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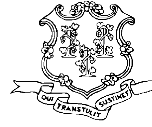

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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KIRBY OF NORWICH *v.* ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT, ET AL.
(SC 19825)
(SC 19826)

KIRBY OF NORWICH *v.* ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT
(SC 19827)

Rogers, C. J., and Palmer, McDonald, Robinson and Keller, Js.

Syllabus

The plaintiff employer, K Co., which was engaged in the business of selling vacuums to consumers via door-to-door sales representatives, filed three

appeals in the trial court from the decisions of the Employment Security Board of Review, which upheld the decisions of the Employment Security Appeals Division that the defendants G and M, and other members of K Co.'s sales force, were properly designated as K Co.'s employees and that K Co. was liable under the Unemployment Compensation Act (§ 31-222 et seq.) for contributions to the state's unemployment compensation fund based on their wages. G and M had engaged in door-to-door sales of K Co.'s vacuums. K Co. claimed that G and M should be classified as independent contractors rather than employees for purposes of the act. The defendant Unemployment Compensation Act Administrator found that there was an employer-employee relationship between K Co. and G and M, as K Co. had failed to establish any of the three requirements of the ABC test, as set forth in § 31-222 (a) (1) (B) (ii) (I), (II) and (III), which governs the determination of whether services performed by an individual constitute employment under the act. On appeal from the appeals division's decisions sustaining the administrator's decisions, the board of review concluded that K Co. had failed to establish that G or M was customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed for K Co., as required by part C of the ABC test. The trial court rendered judgments dismissing K Co.'s appeals from the decisions of the board of review. The trial court agreed with the board of review that the requirements of part C were not satisfied because K Co. presented no evidence that G or M engaged in an independent vacuum sales business. K Co. then appealed from the trial court's judgments, claiming, inter alia, that the trial court interpreted part C of the ABC test, set forth in § 31-222 (a) (1) (B) (ii) (III), too narrowly and incorrectly concluded that G and M were employees rather than independent contractors. *Held* that the trial court properly dismissed K Co.'s appeals because K Co. did not establish the requirements of part C of the ABC test, it having failed to present evidence that its sales representatives were customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed for K Co. during their relationship with K Co.: K Co. presented no evidence, with respect to any of its sales representatives, of the existence of any of the factors that a court may consider under the totality of the circumstances test for evaluating the dynamics of the relationship between a putative employee and employer, which include the facts that a putative employee actually performed work of the same nature for third parties, maintained his own home office and liability insurance, was independently licensed by the state, had business cards, sought similar work from third parties, and advertised his services to third parties; moreover, this court rejected K Co.'s request to reconsider and overrule prior case law holding that part C is satisfied only if the putative employee is actually engaged in an independently established trade, occupation, profession or business of

the same nature as that involved in the service performed for the putative employer, and not if the putative employee is merely free to engage in an independent occupation, because, even though a narrow interpretation of part C of the ABC test imposes significant burdens on businesses such as K Co., to adopt K Co.'s interpretation of part C would result in writing that provision entirely out of § 31-222 (a) (1) (B) (ii) and rendering it meaningless, and any decision to alter or modify part C on the basis of a determination that, under such facts and circumstances, its costs outweigh its benefits must be made by the legislature, not this court.

Argued October 18, 2017—officially released January 31, 2018*

Procedural History

Appeals, in the first and the second cases, from the decisions of the Employment Security Board of Review upholding the decisions of the Employment Security Appeals Division that, in the first case, the defendant Bryant Gardner and, in the second case, the defendant Rick Magee were properly designated as the plaintiff's employees and that the plaintiff was liable for contributions based on their wages, and appeal, in the third case, from the decision of the Employment Security Board of Review upholding the decision of the Employment Security Appeals Division that the plaintiff had engaged certain individuals in employment under the Unemployment Compensation Act and was liable for contributions based on their wages, brought to the Superior Court in the judicial district of New London, where the court, *Hon. Seymour L. Hendel*, judge trial referee, granted the motions for judgment filed by the named defendant in the first and the second cases, and, exercising the powers of the Superior Court, rendered judgments dismissing the appeals, from which plaintiff filed separate appeals; thereafter, the court, *Hon. Robert C. Leuba*, judge trial referee, granted the motion for judgment filed by the defendant in the third case and, exercising the powers of the Superior Court, rendered judgment dismissing the appeal, from which the plain-

* January 31, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

tiff filed a separate appeal; subsequently, the appeals were consolidated. *Affirmed.*

Barbara M. Schellenberg, with whom were *Stuart M. Katz* and *Jeffrey R. Babbin*, for the appellant (plaintiff).

Krista D. O'Brien, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Philip M. Schulz*, assistant attorney general, for the appellee (named defendant in the first and second cases, and defendant in the third case).

Jeffrey J. White and *Thomas J. Dolon* filed a brief for the Direct Selling Association as amicus curiae.

Opinion

PALMER, J. The issue that we must resolve in these appeals is whether certain individuals who have engaged in door-to-door sales of vacuums provided by the plaintiff, Kirby of Norwich, also known as GP Industries of Norwich, Inc., should be classified as independent contractors or, instead, as employees of the plaintiff for purposes of the Unemployment Compensation Act (act), General Statutes § 31-222 et seq. The named defendant, the Unemployment Compensation Act Administrator (administrator), found that there was an employer-employee relationship between the plaintiff and those individuals, thereby obligating the plaintiff to contribute to the state's unemployment compensation fund (fund),[1] because the plaintiff failed to meet its burden of satisfying the requirements of all three prongs of the ABC test, codified at General Statutes

[1] See General Statutes § 31-225 (a) ("Each contributing employer who is subject to [the act] shall pay to the administrator contributions, which shall not be deducted or deductible from wages, at a rate which is established and adjusted in accordance with the provisions of section 31-225a, stated as a percentage of the wages paid by said employer with respect to employment. In no event shall any employer be required to pay contributions on any amount of wages for which said employer has previously paid contributions.").

§ 31-222 (a) (1) (B) (ii) (I), (II) and (III),[2] with parts A, B and C of the test corresponding to clauses (I), (II) and (III), respectively, of that statutory provision. After the administrator's decisions were sustained by the Employment Security Appeals Division (appeals division) and the defendant Employment Security Board of Review (board), the plaintiff appealed to the trial court, which agreed with the administrator in three separate cases that such individuals are the plaintiff's employees on the ground that the plaintiff failed to establish that the individuals are "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed" for the plaintiff, within the meaning of part C of the ABC test. See General Statutes § 31-222 (a) (1) (B) (ii) (III). The plaintiff now appeals from the judgments of the trial court, claiming that the court in each case interpreted § 31-222 (a) (1) (B) (ii) (III) too narrowly and, as a result, incorrectly concluded that the individuals engaged in door-to-door sales of the plaintiff's product were employees of the plaintiff rather than independent contractors. We affirm the judgments of the trial court.

The record reveals the following relevant facts[3] and procedural history. The plaintiff is in the business of

[2] General Statutes § 31-222 (a) (1) (B) (ii) provides in relevant part: "Service performed by an individual shall be deemed to be employment subject to [the act] irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed . . . ."

[3] The facts pertinent to our resolution of these appeals generally are not in dispute. To the extent that any of them may have been disputed in the trial court, however, the following statement of the facts is predicated on findings by the trial court that have not been challenged on appeal.

selling Kirby vacuums to consumers. Its sales force consists of door-to-door sales representatives who sell the vacuums exclusively by performing demonstrations in the homes of potential customers. The plaintiff provides its sales representatives with leads, makes appointments with customers on their behalf, and provides them with nonmandatory training.

In Docket No. SC 19825, the administrator determined that the plaintiff had an employer-employee relationship with one of its sales representatives, the defendant Bryant Gardner, and was therefore liable to make contributions to the fund. The administrator determined that the plaintiff had failed to establish any of the three requirements of the ABC test, which, as we previously explained, are set forth in clauses (I), (II) and (III) of § 31-222 (a) (1) (B) (ii). See footnote 2 of this opinion. The plaintiff appealed from this decision to the appeals division. An appeals referee conducted an evidentiary hearing, at which the plaintiff's president, Vess Zaprianov, testified that Gardner independently sold cell phones while he was engaged as a vacuum sales representative for the plaintiff. The appeals division sustained the decision of the administrator on the ground that the plaintiff had failed to establish the criteria set forth in any of the three prongs of the ABC test.

The plaintiff then appealed from the appeals division's decision to the board. The board concluded that, although the plaintiff had established that Gardner had sold cell phones during the course of his work relationship with the plaintiff, the plaintiff had provided "no evidence that [Gardner] was engaged in the independent sale of vacuum[s] . . . before, during or after his relationship with the [plaintiff]" and, therefore, that it had failed to establish that Gardner was "customarily engaged in an independently established . . . business of the same nature as that of the service performed," as required by part C of the ABC test. (Internal quotation

marks omitted.) The board did not address the first two prongs of the ABC test. The plaintiff appealed from the board's decision to the trial court. The trial court, *Hon. Seymour L. Hendel*, judge trial referee, agreed with the board that the requirements of part C were not satisfied because the plaintiff had presented no evidence to establish that Gardner was engaged in an independent vacuum sales business, and the court rendered judgment dismissing the plaintiff's appeal.

In Docket No. SC 19826, the administrator determined that the plaintiff had an employer-employee relationship with its sales representative, the defendant Rick Magee. The plaintiff appealed from this decision to the appeals division. An appeals referee conducted an evidentiary hearing, at which Zaprianov testified that Magee worked at a church. The appeals division sustained the administrator's decison on the ground that the plaintiff had failed to establish the criteria set forth in any of the three prongs of the ABC test.

The plaintiff then appealed from the decision of the appeals division to the board. The board concluded that the plaintiff had provided "no evidence that [Magee] was engaged in the independent sale of vacuum[s] . . . before, during or after his relationship with the [plaintiff]" and, therefore, that it had failed to establish that Magee was "customarily engaged in an independently established . . . business of the same nature as that of the service performed," as required by part C of the ABC test. (Internal quotation marks omitted.) Again, the board did not address the first two prongs of the ABC test. The plaintiff appealed from the board's decision to the trial court, *Hon. Seymour L. Hendel*, judge trial referee. As in the case involving Gardner, Judge Hendel agreed with the board that the requirements of part C were not satisfied because the plaintiff had presented no evidence to establish that Magee was

engaged in an independent vacuum sales business, and rendered judgment dismissing the plaintiff's appeal.[4]

In Docket No. SC 19827, the administrator conducted an audit of the plaintiff's business and concluded that the plaintiff's entire sales force should be classified as employees for purposes of the act. The plaintiff appealed from this determination to the appeals division. An appeals referee conducted an evidentiary hearing, at which the plaintiff presented evidence that many of the plaintiff's sales representatives sold vacuums for only a very short time period. Specifically, according to the plaintiff, the evidence showed that, out of a total of 378 sales representatives who worked for the plaintiff between 2012 and 2014, 194 worked for only one week and 104 worked for between two weeks and one month. The appeals referee sustained the administrator's determination on the ground that the plaintiff had failed to establish the criteria set forth in any of the three prongs of the ABC test.

The plaintiff then appealed from the decision of the appeals division to the board. The board concluded that the plaintiff had "failed to present any evidence, such as business cards, advertisements or web sites, to show that any of the individuals in question were 'customarily engaged' in a business of the same nature as the [plaintiff]," as required by part C of the ABC test. Again, the board did not address the first two prongs of the test. The plaintiff appealed to the trial court. The court, *Hon. Robert C. Leuba*, judge trial referee, concluded that "the record is replete with evidence to support the conclusion of the board that an employer-employee relationship existed" and dismissed the plaintiff's appeal.

