classification is false. At least one court has rejected a petitioner's claim on the basis that he failed to do so. See *Vega* v. *Lantz*, supra, 596 F.3d 77 (concluding that petitioner failed to establish threshold requirement of alleging that classification as sex offender was false). In the present case, the petitioner has satisfied this

requirement by claiming that he did not sexually assault his wife and pointing to her retraction of her initial statements to the contrary.

The weightier problem is resolving whether a prisoner's allegations have established the "plus" factor. A recent decision of the United States Supreme Court highlights the difficulty of determining what constitutes a qualitative difference or major change in the conditions of confinement amounting to a grievous loss. One cannot do so without reference to what constitutes "typical" or "ordinary" conditions of confinement for a prisoner. In *Wilkinson* v. *Austin*, 545 U.S. 209, 223–24, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005), the court found that the extreme conditions experienced by prisoners placed in a super maximum security prison easily satisfied the "atypical and significant hardship" inquiry, an inquiry that is very similar to the "plus" portion of the stigma plus test. The court explained that "the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves *in relation to the ordinary incidents of prison life*." (Emphasis added; internal quotation marks omitted.) Id., 223. The extreme isolation and indeterminate length of confinement in a super maximum security facility, the court held, established a "*dramatic departure* from the basic conditions of [the inmate's] sentence." (Emphasis added; internal quotation marks omitted.) Id. What must be determined, the court explained, is the degree of departure from the "baseline." Id. The court in *Wilkinson* acknowledged that the lower federal courts have not arrived at a uniform method of determining what the baseline is, but declined to resolve the question because it was unnecessary, given the extreme nature of confinement in a super maximum security facility. Id.

The emphasis in *Wilkinson* on the need to first determine the baseline requires that our inquiry be a pragmatic one, aimed at determining the degree to which the conditions alleged by the petitioner depart from the expected norm of prison confinement. For that reason, although the Supreme Court expressly has stated that dichotomies such as mandatory/discretionary and rights/privileges are not determinative as to whether a petitioner has established a protected interest; *Sandin* v. *Connor*, supra, 515 U.S. 479; *Morrissey* v. *Brewer*, supra, 408 U.S. 483–84; such distinctions remain helpful to the extent that they are relevant to determining (1) what a prisoner ordinarily should expect from prison confinement, and (2) the degree to which particular conditions impose a hardship on a prisoner. For instance, in determining whether the refusal to consider an inmate eligible for parole or the denial of good time credits constitutes a major change in the conditions of confinement amounting to a grievous loss, it is relevant to consider the degree of discretion accorded to the officials making those decisions. The greater the discretion, the more difficult it becomes to establish a departure from the norm. See, e.g., *Meachum* v. *Fano*, supra, 427 U.S. 226–27 (finding no protected liberty interest in avoiding transfer to maximum security prison because officials had broad discretion to transfer inmates and prisoners had no right to be in particular prison).

Federal courts have considered an inmate's allegation that he was compelled to participate in sex offender treatment sufficient to satisfy the "plus" factor. See, e.g., *Renchenski* v. *Williams*, 622 F.3d 315, 326–27 (3d Cir. 2010) (likening sex offender treatment program to forced transfer to mental institution in *Vitek*). Courts have found such treatment programs to be compulsory when the receipt of benefits, such as parole or good time credits, is conditioned on participation in treatment. See, e.g., *Coleman* v. *Dretke*, 395 F.3d 216, 222–23

(5th Cir. 2004) (conditioning parole on sex offender registration and treatment rendered facts of case "materially indistinguishable from *Vitek*"); *Kirby* v. *Siegelman*, 195 F.3d 1285, 1288, 1291–92 (11th Cir. 1999) (making sex offender therapy prerequisite for parole eligibility rendered therapy "compelled treatment" akin to "mandatory behavior modification" programs at issue in *Vitek*); *Chambers* v. *Colorado Dept. of Corrections*, 205 F.3d 1237, 1239–41 (10th Cir.) (reduction of good time credits for failure to participate in sex offender therapy was "coercive consequence" establishing "plus" factor), cert. denied, 531 U.S. 974, 121 S. Ct. 419, 148 L. Ed. 2d 323 (2000). Courts have held to this rule notwithstanding the representations of prison officials that participation in sex offender treatment is voluntary. Rather than rely on such characterizations, courts consistently have looked to whether significant negative consequences flowed from failure to participate in a "recommended" treatment program. See, e.g., *Neal* v. *Shimoda*, supra, 131 F. 3d 822, 829 (rejecting claim by prison officials that participation in treatment was merely recommendation and voluntary, where treatment was condition of parole eligibility). By contrast, courts have found no protected liberty interest where an inmate has been labeled a sex offender and provided with a recommendation for sex offender treatment, but has been unable to demonstrate that he suffered any negative consequences for failure to participate in treatment. See *Toney* v. *Owens*, 779 F.3d 330, 340–41 (5th Cir. 2015).[9]

[9] The only court of appeals that has arrived at the opposite conclusion is the United States Court of Appeals for the Seventh Circuit, which, in *Grennier* v. *Frank*, 453 F.3d 442, 446 (7th Cir. 2006), rejected a claim by a Wisconsin inmate that his wrongful classification as a sex offender, taken together with the conditioning of parole eligibility on his participation in a sexual disorder treatment program, implicated a protected liberty interest. Although the inmate's claim set forth a classic stigma plus claim, the court concluded that no protected liberty interest was implicated because parole for inmates serving life sentences in Wisconsin is wholly discretionary, as compared to inmates with fixed terms, who are presumptively entitled to parole after

Connecticut law is not to the contrary. Although this court has addressed inmates' claims that state action implicated a protected liberty interest, this appeal presents the first instance in which we are called upon to apply the stigma plus test in resolving that question. In fact, the two instances in which this court has considered the question of whether the actions of prison officials gave rise to a protected liberty interest, the court resolved the issue by relying on authority that predated and was disapproved by *Sandin*. Those cases, therefore, are not controlling. Specifically, in *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 243, we rejected the petitioner's claim that he had been denied parole eligibility status on the basis of his improper classification as a violent offender, concluding that Connecticut's statutory scheme does not create a cognizable liberty interest in parole eligibility status. The court in *Baker* restricted its discussion, however, to state created rights decisions that the United States Supreme Court subsequently criticized in *Sandin*. Id., 253–54. The court in *Baker* did not discuss *Sandin*, and it does not appear that the petitioner claimed that he was stigmatized by the classification. Earlier, in *Wheway* v. *Warden*, supra, 215 Conn. 423, this court addressed the question of whether an inmate's classification as a maximum security prisoner solely on the basis of a parole violation detainer implicated a protected liberty interest. *Wheway* was decided well before *Sandin*. In concluding that the prisoner had no protected liberty interest in his classification, the court in *Wheway* relied exclusively on the level of discretion enjoyed by prison officials in making the classification determination; id., 431; an approach that was subsequently criticized in *Sandin*. *Sandin* v. *Connor*, supra, 515 U.S. 479.

serving two-thirds of their sentences. Id., 444. *Grennier*, however, relies primarily on the line of cases; id., 444, 446; that *Sandin* expressly criticized as establishing a "mechanical dichotomy" of mandatory versus discretionary decisions. *Sandin* v. *Connor*, supra, 515 U.S. 479.

Turning to the petitioner's allegations, which we have noted must be accepted as true, we conclude that they are sufficient to allege a protected liberty interest, thus invoking the jurisdiction of the habeas court. The petitioner alleged that he was classified as a sex offender, and that he was required to participate in sex offender treatment, or risk forfeiting parole eligibility, community release, and good time credits. These allegations are precisely of the type that the majority of the courts of appeals have found to be sufficient to allege a protected liberty interest, such that a hearing now may proceed on the merits. See, e.g., *Coleman* v. *Dretke*, supra, 395 F.3d 222–23. The allegations are sufficient to invoke the jurisdiction of the habeas court.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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CONNECTICUT APPELLATE REPORTS

Vol. 175

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* SHAKEE S. GALBERTH (AC 38633)

Sheldon, Beach and Mihalakos, Js.

Syllabus

The defendant appealed to this court following the trial court's denial of his motion to dismiss his violation of probation charge. In November, 2002, the defendant pleaded guilty to the sale of a narcotic substance, and was sentenced to fifteen years of imprisonment, execution suspended after six years, followed by three years of probation. In April, 2005, he was granted parole with a maximum release date in September, 2007, but, in April, 2006, while on parole, the defendant was arrested for additional narcotics offenses. He pleaded guilty to the 2006 charges, and was incarcerated from October, 2006, to July, 2012. In December, 2012, the defendant was again arrested and charged with four additional counts of the sale of a narcotic substance. In January, 2013, a warrant was issued for the defendant's arrest on the ground that he had violated his probation, and, the following month, he was arrested and charged with violation of probation. Subsequently, the defendant filed a motion to dismiss the violation of probation charge on the ground that he was not legally on probation in 2013 when the violation of probation warrant was executed, based on his arrest on the 2012 narcotics charges. The trial court denied the defendant's motion to dismiss, and after the defendant's plea of nolo contendere to the charge of violation of probation, this appeal followed. *Held*:

1. The defendant could not prevail on his claim that the trial court did not have subject matter jurisdiction over the probation violation proceeding because he was not on probation at the time the warrant for his arrest for violation of probation was executed or at the time of the subsequent hearing on his motion to dismiss: the court's jurisdiction over the probation revocation proceeding was derived from the defendant's original criminal proceeding in 2002, and the probationary period imposed as part of the 2002 sentence was at issue before the court, and therefore the trial court had jurisdiction over the defendant's subsequent violation of probation charge.

2. The defendant could not prevail on his claim that the trial court improperly denied his motion to dismiss the violation of probation charge because he had completed the three year probationary portion of his 2002 sentence prior to his arrest on the 2012 narcotics charges, which formed the basis of the arrest warrant for the violation of probation: pursuant to statute (§ 53a-31 [a]), a defendant cannot be released from imprisonment for the purposes of commencing his probationary period until he is no longer in the custody of the Commissioner of Correction, and a defendant on parole is not functionally released from imprisonment, and because the defendant here was in the continuous custody of the Commissioner of Correction for an extended period of time due to his incarceration for additional narcotics offenses committed in 2006 while he was on parole, the defendant did not commence his probation until he was released from custody in July, 2012, and, therefore, he did not complete the probationary portion of his 2002 sentence prior to January, 2013, when the arrest warrant for the violation of probation was issued.

Argued May 25—officially released August 29, 2017

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, where the court, *Cradle*, *J.*, denied the defendant's motion to dismiss; thereafter, the defendant was presented to the court on a conditional plea of nolo contendere; judgment of guilty in accordance with the plea, from which the defendant appealed to this court. *Affirmed.*

Edward G. McAnaney, assigned counsel, for the appellant (defendant).

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *Jonathan M. Sousa*, former special deputy assistant state's attorney, and *Marc R. Durso*, senior assistant state's attorney, for the appellee (state).

Opinion

MIHALAKOS, J. The defendant, Shakee S. Galberth, appeals following the trial court's denial of his motion to dismiss his violation of probation charge. On appeal,

the defendant claims that the trial court (1) did not have subject matter jurisdiction over the probation violation proceeding, and (2) improperly denied his motion to dismiss because his probationary period had expired. We disagree with the defendant and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our review. On November 20, 2002, the defendant pleaded guilty to three counts of the sale of a narcotic substance in violation of General Statutes § 21a-277 (a)[1] and was sentenced to fifteen years of imprisonment, execution suspended after six years, followed by three years of probation (2002 sentence). On April 29, 2005, he was granted parole with a maximum release date of September 7, 2007.[2] On April 18, 2006, while on parole, the defendant was arrested for several more narcotics offenses (2006 charges). He pleaded guilty to the 2006 charges and was sentenced to an additional eighty-one months of incarceration, to run concurrently with the remainder of his 2002 sentence. His probationary period from the 2002 sentence was not addressed by the court. He was incarcerated from October 2, 2006, to July 20, 2012. On July 24, 2012, he signed the document containing the conditions of his probation, and his probationary period began. Subsequently, on December 7, 2012, while on probation, the defendant was arrested and charged with four counts of the sale of a narcotic substance (2012 charges). On

[1] General Statutes § 21a-277 (a) provides in relevant part: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any controlled substance which is a hallucinogenic substance other than marijuana, or a narcotic substance . . . shall be imprisoned not more than fifteen years . . . ."

[2] The parties stipulated to a maximum release date of September 7, 2007, taking into account the sentence credit that the defendant received for time served while on bond and awaiting disposition of the 2002 case.

January 29, 2013, the Office of Adult Probation, pursuant to General Statutes § 53a-32,[3] obtained a warrant for the defendant's arrest on the ground that he had violated his probation. Thereafter, the defendant was arrested and charged with violating his probation.

The defendant was arraigned on the December, 2012 charges on February 6, 2013, and on the violation of probation charge on February 7, 2013. At his arraignment on the violation of probation charge, a question arose between the defendant and the state about whether the defendant's probation under the 2002 sentence had terminated prior to his arrest on the 2012 charges. Thereafter, the defendant filed a motion to dismiss the violation of probation charge on the ground that he was not legally on probation at the time of the execution of the violation of probation warrant on January 29, 2013, which was based on the defendant's arrest on the 2012 narcotics charges. The defendant did not challenge the trial court's subject matter jurisdiction at that time, and the trial court did not rule on jurisdictional matters. Arguments were heard on November 4, 2013, and the trial court denied the motion to dismiss in a written memorandum of decision. Subsequently, the defendant entered a conditional plea of nolo contendere on the violation of probation charge, reserving his right to appeal from the denial of his motion to dismiss. Upon agreement between the defendant and the state that he would serve only one half of his remaining nine years, the defendant was sentenced to four and one-half years of imprisonment on July 3, 2014, to be served concurrently with the sentence imposed for his 2012 narcotics charges. This appeal followed. Additional facts will be set forth as necessary.

[3] General Statutes § 53a-32 (a) provides in relevant part: "At any time during the period of probation . . . the court or any judge thereof may issue a warrant for the arrest of a defendant for violation of any of the conditions of probation . . . ."

I

The defendant first claims that the trial court did not have subject matter jurisdiction over the probation violation proceeding because he was not on probation at the time the warrant for his arrest for violation of probation was executed or at the time of the hearing on his motion to dismiss. Specifically, he argues that his probationary period concluded no later than November 19, 2011, and therefore he was not on probation at the time of the 2012 narcotics charges, which formed the basis of his violation of probation. Accordingly, he argues, the court lacked subject matter jurisdiction over the probation violation proceeding. We disagree.

We first set forth our standard of review. "[B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Arriaga* v. *Commissioner of Correction*, 120 Conn. App. 258, 261, 990 A.2d 910 (2010), appeal dismissed, 303 Conn. 698, 36 A.3d 224 (2012). "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.) *Amodio* v. *Amodio*, 247 Conn. 724, 727–28, 724 A.2d 1084 (1999).

"Article fifth, § 1 of the Connecticut constitution proclaims that '[t]he powers and jurisdiction of the courts shall be defined by law' "; *State* v. *Carey*, 222 Conn.

299, 305, 610 A.2d 1147 (1992); and General Statutes § 51-164s provides in relevant part that "[t]he Superior Court shall be the sole court of original jurisdiction for all causes of action, except such actions over which the courts of probate have original jurisdiction, as provided by statute. . . ." "Because [r]evocation is a continuing consequence of the original conviction from which probation was granted . . . and the inherent authority to convict and sentence a defendant flows from the authority to adjudicate a criminal cause of action, the subject matter jurisdiction over a probation revocation proceeding derives from the original presentment of the information." (Citation omitted; internal quotation marks omitted.) Id., 306.

In the present case, the trial court's subject matter jurisdiction derived from the defendant's original criminal proceeding in 2002, in which he was convicted of the sale of narcotics. As part of his 2002 sentence, a probationary period was imposed, and it is this probationary period that is at issue. Therefore, the trial court maintained subject matter jurisdiction over the defendant's subsequent violation of probation charge.

II

The defendant next claims that the trial court improperly denied his motion to dismiss the violation of probation charge because his probationary period had expired. Specifically, the defendant argues that he had completed the probationary portion of his 2002 sentence prior to his arrest on the 2012 charges, which formed the basis of the arrest warrant for the violation of probation, because his probation commenced following his maximum release date of September 7, 2007, as stipulated by the parties and after he was physically released from prison, and terminated three years later, on September 7, 2010. The state argues that, because the defendant was charged in 2006 while on parole

for the 2002 sentence, the start of his probation was delayed. Specifically, the state claims that the defendant's probationary period was delayed until he was released from incarceration on July 20, 2012. The trial court found that the defendant began his probation on the 2002 sentence after he was released from custody on July 20, 2012. We agree with the trial court.

At the outset, we must distinguish between the effects of parole and probation on the status of the defendant. Pursuant to General Statutes § 54-125a (a),[4] a defendant who received a definite sentence or total effective sentence of more than two years may be approved to be released on parole at the discretion of the Board of Pardons and Paroles to serve out the remainder of his custodial sentence in the community. If released on parole, the defendant is not considered released from custody or imprisonment. Section 54-125a (g) indicates that "[a]ny person released on parole under this section *shall remain in the custody of the Commissioner of Correction* and be subject to supervision by personnel of the Department of Correction during such person's period of parole." (Emphasis added.)

"The rights of an individual on [parole] are unique in that they lie somewhere between those of a [probationer] and those of an incarcerated inmate . . . . [S]upervision of the [parolee] continues to be vested in the [D]epartment of [C]orrection, as it is for someone who is incarcerated. . . . Conversely, a probationer is subject to judicial control and the court has the freedom

[4] General Statutes § 54-125a (a) provides in relevant part: "A person convicted of one or more crimes who . . . received a definite sentence or total effective sentence of more than two years, and who has been confined under such sentence or sentences for not less than one-half of the total effective sentence . . . may be allowed to go at large on parole . . . if (A) it appears from all available information . . . that there is a reasonable probability that such inmate will live and remain at liberty without violating the law, and (B) such release is not incompatible with the welfare of society."

to modify or enlarge the conditions of probation if necessary. . . . Clearly the situations of a prisoner on [parole] and a person on probation are different. The legislature has set out separate schemes of treatment with different consequences of not complying with the established conditions. It is in keeping with these schemes that a violation of probation cannot occur until the probationary period has begun." (Citations omitted; internal quotation marks omitted.) *State* v. *Deptula*, 34 Conn. App. 1, 10, 639 A.2d 1049 (1994). In the present case, when the defendant was physically released from prison in 2005, he was on parole. Therefore, he was still under the custody of the Commissioner of Correction at the time of the 2006 charges. Consequently, his probationary period did not begin until he was released from the custody of the Commissioner of Correction on July 20, 2012.

Having resolved the distinctions between probation and parole, we now set forth our standard of review. "A trial court may continue or revoke the sentence of probation or conditional discharge or modify or enlarge the conditions, and, if such sentence is revoked, require the defendant to serve the sentence imposed or impose any lesser sentence. . . . In making this determination, the trial court is vested with broad discretion. . . . [H]owever, an issue of law must be determined before any question of discretion is reached. The court's legal conclusion that the defendant was subject to a charge of violation of probation is subject to our plenary review." (Internal quotation marks omitted.) *State* v. *Outlaw*, 60 Conn. App. 515, 522, 760 A.2d 140 (2000), aff'd, 256 Conn. 408, 772 A.2d 1122 (2001).

Pursuant to General Statutes § 53a-31 (a), "[a] period of probation or conditional discharge commences on

the day it is imposed, unless the defendant is imprisoned, in which case it commences on the day the defendant is *released* from such imprisonment."[5] (Emphasis added.) As previously determined by this court, "the term release as used in . . . § 53a-31 includes physical release from custody . . . and . . . probation commences by operation of law on the date of the actual release from imprisonment." (Internal quotation marks omitted.) *State* v. *Outlaw*, supra, 60 Conn. App. 521. "Although probation may continue during a period of incarceration, it does not commence pursuant to § 53a-31 (a) unless the defendant is released from imprisonment." Id., 523–24.[6]

Our holding in *Outlaw* is controlling in the present case. In *Outlaw*, the defendant was sentenced to a period of twenty years of incarceration, execution suspended after ten years, followed by three years of probation. Id., 517. The defendant was continuously incarcerated from July 9, 1985, to August 6, 1996. Id., 518. During his incarceration he was convicted of three additional offenses for which "unrelated consecutive

[5] The defendant's reliance on § 53a-31 (b) is misplaced. General Statutes § 53a-31 (b) provides in relevant part: "The issuance of a warrant or notice to appear . . . for violation pursuant to section 53a-32 shall interrupt the period of the sentence until a final determination as to the violation has been made by the court." The defendant claims that the 2006 arrest did not toll the running of his period of probation. This court has held that "[p]ursuant to . . . § 53a-31 (b), the running of the probationary period is tolled where the revocation is commenced pursuant to the provisions of . . . § 53a-32." (Emphasis omitted.) *State* v. *Egan*, 9 Conn. App. 59, 73, 514 A.2d 394, cert. denied, 201 Conn. 811, 516 A.2d 886 (1986). In the present case, the issue is not whether the defendant's probationary period was tolled by his 2006 arrest, but rather whether the probationary period began to run in the first place. Because the defendant's probationary period did not commence until he was released from imprisonment in 2012, § 53a-31 (b) is inapplicable.

[6] See *State* v. *Strickland*, 39 Conn. App. 722, 727, 667 A.2d 1282 (1995) (holding that it was possible for defendant to be concurrently in custody and on probation as result of separate convictions), cert. denied, 235 Conn. 941, 669 A.2d 577 (1996). Those facts, however, are not present in this case.

sentences were imposed on [him] before he completed the incarceration portion of his [first] sentence." (Emphasis omitted.) Id., 518, 523.[7] His probation would have begun on February 3, 1995, but he was incarcerated until August 6, 1996, on the additional offenses. Id., 518, 520 and n.7. Because the defendant in *Outlaw* was not released from custody until August 6, 1996, after all his sentences had been served, this court held that the defendant did not begin his probationary period for the 1985 sentence until he was released from incarceration in 1996. Id., 523–24.

Similarly, in the present case, the defendant was continuously in the custody of the Commissioner of Correction, whether incarcerated or on parole, until his release in 2012. He was granted parole on April 29, 2005, and would have remained in the custody of the Commissioner of Correction while on parole until his maximum release date of September 7, 2007. Had he successfully completed his parole, the defendant would have then begun his three years of probation on September 7, 2007. His arrest in 2006, however, interrupted his parole because he was subsequently convicted and incarcerated on the 2006 charges. Although the defendant was no longer physically incarcerated beginning on April 29, 2005, he was not released from the custody of the

[7] It is not pertinent for the purposes of this analysis that the defendant's 2006 sentence ran concurrent to his 2002 sentence, as opposed to running consecutively as in the *Outlaw* case. This court's analyses in *Outlaw* and *McFarland* indicate that whether the defendant is in the custody of the Commissioner of Correction is the key consideration in determining whether the defendant has been released for the purposes of § 53a-31 (a). See *State* v. *Outlaw*, supra, 60 Conn. App. 523 ("[t]he [*McFarland*] decision's rationale is that the defendant is not in the custody of the commissioner of correction under either circumstance"); see also *State* v. *McFarland*, 36 Conn. App. 440, 448, 651 A.2d 285 (1994) ("[w]e hold that the term release as used in . . . § 53a-31 includes physical release from custody . . . and that probation commences by operation of law on the date of the actual release from imprisonment"), cert. denied, 232 Conn. 916, 655 A.2d 259 (1995).

Commissioner of Correction, and, therefore, his probation did not commence. To hold that the defendant could serve the entirety of his probationary period while incarcerated would lead to results that would undermine the purposes of and distinctions between the probation and parole statuses.[8]

Because a defendant cannot be released from imprisonment for the purposes of commencing his probationary period under § 53a-31 (a) until he is no longer in the custody of the Commissioner of Correction, and our case law has determined that one on parole has not functionally been "released from imprisonment," we conclude that the defendant did not commence his probation until he was released from custody on July 20, 2012. Accordingly, the trial court properly determined that the defendant was on probation at the time that the arrest warrant for the violation of probation was issued on January 29, 2013, and properly denied the motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

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[8] See *State* v. *McFarland*, 36 Conn. App. 440, 446, 651 A.2d 285 (1994) ("Although penal statutes such as § 53a-31 et seq. are to be strictly construed in favor of the accused, such construction should not exclude common sense so that absurdity results and the evident design of the legislature is frustrated. . . . If two constructions of a statute are possible, we will adopt the one that makes the statute effective and workable, not the one leading to difficult and bizarre results." [Citation omitted.]), cert. denied, 232 Conn. 916, 655 A.2d 259 (1995).

ROSE B.* *v.* PRINCESS DICKSON DAWSON
(AC 39695)

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

Syllabus

The defendant appealed to this court from the judgment of the trial court granting the plaintiff's application for a civil protection order. The plaintiff had filed the application, pursuant to statute (§ 46b-16a), against the defendant, a former friend, claiming that she had been the victim of stalking by the defendant and that she feared for her safety and well-being. *Held*:

1. The defendant could not prevail on her claim that the trial court abused its discretion in granting the application because the plaintiff did not present sufficient evidence to warrant such relief; because the record did not contain either a memorandum of decision or a transcribed copy of an oral decision signed by the trial court stating the reasons for its decision as required by the rules of practice (§ 64-1 [a]), and the defendant merely included a copy of three pages of the trial transcript that was not signed by the court, which did not reveal the factual or legal bases for the court's decision, this court's review of the record did not afford it a basis on which to conclude that errors were made, and this court would not speculate with regard to the rationale of the trial court's decision nor presume that the court acted erroneously.
2. The trial court did not abuse its discretion in denying the defendant's request for reconsideration, in which she alleged that because the application filed by the plaintiff did not include dates, she lacked adequate notice as to the specific facts that formed the basis for the plaintiff's application and was unduly surprised at the hearing by the plaintiff's version of the events; the defendant did not raise any issue with respect to a lack of specificity in the plaintiff's application prior to the date of the full hearing, during the presentation of evidence at the hearing, or after the court heard the evidence but prior to the time that it rendered its decision in this matter, and because the defendant did not assert that she was prejudiced by the lack of specificity in the plaintiff's application until after the court announced its ruling, which was adverse to her, the trial court properly found the defendant's expressed concern to be untimely.

Argued May 31—officially released August 29, 2017

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

Procedural History

Application for civil order of protection, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kamp*, *J.*, granted the application; thereafter, following a hearing, the court, *Hon. Edward F. Stodolink*, judge trial referee, continued the order of protection, and the defendant appealed to this court. *Affirmed.*

Robert Berke, for the appellant (defendant).

Opinion

KELLER, J. The defendant, Princess Dickson Dawson, appeals from the judgment of the trial court granting the application for a civil protection order filed by the plaintiff, Rose B.[1] The defendant claims (1) that the court abused its discretion in granting the application because the plaintiff did not present sufficient evidence to warrant such relief[2] and (2) the court improperly denied the defendant's "request for a continuance and reconsideration." We affirm the judgment of the trial court.

The record reveals the following facts. On September 27, 2016, the plaintiff, pursuant to General Statutes § 46b-16a, filed an application for an order of civil protection against the defendant, who is described in the application as the plaintiff's "former friend," a person whom she has known for more than fifteen years. In her application, the plaintiff alleged in relevant part that she had been the victim of stalking by the defendant and that she feared for her "safety [and] well-being." She referred to three incidents involving her and the

[1] The plaintiff did not file a brief in connection with this appeal. We consider the appeal on the basis of the defendant's brief and the record.

[2] We observe that the defendant sets forth three claims in her brief. We deem the first two of those claims to be materially indistinguishable and, therefore, consider them together.

defendant. One incident took place outside of her place of employment, a second incident took place at a Walmart store in Stratford, and a third incident took place at a courthouse. The plaintiff stated that, during the incident at Walmart, the defendant and the defendant's daughter "followed [her] into every aisle." The plaintiff requested that the court order that the defendant (1) not assault, threaten, abuse, harass, follow, interfere with, or stalk her; (2) stay away from her home; (3) not contact her in any manner; and (4) stay 100 yards away from her. The court, *Kamp, J.*, granted the application and issued an ex parte civil protection order.

The court, *Hon. Edward F. Stodolink*, judge trial referee, held a hearing on the application on October 6, 2016. At the hearing, the court considered the application brought by the plaintiff against the defendant as well as a separate application brought by the plaintiff against the defendant's daughter.[3] The plaintiff testified with respect to three separate incidents. The first was on May 10, 2016, at the Stratford Walmart store; the second was on June 25, 2016, at a public park in Bridgeport; the third was on September 26, 2016, at a courthouse in Bridgeport. The court also heard testimony from the defendant, the defendant's daughter, and Sylveri Gonzalez, a victim's advocate. At the conclusion of the hearing, the court granted the plaintiff's application, with the conditions sought by the plaintiff to remain in effect until October 6, 2017. The court denied the defendant's oral motion, raised immediately after the court announced its ruling, to reconsider its decision. This appeal followed.

I

First, the defendant, interpreting the evidence in the light most favorable to the nonmovant, argues that the

[3] The court denied the application brought against the defendant's daughter. The court's resolution of that matter is not a subject of the present appeal.

court abused its discretion in granting the application because the plaintiff did not present sufficient evidence to warrant such relief. We disagree.

In the appendix to her brief, the defendant has included a copy of what she describes as the "Trial Court's Decision," but it is not in the proper form. The "decision" consists of three pages of the trial transcript. These pages consist of a colloquy between the court, the defendant's counsel, the defendant, and the plaintiff. The transcript is not signed by the trial court. A signed copy of a memorandum of the court's decision does not appear in the court file.

Because the court's judgment in the plaintiff's favor was a final judgment in this matter, the court was obligated under Practice Book § 64-1 (a) "[to] state its decision either orally or in writing . . . . The court's decision shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor. If oral, the decision shall be recorded by a court reporter, and, if there is an appeal, the trial court shall create a memorandum of decision for use in the appeal by ordering a transcript of the portion of the proceedings in which it stated its oral decision. The transcript of the decision shall be signed by the trial judge and filed with the clerk of the trial court." Pursuant to § 64-1 (b), "[i]f the trial judge fails to file a memorandum of decision or sign a transcript of the oral decision in any case covered by subsection (a), the appellant may file with the appellate clerk a notice that the decision has not been filed in compliance with subsection (a). The notice shall specify the trial judge involved and the date of the ruling for which no memorandum of decision was filed. The appellate clerk shall promptly notify the trial judge of the filing of the appeal and the notice. The trial court shall thereafter comply with subsection (a)." The court file reflects that the defendant, who bears the burden of perfecting the

record for presentation on appeal; Practice Book §§ 60-5, 61-10 (a); did not file a motion pursuant to § 64-1 (b) with the appellate clerk. Thus, we are unable readily to identify the decision from which the defendant now appeals.

"When the record does not contain either a memorandum of decision or a transcribed copy of an oral decision signed by the trial court stating the reasons for its decision, this court frequently has declined to review the claims on appeal because the appellant has failed to provide the court with an adequate record for review. . . . Moreover, [t]he requirements of Practice Book § 64-1 are not met by simply filing with the appellate clerk a transcript of the entire trial court proceedings. . . . Despite an appellant's failure to satisfy the requirements of . . . § 64-1, this court has, on occasion, reviewed claims of error in light of an unsigned transcript as long as the transcript contains a sufficiently detailed and concise statement of the trial court's findings." (Citations omitted; internal quotation marks omitted.) *Stechel* v. *Foster*, 125 Conn. App. 441, 445, 8 A.3d 545 (2010), cert. denied, 300 Conn. 904, 12 A.3d 572 (2011).

As stated previously in our discussion, the defendant has drawn our attention to the pages of the trial court transcript in which the court stated that it granted the relief sought in the plaintiff's application. The unsigned transcript, however, does not reveal a sufficiently detailed and concise statement of the court's findings. With respect to its decision to grant the relief sought in the plaintiff's application, the court merely stated: "As to [the defendant], I will grant the application."

A careful review of the defendant's arguments reflects her belief that the court committed errors of law or fact in exercising its discretion to grant the application. Because the record does not reveal the

factual or legal bases for the court's decision, our careful review of the record does not afford us a basis on which to conclude that such errors were made. See *Ellen S.* v. *Katlyn F.*, 175 Conn. App. 559, 565, A.3d (2017), and cases cited therein. This court will neither speculate with regard to the rationale underlying the court's decision nor, in the absence of a record that demonstrates that error exists, presume that the court acted erroneously. See, e.g., *State* v. *Milner*, 325 Conn. 1, 13, 155 A.3d 730 (2017); *Stacy B.* v. *Robert S.*, 165 Conn. App. 374, 382, 140 A.3d 1004 (2016). Accordingly, we reject this claim.

II

Next, the defendant claims that the court "erred in denying [her] request for a continuance and reconsideration." The defendant argues that the court's ruling was improper because "[t]he application [filed by the plaintiff] did not include dates and therefore did not provide [the defendant] with adequate notice as to the specific facts which form the basis of the application." She argues that, at the time of the hearing, she was unduly surprised by the plaintiff's version of the events. We disagree with the defendant that the court's ruling reflected an abuse of discretion.

With respect to the motion for reconsideration,[4] the defendant refers us to the trial transcript, which reflects that, immediately after the court stated that it had granted the plaintiff's application, the defendant's counsel stated: "In regard to [the defendant], you know, what sometimes is complicated about these is that sometimes the applications are not entirely complete and don't

[4] Although the defendant claims that the court denied a request for a continuance and reconsideration, neither the court file nor the transcript of the proceedings filed by the defendant reflect that the defendant explicitly requested a continuance. The defendant is not entitled to relief in connection with a request for a continuance that was neither raised before nor ruled on by the court.

have all the dates. Now that we are on notice of the dates, would the court . . . consider a motion to reconsider so [that] we can have the opportunity to supply for lack of a better word an alibi regarding the dates that were alleged?" The court replied: "No, because the hearing was set by Judge Kamp some time ago and it was going to go forward today." The defendant's counsel replied: "The only problem is we don't know based on the complaint what the dates were in regards to the complaints." The court stated: "I'll deny your request."

As the defendant correctly observes, the court's denial of the oral motion for reconsideration is entitled to deference by this court. "The granting of a motion for reconsideration . . . is within the sound discretion of the court. The standard of review regarding challenges to a court's ruling on a motion for reconsideration is abuse of discretion. As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did." (Internal quotation marks omitted.) *Shore* v. *Haverson Architecture & Design, P.C.*, 92 Conn. App. 469, 479, 886 A.2d 837 (2005), cert. denied, 277 Conn. 907, 894 A.2d 988 (2006).

From the court's response to the defendant's motion, it appears that the court viewed the defendant's expressed concern to be untimely. The court observed that the matter was scheduled for a hearing by Judge Kamp when he granted the plaintiff's ex parte application for an order of civil protection. Judge Kamp's ruling occurred on September 27, 2016, nine days before the full hearing, which took place on October 6, 2016. The defendant did not raise any issue with respect to a lack of specificity in the plaintiff's application prior to the date of the full hearing, during the presentation of evidence at the hearing, or after the court heard the evidence but prior to the time that it rendered its decision in this matter. Instead, only after the court announced

its ruling, which was adverse to the defendant, did the defendant's counsel for the first time assert that the defendant was prejudiced by a lack of specificity in the plaintiffs application. In these circumstances, we are not persuaded that the court's decision reflects an abuse of discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

GAYLORD SALTERS *v.* COMMISSIONER OF CORRECTION (AC 38371)

Lavine, Mullins and Bear, Js.

Syllabus

The petitioner, who had been convicted of various crimes in connection with a gang related shooting, filed a second petition for a writ of habeas corpus, claiming, inter alia, that the counsel who represented him in connection with his first habeas petition provided ineffective assistance in failing to raise claims that the petitioner's criminal trial counsel was ineffective for not objecting to erroneous jury instructions or requesting an evidentiary hearing pursuant to *Brady* v. *Maryland* (373 U.S. 83), which the petitioner claimed would have disclosed material, exculpatory impeachment evidence. He also alleged that his first habeas counsel was ineffective for having failed to raise claims that the petitioner's appellate counsel on direct appeal was ineffective for having failed to raise the *Brady* violation and a claim of prosecutorial impropriety. The habeas court rendered judgment denying the second habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The record was inadequate to review the petitioner's claim that the habeas court erred in failing to apply the strict standard of materiality to his *Brady* claims, in which he alleged that the prosecutor knowingly relied on false testimony; although the amended habeas petition included factual allegations that the prosecution knowingly relied on false testimony, the habeas court's memorandum of decision was devoid of any factual findings or legal analysis involving the allegations of false testimony, and this court would not address a claim that was not decided by the habeas court.
2. The petitioner could not prevail on his claim that the habeas court erred in denying his claim that his first habeas counsel was ineffective for

having failed to raise a claim that the petitioner's trial counsel provided ineffective assistance by failing to object to certain jury instructions on intent, which included the full statutory definition for specific and general intent crimes, even though the petitioner had been charged with specific intent crimes only; although it was improper for the trial court to include the full statutory definition of intent in its charge to the jury, it was not reasonably possible that the jury was misled and the petitioner was not harmed thereby, as the trial court, in its instructions on the intent required for the crimes charged, repeatedly referred to the proper specific intent required for the commission of those crimes so as to mitigate any harm to the petitioner, whereas it gave the erroneous instruction once.

3. The habeas court's determination that appellate counsel made a reasonable strategic decision to forgo on direct appeal a claim of prosecutorial impropriety was supported by the record, the evidence having shown that counsel decided to forgo the claim because she considered it to be meritless, and, therefore, because appellate counsel was not deficient for having failed to bring such a claim, a claim of ineffective assistance of first habeas counsel for failing to claim that appellate counsel was ineffective on that ground could not stand; moreover, although certain testimony by a state's witness could have indicated that he was pressured by the police to make a statement, the prosecutor's statements to the jury that the witness was not told to identify the petitioner as the driver of the vehicle from which gunshots were fired and was not directed what to say in his statement to the police were reasonable characterizations of the evidence and were not improper.

Argued April 11—officially released August 29, 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, *Cobb*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Arthur L. Ledford, assigned counsel, for the appellant (petitioner).

Rita M. Shair, senior assistant state's attorney, with whom were *Patrick J. Griffin*, state's attorney, and, on the brief, *Adrienne Maciulewski*, assistant state's attorney, for the appellee (respondent).

Opinion

BEAR, J. The petitioner, Gaylord Salters, 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 (1) failed to apply the strict standard of materiality to his claim of a *Brady* violation,[2] which included factual allegations that the prosecution knowingly relied on false testimony; (2) denied his claim of ineffective assistance by his prior habeas trial counsel (habeas counsel) for failing to raise a claim that the petitioner's criminal trial counsel (trial counsel) was ineffective for failing to raise a claim of instructional error;[3] (3) failed to apply the "findings" that this court made in his appeal from the judgment in his first habeas case; and (4) found that the decision of his appellate counsel on direct appeal (appellate counsel) to forgo raising a prosecutorial impropriety claim was a reasonable strategic decision. We affirm the judgment of the habeas court.

As this court previously stated, the jury reasonably could have found the following facts in the petitioner's criminal trial. "On November 24, 1996, the [petitioner] participated in a gang related shooting in New Haven. The [petitioner], a member of the Island Brothers street

[1] The habeas court granted the petitioner certification to appeal. See General Statutes § 52-470.

[2] See *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1986).

[3] As stated exactly by the petitioner, the second issue he raises on appeal asks "whether the habeas court erred when it failed to consider the trial court's jury instruction defining 'acting intentionally,' which included the definition for specific and general intent . . . ." On the basis of our reading of the petitioner's arguments in support of this claim, we understand his claim to be that the habeas court improperly denied his claim of ineffective assistance of habeas counsel for failing to raise a claim that his trial counsel was ineffective for failing to raise a claim of instructional error when the habeas court failed to adequately address the legal ramifications of the trial court's reading of the statutory definition of "acting intentionally."

gang, drove behind an automobile being driven by Daniel Kelley. Either the [petitioner] or an accomplice riding in his automobile fired on Kelley's automobile. Kelley sustained a gunshot wound to his shoulder and lost control of his automobile, causing it to crash into two vehicles parked nearby. Kelley's passenger, Kendall Turner, a member of the Ghetto Boys street gang, sustained a gunshot wound to his elbow. The Island Brothers and the Ghetto Boys, both of which were involved in illegal activity, had a hostile relationship marked by gun violence between rival gang members." *State* v. *Salters*, 89 Conn. App. 221, 222–23, 872 A.2d 933, cert. denied, 274 Conn. 914, 879 A.2d 893 (2005).

The following factual and procedural background is relevant to our resolution of the petitioner's appeal. Following a jury trial, the petitioner was convicted of two counts of assault in the first degree in violation of General Statutes §§ 53a-59 (a) (5) and 53a-8, and one count of conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-59 (a) (5) and 53a-48 (a). Id., 222. The petitioner directly appealed to this court, claiming that the trial court violated his right to present a defense by precluding him from presenting testimony from an alibi witness at trial. Id. This court affirmed his conviction. Id., 236.

In 2006, the petitioner filed his first petition for a writ of habeas corpus, which he subsequently amended. In his second amended petition, he claimed that he was denied due process because the prosecutor withheld material, exculpatory impeachment information, which constituted a *Brady* violation, in that the prosecutor failed to provide such information pertaining to Kendall Turner, a key witness for the state. *Salters* v. *Commissioner of Correction*, 141 Conn. App. 81, 83–84, 60 A.3d 1004, cert. denied, 308 Conn. 932, 64 A.3d 330 (2013). He also alleged ineffective assistance of counsel

because his trial counsel failed (1) to sufficiently investigate, discover, and present to the jury information regarding Turner's statement to the police and (2) to conduct sufficient discovery.[4] Id., 84. After conducting a habeas trial, the court, *Fuger*, *J.*, rendered judgment denying the petition. Id. The habeas court determined that defense counsel's testimony was more credible than the petitioner's testimony, that defense counsel adequately investigated Turner's criminal history prior to trial, and that the prosecutor disclosed all of the information he had pertaining to Turner. Id. The petitioner subsequently appealed to this court.

On appeal, this court concluded that the habeas court did not err in rejecting the petitioner's claim of ineffective assistance of counsel. Id., 86. Additionally, this court held that the petitioner's *Brady* claim was procedurally defaulted because, at the time of trial and his direct appeal, he knew of the existence of the records that he claimed in his habeas petition were unlawfully withheld, and he could have raised the alleged *Brady* violation at trial by requesting an evidentiary hearing on the potential *Brady* evidence or on direct appeal by raising a *Brady* claim. Id., 89–90. Consequently, this court affirmed the habeas court's judgment denying the petition; id., 91; and our Supreme Court denied certification to appeal. *Salters* v. *Commissioner of Correction*, 308 Conn. 932, 64 A.2d 330 (2013).

On June 2, 2010, the then self-represented petitioner filed a second petition for a writ of habeas corpus, which is the subject of the present appeal. The habeas court appointed counsel for him. In his fifth amended petition, the petitioner set forth seventeen counts, four of which are relevant to this appeal. In count one, the

[4] The habeas court determined that the petitioner had abandoned an additional claim of ineffective assistance of counsel for the alleged failure to advise the petitioner of his right to apply for sentence review sufficiently. *Salters* v. *Commissioner of Correction*, supra, 141 Conn. App. 84 n.1.

petitioner asserted that his habeas counsel provided ineffective assistance by failing to allege that his trial counsel provided ineffective assistance by failing to request an evidentiary hearing, pursuant to *Brady*, which would have revealed material, exculpatory impeachment evidence. Additionally, in count fourteen, the petitioner claimed that his habeas counsel provided ineffective assistance by failing to allege that trial counsel provided ineffective assistance when he failed to object to erroneous jury instructions, which prejudiced the petitioner's case. In count six, the petitioner asserted that his habeas counsel provided ineffective assistance by failing to allege that appellate counsel provided ineffective assistance by failing to "raise the *Brady* violation . . . ." Additionally, in count seven, the petitioner claimed that his habeas counsel provided ineffective assistance by failing to allege that his appellate counsel provided ineffective assistance by failing to raise a claim of prosecutorial impropriety because the prosecutor misstated evidence during closing arguments.

On July 22, 2015, the habeas court, *Cobb*, *J.*, rendered judgment denying the petition. As to count one, the court found that the petitioner had failed to establish prejudice by proving that there was a reasonable probability that the result in his criminal trial would have been different. The court determined that further impeachment of Turner would not have added significantly to his cross-examination. On count fourteen, the court found that the jury instruction was appropriate and, therefore, the petitioner had failed to prove that his trial counsel's or his habeas counsel's performance was deficient or that he was prejudiced. As to count six, the court found that there was an inadequate record on direct appeal to raise a previously unraised *Brady* claim to satisfy *Golding* review.[5] Additionally, the court

[5] See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

had already found that the petitioner failed to prove prejudice regarding the claimed *Brady* violation and that appellate counsel's decision to forgo such a claim was a strategic decision. Accordingly, the court denied this claim as to appellate counsel. Finally, on count seven, the court found that there was no evidence that appellate counsel could have satisfied the requirements of *Golding* to prevail on a previously unraised claim of prosecutorial impropriety.[6] Additionally, the habeas court found that appellate counsel's decision to forgo this claim, which she considered weak, was a reasonable strategic decision and that the petitioner failed to establish that he would have prevailed on such a claim. Consequently, the court denied the petition for a writ of habeas corpus. Thereafter, the habeas court granted the petitioner certification to appeal, and this appeal followed.

"We begin with the applicable standard of review and the law governing ineffective assistance of counsel claims. The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* requires that a petitioner satisfy both

[6] Prosecutorial impropriety claims are not subject to analysis pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). *State* v. *Fauci*, 282 Conn. 23, 34, 917 A.2d 978 (2007).

a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Citation omitted; internal quotation marks omitted.) *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 668–69, 159 A.3d 1112 (2017).

"[When] applied to a claim of ineffective assistance of prior habeas counsel, the *Strickland* standard requires the petitioner to demonstrate that his prior habeas counsel's performance was ineffective and that this ineffectiveness prejudiced the petitioner's prior habeas proceeding. . . . [T]he petitioner will have to prove that one or both of the prior habeas counsel, in presenting his claims, was ineffective and that effective representation by habeas counsel establishes a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . . Therefore, as explained by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992), a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of [trial] counsel must essentially satisfy *Strickland* twice: he must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his [trial] counsel was ineffective. . . . We have characterized this burden as presenting a herculean task . . . ." (Citations omitted; internal quotation marks omitted.) *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 438–39, 119 A.3d 607 (2015).

Our standard of review for claims of ineffective assistance of appellate counsel is similar. "In regard to the

second prong [of *Strickland*], our Supreme Court distinguished the standards of review for claims of ineffective trial counsel and ineffective appellate counsel. . . . For claims of ineffective appellate counsel, the second prong considers whether there is a reasonable probability that, but for appellate counsel's failure to raise the issue on appeal, the petitioner would have prevailed in his direct appeal, i.e., reversal of his conviction or granting of a new trial. . . . This requires the reviewing court to [analyze] the merits of the underlying claimed error in accordance with the appropriate appellate standard for measuring harm." (Citations omitted; internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, 119 Conn. App. 530, 535, 988 A.2d 881, cert. denied, 296 Conn. 902, 991 A.2d 1103 (2010).

I

The petitioner claims that the habeas court erred in failing to apply the "strict standard of materiality"[7] to his

[7] Such a standard would be more advantageous to the petitioner. "In a classic *Brady* case, involving the state's inadvertent failure to disclose favorable evidence, the evidence will be deemed material only if there would be a reasonable probability of a different result if the evidence had been disclosed. [The] touchstone of materiality [under *United States* v. *Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)] is a reasonable probability of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. . . .

"When, however, a prosecutor obtains a conviction with evidence that he or she knows or should know to be false, the materiality standard is significantly more favorable to the defendant. [A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. . . . This standard . . . applies whether the state solicited the false testimony or allowed it to go uncorrected . . . and is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless beyond a reasonable doubt. . . . This strict standard of materiality

Brady claims in which he alleged that the prosecution knowingly relied on false testimony. We do not review this claim because the petitioner has failed to provide this court with an adequate record for review.

Although the petitioner's fifth amended petition included factual allegations that the prosecution knowingly relied on false testimony, the habeas court's memorandum of decision is devoid of any factual findings or legal analysis involving the false testimony allegations raised by the petitioner. "It is fundamental that claims of error must be distinctly raised and decided in the [habeas] court before they are reviewed on appeal. As a result, Connecticut appellate courts will not address issues not decided by the [habeas] court." (Internal quotation marks omitted.) *Bozelko* v. *Commissioner of Correction*, 162 Conn. App. 716, 717 n.1, 133 A.3d 185, cert. denied, 320 Conn. 926, 133 A.3d 458 (2016); see also *Crest Pontiac Cadillac, Inc.* v. *Hadley*, 239 Conn. 437, 444 n.10, 685 A.2d 670 (1996) (claims "neither addressed nor decided" by trial court not properly before appellate tribunal). "It is the responsibility of the appellant to provide an adequate record for review . . . ." Practice Book § 60-5. Accordingly, we cannot and do not address the petitioner's claim that the court applied the wrong standard of materiality to his *Brady* claims.[8]

is appropriate in such cases not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process. . . . In light of this corrupting effect, and because the state's use of false testimony is fundamentally unfair, prejudice sufficient to satisfy the materiality standard is readily shown . . . such that reversal is virtually automatic . . . unless the state's case is so overwhelming that there is no reasonable likelihood that the false testimony could have affected the judgment of the jury." (Citations omitted; internal quotation marks omitted.) *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 370–73, 71 A.3d 512 (2013).

[8] As to his claim on appeal that the habeas court erred in failing to apply the "findings" of this court in *Salters* v. *Commissioner of Correction*, supra, 89 Conn. App. 221, to his claim that habeas counsel was ineffective for having failed to allege that appellate counsel was ineffective for failing to

II

The petitioner claims that the habeas court erred in denying his assertion that his habeas counsel was ineffective in failing to raise a claim that trial counsel was ineffective for failing to object to the jury instructions because they contained errors that made it easier for the jury to find him guilty. Specifically, the petitioner argues that the trial court's charge to the jury included the full statutory definition of "acting intentionally," which included the definitions for both specific and general intent. As the petitioner was charged only with specific intent crimes—two counts of assault in the first degree and one count of conspiracy to commit assault in the first degree—he argues that the jury was allowed to find him guilty of specific intent crimes while utilizing the lower standard of general intent. Because this improper definition was repeatedly referred to throughout the jury charge, the petitioner argues that the jury was misled. We agree that it was improper for the trial court to have included the full statutory definition of intent but conclude that the petitioner was not harmed thereby or by habeas counsel's failure to raise that claim in the petitioner's first habeas proceeding.

The following additional facts are relevant to the resolution of this claim. The trial court instructed the jury as follows: "Section 53a-59 (a) (5) of the Connecticut General Statutes provides that a person is guilty of assault in the first degree when: With intent to cause physical injury to another person, he causes such injury to such person by means of the discharge of a firearm. . . .

bring a *Brady* claim, the petitioner acknowledges that that claim is dependent on a favorable determination by this court on his materiality claim. Because we conclude that he has not provided an adequate record to review his materiality claim and the habeas court otherwise concluded that his *Brady* claims were immaterial, we do not address his third claim on appeal.

"For you to find the [petitioner] guilty of this charge, the state must prove each of the following elements beyond a reasonable doubt: (1) that the [petitioner] intended to cause physical injury to another person; (2) that the [petitioner] caused physical injury to that person; and (3) that he caused that injury by means of the discharge of a firearm.

"The state must first prove beyond a reasonable doubt that the [petitioner] intended to cause physical injury to another person. What the [petitioner] intended is a question of fact for you to determine.

"Our statutes provide that a person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct."

After setting forth the trial court's instruction on the elements of assault in the first degree and comparing it to the model jury instruction on the same charge, the habeas court found that the trial court's instruction was appropriate. The court therefore concluded that the petitioner had failed to meet his burden of proving that trial counsel's or habeas counsel's performance was deficient or that he was prejudiced by any deficient performance.

The standard of review for claims of instructional impropriety is well established. "[I]ndividual jury instructions should not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper

verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury." (Internal quotation marks omitted.) *State* v. *Revels*, 313 Conn. 762, 784, 99 A.3d 1130 (2014), cert. denied, U.S. , 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015). "An improper instruction on an element of an offense . . . is of a constitutional dimension." (Internal quotation marks omitted.) *State* v. *Flores*, 301 Conn. 77, 83, 17 A.3d 1025 (2011). "Finally, because a challenge to the validity of a jury instruction presents a question of law, we exercise plenary review." *State* v. *Jones*, 320 Conn. 22, 53, 128 A.3d 431 (2015).

"It has become axiomatic, through decisional law, that it is improper for a court to refer in its instruction to the entire definitional language of [General Statutes] § 53a-3 (11), including the [general] intent to engage in conduct, when the charge relates to a crime requiring only the [specific] intent to cause a [precise] result." (Internal quotation marks omitted.) *Barlow* v. *Commissioner of Correction*, 131 Conn. App. 90, 95 n.2, 26 A.3d 123, cert. denied, 302 Conn. 937, 28 A.3d 989 (2011). "Although [our appellate courts] have stated that [i]t is improper for the trial court to read an entire statute to a jury when the pleadings or the evidence support a violation of only a portion of the statute . . . that is not dispositive. We must determine whether it is reasonably possible that the jury was misled by the trial court's instructions." (Citation omitted; internal quotation marks omitted.) *State* v. *DeJesus*, 260 Conn. 466, 474, 797 A.2d 1101 (2002). Our appellate courts consistently have held that the risk of juror confusion from an

improper intent instruction has been "eliminated by the trial court's numerous proper instructions on the elements of [the charged offense]." (Internal quotation marks omitted.) Id., 475; see also, e.g., *State* v. *Montanez*, 277 Conn. 735, 745–47, 894 A.2d 928 (2006) (holding no reasonable possibility jury misled by general instruction or reference to principle of general intent eleven times because trial court repeatedly gave clear instructions on specific intent required for manslaughter); *State* v. *Austin*, 244 Conn. 226, 236–37, 710 A.2d 732 (1998) (any possible risk of jury confusion over intent element eliminated by numerous proper instructions on elements of murder and because trial court distinguished intent required for manslaughter and murder); *State* v. *Prioleau*, 235 Conn. 274, 321–22, 664 A.2d 743 (1995) (holding not reasonable to believe jury misled by single use of instruction on general intent that contained entire statutory definition of intent when trial court repeatedly instructed jury on specific intent required for murder); but see *State* v. *Sivak*, 84 Conn. App. 105, 112–13, 852 A.2d 812 (holding that jury in assault case misled by improper intent instruction that included statutory definition of intentionally and focused on intended conduct rather than intended result because key issue was whether defendant intended to cause serious physical injury where defendant claimed self-defense and both victim and defendant were intoxicated), cert. denied, 271 Conn. 916, 859 A.2d 573 (2004); *State* v. *Lopes*, 78 Conn. App. 264, 271–72, 826 A.2d 1238 (holding reasonably possible that jury misled because general intent instruction given with definition of murder and this court did not observe numerous proper intent instructions), cert. denied, 266 Conn. 902, 832 A.2d 66 (2003).

"Assault in the first degree is a specific intent crime. It requires that the criminal actor possess the specific

intent to cause serious physical injury to another person." (Internal quotation marks omitted.) *State* v. *Sivak*, supra, 84 Conn. App. 110. "Conspiracy . . . is a specific intent crime, with the intent divided into two elements: [1] the intent to agree or conspire and [2] the intent to commit the offense which is the object of the conspiracy." (Internal quotation marks omitted.) *State* v. *Pond*, 315 Conn. 451, 467–68, 108 A.3d 1083 (2015).

The trial court in the present case instructed the jury on the entire statutory definition of intentionally under § 53a-3 (11).[9] The court referred the jury to that definition once. By quoting the definition of "intentionally" contained in § 53a-3 (11), the court gave instructions on both general intent—the intent to engage in conduct—and specific intent—causing a desired result. The court, thus, improperly provided a general intent instruction when the only crimes with which the petitioner was charged were specific intent crimes.

Nonetheless, we conclude that, despite the trial court's having improperly given the general intent instruction, it is not reasonably possible that the jury was misled. In defining assault in the first degree as to count one, the trial court referred to the specific intent required by the first element. The trial court explained that to be guilty of assault in the first degree as an accessory, the petitioner must have had the same criminal intent required for assault in the first degree—intent to cause physical injury. Additionally, the court instructed that to be found guilty as an accessory, the petitioner must have intended to aid in the commission of assault in the first degree.

[9] Compare the trial court's instruction to General Statutes § 53a-3, which provides in relevant part: "Except where different meanings are expressly specified, the following terms have the following meanings when used in this title . . . (11) A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ."

In defining assault in the first degree in the second count, the trial court referred the jury to the elements of that crime and instructed that the state must have proven all of the elements of the crime beyond a reasonable doubt. The first element of assault in the first degree, as explained to the jury, includes the intent to cause physical injury—specific intent.

In defining conspiracy to commit assault in the first degree, the trial court explained that the state needed to prove beyond a reasonable doubt that the petitioner agreed with one or more persons to engage in conduct constituting a crime. In explaining this first element of conspiracy, the trial court referred the jury to the elements of assault in the first degree. When the trial court instructed the jury on the third element of conspiracy—intent on the part of the petitioner that conduct constituting the crime be performed—the trial court explained that the state must have proven that "the [petitioner] had the specific intent to violate the law when he entered into the agreement to engage in conduct constituting a crime." At this point, however, the trial court referred the jury to its previous instruction "on the law pertaining to intent in [its] instructions on the first count."

We conclude that this case is akin to those in which our courts have determined that repeated proper instructions mitigated any harm caused by the improper general intent instruction, such that it is not reasonable to conclude that the jury was misled. In its instructions on the intent required for accessory to assault in the first degree, the trial court at least thirteen times referred to the specific intent required for assault and accessorial liability. The trial court referred the jury to its instruction on the elements of assault in the first degree, which included the specific intent to cause physical injury, five times in its instruction on the second count of assault in the first degree. In instructing the jury on

conspiracy to commit assault in the first degree, the court at least four times explained that the jury must find that the petitioner had the specific intent to participate in a conspiracy and, by reference to the elements of assault in the first degree, the specific intent to commit assault in the first degree.

The trial court's jury instruction included more than twenty references to the specific intent required for the crimes charged in contrast with two improper uses of a general intent instruction. Although the number of proper intent instructions given alone is not the measure of whether an improper intent instruction has been sufficiently ameliorated; *State* v. *Montanez*, supra, 277 Conn. 746 ("A quantitative 'litmus test' measuring how frequently a trial court gives an irrelevant instruction is . . . insufficient to establish an instruction's tendency to mislead the jury. The tendency of an irrelevant instruction to mislead the jury instead must be considered in the context of the whole charge."); in the context of the whole charge, we are not convinced that it is reasonably possible that the court's improper reading and reference to the full statutory language of general and specific intent misled the jury.

The petitioner analogizes this case to *State* v. *DeBarros*, 58 Conn. App. 673, 755 A.2d 303, cert. denied, 254 Conn. 931, 761 A.2d 756 (2000), in which this court held that it was reasonably possible that the jury was misled when the trial court gave the same improper intent instruction ten times. Id., 682–83. After reading the definition of murder to jury, the trial court in *DeBarros* instructed: "There are two elements that the state has to prove to you beyond a reasonable doubt. The first is that the defendant had the intent to cause the death of another person, [the victim]. Second . . . I'll now go through these two elements with you one by one and explain them to you in a little more detail. The first element is that the defendant had the intent

to cause the death of another person. Our statutes and law [are] that a person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. Intentional conduct is purposeful conduct, rather than conduct that is accidental or inadvertent." (Emphasis omitted; internal quotation marks omitted.) Id., 683–84.

This court concluded, "[t]he order in which the instruction was read likely misled the jury to believe that to intend to cause the death of another person means either to intend to cause the death of that person or to intend to engage in conduct that causes the death of that person. Similarly, when the court referred to the improper instruction as it charged the jury on attempt to commit murder and assault in the first degree with a firearm, the jury was also likely misled in the same manner." Id., 684.

Although the order of the improper intent instruction in *DeBarros* is similar to the present case, this court's determination in *DeBarros* is otherwise distinguishable. First, the trial court in *DeBarros* repeated the erroneous instruction when it instructed the jury on assault in the first degree and attempted murder. See id., 681–82 n.14 and 684. In the present case, the trial court repeatedly instructed the jury that it must find that the petitioner had the requisite specific intent, and the court's references to its prior instructions were to the elements of assault in the first degree, which included the required specific intent. Second, in *DeBarros* the trial court gave the erroneous instruction ten times, and this court determined that those improper instructions were too numerous to be rectified by the court's proper instructions. Id., 683. In the present case, the court gave the erroneous instruction once and only once referred to it, whereas it gave or referenced proper specific intent

instructions on more than twenty occasions. Accordingly, the habeas court properly denied the erroneous jury instruction claim set forth in count fourteen of the petition because the petitioner failed to demonstrate that he was prejudiced by any alleged deficient performance of his trial counsel or habeas counsel.

III

The petitioner also claims that the habeas court improperly found that appellate counsel's decision to forgo a claim of prosecutorial impropriety on direct appeal was a reasonable strategic decision. The petitioner argues that the prosecutor's arguments in summation misrepresented the evidence presented at trial. He asserts that Turner testified that detectives pressured him to identify the petitioner as the driver of the car at the shooting scene. Consequently, the petitioner maintains that the prosecutor mischaracterized the facts in evidence when he argued that there was no evidence that the police pressured Turner into identifying the petitioner. We disagree with the petitioner's characterization of both Turner's testimony and the prosecutor's argument.

The following additional facts and procedural history are relevant to the resolution of this claim. The habeas court found that "[i]n late [1996],[10] the petitioner was arrested and charged with a gang related drive-by shooting that occurred on November 24, [1996].[11] Immediately after the shooting, while he was in the hospital, one of the victims, a member of the rival gang that was in the other vehicle, Kendall Turner, identified the petitioner as the shooter and was a key state's witness at the

[10] The habeas court's memorandum of decision states that the petitioner was arrested and that the crime occurred in 2006, but this is a typographical error, as all of the evidence, and the habeas court's other recitations of facts, indicate that these events occurred in 1996.

[11] See footnote 10 of this opinion.

criminal trial. . . . Due to [a] delay, the trial was not held in this case until December, 2002, six years after the shooting and the petitioner's arrest. Sometime prior to trial, Turner recanted his identification of the petitioner. The state then used his original statement at trial, under the *Whelan* doctrine."[12] (Footnotes added.)

The petitioner presented evidence to the habeas court that at his criminal trial, Turner testified as follows. After being shot, he and Kelley exited the car and proceeded on foot to the home of Turner's aunt. Law enforcement officers arrived at his aunt's home shortly thereafter, and he informed an officer who questioned him that there were three or four African-American males in a Sentra from which the shots were fired, but he did not know any of them and was unable to describe them further. An ambulance was summoned and, as he was being placed into the ambulance, Turner spoke with another law enforcement officer, Detective William Piascyk.

Turner's testimony on cross-examination by trial counsel continued as follows:

"Q. And you told Detective Piascyk that the shots that came from the [Sentra], four-door hardtop, which you believe was dark green; isn't that right?

"A. It's probably—

"Q. But you were not able to tell Detective Piascyk, and, in fact, you did not give Detective Piascyk the names of anybody who had been involved in shooting you; isn't that right?

"A. Yes.

"Q. And that's because you didn't know; isn't that right?

[12] See *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).

"A. Yes.

"Q. But later at the hospital, these two detectives came and showed you these pictures and, at that point, you gave this witness statement; isn't that right, the taped statement? Isn't that right?

"A. Yes.

"Q. And as we all know, at that time you claimed that [the petitioner] was the driver of that car?

"A. Yes.

"Q. But that wasn't the truth, was it?

"A. No.

"Q. So, why did you say that about him?

"A. Pressuring me.

"Q. Pressure?

"A. Yeah.

"Q. From whom?

"A. All of them, detectives.

"Q. And was that Detective Trocchio?

"A. I don't even know their name.

"Q. You don't know his name?

"A. I don't know none of them.

"Q. Because, in fact, you had known [the petitioner] most of your life; isn't that right?

"A. Yes.

"Q. You knew him when you were kids?

"A. Yes.

"Q. You recognized him any time you saw him. And in fact, if [the petitioner] was driving the car, you would

have—and you'd seen him, you would have known who it was; isn't that right?

"A. Yes."

During the rebuttal portion of his closing argument, the prosecutor stated: "You heard about why don't you speculate that the police are somehow *feeding information* to . . . Turner. Is there any shred of evidence, any shred of evidence in this case that anything like that ever happened? No, there is not. And if there isn't any evidence on it, you can't conclude that it had been. Even . . . Turner, who you will have [to] agree was pretty much willing to agree with anything [trial counsel] said yesterday, not only wasn't asked but certainly never said, oh, yeah, I named [the petitioner] *because the police told me to*. Not once. There is no evidence of that, and you can't conclude that it exists when there is no evidence. . . .

"And the evidence, as I would say, does not include any suggestions, any suggestions even from the cooperative Mr. Turner, that the police *told him to say anything*. His response to, why did you say that, when he claimed to be making up the name was, I can't tell you that.

***

"And all of the suggestions that somebody planted this material in his head are contradicted by the evidence that's admitted in this case. What was the reason that Mr. Turner would falsely identify [the petitioner]? There isn't any. There is nothing in this case to suggest that he would falsely identify someone."[13] (Emphasis added.)

[13] Even if we assume that the prosecutor's argument was an incorrect characterization of Turner's testimony, because Turner testified that he was "pressured," the petitioner has not demonstrated that the statement, considered in the full context of a closing argument, is of the type or level of prosecutorial impropriety that has been determined to deprive a defendant of his due process right to a fair trial. See *State* v. *Orellana*, 89 Conn. App. 71, 106, 872 A.2d 506, cert. denied, 274 Conn. 910, 876 A.2d 1202 (2005); see

Trial counsel did not object to the prosecutor's statements at trial. When asked about claims that she could have brought but did not raise on appeal, appellate counsel testified at the habeas trial in the present case that she thought that the prosecutor's closing argument was improper but that she thought it was a weak claim of prosecutorial impropriety.

The habeas court's denial of the petitioner's claim that appellate counsel was deficient in failing to raise a claim of prosecutorial impropriety rested on three grounds. First, the court found that there was no evidence that if appellate counsel had raised the prosecutorial impropriety claim she would have or could have met the standards required under *Golding* for review of such an unpreserved claim.[14] Second, the court determined that appellate counsel made a reasonable strategic decision to forgo the claim because she considered it weak. Third, the court determined that the petitioner had failed to establish that there was a reasonable probability that he would have prevailed on appeal.

"On appeal, the petitioner must overcome the presumption that, under the circumstances, the challenged action might be considered sound [appellate] strategy."

also *State* v. *Maguire*, 310 Conn. 535, 552, 78 A.3d 828 (2013) ("[w]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived [him] of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper" [internal quotation marks omitted]). Additionally, the prosecutor made this argument in response to suggestions by trial counsel that the police told Turner to identify the petitioner. "[T]here is ample room, in the heat of argument, for the prosecutor to challenge vigorously the arguments made by defense counsel." (Internal quotation marks omitted.) *State* v. *Maner*, 147 Conn. App. 761, 789, 83 A.3d 1182, cert. denied, 311 Conn. 935, 88 A.3d 550 (2014).

[14] Prosecutorial impropriety claims are not subject to analysis pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). *State* v. *Fauci*, 282 Conn. 23, 34, 917 A.2d 978 (2007). Although the habeas court based its conclusion in part on this determination, this does not affect our conclusion that the habeas court properly denied this claim for the reasons we discuss.

(Internal quotation marks omitted.) *Otto* v. *Commissioner of Correction*, 161 Conn. App. 210, 226, 136 A.3d 14 (2015), cert. denied, 321 Conn. 904, 138 A.3d 281 (2016); see also *Alterisi* v. *Commissioner of Correction*, 145 Conn. App. 218, 227, 77 A.3d 748 (tactical decision of appellate counsel not to raise particular claim ordinarily matter of appellate tactics and not evidence of incompetency), cert. denied, 310 Conn. 933, 78 A.3d 859 (2013). "Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at a lack of confidence in any one [issue] . . . . [M]ultiplying assignments of error will dilute and weaken a good case and will not save a bad one." (Internal quotation marks omitted.) *Synakorn* v. *Commissioner of Correction*, 124 Conn. App. 768, 775, 6 A.3d 819 (2010), cert. denied, 300 Conn. 906, 12 A.3d 1004 (2011).

"[T]he defendant's failure to object at trial to each of the occurrences that he now raises as instances of prosecutorial impropriety, though relevant to our inquiry, is not fatal to review of his claims. . . . This does not mean, however, that the absence of an objection at trial does not play a significant role in the determination of whether the challenged statements were, in fact, improper. . . . To the contrary, we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time." (Internal quotation marks omitted.) *State* v. *Barry A.*, 145 Conn. App. 582, 597, 76 A.3d 211, cert. denied, 310 Conn. 936, 79 A.3d 889 (2013).

In the present case, we disagree with the petitioner's characterization of both Turner's testimony and the

prosecutor's statements to the jury. Although Turner's testimony may have indicated that law enforcement officers pressured him to make a statement, it did not indicate that they were feeding him information. His testimony suggested that law enforcement officers were trying to persuade him to give a statement, but Turner did not testify that the police told him *what* to say. His testimony indicated that law enforcement officers presented him with a photographic array and that he identified the petitioner from it. It was, therefore, a reasonable characterization of the evidence, his testimony included, that he was not told to identify the petitioner or that he was fed information.

The evidence, thus, supports the habeas court's conclusion that appellate counsel made a reasonable strategic decision in choosing to forgo a meritless or weak claim of prosecutorial impropriety. Appellate counsel's performance, therefore, was not deficient for having failed to bring such a claim. Accordingly, a claim of ineffective assistance of habeas counsel for failing to claim that appellate counsel was ineffective on this ground cannot stand.

The judgment is affirmed.

In this opinion the other judges concurred.

ANDRES R. SOSA *v.* COMMISSIONER OF CORRECTION ET AL.
(AC 38585)

Sheldon, Mullins and Sullivan, Js.