Thereafter, the plaintiff filed a motion for articulation of the factual and legal bases for Judge Leuba's decision.

[4] Because the facts of Magee's case were so similar to those of Gardner's case, Judge Hendel consolidated the two appeals and issued a single memorandum of decision addressing both appeals.

In response, Judge Leuba issued an articulation in which he explained that, to meet the requirements of part C of the ABC test, the plaintiff bore "the burden of maintaining that its sales persons were customarily engaged as independently established sellers of vacuum[s] . . . ." Because it had failed to do so, Judge Leuba concluded that the board properly determined that the sales representatives were employees.

The plaintiff then filed the present appeals,[5] which were subsequently consolidated for purposes of argument and briefing.[6] The plaintiff claims that, in each case, the trial court[7] incorrectly upheld the board's unduly narrow interpretation of part C of the ABC test. Specifically, the plaintiff contends that part C was satisfied because the plaintiff's sales representatives have an occupation or calling of the same nature as that involved in the service performed for the plaintiff that they can pursue after terminating their services to the plaintiff, and the plaintiff was not required to establish that the sales representatives actually independently engaged in that occupation or calling while providing services to the plaintiff. We conclude that, because the plaintiff presented no evidence that its sales representatives were "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed" for the plaintiff during their relationship with the plaintiff; General Statutes § 31-222 (a) (1) (B) (ii)

[5] The plaintiff appealed from the judgments of the trial courts to the Appellate Court, and we transferred the appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1 or 65-2.

[6] After these appeals were filed, this court granted permission to the Direct Selling Association to file an amicus curiae brief in support of the plaintiff's position.

[7] Because all three appeals involve the same issue, and because Judges Hendel and Leuba engaged in the same analysis and reasoning in reaching their respective decisions, we hereinafter refer collectively to Judges Hendel and Leuba as the trial court.

(III); the trial court correctly concluded that the plaintiff had not established the requirements of part C and properly dismissed the plaintiff's appeals.

We begin our analysis with the standard of review. The proper interpretation of § 31-222 (a) (1) (B) (ii) (III) presents a question of law. See, e.g., *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, 265 Conn. 413, 418, 828 A.2d 609 (2003). Although "[o]ur review of an agency's decision on questions of law is limited by the traditional deference that we have accorded to that agency's interpretation of the acts [that] it is charged with enforcing"; (internal quotation marks omitted) *Church Homes, Inc.* v. *Administrator, Unemployment Compensation Act*, 250 Conn. 297, 303, 735 A.2d 805 (1999); "[i]t is well settled . . . that we do not defer to the board's construction of a statute . . . when . . . the [provision] at issue previously ha[s] not been subjected to judicial scrutiny or when the board's interpretation has not been time tested." (Internal quotation marks omitted.) *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 418. Because the administrator[8] has neither expressly claimed nor demonstrated that the board's interpretation of § 31-222 (a) (1) (B) (ii) (III), as applied to the facts of these cases, is time tested or that its interpretation previously has been subject to judicial scrutiny, our review is plenary. See, e.g., *Southwest Appraisal Group, LLC* v. *Administrator, Unemployment Compensation Act*, 324 Conn. 822, 838 n.10, 155 A.3d 738 (2017) (rejecting claim of administrator that board's interpretation of part C of ABC test was time tested in light of "fact sensitivity" of board's decisions).

For purposes of the act, "employment" is defined by § 31-222 (a) (1) (B) (ii), which provides in relevant part

[8] The administrator is the sole defendant participating in these appeals.

that "[s]ervice performed by an individual shall be deemed to be employment subject to [the act] irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed . . . ." Because this statutory provision is in the conjunctive, "unless the party claiming the exception to the rule that service is employment shows that all three prongs of the test have been met, an employment relationship will be found." *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 265 Conn. 419.

It is well established that, "[w]hen interpreting provisions of the act, we take as our starting point the fact that the act is remedial and, consequently, should be liberally construed in favor of its beneficiaries. . . . Indeed, the legislature underscored its intent by expressly mandating that the act shall be construed, interpreted and administered in such [a] manner as to presume coverage, eligibility and nondisqualification in doubtful cases. General Statutes § 31-274 (c). . . . We also note that exemptions to statutes are to be strictly construed." (Citation omitted; internal quotation marks omitted.) *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, 320 Conn. 611, 616, 134 A.3d 581 (2016).

This is not the first time that we have had occasion to consider the scope of part C of the ABC test. In *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 265 Conn. 413, the plaintiff, JSF Promotions, Inc. (JSF), "operate[d] a business providing individuals to demonstrate products of various manufacturers to consumers, primarily in supermarkets." (Internal quotation marks omitted.) Id., 415. Following an audit by the administrator, it was determined that the demonstrators were employees for purposes of the act. See id. JSF appealed from this determination to the appeals division, which agreed with the administrator's determination. See id. JSF then appealed to the board, which upheld the decision of the appeals division. See id., 415–17. JSF appealed from board's decision to the trial court, which reversed the board's decision. Id., 417. The trial court concluded that, because the demonstrators were "free to work for a competitor of [JSF], or even [to] compete directly, during the same period [that they were] doing similar work . . . [for JSF]"; (internal quotation marks omitted) id., 419; the requirements of part C of the ABC test were met. Id., 420.

The administrator then appealed. Id., 417. We observed that part C required the plaintiff to prove that the individuals in question were "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed . . . ." (Internal quotation marks omitted.) Id., 418. We then concluded that this requirement was not satisfied when the individuals were "*free* to engage in an independently established trade, occupation, profession or business, but . . . [had] not done so customarily . . . ." (Emphasis in original.) Id., 420. We also quoted with approval the holding of the court in *McGuire* v. *Dept. of Employment Security*, 768 P.2d 985, 988 (Utah App.), cert. denied,

109 Utah Adv. 39 (1989), that "the appropriate inquiry under part [C] is whether the person engaged in covered employment actually has such an independent business, occupation, or profession, not whether he or she could have one." (Internal quotation marks omitted.) *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 265 Conn. 421–22. We reasoned that "[t]o conclude otherwise would undermine the purpose of the [act], which is to protect those who are at risk of unemployment if their relationship with a particular employer is terminated." Id., 420.

In *Southwest Appraisal Group, LLC* v. *Administrator, Unemployment Compensation Act*, supra, 324 Conn. 822, however, we clarified that, under our decision in *JSF Promotions, Inc.*, a putative employer is not *always* required to present "evidence of the performance of services for third parties . . . to prove part C of the ABC test . . . ." Id., 825. Rather, such evidence "is a single factor that may be considered under the totality of the circumstances analysis governing that inquiry." Id.; see also id., 831–82 (under *JSF Promotions, Inc.*, "a putative employee's work for other entities is a relevant, but not dispositive, factor in the totality of the circumstances analysis that governs the relevant inquiry under part C").[9] "This totality of the

[9] We explained in *Southwest Appraisal Group, LLC*, however, that "[o]ur conclusion in *JSF Promotions, Inc.*, was wholly consistent with the factual records considered in this court's previous part C jurisprudence. See *F.A.S. International, Inc.* v. *Reilly*, [179 Conn. 507, 514–15 and n.6, 427 A.2d 392 (1980)] (holding that art school satisfied part C with proof that artists, writers, and photographers who reviewed work of its students practiced their artistic professions elsewhere independently of school, in contrast to delivery person in *Rozran* v. *Durkin*, 381 Ill. 97, 105, 45 N.E.2d 180 [1942], with essentially full-time schedule, with no discussion of financial viability of artists' careers beyond their adjunct work for school or other indicia of independent businesses); *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, [42 Conn. Supp. 376, 410–11, 622 A.2d 622 (1992), aff'd, 225 Conn. 99, 622 A.2d 518 (1993)] (holding [that] part C [was] satisfied with respect to licensed nurses who received assignments from referral service, and relying on their performance of assignments for other medical facilities while working for plaintiff, to reject argument that nurses needed 'a saleable

circumstances test . . . evaluates the dynamics of the relationship between the putative employee and the employer; there is no dispositive single factor or set of factors." (Internal quotation marks omitted.) Id., 839. In addition to the fact that a putative employee actually performed work of the same nature for third parties, factors that may be relevant when determining whether part C is satisfied include, but are not limited to, the fact that the putative employee maintained a home office, that he was independently licensed by the state, that he had business cards, that he sought similar work from third parties, that he maintained his own liability insurance, and that he advertised his services to third parties. See id., 827, 839–40.

In the present case, the plaintiff presented *no* evidence that *any* of these factors existed with respect to any of its sales representatives.[10] We must conclude, therefore, that the trial court properly determined that the plaintiff had not established part C of the ABC test.

In support of its claim to the contrary, the plaintiff cites to this court's decision in *Electrolux Corp.* v. *Danaher*, 128 Conn. 342, 23 A.2d 135 (1941), in which

business before they could be considered customarily engaged in an independently established profession' . . .)." *Southwest Appraisal Group, LLC*, v. *Administrator, Unemployment Compensation Act*, supra, 324 Conn. 837 n.8.

[10] We recognize that there was evidence that Gardner had "sold cell phones" during his relationship with the plaintiff. There is no evidence, however, as to the manner in which Gardner sold cell phones, that is, whether he was a retail sales clerk, a telemarketer or a door-to-door salesman, or whether he sold the phones by some other method. In the absence of any such evidence, or other indicia that he had an independent occupation, we cannot conclude that Gardner was engaged independently in a business of the same nature as the service that he performed for the plaintiff. Because there is no evidence that any of the plaintiff's sales representatives engaged independently in door-to-door sales of any type of product, or that they engaged in a similar type of activity, we need not decide in the present case whether part C of the ABC test required the plaintiff to demonstrate that the sales representatives engaged independently in door-to-door sales of *vacuums*, and not some other product, as the trial court concluded.

we concluded that the trial court properly had determined that the sales representatives of the plaintiff in that case, Electrolux Corporation (Electrolux), which sold vacuums door-to-door, were not Electrolux' employees for purposes of the then existing Unemployment Compensation Act, General Statutes (Supp. 1939) § 1334e (a) (1); see id., 347, 349–51; but were "engaged in an independent calling . . . ." Id., 349. The plaintiff in the present case contends that, because it has the same relationship with its sales representatives that Electrolux had with its sales representatives, that case controls the outcome in the present case. The plaintiff fails to recognize, however, that, in *Electrolux Corp.*, the sole issue presented was whether, under the common law, the relationship between Electrolux and its sales representatives was that of master and servant; see id., 347; which turned on whether Electrolux had "the right of general control over the means and methods . . . of the sales representatives . . . ." Id., 349, citing *Robert C. Buell & Co.* v. *Danaher*, 127 Conn. 606, 610, 18 A.2d 697 (1941) ("[t]he fundamental distinction between an employee and an independent contractor depends [on] the existence or nonexistence of the right to control the means and methods of work" [internal quotation marks omitted]); *Beaverdale Memorial Park, Inc.* v. *Danaher*, 127 Conn. 175, 179, 15 A.2d 17 (1940) (same); *Jack & Jill, Inc.* v. *Tone*, 126 Conn. 114, 119, 9 A.2d 497 (1939) ("[t]he controlling consideration in the determination [of] whether . . . the relationship of master and servant exists, or that of [an] independent contractor, is . . . [whether] the employer [has] the general authority to direct what shall be done and when and how it shall be done—the right of general control of the work" [internal quotation marks omitted]); *Northwestern Mutual Life Ins. Co.* v. *Tone*, 125 Conn. 183, 191, 4 A.2d 640 (1939) ("[i]n many instances the decisive factor in determining whether one who per-

forms services for another is a servant or is exercising an independent employment is the right of control [that] the former has over the other, the right to direct what shall be done and when and how it shall be done . . . the right to the general control" [internal quotation marks omitted]). The legislature amended the act in 1971, however, to include the ABC test. See, e.g., *F.A.S. International, Inc.* v. *Reilly*, 179 Conn. 507, 511, 427 A.2d 392 (1980) ("[i]n addition to codifying the common-law rules applicable to determine the existence of an employer-employee relationship, the act was amended in 1971 to include the so-called ABC test" [internal quotation marks omitted]). Thus, "under [current] Connecticut law, service may be employment and [an individual] may be an employee even if the common-law relationship of master and servant does not exist," if the putative employer fails to establish all three prongs of the ABC test. Id. In other words, under current law, even if a putative employer establishes under the common-law test for employment, which is now contained in part A of the ABC test, that the putative employee is not under its control and direction, if the putative employer fails to establish part C, it will still be liable under the act. Although *Electrolux Corp.* continues to be good law, the case provides guidance only with respect to part A of the ABC test, and is not controlling when part C of the test is at issue.