Syllabus

The self-represented, incarcerated plaintiff brought this action against the defendants, employees of the Department of Correction, including the Commissioner of Correction, claiming that the defendants wrongly revoked his visitation privileges in violation of his constitutional rights. The trial court granted the defendants' motion to dismiss as to all claims

for monetary damages as to all of the defendants in their official and individual capacities on the basis of sovereign immunity, and it dismissed all of the plaintiff's claims for injunctive and declaratory relief against the defendants in their individual capacities due to insufficient service of process. The court denied the motion to dismiss the plaintiff's claims for prospective declaratory and injunctive relief against the defendants in their official capacities. From the judgment of dismissal, the plaintiff appealed to this court. *Held*:

1. Because the trial court denied the defendants' motion to dismiss the plaintiff's claims for declaratory and injunctive relief against the defendants in their official capacities, those claims remained pending, and, therefore, the court did not render a final judgment disposing of all causes of action against the defendants in their official capacities; accordingly, because there was no final judgment as to all of the plaintiff's claims against the defendants in their official capacities, this court lacked jurisdiction over the plaintiff's appeal from the dismissal of his claims for monetary damages against the defendants in their official capacities.
2. The plaintiff could not prevail on his claim that the trial court improperly dismissed his claims for monetary, declaratory and injunctive relief against the defendants in their individual capacities, which was based on his claim that the court improperly dismissed those claims for insufficient service of process and determined that those claims were barred by qualified immunity; the plaintiff's challenge to the court's qualified immunity determination was inadequately briefed and, thus, was not reviewable, and where, as here, the defendants were served at the Office of the Attorney General, not at their usual places of abode, they were properly served in their official capacities only and, therefore, the trial court properly dismissed all of the plaintiff's claims against the defendants in their individual capacities for lack of personal jurisdiction.

Argued May 30—officially released August 29, 2017

Procedural History

Action, inter alia, to recover damages for the alleged deprivation of the plaintiff's federal constitutional rights, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Gleeson, J.*, granted in part the defendants' motion to dismiss, from which the plaintiff appealed to this court. *Appeal dismissed in part; affirmed.*

Andres R. Sosa, self-represented, the appellant (plaintiff).

Robert S. Dearington, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellees (defendants).

Opinion

PER CURIAM. The self-represented, incarcerated plaintiff, Andres R. Sosa, brought this action for monetary damages and declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983, against employees of the Department of Correction, including Commissioner of Correction Scott Semple, Warden Carol Chapdelaine, and District Administrator Angel Quiros, individually and in their official capacities. The plaintiff claimed that the defendants wrongly revoked his visitation privileges in violation of his rights under the first and fourteenth amendments to the United States constitution. The trial court granted in part and denied in part a motion to dismiss filed by the defendants. The court granted the motion to dismiss as to all claims for monetary damages as to all of the defendants in their official and individual capacities. The court also granted the motion to dismiss the plaintiff's claims for injunctive and declaratory relief against the defendants in their individual capacities, but denied the motion to dismiss his claims for prospective declarative and injunctive relief against the defendants in their official capacities. The plaintiff appeals from the judgment of dismissal of all of his claims against the defendants in their individual capacities and his claim for monetary damages in their official capacities. Because there is no final judgment as to the plaintiff's claims against the defendants in their official capacities, we dismiss the plaintiff's appeal from the judgment of the trial court dismissing his claim for monetary damages against the defendants in their official capacities. We affirm the judgment of the trial court dismissing all of the claims against the defendants in their individual capacities.

The trial court set forth the following relevant procedural history. "The action primarily concerns the constitutionality of a portion of Department of Correction administrative directive § 10.6 prohibiting prisoners from receiving contact visits for a two year period for each individual class A or B disciplinary report.

"On December 5, 2014, the plaintiff filed a complaint, dated November 18, 2014, against the defendants. The plaintiff alleges that, on August 9, 2014, he was given a class A disciplinary report for masturbating inside his own cell. The plaintiff alleges that he was issued several sanctions, including an automatic two year loss of contact visits, pursuant to administrative directive § 10.6. The plaintiff claims that the two year restriction on contact visits is not a permissible penalty under administrative directive § 9.5.

"The plaintiff further alleges that during his seventeen years of incarceration, he has been deprived of physical contact with family and friends for a period of twelve or more years, and was not provided with a due process hearing in which to appeal the denial of his contact visits. The plaintiff claims that this fact show[s] that the defendants have created an unconstitutional 'custom policy.'

"The plaintiff alleges that the only notice provided by the defendants was in 2001, and the notice stated that the plaintiff will be deprived of contact visits for (1) intoxication, (2) assault, (3) refusal to give urine specimen, (4) visiting room misconduct, and (5) contraband. The plaintiff states that the only listed violation that he is actually guilty of was fighting in 2001.

"On March 12, 2015, the defendants filed a motion to dismiss the entire action. On April 22, 2015, the plaintiff filed an objection to the motion. The matter was heard at short calendar on June 22, 2015." (Footnotes omitted.)

By way of memorandum of decision filed on October 8, 2015, the trial court granted in part and denied in part the defendants' motion to dismiss. The court granted the motion to dismiss as to all claims for monetary damages as to all of the defendants in their official capacities on the basis of sovereign immunity. The court granted the defendants' motion to dismiss the plaintiff's claims against the defendants in their individual capacities on the basis of qualified immunity because none of the plaintiff's claims invoked a protected liberty interest in contact visitation, which has been held to be a privilege rather than an entitlement. The court also determined that the plaintiff had not properly served his action upon the defendants in their individual capacities and thus that it lacked personal jurisdiction over all of his claims against the defendants in their individual capacities. Accordingly, the court dismissed all of the plaintiff's individual capacity claims on the basis of insufficiency of service of process. This appeal followed.

"A motion to dismiss . . . properly attacks the jurisdiction of the court . . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to grant] . . . the motion to dismiss will be de novo." (Citation omitted; internal quotation marks omitted.) *State* v. *Courchesne*, 296 Conn. 622, 668, 998 A.2d 1 (2010).

The plaintiff first challenges the trial court's judgment dismissing its claims against the defendants for monetary damages on the basis of sovereign immunity. In ruling on the motion to dismiss, the trial court denied the motion as to the plaintiff's claims for declaratory and injunctive relief, granting the motion only as to monetary damages. The statutory right to appeal is limited to appeals by parties aggrieved by final judgments.

General Statutes § 52-263; *State* v. *Curcio*, 191 Conn. 27, 30, 463 A.2d 566 (1983).[1] Practice Book § 61-3 provides in relevant part that a judgment that does not fully dispose of a complaint is a final judgment only if it "disposes of all causes of action in [the] complaint . . . brought by or against a particular party or parties. . . ." Because the court denied the motion to dismiss the plaintiff's claims for declaratory and injunctive relief, those claims remain pending, and thus the court did not render a final judgment disposing of all causes of action brought against the defendants in their official capacities. Because there is no final judgment as to all of the plaintiff's claims against the defendants in their official capacities, this court lacks jurisdiction over the plaintiff's appeal from the judgment of dismissal of his claim for monetary damages.

The plaintiff also claims that the trial court erred in dismissing his claims for monetary, declaratory and injunctive relief against the defendants in their individual capacities. The plaintiff first challenges the court's determination that his claims against the defendants in their individual capacities were barred by qualified immunity. The court based its qualified immunity determination on the ground that the plaintiff had no constitutional liberty interest in visitation. Purporting to challenge that determination, the plaintiff argued: "The [defendants'] conduct did violate clearly . . . constitutional rights in which a reasonable person would have know[n], making the defendants not entitle[d] to qualified immunity." Other than an additional bald statement that his "interest in having contact visits is among the interest[s] protected by the fourteenth amendment's

[1] Prior to oral argument before this court, we ordered the parties "to be prepared to address at oral argument whether the portion of the appeal that challenges the dismissal of the claim for money damages asserted against the defendants in their official capacities should not be dismissed for lack of a final judgment because the court did not dispose of all causes of action asserted against the defendants in their official capacities."

due process clause," the plaintiff provides no additional factual or legal analysis in support of his challenge to the trial court's thorough and amply supported ruling. We conclude that the plaintiff's challenge to the court's qualified immunity determination is inadequately briefed, and thus we decline to address it. See *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016).

Finally, the plaintiff challenges the trial court's finding of insufficiency of service of process on the defendants in their individual capacities, and its resulting judgment dismissing his claims against the defendants in their individual capacities. "[T]he Superior Court . . . may exercise jurisdiction over a person only if that person has been properly served with process, has consented to the jurisdiction of the court or has waived any objection to the court's exercise of personal jurisdiction. . . . [S]ervice of process on a party in accordance with the statutory requirements is a prerequisite to a court's exercise of [personal] jurisdiction over that party." (Citation omitted; internal quotation marks omitted.) *Matthews* v. *SBA, Inc.*, 149 Conn. App. 513, 529–30, 89 A.3d 938, cert. denied, 312 Conn. 917, 94 A.3d 642 (2014). Pursuant to General Statutes § 52-57 (a),[2] a defendant in any civil action must be served in hand or at his usual place of abode. This requirement includes civil suits brought against state defendants who are sued in their individual capacities. See *Edelman* v. *Page*, 123 Conn. App. 233, 243, 1 A.3d 1188, cert. denied, 299 Conn. 908, 10 A.3d 525 (2010).

Thus, a plaintiff who serves a state defendant pursuant to General Statutes § 52-64 (a)[3] by leaving a copy

[2] General Statutes § 52-57 (a) provides: "Except as otherwise provided, process in any civil action shall be served by leaving a true and attested copy of it, including the declaration or complaint, with the defendant, or at his usual place of abode, in this state."

[3] General Statutes § 52-64 (a) provides: "Service of civil process in any civil action or proceeding maintainable against or in any appeal authorized from the actions of, or service of any foreign attachment or garnishment authorized against, the state or against any institution, board, commission,

of the process at the Office of the Attorney General has properly served the defendant only in his or her official capacity and has failed to properly serve the defendant in his or her individual capacity. See id.

Here, the defendants were served at the Office of the Attorney General, not at their usual places of abode, and they thus were properly served in their official capacities, not in their individual capacities. Accordingly, we conclude that the court properly dismissed all of the plaintiff's claims against the defendants in their individual capacities for lack of personal jurisdiction.

The appeal from the judgment of dismissal of the plaintiff's claim against the defendants in their official capacities is dismissed. The judgment is affirmed in all other respects.

STATE OF CONNECTICUT *v.* SKENDER HALILI
(AC 39098)

Lavine, Keller and Prescott, Js.

Syllabus

Convicted of the crime of sexual assault in the fourth degree, the defendant appealed to this court. He claimed, inter alia, that certain of the trial court's evidentiary rulings violated his constitutional right to confront his accuser and to present a defense. *Held*:

1. The trial court did not abuse its discretion by precluding the defendant from cross-examining the complainant with respect to her mental state or psychiatric history, it properly having determined that the complainant's testimony that she had ingested some medication for anxiety that

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department or administrative tribunal thereof, or against any officer, servant, agent or employee of the state or of any such institution, board, commission, department or administrative tribunal, as the case may be, may be made by a proper officer (1) leaving a true and attested copy of the process, including the declaration or complaint, with the Attorney General at the office of the Attorney General in Hartford, or (2) sending a true and attested copy of the process, including the summons and complaint, by certified mail, return receipt requested, to the Attorney General at the office of the Attorney General in Hartford."

had been prescribed by a physician prior to her testimony in court was not a sufficient foundation for further inquiry, in the presence of the jury, into whether she was under the care of a psychiatrist: it was apparent that defense counsel, who based the inquiry on the complainant's demeanor while testifying, did not know or have a good faith belief that the complainant was under the care of a psychiatrist or that she had been diagnosed with a psychiatric condition that could affect her ability to perceive or recall the events at issue and to relate them to the jury accurately, and defense counsel's personal observations of the complainant were insufficient to support further inquiry; moreover, the court permitted defense counsel to ask the complainant whether she ingested any medication prior to going to court that day, the court sustained the state's objection to the cross-examination only with respect to defense counsel's inquiry as to whether the complainant's medication had been prescribed by a psychiatrist, and defense counsel did not ask the complainant whether she ingested any medication on or before the date of the incident at issue, whether it affected her ability to perceive the events at issue or impacted her ability to recall or narrate them, which might have provided a sufficient basis to warrant additional inquiry, and although the court heard argument with respect to the state's objection outside the presence of the jury where the possibility of questioning the complainant outside the jury's presence was raised, defense counsel never asked the court to conduct any such inquiry and never made an offer of proof on the issue.

2. The trial court violated the defendant's sixth amendment right to present a defense and to confront his accuser when it prohibited him from presenting evidence purporting to show that the complainant had solicited a bribe from the defendant's wife, H: H's proffered testimony, which demonstrated that H had observed the complainant at the place of employment where H worked with her daughter and that the complainant had made statements to H referring to H's husband and to the sum of $40,000, when viewed in light of the circumstances revealed by the evidence as a whole, provided a reasonable basis for the jury to infer that the complainant attempted to solicit money from H, and although H's testimony lacked clarity and completeness in some respects, H was unwavering in her testimony that, during her brief encounter with the complainant, the complainant referred to her husband and to the sum of $40,000; moreover, H also testified to previous encounters with the complainant at H's place of employment in which the complainant behaved in a weird manner, and to having reported the complainant's prior conduct to the police, which supported an inference that the complainant's conduct was viewed to be legally questionable, the trial court was not entitled to exclude the evidence simply because it did not consider it to be persuasive, as the weight to be afforded the evidence is a question for the jury, the proffered testimony was relevant to an assessment of the complainant, the state's key witness, concerning the

events at issue, and the inference that the defendant wanted to invite the jury to draw from the evidence was not so unreasonable as to warrant its exclusion; accordingly, because the proffered testimony likely would have changed the outcome of the trial if the jury had credited the testimony and inferred that it was evidence that the complainant had solicited a bribe from a member of the defendant's family, the state could not demonstrate that the trial court's ruling was harmless beyond a reasonable doubt and a new trial was warranted.

3. This court declined to consider the merits of the defendant's claim that the trial court improperly admitted evidence of the complainant's demeanor after she made an initial complaint to the police, which was based on his claim, raised for the first time on appeal, that the court improperly failed to analyze the admissibility of the evidence under the constancy of accusation doctrine, the defendant having failed to raise that argument before the trial court at the time that he objected to the admissibility of the evidence on the ground of relevance.

Argued April 12—officially released August 29, 2017

Procedural History

Substitute information charging the defendant with the crime of sexual assault in the fourth degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, and tried to the jury before *Hudock*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed; new trial.*

John R. Williams, for the appellant (defendant).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Nadia C. Prinz*, deputy assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Skender Halili, appeals from the judgment of conviction, following a jury trial, of sexual assault in the fourth degree in violation of General Statutes § 53a-73a. The defendant claims that the trial court (1) violated his sixth amendment right to confront his accuser when it prohibited him from

cross-examining the complainant[1] with respect to her mental state or psychiatric history, (2) violated his sixth amendment right to present a defense and confront his accuser when it prohibited him from presenting evidence purporting to show that the complainant had solicited a bribe from the defendant's wife, and (3) improperly admitted evidence of the complainant's demeanor after she made an initial complaint to the police. We agree with the defendant's second claim. Accordingly, we reverse the judgment of the trial court and remand the case to the court for a new trial.

At trial, the state presented evidence in support of the following alleged version of events. At times relevant, the defendant and the female complainant were neighbors in a New Canaan condominium complex. The defendant is an Albanian national who has a green card and speaks with an Albanian accent. On April 9, 2014, the complainant and her father were standing near the complainant's automobile in the parking lot of the complex while attempting to resolve a mechanical issue. On prior occasions, the complainant observed the defendant performing work on automobiles at the complex. The defendant approached the complainant and her father, stated that he was experienced in repairing automobiles, and offered to repair the automobile, even if this meant that he had to pay for the repairs himself.

After the complainant's father left the scene, the defendant accompanied the complainant as she took the automobile for a test drive so that the defendant could hear the sounds that the automobile made while it was being operated on the road. During the test drive, the complainant conversed with the defendant and "[f]or the most part" understood what he was saying

[1] In accordance with our policy of protecting the privacy interests of the victims of sexual abuse, we decline to identify the complainant or others through whom the complainant's identity may be ascertained. See General Statutes § 54-86e.

to her despite his accent. Following the test drive, which was uneventful, the defendant and the complainant agreed that, the following day, he would bring his automobile ramps to the complainant's residence so that he could further inspect her automobile.

Shortly before 10 a.m. on April 10, 2014, the defendant arrived at the complainant's residence and utilized the ramps to inspect her automobile. Thereafter, he entered the complainant's residence and washed his hands in the bathroom. The complainant took the defendant for another test drive in the automobile.

At the beginning of the test drive, the defendant offered the complainant a piece of chewing gum. When the complainant accepted, the defendant attempted to insert the gum into her mouth while she was operating the automobile. The complainant told him not to do so. The complainant testified that the defendant's "weirdness" continued to escalate during the remainder of the test drive. The defendant asked the complainant if she had a boyfriend, and she replied that she did. The complainant mentioned to the defendant that he was married, to which he replied, "that doesn't matter." While the complainant was driving on the Merritt Parkway, the defendant referred to the opera, "Madame Butterfly," unbuckled his safety belt, and opened the passenger door of the automobile while it was in motion. The defendant's sudden and unusual conduct frightened the complainant, and she was anxious to keep the automobile under control.

The defendant's actions became sexual in nature when he placed the open palm of his left hand on the complainant's right thigh while she continued to operate the automobile. The complainant asked the defendant repeatedly to remove his hand from her thigh. When he failed to comply, the complainant pushed his hand away. This initiated a physical struggle between

the complainant and the defendant. He quickly moved his hand between her legs and, with his extended fingers, began to exert pressure on the complainant's vagina over her clothing in what the complainant believed to be an effort to "stimulate" her. While the complainant continued to drive, she tried to prevent the defendant from touching her. At one point in time, the complainant used her elbow to strike the defendant's body and, in so doing, caused the automobile to shift out of gear. Meanwhile, the defendant was snickering and making moaning sounds. At another point in time, the defendant lifted himself off of the passenger seat in what the complainant believed to be an effort to crawl on top of her. The defendant also tried to lift the complainant's shirt; he exposed and touched her bare skin. Toward the end of the approximately twenty minute ordeal, the complainant told the defendant that he was "going to get in a lot of trouble . . . ."

The complainant became aware that her automobile was running low on gasoline, but she drove to the New Canaan police station. She parked in front of the station, turned off the ignition, took her keys with her, and went inside to seek assistance. Meanwhile, the defendant exited the automobile and left the scene.

The complainant met with Officer Thomas Patten of the New Canaan Police Department, who interviewed her briefly. He asked her to complete a statement and to return it to him the following morning. The complainant complied with this request. Later that day, Patten visited with the complainant at her residence. At the condominium complex, Patten also spoke with the defendant. During this initial encounter with the police, the defendant denied having had any interaction with the complainant that day.

On the following day, April 11, 2014, during a voluntary interview of the defendant at the New Canaan

police station, Patten informed the defendant that the police had surveillance footage of the police department on April 10, 2014. In response, the defendant admitted that he was with the complainant on April 10, 2014, that he had provided assistance to her with her automobile, and that he had gone for a drive with her. Although, in their prior interactions with the defendant, the police officers who were investigating the incident had not raised the subject of inappropriate touching in the automobile, the defendant volunteered that nothing had happened in the automobile. He stated: "I did not touch." During the interview, the defendant stated to Sergeant Peter Condos of the New Canaan Police Department that, the previous day, he lied about his not having been with the complainant because he was scared. Additionally, the defendant stated that the complainant had not made any advances of a sexual nature toward him. The defendant acknowledged to the police that, although he felt "ashamed," he did not know why the complainant ended the test drive at the police department on April 10, 2014.

The jury found the defendant guilty of sexual assault in the fourth degree. The court sentenced the defendant to a term of incarceration of one year, execution suspended after thirty days, followed by two years of probation.[2] Additional facts will be set forth as necessary in the context of the defendant's claims.

I

First, the defendant claims that the court violated his sixth amendment right to confront his accuser when it prohibited him from cross-examining the complainant

[2] Among the terms of probation were that the defendant (1) have no contact with the complainant or members of her family, (2) submit to sex offender and mental health treatment, (3) seek and maintain full-time employment, and (4) abide by a ten year standing criminal protective order.

with respect to her mental state or psychiatric history. We disagree.

The following additional facts are relevant to the present claim. During the state's direct examination of the complainant, she related her account of the events at issue. At the conclusion of her direct examination, the prosecutor asked the complainant about her emotional state while testifying. The complainant replied that she felt "[e]xtremely uncomfortable . . . [b]ecause this is not a place I want to be." During the defendant's cross-examination of the complainant, defense counsel asked the complainant, "have you taken any kind of medications prior to coming here to court today?" After the court overruled the state's objection to the inquiry, the complainant answered: "Yes."

The following examination of the complainant by defense counsel then transpired:

"Q. What have you taken?

"A. I took a—last night I took a—something for anxiety.

"Q. What type of medicine is that?

"A. I . . . don't know the name of it.

"Q. It's prescribed by your physician?

"A. Yes.

"Q. Is that physician a psychiatrist?"

At this point in the inquiry, the state objected on the ground of relevance. The court excused the jury and asked defense counsel to provide a good faith basis for his inquiry, and whether he was "on a fishing expedition . . . ."

Defense counsel explained: "I am basing [the inquiry] on the demeanor of the witness throughout her direct

examination, which, in my experience, is beyond odd and not characteristic of any kind of behavior I've ever seen from a witness testifying as to such matters before.

"I think . . . that my suspicions were borne out when it was confirmed that she is taking medication that relate[s] to mental state, and I . . . it's apparent that she is indeed under psychiatric care, and I think that it is increasingly apparent that she suffers from some type of psychiatric condition. I believe that that is a fair line of inquiry, given the nature of this case, the fact that this case relies entirely on the accuracy of her recollections.

"I think that these questions have a basis to be asked, as I've indicated. And certainly they go to her ability to perceive, to remember and to relate accurately and truthfully.

"Quite frankly, Your Honor, when you combine with the wild disparities in the various versions she's given in this case, which we'll get to in due course, I think there's [a] very serious question about whether she is fantasizing."

After remarking that it was not bothered by the fact that even "extreme" disparities may be reflected in the complainant's versions of events, the court observed that it was "looking for . . . her ability to tell the truth . . . ."

The prosecutor objected to the line of inquiry on the ground that it was based on defense counsel's admission that he merely had suspicions concerning the complainant's mental state—suspicions that were based only on his own evaluation of the witness' demeanor in court. Suspicions, the prosecutor argued, did not amount to a good faith basis to warrant the inquiry.

Defense counsel responded that the prosecutor had an affirmative obligation to inquire about and disclose

information about the complainant's prior psychiatric history, but that the prosecutor "has not indicated one way or the other in that respect." Thus, defense counsel suggested that the prosecutor may be withholding exculpatory information concerning the complainant.

The prosecutor replied in relevant part: "I did inquire of [the complainant] whether she had ever been diagnosed with any psychiatric conditions, and she indicated, no. She did indicate to me that she had a learning disability that she sometimes talked to a therapist about. She did not indicate to me at that time that she was taking any medications. And I don't know, we could question her further, although I don't think it's appropriate, but it sounds to me like anxiety medication taken on the night before a trial is not a consistently prescribed or consistently taken medicine, and she did not in fact take anything this morning, which was her first answer to counsel's question. The fact that she took an anxiety pill before this testimony last night, I might have taken an anxiety pill before the testimony last night. I didn't in this case, but I don't see that I have any duty to disclose that or even to ask her about that."[3]

The prosecutor went on to state that anxiety was not a mental illness, to which defense counsel stated that "it is one of the psychiatric conditions contained in the Diagnostic and Statistical Manual [of Mental Disorders]."

[3] Following the court's ruling, the prosecutor stated that, in light of the defendant's suggestion that a *Brady* type of violation had occurred; see *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); he wanted to put more representations on the record. The prosecutor stated: "I'd just like to indicate that I did ask the witness if she had ever been diagnosed with any psychiatric condition. She told me about the learning disability. We talked about what that meant for her. It in no way seemed exculpatory to me in any way. She indicated talking, processing information, telling stories, sometimes it was a little slower for her. And in my view, I did not think that rose to anything near a level . . . requiring disclosure . . . and that was . . . the extent of that conversation."

The court sustained the state's objection to the inquiry. The court stated: "Up to this point, I've listened to the testimony of the witness. . . . [S]he has indicated that she is not comfortable. . . . [W]ithout anything further, counsel, I'm going to sustain the objection. . . . [T]he state has, in good faith, made inquiry. There's been no effort by the defendant to delve further [into] the issue of her psychiatric issues, if any.

"As far as I know, she took a pill because she had to testify the next day, and that's where it's going to stay unless you can give me something firmer other than it's just confirmed your suspicions."

Thereafter, the court summoned the jury to the courtroom and stated that it had sustained the state's objection. Defense counsel resumed his examination of the complainant. Defense counsel asked the complainant about her testimony that the defendant opened the door to her automobile while the automobile was being operated at highway speed, that she exited the highway but got back on so that she could travel in the opposite direction, that she did not stop for gasoline or to seek assistance prior to driving to the police station, and that she seemingly had difficulty relating relevant facts to the police when she arrived at the police station.[4] Defense counsel also inquired about the fact that it took the complainant five hours to complete her three page written statement and that she was late for her appointment to meet with Patten on April 11, 2014. Additionally, defense counsel asked the complainant to explain why

[4] For example, the following examination of the complainant by defense counsel took place:

"Q. [W]hen you got to the police station, you had a lot of trouble answering the questions . . . that Officer Patten asked you, didn't you?

"A. I don't remember that.

"Q. Isn't it true that you couldn't give him a coherent story and that it was for that reason that he said, well, take this form home and write it out and bring it back later?

"A. Incorrect."

she failed to tell the police initially that the defendant had touched her vagina over her clothing. Defense counsel, however, did not inquire further into the complainant's psychiatric history or use of anxiety medication.

Before this court, the defendant argues that "[t]he court's complete prohibition, without even conducting the inquiry [into the complainant's use of anxiety medication] suggested by the prosecution, of any cross-examination of the complainant regarding her acknowledged, ongoing psychiatric condition, clearly violated [his] sixth amendment right of confrontation." The defendant argues that "the court flatly prohibited any inquiry whatsoever into an obvious issue in the case, which was crucial to the defense"—precluding even an inquiry outside of the presence of the jury—and that its ruling was so prejudicial as to warrant a new trial. The state counters these arguments by arguing that defense counsel, by failing to lay a proper foundation for the inquiry, failed to demonstrate that the inquiry was likely to yield relevant evidence. Thus, the state maintains, the court properly exercised its discretion to disallow the inquiry. Alternatively, the state argues that the defendant is unable to demonstrate that a constitutional violation exists because the defendant was afforded an ample opportunity to expose facts from which the jury could assess the reliability of the complainant's testimony, and any error by the court was harmless beyond a reasonable doubt.

"[T]he sixth amendment to the [United States] constitution guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . . As an appropriate and potentially vital function of cross-examination, exposure of a witness' motive, interest, bias or prejudice may not be unduly restricted. . . . Compliance with

the constitutionally guaranteed right to cross-examination requires that the defendant be allowed to present the jury with facts from which it could appropriately draw inferences relating to the witness' reliability. . . . [P]reclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements of the sixth amendment. . . . Further, the exclusion of defense evidence may deprive the defendant of his constitutional right to present a defense. . . .

"However, [t]he [c]onfrontation [c]lause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . . Thus, [t]he confrontation clause does not . . . suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination. . . . Only relevant evidence may be elicited through cross-examination. . . . The court determines whether the evidence sought on cross-examination is relevant by determining whether that evidence renders the existence of [other facts] either certain or more probable. . . . [Furthermore, the] trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion. . . . [Finally, the] proffering party bears the burden of establishing the relevance of the offered testimony. . . .

"Although [t]he general rule is that restrictions on the scope of cross-examination are within the sound discretion of the trial [court] . . . this discretion comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment. . . . The constitutional standard is met when defense counsel is permitted to expose to the

jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. . . . Indeed, if testimony of a witness is to remain in the case as a basis for conviction, the defendant must be afforded a reasonable opportunity to reveal any infirmities that cast doubt on the reliability of that testimony. . . . The defendant's right to cross-examine a witness, however, is not absolute. . . . Therefore, a claim that the trial court unduly restricted cross-examination generally involves a two-pronged analysis: whether the aforementioned constitutional standard has been met, and, if so, whether the court nonetheless abused its discretion . . . ." (Internal quotation marks omitted.) *State* v. *Leconte*, 320 Conn. 500, 510–12, 131 A.3d 1132 (2016).

"It is well established that [a] criminal defendant has a constitutional right to cross-examine the state's witnesses, which may include impeaching or discrediting them by attempting to reveal to the jury the witnesses' biases, prejudices or ulterior motives, or facts bearing on the witnesses' reliability, credibility, or sense of perception. . . . Thus, in some instances, otherwise privileged records . . . must give way to a criminal defendant's constitutional right to reveal to the jury facts about a witness' mental condition that may reasonably affect that witness' credibility." (Internal quotation marks omitted.) *State* v. *Santos*, 318 Conn. 412, 424, 121 A.3d 697 (2015); *State* v. *Slimskey*, 257 Conn. 842, 853–54, 779 A.2d 723 (2001) (same). Thus, a defendant has a constitutional right to attempt to cast doubt on a witness' testimony by demonstrating that his or her sense of perception or ability to recall material events is suspect. See *State* v. *Esposito*, 192 Conn. 166, 176, 471 A.2d 949 (1984) ("[t]he capacity of a witness to observe, recollect and narrate an occurrence is a proper subject of inquiry on cross-examination"); *State* v.

Grant, 89 Conn. App. 635, 641, 874 A.2d 330, cert. denied, 275 Conn. 903, 882 A.2d 678 (2005) (same).

"The proffering party bears the burden of establishing the relevance of the offered testimony. Unless a proper foundation is established, the evidence is irrelevant. . . . Relevance may be established in one of three ways. First, the proffering party can make an offer of proof. . . . Second, the record can itself be adequate to establish the relevance of the proffered testimony. . . . Third, the proffering party can establish a proper foundation for the testimony by stating a good faith belief that there is an adequate factual basis for his or her inquiry." (Citation omitted; internal quotation marks omitted.) *State* v. *Beliveau*, 237 Conn. 576, 586, 678 A.2d 924 (1996); see also *State* v. *Benedict*, 313 Conn. 494, 511, 98 A.3d 42 (2014) (same).

In evaluating a claim of this nature, "[w]e first review the trial court's evidentiary rulings, if premised on a correct view of the law . . . for an abuse of discretion. . . . If, after reviewing the trial court's evidentiary rulings, we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail. . . . If, however, we conclude that the trial court improperly excluded certain evidence, we will proceed to analyze [w]hether [the] limitations on impeachment, including cross-examination, [were] so severe as to violate [the defendant's rights under] the confrontation clause of the sixth amendment . . . ." (Internal quotation marks omitted.) *State* v. *David N.J.*, 301 Conn. 122, 133, 19 A.3d 646 (2011). In evaluating the severity of the limitations, if any, improperly imposed on the defendant's right to confront, and thus impeach, a witness, "[w]e consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually

litigated at trial." (Internal quotation marks omitted.) *State* v. *Leconte*, supra, 320 Conn. 512. In conducting our analysis, we are mindful that "trial judges retain wide latitude insofar as the [c]onfrontation [c]lause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. . . . [W]e have upheld restrictions on the scope of cross-examination where the defendant's allegations of witness bias lack any apparent factual foundation and thus appear to be mere fishing expeditions." (Internal quotation marks omitted.) *State* v. *Jordan*, 305 Conn. 1, 28, 44 A.3d 794 (2012). We consider de novo whether a constitutional violation occurred. See, e.g., *State* v. *Annulli*, 309 Conn. 482, 492, 71 A.3d 530 (2013); *State* v. *Abernathy*, 72 Conn. App. 831, 837, 806 A.2d 1139, cert. denied, 262 Conn. 924, 814 A.2d 379 (2002).

The court's ruling does not reflect that it misunderstood the applicable legal principles. The court appears to have agreed with the prosecutor's arguments that the complainant's testimony—that in the hours prior to her appearance in court she ingested "something for anxiety" that had been prescribed by a physician—was not a sufficient foundation for a further inquiry in the presence of the jury into whether the complainant was under the care of a psychiatrist. We agree with the court's determination that the complainant's testimony constituted an insufficient foundation from which to pursue the line of inquiry.

In the present case, the complainant testified that, the night prior to her testimony, she ingested medication that had been prescribed for her by a physician to treat anxiety. Then, the state objected to defense counsel's inquiry as to whether the prescribing physician was *a psychiatrist*. The victim's testimony, without

more, did not provide a sufficient factual foundation for this further inquiry. During argument outside of the presence of the jury, defense counsel represented that he based the inquiry on the complainant's demeanor while testifying. It is apparent that defense counsel did not know or have a good faith belief that the complainant was under the care of a psychiatrist or, more significantly, that she had been diagnosed with a psychiatric condition that could affect her ability accurately to perceive the events of April 10, 2014, to recall those events, and to relate them to the jury. His personal observations of the complainant were insufficient. In the absence of adequate support for the inquiry in the record, a good faith belief by defense counsel, or a sufficient proffer to support the further inquiry, the court did not abuse its discretion in precluding the inquiry. See *State* v. *Beliveau*, supra, 237 Conn. 586 (discussing methods of establishing relevance of proffered testimony).

Although the defendant argues that the court prevented him from conducting "any cross-examination of the complainant regarding her acknowledged, ongoing psychiatric condition," the record belies this sweeping assessment of the court's ruling. Over the state's objection, the court permitted defense counsel to ask the complainant whether she had ingested "any kind of medications prior to coming here to court today." The court sustained the state's objection to a specific topic: defense counsel's inquiry with respect to whether the complainant's medication had been prescribed by a psychiatrist. Although defense counsel argues that the court prevented him from inquiring into the complainant's "condition," the record reflects that defense counsel did not ask the complainant whether she had ingested the medication on or before April 10, 2014; whether it affected her ability to perceive events; or whether the medication she ingested prior to her testimony impacted her ability to recall or narrate the events

at issue. The answers to these questions, which were never asked, might have provided a sufficient basis in the evidence to warrant additional inquiry. Instead, following the complainant's admission that she ingested medication to treat anxiety, defense counsel immediately asked her whether the medication was prescribed by a psychiatrist.

Additionally, the defendant argues that the court's ruling was erroneous because it precluded any further inquiry outside of the presence of the jury. The court heard argument with respect to the state's objection outside of the presence of the jury, and, as the defendant observed before this court, at one point during such argument, the prosecutor referred to the possibility that the witness could be questioned outside of the jury's presence. Yet, defense counsel never asked the court for permission to conduct any inquiry of this nature or otherwise make an offer of proof with respect to this issue. The court afforded the prosecutor and defense counsel an ample opportunity to address the court with respect to the state's objection. To the extent that there was any ambiguity in the court's ruling as to whether the court was precluding the defendant from conducting an inquiry outside of the jury's presence, the record does not suggest that defense counsel was discouraged from asking the court to clarify the ruling. On the record before us, the defendant is unable to point to any evidence that the complainant suffered from a condition that negatively affected her ability to perceive, to recall, or to relate the events of April 10, 2014.

Because we conclude that the court properly excluded the defendant's inquiry, we reject his claim that the court's evidentiary ruling violated his rights under the sixth amendment.

II

Next, the defendant claims that the court violated his sixth amendment right to present a defense and

confront his accuser when it prohibited him from presenting evidence purporting to show that the complainant had solicited a bribe from the defendant's wife. We agree.

The following additional facts are relevant to the present claim. During the defendant's case-in-chief, the defense presented testimony from Flutura Halili,[5] the defendant's wife. Halili testified that she emigrated to the United States from Albania ten years earlier. Halili testified that she was comfortable speaking in English, but she asked to use an interpreter during her examination if it became necessary to do so. In relevant part, Halili testified that she and her daughter were employed at a CVS.[6] Halili testified that she worked on "the floor" and that her daughter worked in the pharmacy as a pharmacy technician. After the complainant reported the events underlying this action to the police, the complainant interacted with her and her daughter at CVS. Halili testified that the complainant "came around us" many times and that the complainant "was . . . weird." Halili testified that, following these encounters at CVS, she and her daughter went to the police station to report these encounters to the police.