The plaintiff also contends that *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, 42 Conn. Supp. 376, 622 A.2d 622 (1992), aff'd, 225 Conn. 99, 622 A.2d 518 (1993), and *F.A.S. International, Inc.* v. *Reilly*, supra, 179 Conn. 507, support its position. These cases, however, are readily distinguishable. In *Daw's Critical Care Registry, Inc.*, the trial court found, in a decision that this court later adopted; *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 225 Conn. 102; that part C was satisfied because a large majority of the putative

employees—nurses who performed services that were arranged by the plaintiff—"worked for other agencies at other medical facilities performing similar services while also working on assignments [for the plaintiff]." *Daw's Critical Care Registry, Inc.* v. *Dept. of Labor*, supra, 42 Conn. Supp. 408. In *F.A.S. International, Inc.*, we concluded that part C was satisfied because the evidence showed that the putative employees—artists, writers and photographers who analyzed and corrected the work of the correspondence students of the plaintiff, F.A.S. International, Inc.—"did [freelance] work . . . for others as well as for F.A.S. [International, Inc.] when work was available." *F.A.S. International, Inc.* v. *Reilly*, supra, 510. Thus, unlike in the present case, in both of the foregoing cases, there was evidence to support the conclusion that the putative employees "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed," as required by part C of the ABC test.[11] General Statutes § 31-222 (a) (1) (B) (ii) (III).

The plaintiff further contends that we should reconsider and overrule our holding in *JSF Promotions, Inc.* that part C is satisfied only if the putative employee is *actually* "engaged in an independently established

[11] The plaintiff contends that the fact that the putative employees in *F.A.S. International, Inc.*, were providing teaching services for the putative employer while they were engaging in freelance work as artists, writers and photographers for third parties, indicates that putative employees do not have to be performing the same type of work for third parties that they are performing for the putative employer to satisfy part C. Rather, the plaintiff contends, the fact that putative employees have an independent calling that they can pursue after terminating their relationship with the putative employer is sufficient to satisfy the requirements of part C. The trial court in *F.A.S. International, Inc.*, expressly found, however, that the putative employees in that case were not acting as teachers when they evaluated the work of the plaintiff's correspondence students; *F.A.S. International, Inc.* v. *Reilly*, supra, 179 Conn. 514; but were "practicing elements of their chosen professions as artists, writers and photographers." Id., 515.

trade, occupation, profession or business of the same nature as that involved in the service performed"; (internal quotation marks omitted) *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 265 Conn. 420; and not if the putative employee is merely free to engage in an independent occupation, because the interpretation is unworkable and leads to absurd results. Specifically, the plaintiff contends that, under this interpretation, a business owner must monitor its sales representatives constantly to determine if they are engaged in independently established occupations, it is illogical to treat employees who are performing identical work differently depending on whether they are engaged in independently established occupations, and it is illogical to treat an individual worker as an independent contractor if the worker is engaged in an independently established occupation when hired but then to treat him as an employee if he later decides to work exclusively for the putative employer. The plaintiff also contends that this interpretation has a negative effect on the freedom of workers to decide how they wish to earn a living because businesses will be discouraged from hiring workers who have a job in another field and who wish to work only part-time or for a short period to supplement their income.

In support of this contention, the plaintiff relies on our decision in *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 320 Conn. 611, in which we cautioned against interpreting the act too liberally in favor of coverage merely because it is remedial legislation. See id., 657–58. We stated in that case that "[n]o legislation pursues its purposes at all costs." (Internal quotation marks omitted.) Id., 657. Rather, remedial statutes "achieve a particular amount of [their] objective, at a particular cost [to] other interests. An agency cannot treat a stat-

ute as authorizing an indefinite march in a single direction. . . . Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." (Internal quotation marks omitted.) Id., 657–58.

The plaintiff also relies on the decisions of several of our sister states that support the proposition that part C is satisfied if the putative employee is *free* to engage in an independently established occupation, even if the putative employee does not actually do so. See *Commissioner of Unemployment Assistance* v. *Town Taxi of Cape Cod, Inc.*, 68 Mass. App. 426, 432, 862 N.E.2d 430 (2007) (finding that taxi drivers were independent contractors because they were free to operate their own taxi services, to drive for another service, to find customers on their own, and to engage in other employment or to generate their own business while using taxis leased from putative employer); see also *Athol Daily News* v. *Board of Review of the Division of Employment & Training*, 439 Mass. 171, 181, 786 N.E.2d 365 (2003) ("[t]he better approach to the evaluation required by part [C] is to consider whether the service in question could be viewed as an independent trade or business because the worker is capable of performing the service [for] anyone wishing to avail [himself or herself] of the services or, conversely, whether the nature of the business compels the worker to depend on a single employer for the continuation of the services"); *Trauma Nurses, Inc.* v. *Board of Review*, 242 N.J. Super. 135, 148, 576 A.2d 285 (App. Div. 1990) (finding that nurses are independent contractors for employment broker because they were "able to obtain positions either as full-time employees, part-time employees, independent contractors, shift workers,

etc."); *Beare Co.* v. *State*, 814 S.W.2d 715, 720 (Tenn. 1991) (finding that putative employees were independent contractors because they were free to work at other businesses without interference from putative employer).[12]

Although we recognize the appeal of the plaintiff's arguments, we are not persuaded that we should overrule *JSF Promotions, Inc.* We acknowledge that a narrow interpretation of part C of the ABC test imposes significant burdens on businesses, like the plaintiff, which rely primarily or significantly on short-term or part-time workers who operate outside of the businesses' direction and control, and outside their places of business. To adopt the plaintiff's interpretation of part C, however, would require us to write the provision entirely out of § 31-222 (a) (1) (B) (ii).[13] Any worker who provides services to a business necessarily has a "trade, occupation, profession or business" that the worker would be free to engage in at some point for another similar entity after his relationship with the business has terminated. If evidence that the worker is actually performing those services for another entity during its relationship with the putative employer were not required, part C would be rendered meaningless.

[12] In addition, the amicus curiae, Direct Selling Association, cites to *Sarah Coventry, Inc.* v. *Caldwell*, 243 Ga. 429, 434, 254 S.E.2d 375 (1979) (evidence that putative employee was free to sell products of companies other than those of putative employer and that he had intermittent and casual relationship with putative employer were sufficient to satisfy part C of Georgia's analogue to ABC test).

[13] In contrast, our holding in *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 320 Conn. 655–56, that "undesirable, practical consequences" would follow from a broad interpretation of the phrase " 'places of business' " to include the homes of the putative employer's residential customers for purposes of part B of the ABC test did not effectively eliminate that provision from § 31-222 (a) (1) (B) (ii). Thus, that case does not support the proposition that a court may entirely ignore the language of a statutory provision if, in the court's view, the provision has undesirable policy consequences.

We will not interpret the ABC test in such a manner.[14] Although we are sympathetic to the plaintiff's claim that part C creates certain, undesirable practical consequences as applied to the specific facts and circumstances of this case, any decision to alter or modify part C on the basis of a determination that, under such facts and circumstances, its costs outweigh its benefits must be made by the legislature, not this court.[15]

[14] As the administrator notes, our reasoning and interpretation of part C of the ABC test finds support in the decisions of several of our sister states. See, e.g., *Hart* v. *Johnson*, 68 Ill. App. 3d 968, 976, 386 N.E.2d 623 (1979) (putative employer failed to establish that door-to-door vacuum salespersons satisfied third requirement of Illinois' analogue to ABC test because "the [Illinois Unemployment Insurance Act] contemplates that one who is engaged in an independent enterprise is an individual who has a proprietary interest in such business to the extent that he can operate [the] same without hindrance from any individual," and, "[a]lthough [the putative employer] urge[d] that the individuals were free to carry other lines [of vacuums] . . . there [was] no evidence that any of the individuals did so." [internal quotation marks omitted]); *Boston Bicycle Couriers, Inc.* v. *Deputy Director of the Division of Employment & Training*, 56 Mass. App. 473, 481, 778 N.E.2d 964 (2002) (finding that worker was employee when putative employer failed to prove that worker "performed other courier delivery services on his own behalf that were completely apart from those performed for [the putative employer], and that this other separate courier delivery work exhibited economic independence such that [the worker's] business would continue as an ongoing enterprise, notwithstanding the end of work for [the putative employer]"); *Herron Enterprises, Inc.* v. *Labor & Industrial Relations Commission*, 765 S.W.2d 614, 617 (Mo. App. 1988) (door-to-door vacuum salespersons did not satisfy last part of Missouri's analogue to ABC test because "[their] opportunity to sell [the vacuums] was totally dependent on their relationship with [the putative employer]"); *Carpet Remnant Warehouse, Inc.* v. *New Jersey Dept. of Labor*, 125 N.J. 567, 592–93, 593 A.2d 1177 (1991) (evidence that "carpet installers generally provide[d] services for several retailers and [were] not financially dependent on one retailer . . . [was] not sufficient to satisfy the C criterion" of New Jersey's analogue to ABC test, and putative employer was required to present evidence of "installers' ability to maintain an independent business or trade, including the duration and strength of the installers' businesses, the number of customers and their respective volume of business, the number of employees, and the extent of the installer's tools, equipment, vehicles, and similar resources").

[15] We acknowledge, as the amicus curiae, Direct Selling Association, observes, that a number of states have enacted statutes exempting direct sellers from the requirements of their unemployment compensation laws. See Ala. Code § 25-4-10 (b) (23) (2007); Alaska Stat. § 23.20.526 (a) (21) (2012); Ariz. Rev. Stat. Ann. § 23-617 (22) (Supp. 2016) (exempts direct sales

We conclude that the trial court correctly determined that the plaintiff had failed to establish part C of the ABC test because it presented no evidence that its sales representatives are "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed . . . ." General Statutes § 31-222 (a) (1) (B) (ii) (III). Accordingly, we agree with the administrator

in homes when compensation includes commissions); Cal. Unemp. Ins. Code § 650 (Deering 2009); Colo. Rev. Stat. § 8-70-136 (2017); Del. Code Ann. tit. 19, § 3302 (11) (N) (2005); Fla. Stat. Ann. § 443.1216 (13) (u) (West Supp. 2017); Ga. Code Ann. § 34-8-35 (n) (18) (2017); Haw. Rev. Stat. § 383-7 (21) (2015); 820 Ill. Comp. Stat. Ann. 405/217 (b) (West 2011); Iowa Code Ann. § 96.19 (18) (g) (9) (b) (West Supp. 2017); Kan. Stat. Ann. § 44-703 (i) (4) (V) (Supp. 2016); La. Stat. Ann. § 23:1472 (12) (H) (XVIII) (Supp. 2017); Me. Rev. Stat. Ann. tit. 26, § 1043 (11) (F) (28) (West Supp. 2016); Md. Code Ann., Lab. & Empl. § 8-206 (b) (2016); Mich. Comp. Laws Serv. § 421.43 (r) and (s) (LexisNexis Cum. Supp. 2017); Minn. Stat. § 268.035 20(29) (2016); Miss. Code Ann. § 71-5-11 (I) (15) (p) (Cum. Supp. 2017); Mo. Ann. Stat. § 288.034 12(17) (West 2014); Mont. Code Ann. § 39-51-204 (1) (h) (2015); Neb. Rev. Stat. § 48-604 (6) (t) (Cum. Supp. 2016); Nev. Rev. Stat. § 612.144 (2015); N.H. Rev. Stat. Ann. § 282-A:9 (IV) (s) (Cum. Supp. 2016); N.J. Stat. Ann. § 43:21-19 (i) (7) (O) (West 2015) (exempts "home-to-home salespersons" or "in-the-home demonstrators" who are paid by commissions or commissions and bonuses); Okla. Stat. Ann. tit. 40, § 1-210 (15) (k) (West 2014) (applicable only to delivery and distribution of newspapers and shopping news); S.C. Code Ann. § 41-27-260 (18) (Supp. 2017); Tenn. Code Ann. § 50-7-207 (c) (12) (2014); Tex. Lab. Code Ann. § 201.070 (2) (West 2015); Vt. Stat. Ann. tit. 21, § 1301 (6) (C) (xxi) (2016); Va. Code Ann. § 60.2-219 (20) (Supp. 2017). In addition, three other states exempt certain individuals who are compensated primarily on the basis of commissions from their unemployment compensation laws. See Ohio Rev. Code Ann. § 4141.01 (B) (3) (g) (West Supp. 2017); Utah Code Ann. § 35A-4-205 (1) (p) (LexisNexis 2011); Wn. Rev. Code Ann. § 50.04.235 (West 2012). The amicus curiae contends that, in states without such statutes, direct sellers have been recognized as independent contractors under the common law "for decades." The only case addressing that question in Connecticut, however, is *Electrolux Corp.* v. *Danaher*, supra, 128 Conn. 342, which, as we have explained, was decided before the legislature amended the act to include the ABC test. Other jurisdictions are split on the issue of whether a putative employee must actually be engaged in an independently established occupation to satisfy part C of the ABC test. It may well be that exempting direct sellers from the act, regardless of whether they are actually engaged in an independently established occupation, is the better public policy. As we have indicated, however, that policy judgment is one to be made by the legislature, not us.

that the trial court properly dismissed the plaintiff's appeals.

The judgments are affirmed.

In this opinion the other justices concurred.

ORDERS

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BRENNA M. SPENCER *v.* ROBERT B. SPENCER

The plaintiff's petition for certification to appeal from the Appellate Court, 177 Conn. App. 504 (AC 38050), is granted, limited to the following issues:

"1. Did the trial court properly rectify and articulate its original judgment, more than twelve months after its issuance, within the scope of the Appellate Court's grant of the defendant's motion for rectification and articulation?

"2. If the answer to the first question is no, did the Appellate Court properly affirm the judgment of the trial court terminating the plaintiff's alimony only on the basis of factual findings or conclusions of law that were part of the original judgment of the trial court?

"3. Did the Appellate Court properly affirm the trial court's finding of cohabitation on the basis of a definition of 'cohabitation' that does not require a romantic or sexual relationship between the alimony recipient and the individual with whom they reside?"

MULLINS, J., did not participate in the consideration of or decision on this petition.

Norman A. Roberts II and *Tara C. Dugo*, in support of the petition.

Decided January 31, 2018

TOWN OF GRISWOLD *v.* PASQUALE CAMPUTARO ET AL.

The joint petition by the plaintiff and the defendants Pasquale Camputaro, Jr., executor of the estate of Pasquale Camputaro, and American Industries, Inc., for certification to appeal from the Appellate Court, 177 Conn. App. 779 (AC 38889), is granted, limited to the following issues:

"1. Did the Appellate Court properly conclude that it had subject matter jurisdiction to consider the intervenors' appeal?

"2. Did the Appellate Court properly conclude that a hearing pursuant to General Statutes § 8-8 (n) was required to be held by the trial court before it rendered the modified judgment?

"3. Did the Appellate Court properly conclude that the trial court violated the rules of practice by rendering the modified judgment on November 16, 2015?"

MULLINS, J., did not participate in the consideration of or decision on this petition.

Mark K. Branse and *Harry B. Heller*, in support of the petition.

Decided January 31, 2018

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* ROBIN BLOWERS ET AL.

The petition by the defendant Mitchell Piper for certification to appeal from the Appellate Court, 177 Conn. App. 622 (AC 39219), is granted, limited to the following issues:

"1. Did the Appellate Court properly hold that (a) special defenses to a foreclosure action must 'directly

attack' the making, validity, or enforcement of the note or mortgage, and (b) counterclaims in a foreclosure action must also satisfy the 'making, validity, or enforcement' requirement? See Practice Book § 10-10.

"2. If the Appellate Court properly addressed the issues in the first question, did it properly hold that alleged postorigination misconduct concerns a plaintiff's 'enforcement' of a note or mortgage only if the plaintiff breaches a loan modification or other similar agreement that affects the enforceability of the note or mortgage?

"3. If the Appellate Court properly addressed the issues in the first and second questions, did it properly hold that the defendants' allegations of the plaintiff's misconduct and breach relating to a 'received' 'immediate modification' did not amount to an allegation that the plaintiff had agreed to a 'final, binding loan modification' that affected the plaintiff's ability to enforce the note or mortgage?"

Jeffrey Gentes, *J.L. Pottenger*, *Jr.*, and *Anderson Tuggle*, *Eli Jacobs*, *Michael Linden* and *Victoria Stilwell*, certified legal interns, in support of the petition.

Pierre-Yves Kolakowski, in opposition.

Decided January 31, 2018

STATE OF CONNECTICUT *v.* ANTHONY JOHNSON

The defendant's petition for certification to appeal from the Appellate Court, 178 Conn. App. 490 (AC 37859), is denied.

KAHN, J., did not participate in the consideration of or decision on this petition.

Emily Wagner, assistant public defender, in support of the petition.

Jennifer F. Miller, assistant state's attorney, in opposition.

Decided January 31, 2018

STATE OF CONNECTICUT *v.* JACQUI SMITH

The defendant's petition for certification to appeal from the Appellate Court, 178 Conn. App. 715 (AC 38832), is denied.

Laila M. G. Haswell, senior assistant public defender, in support of the petition.

Robert J. Scheinblum, senior assistant state's attorney, in opposition.

Decided January 31, 2018

ARMAND CUOZZO *v.* TOWN OF ORANGE

The plaintiff's petition for certification to appeal from the Appellate Court, 178 Conn. App. 647 (AC 39097), is denied.

Karen E. Souza, in support of the petition.

Logan A. Carducci, in opposition.

Decided January 31, 2018

MALKIE WIEDERMAN *v.* ISSAC HALPERT ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 178 Conn. App. 783 (AC 39274), is granted, limited to the following issue:

"Did the Appellate Court properly uphold the determination of the trial court that the plaintiff had standing to sue?"

Kerry M. Wisser, in support of the petition.

Taryn D. Martin and *Robert A. Ziegler*, in opposition.

Decided January 31, 2018

STATE OF CONNECTICUT *v.* STEVEN K. STANLEY

The defendant's petition for certification to appeal from the Appellate Court, 178 Conn. App. 903 (AC 39316), is denied.

Peter G. Billings, in support of the petition.

Nancy L. Walker, assistant state's attorney, in opposition.

Decided January 31, 2018

HECTOR COLON *v.* COMMISSIONER OF CORRECTION

The petitioner Hector Colon's petition for certification to appeal from the Appellate Court, 179 Conn. App. 30 (AC 38688), is denied.

KAHN, J., did not participate in the consideration of or decision on this petition.

Peter G. Billings, assigned counsel, in support of the petition.

Nancy L. Chupak, senior assistant state's attorney, in opposition.

Decided January 31, 2018

RONALD F. BOZELKO *v.* STATEWIDE CONSTRUCTION, INC., ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court (AC 40459) is dismissed.

KAHN, J., did not participate in the consideration of or decision on this petition.

Ronald F. Bozelko, self-represented, in support of the petition.

Decided January 31, 2018

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

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STATE OF CONNECTICUT *v.* DENNIS SALMOND (AC 40237)

Alvord, Elgo and Sullivan, Js.

Syllabus

Convicted of the crimes of murder and criminal possession of a pistol or revolver in connection with the shooting death of the victim, the defendant appealed. The defendant's conviction stemmed from an incident in which he allegedly approached the victim's parked vehicle and fatally shot him. The victim's friend, J, was in the vehicle at the time, and he was a witness to the shooting. J identified the defendant as the shooter from photographic arrays that were shown to him by the police, and later identified the defendant as the shooter before the jury during trial. On appeal, the defendant claimed that the trial court violated his constitutional right to due process by denying his motion to suppress J's in-court identification of him, and abused its discretion by denying his request for a special credibility instruction with respect to J's testimony. *Held*:

1. The trial court did not abuse its discretion by allowing J to make an in-court identification of the defendant: the court's determination that, although the out-of-court identification procedure was unnecessarily suggestive, the state had proven the reliability of J's in-court identification by clear and convincing evidence was supported by the record, which demonstrated that J was personally familiar with the defendant, that J had the opportunity to view the defendant in broad daylight on the morning of the murder from the front passenger seat of the motor vehicle and again as J fled from the scene and saw the defendant unmasked, that J's description of the shooter's appearance, which was given prior to his identification of the defendant from a photographic array, was generally consistent with the defendant's appearance as captured by surveillance video, as described by a 911 caller, and as testified to by J at trial, and that the eight day time period between the crime and J's interview in which he identified the defendant was not so long as to render his identification unreliable; furthermore, any alleged evidentiary error as to the in-court identification was harmless and had very little, if any, likelihood of affecting the jury's verdict, as the state had a strong case against the defendant even without J's in-court identification.
2. The defendant's unpreserved claim that the trial court should have granted his request to charge and charged the jury that the out-of-court identification procedure was not substantive evidence of guilt due to its suggestiveness was not reviewable, the defendant having failed to raise before the trial court the particular objection that he asserted on appeal; the record demonstrated that the defendant's request to charge did not

specifically state that the out-of-court identification procedure was not substantive evidence of guilt due to its suggestiveness, and although defense counsel objected to the court's proposed jury charge regarding the identification of the defendant, he merely referred the court to the language in the defendant's request to charge, which did not address whether the jury should be permitted to use the out-of-court identification as substantive evidence of the defendant's guilt.