Defense counsel asked Halili whether the complainant made any "contact" with her, to which Halili began to refer to a specific incident that took place at CVS. The prosecutor objected to the inquiry on the ground of hearsay. The court excused the jury to hear argument on the matter. Outside of the presence of the jury, defense counsel made an offer of proof. Defense counsel asked, "what did [the complainant] say?" Halili testified: "She was talking over there, and I didn't realize

[5] Hereinafter, we refer to Flutura Halili as Halili and to Skender Halili as the defendant.

[6] Following Flutura Halili's testimony, the defense presented testimony from Alemsha Halili, the daughter of Flutura Halili and the defendant. As relevant to the present claim, Alemsha Halili testified that she was employed part-time at CVS in New Canaan.

her until I went there because she came in that place where I was working and she was talking about money, but she never put her head up. She was doing something, like, something she's doing, like by creams over there. She was watching over there, and she was saying something, the money, about money. When I walk there because always I walk away from her—in order not to be around her, but she came over there and she was talking something about my husband, but I don't know what she was talking. But she was talking about money first and my husband."

Defense counsel asked: "[D]id you have any understanding from what this woman said to you about your husband and about money; did you have any understanding that she was trying to get something from you?" Halili testified: "I think she was trying to get something from me. . . . I think she was talking just about to give her money. It's my point, because she came there many times and, that day, she came there just when I was alone over there."

Outside of the presence of the jury, the prosecutor conducted an examination of Halili, as follows:

"Q. Do you recall exactly what words she said?

"A. She was talking about money. She was saying something about forty thousand, something like that. And when I see her, she was saying something about husband, but I walk away always when she's there.

"Q. What did she say about forty thousand? She just said the words forty thousand or she said other words?

"A. She was talking, but when I there, she was saying those things.

"Q. But what was she saying about forty thousand?

"A. Just forty thousand. She was talking, but what I listen was forty thousand and something about my husband.

"Q. Did she . . . use any words around . . . did she just say the number forty thousand?

"A. No. She was saying other words, but I walk away from her.

"Q. But you don't know what those other words were?

"A. She was saying something about him.

"Q. So, she said some words about forty thousand?

"A. No. She was saying some words before forty thousand, and I went there, I saw her, and she said your husband, and I walk away from her.

"Q. So, the only words you can repeat for me today are husband and forty thousand?

"A. Yeah. She was talking more, but when went there and I walk right away because I saw it was her."

Defense counsel argued that "this is evidence from which a jury can find that [the complainant] was seeking . . . to be paid off in this case, and I think that that is certainly relevant to her credibility and, therefore, admissible evidence." Defense counsel argued that the testimony did not constitute hearsay because it was a verbal act and that the act was relevant to the jury's evaluation of the complainant's credibility. Defense counsel argued: "I think the court can take judicial notice that CVS does not sell anything for forty thousand dollars, and I think there's sufficient evidence here to allow this in."

The prosecutor argued that the testimony was not evidence of a verbal act because Halili was unsure what the complainant said. The prosecutor argued that

defense counsel lacked a good faith basis for his argument. The prosecutor argued that Halili was unable to articulate what the complainant said, Halili worked at a business involving money transactions, the incident was not relevant to an understanding of the defendant's alleged criminal acts, and there was nothing in the proffered testimony that would reflect on the complainant's credibility. The prosecutor stated: "[A]t this point, I would indicate that . . . despite the fact [that] the witness is claiming that she had an understanding, that the only words she can repeat for us are forty thousand and husband. I think, for that reason, there was no understanding gleaned there, and despite whatever opinion this witness may have formed."

The court stated: "I'm still skeptical. . . . I'm going to sustain the objection just based upon the fact that we're talking a number, a large number, and we're talking that she mentioned a husband. It's so tenuous. Again, I have no connection between the two. I don't know what words were said in between. I can't put that in front of the jury in all good faith and allow them to do anything other than to speculate as to what this conversation was about. I can't do that." Thereafter, the jury was summoned to the courtroom, and defense counsel indicated that he had no additional questions for the witness. Thus, the court appears to have agreed with the state that Halili's testimony lacked sufficient clarity to be considered evidence of the verbal act for which it was offered, specifically, that the complainant attempted to be paid off by Halili.

On appeal, the defendant argues: "The right of a defendant in a criminal trial to present evidence of bias or improper motivation on the part of a prosecution witness is protected by the confrontation clause of the sixth amendment. . . . Certainly, evidence that the complaining witness had sought a $40,000 payment

from the defendant's wife after she had filed her criminal complaint but before she testified at trial, and that the solicitation had been rebuffed, was evidence of [her] bias and motive well within the parameters of sixth amendment protection. Such evidence is material and not collateral, and may be presented through extrinsic evidence, as the defendant attempted to do in this case." (Citation omitted.) The defendant acknowledges that the testimonial evidence at issue was circumstantial in nature, subject to more than one interpretation, and, therefore, did not fall into the category of " 'smoking gun' " evidence. Yet, the defendant argues, the jury reasonably could have drawn inferences from the evidence and found that the alleged verbal act occurred.

The state appears to agree with the defendant that if, in fact, the defendant proffered evidence that the complainant solicited a bribe, such evidence is relevant impeachment evidence. Rather, as it did at trial, the state argues that the evidence "was far too speculative to establish that [the complainant] solicited a bribe from Flutura Halili, and . . . [was] not relevant to [an evaluation of the complainant's] credibility." The state argues: "Putting aside [Halili's] conclusory and self-serving conjecture that [the complainant] was asking for money, the facts that she testified to—that [the complainant] uttered the words 'money,' 'forty thousand,' and 'your husband,' amidst other unknown words—was far too vague to support the inference that [the complainant] was soliciting a bribe. In other words, the inferences that the defendant suggests were not supported by the proffer. This lack of connection between the words uttered and their proffered purpose made their admission 'not worthy or safe' to prove that [the complainant] had a motive or bias to be untruthful."

The principles set forth in part I of this opinion, related to an accused's right to confront the witnesses against him, also apply to our analysis of the present

claim. The sixth amendment guarantees the right to present facts to the jury that are relevant to an assessment of a witness' credibility and, in particular, his or her "motive, bias and interest. . . . Further, the exclusion of defense evidence may deprive the defendant of his constitutional right to present a defense." (Internal quotation marks omitted.) *State* v. *Leconte*, supra, 320 Conn. 510. "In plain terms, the defendant's right to present a defense is the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . It guarantees the right to offer the testimony of witnesses, and to compel their attendance, if necessary . . . . Therefore, exclusion of evidence offered by the defense may result in the denial of the defendant's right to present a defense." (Citation omitted; internal quotation marks omitted.) *State* v. *Wright*, 320 Conn. 781, 817, 135 A.3d 1 (2016). "A defendant is, however, bound by the rules of evidence in presenting a defense. . . . Although exclusionary rules of evidence should not be applied mechanistically to deprive a defendant of his rights, the constitution does not require that a defendant be permitted to present every piece of evidence he wishes. . . . The trial court retains the power to rule on the admissibility of evidence pursuant to traditional evidentiary standards." (Citation omitted; internal quotation marks omitted.) *State* v. *Romanko*, 313 Conn. 140, 147–48, 96 A.3d 518 (2014).

The parties appear to agree that, if the evidence demonstrated that the complainant solicited a bribe from Halili, it would be admissible as a verbal act that was relevant to an assessment of the credibility of the state's key witness, the complainant. "A verbal act is an out-of-court statement that causes certain legal consequences, or, stated differently, it is an utterance to which the law attaches duties and liabilities . . . [and] is admissible nonhearsay because it is not being offered for the truth

of the facts contained therein." (Internal quotation marks omitted.) *State* v. *Perkins*, 271 Conn. 218, 255, 856 A.2d 917 (2004). "Extrinsic evidence may be admitted . . . if the subject matter of the testimony is not collateral, that is, if it is relevant to a material issue in the case apart from its tendency to contradict the witness. . . . Evidence tending to show the motive, bias or interest of an important witness is never collateral or irrelevant. . . . It may be . . . the very key to an intelligent appraisal of the testimony of the [witness]." (Citations omitted; internal quotation marks omitted.) *State* v. *Colton*, 227 Conn. 231, 248, 630 A.2d 577 (1993); *State* v. *Erick L.*, 168 Conn. App. 386, 402, 147 A.3d 1053, cert. denied, 324 Conn. 901, 151 A.3d 1287 (2016); Conn. Code Evid. § 6-5. The claim may be distilled to the issue of whether the evidence was relevant simply because it tended to demonstrate the fact for which it was admitted.

" 'Relevant evidence' means evidence having any tendency to make the existence of the fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1. "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter. . . . The trial court has wide discretion to determine the relevancy of evidence and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion. . . . [A]buse

of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Internal quotation marks omitted.) *State* v. *Martinez*, 171 Conn. App. 702, 726, 158 A.3d 373, cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017).

"Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative. . . . Furthermore, [t]he fact that the [trier of fact] would have . . . to rely on inferences to make [a] determination does not preclude the admission of . . . evidence. . . . The trial court [however] properly could [exclude] evidence where the connection between the inference and the fact sought to be established was so tenuous as to require the [trier of fact] to engage in sheer speculation. . . . Because the law furnishes no precise or universal test of relevancy, the question must be determined on a case by case basis according to the teachings of reason and judicial experience." (Citations omitted; internal quotation marks omitted.) *Masse* v. *Perez*, 139 Conn. App. 794, 805–806, 58 A.3d 273 (2012), cert. denied, 308 Conn. 905, 61 A.3d 1098 (2013).

"[P]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . Thus, in determining whether the evidence supports a particular inference, we ask whether that inference is so unreasonable as to be unjustifiable. . . . In other words, an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference. Equally well

established is our holding that a jury may draw factual inferences on the basis of already inferred facts." (Citations omitted; internal quotation marks omitted.) *State* v. *Copas*, 252 Conn. 318, 339–40, 746 A.2d 761 (2000).

At the outset of our analysis of the testimony at issue, we observe that, although Halili chose to testify without the aid of an interpreter, Halili's proficiency in English was not high. That her language skills were not strong does not necessarily lead us to conclude that her entire testimony was unintelligible or without probative value. As the state recognizes, Halili testified before the jury with respect to several facts: (1) she and her daughter were employed at CVS; (2) on several occasions, the complainant encountered Halili and her daughter while they were working at CVS; (3) Halili considered the complainant's conduct on these occasions to be "weird"; and (4) Halili and her daughter brought the matter to the attention of the police. Outside of the presence of the jury, Halili testified with respect to several additional facts: (1) on the occasion at issue, Halili once again observed the complainant in CVS; (2) when Halili approached the complainant, and the two women were alone in the store, the complainant made statements; (3) in her statements, the complainant referred to the defendant ("your husband") and money, specifically, the sum of $40,000; and (4) when Halili recognized that it was the complainant who was speaking, she walked away.

Despite the fact that Halili did not provide further details about what the complainant said in her presence, her proffered testimony, when viewed in light of the circumstances revealed by the evidence as a whole, provided a reasonable basis for the jury to infer that the complainant attempted to solicit money from Halili. Although it lacked clarity and completeness in some respects, Halili was unwavering in her testimony that, during her brief encounter with the complainant in CVS,

the complainant referred to her "husband" and "$40,000." The complainant made these statements while she and Halili were "alone" in a portion of the store, after she had encountered Halili and her daughter in the store and behaved in a "weird" manner on prior occasions, after she brought a police complaint against Halili's husband, and prior to her testimony at the trial. Halili testified that she and her daughter reported the complainant's prior conduct at their place of employment, CVS, to the police. This evidence reasonably supported an inference that Halili and her daughter at that time considered the complainant's conduct to be legally questionable. If Halili's testimony was credited, in light of the unique circumstances surrounding the encounter in CVS, it is difficult to conceive of an alternative explanation than that suggested by the defense for the fact that the complainant referred to the defendant and a specific sum of money during this encounter with the wife of the person who, according to her version of events, assaulted her sexually.[7] This, of course, does not mean that one does not exist.

Moreover, to the extent that Halili did not recall more specific statements by the complainant, in light of her language skills and her close relationship to the defendant, the jury reasonably could have considered that such lack of clarity in her testimony supported, rather than detracted from, a finding that Halili was testifying truthfully. And, we observe that it was not necessary that proof of such an illicit offer by the complainant be unambiguous or formal. The jury reasonably could have concluded that the complainant, mindful of the impropriety of her offer and the risk that, in a public place, persons other than Halili may hear her statements, chose to remain deliberately vague until Halili indicated a willingness to discuss the matter further.

[7] Indeed, at the time of oral argument before this court, the state was unwilling to provide a possible alternative explanation for the complainant's alleged conduct at CVS.

We are bound to look deferentially at the court's evidentiary ruling, and we recognize that, unlike this court, the trial court has a firsthand opportunity to observe witnesses. Although the state's objection to the testimony appears to have focused on a lack of completeness or clarity in Halili's testimony, the court did not find that the witness was incapable of remembering the events that she was asked to recall or that she was incapable of expressing herself before the jury without the aid of an interpreter.[8] Rather, the court expressed what appeared to be its own "skepticism" with respect to the testimony at issue, and stated that it was it was unable in its own mind to connect the reference to "money" and the reference to Halili's "husband." This suggests that the court simply did not find the evidence to be persuasive. The court is not entitled to exclude evidence simply because it does not consider it to be persuasive; the weight to be afforded the evidence is a question for the jury. As we have discussed, in light of the unique circumstances surrounding the complainant's statements, a jury reasonably could infer that these statements were made in an attempt to receive money from Halili in exchange for favorable treatment in the defendant's case. Stated otherwise, despite the fact that Halili was unable to testify in a more coherent manner concerning the statements made by the complainant, the defendant had the right to attempt to persuade the jury that the evidence nonetheless was proof of the illegal verbal act for which it was offered. The inference that the defendant wanted to invite the jury to draw from this evidence was not so unreasonable as to warrant its exclusion. Accordingly, we conclude that the proffered evidence was relevant

[8] "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." Conn. Code Evid. § 6-3 (b).

and, therefore, admissible evidence that the court should have admitted at trial.

In connection with this claim, the state argues that the alleged constitutional violation did not occur because the court properly excluded the evidence on the ground that it was not relevant. The state, however, has not attempted to demonstrate that, if the court erroneously excluded the evidence, its ruling was harmless beyond a reasonable doubt. "Whether such error is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless." (Internal quotation marks omitted.) *State* v. *Merriam*, 264 Conn. 617, 649, 835 A.2d 895 (2003).

It suffices to observe that the state could not prevail in demonstrating that the court's erroneous ruling was harmless beyond a reasonable doubt. The proffered testimony was relevant to an assessment of the state's key witness, the complainant, concerning events that allegedly transpired when she was alone in an automobile with the defendant. The proffered testimony was not cumulative of any other evidence presented at trial, and although the defendant was afforded an ample opportunity to cross-examine the complainant, the cross-examination permitted did not cover this topic. Although the state presented evidence that corroborated the complainant's testimony in several respects, we are unable to conclude that the state's case was so

strong that the evidence at issue would not likely have persuaded the jury in reaching its verdict. If the jury credited the testimony at issue and inferred that it was evidence that the complainant solicited a bribe from a member of the defendant's family, it likely would have changed the outcome of the trial.

In sum, the court erroneously precluded the defendant from presenting extrinsic evidence to demonstrate that the complainant was motivated to testify untruthfully. The exclusion infringed on the defendant's right to confront the complainant and present a defense. Accordingly, the defendant is entitled to a new trial.

III

Finally, the defendant argues that the court improperly admitted evidence of the complainant's demeanor after she made an initial complaint to the police. We decline to reach the merits of this claim.

The defendant argues that, over his objection at trial, the court permitted the state to present testimony from Louise Simpson, the complainant's neighbor, that, in the hours after she reported the incident to the police on April 10, 2014, the complainant appeared to be distraught. Specifically, the record reveals that Simpson testified that the complainant generally exhibited a calm demeanor but, later in the morning on April 10, 2014, her demeanor was different because she "was shaking . . . teary eyed and distraught." The record reflects that the defendant objected to the state's inquiry on the ground that it was irrelevant. The state argued that the evidence, which was based on Simpson's firsthand observations of the complainant, was relevant "because it goes to credibility." The court overruled the defendant's objection.

The defendant also argues that, over his objection at trial, the court permitted the state to present testimony

from M.N., the complainant's sister, that, at or around noon on April 10, 2014, she observed that the complainant "was sweating profusely . . . her eyes were open wide. She looked very scattered. She seemed frazzled, and I had asked her what happened. That was the first thing that came out of my mouth is, what happened." M.N. testified that the complainant and her aunt went shopping together that day. The record reveals that, when the state inquired about the complainant's demeanor that day, the defendant objected on the ground that the evidence was irrelevant.

On appeal, the defendant argues that the court's rulings were improper because the court failed to analyze the admissibility of the evidence under the constancy of accusation doctrine. The defendant argues that "[a]fter the formal police complaint has been lodged . . . demeanor is increasingly suspect as probative evidence and, since it cannot be cross-examined, must be subject to the same sort of rational limitations which have been imposed upon constancy of accusation evidence." The defendant argues that the evidence at issue was "highly suspect" and that the probative value of the evidence was "dubious at best . . . ."

Because the defendant failed to raise this unique argument before the court at the time that he objected to the admissibility of the evidence, but merely objected on the ground that the evidence was not relevant, we decline to consider the merits of the argument here. "[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate

basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted." (Internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013).

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

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Robbery second degree; conspiracy to commit robbery second degree; sexual assault fourth degree; breach of peace second degree; whether trial court improperly dismissed motion to correct illegal sentence; claim that defendant's constitutional right against double jeopardy was violated as result of imposition of separate sentences for conviction of two counts of second degree robbery that stemmed from single incident but were prosecuted under different subdivisions of statute ([Rev. to 2007] § 53a-135 [a] [1] and [2]) governing second degree robbery; whether conviction of two counts of second degree robbery arose out of same act or transaction; whether each robbery offense required proof of fact that other did not; whether § 53a-135 contained language indicating legislature's intent to bar multiple punishments for perpetrators of second degree robbery who, in committing such offenses, violate multiple subdivisions of statute; whether claim that two sentences were improperly imposed for one incident of second degree robbery was procedurally proper double jeopardy claim over which court had jurisdiction on motion to correct; whether court should have denied, rather than dismissed, motion to correct illegal sentence.

State *v.* Raynor 409

Assault first degree as accessory; conspiracy to commit assault first degree; whether evidence was sufficient to support conviction of assault first degree as accessory; whether evidence was sufficient for jury to have found beyond reasonable doubt that defendant aided principal shooter to cause victim physical injury by discharge of firearm and that defendant intended that principal commit assault first degree; whether conviction of conspiracy to commit assault first degree was supported by sufficient evidence; whether jury reasonably could have found that defendant entered into agreement to commit assault first degree and that defendant intended that member of conspiracy would cause physical injury to victim by means of discharge of firearm; reviewability of claim that trial court abused discretion by admitting uncharged misconduct drug evidence on ground of relevance where defendant did not object on that ground at trial; reviewability of claim that uncharged misconduct evidence concerning other shooting should not have been admitted because it was not relevant to defendant's motive or intent to commit charged offenses; whether court abused discretion in determining

that probative value of other misconduct evidence outweighed prejudicial effect; reviewability of claim that defendant's constitutional rights were violated when state used peremptory challenge to strike minority juror without providing sufficient race neutral explanation.

State *v.* Soto 739

Criminal possession of pistol; risk of injury to child; reviewability of claim; claim that jury's verdict was against weight of evidence; whether this court could review defendant's claim that evidence against him was so weak as to raise substantial question regarding reliability of verdict when defendant failed to file motion to set aside verdict and for new trial; sufficiency of evidence claims and weight of evidence claims, distinguished and discussed.

State *v.* Torres 138

Murder; carrying pistol without permit; whether first time in-court identification of defendant as shooter made by eyewitness violated defendant's right to due process and should have been excluded pursuant to State *v.* Dickson *(322 Conn. 410), where eyewitness was unable to make reliable identification of defendant in nonsuggestive out-of-court procedure prior to trial; whether defendant waived claim that first time in-court identification of him as shooter by eyewitness violated right to due process and should have been excluded; whether record was adequate for this court to determine that in-court identification of defendant was unreliable; whether admission of identification was harmless beyond reasonable doubt.*

State *v.* Walton 642

Robbery first degree; larceny second degree; assault on elderly person third degree; prosecutorial impropriety; claim that certain comments made by prosecutor during rebuttal closing argument constituted improper vouching and misstatements of law; whether subject comments were proper request for jurors to use common sense and to draw reasonable inferences from evidence in assessing credibility of witnesses.

Stratford *v.* Hawley Enterprises, Inc. 369

Eminent domain; appeal from taking by eminent domain of real property; whether trial court improperly determined that plaintiff town was entitled to recover back taxes owed to it on parcel from condemnation award; claim that town was not entitled to recover back taxes because it failed to claim interest in condemnation award in statement of compensation, as required by statute (§ 8-129 [a] [3] and [b]); whether purpose of notice provisions of § 8-129 was satisfied; whether defendant first mortgagor demonstrated that it was harmed by statement of compensation; whether it was improper for trial court to have cited foreclosure law, by analogy, for purpose of determining priority of tax lien.

Stratford *v.* LeBlanc 362

Foreclosure; municipal tax liens; default for failure to appear; whether trial court abused discretion in denying motions to open judgments of foreclosure by sale; whether defendant established, pursuant to statute (§ 52-212 [a]) governing opening of judgment rendered on default, that good defense existed at time judgments were rendered and that he was prevented by mistake, accident or other reasonable cause from presenting defense; whether trial court could have found that defendant did not have reasonable cause to fail to file appearances prior to defaults; reviewability of claim that good defense existed at time that judgments were rendered; whether party seeking to open default judgment must show, pursuant to § 52-212 (a), both that good defense existed and that party was prevented by mistake, accident or other reasonable cause from presenting defense.

TD Bank, N.A. *v.* Salce 757

Promissory note; personal jurisdiction; promissory estoppel; claim that trial court erred in denying defendant's motion to dismiss for lack of personal jurisdiction due to insufficient service of process as required by statute (§ 52-59b [c]); claim that trial court improperly rendered summary judgment in favor of plaintiff because defendant's special defense of promissory estoppel, which alleged that plaintiff was estopped from prosecuting action due to its failure or refusal to issue promised documents after agreeing to note modification, raised genuine issue of material fact.

Tilus *v.* Commissioner of Correction 336

Habeas corpus; claim that trial counsel's joint representation of petitioner and accomplice in pretrial phase presented conflict of interest and that there was no valid waiver of potential conflict in violation of petitioner's constitutional right to conflict free representation; whether habeas court properly determined that no

actual conflict of interest existed; whether habeas court properly determined that petitioner failed to prove that he was prejudiced by any potential conflict created by dual representation; whether habeas court properly determined that petitioner was not denied constitutional right to effective assistance of trial counsel; whether habeas court properly concluded that trial counsel's performance was deficient in that he failed to conduct timely investigation of charges against petitioner; whether petitioner was prejudiced by trial counsel's deficient performance.

Torres *v.* Commissioner of Correction 460

Habeas corpus; claim that respondent Commissioner of Correction improperly failed to give petitioner risk reduction earned credits for conduct that occurred during period of time that petitioner was confined as pretrial detainee; whether habeas court abused discretion in denying petition for certification to appeal where issues involved matters of first impression; whether habeas court improperly concluded that petitioner was not eligible for risk reduction earned credits as pretrial detainee; whether language of applicable statute (§ 18-98e) was clear and unambiguous, and demonstrated that legislature intended to afford only sentenced inmates opportunity to earn risk reduction earned credits; claim that § 18-98e violates equal protection clause because it does not permit indigent individuals who are held in presentence confinement to earn risk reduction credits; whether habeas court lacked subject matter jurisdiction over claim.

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.

Washburne *v.* Madison 613

Negligence; action for damages for injuries to third grade student while playing soccer in physical education class; claim that safety guideline in physical education guide of defendant board of education indicating that students should wear shin guards for additional protection created ministerial duty; claim that, even if defendants' acts or omissions were discretionary in nature, there remained genuine issue of material fact as to whether student had been subject to imminent harm and, thus, fell within identifiable person/imminent harm exception to governmental immunity; whether foreseeability of injury can demonstrate that harm is imminent without also showing that probability that injury will occur from dangerous condition is high enough to necessitate that defendants act to prevent it.

Wells Fargo Bank, N.A. *v.* Henderson. 474

Foreclosure; whether trial court improperly granted motion for summary judgment as to liability; claim that plaintiff failed to demonstrate standing to foreclose because it had not been assigned mortgage and note until after action commenced; whether affidavit stating that plaintiff was holder of note and copy of note were sufficient to establish, for summary judgment purposes, standing to foreclose; whether court properly summarily disposed of amended special defenses that substantively were nearly identical to ones previously stricken; whether defendant was deprived of evidentiary hearing on issue of standing; whether defendant failed to establish genuine issue of material fact as to whether plaintiff had standing to foreclose; whether defendant was deprived of due process as to several motions and request filed during litigation; whether defendant was provided full and fair opportunity to present counterarguments to motion for summary judgment as to liability; reviewability of claim that defendant was prevented from presenting oral argument on motion to dismiss; whether defendant was deprived of evidentiary hearing on second motion to dismiss where defendant submitted no proof to rebut jurisdictional allegations in plaintiff's complaint; whether defendant was deprived of oral argument on motion for continuance; whether court had discretion to deny motion to reargue without hearing.

Windsor Federal Savings & Loan Assn. *v.* Reliable Mechanical Contractors, LLC 651

Contracts; whether individual defendant, who was no longer defendant to complaint when trial court rendered final judgment on complaint, was aggrieved and had

standing to appeal from final judgment on complaint; whether this court lacked jurisdiction for lack of final judgment over appeal challenging trial court's dismissal of counterclaim; whether trial court improperly granted motion for summary judgment; whether defendant raised genuine issue of material fact as to whether guarantee was signed by defendant; whether trial court improperly resolved contested fact in granting motion for summary judgment; whether claim that trial court improperly dismissed counterclaim on ground that it was barred by statute of limitations was moot where there still existed another unchallenged ground on which trial court based judgment.

CONNECTICUT APPELLATE REPORTS

Vol. 176

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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STATE OF CONNECTICUT *v.* THOMAS STEELE
(AC 37956)

Alvord, Sheldon and Norcott, Js.

Syllabus

Convicted of the crimes of robbery in the first degree, conspiracy to commit robbery in the first degree and conspiracy to commit larceny in the third degree in connection with his conduct in robbing a bank, the defendant appealed to this court. He challenged the sufficiency of the evidence to support his robbery conviction and also claimed, inter alia, that the trial court improperly admitted lay testimony from a detective, D, concerning historic cell site analysis, a certain process that utilizes cell phone records and cell site locations to identify the location of cell phones at a particular time. Specifically, he claimed that the court should have qualified D as an expert witness before permitting him to testify about how he used the defendant's cell phone records to determine his whereabouts before, during and after the bank robbery. *Held*:

1. There was sufficient evidence presented at trial to support the defendant's conviction of robbery in the first degree as a principal: the jury reasonably could have credited the testimony of M, the defendant's friend, that the defendant had told M that he robbed a bank but discredited M's testimony that she understood him to be joking, and the state presented a variety of direct and circumstantial evidence that created a connection between the physical attributes and possessions of the robber and the defendant, including, inter alia, surveillance footage of the robbery, eyewitness testimony describing what the robber was wearing, which matched other surveillance footage that depicted the defendant wearing similar clothing, and evidence of the defendant's purchase of a BB gun like the one used in the robbery; moreover, although the evidence was not inconsistent with the defendant being

the getaway driver instead of the robber, a reasonable view of the evidence supported a finding that the defendant acted as a principal during the robbery, which was the only theory of liability the state pursued at trial and on which the court instructed the jury.

2. The trial court abused its discretion by not requiring D to be qualified as an expert witness before allowing him to testify regarding historic cell site analysis: although that analysis is not extremely difficult to understand, the analytical process involved therein is beyond the ken of the average juror, as call detail records can be used to determine the approximate location of a cell phone at the time of a particular communication by determining the geographical coverage area of the cell sector used to facilitate that communication, and that process of determining the coverage area requires scientific and technical knowledge, which would require a trial court, prior to admitting such testimony, to conduct a hearing to ensure that the testimony was based on a reliable scientific methodology, and contrary to the state's claim, D did not merely read from a document that was already in evidence, he explained how cell phones and cell sites operate and, thus, broached the realm of expert testimony; nevertheless, the admission of D's testimony was harmless beyond a reasonable doubt, as the state presented substantial evidence of the defendant's involvement in the bank robbery, including his admission to M that he robbed a bank, and D's testimony was largely cumulative of other direct and circumstantial evidence establishing the defendant's locations before, during and after the robbery.

3. The defendant's conviction of and sentences on the charges of conspiracy to commit robbery and conspiracy to commit larceny, having arisen out of a single agreement to rob the bank, violated his right against double jeopardy; accordingly, his conviction of both conspiracy charges could not stand.

Argued April 18—officially released August 29, 2017

Procedural History

Substitute information charging the defendant with of the crimes of robbery in the first degree, conspiracy to commit robbery in the first degree and conspiracy to commit larceny in the third degree, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the jury before *Markle*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed in part; judgment directed.*

James B. Streeto, senior assistant public defender, with whom, on the brief, was *Maria V. Morse*, certified legal intern, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Kevin D. Lawlor*, state's attorney, and *Amy L. Bepko*, assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Thomas Steele, appeals from the judgment of conviction, rendered after a jury trial, of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (4), and conspiracy to commit larceny in the third degree in violation of General Statutes §§ 53a-48 (a) and 53a-124 (a) (2). On appeal, the defendant claims that (1) there was insufficient evidence presented at trial to convict him of robbery in the first degree; (2) the trial court abused its discretion and violated his rights under the confrontation clause of the sixth and fourteenth amendments to the United States constitution when it permitted a detective to testify about historic cell site analysis without being qualified as an expert witness; and (3) his cumulative conviction and sentences for conspiracy to commit robbery and conspiracy to commit larceny violate the double jeopardy clause of the fifth and fourteenth amendments to the United States constitution. We agree with the defendant that his cumulative convictions and sentences for conspiracy to commit robbery and conspiracy to commit larceny violate the double jeopardy, but we reject the defendant's other claims. Accordingly, we reverse the judgment in part and affirm the judgment in part.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. In the early morning hours of Saturday, February 16, 2013, the defendant checked into a Comfort Inn in Naugatuck and paid the required $100 deposit in cash. Later

that morning, at approximately 9:30 a.m., the defendant purchased a Beretta Airsoft BB gun (facsimile firearm), which looked like a Beretta style handgun, at a Walmart in Derby. Thereafter, the defendant returned to the Comfort Inn to check out. Caitlin Mitchell and an unidentified black male accompanied the defendant during the checkout process. When he was informed that he had to wait for housekeeping to check his room before his cash deposit would be refunded, the defendant became irate, insisting that he had to be somewhere and threatening to call the police if his deposit was not returned. Eventually, the hotel manager calmed the defendant down while the checkout process was completed. At approximately 11:30 a.m., after the hotel manager was informed that the defendant's room was in order, she placed the defendant's deposit on the counter beside her while she printed a receipt for the defendant. The defendant reached over the counter, grabbed the money, and left with Mitchell and the unidentified black male before the hotel manager could complete the checkout process. After exiting the hotel, all three individuals entered the defendant's green Cadillac Deville and left.[1]

At 11:54 a.m., the defendant ran into the Webster Bank in Seymour while wearing dark blue jeans, a black ski mask, and grey gloves. He pointed his facsimile firearm at Tara Weiss, the assistant bank manager, and ordered everybody "[to] get to the fucking floor." After the bank employees and customers complied with his order, the defendant jumped onto and then over the teller counter and aimed his facsimile firearm at Danielle George, a bank teller. He ordered her to open her

[1] At trial, the defendant disputed possessing or operating the Cadillac, which was registered to and insured by Wardell Eaddy. The state presented substantial evidence, however, that although Eaddy registered the Cadillac in his own name as a favor to the defendant, the defendant possessed and operated the Cadillac at the time of the robbery.

cash drawer and place the money in the bag he provided. As George complied with his order, another teller behind the counter began to move. The defendant aimed his facsimile firearm at the other teller and told her "not to be a hero . . . ." The defendant returned his attention to George. George continued to put money in the defendant's bag and managed to place a dye pack in the bag as well.[2] When George finished, the defendant took the bag and exited the bank.

On June 4, 2013, the defendant was arrested for his role in the bank robbery. In the operative information, the defendant was charged with robbery in the first degree, conspiracy to commit robbery in the first degree, and conspiracy to commit larceny in the third degree. After a trial, a jury found the defendant guilty of all counts. The defendant was sentenced to a total effective sentence of ten years of incarceration followed by four years of special parole.[3] This appeal followed. Additional facts will be set forth as necessary.

I

We begin with the defendant's claim that there was insufficient evidence presented at trial to convict him of robbery in the first degree as a principal, which was the only theory of liability the state pursued at trial

[2] A "dye pack" is a bank security feature that is made up of a stack of actual currency with its center removed and a dye pack put in its place. The dye pack is designed to release red dye, tear gas, and smoke at a designated period of time after the device has been removed from the bank. When the dye pack explodes, it becomes very hot and can burn currency it comes in contact with it. The serial numbers of the devices and the bills used on the top and bottom of the stack are recorded to pair specific packets with specific teller stations inside a bank.

[3] For both his conviction of robbery in the first degree and his conviction of conspiracy to commit robbery, the defendant was sentenced to ten years of incarceration followed by four years of special parole. For his conviction of conspiracy to commit larceny, the defendant was sentenced to five years of incarceration. The court further ordered that the defendant's three sentences were to be served concurrently.

and on which the court instructed the jury. The state responds that, when viewing the evidence in the light most favorable to sustaining the verdict, there was sufficient circumstantial evidence for a jury to reasonably conclude that the defendant acted as a principal during the robbery. We agree with the state.

The following additional facts are relevant to this claim. As the robber exited the bank, he ordered Weiss to count to 100. Weiss initially complied and began counting. Once the robber left the bank, however, she jumped up, ran to the doors, and locked them. Weiss then returned to her station, pressed the bank's panic alarm, and called 911. After speaking with a 911 operator, Weiss reported the robbery to Webster Bank's emergency hotline and to the branch manager, Jason Rodriguez, who was in New York. Rodriguez immediately began driving back to Connecticut from New York. State and federal law enforcement personnel arrived at the bank shortly thereafter and obtained, inter alia, surveillance footage of the robbery. Surveillance footage from inside the bank revealed that the robber wore dark blue jeans, grey gloves, and a black ski mask. Surveillance footage from outside the bank revealed that a green vehicle, which was similar in appearance to the defendant's Cadillac, entered the bank parking lot shortly before the robbery and picked up an individual on Spruce Street shortly after the robbery.[4]

After leaving the bank, the robber and his companion(s) initially drove north on Route 8, stopping in Beacon Falls to dispose of the discharged dye pack and the cash that was burned when the dye pack discharged. Shortly thereafter, members of law enforcement, with

[4] Raider, a canine trained and certified in tracking humans, tracked a scent from the front door of the Webster Bank where the robber was last seen to the corner of Garden Street and Spruce Street where he lost the trail. Raider's handler testified that he observed fresh tire tracks in the area where Raider lost the scent trail.

the assistance of a pedestrian, recovered the dye pack and some of the burned and stained cash from an area near the Beacon Falls Police Department.