3. The trial court did not abuse its discretion in denying the defendant's request for a special credibility instruction regarding J's testimony: there was no basis in the record for the jury to reasonably conclude that J was involved in the murder of the victim so as to warrant an accomplice instruction, as the jury could have reasonably found that J and the victim were close friends and had known each other for eight or nine years, and that J pleaded with the defendant to stop shooting at the victim; moreover, the defendant's claim that the trial court was required to give a special credibility instruction with respect to J's testimony because he was akin to a jailhouse informant was unavailing, as a special credibility instruction is required in situations where a prison inmate has been promised a benefit by the state in return for his testimony regarding incriminating statements made by a fellow inmate, and the trial court was not required to give a special credibility instruction under the circumstances here, where J, an incarcerated witness, had testified concerning events surrounding the crime that he had witnessed outside of prison, the court's general credibility instruction having been sufficient under those circumstances.

Argued October 11, 2017—officially released February 13, 2018

Procedural History

Substitute information charging the defendant with the crimes of murder and criminal possession of a pistol or revolver, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, where the charge of murder was tried to the jury before *Blawie, J.*; thereafter, the court, *Blawie, J.*, denied in part the defendant's motion to suppress; verdict of guilty; subsequently, the charge of criminal possession of a pistol or revolver was tried to the court, *Blawie, J.*; judgment of guilty, and the defendant appealed; thereafter, the court, *Blawie, J.*, issued an articulation of its denial of the defendant's motion to suppress. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Pamela J. Esposito*, senior assistant state's attorney, for the appellee (state).

Opinion

SULLIVAN, J. The defendant, Dennis Salmond, appeals from the judgment of conviction of murder in violation of General Statutes § 53a-54a (a) and criminal possession of a pistol or revolver in violation of General Statutes (Rev. to 2013) § 53a-217c (a) (1). On appeal, the defendant claims that the trial court (1) violated his constitutional right to due process by denying his motion to suppress an eyewitness' in-court identification of him, and (2) abused its discretion by denying his request for a special credibility instruction with respect to the testimony of that eyewitness. We disagree and, accordingly, affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. This case is the end result of a dispute over "drug turf" in the east end of Bridgeport. The victim, Kiaunte "Stretch" Ware, lived on Sixth Street in Bridgeport and sold drugs in that neighborhood. The defendant[1] had recently returned to live in the east end and started selling drugs on Sixth Street. The defendant was not a Sixth Street regular, but he "[w]as . . . out there enough" to be noticed by the victim and his friend, Richard Jackson. On July 15, 2013, the victim and the defendant had a physical altercation on Sixth Street. Later that day, the defendant sent a text message to a friend stating that he had been jumped by the victim and another male, who told him that he could not come

[1] The defendant is also known by his street name, "Sleep" or "Sleepy."

on Sixth Street. The defendant further stated that he "wasn't hearing [that]" and that he was looking for a gun. On July 16, 2013, the victim pulled a gun on the defendant while the defendant was with his children at a nearby park.

Unlike the victim, Jackson had no issue with the defendant, and the two interacted on four or five occasions in the two weeks prior to the victim's murder. On one occasion, Jackson and the defendant shared a marijuana cigarette and talked for approximately twenty minutes. On another occasion, the two sat together on the porch steps of a property on Sixth Street. Jackson and the defendant also exchanged remarks as they passed by each other on the street. Jackson did not witness the July 15, 2013 altercation, but the next day he was shown a cell phone video recording of the incident.

On the morning of July 17, 2013, at approximately 7:20 a.m., the victim and Jackson were sitting in a car outside the victim's apartment on Sixth Street. The victim sat in the driver's seat with his window rolled down, and Jackson sat next to him in the front passenger seat. The two friends talked about the July 15, 2013 altercation and Jackson cautioned the victim that his dispute with the defendant was unnecessary. The defendant walked up Sixth Street wielding a small black handgun and approached within three feet of the driver's side of the victim's car. The defendant was wearing a black shirt and his face was covered up to the top of his nose, leaving only his eyes and the top of his head exposed. The defendant fired at the victim and then uttered the words "bitch ass n*****." Jackson told the defendant to "chill" and that he had "proven his point." The defendant, however, fired more bullets, hitting the victim in the left upper neck, left upper shoulder, back and chest. The defendant then fled.

Jackson also fled because there were outstanding warrants for his arrest and he feared becoming involved with the police. As Jackson ran east toward Bunnell Street through the backyards of houses on Sixth Street, he said aloud, "I'm going to jail." He then heard a voice reply, "[m]y bad my n*****," and realized that the defendant, whose face was no longer covered, was running close behind him. The defendant continued running in the direction of Stratford Avenue.

A juvenile standing in the backyard of a house on Bunnell Street, which abutted the backyards of houses on Sixth Street, heard the gunshots and called 911. Shortly thereafter, police and emergency response personnel found the unconscious victim, who was later pronounced dead at Bridgeport Hospital. The police recovered four spent bullets from the victim's car, four spent casings in the roadway and a white tank top in the grass near the victim's car. A firearm never was recovered.

On the basis of video surveillance[2] and witness interviews,[3] Detective Robert Winkler applied for, and was

[2] On the day of the murder, Detective Robert Winkler reviewed surveillance footage from cameras posted by the Bridgeport Police Department at three intersections along Stratford Avenue. The defendant emerged from an apartment at the intersection of Stratford and Hollister Avenues at approximately 7 a.m. The defendant walked west on Stratford Avenue, in the direction of Sixth Street, while using his cell phone. The defendant had something white draped over his shoulder and his dominant right hand was positioned in a way that suggested he was carrying a concealed weapon. At 7:22 a.m., minutes prior to the shooting, the camera posted at the intersection of Stratford and Newfield Avenues captured the defendant at the corner of Stratford and Bunnell walking in the direction of Sixth Street. The shooting was not captured on video as there was no camera focused on that area of Sixth Street. At 7:27 a.m., the defendant emerged from the empty lot on the corner of Bunnell and Stratford without the white item. The defendant continued eastbound on Stratford Avenue, at times running, repeatedly looking back in the direction of Sixth Street.

[3] In the defendant's arrest warrant, Detective Robert Winkler stated that an anonymous witness was shown the surveillance video and "immediately . . . identified 'Sleepy' as the individual."

issued, a warrant for the arrest of the defendant on July 25, 2013. That same day, Jackson was arrested on unrelated charges and interviewed by Detectives Winkler and Dennis Martinez about the victim's murder. Initially, Jackson was reluctant to provide the detectives with the assailant's identity. Jackson stated that he had been sitting in the victim's car for approximately four to seven minutes before the assailant ran up to the car and started shooting at the victim. He described the victim's assailant as a black male at least six feet, three inches tall, wearing a black shirt and a scarf or shirt covering most of his face, and wielding a black small caliber gun. Jackson stated that as he was running to his girlfriend's apartment on Bunnell Street, the assailant, whose face was still covered, ran by him and continued in the direction of Stratford Avenue. Later in the interview, Martinez inadvertently used the defendant's street name, "Sleep," instead of the victim's street name, "Stretch." Jackson was shown portions of the Stratford Avenue surveillance video and he confirmed that the man in the video was the person he recognized as the assailant. He claimed, however, that he did not know the assailant's name. Jackson stated that he had seen the assailant on Sixth Street previously and would recognize him if he saw him again. He also stated that he knew the assailant's voice because he had heard it before and that he could match that voice to a face.

The detectives conducted a blind sequential photo array of eight photographs. When he was shown the seventh photograph, that of the defendant, Jackson became quiet and asked to return to his cell multiple times. The detectives urged Jackson to tell them what he knew and whether the seventh photograph was the assailant. Jackson asked to speak alone with Winkler and attempted to negotiate a release on a promise to appear on his unrelated charges. Winkler stated multiple times that he could try to help but could not promise

anything. Jackson admitted that he knew the defendant was the assailant all along, identified him in the seventh photograph in the array and stated that Martinez already had used his street name, "Sleep."

On July 30, 2013, the defendant was arrested and charged with murder and criminal possession of a pistol or revolver. Prior to trial, the defendant moved to suppress Jackson's out-of-court identification and any subsequent in-court identification of the defendant, claiming, inter alia, that the procedures used by the detectives during the out-of-court identification were unnecessarily suggestive, and that, as a result, any in-court identification would be tainted by the improper out-of-court identification. In response, the state contended that it did not seek to offer Jackson's out-of-court identification of the defendant at trial.

A seven day jury trial commenced on September 24, 2014. During trial, outside the presence of the jury, the court conducted a two part evidentiary hearing on the defendant's motion to suppress. After reviewing Jackson's videotaped interview and hearing testimony from Winkler,[4] the court determined that the police identification procedure was unnecessarily suggestive and suppressed the out-of-court identification. The court reasoned that Martinez's inadvertent use of the defendant's street name and "showing [Jackson] the surveillance video that only contained [the defendant was] tantamount to making a suggestion as to who should be picked out of the [photographic] array."

The court then addressed the reliability of any subsequent in-court identification. The court heard testimony

[4] Winkler testified that prior to the interview, he knew that Jackson was the victim's friend and was sitting in the passenger seat of the victim's car at the time of the homicide. He further testified that he "was quite confident that [Jackson] was familiar with the [defendant], just reluctant to give [him] specific details."

from Jackson, who stated that he knew that the defendant was the shooter prior to the interview, but did not want to provide that information to the detectives. Jackson testified that there weren't "too many different people . . . on Sixth Street" and that he "[paid] attention to who was out there." It was important for Jackson, who was involved in the sale of narcotics, to know who the regular people were, "because other people could be snitches." Jackson further testified that he had seen the defendant on Sixth Street four or five times in the two weeks prior to the shooting, and had become familiar with both the defendant's appearance and voice. Jackson indicated that he would have known that the defendant was the shooter even if he had not seen him a second time as he was running away. The court then asked Jackson the following questions:

"The Court: Sir, you were shown some video by the detectives that was taken from a street pole camera that day. Is that right?

"[Jackson]: Yes.

"The Court: Did that video influence or plant the idea in your mind that [the defendant] was the shooter?

"[Jackson]: No.

"The Court: How sure are you of that?

"[Jackson]: A hundred percent.

"The Court: And did Detective Martinez, using the name Sleep while he was interviewing you, did that influence your identification of the defendant here in court as the shooter of [the victim]?

"[Jackson]: No."

On the basis of Jackson's testimony, the court ruled that "the state [had] established by clear and convincing evidence that under the totality of the circumstances

. . . [Jackson's] in-court identification . . . [was] based upon his independent recollection and [was] untainted by any faulty pretrial identification process." The court made the following findings of fact in support of its determination: "[T]his case did not involve a one-time encounter between an eyewitness and a shooter who was a total stranger"; "[t]he defendant and Jackson had been together in each other's company in close proximity in social settings [on Sixth Street] in the days leading up to [the victim's] murder"; "Jackson . . . was already personally familiar with [the defendant] before [the victim] was murdered"; "[Jackson] was also privy to the bad blood that existed between [the defendant] and the victim at the time of the shooting"; "Jackson had a chance to view the [defendant] that morning, both during and after the murder"; "Jackson also interacted and spoke with the defendant immediately after [the defendant] shot [the victim]"; and "Jackson demonstrated an obvious reluctance to cooperate [during his interview] with [the] detectives." (Emphasis omitted.)

Jackson then testified before the jury and identified the defendant as the man who shot the victim. Jackson testified that the main factor in being able to identify the defendant as the shooter was seeing him unmasked as they ran away from the crime scene. On October 6, 2014, the jury found the defendant guilty of murder in violation of § 53a-54a (a) and the court found him guilty of criminal possession of a pistol or revolver in violation of General Statutes (Rev. to 2013) § 53a-217c (a) (1). Thereafter, the court sentenced the defendant to a total effective sentence of fifty years incarceration. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant's principal claim on appeal is that the trial court violated his federal constitutional right to due

process by denying his motion to suppress Jackson's in-court identification of him.[5] The defendant's arguments in support of that claim are twofold. First, he argues that, although the court determined that the out-of-court identification procedure was unnecessarily suggestive,[6] the court improperly concluded that the state had proven the reliability of Jackson's in-court identification by clear and convincing evidence. Second, he argues that the court improperly permitted the jury to consider Jackson's out-of-court identification as evidence of guilt. We disagree.

A

We first address the defendant's claim that the court improperly concluded that the state had proven the reliability of Jackson's in-court identification by clear and convincing evidence. Specifically, the defendant argues that Jackson's "brief prior acquaintance" with the defendant and Jackson's "denial that the identification procedure affected him" does not constitute clear and convincing evidence of reliability.[7] In response, the

[5] The defendant also asks this court to consider whether his state constitutional rights provide him greater protection. We decline to review the defendant's state constitutional claim because it is inadequately briefed. The defendant allots two paragraphs of his brief to this claim, which provides no substantive analysis in support of his claim. This court is "not required to review issues that have been improperly presented . . . through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003). Because the defendant's state constitutional claim is inadequately briefed, we decline to address it.

[6] On appeal, the state has not challenged the trial court's finding with respect to the suggestiveness of the out-of-court identification.

[7] The defendant also asks this court to extend our Supreme Court's holding in *State* v. *Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017), to disallow in-court identifications in situations "when the out-of-court identification procedure is unnecessarily suggestive and either suppressed or the prosecution

state contends that, although the trial court improperly shifted the burden of proving the reliability of Jackson's in-court identification onto the state, Jackson was sufficiently familiar with the defendant to minimize the risk of misidentification, and that this familiarity, considered under the totality of the circumstances surrounding the crime and subsequent identification, demonstrates that the trial court's ruling was not an abuse of its discretion. Without determining whether the trial court improperly shifted the burden of proof onto the state, we conclude that the court did not abuse its discretion by allowing Jackson to make an in-court identification of the defendant.

We begin by setting forth the applicable standard of review and the legal principles that guide our analysis of a defendant's constitutional challenge to an eyewitness identification procedure. "Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact

declines to offer it as evidence, and there is a factual dispute about the witness' ability to identify the defendant." The state contends that "*Dickson* itself . . . rejects such an extension." We agree with the state. In effect, the defendant asks us to overrule Supreme Court precedent. However, "[i]t is not within our function as an intermediate appellate court to overrule Supreme Court authority." (Internal quotation marks omitted.) *State* v. *Holmes*, 59 Conn. App. 484, 487–88, 757 A.2d 639 (2000), aff'd, 257 Conn. 248, 777 A.2d 627 (2001), cert. denied, 535 U.S. 939, 122 S. Ct. 1321, 152 L. Ed. 2d 229 (2002). In *Dickson*, our Supreme Court narrowly held that "in cases in which identity is an issue, in-court identifications that are not preceded by a successful identification in a nonsuggestive identification procedure implicate due process principles and, therefore, must be prescreened by the trial court." (Footnote omitted.) *State* v. *Dickson*, supra, 415. The *Dickson* court recognized that "[*a*] *different standard applies* when the defendant contends that an in-court identification followed an unduly suggestive pretrial identification procedure that was conducted by a state actor. In such cases, both the initial identification and the in-court identification may be excluded if the improper procedure created a substantial likelihood of misidentification." (Emphasis added.) Id., 420; see also id., 447 n.31. That "different standard" is applicable here and, therefore, is the standard that we will apply in analyzing the defendant's claim.

will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . . We undertake a more probing factual review when a constitutional question hangs in the balance." (Internal quotation marks omitted.) *State* v. *Aviles*, 154 Conn. App. 470, 478–79, 106 A.3d 309 (2014), cert. denied, 316 Conn. 903, 111 A.3d 471 (2015).

"[W]e will reverse the trial court's ruling [on evidence] only where there is an abuse of discretion or where an injustice has occurred . . . and we will indulge in every reasonable presumption in favor of the trial court's ruling. . . . Because the inquiry into whether [identification evidence] should be suppressed contemplates a series of factbound determinations, which a trial court is far better equipped than this court to make, we will not disturb the findings of the trial court as to subordinate facts unless the record reveals clear and manifest error." (Internal quotation marks omitted.) *State* v. *Dakers*, 155 Conn. App. 107, 112–13, 112 A.3d 819 (2015); accord *State* v. *Ledbetter*, 275 Conn. 534, 548, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

"[B]ecause the issue of the reliability of an identification involves the constitutional rights of an accused . . . [our appellate courts] are obliged to examine the record scrupulously to determine whether the facts found are adequately supported by the evidence and whether the [trial] court's ultimate inference of reliability was reasonable." (Internal quotation marks omitted.) *State* v. *Ledbetter*, supra, 275 Conn. 547; see also *State* v. *Aviles*, supra, 154 Conn. App. 479. "[T]he required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the

identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on an examination of the totality of the circumstances." (Internal quotation marks omitted.) *State* v. *Ledbetter*, supra, 547–48; see also *Manson* v. *Brathwaite*, 432 U.S. 98, 110–14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

"[A]n out-of-court eyewitness identification should be excluded on the basis of the procedure used to elicit that identification only if the court is convinced that the procedure was so suggestive and otherwise unreliable as to give rise to a very substantial likelihood of irreparable misidentification." (Emphasis omitted.) *State* v. *Marquez*, 291 Conn. 122, 142, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009). "That the initial identification ha[s] been invalid[ated] . . . place[s] the state under a constitutional restraint to establish an independent basis for the subsequent [in-court identification]. Thus, the burden [is] on the state to establish by clear and convincing evidence that the subsequent [in-court identification is] based on the [witness'] independent recollection." *State* v. *Mitchell*, 204 Conn. 187, 204, 527 A.2d 1168, cert. denied, 484 U.S. 927, 108 S. Ct. 293, 98 L. Ed. 2d 252 (1987); see also *State* v. *Guertin*, 190 Conn. 440, 459, 461 A.2d 963 (1983). "[R]eliability is the linchpin in determining the admissibility of identification testimony . . . . To determine whether an identification that resulted from an unnecessarily suggestive procedure is reliable, the corruptive effect of the suggestive procedure is weighed against certain factors, such as the opportunity of the [witness] to view the criminal at the time of the crime, the [witness'] degree of attention, the accuracy of [the witness'] prior description of the criminal, the level of certainty demonstrated at the [identification] and the

time between the crime and the [identification].” (Internal quotation marks omitted.) *State* v. *Mitchell*, 127 Conn. App. 526, 534, 16 A.3d 730, cert. denied, 301 Conn. 929, 23 A.3d 724 (2011); see also *Manson* v. *Brathwaite*, supra, 432 U.S. 114; *Neil* v. *Biggers*, 409 U.S. 188, 199–200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

With the foregoing factual background and legal framework in mind, we now review the trial court’s denial of the defendant’s motion to suppress Jackson’s in-court identification. We begin our analysis by addressing the court’s factual finding that Jackson was “personally familiar” with the defendant. The defendant disagrees with this finding and, instead, contends that he and Jackson were “near strangers.” Specifically, the defendant argues that “the state did not cite to any case in which a twenty minute conversation and three to four brief encounters over two weeks creates” sufficient familiarity “to identify him from a brief glimpse . . . or from seven spoken words.” In response, the state argues that the court’s factual findings were supported by the record.

At the outset, we note that our Supreme Court has declined to “articulate a specific rule regarding the degree of familiarity that an eyewitness must have with a suspect . . . .” *State* v. *Williams*, 317 Conn. 691, 707, 119 A.3d 1194 (2015). “Rather, the typical approach is to consider the nature and extent of the eyewitness’ prior knowledge of the suspect, along with all of the other facts and circumstances of the crime and the subsequent identification of a perpetrator, to determine whether a trial court has abused its discretion . . . . [A]ffording flexibility to trial courts is desirable due to the myriad and unpredictable ways in which crimes occur and are witnessed and in which individuals may have had previous contact with each other. . . . [I]n a case in which an eyewitness has a limited, stressful encounter with a criminal actor whose features are

largely concealed, a high level of prior familiarity likely would be necessary . . . . On the other hand, if a witness has ample opportunity to view a perpetrator under conditions conducive to an accurate identification and identifies him or her shortly thereafter, a lesser degree of familiarity may suffice." (Citation omitted; footnote omitted.) Id., 707–708.

The record demonstrates that Jackson had a heightened awareness of who was present on Sixth Street, including the defendant. Jackson had interacted with the defendant at least four times in the two weeks prior to the victim's murder. On the basis of these interactions, Jackson stated that he was able to recognize the defendant by both his appearance and his voice. Jackson also was aware of the ongoing dispute between the defendant and the victim at the time of the shooting. We therefore conclude that the trial court's finding that Jackson was personally familiar with the defendant was supported by the record.

We next address Jackson's opportunity to view the defendant at the time of murder. "This consideration implicates factors that relate to the [witness'] condition at the time as well as the external environment." *State* v. *Artis*, 136 Conn. App. 568, 595, 47 A.3d 419 (2012), rev'd on other grounds, 314 Conn. 131, 101 A.3d 915 (2014). Jackson was an eyewitness to the crime. As the trial court explained, Jackson "had a front row seat to [the victim's] murder." Jackson even referred to himself as the "star witness" because he "[was] the one closest to the person that got killed." Jackson had two opportunities to view the defendant in broad daylight on the morning of the murder; once from the front passenger seat of the vehicle, and again as he fled from the crime scene and saw the unmasked defendant.

Jackson's description of the perpetrator's appearance, which was given prior to the unduly suggestive

police identification procedure and his identification of the defendant from a photographic array, was generally consistent with the defendant's appearance as captured by the surveillance video, as described by the 911 caller[8] and as testified to by Jackson at trial. The defendant contends that Jackson's differing descriptions as to what type of pants the assailant was wearing suggests that he altered his original description after viewing the surveillance video. We disagree that this claimed discrepancy is significant, as Jackson himself acknowledged that he was not staring at the assailant's pants and was not sure what he was wearing. We note that Jackson, when testifying before the jury, stated for the first time that the defendant's face was uncovered and visible as they ran away from Sixth Street. Although Jackson's withholding of this fact until trial was proper fodder for the jury to consider when assessing his credibility, it does not significantly impact our analysis of the defendant's claim on appeal. See *State* v. *Williams*, supra, 317 Conn. 713–14 (fact that witness gave more complete description of defendant at trial than during police interview does not compel reversal of trial court's ruling).

Finally, the eight day time period between the crime and Jackson's interview in which he identified the defendant is not so long as to render Jackson's identification unreliable.[9] See, e.g., *State* v. *Sanchez*, 128 Conn.

[8] The caller described the gunman as being "very tall," wearing all black and having a black and white bandana covering his face.