Later that day, at approximately 2 p.m., the defendant and an unidentified black male were traveling northbound on Route 8 when they stopped to dispose of a facsimile firearm by throwing it onto the embankment along the side of the highway. Unbeknownst to the defendant and his companion, Rodriguez, who was also traveling northbound on Route 8 on his way to the bank, observed this conduct. When he neared the defendant's Cadillac, he immediately noticed that it was being driven erratically. In response, he slowed down and watched as the Cadillac swerved into the breakdown lane, where he saw the driver throw an object over the roof of the Cadillac and onto the embankment. Because of the suspicious nature of this conduct and his knowledge of the recent robbery at his bank branch, Rodriguez used his cell phone to record his observations, including the vehicle's make, color, and license plate number and a brief physical description of the men in the driver's and front passenger's seats.[5] He then reported the incident to the police. Shortly thereafter, officers recovered a black Beretta style facsimile firearm from the Route 8 embankment near the Bridgeport-Trumbull line. Notably, the tip of the recovered facsimile firearm was covered with black electrical tape.

Shortly after the incident along Route 8, the defendant purchased professional strength Goo Off and rubber cleaning gloves with cash at the Home Depot in Derby. He then proceeded to the Post Motor Inn in Milford where he rented a cabin in his own name and

[5] Rodriguez testified that the driver, who threw the object, had a thin mustache and that the passenger, whom he did not get a good look at, was wearing a hat. In surveillance footage from Walmart and a hotel the defendant stayed at the day after the robbery, the defendant is seen with a thin black mustache and a light grey beard.

paid for it in cash. The following morning, February 17, 2013, the defendant checked into the Super 8 Motel in Milford with Mitchell, paying for the room with cash.

That evening, a patrol officer reported that she had located the Cadillac involved in the Webster Bank robbery in the Super 8 Motel parking lot. Shortly thereafter, officers investigating the bank robbery arrived. After speaking to the employees at the front desk of the motel and reviewing its surveillance footage, the officers determined that the defendant was associated with the Cadillac and that he was staying in room 206. After about fifteen minutes of knocking on the defendant's door, the defendant came to the window of his room but refused to open the door. He denied ever being in Seymour or knowing anything about the Cadillac in the parking lot, claiming that a friend had dropped him off at the motel. When the detectives asked him whether he knew anything about a bank robbery, he stated that he did not, but added that "if [the officers] had enough information on him, [they] would be arresting him right now." Members of the Milford Police Department then detained the defendant and Mitchell in the lobby of the Super 8 Motel. When special agent Lisa C. McNamara of the Federal Bureau of Investigation arrived, she attempted to talk to Mitchell, but the defendant kept yelling at her: "Don't talk to them, you don't have to talk to them, your parents have to be present, you don't have to talk to them." As a result, McNamara brought Mitchell outside of the lobby and they sat in an unmarked police cruiser so that they could talk without the defendant hearing.

Officers subsequently seized several items from the Super 8 Motel. From the defendant and Mitchell's vacated room, they seized a hotel room key for the room that the defendant had rented at the Comfort Inn. From the hotel staff, they obtained surveillance footage, which showed the defendant arriving at the motel in

his Cadillac and checking into his room. Notably, during the course of check-in, the defendant could be seen removing several folded bundles of cash from his pants pockets and using that cash to pay for his room. Because the defendant paid in cash, officers further seized from the Super 8 Motel seventy dollars that was stained with red dye, which they believed that the defendant used to pay for the room. Subsequent forensic tests confirmed the presence of chemicals used in bank dye packs on the stained cash.

In addition to retrieving several items from the Super 8 Motel staff, officers seized and searched the defendant's Cadillac. In the Cadillac, officers found five pairs of grey latex gloves, receipts from Walmart and Home Depot, and a roll of black electrical tape. The latex gloves that were recovered from the Cadillac's glove box were similar in appearance to the ones worn by the individual who had robbed the Webster Bank. The Walmart receipt helped the officers obtain surveillance footage from Walmart, which confirmed that on the morning of the robbery the defendant, who was wearing dark blue jeans, arrived at Walmart in his Cadillac and purchased a facsimile firearm of the same make and model as the one recovered from the embankment along Route 8. Subsequent forensic tests revealed that the electrical tape found in the defendant's Cadillac was indistinguishable from the electrical tape found on the facsimile firearm recovered from the embankment along Route 8.

Because the defendant appeared to lead a transient lifestyle in which he frequently moved from motel to motel, officers checked with hotels and motels in the area to determine whether he had stayed in them after the robbery. When they arrived at the Post Motor Inn, they learned that the defendant had checked into a cabin at 2:51 p.m. on the day of the robbery. On his registration card, the defendant had listed two people

in his party and had noted his vehicle's make and license plate number. The officers noticed that the sink in the defendant's cabin was tinted red and that the snow behind the cabin was stained red. They took samples of the stained snow. In the tree line near the cabin, the officers found a garbage bag, which contained, inter alia, rubber gloves similar to those the defendant had purchased at Home Depot, towels with red stains on them, and an empty bottle of soap. A Post Motor Inn employee also gave them a black ski mask that he had found in the snowbank approximately thirty feet from the defendant's cabin. Subsequent forensic tests confirmed that the gloves and towels retrieved from the garbage bag and the seized samples of stained snow contained traces of the chemicals used in bank dye packs.

Finally, at trial, Mitchell testified that on the weekend of the robbery she had seen the defendant in possession of "a substantial amount of money" and cleaning "red stuff" off his Cadillac. Mitchell also testified that the defendant had told her that he "robbed a bank . . . ." Mitchell maintained that when the defendant stated that he robbed a bank, he did so "jokingly" and, as a result, she did not take him seriously. She admitted, however, that the defendant was her friend and that "I don't want to be here with this," i.e., "to testify against someone that was close to me . . . ." After the parties rested and presented closing arguments, the court instructed the jury. With respect to the charge of robbery in the first degree, the court instructed the jury only on principal liability.

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict.

Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

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

"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. *Crespo*, 317 Conn. 1, 16–17, 115 A.3d 447 (2015).

We conclude that there was sufficient evidence presented at trial to support the defendant's conviction of robbery in the first degree. First, Mitchell testified that the defendant told her that he "robbed a bank . . . ." On the basis of this testimony, the jury could have concluded that when the defendant said that he "robbed a bank," he meant that he personally had robbed a bank. The defendant, relying on the corpus delicti doctrine, argues that Mitchell's testimony cannot support his conviction because his purported confession is uncorroborated. The purpose of the corpus delicti doctrine, however, is to protect against convictions for offenses that have not in fact occurred. *State* v. *Farnum*, 275 Conn. 26, 33–34, 878 A.2d 1095 (2005). The corpus delicti doctrine has no bearing on the present case because it is undisputed that the Webster Bank in Seymour was robbed on February 16, 2013; indeed, it is undisputed on appeal that the defendant was one of the individuals who conspired to rob the bank.

The defendant further suggests that Mitchell's testimony cannot support his conviction because Mitchell testified that she did not take the defendant seriously when he said that he "robbed a bank . . . ." A jury may properly decide, however, "what—all, none, or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.) *State* v. *Victor C.*, 145 Conn. App. 54, 61, 75 A.3d 48, cert. denied, 310 Conn. 933, 78 A.3d 859 (2013). The jury in this case very well could have credited Mitchell's testimony that the defendant told her that he robbed a bank but discredited her testimony that she understood him to be

joking. Mitchell admitted that the defendant was her friend and that she did not want "to testify against someone that was close to [her]." The jury reasonably could have concluded, therefore, that Mitchell characterized the defendant's statement as a joke because of her desire to protect him.

The defendant's robbery conviction, however, is not supported solely by Mitchell's testimony. At trial, the state presented a variety of direct and circumstantial evidence creating a connection between the physical attributes and possessions of the robber and the defendant. The jury had before it surveillance footage of the robbery. When determining if the defendant was the robber, the jurors could have compared surveillance footage of the robber with other surveillance footage of the defendant and their own observations of the defendant in court to determine if there was a physical resemblance between the robber and the defendant. Additionally, the bank surveillance footage and eyewitness testimony established that the robber possessed a black firearm and was wearing dark blue jeans, grey gloves, and a black ski mask. Walmart surveillance footage depicted the defendant wearing dark blue jeans on the morning of the robbery. The receipt and surveillance footage from Walmart further established that while at Walmart the defendant personally purchased a black facsimile firearm, which was the same make and model as the facsimile firearm an individual driving a Cadillac disposed of later that afternoon by throwing it onto an embankment alongside of Route 8. Five pairs of grey latex gloves similar to those worn by the robber were recovered from the Cadillac's glove compartment, and a black ski mask similar to the one worn by the robber was recovered from a snowbank approximately thirty feet from the defendant's cabin at the Post Motor Inn.

Although it can be argued that this evidence is not inconsistent with the defendant being the getaway

driver instead of the robber, "[i]n reviewing a sufficiency of the evidence claim . . . we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Silva*, 285 Conn. 447, 459, 939 A.2d 581 (2008). Mindful that in determining the sufficiency of the evidence we consider its cumulative effect and construe the evidence in the light most favorable to sustaining the verdict, we determine that there was sufficient evidence presented at trial to support the defendant's conviction of robbery in the first degree.

II

The defendant next claims that the court improperly admitted lay testimony concerning historic cell site analysis.[6] Specifically, the defendant argues that the court should have qualified Detective Steven Ditria as an expert witness before permitting him to testify about how he used the defendant's cell phone records to determine his whereabouts before, during, and after the bank robbery. The defendant further contends that this evidentiary error obstructed his rights under the confrontation clause because Ditria's lack of training, education, or experience with cell phones, cellular networks, and cell site analysis prevented him from being meaningfully cross-examined on this evidence.[7] The defendant seeks

[6] Historic cell site analysis involves the use of cell phone records and cell site locations to determine, within some range of error, a cell phone's approximate location at a particular time. *United States* v. *Natal*, 849 F.3d 530, 534 (2d Cir. 2017).

[7] It is unclear whether the defendant also claims that Ditria's testimony concerning what he learned from a Sprint representative about how cell phones and cellular networks operate was improper and constituted a confrontation violation under *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In the "legal standard" section of his opening appellate brief, the defendant briefly reviewed the principles of *Crawford* and, in one paragraph, argues why "the 'interpretations of the data' offered through Detective Ditria constituted testimonial hearsay" in violation of

review of this unpreserved constitutional claim pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989); see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third condition of *Golding*).[8] The state responds that Ditria merely read from a document that was already in evidence, i.e., the defendant's cell phone records and instructions from the cellular carrier on interpreting those records, and, thus, his testimony was factual, not opinion.[9] Alternatively,

Crawford. The defendant did not thereafter advance, in his briefs or at oral argument before this court, a claim that a *Crawford* violation occurred. Indeed, the defendant's briefs and oral argument focused principally on his claim that Ditria should have been qualified as an expert witness and that the court's failure to do so obstructed his confrontation rights. As a result, we conclude that, to the extent the defendant alleges a *Crawford* violation, this claim is inadequately briefed. See *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016).

[8] "Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Internal quotation marks omitted.) *State* v. *Dixon*, 318 Conn. 495, 511, 122 A.3d 542 (2015). "The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim." (Internal quotation marks omitted.) *State* v. *Britton*, 283 Conn. 598, 615, 929 A.2d 312 (2007). "The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *State* v. *Dixon*, supra, 511.

[9] The state further argues that the defendant has abandoned or, alternatively, inadequately briefed any evidentiary claim because he "appears to limit his appellate claims to his assertion that his constitutional right to confrontation was violated." The state is correct that the defendant framed this issue in his statement of the issues as "whether the defendant's sixth amendment right to confrontation was violated when Detective Ditria testified without specialized knowledge regarding the whereabouts of the defendant based upon his interpretation of cell phone records." In advancing this claim, however, the defendant has consistently argued that the violation of his confrontation rights stems from the court's evidentiary error in permitting Ditria to interpret his cell phone records without qualifying him as an expert

the state argues that any error in the admission of this testimony was harmless beyond a reasonable doubt. We agree with the defendant that the court abused its discretion by not requiring Ditria to be qualified as an expert witness, but we agree with the state that this error was harmless beyond a reasonable doubt. Accordingly, the defendant's constitutional claim fails under the fourth prong of *Golding*. See *State* v. *Dixon*, 318 Conn. 495, 511, 122 A.3d 542 (2015).

A

To understand the significance of the trial court's decision to permit a lay witness to testify about historic cell site analysis, it is first necessary to understand the manner in which cell phones and cellular networks operate. Although the trial court did not have the benefit of such information when it made its evidentiary ruling, we share the view of our sister courts that such information is essential to understanding how historic cell site data is generated and what inferences that data supports concerning the locations of a cell phone, and by inference its user, during a communication. E.g., *State* v. *Payne*, 440 Md. 680, 690–98, 104 A.3d 142 (2014); *Collins* v. *State*, 172 So. 3d 724, 740–41 (Miss. 2015); *State* v. *Patton*, 419 S.W.3d 125, 130–31 (Mo. App. 2013); *State* v. *Johnson*, 797 S.E.2d 557, 561–62 (W. Va. 2017); see, e.g., *Commonwealth* v. *Augustine*, 467 Mass. 230, 236–39, 4 N.E.3d 846 (2014) (reviewing cell phone technology prior to determining whether police were required to obtain search warrant to obtain information from defendant's cell phone service provider); *State* v. *Earls*, 214 N.J. 564, 574–78, 70 A.3d 630 (2013) (same). We will rely in this overview on information and materials relied on by our sister courts when discussing cellular network technology or cell site analysis.

witness. The defendant has thoroughly briefed why testimony concerning cell site analysis should be admitted only through an expert witness. Accordingly, we conclude that the defendant has not abandoned or inadequately briefed this threshold evidentiary claim.

Cell phones are essentially sophisticated two way radios that use cellular networks comprised of cell sites[10] and radio frequency (RF) antennae to communicate with one another. *State* v. *Payne*, supra, 440 Md. 692; J. Beck et al., "The Use of Global Positioning (GPS) and Cell Tower Evidence to Establish a Person's Location—Part II," 49 Crim. L. Bull. Art. 8, 2 (2013). A cell site is the fixed location that provides cellular coverage using RF antennae, a base station, and other network equipment. J. Beck et al., supra, 3. The geographical coverage area of a cell site is called a cell sector.[11] See *United States* v. *Bohannon*, 824 F.3d 242, 256 (2d Cir. 2016), cert. denied, U.S. , 137 S. Ct. 628, 196 L. Ed. 2d 517 (2017). The shape and size of a cell sector is variable and depends on several external and internal factors. External factors include the surrounding environment and geography, e.g., the location of buildings, vehicles, vegetation, and land masses, which might prevent the RF signal from propagating in a uniform and uninterrupted manner. *State* v. *Payne*, supra, 693–94; A. Blank, "The Limitations and Admissibility of Using Historical Cellular Site Data to Track the Location of a Cellular Phone," 18 Rich. J.L. & Tech. 3, 6–7 (2011);

[10] "Cell sites" are often referred to as "cell towers." We believe that the term cell site is more precise. The primary purpose of a cell site "is to elevate antennas that transmit and receive radio-frequency (RF) signals from" cell phones. M. Harris, Unison, How Cell Towers Work (2011), available at www.unisonsite.com/pdf/resource-center/How%20Towers%20Work.pdf (last visited August 23, 2017). This purpose can be accomplished by building an independent tower or by placing the cell site in common structures such as buildings, water towers, bridges, tunnels, streetlights, traffic lights, stadium lights, and billboards. Id.

[11] This geographical coverage area is also known as a "cell," "sector," and "footprint." See *T-Mobile USA, Inc.* v. *City of Anacortes*, 572 F.3d 987, 997 n.11 (9th Cir. 2009) (" 'coverage footprint' "); *State* v. *Payne*, supra, 440 Md. 692 ("cell"); *United States* v. *Mack*, Docket No. 3:13-cr-00054 (MPS), 2014 WL 6474329, *3 (D. Conn. November 19, 2014) ("sector"); *United States* v. *Davis*, Docket No. 11-60285-CR, 2013 WL 2156659, *5 (S.D. Fla. May 17, 2013) ("footprints of the sectors"); T. Singal, Wireless Communications 99 (2011) ("cell" or "footprint").

see generally T. Singal, Wireless Communications 35–65, 100 (2011) (discussing propagation patterns of radio frequency signals). Internal factors include the technical characteristics of the cell site and the RF antennae. *State* v. *Payne*, supra, 693; A. Blank, supra, 4–6.

There are four types of cell sites generally used by cellular companies: macrocells, microcells, picocells, and femtocells. M. Harris, Unison, How Cell Towers Work 2–3 (2011), available at www.unisonsite.com/pdf/resource-center/How%20Towers%20Work.pdf (last visited August 23, 2017) (hereinafter M. Harris, How Cell Towers Work); Geolocation Privacy and Surveillance (GPS) Act: Hearing on H.R. 2168 before the Subcommittee on Crime, Terrorism, Homeland Security and Investigations of the House Committee on the Judiciary, 113th Cong. 45, 54–55 (2013) (written testimony of Matthew Blaze, associate professor of computer and information science, University of Pennsylvania), available at https://judiciary.house.gov/wp-content/uploads/2016/02/113-34-80542.pdf (last visited August 23, 2017) (hereinafter Blaze testimony); see also *United States* v. *Davis*, 785 F.3d 498, 542 (11th Cir.), cert. denied, U.S. , 136 S. Ct. 479, 193 L. Ed. 2d 349 (2015). Macrocells are prototypical "cell towers," although they can be attached to a structure, and can cover an area often miles in diameter or more in rural areas where there is less signal interference. M. Harris, How Cell Towers Work, supra, 3; Blaze testimony, supra, 54; see also *Sprint Spectrum L.P.* v. *Zoning Board of Adjustment*, 21 F. Supp. 3d 381, 391 (D.N.J. 2014), aff'd, 606 Fed. Appx. 669 (3d Cir. 2015). Microcells typically are used in urban or suburban settings to cover an area that is less than one mile in diameter. M. Harris, How Cell Towers Work, supra, 3. A picocell is a small base station that acts like an extension cord, extending the macrocell's or microcell's signal through high traffic or obstructed areas and covering an area of less than 250

yards in diameter. Id.; M. Harris, Unison, Think Small: Micro, Pico and Femto Cell Sites 2 (2011), available at http://www.unisonsite.com/pdf/resource-center/Think-%20Small%20Unison-whitepaper-7D.pdf (last visited August 23, 2017) (hereinafter M. Harris, Think Small). Finally, a femtocell is like a booster pack; it uses a broadband Internet connection to "backhaul" mobile calls and data traffic into a wireless carrier's existing cellular network. M. Harris, Think Small, supra, 2; see also *EON Corp IP Holdings LLC* v. *Cisco Systems*, *Inc.*, 36 F. Supp. 3d 912, 923 (N.D. Cal. 2014), aff'd, 595 Fed. Appx. 991 (Fed. Cir. 2015). The coverage range of these devices is similar to that of a cordless phone base. M. Harris, How Cell Towers Work, supra, 3; M. Harris, Think Small, supra, 2; Blaze testimony, supra, 55; see also *United States* v. *Davis*, supra, 503–504 n.7.

Each of the four types of cell sites contains, inter alia, a base station and at least one RF antenna. M. Harris, How Cell Towers Work, supra, 2, 6. An RF antenna can be omnidirectional or multidirectional. An omnidirectional antenna is intended to service the entire, 360 degree area around a cell site. T. Singal, supra, p. 100; M. Harris, How Cell Towers Work, supra, 5–6; see also *Ruckus Wireless*, *Inc.* v. *Netgear*, *Inc.*, Docket No. C 08-2310 PJH, 2013 WL 6627737, *1, *4 (N.D. Cal. December 16, 2013). The idealized cell sector of a cell site with an omnidirectional antenna is a hexagon with the cell site at the center.[12] E.g., T. Singal, supra, pp. 99–100; M. Harris, How Cell Towers Work, supra, 5. In contrast, directional antennae are intended to service only small portions of the area around a cell site. For example, a cellular carrier might use three directional antennae with beam widths set at 120

[12] "Cells [or cell sectors] are always drawn as hexagons because it makes it simpler and easier to show adjacent cells without any overlap. In reality, the cell shape is closer to a circle but it may be affected by surrounding buildings and other geographic features." T. Singal, supra, p. 101.

degrees in order to achieve 360 degrees of coverage around a cell site. *Collins* v. *State*, supra, 172 So. 3d 740; J. Beck et al., supra, 49 Crim. L. Bull. Art. 8, 3; see also T. O'Connor, "Provider Side Cell Phone Forensics," 3 Small Scale Digital Device Forensics J. 1 (2009) (discussing and depicting typical cell site and antenna configurations), available at http://ctfdatapro.com/pdf/celltower.pdf (last visited August 23, 2017). With this configuration, the idealized cell sector is a wedge, with a center angle of 120 degrees, emanating out from the cell site. E.g., *State* v. *Payne*, supra, 440 Md. 724 (appendix C); T. O'Malley, "Using Historical Cell Site Analysis Evidence in Criminal Trials," 59 U.S. Atty. Bull. 16, 19 (2011), available at https://www.hsdl.org/?view&did=701377 (last visited August 23, 2017). The directional orientation of a directional antenna is called its "azimuth."[13] T. O'Connor, supra, 1; *United States* v. *Mack*, Docket No. 3:13-cr-00054 (MPS), 2014 WL 6474329, *2 (D. Conn. November 19, 2014).

Every seven seconds, regardless of whether it is being used, a cell phone will "register" with in-range cell sites.[14] J. Beck et al., supra, 49 Crim. L. Bull. Art. 8, 3; A. Blank, supra, 18 Rich. J.L. & Tech. 5. When an individual

[13] "Commonly a cell [site] will have the first of the three antennas centered on due North or 0 degrees. This antenna has a nominal area 120 degrees wide which [covers] 60 degrees each side of due north. This antenna's nominal field [extends] from 300 degrees (-60 degrees) to 60 degrees and is called either the north facing antenna or the Alpha antenna. The second antenna is centered at 120 degrees and has a nominal coverage area [that extends] from 60 degrees to 180 degrees, this antenna is referred to as the southeast facing antenna or the Beta antenna. The third antenna nominally covers the remaining area of the field; it is centered on 240 degrees and nominally [extends] from 180 degrees to 300 degrees, this antenna is called either the southwest facing antenna or the gamma antenna." T. O'Connor, supra, 3 Small Scale Digital Device Forensics J. 1; see also id., 1, 3 (depicting different antenna orientation models).

[14] The only way to prevent registration is by turning the cell phone off, by putting it in "Airplane Mode," or by placing it in a shielded container, such as a Faraday bag. J. Beck et al., supra, 49 Crim. L. Bull. Art. 8, 3.

places a call or sends a message, the cell phone communicates with the base station at the cell site with which it has the strongest, best quality signal. J. Beck et al., supra, 3–4; A. Blank, supra, 5; see also *United States* v. *Mack*, supra, 2014 WL 6474329, *3. Through various processes, the base station of that cell site helps the transmitting cell phone connect to the receiving cell phone, which will also use the cell site with the strongest, best quality signal to receive the call or message. See generally T. O'Malley, supra, 59 U.S. Atty. Bull. 20–21. Importantly, the cell site in closest proximity to these cell phones might not be the one producing the strongest, best quality signal for them. J. Beck et al., supra, 3; see A. Blank, supra, 5. The characteristics of the cell site, the RF antenna, and the cell phone as well as a variety of environmental and geographic factors influence which cell site has the strongest, best quality signal for a cell phone.[15]

In addition, it is possible that during a communication the cell site being used by either the transmitting or the receiving cell phone will cease to be the one with the strongest, best quality signal for that cell phone. In this circumstance, a "handoff," or "handover," will occur to ensure that the communication is not disrupted. A. Blank, supra, 18 Rich. J.L. & Tech. 5–6. Handoffs are broadly classified as being "hard" or "soft"

[15] Cell site characteristics include whether maintenance or repairs are being performed on a given cell site, the range of coverage, the wattage output, the call capacity of a cell site, and the number and closeness of neighboring cell sites that will be competing with the cell site in question to produce the strongest, best quality signal in the area. A. Blank, supra, 18 Rich. J.L. & Tech. 6; J. Beck et al., supra, 49 Crim. L. Bull. Art. 8, 5–6. Antenna characteristics include the number of antenna on the cell site, the antenna's height, the direction and angle of the antenna, and the call volume of the antenna at any given time. A. Blank, supra, 4. Cell phone specific characteristics include the wattage output and the generation of the cell phone's broadband capability. Id. Last, environmental and geographical factors include the weather, topography (e.g., height above sea level), and density of physical structures in the area. Id., 6–7; J. Beck et al., supra, 5–6.

depending on the cell phone system the cellular carrier uses. A hard, or "break before make," handoff involves a definite decision by the cell phone to break its connection with its current cell site before, or as, it makes a connection with a new cell site. D. Wong & T. Lim, "Soft Handoffs in CDMA Mobile Systems," IEEE Personal Communications, 6 (1997), available at http://wireless.stanford.edu/papers/DWongsoftHandoff.pdf (last visited August 23, 2017); L. Paul, "Handoff/Handover Mechanism for Mobility Improvement in Wireless Communication," 13 Glob. J. Res. Engineering Elec. & Elecs. Engineering 6, 7 (2013), available at https://globaljournals.org/GJRE Volume13/2-Handoff-Handover-Mechanism.pdf (last visited August 23, 2017).

Conversely, during a soft, or "make before break," handoff a cell phone will simultaneously connect to multiple base stations until it determines which of the in-range cell sites is producing the strongest, best quality signal. D. Wong & T. Lim, supra, 6; L. Paul, supra, 8–9.

Every time a cell phone sends or receives a communication the base station at the cell site automatically generates a call detail record. *State* v. *Payne*, supra, 440 Md. 695–96 and 696 n.24; *In re United States for Historical Cell Site Data*, 724 F.3d 600, 611–12 (5th Cir. 2013); J. Beck et al., supra, 49 Crim. L. Bull. Art. 8, 4. The purpose of call detail records is to enable the cellular provider to bill a subscriber accurately for his or her cell phone usage and to help the carrier understand the calling patterns of their subscribers. J. Beck et al., supra, 4; see also *State* v. *Payne*, supra, 695; *In re United States for Historical Cell Site Data*, supra, 611–12. Call detail records can contain a variety of information depending on the cellular carrier, but these records ordinarily include some information about the cell site(s) used to make or receive the communication.[16]

[16] The information contained in call detail records is sometimes referred to as cellular site location information, or CSLI. E.g., *State* v. *Smith*, 156 Conn. App. 537, 540, 554 n.4, 113 A.3d 103, cert. denied, 317 Conn. 910, 115

State v. *Payne*, supra, 696; J. Beck et al., supra, 4; T. O'Malley, supra, 59 U.S. Atty. Bull. 23; Blaze testimony, supra, 57. The call detail records in the present case contain information about the cell sites in use when the cell phone initiated and terminated a communication.

One form of historic cell site analysis uses the cell site and antenna information contained in a call detail record to determine which cell sector a cell phone was using at the time of a certain communication and, thereby, the geographical area the cell phone, and by inference its user, was in at that time. The geographical coverage area of a specific cell sector can be determined by conducting a drive test or by estimating the cell sector.[17] Drive testing involves the use of RF mapping equipment and software to map the actual cell sector generated by a particular cell site and antenna. E.g., T. O'Malley, supra, 59 U.S. Atty. Bull. 28; see also id., 29 (depicting cell sector based on drive testing). This method was developed by cellular carriers to help them monitor and maintain the quality of their cellular networks, but it has also been used by law enforcement agencies to track suspects and fugitives and by attorneys at trial to establish a cell phone's, and by inference its user's, approximate locations at particular dates and times. See *T-Mobile Central, LLC* v. *Unified Government of Wyandotte Country/Kansas City, Kan.*, 528 F. Supp. 2d 1128, 1140, 1150–52, 1166–67 (D. Kan. 2007), aff'd in part, 546 F.3d 1299 (10th Cir. 2008); T. O'Malley, supra, 28–29.

Although the precision of drive testing makes it the preferred method for determining the shape and size

A.3d 1106 (2015); see also *Commonwealth* v. *Estabrook*, 472 Mass. 852, 853 n.2, 38 N.E.3d 231 (2015).

[17] The methodology of estimating the shape and size of a cell sector is sometimes referred to as "cell identification"; *Collins* v. *State*, supra, 172 So. 3d 740; or "mapping"; e.g., *State* v. *Edwards*, 325 Conn. 97, 121, 156 A.3d 506 (2017); *United States* v. *Mack*, supra, 2014 WL 6474329, *3; *United States* v. *Machado-Erazo*, 950 F. Supp. 2d 49, 55–56 (D.D.C. 2013).

of a cell sector, performing a drive test is not always possible. *United States* v. *Mack*, supra, 2014 WL 6474329, *3. For example, the cell site might have been removed or its characteristics altered by the cellular carrier since the crime was committed. E.g., id. (federal agent testified that drive testing was not possible because cell site in question was no longer present at time of his investigation). In this circumstance, the approximate size and shape of a cell sector can be determined by drawing a pie-wedge diagram on a map. Id. The center angle of the pie-wedge corresponds to the antenna's beam width setting, e.g., 120 degrees, and the outward boundary of the pie-wedge will extend 50 to 70 percent of the way into the opposing cell sector. Id.; *United States* v. *Machado-Erazo*, 950 F. Supp. 2d 49, 55–56 (D.D.C. 2013); *United States* v. *Davis*, Docket No. 11-60285-CR, 2013 WL 2156659, *5–6 (S.D. Fla. May 17, 2013); e.g., T. O'Malley, supra, 59 U.S. Atty. Bull. 28 (depicting estimated cell sector superimposed on map). Critically, the boundaries of an estimated cell sector are not fixed. Depending on a variety of factors, the actual cell sector can be smaller or larger than the estimated cell sector. T. Singal, supra, p. 100; A. Blank, supra, 18 Rich. J.L. & Tech. 5; see also T. O'Malley, supra, 28–29 (depicting idealized cell sector and actual cell sector).

B

Against the foregoing scientific and technical background, we turn to the defendant's claims on appeal. As we previously stated, the threshold issue is whether the court improperly permitted lay testimony concerning historic cell site analysis. The following additional facts are relevant to our resolution of this claim. At the time of the robbery, the defendant owned a cell phone serviced by Sprint-Nextel (Sprint). During the course of his investigation, Ditria subpoenaed the defendant's subscription information and call detail records from

Sprint, and, at trial, the state entered the materials Sprint provided into evidence as exhibit 77.

Exhibit 77 includes, inter alia, the defendant's call detail records, instructions on how to interpret those records, and a list of cell site locations. The call detail records are in the form of a ten column chart, which, in relevant part, has columns titled, "First Cell," and, "Last Cell." The "key" to the call detail records explains that "First Cell" and "Last Cell" refer to the specific cell site and "sector" through which the communication was initiated and terminated. "The first digit [of the cell site identification number] reflects the sector. The last 3-4 digits represent the [cell] site number. . . . For example, if the number in the [First Cell or Last Cell] column reads 2083, the cell site is 083 and the sector is 2." (Emphasis omitted.) A separate, eighteen column chart provided by Sprint contains a variety of information about Sprint's cell sites, including the address and azimuth of each cell site. Exhibit 77 does not define what a "sector" or "azimuth" is.[18] Nor does it contain any general or specific information on cellular networks, the geographical coverage areas of Sprint's cell sites, or the operation of cell phones and cell sites.

At trial, Ditria explained that learning the defendant's cell phone number was "crucial" because he "wanted to learn the whereabouts of [the defendant] based on

[18] It appears that "sector" in these instructions refers to the RF antenna, and thereby the cell sector, used. The instructional page titled "Sector Layout" explains that "Sprint . . . cell sites can be set-up in a variety of ways. . . . [N]ot every cell site has three sectors. Some may have two sectors or may be omni sites. . . . The direction that the sector faces depends on the need for coverage in a particular area." The instructions further explain Sprint's labeling schemes for determining the directional orientation of the azimuth's face, which are designated as being an alpha sector, beta sector, or gamma sector. None of the information provided by Sprint explains the nautical directions associated with a particular sector type (e.g., north, south, east, or west). Cf. T. O'Connor, supra, 3 Small Scale Digital Device Forensics J. 1; footnote 14 of this opinion.

his phone records." Once he knew the defendant's cell phone number, Ditria testified, he subpoenaed the defendant's cell phone records from Sprint. Ditria identified the documents provided by Sprint, which were entered into evidence as exhibit 77 without objection. Ditria explained that although he understood the "[b]asic incoming and outgoing phone calls" when he received the call detail records, he needed help to understand the cell site information within them. He contacted a Sprint representative, whose job it was to assist law enforcement, "to learn about the communication of the cell phone and the cell tower . . . ."

When Ditria began to explain his current understanding of "the significance of a cell tower," defense counsel objected on foundational grounds, stating: "I think he is giving opinion testimony here regarding, I think that's where we're going here." The court asked the prosecutor for a response, to which she replied: "What he understands about cell phone records now after being educated." The court overruled the objection. Thereafter, the following colloquy occurred:

"[The Prosecutor]: Okay. You were explaining what a cell phone tower is for.

"[Ditria]: In order for a phone call to be made, incoming or outgoing, you have to have a cell tower, and it dedicates the subscriber information, checking if it's a legitimate phone number, and with that carrier.

"[The Prosecutor]: Can you make a phone call without a cell tower?

"[Ditria]: Absolutely not.

"[The Prosecutor]: And did you also learn how close a cell phone has to be to a tower in order to receive information from it?

"[Ditria]: Yes.

"[The Prosecutor]: And how far away can a phone be to bounce off the tower?

"[Ditria]: Anywhere from zero to thirty miles.

"[The Prosecutor]: A big radius?

"[Ditria]: Right.

"[The Prosecutor]: So, cell phone—at thirty miles or right next to the tower?

"[Ditria]: Correct.

"[The Prosecutor]: That's the tower that's it's going to bounce off of?

"[Ditria]: Correct.

"[The Prosecutor]: And so, did he also teach you how to read these?

"[Ditria]: Yes.

"[The Prosecutor]: Okay. And so, I'm going to pick a random page, page number two of thirty. How can you determine from this page what cell tower you are looking for? What column are we looking at?"

Defense counsel objected, explaining: "I think we're getting into the realm of expert testimony here, and I don't think that the officer has been qualified as an expert. What we're trying to do here is to educate the jury, and I think that's wholly in the purview of an expert." The prosecutor replied: "The officer has indicated that he did not know how to read the records, but now he does know how to read the records and has demonstrated to the jury that he has the information in front of him." The court overruled the defendant's objection, stating that it found that proper foundation had been laid for the admission of exhibit 77 into evidence and that "[i]t's part of his investigation, he learned

how to interpret the data. I'll allow him now to testify from the document entered into evidence.

Direct examination of Ditria continued. The prosecutor asked Ditria, "[h]ow is this information helpful to your understanding of the case," and Ditria explained that it "[b]asically, pinned down the whereabouts of [the defendant] before, during, and after the robbery of Webster Bank." Thereafter, Ditria explained in detail how the defendant's call detail records helped him to confirm the defendant's presence near eight areas of interest: Walmart, the Comfort Inn, the Webster Bank, Beacon Falls, Bridgeport, Home Depot, the Post Motor Inn, and the Super 8 Motel. In particular, Ditria testified as to when the defendant or the bank robbery suspect was believed to be in the area of interest, when the communication in question was made, the address of one of the cell sites used by the defendant's cell phone,[19] and the distance from that cell site to the area of interest.[20] After reviewing these details, the prosecutor asked

[19] We observe that of the eight phone calls analyzed by Ditria, five had different cell sites listed for the initiation and termination of the call. For four of these calls, Ditria provided the address of only the first cell site, and for one of these calls Ditria provided the address of only the last cell site. Ditria did not explain to the jury that a cell phone might use multiple cell sites or antennae during the course of a call or that he was, in some instances, providing them with the address of only one of the cell sites used.