[9] Additionally, although Jackson did not come forward with information voluntarily, the court properly viewed these facts under the totality of the circumstances, given the unwillingness of neighborhood residents to provide information or testimony for fear of being labeled as a "snitch." The court itself noted that "[it understood] how difficult it is to get people to testify in inner city homicides." Jackson testified that being known on the street as a snitch was not a good reputation to have. The court also heard testimony from the 911 caller that his aunt told him to "shut up" in Spanish while he was speaking to the 911 operator, and that she was not supportive of his speaking to police. Bridgeport Police Officer Ilidio Pereira, the initial officer to arrive on scene, testified that he was not "successful in locating anyone

App. 1, 11, 15 A.3d 1182 (2011) (concluding that sixteen month period between crime and identification did not render witness' identification unreliable), aff'd, 308 Conn. 64, 60 A.3d 271 (2013); *State* v. *Henton*, 50 Conn. App. 521, 535, 720 A.2d 517 (four month period between crime and identification did not render witness' identification unreliable), cert. denied, 247 Conn. 945, 723 A.2d 322 (1998); *State* v. *McClendon*, 45 Conn. App. 658, 666, 697 A.2d 1143 (1997) (two year period between crime and identification did not render identification unreliable where victim had ample opportunity to see defendant, had high degree of attention during encounter and provided detailed description at time of incident), aff'd, 248 Conn. 572, 730 A.2d 1107 (1999). Therefore, after reviewing the record, we conclude that the court's denial of the defendant's motion to suppress Jackson's in-court identification was supported by the record, and not an abuse of its discretion.

Moreover, any alleged evidentiary error as to the in-court identification was harmless. "[T]he test for determining whether a constitutional error is harmless . . . is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Internal quotation marks omitted.) *Neder* v. *United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); see also *State* v. *Cook*, 287 Conn. 237, 252, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). "[W]hether an error is harmful depends on its impact on the trier of fact and the result of the case. . . . This court has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error

who [wanted to provide] information about a suspect" and that "it didn't look like anyone wanted to talk to [him] because they quickly walked away." This was not uncommon in Pereira's experience as an officer, because people "don't want to be known as a . . . [snitch], someone that's cooperating with law enforcement to . . . apprehend the suspect of a crime."

would be rendered harmless beyond a reasonable doubt. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]." (Internal quotation marks omitted.) *State* v. *Aviles*, supra, 154 Conn. App. 478.

In this case, the jury heard motive evidence in the form of testimony about the dispute and ensuing physical altercations that occurred in the two days prior to the murder. The jury viewed the timestamped video surveillance of the defendant walking toward Sixth Street and then fleeing after the shooting, which the trial court described as "very incriminating." See footnote 2 of this opinion. At trial, the defendant conceded that he was the person on the surveillance footage. The jury also heard a recording of a phone call the defendant made to his girlfriend from his holding cell, in which he asked her if the police had "[found] anything in [her] house." Additionally, the defendant elicited evidence of Jackson's out-of-court identification of the defendant. See part 1 B of this opinion. We therefore conclude, on the basis of the strength of the state's evidence against the defendant, that any alleged error had very little, if any, likelihood of affecting the jury's verdict.

B

We next turn to the defendant's claim that the court "should have granted [the defendant's] request to charge and charged the jury that the out-of-court identification procedure was not substantive evidence of guilt because of its suggestiveness." The defendant contends that his claim was preserved by his September 29, 2014 request to charge. In response, the state argues that the defendant is not entitled to review of this claim because (1) it was not preserved by the defendant's request to

charge, and (2) the defendant has either induced these errors or waived them pursuant to *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011).[10] We conclude that the defendant's claim was not preserved by his request to charge or exceptions taken at trial and, accordingly, we do not reach its merits.

The following additional facts and procedural history are necessary for the resolution of this claim. During the cross-examination of Winkler, defense counsel introduced portions of Jackson's out-of-court identification "in order to show that Jackson mistakenly identified [the defendant] because of the unnecessarily suggestive procedure." The state objected to its admission. The court sustained the state's objection, but noted that the defendant "[had opened] the door to the state possibly using other portions [of the out-of-court identification] to rehabilitate the identification that [Jackson] made of the defendant because the [out-of-court identification] that the court had previously ordered stricken because it was suggestive has been introduced into this case by the defense. . . . [T]he *state* [*is*] *free to inquire to show that* [*Jackson*] *did in fact make that identification*." (Emphasis added.) Defense counsel then requested a limiting instruction that the comments of the interviewing detectives should not be taken for their truth; however, defense counsel did not request a limiting instruction as to Jackson's statement. The court then instructed the jury as follows: "The . . . evidence is being offered for the statements

[10] The defendant has not requested review as to this claim under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Accordingly, we need not determine if these claims have been waived pursuant to *State* v. *Kitchens*, supra, 299 Conn. 447. See *State* v. *Hall-Davis*, 177 Conn. App. 211, 240, 172 A.3d 222 (2017) ("[i]t is well established in Connecticut that unpreserved claims of improper jury instructions are reviewable under *Golding* unless they have been induced or implicitly waived" [internal quotation marks omitted]).

of [Jackson]. . . . [Y]ou'll hear certain expressions of opinion by the police officers and those are not being offered for the truth of their opinions . . . but to show their effect on [Jackson] or his responses to those statements." Jackson's videotaped interview was then admitted into evidence as a full exhibit and viewed by the jury.

On September 29, 2014, the defendant submitted a draft request to charge that stated in relevant part: "In this case, the identification of the defendant by the witness, [Jackson], was the result of suggestive identification procedures." On October 3, 2014, the court provided defense counsel and the state with a draft of its proposed jury instructions. That same morning, the court, defense counsel and the prosecutor then reviewed the proposed jury instructions page by page. The court indicated that it had incorporated language from the Connecticut criminal jury instructions into the section regarding "identification of the defendant." Defense counsel objected, and referred the court to the defendant's September 29, 2014 request to charge the jury with the following language: "In this case, the identification of the defendant by the witness, [Jackson], was the result of suggestive identification procedures." The court denied that request, stating: "The court's problem with the [defendant's] request is the jury may well make that determination. . . . I'm not preventing you from arguing it. I anticipate you arguing it . . . . But I can't make that leap and make a finding of suggestiveness. I found that while there was a taint to the out-of-court identification, I was satisfied based upon [Jackson's] statements and his prior familiarity with the defendant before the homicide, that his in-court identification was not the result of any suggestive out-of-court identification procedure. . . . I'm not going to charge this jury that the identification was suggestive. That may be something that [the jurors] make a [determination] as to which might create reasonable doubt.

But I can't tell [the jury] that as a matter of law in this instruction because I believe it is marshaling the evidence in a way that's not appropriate in a charge which is supposed to be . . . right down the middle."

It is well settled that "[a]n appellate court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of objection." Practice Book § 16-20; accord Practice Book § 42-16. "Thus, a party may preserve for appeal a claim that an instruction, which was proper to give, was nonetheless defective either by: (1) submitting a written request to charge covering the matter; or (2) taking an exception to the charge as given. . . . Moreover, the submission of a request to charge covering the matter at issue preserves a claim that the trial court improperly failed to give an instruction on that matter." (Internal quotation marks omitted.) *State* v. *Johnson*, 165 Conn. App. 255, 284, 138 A.3d 1108, cert. denied, 322 Conn. 904, 138 A.3d 933 (2016). "In each of these instances, the trial court has been put on notice and afforded a timely opportunity to remedy the error. . . . It does not follow, however, that a request to charge addressed to the subject matter generally, but which omits an instruction on a specific component, preserves a claim that the trial court's instruction regarding that component was defective." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Silva*, 113 Conn. App. 488, 495, 966 A.2d 798 (2009). "[T]he sina qua non of preservation is fair notice to the trial court. . . . An appellate court's determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated [in the

trial court] with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Citation omitted; internal quotation marks omitted.) *State* v. *Sease*, 147 Conn. App. 805, 814, 83 A.3d 1206, cert. denied, 311 Conn. 932, 87 A.3d 581 (2014).

We have reviewed the record in its entirety and find that at no time did the defendant put the trial court on notice of the alleged error now claimed on appeal. The record demonstrates that the defendant's request to charge did not include the specific language that "the out-of-court identification procedure was not substantive evidence of guilt because of its suggestiveness." Although defense counsel objected to the court's proposed jury charge regarding the "identification of the defendant," he merely referred the court to the language in the defendant's request to charge, which did not address whether the jury should be permitted to use the out-of-court identification as substantive evidence of the defendant's guilt. "To permit [the defendant] to raise a different ground on appeal than [that] raised during trial would amount to trial by ambuscade, unfair both to the trial court and to the [state]. . . . Inasmuch as the defendant raises a claim on appeal different from the one that he raised at trial, he is not entitled to review of his claim." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Saunders*, 114 Conn. App. 493, 504, 969 A.2d 868, cert. denied, 292 Conn. 917, 973 A.2d 1277 (2009). We therefore conclude that the defendant's claim has not been preserved for our review.

II

The defendant's final claim is that the trial court abused its discretion in denying his request for a special credibility instruction with respect to Jackson's testimony. The defendant contends that a special credibility

instruction was required because Jackson was either an accomplice or a jailhouse informant. We disagree.

The following additional facts and procedural history are necessary to our resolution of this claim. On September 29, 2014, the defendant submitted a request to charge, stating in relevant part: "A witness who testified in this case, [Jackson], is currently incarcerated and is awaiting trial for some crimes other than the crime involved in this case. At the time this witness first provided information to the police, he was also incarcerated and awaiting trial for some crimes other than the crime involved in this case. You should look with particular care at the testimony of this witness and scrutinize it very carefully before you accept it. You should consider the credibility of this witness in the light of any motive for testifying falsely and inculpating the accused."

On October 3, 2014, the court denied the defendant's request to provide a special credibility instruction to the jury regarding Jackson, stating: "I . . . think that this is a case that's so completely removed from informant . . . if you believe this witness, he's sitting right next to someone who's shot dead multiple times at very close range. He is as close an eyewitness as I've ever seen in any murder. Whether he's reliable and whether his identification is solid, that's a question for [the jury]. But this man had a front row seat to this whole thing, if you believe him. And so I don't find him to be an informant in that sense. He's an eyewitness with baggage, [which] is perhaps a better characterization of him, and whether that baggage is sufficient to sink his credibility [is] a question for the jury. . . . I'm not going to give the [requested] informant instruction for those reasons."

We turn to the legal principles that guide our review of the defendant's claim. "It is a well established principle that a defendant is entitled to have the jury correctly

and adequately instructed on the pertinent principles of substantive law. . . . The primary purpose of the charge to the jury is to assist [it] in applying the law correctly to the facts which [it] find[s] to be established." (Citations omitted; internal quotation marks omitted.) *State* v. *Ortiz*, 252 Conn. 533, 560–61, 747 A.2d 487 (2000). "[T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it 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. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *Bialowas*, 178 Conn. App. 179, 187–88, 174 A.3d 853 (2017).

"Generally, a [criminal] defendant is not entitled to an instruction singling out any of the state's witnesses and highlighting his or her possible motive for testifying falsely." *State* v. *Ortiz*, supra, 252 Conn. 561; accord *State* v. *Colon*, 272 Conn. 106, 227, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005). Our Supreme Court has recognized three exceptions to this general rule, including the accomplice exception and the jailhouse informant exception. See *State* v. *Diaz*, 302 Conn. 93, 101–102, 25 A.3d 594 (2011). Neither the accomplice nor the jailhouse informant exception is applicable in this case.

A

The defendant claims that the court was required to provide an accomplice credibility instruction to the jury regarding Jackson's testimony. Specifically, the defendant contends that the jury could have concluded that Jackson was involved in the shooting due to his presence and subsequent flight from the crime scene; and

because he displayed concern over being suspected as the culprit.