[20] First, Ditria testified that around the time indicated on the Walmart receipt the defendant's cell phone "was hitting off the South Cliff Street tower approximately one mile from the Walmart in Derby located in Ansonia." Second, Ditria testified that around the time that the defendant checked into the Comfort Inn, the defendant's cell phone used a cell site located "on 280 Elm Street in Naugatuck, approximately point six miles from the Comfort Inn motel." Third, Ditria testified that around the time of the robbery, the defendant's cell phone used a cell site located on "Rimmon Street in Seymour . . . approximately point eight miles from the Webster Bank." Fourth, Ditria testified that at 12:20 p.m. on the day of the robbery, the defendant's cell phone used a cell site at "236 Pent Road in Beacon Falls," which was "[a]pproximately 1000 feet, under a quarter of a mile" from the Beacon Falls Police Department. Fifth, Ditria testified that at approximately 1 p.m. on the day of the robbery, the defendant's cell phone used a cell site at "1875 Noble Avenue in Bridgeport," which was "[a]pproximately a quarter mile." Ditria did not explain what this cell site was a quarter mile from, but

Ditria: "So, after learning the proximity of the cell tower locations to the places that you believe that [the defendant] was at, what does that do for your investigation?" Ditria responded: "It gives us a better understanding about the whereabouts of [the defendant] during those dates and times."

On cross-examination, defense counsel attempted to explore Ditria's understanding of cell site analysis through the following colloquy:

"[Defense Counsel]: And now, Sprint only operates a digital cell phone system; isn't that right?

"[Ditria]: I'm not sure.

"[Defense Counsel]: All right. Do you know if they operate an analog system?

"[Ditria]: I'm not sure.

"[Defense Counsel]: And the phones that we use now are all digital, right?

"[Ditria]: (Indicating yes.)

"[Defense Counsel]: And I think you were testifying that the cell phones connect to a particular tower, right?

"[Ditria]: Yes.

"[Defense Counsel]: And didn't they tell you that they actually connect to more than one tower simultaneously; isn't that right?

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it appears he was alluding to the area where the facsimile firearm was recovered. Sixth, Ditria testified that around the time indicated on the Home Depot receipt, the defendant's cell phone used a cell site at "134 Roosevelt Drive in Derby . . . approximately point six miles from the Home Depot in Derby." Seventh, Ditria testified that around the time that the defendant checked into the Post Motor Inn, the defendant's cell phone used a cell site at "28 Orange Road in Orange," which was "[a]pproximately point eight miles from the Post Motor Inn." Finally, Ditria testified that around the time the defendant checked into the Super 8 Motel the defendant's cell phone was using a cell site located at "160 Wampus Lane in Milford," which was "[a]pproximately one mile" from the Super 8 Motel.

"[Ditria]: They did not say that.

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

"[Ditria]: No. . . .

"[Defense Counsel]: Do you know that the cell phone is always looking for the strongest signal?

"[Ditria]: I don't know if it's looking for the strongest, no.

"[Defense Counsel]: Now, do you know that on a digital cell phone, they can connect to multiple cell sites; did you know that?

"[Ditria]: I did not know that.

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

"[Ditria]: (Indicating no.)

"[Defense Counsel]: And the representative at Sprint, did he tell you that there's things that can get in the way of a signal from a cell tower?

"[Ditria]: He did not say that.

"[Defense Counsel]: Things like leaves, weather; did he say that?

"[Ditria]: He did not say that.

"[Defense Counsel]: That the wind could impact the coverage of a cell site; did he say that?

"[Ditria]: He did not.

"[Defense Counsel]: And that digital cell phones have this thing called a soft handoff; did he tell you what that is?

"[Ditria]: No.

"[Defense Counsel]: Have you ever heard of the term triangulation?

"[Ditria]: I have not.

"[Defense Counsel]: They didn't tell you or explain that to you over the phone?

"[Ditria]: No."

The defendant requested to make a motion outside the presence of the jury. After the jury was excused, the defendant moved to strike Ditria's testimony regarding "the cell phone coverage" because he was not competent to testify on that topic. The court disagreed, explaining: "There was never any offer that he is an expert, and he did not offer any opinions. He is simply interpreting or translating the data that was given to him." The state agreed, adding: "[I]t just goes to the weight of his testimony." The court overruled defense counsel's objection, but it stated, in response to a question from defense counsel, that it was "perfectly fine" for defense counsel to explore the defendant's education, or lack thereof, with respect to cell phones and cellular networks on cross-examination. Thereafter, defense counsel continued his cross-examination, during which he explored Ditria's lack of education and training concerning cell phones and cellular networks.

After Ditria's testimony, both parties rested and presented closing arguments. During her opening argument, the prosecutor referred to Ditria's testimony concerning the location of the defendant's cell phone, highlighting in particular the short distance between cell sites used by the defendant's cell phone and the areas of interest. In response, defense counsel during his closing argument emphasized that Ditria "didn't have any expertise as to how these things actually work." During her rebuttal argument, the prosecutor made the following relevant remarks: "Ditria said that he had no formal education in cell phone tower mechanics, but he did have the wherewithal to call somebody who did, right? And we found out that a cell tower is

in a fixed location and that cell phones are mobile, mobile phones, right? So, if you know where the cell tower is, and that's in a fixed location, and a cell phone is mobile, but you know that there are these other things that are fixed locations, like Walmart; Walmart is not mobile, right? Walmart is where it is. Home Depot is where it is. The Super 8 is not moving without some significant effort, okay? So, if you have [the defendant] pinned down in those places, then you could also coordinate the fact that his cell phone is pinging off cell towers in a fixed location all within a mile. Does Ditria really need all that technological expertise to explain it to you, okay?"

"We review a trial court's decision [regarding the admission of] expert testimony for an abuse of discretion. . . . If we determine that a court acted improperly with respect to the admissibility of expert testimony, we will reverse the trial court's judgment and grant a new trial only if the impropriety was harmful to the appealing party." (Internal quotation marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 123, 124, 156 A.3d 506 (2017). A lay witness may not provide opinion testimony "unless the opinion is rationally based on the perception of the witness . . . ." Conn. Code Evid. § 7-1. In order for a witness to testify concerning "scientific, technical or other specialized knowledge," the witness must be "qualified as an expert by knowledge, skill, experience, training, [or] education . . . ." Conn. Code Evid. § 7-2. "Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . [T]o render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion." (Internal quotation

marks omitted.) *State* v. *Williams*, 317 Conn. 691, 702, 119 A.3d 1194 (2015).

Our analysis of the evidentiary issue presented by the defendant is informed by our Supreme Court's recent decision in *State* v. *Edwards*, supra, 325 Conn. 97. In *Edwards*, the state sought to elicit testimony from Detective Christopher Morris concerning how he used the defendant's call detail records to determine his location at certain points in time and to offer into evidence maps that Morris created showing the estimated cell sectors of the cell sites in question. Id., 119–22. As part of the state's offer of proof, Morris testified as to his training and experience conducting historic cell site analysis. Id., 121. "The trial court then ruled that the state had met its burden of establishing the reliability of the proffered evidence and that Morris was qualified by his expertise to analyze cell phone data provided in Verizon records." Id., 122.

On appeal, our Supreme Court agreed with the defendant that "the trial court improperly admitted testimony and documentary evidence through Morris without qualifying him as an expert and conducting a *Porter* hearing[21] in order to ensure that his testimony was based on [a] reliable scientific methodology." (Footnote added.) Id., 133. In reaching this conclusion, the court observed that it "has not had the opportunity to address

[21] See *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).

"A *Porter* analysis involves a two part inquiry that assesses the reliability and relevance of the witness' methods. . . . First, the party offering the expert testimony must show that the expert's methods for reaching his conclusion are reliable. . . . Second, the proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract. . . . Put another way, the proponent of scientific evidence must establish that the specific scientific testimony at issue is, in fact, derived from and based [on] . . . [scientifically reliable] methodology." (Internal quotation marks omitted.) *State* v. *Edwards*, supra, 325 Conn. 124.

whether a police officer needed to be qualified as an expert witness before he could be allowed to testify regarding cell phone data . . . .'' Id., 127. Relying on *State* v. *Payne*, supra, 440 Md. 680, the court concluded that Morris' testimony concerning historic cell site analysis constituted expert testimony and, therefore, Morris should have been qualified as an expert witness. *State* v. *Edwards*, supra, 325 Conn. 128, 133. The court observed that ''although Morris relied on data he obtained from Verizon to conduct his analysis [of the defendant's call detail records], the process he used to arrive at his conclusions [concerning the approximate coverage areas of the cell sites in question] was beyond the ken of [an] average [person].'' Id., 128.

We conclude that *Edwards* is controlling as to this issue on appeal.[22] Although historic cell site analysis is not extremely difficult to understand, we agree with the court in *Edwards* that this analytical process is beyond the ken of the average juror. As we discussed

[22] We recognize that in *Edwards* ''the state [did] not assert that Morris did not provide expert testimony''; *State* v. *Edwards*, supra, 325 Conn. 118; and the court elsewhere concluded that ''the trial court admitted Morris' testimony as an expert witness . . . .'' Id., 128. Indeed, the court initially framed the issue presented on appeal only as whether the trial court improperly admitted Morris' testimony and maps ''without determining that the evidence was based on reliable scientific principles under *State* v. *Porter*, 241 Conn. 57, 80–90, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998).'' *State* v. *Edwards*, supra, 118.

Nevertheless, our Supreme Court's holding does not appear to be dicta because this discussion was not ''merely [a] passing commentary'' that went ''beyond the facts at issue'' and was ''unnecessary to the holding in the case.'' (Internal quotation marks omitted.) *Voris* v. *Molinaro*, 302 Conn. 791, 797 n.6, 31 A.3d 363 (2011). Instead, the court was intentionally taking up, discussing, and deciding a question germane to, though not necessarily decisive of the controversy before it, i.e., whether historic cell site analysis is the kind of scientific evidence that requires expert testimony and a *Porter* hearing to ensure the reliability of the scientific principles underlying it. See id. Moreover, even if our Supreme Court's statements concerning the need to qualify a witness as an expert before permitting him to testify about historic cell site analysis was dicta, we conclude that it is persuasive precedent. See id.

in part II A of this opinion, call detail records can be used to determine the approximate location of a cell phone at the time of a particular communication by determining the geographical coverage area of the cell sector used to facilitate that communication. This process of determining the actual or approximate geographical coverage area of a cell sector requires scientific and technical knowledge. Specifically, it requires an understanding of how cell sites and RF antennae operate, and knowledge of all of the internal and external factors that influence the size and shape of a cell sector. Indeed, in recognition of the scientific underpinnings of historic cell site analysis, our Supreme Court in *Edwards* held that a court must conduct a *Porter* hearing prior to admitting testimonial or documentary evidence of historic cell site analysis. Id., 132–33. For these reasons, we conclude that the court abused its discretion by not requiring Ditria to be qualified as an expert witness.

The state nonetheless urges that "when Ditria's testimony is reviewed in relation to the cell phone records themselves, a document that was admitted as a full exhibit without objection, it is clear that the substance of his testimony, i.e., the particular cell tower that the defendant's cell phone connected with at particular times, did not constitute 'expert' testimony at all, but was the equivalent of Ditria merely reading from a document that was already in evidence." We disagree; Ditria did not merely read from exhibit 77. Ditria testified that in order to make a phone call, a cell phone must use a cell site. Ditria then explained that in order to use a cell site, a cell phone must be within thirty miles of it. Ditria further agreed with the prosecutor that, because of these principles, if a cell phone is "at thirty miles or right next to" a cell site, then that is the cell site that the cell phone is going to use to make or receive a call. None of this information is contained in Exhibit 77. By

explaining to the jury how cell phones and cellular sites operate and the geographical coverage area of Sprint's cell sites, Ditria broached the realm of expert testimony.

Having concluded that the court abused its discretion by not requiring Ditria to be qualified as an expert witness, we turn to the defendant's confrontation clause claim. Because the defendant seeks *Golding* review of this unpreserved constitutional claim, we do not need to determine whether the court's failure to qualify Ditria as an expert witness obstructed the defendant's confrontation rights if this error was harmless beyond a reasonable doubt. See *State* v. *Dixon*, supra, 318 Conn. 511.

"[W]hether [an improper evidentiary ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error." (Internal quotation marks omitted.) *State* v. *Edwards*, supra, 325 Conn. 133; accord *State* v. *Santos*, 318 Conn. 412, 425, 121 A.3d 697 (2015). For the purposes of our analysis, we assume that this evidentiary error was of constitutional magnitude and, therefore, the burden is on the state to prove that this error was harmless beyond a reasonable doubt. See *State* v. *Santos*, supra, 425.

We conclude that the admission of Ditria's testimony was harmless beyond a reasonable doubt. As we discussed in part II of this opinion, the state presented

substantial and varied evidence of the defendant's involvement in the bank robbery, including the defendant's admission to Mitchell that he robbed a bank. Moreover, Ditria's testimony was largely cumulative evidence of the defendant's location before, during, and after the robbery. Specifically, Ditria's testimony was used to corroborate the defendant's presence near eight areas of interest: Walmart, the Comfort Inn, the Webster Bank, Beacon Falls, Bridgeport, Home Depot, the Post Motor Inn, and the Super 8 Motel. The state established the defendant's presence at all of these locations through other direct and circumstantial evidence. For example, surveillance footage established the defendant's presence at Walmart and the Super 8 Motel as well as the presence of a vehicle similar in appearance to the defendant's Cadillac at the Webster Bank during the robbery. The Walmart and Home Depot receipts recovered from the defendant's Cadillac corroborated the defendant's presence at those stores. Rodriguez' testimony and the recovered facsimile firearm, which was the same make and model as the one the defendant purchased from Walmart, established the defendant's and his Cadillac's presence on Route 8 near the Bridgeport-Trumbull line. To establish the defendant's presence at various hotels, the state admitted into evidence registration forms, in the defendant's own name, for the Comfort Inn, the Post Motor Inn, and the Super 8 Motel and presented the testimony of employees from those hotels who confirmed that guests must present a driver's license when checking into those establishments. Finally, all of the direct and circumstantial evidence of the defendant's participation in the robbery corroborates his presence in Beacon Falls, where the dye pack associated with George's cash drawer was recovered shortly after the robbery.

As a result, even though we conclude that the court abused its discretion by not requiring Ditria to be qualified as an expert witness, we also conclude that this

error was harmless beyond a reasonable doubt. Therefore, the defendant's constitutional claim fails under the fourth prong of *Golding*.

III

The defendant's final claim is that his cumulative convictions and sentences for conspiracy to commit robbery and conspiracy to commit larceny violated his right against double jeopardy. The defendant seeks *Golding* review of this unpreserved constitutional claim. The defendant's claim is reviewable under *Golding* because the record is adequate to review the alleged claim of error and the claim is of constitutional magnitude alleging the violation of a fundamental right. See *State* v. *Dixon*, supra, 318 Conn. 511. As the state concedes, the defendant is further entitled to reversal of one of his conspiracy convictions under *Golding* because both convictions arose out of a single agreement to rob the Webster Bank in Seymour. See *State* v. *Wright*, 320 Conn. 781, 829, 135 A.3d 1 (2016) ("it is a double jeopardy violation to impose cumulative punishments for conspiracy offenses if they arise from a single agreement with multiple criminal objectives").

The appropriate remedy for this due process violation is to reverse the judgment of conviction as to both counts of conspiracy and to remand the case to the trial court with direction to vacate the defendant's conviction of conspiracy to commit larceny and to render judgment on the defendant's remaining conviction of conspiracy to commit robbery. See id., 829–30; see also *State* v. *Lee*, 325 Conn. 339, 345, 157 A.3d 651 (2017); *State* v. *Padua*, 273 Conn. 138, 171–73, 869 A.2d 192 (2005). The defendant further requests that we direct the trial court to resentence him with respect to his remaining conviction of conspiracy to commit robbery. Cf. *State* v. *Wright*, supra, 320 Conn. 830. We cannot

order the trial court to resentence the defendant, however, because vacatur of the defendant's conviction and sentence for conspiracy to commit larceny will not alter his total effective sentence. See *State* v. *Johnson*, 316 Conn. 34, 42–43, 111 A.3d 447 (2015); see footnote 3 of this opinion.

The judgment is reversed only with respect to the conviction of conspiracy to commit larceny in the third degree and the case is remanded with direction to vacate the judgment as to that conviction. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ANNA ROCKHILL *v.* DANBURY HOSPITAL
(AC 37864)

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

Syllabus

The plaintiff, a business invitee of the defendant hospital, sought to recover damages for negligence in connection with personal injuries she sustained when she struck her toe against an obstacle while walking in a crosswalk to the parking lot of the hospital, which caused her to fall and break one of her toes and to sustain other injuries. The case was tried to the court, which rendered judgment for the plaintiff, from which the defendant appealed to this court. *Held*:

1. The defendant could not prevail on its claim that the trial court erroneously found that the defect in the walkway that caused the plaintiff's injuries was a reasonably foreseeable hazard; that court, which reviewed reports prepared by members of the defendant's security and medical staff, and photographs depicting the alleged defect and the surrounding area, and which heard the testimony of the plaintiff and her daughter describing the fall and the defect, had before it adequate evidence of a broken slab of pavement that contained a chip in a well traveled walkway that had existed for a sufficient period of time, and, thus, its findings relating to this claim were not clearly erroneous and its conclusions were not unreasonable.

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

2. The trial court reasonably found, on the basis of the evidence presented, that the defect in the crosswalk was the actual cause of the plaintiff's fall; that court's finding that the plaintiff struck her toe on some obstacle while walking in or next to the crosswalk was reasonably supported by the evidence and the inferences drawn therefrom, namely, that there was broken pavement at the corner where the plaintiff's foot had hit, that when a security officer examined the area of the fall, he identified only the defect in question, that the sensation the plaintiff felt when striking her foot was the inside of the broken pavement, and that the defect caused the fall based on the proximity of the plaintiff's location after the fall to the location of the defect.
3. The trial court's finding that all of the plaintiff's medical costs were substantially caused by the fall was supported by the record and was not clearly erroneous; that court's findings that the plaintiff's fall was a substantial factor in bringing about her injuries and exacerbating her preexisting spinal stenosis were supported by the record, there having been expert testimony that the plaintiff's fall was a significant factor in her accelerated need for surgery, the relevant medical records admitted into evidence having indicated that the plaintiff began significantly complaining to her physician of chronic back pain shortly after the incident and prior to seeking surgical treatment, and the testimony and medical records having demonstrated that, prior to the fall, despite the radiological presence of the plaintiff's preexisting condition, the plaintiff led an active and independent lifestyle.
4. The trial court did not abuse its discretion in denying the defendant's motion to preclude the expert testimony of K, one of the plaintiff's treating physicians: K's reliance on the plaintiff's statements to him pertaining to her medical history did not render his opinion factually baseless, and the plaintiff's recitation of her medical history to K was reinforced by other medical records admitted into evidence, on which K relied, describing her complaints regarding back pain shortly after the fall and the extensive treatment she received thereafter; moreover, although K testified that his apportionment between the plaintiff's preexisting condition and the fall was admittedly arbitrary, he nonetheless opined that the plaintiff's fall was a significant factor in causing her accelerated need for surgery, his opinion was supported by the plaintiff's medical history and had a reasonable foundation in the evidence, and it was within the province of the court, as the trier of fact, to credit some, all or none of K's testimony regarding his conclusion that the plaintiff's fall exacerbated her preexisting condition.

Argued April 24—officially released August 29, 2017

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's negligence, brought

to the Superior Court in the judicial district of Danbury and tried to the court, *Doherty, J.*; thereafter, the court denied the defendant's motion to preclude certain evidence; judgment for the plaintiff, from which the defendant appealed to this court; subsequently, the court, *Doherty, J.*, issued an articulation of its decision. *Affirmed.*

Michael G. Rigg, for the appellant (defendant).

James P. Sexton, with whom were *Michael S. Taylor* and, on the brief, *Marina L. Green*, for the appellee (plaintiff).

Opinion

BEACH, J. The defendant, Danbury Hospital, appeals from the judgment of the trial court rendered in favor of the plaintiff, Anna Rockhill, following a trial to the court. On appeal, the defendant claims that the court erroneously found that (1) a defect on the defendant's property that allegedly caused the plaintiff to fall was a reasonably foreseeable defect; (2) the defect caused the plaintiff to fall; and (3) all of the plaintiff's medical expenses were caused by the fall rather than by her preexisting spinal stenosis. The defendant also claims that the court abused its discretion in admitting the testimony of the plaintiff's expert witness pertaining to the causation element of her negligence claim. We affirm the judgment of the trial court.

The trial court's memorandum of decision sets forth the following relevant facts. On June 16, 2010, the plaintiff and her daughter, Cynthia Fusco, were visiting the plaintiff's husband, who was receiving medical care at Danbury Hospital. After their visit, the plaintiff and Fusco exited the hospital's main building and walked onto a walkway leading toward the parking lot. The plaintiff and Fusco were familiar with this walkway, as they had made this same trip several times in the past.

While the plaintiff and Fusco were walking along the pathway, the plaintiff hit something with her foot and fell to the ground. As a result of the fall, she sustained injuries to her right foot and ankle. It later was determined that she had broken her big toe and damaged the fifth metatarsal of her right foot. Within minutes of the fall, the plaintiff was taken to the defendant's emergency department by hospital staff where she was examined and treated for her injuries. As a result of her fall, the plaintiff experienced chronic lower back pain from a protruded disk that required several epidural steroid injections and, eventually, a surgical decompression procedure.

A trial to the court was held on August 26, 2014. On February 2, 2015, the court issued a memorandum of decision and rendered judgment in favor of the plaintiff. The court made detailed findings pertaining to both liability and damages. With respect to liability, the court noted that "the evidence [presented at trial] permits the court to find that the plaintiff struck her right toe against some obstacle while walking in or next to the crosswalk, which caused the fracture for which she was treated minutes later in the emergency department." The court further noted that the "area where the defect exists is contiguous with the crosswalk, a heavily traveled area used daily by patients and other invitees of the hospital." As to damages, the court found that the plaintiff's total damages were $181,076.45. The court further found that the plaintiff was contributorily negligent in each way alleged in the defendant's special defenses.[1] The court found the plaintiff 40 percent at

[1] In its memorandum of decision, the court noted that the defendant raised several special defenses alleging that the plaintiff "[1] failed to keep and maintain a reasonable and proper lookout; [2] failed to make reasonable and proper use of her senses and of her faculties; [3] failed to take the necessary and proper precautions to observe the conditions then and there existing; [4] failed to be watchful of her surroundings; [5] failed to use reasonable care for her own safety commensurate with the existing circumstances and conditions; and/or [6] failed to take into account a condition

fault for the injuries she sustained. As a result, the court awarded judgment to the plaintiff in the amount of $108,645.87, plus taxable costs. This appeal followed.[2] Additional facts will be set forth as necessary.

I

The defendant sets forth three claims challenging the factual findings of the trial court. Specifically, the defendant argues that the court erroneously found that (1) the divot[3] that caused the plaintiff's injuries was a reasonably foreseeable hazard; (2) the divot actually caused the plaintiff to fall; and (3) the plaintiff's fall caused all of her medical expenses. We disagree.

Before we address the defendant's individual claims, we set forth the guiding legal principles and our standard of review. "The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . If a plaintiff cannot prove all of those elements, the cause of action fails. . . . [I]n a negligence action . . . [a] causal relation between the defendant's wrongful conduct and the plaintiff's injuries is a fundamental element without which a plaintiff has no case . . . ." (Citations

that was open and obvious; [7] failed to observe and avoid whatever dangers or conditions of dangers she alleges to have been presented at said time and place; [8] failed to be watchful of where she was walking and stepping; and/or [9] [f]ailed to use reasonable care for her own well-being/safety under the conditions and circumstances then and there existing."

[2] During the pendency of this appeal, the defendant filed a motion for articulation, which the court denied. The defendant then filed a motion for review of the trial court's decision denying the relief requested therein, which this court granted. The trial court then issued an articulation in compliance with this court's order. The court's articulation is discussed in more detail in this opinion.

[3] The parties erroneously used the word "divot" to refer to a shallow hole or decompression in the surface. From the photographs introduced into evidence, one can see, perhaps, some similarity to the disturbance of turf caused by a golf club. A "divot", however, is the turf dislodged by the swing, not the resulting hole. Merriam-Webster's Collegiate Dictionary (11th Ed. 2003). With this reservation, we will use the same terminology as the parties.

omitted; internal quotation marks omitted.) *Right* v. *Breen*, 88 Conn. App. 583, 586–87, 870 A.2d 1131 (2005), rev'd on other grounds, 277 Conn. 364, 890 A.2d 1287 (2006).

Notably, the present case was tried to the court. When the court is the finder of fact, "inferenc[es] of fact [are] not reversible unless the inferenc[es] [were] arrived at unreasonably. . . . We note as well that [t]riers of fact must often rely on circumstantial evidence and draw inferences from it. . . . Proof of a material fact by inference need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . Moreover, it is the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony. . . . Thus, if the court's dispositive finding . . . was not clearly erroneous, then the judgment must be affirmed." (Emphasis omitted; internal quotation marks omitted.) *Palkimas* v. *Fernandez*, 159 Conn. App. 129, 133–34, 122 A.3d 704 (2015).

A

The defendant first claims that the court erroneously found that the divot causing the plaintiff's injuries was a reasonably foreseeable trip hazard. In support of this claim, the defendant raises two arguments. First, the defendant argues that this finding was improper as a matter of law because the divot is insufficient in size to constitute a reasonably foreseeable hazard; that is, the divot is "trivial" as a matter of law. Second, it argues that the court's finding was speculative and unsupported by the record because the plaintiff failed to satisfy her burden of establishing that the divot was a reasonably foreseeable hazard. In response, the plaintiff

argues that the size of the divot is presumptively a question for the finder of fact and that the trial court's finding that the divot was a reasonably foreseeable trip hazard is sufficiently supported by evidence in the record. We agree with the plaintiff.

In its memorandum of decision, the court concluded that "[t]he evidence elicited at trial permits the court to find that in or near the crosswalk where the plaintiff alleges to have fallen, there did exist a portion of uneven surface where the blocks of cement or other materials meet to form the crosswalk and the adjacent walkway. In addition, a small edge of raised surface appeared to have been chipped or otherwise broken off." The court further noted that the area in question was "well worn" and that the defect "is a specific condition which existed for a sufficient length of time as to give the defendant constructive notice of its existence." The court also found that the divot "is easily visible when looked upon directly and . . . there [were] no express signs or paint or other warnings located in its proximity to point it out."

After this court acted on the defendant's motion for review of the trial court's denial of the defendant's motion for articulation, the trial court articulated its ruling as to the "trivial defect" rule. The court stated that the divot, "which was the subject of extensive testimony and which was illustrated in the photographs comprising . . . [the] plaintiff's exhibit 1, was found by this court of sufficient size and orientation to permit the court to find that the plaintiff, Anna Rockhill, had proved, by a fair preponderance of the evidence, her allegation that it was the proximate cause of her fall on June 16, 2010, on the premises of the defendant . . . and that it was of sufficient size and duration so as to put the defendant on notice of its existence."

We necessarily begin with the defendant's argument that the divot causing the plaintiff's injury was insufficient in size as a matter of law. In support of this argument, the defendant contends that our Supreme Court's decision in *Older* v. *Old Lyme*, 124 Conn. 283, 199 A. 434 (1938), demonstrates that Connecticut adheres to a trivial defect rule,[4] as adopted by other jurisdictions. In essence, the defendant invites this court to examine the evidence and make its own factual finding to determine whether the divot was a reasonably foreseeable hazard or otherwise to conclude that the divot was too small to support liability as a matter of law. Neither approach is supported by our precedent.

In *Older*, the plaintiff sustained injuries while she was walking on public property and sought to hold the municipality liable. The area in which she was walking was described by the court to be the outer edge of a sidewalk that extended "to the edge of the traveled portion of the adjoining highway." Id., 285. While the plaintiff was walking in that area, "she caught the heel of one of her shoes, fell, and sprained her ankle." Id. The hole that the plaintiff caught her heel in was "about [two] inches in width and about [one] inch in depth." (Internal quotation marks omitted.) Id. Judgment was rendered in her favor. Id., 284.

Our Supreme Court reversed. It discussed liability pursuant to a statutory predecessor of General Statutes

[4] Other jurisdictions have adopted a *de minimis* or trivial defect rule in which an alleged defect can be held to be insignificant or trivial as a matter of law. See, e.g., *Czochanski* v. *Tishman Speyer Properties, Ltd.*, 45 Fed. Appx. 45, 47 (2d Cir. 2002) ("New York courts often rely on the judge's examination of photographs to determine whether a defect is trivial as a matter of law"); *Ursino* v. *Big Boy Restaurants of America*, 192 Cal. App. 3d 394, 399, 237 Cal. Rptr. 413 (1987) (identifying trivial defect rule as procedural "check valve" to avoid imposing absolute liability upon property owner); *Gleason* v. *Chicago*, 190 Ill. App. 3d 1068, 1069–70, 547 N.E.2d 518 (1989) (affirming court's grant of summary judgment because alleged defect too slight to be actionable).

§ 13a-149, the highway defect statute. Liability was determined by standards somewhat different from the more general considerations underlying common-law premises liability. The court defined a highway defect to be "such an object or condition in, upon or near the traveled path as would necessarily obstruct or hinder one in its use for the purpose of traveling, or which from its nature and position would be likely to produce that result or injury to one so traveling upon it." Id. The only obligation of the municipality was to keep streets and sideways in a reasonably safe condition for travel. Id. The court noted that the question of whether a condition constituted a highway defect depended on "a great variety of circumstances"; it "is in general [a question] of fact," but whether the facts found warrant the conclusion of liability could be a question of law. Id., 285. The court concluded that the "subordinate facts as to its size and shape and especially its location at the extreme outer edge of the walk, comparable to the curb in usual forms of construction, and where persons would not ordinarily be expected to travel," did not support the conclusion of liability. Id.

In *Older*, then, the factor that a person was not likely to walk in the location of the defect was a significant, perhaps controlling, factor. See id.; see also *Ferreira* v. *Pringle*, 255 Conn. 330, 341–42, 766 A.2d 400 (2001) (seeking to hold municipality liable for defective highway, "may involve issues of [fact; however, whether] the facts alleged would, if true, amount to a highway defect according to the statute is a question of law" [internal quotation marks omitted]). There is in *Older* no mention of a "trivial defect rule," nor need there be. There simply was a recognition that in any particular case, evidence may be insufficient to support an essential element of the cause of action. The court did not establish a minimum "depth" requirement for liability.

In addition to its reliance on *Older*, the defendant also directs this court to authority in other jurisdictions that have adopted a less deferential standard of appellate review in determining whether a defect is "trivial" as a matter of law. In *Alston* v. *New Haven*, 134 Conn. 686, 60 A.2d 502 (1948), however, our Supreme Court declined to adopt such an approach. It stated that the defendants "cited numerous cases from other jurisdictions claimed by them to establish that in other states courts are much more inclined to rule on the character of the defect as a matter of law. A detailed analysis of those cases would serve no useful purpose. In many states the appellate court has more power than this court over questions of fact." Id., 688.

Our Supreme Court in *Alston* further stated that while "courts and juries have refused to hold municipalities liable for slight defects . . . in only one case [*Older* v. *Old Lyme*, supra, 124 Conn. 283] has such a defect been held too slight as a matter of law to form the basis of a judgment for the plaintiff." *Alston* v. *New Haven*, supra, 134 Conn. 688. Furthermore, it noted that the alleged defect in *Older* "was not only slight but was in a place where pedestrians were not apt to walk." Id., 689. Our Supreme Court ultimately reiterated our long-standing approach to questions of fact in negligence claims, which is that "[u]nless only one conclusion can reasonably be reached, the question is one of fact for the trier." Id., 688. We are thus required by binding authority to reject the invitation to impose a firm "trivial defect" rule.

Our resolution of this claim, then, is guided by the following traditional legal principles. It is undisputed that the plaintiff in the present case was a business invitee of the defendant. The fact finder is the exclusive arbiter in determining whether the elements of negligence are satisfied, including whether the defect causing injury is reasonably foreseeable. See *Ruiz* v. *Victory*

Properties, *LLC*, 315 Conn. 320, 330, 107 A.3d 381 (2015). In order "to prevail on a negligence claim as a business invitee in a premises liability case, it [is] incumbent upon [the plaintiff] to allege and prove that the defendant either had actual notice of the presence of the specific unsafe condition which caused [his injury] or constructive notice of it. . . . [T]he notice, whether actual or constructive, must be notice of the very defect which occasioned the injury and not merely of conditions naturally productive of that defect even though subsequently in fact producing it. . . . In the absence of allegations and proof of any facts that would give rise to an enhanced duty . . . [a] defendant is held to the duty of protecting its business invitees from known, foreseeable dangers." (Internal quotation marks omitted.) *Porto* v. *Petco Animal Supplies Stores, Inc.*, 167 Conn. App. 573, 578–79, 145 A.3d 283 (2016).

Furthermore, "whether the injury is reasonably foreseeable ordinarily gives rise to a question of fact for the finder of fact, and this issue may be decided by the court only if no reasonable fact finder could conclude that the injury was within the foreseeable scope of the risk such that the defendant should have recognized the risk and taken precautions to prevent it. . . . In other words, foreseeability becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for reasonable disagreement the question is one to be determined by the trier as a matter of fact." (Citation omitted; internal quotation marks omitted.) *Ruiz* v. *Victory Properties*, *LLC*, supra, 315 Conn. 330; see also *Doe* v. *Saint Francis Hospital & Medical Center*, 309 Conn. 146, 188, 72 A.3d 929 (2013) (question for fact finder to determine whether plaintiff's injuries were foreseeable). With these principles in mind, we turn to the question of whether the court's factual findings are sufficiently supported by the record.

Two reports were introduced into evidence. While the plaintiff received medical attention at the scene, a Danbury Hospital security officer spoke to Fusco and prepared an incident report. That report provided in relevant part: "[The plaintiff] exited the hospital via the main lobby after visiting her husband . . . . While crossing the main drive crosswalk she tripped and fell to the ground. She was assisted to the [emergency department] for examination." The security officer also transcribed Fusco's description of the incident in the report, which stated: "[The plaintiff] fell while walking across the main drive crosswalk. The witness believes that the right foot of her mother slipped into the crack causing her to fall." The report also noted the officer's personal observation and assessment of the location in question, and stated that the "[c]rosswalk path is slightly unlevel [and] at the end of the crosswalk near the elevator there is a crack where the slab's corner has been chipped." The report ended with a notation that photographs were taken of the incident location. The photographs were admitted into evidence.

Second, the emergency department's medical staff prepared a report at the time of the plaintiff's admission to the emergency room on June 16, 2010, following her fall. That report provided in relevant part: "[T]his pleasant [seventy-nine] year old female fell out in the parking [area], and then had right foot pain for which she was brought in. Advanced triage [led to] two x-rays of the right foot and ankle . . . . She is accompanied by her daughter who said that she is in pretty good health despite all of the medical problems she has, and there is no history of her feeling dizzy or having . . . neurologic symptoms which would cause her to have tripped and fallen. She has pain in her right foot in the front some pain in the ankle on any kind of movement but the worse pain is in the right foot frontal with the pain being fairly sharp worse with movement." The

report also noted that the plaintiff's chief complaint was that she "fell in the hospital parking lot by the elevators where there is a bump in the walkway."

In addition, both Fusco and the plaintiff testified at trial. Fusco was called first to testify and stated that when the plaintiff fell, she reached down to assist the plaintiff. While aiding the plaintiff, Fusco noticed "[t]hat there was this broken pavement at the corner where she—her right foot had hit." Fusco also testified that the plaintiff told her shortly after the fall that her "foot hit the pavement right there" and that she immediately complained of foot pain. Fusco also positively identified the gap in the concrete depicted in the plaintiff's exhibit 1 as the concrete gap that she referred to in her testimony.

The plaintiff's recollection of the events was not as detailed as Fusco's. She testified that it felt like she had "hit a block with [her] big toe." The plaintiff further testified that she was walking "to the elevator and just hit that spot." It was the plaintiff's belief that the "spot" caused the fall, but she admitted that she did not actually see what caused her fall.

The court reviewed the reports written by members of the defendant's security staff and medical staff, the photographs depicting the alleged defect and the surrounding area, and the testimony of the plaintiff and Fusco describing the fall and the divot. We conclude that there is adequate evidence in the record reasonably supporting the court's factual findings and conclusions. More specifically, the evidence presented at trial reasonably described a broken slab of pavement that contained a chip in a well traveled walkway that had existed for a sufficient period of time.[5] This evidence sufficiently supports the court's findings. Accordingly, the

[5] The court found that the walkway where the plaintiff fell was "a convergence of large, well-worn slabs of stone or some concrete material. The paint on the slabs is worn and flaked." On appeal, the defendant has not specifically contested the length of time that the defect existed.

court's findings relating to this claim were not clearly erroneous, and its conclusions were not unreasonable.[6]

B

The defendant next claims that the plaintiff did not satisfy her burden of proving that the defect actually caused her injuries. Specifically, the defendant contends that, other than the evidence that the plaintiff's toe struck "something," nothing in the record supports the court's finding that the divot was the actual cause of her injuries. In response, the plaintiff argues that there is more than sufficient evidence supporting the court's findings pertaining to this claim. We agree.

In its memorandum of decision, the trial court found that "the plaintiff struck her right toe against some obstacle while walking in or next to the crosswalk, which caused the fracture for which she was treated minutes later in the emergency department." The court further found that "where the plaintiff alleges to have fallen, there did exist a portion of uneven surface where the blocks of cement or other materials meet to form the crosswalk and the adjacent walkway. In addition, a small edge of raised surface appeared to have been chipped or otherwise broken off." The court identified that uneven surface as the area depicted in the photographs admitted into evidence.

Before we address the defendant's claim, we set forth the following relevant legal principles. "To prevail on a negligence claim, a plaintiff must establish that the

[6] The defendant also argues that this court should review the photographs depicting the divot de novo. We disagree. We are cognizant that the trial court remains in a superior position to credit and weigh the evidence as it did in this case, including the photographs. As noted previously, the proper inquiry regarding the court's factual findings is whether the trial court could reasonably have drawn the inferences it did from the evidence presented. See *Cagianello* v. *Hartford*, 135 Conn. 473, 476, 66 A.2d 83 (1948). In light of our conclusion that the court's findings were not clearly erroneous, we need not further address this claim.

defendant's conduct legally caused the injuries. . . . The first component of legal cause is causation in fact. Causation in fact is the purest legal application of . . . legal cause. The test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct." (Citations omitted; internal quotation marks omitted.) *Paige* v. *St. Andrew's Roman Catholic Church Corp.*, 250 Conn. 14, 24–25, 734 A.2d 85 (1999).

The defendant takes issue with the court's conclusion that the plaintiff struck her toe on "some obstacle" by arguing that this conclusion is too imprecise or speculative. The defendant further argues that this imprecise conclusion is based on the plaintiff's similarly imprecise testimony that she "felt her right toe strike something as she was walking . . . ." Although these statements in a vacuum may perhaps be imprecise, there is significantly more evidence in the record supporting the court's finding that the divot was the actual cause of the plaintiff's injuries than the defendant sets forth. The opinion read as a whole shows that the court concluded that the plaintiff tripped on the defect identified by the witnesses.

As noted in part I A of this opinion, Fusco testified at trial and described the plaintiff's fall and what she noticed thereafter. When Fusco was asked what she observed in the area immediately next to where the plaintiff fell, she testified that "there was this broken pavement at the corner where she—[the plaintiff's] right foot had hit." Fusco also was shown the photographs taken by the security officer to whom she indicated that the "gap in the concrete" was the cause of her mother's fall. The plaintiff corroborated Fusco's testimony through her own testimony and described the sensation of striking what felt like a "block" with her right foot during the incident in question. Additionally, the report prepared by the security officer stated that

"at the end of the crosswalk near the elevator there is a crack where the slab's corner has been chipped."

In our view, the court made several reasonable inferences from facts. We have found in the record evidence that (1) when the security officer examined the area, he identified only the defect in question; (2) the sensation that the plaintiff felt when striking her foot was the inside of the divot; and (3) the defect caused the fall based on the proximity of the plaintiff's location after the fall to the divot's location. We thus conclude that the court reasonably found that the divot was the actual cause of the plaintiff's fall. Accordingly, the court's findings with respect to this claim were not clearly erroneous.

C

Finally, the defendant claims that the court erroneously found that all of the plaintiff's medical bills were the result of her fall. Specifically, the defendant argues that "[d]espite the fact that [a medical expert] testified that only half of the 10 percent impairment he assigned to [the] plaintiff's back was related to the fall, the trial court concluded that 100 percent of the medical treatment was caused solely by the fall." In response, the plaintiff contends that the evidence at trial supports the court's conclusion that all of her medical bills were substantially caused by the fall. We agree with the plaintiff.

In its memorandum of decision, the court found that "the plaintiff . . . has proven by a fair preponderance of the evidence that she did sustain the injuries and losses which she alleged in her complaint, including the injuries which exacerbated prior conditions of spinal stenosis and low back pain, and that those injuries and losses were caused by the negligence of the defendant . . . ." Following this court's granting of the defendant's motion for review of the trial court's denial of

its motion for articulation, the trial court articulated its decision in relevant part: "The evidence and testimony gave the court a factual basis for its finding that subsequent to her fall, the plaintiff underwent surgery, which required her to undergo rehabilitative care and treatment and which required her to purchase or otherwise acquire various items of rehabilitative equipment, drugs and miscellaneous items to promote her rehabilitation. As a proximate result of her fall, she incurred medical costs and expenses in a total amount of $131,076.45. The defendant offered no evidence or testimony which would permit the court to find that any of those expenses were incurred for anything other than the fractures which she sustained as a result of her fall on the defendant's premises on June 6, 2010, and the exacerbation of her preexisting back injuries."

Our inquiry is guided by the following legal principles. As noted previously in this opinion, one of the elements that a plaintiff must prove in order to prevail on a claim of negligence is legal cause. Legal cause comprises two components: (1) cause in fact and (2) proximate cause. See *Winn* v. *Posades*, 281 Conn. 50, 56–57, 913 A.2d 407 (2007). We noted previously that "[t]he test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct." (Internal quotation marks omitted.) *Gurguis* v. *Frankel*, 93 Conn. App. 162, 167, 888 A.2d 1083, cert. denied, 277 Conn. 916, 895 A.2d 789 (2006). "The second component of legal cause is proximate cause . . . . [T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . Further, it is the plaintiff who bears the burden to prove an unbroken sequence of events that tied his injuries to the [defendants' conduct]. . . . The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for

the necessary causal connection. . . . This causal connection must be based upon more than conjecture and surmise." (Internal quotation marks omitted.) Id., 167–68. We review challenges to the finding of causation under the clearly erroneous standard because the conclusion of negligence is factual. See *Twin Oaks Condominium Assn., Inc.* v. *Jones*, 132 Conn. App. 8, 11, 30 A.3d 7 (2011) ("[t]he conclusion of negligence is necessarily one of fact"), cert. denied, 305 Conn. 901, 43 A.3d 663 (2012); see also *Gurguis* v. *Frankel*, supra, 168 (reviewing challenge to finding of causation under clearly erroneous standard).

Because the court concluded that the plaintiff's injuries were caused, at least in part, by an exacerbation of a prior condition, a discussion of the eggshell plaintiff doctrine is relevant to our inquiry. "The eggshell plaintiff doctrine states that [w]here a tort is committed, and injury may reasonably be anticipated, the wrongdoer is liable for the proximate results of that injury, although the consequences are more serious than they would have been, had the injured person been in perfect health. . . . The eggshell plaintiff doctrine is not a mechanism to shift the burden of proof to the defendant; rather, it makes the defendant responsible for all damages that the defendant legally caused even if the plaintiff was more susceptible to injury because of a preexisting condition or injury. Under this doctrine, the eggshell plaintiff still has to prove the nature and probable duration of the injuries sustained." (Internal quotation marks omitted.) *Iazzetta* v. *Nevas*, 105 Conn. App. 591, 593 n.4, 939 A.2d 617 (2008); see also W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 43, p. 292.

At trial, one of the plaintiff's treating physicians, David L. Kramer, testified as an expert witness with respect to her treatment and the cause of her accelerated need for surgery. Kramer testified that although

he "did come up with an admittedly arbitrary apportionment, [he] still assigned 5 percent, or half of her accelerated need for surgery, to an underlying and natural degenerative condition." The defendant argues that Kramer's opinion was arbitrary, and that this statement indicates that the cause of her accelerated need for surgery was her degenerative condition. The defendant's argument misses the point and takes Kramer's testimony out of context.

Kramer testified that it was his medical opinion that "at the end of the day a lot of this is degenerative in nature, but to some extent, as far as [he] understood it, [the plaintiff's] clinical picture deteriorated after the fall, and there may have been some acceleration in the need for surgery subsequent to that fall, and so to the extent that [he] had already minimized her impairment rating, [he] still apportioned a significant percentage of that to an underlying degenerative condition." Specifically, Kramer testified that in his opinion, the plaintiff's fall "may have contributed to some accelerated deterioration" leading to her subsequent medical treatment. Moreover, Kramer testified that spinal stenosis, like other advanced conditions, may show significant damage when viewed through a radiological image, but an individual with such a condition may feel no effects or be only slightly affected by the condition in her daily life and not require extensive medical treatment.[7]

[7] Kramer testified in relevant part during his deposition: "[N]ot surprisingly, eighty year old people have the ugliest looking X-rays and [magnetic resonance imaging] scans, and yet, as a group, they tend to have one of the lower incidents of neck and lower back pain. So, tempting as it is to look at that time and X-ray that shows severe arthritis, it does not necessarily require treatment.

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"[The plaintiff] was functioning apparently at a reasonably high level with radiographically severe spinal stenosis and may have been more vulnerable to even an innocuous physical insult like the fall she described. We see that all the time in the emergency room where elderly people have been living their lives and experiencing their subclinical degenerative changes with ongoing narrowing of the spinal canal and then they have a little slip and

A plaintiff with a "dormant" condition, such as the plaintiff's preexisting spinal stenosis here, is entitled to recover full compensation for a resulting disability. See *Tuite* v. *Stop & Shop Cos.*, 45 Conn. App. 305, 310–11, 696 A.2d 363 (1997). Contrary to the defendant's argument, the court was not required to find that the plaintiff's medical treatment and costs were "solely the result of the plaintiff's fall" in order to recover full compensation from the defendant. Instead, the proper inquiry to determine whether the defendant was liable for all the medical costs resulting from the plaintiff's fall is whether the fall was a "substantial factor in bringing about the plaintiff's injuries." (Internal quotation marks omitted.) *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 433, 820 A.2d 258 (2003). In the present case, the court found that the plaintiff's fall was a substantial factor in bringing about her injuries and that finding is supported by the record. It was not illogical to conclude that all of the medical costs were substantially caused by the fall, even if the plaintiff had a preexisting condition.

In addition to Kramer's testimony that the plaintiff's fall was a significant factor in her accelerated need for surgery, the relevant medical records admitted into evidence indicate that the plaintiff began significantly complaining of chronic back pain to Dr. Sanjay Gupta shortly after the incident and prior to seeking surgical treatment from Kramer. The record also includes Fusco's testimony and the plaintiff's medical records, which indicate that prior to the fall, despite the radiological presence of her preexisting condition, the plaintiff led an active and independent lifestyle. Parenthetically, there is nothing in the record to suggest that an intervening event broke the chain of causation.

fall or a little car accident, and they become catastrophically [a]ffected if it's in the neck, for instance."

In short, the court's conclusion that the plaintiff's fall was a substantial factor in exacerbating her preexisting condition of spinal stenosis and, therefore, that the defendant was liable for all of the medical costs resulting therefrom is supported by the record. Accordingly, the court's findings relating to this claim are not clearly erroneous, nor are the conclusions unreasonable.[8]

II

The defendant also claims that the court abused its discretion in denying its motion in limine seeking to exclude an expert witness' testimony. Prior to the introduction of Kramer's deposition testimony, the defendant made a motion in limine to exclude his testimony on the ground that he "lacked a factual basis upon which to predicate an opinion that claimed damages were related to the alleged occurrence." The court reserved decision on the motion pending evidence at trial. Later, in its memorandum of decision, the court denied the defendant's motion in limine. On appeal, the

[8] In a related claim, the defendant contends that the trial court's articulation shifted the burden of proof to the defendant to prove that the plaintiff's expenses were not caused by her fall. Specifically, the defendant challenges the following portion of the court's articulation: "The defendant offered no evidence or testimony which would permit the court to find that any of those expenses were incurred for anything other than the fractures which she sustained as a result of her fall on the defendant's premises on June 6, 2010, and the exacerbation of her preexisting back injuries."

For the following reasons we disagree with this claim. When a party claims that the trial court applied an incorrect burden of proof, an appellate court does not presume error in the absence of a clear expression of what burden the court actually employed. See *Kaczynski* v. *Kaczynski*, 294 Conn. 121, 131, 981 A.2d 1068 (2009). It appears to this court that the challenged language simply reiterated that the plaintiff had satisfied her burden and noted that there was no evidence introduced to the contrary. The language was a comment on the state of the evidence, not on the burden of proof. In any event, we do not presume error on the part of the trial court. *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 145, 101 A.3d 279, cert. denied, 315 Conn. 901, 104 A.3d 107 (2014).

defendant claims that the court abused its discretion in admitting Kramer's testimony. We disagree.

As an initial matter we note our standard of review. "[T]he trial court has broad discretion in ruling on the admissibility . . . of evidence . . . [and its] ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) *Desrosiers* v. *Henne*, 283 Conn. 361, 365, 926 A.2d 1024 (2007).

In its memorandum of decision, the court noted the defendant's prior motion in limine to exclude Kramer's testimony on the grounds that he "lacked a factual basis upon which to predicate an opinion that claimed damages were related to the alleged occurrence." The court denied the motion and stated in relevant part: "Having taken into consideration the totality of the evidence offered at trial, the court has denied the defendant's motion in limine, which seeks the preclusion of Dr. Kramer's testimony, and has reviewed that deposition testimony and has given it the weight which the court finds it deserves."

In the court's later articulation regarding its denial of the defendant's motion in limine pertaining to this claim, the court stated in relevant part: "In the instant case, the court found that the facts upon which Dr. Kramer's opinions are predicated are not without substantial value. His report states that based on the patient's history, as she reported it to him, and as set forth in the records of Dr. [S. Javed Shalid, a neurologist] and Dr. [David S. Kloth, a pain management specialist], which he reviewed, there was a factual basis on which to form his opinions that the fall was a significant

factor in the need for her subsequent lumbar decompression, her increase in back pain and her lack of tolerance for standing and walking. The court found that Dr. Kramer's opinions were based on reasonable probabilities rather than mere speculation and, for that reason, they were admissible in establishing causation."

Our standard regarding the admissibility of expert testimony is well settled. "Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . In other words, [i]n order to render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion." (Citations omitted; internal quotation marks omitted.) *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 158, 971 A.2d 676 (2009); see also Conn. Code Evid. § 7-2.[9]

We begin with the defendant's argument that Kramer lacked a sufficient factual basis for his opinion that the plaintiff's fall caused her accelerated need for surgery. The record indicates that the plaintiff advised Kramer of her medical history when she initially met with him on June 21, 2012. During this time, the plaintiff "complained of symptoms consistent with lumbar spinal stenosis, namely an inability to stand and walk for any length of time. She described a spinal history which was significant for three prior surgical procedures performed in the distant past." The plaintiff also informed

[9] Section 7-2 of the Connecticut Code of Evidence provides: "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."

Kramer that "she was involved in a slip and fall, subsequent to which her symptoms of spinal stenosis seemed to have progressed." Furthermore, in Kramer's narrative summary regarding the diagnosis and treatment of the plaintiff, Kramer concluded, inter alia, that "[w]ithin a reasonable degree of medical probability, the fall of June 16, 2010 seems to have intensified this patient's symptoms of spinal stenosis. Based upon this patient's history, the fall was a significant factor in the need for her subsequent lumbar decompression." This narrative was introduced into evidence at trial.

"[O]ur case law is clear that a physician's medical opinion is not inadmissible because it is formed, in whole or in part, on the basis of hearsay statements made by a patient. See *George* v. *Ericson*, 250 Conn. 312, 320, 736 A.2d 889 (1999) (although "[i]t is the general rule that an expert's opinion is inadmissible if it is based on hearsay evidence . . . [o]ne exception to this rule . . . is the exception which allows a physician to testify to his opinion even though it is based, in whole or in part, on statements made to him by a patient for the purpose of obtaining from him professional medical treatment or advice incidental thereto" [citation omitted; internal quotation marks omitted]). The rationale for this exception is that "the patient's desire to recover his health . . . will restrain him from giving inaccurate statements to a physician employed to advise or treat him." (Internal quotation marks omitted.) *Millıun* v. *New Milford Hospital*, 129 Conn. App. 81, 96, 20 A.3d 36 (2011), aff'd, 310 Conn. 711, 80 A.3d 887 (2013).

Kramer's reliance on the plaintiff's statements to him pertaining to her medical history did not, then, render his opinion factually baseless. Moreover, the plaintiff's recitation of her medical history to Kramer was reinforced by other medical records admitted into evidence, which were also relied on by Kramer, describing her complaints regarding back pain shortly after the fall

and the extensive treatment she received thereafter. We thus find no merit to the defendant's argument that Kramer lacked a sufficient evidentiary basis on which to base his opinion.

Finally, the defendant challenges the admission of Kramer's opinion by again taking issue with Kramer's division of the cause of the plaintiff's 10 percent spinal stenosis injury equally between her preexisting condition and the fall, and his statement that it was "an admittedly arbitrary apportionment . . . ." We addressed this issue in part I C of this opinion. There, we noted that the defendant took the challenged statement out of context. Although the precise calculation of the apportionment was characterized by Kramer as somewhat arbitrary, it was nonetheless his medical opinion that the plaintiff's fall was a significant factor in causing her accelerated need for surgery. Kramer's opinion was supported by the plaintiff's medical history, as evidenced by the plaintiff's conversations with Kramer and her medical records.

Furthermore, as noted previously in this opinion, Kramer opined that the plaintiff's fall was a factor contributing to her accelerated need for surgery and that her symptoms appeared to progress significantly after the fall. Kramer also testified that his apportionment was "admittedly arbitrary . . . ." This statement is not necessarily inconsistent with a finding that the fall was a substantial factor; in any event, it is "the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony." (Emphasis omitted; internal quotation marks omitted.) *Palkimas* v. *Fernandez*, supra, 159 Conn. App. 133. In the present case, the court, as the arbiter of credibility, was free to credit some, all or none of Kramer's testimony regarding his conclusion

that the plaintiff's fall exacerbated her preexisting condition.

We thus conclude that, in light of the sufficient evidentiary foundation supporting Kramer's testimony and his conclusion that the plaintiff's fall was a substantial contributing factor with respect to the plaintiff's accelerated need for surgery, his opinions had reasonable foundation.[10] Accordingly, the court did not abuse its discretion in admitting Kramer's testimony.

The judgment is affirmed.

In this opinion the other judges concurred.

KATHLEEN FREESE *v.* DEPARTMENT OF SOCIAL SERVICES
(AC 38045)

GUSTAV CARIGLIO *v.* DEPARTMENT OF SOCIAL SERVICES
(AC 38083)

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

Syllabus

Pursuant to statute (§ 52-109), "[w]hen any action is commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff."

The plaintiffs in both actions appealed to the trial court, pursuant to statute (§ 4-183 [a]), from the decisions of the defendant Department of Social Services denying the plaintiffs' applications for certain Medicaid benefits, which they had filed on behalf of their mothers, both of whom died before the defendant rendered final decisions in the underlying administrative proceedings. The trial court thereafter granted the defendant's motions to dismiss for lack of subject matter jurisdiction and

[10] At the conclusion of its brief, the defendant, without any further analysis, claims that Kramer's opinions were not expressed to a reasonable degree of medical certainty. We will not review claims not supported by analysis. See *Nowacki* v. *Nowacki*, 129 Conn. App. 157, 164–65, 20 A.3d 702 (2011).

rendered judgments dismissing both appeals. Thereafter, the plaintiffs filed separate appeals to this court, which consolidated the appeals. The trial court had determined that because the plaintiffs' decedents died before they brought the appeals and because the plaintiffs did not bring the appeals as executors or administrators of their decedents' estates, the plaintiffs lacked standing. Moreover, although the plaintiffs had been appointed as fiduciaries of their decedents' estates after they instituted the appeals and before the trial court ruled on the defendant's motions to dismiss, the trial court denied the plaintiffs' requests to cure the jurisdictional defects pursuant to the remedial statute, § 52-109, by substituting themselves, in their capacities as estate fiduciaries, as plaintiffs in the administrative appeals. *Held*:

1. The trial court properly concluded that the plaintiffs lacked standing to appeal:

   a. The plaintiffs' claim that they had standing, pursuant to certain state regulations (§ 17b-10-1), to assert their decedents' rights in representative capacities lacked merit, as the plaintiffs' standing to appeal derived from § 4-183 (a), and the state regulations could not diminish the standing requirements set forth in § 4-183 or a similar enabling statute (§ 17b-61 [b]), which do not confer standing to appeal to any party eligible to request a fair hearing, as claimed by the plaintiffs; moreover, although the plaintiffs cited § 17b-61 (b) as support for their claim that the person who applied for the fair hearing may appeal from the decision to the Superior Court, that statute provides that an individual who applies for a fair hearing may appeal from that decision provided that he or she also is aggrieved, and it does not diminish the standing requirements set forth in § 4-183 (a) for filing administrative appeals.

   b. The plaintiffs failed to plead facts establishing aggrievement, as the operative complaints alleged that the defendant prejudiced the rights of the plaintiffs' decedents by improperly denying the applications, and the plaintiffs thus failed to allege that they have any specific personal and legal interests in the decisions to establish their aggrievement and standing; moreover, the plaintiffs failed to allege facts establishing their standing to appeal under the right of survival statute (§ 52-599), which abrogates the common-law rule that causes of action do not survive the death of a plaintiff, as neither plaintiff commenced their appeal as an executor or administrator of their decedent's estate, and § 52-599 (b) is limited to executors or administrators and does not authorize actions by parties such as next friends, putative administrators, or estate examiners, and, therefore, the plaintiffs failed to plead sufficient facts to establish aggrievement.

2. The trial court improperly granted the defendants' motions to dismiss instead of giving the plaintiffs an opportunity to cure the jurisdictional defect by substituting themselves, as fiduciaries of their decedents' respective estates, as plaintiffs in the appeals: that court improperly denied substitution and concluded that the plaintiffs' administrative

appeals were not legally cognizable actions capable of being cured by § 52-109 or the right to survival statute (§ 52-599) because they were commenced by parties without authorization to sue and, consequently, were nullities, as the plaintiffs here lacked authority to bring the appeal but did not lack the capacity to sue so as to render their administrative appeals nullities, the mere fact that their action failed to confer jurisdiction on the court did not preclude that jurisdictional defect from being cured through substitution, and adding the plaintiffs here to correct a mistake in ascertaining the real plaintiff in interest did not prejudice the defendant because it was fully apprised of the claims against it and was prepared to defend against them, and the alternative grounds asserted by the defendant regarding why substitution was unavailable were without merit; nevertheless, because the court did not determine whether the failure of the plaintiffs to bring the actions in their capacities as fiduciaries of their decedents' estates was due to an error, misunderstanding or misconception, which is a prerequisite for substitution under § 52-109, the cases were remanded for further proceedings to make such findings and to determine whether substitution is necessary to determine the real matter in dispute.

Argued January 30—officially released August 29, 2017

Procedural History

Appeals from the decisions by the defendant denying the plaintiffs' applications for certain benefits, brought to the Superior Court in the judicial district of Middlesex and transferred to the judicial district of New Britain; thereafter, the matters were transferred to the judicial district of Fairfield; subsequently, the court, *Hon. Howard T. Owens, Jr.*, judge trial referee, granted the defendant's motions to dismiss and rendered judgments thereon, from which the plaintiffs filed separate appeals to this court; thereafter, this court consolidated the appeals. *Reversed; further proceedings.*

Andrew S. Knott, with whom was *Elizabeth A. Holman*, for the appellants (plaintiff in each case).

Patrick B. Kwanashie, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (defendant in both cases).

Opinion

FLYNN, J. Our Supreme Court has construed remedial statutes liberally to give effect to their purpose. See *Dorry* v. *Garden*, 313 Conn. 516, 533, 98 A.3d 55 (2014). The plaintiffs, Kathleen Freese and Gustav Cariglio,[1] appeal from judgments of the trial court dismissing their administrative appeals. The principal issue in these cases is whether General Statutes § 52-109,[2] a remedial savings statute, could be utilized by the plaintiffs to save from dismissal their administrative appeals commenced in the names of the wrong persons as plaintiffs.

In these consolidated administrative appeals, the defendant, the Department of Social Services, denied applications for Medicaid benefits that the plaintiffs filed on behalf of their respective mothers, Noreen McCusker and Arlene Cariglio (Arlene), both of whom died before the defendant rendered final decisions in the underlying administrative proceedings. The plaintiffs appealed those denials to the trial court, but because their decedents died before they brought the appeals, and because they did not bring the appeals as executors or administrators of their decedents' estates, the court determined that the plaintiffs lacked standing and dismissed their appeals for lack of subject matter jurisdiction. Furthermore, although the plaintiffs had been appointed as fiduciaries of their decedents' estates after they instituted the appeals and before the court ruled on the defendant's motions to dismiss, the court

[1] We refer to Freese and Cariglio collectively as the plaintiffs throughout this opinion, distinguishing between them only where necessary to avoid confusion.

[2] General Statutes § 52-109 provides: "When any action has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff."

denied the plaintiffs' requests to cure the jurisdictional defect by substituting themselves, in their capacities as estate fiduciaries, as plaintiffs in the administrative appeals pursuant to the remedial savings statute § 52-109 and the similarly worded rule of practice. See Practice Book § 9-20.

On appeal to this court, the plaintiffs claim that the trial court (1) improperly concluded that they did not have standing to bring their administrative appeals because, despite the fact that they did not bring the appeals as fiduciaries of their decedents' estates, they nonetheless had standing, pursuant to the regulations set forth in the Uniform Policy Manual (UPM); Regs., Conn. State Agencies § 17b-10-1; to assert their decedents' rights in representative capacities, and (2) improperly denied their requests for substitution because, even if they did not have standing initially, they were subsequently appointed as estate fiduciaries and, thus, were entitled to cure the standing problem pursuant to § 52-109 as applied by our Supreme Court in *Kortner* v. *Martise*, 312 Conn. 1, 91 A.3d 412 (2014). Although we agree with the court that the plaintiffs initially lacked standing to commence their appeals in representative capacities, we conclude that the court's stated justifications for denying the plaintiffs' requests for substitution of the fiduciaries of their decedents' estates were legally incorrect. Because, however, the court did not issue any findings as to whether the plaintiffs' failure to name the proper parties in their administrative appeals was due to a mistake, as is required for substitution to be available under § 52-109, we reverse the court's judgment and remand the case for further proceedings not inconsistent with this opinion.

The facts and procedural history relevant to these appeals are undisputed. Freese applied for Medicaid benefits on behalf of her mother, Noreen McCusker, in October, 2013. On April 27, 2014, before the defendant

ruled on the application, McCusker died. Thereafter, the defendant denied Freese's application because McCusker's assets exceeded the limit for eligibility for Medicaid. Acting on her mother's behalf, Freese requested a fair hearing with the defendant's Office of Legal Counsel, Regulations and Administrative Hearings. On September 26, 2014, after conducting the hearing, the Office of Legal Counsel concurred that McCusker's assets rendered her ineligible for Medicaid and denied Freese's appeal. Contesting the merits of that decision, Freese commenced an administrative appeal to the trial court on October 29, 2014. In her complaint, Freese alleged that McCusker's rights were prejudiced because the defendant improperly deprived McCusker of her entitlement to Medicaid benefits. Freese further alleged that she was aggrieved "by virtue of being next friend and putative administrator for [McCusker]." More than one month later, on December 11, 2014, Freese was appointed administratrix of McCusker's estate.

Cariglio's action followed a similar procedural path. Cariglio's mother, Arlene, died on November 4, 2013. Just over one week later, Cariglio applied for Medicaid benefits on Arlene's behalf. The defendant denied Cariglio's application because Arlene had died and because Arlene's assets exceeded the eligibility limit. Cariglio requested a fair hearing and, following the hearing, the Office of Legal Counsel denied Cariglio's appeal on August 12, 2014. Cariglio commenced an administrative appeal in the trial court on September 16, 2014, alleging, in his operative complaint, that Arlene's rights were prejudiced by the defendant's erroneous finding that Arlene was ineligible for benefits. Cariglio further alleged that he brought the appeal in his capacity as Arlene's "co-attorney-in-fact, next friend, and putative

coexecutor of [Arlene's] will."[3] With regard to aggrievement, Cariglio alleged that he was aggrieved as Arlene's "estate examiner."[4] Over a month later, on December 3, 2014, Cariglio was appointed as a coexecutor of Arlene's estate.

Around the time when the plaintiffs were appointed as fiduciaries of their decedents' estates, the defendant moved to dismiss the plaintiffs' administrative appeals for lack of subject matter jurisdiction. In both motions, the defendant argued that the plaintiffs lacked standing to appeal from the denials of their Medicaid applications because they were not personally aggrieved by the denials and, furthermore, did not institute the appeals as administrators or executors of their decedents' estates. In response, the plaintiffs filed motions to substitute

[3] Cariglio alleged that Arlene left a will that designated him and his brother Pasquale Cariglio "as coexecutors," and that the will was "in the process" of being admitted into probate.

[4] Cariglio's reference to his status as "estate examiner" appears to be a reference to General Statutes § 45a-317a, which provides in relevant part: "Any person interested in the estate of a deceased person and having a need to obtain financial information concerning the deceased person for the limited purpose of determining whether the estate may be settled as a small estate under section 45a-273, or having a need to obtain financial or medical information concerning the deceased person for the limited purpose of investigating a potential cause of action of the estate, surviving spouse, children, heirs or other dependents of the deceased person, or a potential claim for benefits under a workers' compensation act, an insurance policy or other benefits in favor of the estate, surviving spouse, children, heirs or other dependents of the deceased person, may apply to the Probate Court having jurisdiction of the estate of the deceased person for the appointment of an estate examiner. . . . If the court appoints an estate examiner under this section, the court may require a probate bond or may waive such bond requirement. The court shall limit the authority of the estate examiner to disclose the information obtained by the estate examiner, as appropriate, and may issue an appropriate order for the disclosure of such information. Any order appointing an estate examiner under this section, and any certificate of the appointment of a fiduciary issued by the clerk of the court, shall indicate (1) the duration of the estate examiner's appointment, and (2) that such estate examiner has no authority over the assets of the deceased person."

themselves, in their newly-obtained capacities as fiduciaries of their respective decedents' estates, as party plaintiffs in order to cure any jurisdictional defects. The plaintiffs both asserted that they commenced their appeals "based on a good-faith belief, not being the result of negligence," that they were the proper parties to appeal. The plaintiffs also requested leave to amend their complaints to that effect.[5] In their objections to the defendant's motions to dismiss, the plaintiffs argued that, on the basis of *Kortner* v. *Martise*, supra, 312 Conn. 1, substitution of an estate fiduciary as a plaintiff to cure a defect in standing is warranted under § 52-109 where, as in their cases, the original action was mistakenly brought in the name of an unauthorized party. Alternatively, the plaintiffs argued that, pursuant to the regulations set forth in the UPM, they had representative standing to appeal on their decedents' behalves despite the fact that, when they commenced their appeals, they had not yet been appointed as fiduciaries of their decedents' estates.

After hearing argument on May 12, 2015, and ordering supplemental briefing, the court issued memoranda of decision dismissing the plaintiffs' appeals. With regard to Freese, the court began by distinguishing her case from our Supreme Court's decision in *Kortner* v. *Martise*, supra, 312 Conn. 14, reasoning that, under *Kortner*, "substitution is permissible . . . only if the decedent had a colorable claim of injury during his life that is a real matter in dispute . . . such that the decedent had standing to bring the action himself," whereas McCusker died before Freese commenced her administrative appeal and, therefore, "ha[d] neither a vindicable right nor a colorable claim of injury that the action

[5] Freese's proposed amended complaint alleged that she was aggrieved "by virtue of being administratrix of estate for [McCusker]." Cariglio's proposed second amended complaint alleged that he and Pasquale Cariglio were aggrieved "by virtue of being the coexecutors of estate for [Arlene]."

implicates." The court further observed that, because Freese's appeal was not commenced by an executor or administrator of McCusker's estate, it was incapable of being cured by substitution: "Being a nullity and incapable of vesting the court with subject matter jurisdiction over any controversy, a suit initiated by a decedent or his heir, or by another on their behalf, cannot be an action within the meaning of § 52-109, that section contemplating a legally cognizable right of action. Further, substitution under § 52-109 cannot retroactively validate such a suit."[6] Accordingly, the court determined that *Kortner* was inapposite, declined to permit substitution, and dismissed Freese's appeal for lack of subject matter jurisdiction. In denying substitution, the court did not determine whether Freese's failure to appeal in her capacity as administratrix of McCusker's estate was the result of a mistake. See General Statutes § 52-109 (substitution appropriate only if trial court is satisfied that original action was commenced in name of improper party through mistake).

In its memorandum of decision dismissing Cariglio's appeal, the court reasoned that, to have standing to appeal, Cariglio was required to commence the appeal in his capacity as a fiduciary of Arlene's estate, and that Cariglio's operative complaint failed to allege that he brought his appeal in such a capacity. The court also rejected Cariglio's argument that his appeal could be saved by § 52-109 or General Statutes § 52-599,[7] reasoning that, because the appeal failed to invoke the court's

[6] The court further reasoned that permitting substitution in Freese's action would prejudice the defendant because it would permit Freese to avoid the forty-five day limitation period for filing administrative appeals. See General Statutes § 4-183 (c).

[7] General Statutes § 52-599 provides in relevant part: "(a) A cause or right of action shall not be lost or destroyed by the death of any person, but shall survive in favor of or against the executor or administrator of the deceased person.

"(b) A civil action or proceeding shall not abate by reason of the death of any party thereto, but may be continued by or against the executor or administrator of the decedent. If a party plaintiff dies, his executor or

jurisdiction in the first place, "there [was] no cause or right of action to save." Furthermore, the court concluded that Cariglio failed to plead aggrievement, as is required to have standing to appeal from an administrative decision. See General Statutes § 4-183 (a). Thus, the court declined to permit substitution and dismissed Cariglio's administrative appeal for lack of subject matter jurisdiction.[8] As in Freese's case, the court did not determine whether Cariglio failed to appeal as coexecutor of Arlene's estate due to a mistake. These consolidated appeals followed.

The plaintiffs claim that court improperly granted the defendant's motions to dismiss for lack of subject matter jurisdiction. First, they argue that the court erroneously concluded that they lacked standing to appeal because, pursuant to the regulations set forth in the UPM, they had standing to appeal in representative capacities. Second, the plaintiffs contend that, on the basis of § 52-109 and *Kortner* v. *Martise*, supra, 312 Conn. 1, the court erred in refusing to permit substitution in lieu of dismissing the cases.[9] As set forth subsequently in this opinion, we disagree with the plaintiffs'

administrator may enter within six months of the plaintiff's death or at any time prior to the action commencing trial and prosecute the action in the same manner as his testator or intestate might have done if he had lived. If a party defendant dies, the plaintiff, within one year after receiving written notification of the defendant's death, may apply to the court in which the action is pending for an order to substitute the decedent's executor or administrator in the place of the decedent, and, upon due service and return of the order, the action may proceed. . . ."

[8] In both memoranda of decision, the court did not address the plaintiffs' alternative arguments that they had representative standing to appeal pursuant to the UPM.

[9] The plaintiffs also argue that, by failing to raise the issue of standing at any point during the underlying administrative proceedings before the agency, the defendant is estopped from raising it now. Because, however, subject matter jurisdiction "addresses the basic competency of the court, [it] can be raised by any of the parties, or by the court sua sponte, at any time." (Internal quotation marks omitted.) *ABC, LLC* v. *State Ethics Commission*, 264 Conn. 812, 823, 826 A.2d 1077 (2003). Moreover, "subject matter jurisdiction cannot be conferred by waiver or consent . . . ." *Man-*

claim that they had standing to appeal in capacities other than as fiduciaries of their respective decedents' estates. However, we reverse the judgments of dismissal and remand the cases for the court to determine whether the plaintiffs' failure to name the proper parties as plaintiffs in their appeals was due to a mistake and for such further proceedings as are not inconsistent with this opinion.

We begin by setting forth our standard of review. "A determination regarding a trial court's subject matter jurisdiction is a question of law. . . . When the trial court draws conclusions of law, appellate review is plenary, and the reviewing court must decide whether the trial court's conclusions are legally and logically correct." (Internal quotation marks omitted.) *Youngman* v. *Schiavone*, 157 Conn. App. 55, 63, 115 A.3d 516 (2015). Furthermore, "[t]he decision whether to grant a motion for the addition or substitution of a party to legal proceedings rests in the sound discretion of the trial court." (Internal quotation marks omitted.) Id. "[When] a motion to dismiss is filed on the ground that the plaintiff lacks standing, and the plaintiff quickly follows by filing a motion to substitute the correct party, the motion to substitute may be heard while the motion to dismiss is pending, notwithstanding the general rule that the subject matter jurisdictional issues raised by a motion to dismiss must be dealt with prior to other motions." (Internal quotation marks omitted.) Id.

I

The plaintiffs first argue that the court erroneously concluded that they lacked standing to appeal from the defendant's denials of their Medicaid applications

ning v. *Feltman*, 149 Conn. App. 224, 236, 91 A.3d 466 (2014). Therefore, assuming, arguendo, that the defendant could have raised the standing issue during the administrative proceedings, the doctrine of estoppel does not apply.

because the UPM conferred them with standing to assert their decedents' rights in representative capacities. We disagree.

"It is well established that the right to appeal an administrative action is created only by statute and a party must exercise that right in accordance with the statute in order for the court to have jurisdiction." *New England Rehabilitation Hospital of Hartford, Inc.* v. *Commission on Hospitals & Health Care*, 226 Conn. 105, 120, 627 A.2d 1257 (1993). In the present cases, the plaintiffs appealed pursuant to § 4-183 (a), which provides in relevant part that "[a] person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section." See also General Statutes § 17b-61 (b) (providing that "[t]he applicant for [a fair] hearing, if aggrieved, may appeal therefrom in accordance with section 4-183").

Therefore, "in order to have standing to bring an administrative appeal, a person or entity must be aggrieved. . . . Aggrievement is a question of fact for the trial court and the plaintiff has the burden of proving that fact. . . . Pleading and proof of facts that constitute aggrievement are essential prerequisites to the trial court's subject matter jurisdiction over an administrative appeal. . . . In the absence of aggrievement, an administrative appeal must be dismissed for lack of subject matter jurisdiction." (Citations omitted.) *New England Rehabilitation Hospital of Hartford, Inc.* v. *Commission on Hospitals & Health Care*, supra, 226 Conn. 120–21.

"[T]he fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and

legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the decision . . . .'' (Internal quotation marks omitted.) *New England Cable Television Assn., Inc.* v. *Dept. of Public Utility Control*, 247 Conn. 95, 103, 717 A.2d 1276 (1998).

Before reaching the question of aggrievement under § 4-183 (a), we reject the plaintiffs' central contention that the UPM conferred them with standing to commence their administrative appeals in representative capacities. In essence, the plaintiffs' argument is that they need not establish aggrievement under § 4-183 (a) provided that they had standing under the UPM. It is well settled, however, that ''[a]ppeals to the courts from administrative [agencies] exist only under statutory authority . . . . Appellate jurisdiction is derived from the . . . statutory provisions by which it is created . . . and can be acquired and exercised only in the manner prescribed. . . . In the absence of statutory authority, therefore, there is no right of appeal from [an agency's] decision . . . .'' (Internal quotation marks omitted.) *Cales* v. *Office of Victim Services*, 319 Conn. 697, 700–701, 127 A.3d 154 (2015). Therefore, the plaintiffs' standing to appeal from the defendant's denials of their Medicaid applications is derived solely from §§ 4-183 (a) and 17b-61 (b), and unless the plaintiffs established the prerequisites to standing as required by those sections, namely, aggrievement, their appeals are subject to dismissal. The regulations set forth in the UPM, promulgated by the defendant pursuant to General Statutes § 17b-10 (a), cannot diminish the standing requirements set forth in the enabling statutes. Indeed, the plaintiffs' contention is that, under the UPM,

any party eligible to request a fair hearing also has standing to appeal to the trial court. The enabling statutes, however, do not confer standing under such circumstances. "[M]ere status . . . as a party or a participant in a hearing before an administrative agency does not in and of itself constitute aggrievement for the purposes of appellate review." (Internal quotation marks omitted.) *Med-Trans of Connecticut, Inc.* v. *Dept. of Public Health & Addiction Services*, 242 Conn. 152, 169, 699 A.2d 142 (1997). Because the plaintiffs' claim that the UPM conferred them with standing would require us to depart from the enabling statutes, their reliance on the UPM is without merit.

The plaintiffs do, however, cite one of the enabling statutes—§ 17b-61 (b)—as support for their argument that "the person who applied for the [f]air [h]earing may appeal the decision to the Superior Court." Section 17b-61 (b), which governs standing to appeal from decisions rendered after administrative hearings, provides in relevant part: "The applicant for such a hearing, *if aggrieved*, may appeal therefrom in accordance with section 4-183. . . ." (Emphasis added.) Contrary to the plaintiffs' interpretation, the plain text of that statute provides that an individual who applies for a fair hearing may appeal from that decision *provided that he or she also is aggrieved*. The plaintiffs' construction ignores the phrase "if aggrieved," in violation of the principle that statutes "must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . ." (Internal quotation marks omitted.) *Marchesi* v. *Board of Selectmen*, 309 Conn. 608, 615, 72 A.3d 394 (2013). Therefore, § 17b-61 (b) does not diminish the standing requirements set forth in § 4-183 (a) for filing administrative appeals, and does not help the plaintiffs' cause.

Having rejected the plaintiffs' primary argument on appeal, namely, that the UPM could confer them with

authority to appeal to the Superior Court, we next conclude that the plaintiffs failed to plead facts establishing aggrievement.[10] In their operative complaints, the plaintiffs allege that they applied for Medicaid benefits on behalf of their decedents, and that the defendant prejudiced their decedents' rights by improperly denying the applications. Therefore, despite the plaintiffs' alleged participation in the underlying proceedings and disagreement with the merits of the administrative decisions, they have failed to allege that they have any specific personal and legal interests in the decisions. See *New England Cable Television Assn., Inc.* v. *Dept. of Public Utility Control*, supra, 247 Conn. 103. On that basis, the plaintiffs were not aggrieved and, thus, lacked standing to commence these appeals.

Nor did the plaintiffs allege facts establishing their standing to appeal under our right of survival statute, § 52-599, which abrogates the common law rule that causes of action do not survive the death of a plaintiff. See *Burton* v. *Browd*, 258 Conn. 566, 570–71, 783 A.2d 457 (2001). Under § 52-599, causes of action survive the death of a plaintiff, but only in favor of the plaintiff's "executor or administrator . . . ." See General Statutes § 52-599 (b).[11] "It is a well established principle

[10] We note that the trial court did not conclude that Freese failed to plead facts establishing aggrievement in its memorandum of decision. That omission does not preclude us from doing so on appeal, however, because defects in subject matter jurisdiction "may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 533, 911 A.2d 712 (2006).

[11] We note that the plaintiffs in the present cases could have availed themselves of § 52-599 during the underlying administrative proceedings. Our Supreme Court has held that § 52-599 (b) applies to situations in which "an executor has entered the administrative proceeding by filing an amended complaint seeking any remedy to which the deceased complainant may have been entitled . . . ." (Emphasis omitted; internal quotation marks omitted.) *Hillcroft Partners* v. *Commission on Human Rights & Opportunities*, 205 Conn. 324, 331, 533 A.2d 852 (1987); see also *Commission on Human Rights & Opportunities* v. *Greenwich Catholic Elementary School System, Inc.*, 202 Conn. 609, 613–14, 522 A.2d 785 (1987).

. . . that [d]uring the interval . . . between the death and the revival of the action [pursuant to § 52-599] by the appearance of the executor or administrator, the cause has no vitality. The surviving party and the court alike are powerless to proceed with it." (Internal quotation marks omitted.) *Burton* v. *Browd*, supra, 571. Limiting § 52-599 to suits brought by the decedent's executor or administrator accords with the established principle that "[t]he proper suit, upon a cause of action arising in favor of . . . the decedent during [his or her] lifetime, is in the name of the fiduciary [of the estate] rather than of the heirs or other beneficiaries of the estate." (Internal quotation marks omitted.) *Geremia* v. *Geremia*, 159 Conn. App. 751, 781, 125 A.3d 549 (2015); see also 31 Am. Jur. 2d 746, Executors and Administrators § 1093 (2012) ("the exclusive right to bring action in behalf of an estate . . . is the legal representative of the estate; the heirs have no standing to maintain such an action" [footnote omitted]).

In the present case, neither plaintiff commenced their appeal as an executor or administrator of their decedent's estate; indeed, it is undisputed that they were not appointed into those capacities until December, 2014, after they instituted the appeals. Instead, Freese alleged that she was aggrieved as McCusker's "next friend and putative administrator," and Cariglio alleged that he was aggrieved as Arlene's "estate examiner." Because § 52-599 limits its ambit to executors or administrators, it does not authorize suits by parties such as next friends, putative administrators, or estate examiners. Accordingly, the plaintiffs failed to plead sufficient facts to establish aggrievement, and the court properly concluded that they lacked standing to appeal.[12]

[12] The plaintiffs assert in their main brief that an administrative appeal pursuant to § 4-183 "is not a new proceeding, but the continuation of an extant proceeding." Regardless of whether that is true, however, the plaintiffs needed to establish their aggrievement in order to have standing to commence their appeals, which they failed to do.

We nonetheless find it appropriate to note that, in terms of whether a party authorized to participate in the administrative proceedings also is authorized to bring an administrative appeal, certain regulations in the UPM leave some room for confusion. For instance, § 1505.15 (A) (1) of the UPM permits applicants to be "represented by other qualified individuals who act responsibly for them," and § 1570.05 (D) (2) (b) provides that, in the case of a deceased applicant, their child may request a fair hearing on their behalf. Finally, § 1570.30 (A) of the UPM provides that "[t]he requester has the right to appeal a [f]air [h]earing decision to the court of jurisdiction." Taken together, we can see how litigants might be misled into thinking that they are authorized to file administrative appeals from fair hearing decisions simply because they were the person to request the fair hearing. Fair hearing applicants who mistakenly rely on these provisions of the UPM as conferring them with standing may be induced into failing to take the necessary measures to establish aggrievement under § 4-183, such as obtaining appointment as fiduciary of their decedent's estate, which could harm their ability to assert the rights of their decedents in administrative appeals. It would be prudent for the defendant to amend the relevant regulations of the UPM to provide a clear indication that none of them diminishes the aggrievement requirements set forth in § 4-183.

Regardless of their lack of clarity, however, the UPM regulations cannot, as we have stated, enlarge the class of persons eligible to file an administrative appeal beyond those qualifying as aggrieved persons under § 4-183 (a). See *Cales* v. *Office of Victim Services*, supra, 319 Conn. 700–701. Because the plaintiffs failed to allege that they were aggrieved, they lacked standing to appeal.

II

Having determined that the plaintiffs failed to plead sufficient facts to establish that they had standing to

commence their administrative appeals, we must next determine whether the court erred by granting the defendant's motions to dismiss instead of giving the plaintiffs an opportunity to cure the jurisdictional defect by substituting themselves, as fiduciaries of their decedents' respective estates, as plaintiffs in the appeals. We conclude that the court's stated justifications for denying substitution are legally incorrect, and that the alternative grounds asserted by the defendant regarding why substitution was unavailable are without merit. Because, however, the court did not determine whether the plaintiffs' failure to sue in their capacities as fiduciaries of their decedents' estates was due to a mistake, which is a prerequisite for substitution under § 52-109, we remand the case for a further finding and for further proceedings not inconsistent with this opinion.

"The decision whether to grant a motion for the addition or substitution of a party to legal proceedings rests in the sound discretion of the trial court. . . . In reviewing the trial court's exercise of that discretion, every reasonable presumption should be indulged in favor of its correctness . . . and only if its action discloses a clear abuse of discretion is our interference warranted." (Internal quotation marks omitted.) *Youngman* v. *Schiavone*, supra, 157 Conn. App. 65.

Section 52-109 provides: "When any action has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff." Section 52-109 "allow[s] a substituted plaintiff to enter a case [w]hen any action has been commenced in the name of the wrong person as [the] plaintiff, and that such a substitution will relate back to and correct, retroactively, any defect in a prior pleading concerning the

identity of the real party in interest. . . . Thus, a substitution of a real party in interest as the plaintiff cures the lack of standing of the original plaintiff . . . and, further, is permissible even after the statute of limitations has run. . . . An addition or substitution is discretionary, but generally should be allowed when, due to an error, misunderstanding or misconception,[13] an action was commenced in the name of the wrong party, instead of the real party in interest, whose presence is required for a determination of the matter in dispute." (Citations omitted; footnotes altered; internal quotation marks omitted.) *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 552–53, 133 A.3d 140 (2016).

Once the trial court determines that the action was commenced in the name of the wrong party due to an error, misunderstanding or misconception, "the substituted party is let in to carry on a pending suit, and is not regarded as commencing a new one. After he is substituted he is . . . treated and regarded for most purposes just as if he had commenced the suit originally. The writ, the complaint, the service of process, attachment made, bonds given, the entry of the case in court, the pleadings if need be, in short all things done in the case by or in favor of the original plaintiff . . .

[13] Our Supreme Court held in *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 133 A.3d 140 (2016), that the term "mistake" as used in § 52-109 should be interpreted according to its ordinary meaning, namely, "error, misunderstanding or misconception." Id., 553 and n.21. In adopting that definition, the court disavowed its previous interpretation of "mistake" as "an honest conviction, entertained in good faith and not resulting from the plaintiff's own negligence," reasoning that such a definition was "too limiting and, practically, too difficult to apply, especially given the ameliorative purpose of § 52-109." Id., 553–54 n.21. We note that the trial court did not have the benefit of our Supreme Court's decision in *Fairfield Merrittview Ltd. Partnership* at the time it issued its memoranda of decision dismissing the plaintiffs' appeals. In any event, the change in the definition of "mistake" does not bear on our analysis of whether the court properly denied the plaintiffs' requests for substitution.

remain for the benefit of the plaintiff who succeeds him, as if done by and for him originally and just as if no change of parties had been made. So far as the defendant is concerned, the same suit upon the same cause of action, under the same complaint and pleadings substantially in most cases, goes forward to its final and legitimate conclusion as if no change had been made." (Internal quotation marks omitted.) *Kortner* v. *Martise*, supra, 312 Conn. 12–13. "[W]hen a plaintiff is added to the case to correct a mistake in ascertaining the real plaintiff in interest, the defendant rarely, if ever, will be prejudiced, as long as he was fully apprised of the claims against him and was prepared to defend against them." *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 158, 998 A.2d 730 (2010).

Finally, we must bear in mind that "remedial statutes must be afforded a liberal construction in favor of those whom the legislature intended to benefit." (Internal quotation marks omitted.) *Dorry* v. *Garden*, supra, 313 Conn. 533. Our rules with respect to substitution are no different—they "permit the substitution of parties as the interest of justice require"; (internal quotation marks omitted) *Kortner* v. *Martise*, supra, 312 Conn. 11; and "are to be construed so as to alter the harsh and inefficient result that attached to the mispleading of parties at common law." (Internal quotation marks omitted.) Id.

In the present cases, the trial court did not determine whether the plaintiffs' failure to name the proper parties in their appeals was due to a mistake. Instead, the trial court's principal reason for denying substitution appears to have been that the plaintiffs' administrative appeals were not legally cognizable actions capable of being cured by § 52-109 or our right of survival statute, § 52-599 (b), because they were commenced by parties without authorization to sue and, consequently, were nullities. In its memorandum of decision dismissing

Freese's case, the court stated that, "[b]eing a nullity and incapable of vesting the court with subject matter jurisdiction over any controversy, a suit initiated by a decedent or his heir, or by another on their behalf, cannot be an action within the meaning of § 52-109, that section contemplating a legally cognizable right of action. Further, substitution under § 52-109 cannot retroactively validate such a suit." Likewise, with regard to Cariglio, the court observed that, although "§ 52-109 permit[s] substitution of a proper party for the plaintiff in any action mistakenly commenced in the name of the wrong person and § 52-599 (b) permits a civil action or proceeding by or against any party who dies during the pendency of the action to be continued by or against the decedent's executor or administrator, neither statute can save an unauthorized suit, there being no cause or right of action to save."

This reasoning is flawed on two levels. First, although the plaintiffs lacked authority to bring these appeals on their decedents' behalves, they did not, as the trial court suggested, lack the capacity to sue so as to render their administrative appeals nullities. "It is elemental that in order to confer jurisdiction on the court the plaintiff must have an actual legal existence, that is he or it must be a person in law or a legal entity with legal capacity to sue." (Internal quotation marks omitted.) *Coldwell Banker Manning Realty, Inc.* v. *Cushman & Wakefield of Connecticut, Inc.*, 136 Conn. App. 683, 687, 47 A.3d 294 (2012). For instance, "[t]he quintessential example of someone who lacks capacity to sue . . . is a deceased person, as capacity only exists in living persons." *In re Estate of Sauers*, 613 Pa. 186, 198, 32 A.3d 1241 (2011); see also *Noble* v. *Corkin*, 45 Conn. Supp. 330, 333, 717 A.2d 301 (1998) ("[a] dead person is a nonexistent entity and cannot be a party to a suit" [internal quotation marks omitted]). Likewise, "[a]n estate is not a legal entity. It is neither a natural nor

artificial person, but is merely a name to indicate the sum total of the assets and liability of the decedent or incompetent. . . . Not having a legal existence, it can neither sue nor be sued." (Citation omitted; internal quotation marks omitted.) *Isaac* v. *Mount Sinai Hospital*, 3 Conn. App. 598, 600, 490 A.2d 1024, cert. denied, 196 Conn. 807, 494 A.2d 904 (1985). In the present cases, however, the plaintiffs did not commence their appeals in the names of their decedents or their decedents' estates; rather, they sued in their own names. Although the plaintiffs were not authorized, and thus lacked standing, to appeal in their own names, they were nonetheless living persons with capacity to sue. See 67A C.J.S. 524–25, Parties § 10 (2013) ("[i]n general, every natural person of lawful age has legal capacity to sue"). Accordingly, the trial court was incorrect to posit that the plaintiffs' appeals were nullities.

Second, even if the plaintiffs' appeals were nullities, the mere fact that an action fails to confer jurisdiction on the court does not preclude that jurisdictional defect from being cured through substitution. "[I]f § 52-109 is to have the ameliorative purpose for which it was intended, then even assuming that the specter of subject matter jurisdiction rears its head, the statute is meant to give the trial courts jurisdiction for the limited purpose of determining if the action should be saved from dismissal by the substitution of plaintiffs. . . . The legislature's provision of this statutory remedy would be completely undermined by any rule requiring the immediate dismissal for lack of subject-matter jurisdiction of any action commenced in the name of the wrong person as plaintiff. The statute, as an exercise of the legislature's constitutional authority to determine [our court's] jurisdiction . . . must be seen as an extension of that jurisdiction for the limited purpose of deciding a proper motion to substitute." (Citations omitted; internal quotation marks omitted.) *Youngman* v. *Schiavone*, supra, 157 Conn. App. 64.

Put simply, substitution is available to cure lawsuits that, like the present cases, were commenced by unauthorized parties. Our Supreme Court recognized this in *Kortner* v. *Martise*, supra, 312 Conn. 1, in which the plaintiff, in her capacity as conservator of Caroline Kortner's person, commenced a tort action against the defendant, asserting that the defendant committed a variety of torts against Kortner. Id., 8. Kortner died after the action was commenced, the plaintiff was appointed administratrix of her estate, and the trial court granted the plaintiff's motion to substitute herself as administratrix as the plaintiff in the action. Id., 11. On appeal, the Supreme Court sua sponte ordered the parties to brief the issue of whether the plaintiff lacked standing to sue as conservator of Kortner's person. Id., 9 and n.7. The court concluded that, "even assuming, arguendo, that the plaintiff did not have standing to bring the claim when she commenced the action . . . any defect was cured when she, as administratrix of [Kortner's] estate, was substituted as the plaintiff . . . and that substitution related back to the commencement of the action." Id., 14. By permitting substitution to cure the alleged jurisdictional defect, the court implicitly recognized in *Kortner* that substitution under § 52-109 is not categorically unavailable to cure lawsuits commenced by unauthorized parties.

We also do not agree with the trial court's reasoning in its memorandum of decision dismissing Freese's appeal that substitution would prejudice the defendant because it would permit Freese to avoid the forty-five day limitation period for filing administrative appeals. Our case law recognizes that "[w]hen a plaintiff is added to the case to correct a mistake in ascertaining the real plaintiff in interest, the defendant rarely, if ever, will be prejudiced, as long as he was fully apprised of the claims against him and was prepared to defend against them." *DiLieto* v. *County Obstetrics & Gynecology*

Group, P.C., supra, 297 Conn. 158. Additionally, "substitution of a real party in interest as the plaintiff cures the lack of standing of the original plaintiff . . . and, further, is permissible even after the statute of limitations has run." (Citation omitted; internal quotation marks omitted.) *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, supra, 320 Conn. 553. Here, Freese brought her administrative appeal on October 29, 2014, within the forty-five day limitation period, and her pleadings fully apprised the defendant of the claims she was raising. Thus, it is difficult to discern the way in which the defendant would be prejudiced by substitution.

The defendant advances additional arguments as to why substitution was unavailable. The defendant argues that administrative appeals are not "actions" eligible to be cured under the provisions of § 52-109, and that there was not a sufficient identity of interest between the originally named plaintiffs and the plaintiffs in their capacities as estate fiduciaries. Moreover, the defendant argues that, in light of *Kortner* v. *Martise*, supra, 312 Conn. 14, substitution was unavailable in the plaintiffs' cases because the plaintiffs' decedents were deceased by the time the defendant issued appealable administrative decisions and, therefore, did not have standing in their own right to bring the appeals.

We turn first to the defendant's argument that the plaintiffs' administrative appeals are not "actions" for purposes of § 52-109. That section provides: "When any *action* has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff." (Emphasis added.) Section 52-109 thus requires that, in order to fall within the statute's saving grace, a case must be an "action." As support for

its argument, the defendant cites to *Carbone* v. *Zoning Board of Appeals*, 126 Conn. 602, 13 A.2d 462 (1940), *Bank Building & Equipment Corp. of America* v. *Architectural Examining Board*, 153 Conn. 121, 214 A.2d 377 (1965), and *Chieppo* v. *Robert E. McMichael, Inc.*, 169 Conn. 646, 363 A.2d 1085 (1975), none of which deal with § 52-109 at issue here.

In *Carbone* v. *Zoning Board of Appeals*, supra, 126 Conn. 602, writing for our Supreme Court, Justice Maltbie, with logic and brevity worthy of Tacitus, observed that, as used in our General Statutes, "the word 'action' has no precise meaning and the scope of proceedings which will be included within the term as used in the statutes depends upon the nature and purpose of the particular statute in question." Id., 605. In deciding that an appeal from a zoning board was not an "action" for purposes of the accidental failure of suit statute, General Statutes § 52-592 (then codified as General Statutes [1930 Rev.] § 6024), the court held that statutory actions and special laws that fix a rather brief time in which appeals may be taken to the courts from the order and decisions of administrative boards, and that make it possible to proceed in the matter as soon as the time to take an appeal has passed if one has not been filed, were unsuited to be considered "actions" that could be saved under the one year recommencement provision of the accidental failure of suit statute. Id., 607. The court stated that "[t]o hold that an appeal in such a proceeding as the one before us is an 'action' within the meaning of [the accidental failure of suit statute] would have the practical effect of eliminating the time factor in taking such appeals." Id.

We see important distinctions between the present cases and *Carbone*. The *Carbone* court wisely ruled that a fifteen day appeal period could not be extended to one year under the accidental failure of suit statute because the short fifteen day appeal period had been

established by the legislature, rather than rule of the court, so that persons who might have received an approval of a zoning application could proceed with a project and so that public officials charged with issuing permits could issue them knowing that no appeal had been taken in the fifteen day period permitted. We see no such imperative here. Under § 4-183, the appeal statute in the present cases, the appeal period is forty-five days, three times longer than the time within which zoning appeals must be taken.[14] Unlike *Carbone*, there is no similar need to "proceed in the matter as soon as the time to take an appeal has passed if one has not been filed." *Carbone* v. *Zoning Board of Appeals*, supra, 126 Conn. 607. Moreover, unlike *Carbone*, the remedial statute involved here is § 52-109.

In *Bank Building & Equipment Corp. of America* v. *Architectural Examining Board*, supra, 153 Conn. 121, also relied upon by the defendant, the statute involved was General Statutes (Cum. Supp. 1965) § 20-289, which governed appeals from orders of the Architectural Examining Board and provided that such appeals must be taken within thirty days of the date of an order. Id., 123. Rejecting the plaintiffs' request to overrule *Carbone*, the court determined that an appeal under § 20-289 was not an "action" for purposes of the accidental failure of suit statute, § 52-592, or a "civil action" under General Statutes § 52-593, which provides that a plaintiff in "any civil action" who fails to obtain a judgment by reason of failure to name the right person as defendant may bring a new action even if the statute of limitations had expired. Id., 124. In reaching this conclusion, the court found it "significant that § 20-289, in authorizing appeals from the defendant board,

[14] Unless specifically regulated by statute, the time frame for taking appeals in Connecticut is governed by the rules of practice. See Practice Book § 63-1 (a).

requires that the citation be 'signed by the same authority' and that the appeal be 'returnable at the same time and served and returned in the same manner as is required in the case of a summons in a civil action.' . . . The steps prescribed in § 20-289 are easily understood. It is apparent from the language used that the General Assembly intended to set forth a procedure distinct from the ordinary concept of a civil action."[15] (Citation omitted.) Id., 125. By contrast, § 4-183 does not set forth any procedure distinct from the procedure used to bring an ordinary civil action.[16]

The defendant also argues that *Chieppo* v. *Robert E. McMichael, Inc.*, supra, 169 Conn. 646, supports the proposition that the present administrative appeals are not actions under § 52-109. *Chieppo*, however, also has factual distinctions from the present cases. *Chieppo* dealt with a workers' compensation appeal pursuant to General Statutes (Rev. to 1975) § 31-301 (a), which, at that time, provided for a very limited ten day appeal

[15] General Statutes (Cum. Supp. 1965) § 20-289 required the use of a citation commanding a party to appear rather than a summons, and provided in relevant part: "Any person aggrieved by an order made under this chapter may, within thirty days after the entry of such order, appeal to the superior court for the county in which he resides from such order, which appeal shall be accompanied by a citation to said board to appear before said court. Such citation shall be signed by the same authority and such appeal shall be returnable at the same time and served and returned in the same manner as is required in the case of a summons in a civil action. The authority issuing the citation shall take from the applicant a bond or recognizance to the state, with sufficient surety, to prosecute the application to effect and to comply with the orders and decrees of the court in the premises. Such application shall operate as a stay of such order pending the ultimate determination of the appeal, including an appeal to the supreme court, if any, unless otherwise ordered by the court. . . ."

[16] Moreover, we note that, subsequent to our Supreme Court's decision in *Bank Building & Equipment Corp. of America* v. *Architectural Examining Board*, supra, 153 Conn. 121, the legislature amended § 20-289 to eliminate the thirty day appeal period. Under the current version of § 20-289, "[a]ny person aggrieved by an order made under this chapter may appeal from such an order as provided in section 4-183."

period within which it might be brought. An employer whose appeal had been dismissed because it had been brought in the wrong court sought to transfer the matter to the proper court pursuant to General Statutes (Rev. to 1975) § 52-32. Id., 648–49. Because the purpose of the workers' compensation act was to provide a prompt, effective means of compensating injured workers for related expenses, it was not deemed a "civil action" for purposes of § 52-32. Id., 653–54. Given the much shorter ten day window for filing an appeal in *Chieppo*, and the obvious legislative purpose of the workers' compensation statutes to ensure that injured workers were provided with a prompt remedy in lieu of their right to sue their employer or negligent fellow worker, the ruling that such appeals are not ordinary civil actions was consistent with the framework that Chief Justice Maltbie's opinion in *Carbone* v. *Zoning Board of Appeals*, supra, 126 Conn. 602, used to decide whether a particular case was a civil action eligible to be saved by a remedial statute, namely, analysis of the nature and purpose of the particular statute in question.

For these reasons, we do not find *Carbone*, *Bank Building & Equipment Corp. of America* or *Chieppo* persuasive for purposes of determining whether administrative appeals under § 4-183 are "actions" that are salvageable under § 52-109. We conclude that substitution is available under § 52-109 to cure an administrative appeal commenced in the name of an improper party due to a mistake.[17]

[17] It bears noting that our rules of practice explicitly contemplate that the term "action" for purposes of substitution encompasses administrative appeals brought under § 4-183. Practice Book § 9-20, which is identical to § 52-109 in all material respects, provides: "When any *action* has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff." (Emphasis added.) Practice Book § 14-6, which is entitled "administrative appeals are civil actions," provides: "For purposes of these rules, administrative appeals are civil actions subject to the provisions and exclusions of General Statutes § 4-183

The defendant also claims that substitution was unavailable because there is an insufficient identity of interest between the plaintiffs in their purported capacities as next of friend, putative administrator, and estate examiner, and the plaintiffs in their capacities as fiduciaries of their decedents' estates. The defendant grounds this argument in the assertion that, "whereas the plaintiffs claim to represent the decedents' interest, the estate fiduciaries represent the decedents' creditors' interest, and, though related, the two sets of interests do not coincide." We disagree. The pleadings in the present cases do not reflect that the plaintiffs, as estate fiduciaries, represent the interests of the decedents' creditors rather than the decedents' interests. To the contrary, the plaintiffs filed proposed amended complaints in conjunction with their requests for substitution in which they both alleged that the rights *of their decedents* were prejudiced by the defendant's erroneous denials of their Medicaid applications. Thus, whether suing in the unauthorized capacities of next of friend, putative administrator or estate examiner, or in their proper capacities as estate fiduciaries, the plaintiffs sought the very same thing—to vindicate their decedents' rights to Medicaid benefits. Accordingly, there is no identity of interest impediment to substitution.

Finally, we do not agree with the defendant's reading of *Kortner* as holding that, for substitution to be appropriate, the decedent must have been alive at the time the original action was commenced. The defendant relies on the specific language from *Kortner* in which our Supreme Court cautioned that its decision that substitution was available was "not meant to suggest that

et seq. and the Practice Book. Whenever these rules refer to civil actions, *actions*, civil causes, causes or cases, the reference shall include administrative appeals except that an administrative appeal shall not be deemed an action for purposes of section 10-8 of these rules or for General Statutes §§ 52-48, 52-591, 52-592 or 52-593." (Emphasis added.)

any person who is appointed an administrator of an estate becomes a proper party to any claim. As § 52-109 requires, the substitution of an administrator of an estate 'is necessary for the determination of the real matter in dispute . . . .' *In the present case, it is clear that* [*Kortner*] *herself had a colorable claim of injury, therefore, the substitution of the plaintiff, as administratrix of the estate, cured any possible jurisdictional defect.*" (Emphasis added.) *Kortner* v. *Martise*, supra, 312 Conn. 14. We do not read this portion of *Kortner* as categorically barring substitution under § 52-109 in every situation in which the decedent predeceases the commencement of the original action. Rather, the court merely was observing that the decedent in *Kortner* had standing by virtue of the fact that she suffered a personal, particularized injury. Similarly, the decedents in the present cases suffered personal legal injuries as a result of the defendant's denials of their Medicaid applications. The defendant's reading of *Kortner* would effectively undermine the remedial purpose of § 52-109.

Because the trial court did not issue findings as to the prerequisites for substitution under § 52-109, we conclude, consistent with *Allied Associates* v. *Q-Tran, Inc.*, 165 Conn. App. 239, 245, 138 A.3d 1104 (2016), that the judgment of dismissal must be reversed and the case remanded to the trial court for further findings. Specifically, the court must determine, in each plaintiff's case, whether (1) the plaintiff's failure to name the estate fiduciaries as plaintiffs was the result of a mistake, that is, an error, misunderstanding or misconception, and (2) whether substitution is necessary to determine the real matter in dispute. See General Statutes § 52-109.

The judgments are reversed and the cases are remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

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NOTICES

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of August 17, 2017:

Caroline M. Gilroy	Franchise World Headquarters, LLC

Certified as of August 18, 2017:

Steven M. Bunkin	Castleton Commodities
Danielle A. Gentin Stock	Purdue Pharma, L. P.
Derek J. Heuzey	NBC Universal
Kerith D. Knechtel	Priceline.com
Edward A. Mishan	Silver Point Capital, L.P.
Darren B. Riggle	Synchrony Financial
Monica C. Thurman	XPO Logistics, Inc.

Certified as of August 21, 2017:

Emily Bretas Romano	Kaman Corporation
Lorena Jiminez	Lego Systems, Inc.
Jacqueline J. Rompre	The Travelers Indemnity Co.

Certified as of August 22, 2017:

Jeffrey D. Larson	General Electric

Hon. Patrick L. Carroll III
Chief Court Administrator

Notice of Resignation of Attorney

MMX CV 17 5009454 S. TREVOR SINCLAIR REDVERS Vs. STATEWIDE GRIEVANCE COMMITTEE. SUPERIOR COURT, JUDICIAL DISTRICT OF MIDDLESEX AT MIDDLETOWN, August 17, 2017.

ORDER: THE COURT accepts the resignation of Trevor Sinclair Redvers. Attorney AnnMarie Cienava-Rocco is appointed to serve as Trustee.

BY THE COURT,
Aurigemma, *Judge*
S. Philip, *Temporary Assistant Clerk*

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.