"[When] it is warranted by the evidence, it is the court's duty to caution the jury to scrutinize carefully the testimony if the jury finds that the witness intentionally assisted in the commission, or if [he] assisted or aided or abetted in the commission, of the offense with which the defendant is charged. . . . [I]n order for one to be an accomplice there must be mutuality of intent and community of unlawful purpose." (Internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 597–98, 134 A.3d 560 (2016); see also *State* v. *Gentile*, 75 Conn. App. 839, 855, 818 A.2d 88 ("[t]he court's duty to so charge is implicated only where the trial court has before it sufficient evidence to make a determination that there is evidence that the witness was in fact an accomplice" [internal quotation marks omitted]), cert. denied, 263 Conn. 926, 823 A.2d 1218 (2003).

In the present case, there was no basis in the record for the jury to reasonably conclude that Jackson was involved in the murder of the victim. The jury could have reasonably found the following additional facts. Jackson and the victim had known each other for eight or nine years. Jackson was very close friends with the victim and described him as a "big brother." On the morning of the murder, they talked about "getting out of the hood" and had planned on driving to New Haven to fill out applications at Gateway Community College. Jackson pleaded with the defendant to stop shooting at the victim. The evidence adduced at trial simply did not warrant an accomplice instruction. We therefore conclude that the court did not abuse its discretion in denying the defendant's request for an accomplice instruction.

B

The defendant also claims that the court was required to provide a special credibility instruction to the jury

regarding Jackson's testimony because he was "akin to a jailhouse informant." The defendant contends that this exception is applicable because Jackson attempted to negotiate the detectives' assistance prior to identifying the defendant.

Our Supreme Court adopted the jailhouse informant exception in *State* v. *Patterson*, 276 Conn. 452, 886 A.2d 777 (2005), holding that a special credibility instruction is required in situations where a prison inmate "has been promised a benefit by the state in return for his or her testimony" regarding incriminating statements made by a fellow inmate. Id., 469; see also *State* v. *Diaz*, supra, 302 Conn. 102 ("a jailhouse informant is a prison inmate who has testified about confessions or inculpatory statements made to him by a fellow inmate"). In *Diaz*, our Supreme Court declined to interpret its decision in *Patterson* as "[requiring] a special credibility instruction when an incarcerated witness has testified concerning events surrounding the crime that [he] witnessed outside of prison"; *State* v. *Diaz*, supra, 102; reasoning that such an exception "would swallow the rule that the trial court generally is not required to give such an instruction for the state's witnesses." Id., 110. Instead, when the "jury [is] aware of the [nonjailhouse informant] witness' involvement in the criminal justice system and their expectations that they would receive consideration in exchange for their testimony," a general credibility instruction is sufficient. Id., 103.

Jackson testified at trial regarding events that he personally witnessed from his "front row seat." Therefore, the defendant's claim is controlled by *Diaz* and fails accordingly. See *State* v. *Jackson*, 159 Conn. App. 670, 673–75, 123 A.3d 1244 (2015) (jailhouse informant instruction inapplicable where "incarcerated witness receive[d] a benefit from the state in exchange for testimony regarding a crime [he claimed to have] personally observed prior to his incarceration"), cert. granted on

other grounds, 325 Conn. 917, 163 A.3d 617 (2017); *State* v. *Carattini*, 142 Conn. App. 516, 523–24, 73 A.3d 733 (jailhouse informant instruction inapplicable where witness testified regarding "observations and recollections of the events surrounding the murder"), cert. denied, 309 Conn. 912, 69 A.3d 308 (2013). Moreover, the court, in its charge to the jury, gave a general credibility instruction regarding the testimony of witnesses. In that instruction, the jury was told to consider if "the witness [had] an interest in the outcome of the case, or any bias or prejudice concerning any party or any matter involved in this case" and to "evaluate the testimony of all witnesses by [the jury's] own knowledge of human nature and of the motives that influence and control human actions." See *State* v. *Ebron*, 292 Conn. 656, 675, 975 A.2d 17 (2009), overruled on other grounds by *State* v. *Kitchens*, supra, 299 Conn. 472–73; *State* v. *Carattini*, supra, 525–27. We therefore conclude that the court did not abuse its discretion in denying the defendant's request for a jailhouse informant instruction.

The judgment is affirmed.

In this opinion the other judges concurred.

ASPIC, LLC *v.* BRACK G. POITIER
(AC 39301)

Alvord, Bright and Sullivan, Js.

Syllabus

The defendant, a general partner in four limited partnerships, appealed to this court from an order of the trial court granting the plaintiff's application for a prejudgment remedy. The plaintiff had brought an action seeking to recover, inter alia, monetary damages from the defendant for default on certain promissory notes that had been executed by H, the managing partner of the limited partnerships. The defendant's partnership agreements provided that each general partner had unlimited personal liability for all obligations of the partnerships. In response to the plaintiff's application for a prejudgment remedy, the defendant

had filed special defenses, alleging, inter alia, that H had breached fiduciary duties to the defendant and the limited partnerships. Following a hearing, the trial court noted that it did not have sufficient information to determine the ultimate strength of the defendant's breach of fiduciary duty defense and granted the plaintiff's application for a prejudgment remedy in the amount of $1 million. On appeal, the defendant claimed, inter alia, that the trial court erred in awarding the plaintiff the prejudgment remedy because he specifically pleaded, inter alia, a breach of fiduciary duty defense, which required the court to shift the burden to the plaintiff to establish fair dealing. *Held* that the trial court committed clear error in granting the plaintiff's application for a prejudgment remedy: where, as here, the defendant raised a breach of fiduciary duty defense and the court found that H owed a fiduciary duty to the defendant and the limited partnerships, the plaintiff had the burden at the prejudgment remedy hearing to establish probable cause, and not by clear and convincing evidence, that it could prove the fairness of the transactions, namely, the plaintiff had to present evidence to establish probable cause to believe that it would be successful on the merits of its cause of action and that it had engaged in fair dealing with respect to the transactions at issue, and the trial court then was required to assess whether such probable cause existed before granting a prejudgment remedy; moreover, although the court made the requisite finding of probable cause to sustain the merits of the underlying action before taking into consideration the defense of breach of fiduciary duty, it, thereafter, did not make the requisite finding that there was probable cause to believe that the plaintiff would overcome that defense by demonstrating that it had engaged in fair dealing, as the court's finding that it could not make any prediction regarding the fiduciary duty defense, without more, should have led to a conclusion that the plaintiff had failed to meet its burden to establish probable cause that it could prove the fairness of the transactions and should have resulted in the denial of the prejudgment remedy, and the court, by granting the prejudgment remedy in the absence of any finding that the plaintiff had met its burden, improperly placed the burden of proving the unfairness of the transactions on the defendant.

Argued November 28, 2017—officially released February 13, 2018

Procedural History

Action to collect on promissory notes, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the plaintiff served the defendant with notice of an ex parte prejudgment remedy; thereafter, the court, *Hon. Howard F. Zoarski*, judge trial referee, granted the defendant's motion to dissolve

the prejudgment remedy; subsequently, the plaintiff filed an application for a prejudgment remedy; thereafter, the court, *Ecker, J.*, granted the plaintiff's application for a prejudgment remedy, and the defendant appealed to this court. *Reversed*; *further proceedings*.

Mark A. Rosenblum, with whom was *Michael D. Blumberg*, for the appellant (defendant).

Timothy A. Diemand, with whom were *Jeffrey R. Babbin* and, on the brief, *Michael Menapace*, for the appellee (plaintiff).

Opinion

BRIGHT, J. The defendant, Brack G. Poitier, appeals from the judgment of the trial court granting the prejudgment remedy application filed by the plaintiff, ASPIC, LLC. The defendant claims that the trial court erred in awarding the plaintiff a $1 million prejudgment remedy because he specifically had pleaded, inter alia, a defense of breach of fiduciary duties, which required the court to shift the burden to the plaintiff to establish fair dealing, and the court failed to do so. He also claims that even if the court appears to have shifted the burden, the record was devoid of evidence to demonstrate fair dealing. Finally, the defendant claims that the trial court failed to make any finding that the plaintiff had met its burden to show that there was probable cause that it would prevail in establishing that the transactions at issue were the product of fair dealing. We agree with the defendant and reverse the judgment of the trial court.

The following facts, as ascertained from the record, reasonably could have been found by the trial court.[1]

[1] We view the facts in a light most favorable to the plaintiff. See *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 339, 71 A.3d 492 (2013) (on appeal, "[w]e will not upset a prejudgment remedy order in the absence of clear error . . . viewing the evidence in the light most favorable to the plaintiff" [citation omitted]).

The plaintiff is a single member limited liability company, whose sole member is Municipal Capital Appreciation Partners III, L.P. (Muni). The defendant is a general partner in four limited partnerships, GAB Hill Limited Partnership, BHP Limited Partnership, WCH Limited Partnership, and Renaissance Limited Partnership. These partnerships collectively are known as the Court Hill Partnerships (Court Hill). The partnership agreements provide that each general partner has unlimited personal liability for all obligations of the partnerships. Court Hill owns properties that served low income individuals in the New Haven area. In addition to the defendant, George Bumbray and Wendell C. Harp[2] also are general partners in Court Hill, with Harp having been appointed as the managing partner. Harp's company, Renaissance Management Company, Inc. (Renaissance), acts as the managing agent for all of the properties owned by Court Hill.

On December 24, 2008, Harp, on behalf of Court Hill, signed an amended and restated promissory note in the amount of $2,039,763 in substitution for an August, 2008 promissory note.[3] The note purported to memorialize Court Hill's debt for "operating expenses as of November 30, 2008, plus accrued interest" by entering into an "amended and restated promissory note" with Renaissance for that amount. Harp endorsed this note four times, once for each of the Court Hill member partnerships. Also on December 24, 2008, Harp, on behalf of Court Hill, then entered into an "amended and restated promissory note," in the amount of $817,692, with Harp, individually. This note also was for "operating expenses

[2] By the time of the hearing on the prejudgment remedy application, Harp was deceased.

[3] The amended and restated promissory note provided that it was "given in substitution for (but not in satisfaction of) a [p]romissory [n]ote of [m]aker to [l]ender in the original principal amount of [$2,007,820] dated on or about August 1, 2008." It does not appear, however, that the August 1, 2008 note was submitted into evidence at the hearing.

as of November 30, 2008, plus accrued interest thereon." Harp also endorsed this note four times, once for each of the Court Hill member partnerships.[4]

On December 30, 2008, Harp, on behalf of himself and Renaissance, executed a loan agreement and a $1.5 million promissory note with Muni (Muni note). The loan agreement provided in part that $695,963.94 of the loan would be advanced to Harp and Renaissance "to be used by [Harp and Renaissance] to repay the promissory note made by [Muni] to Harp," and that proceeds from this loan also were to be used to pay federal, state, and local tax liabilities of Harp and/or Renaissance. Schedule 7(f) of the loan agreement contains, inter alia, a listing of the tax obligations of Renaissance: $950,000 to the Department of Revenue Services; $732,000 to the Internal Revenue Service; and $3700 to the city of New Haven.

Harp, Renaissance, and Muni also entered into a "pledge and security agreement" on December 30, 2008, whereby Renaissance and Harp pledged as collateral for the Muni note their interests in and rights under the Court Hill notes. Additionally, on April 1, 2009, Harp, Renaissance, and Muni entered into a "first amendment to pledge and security agreement" (amended security agreement), which amended the December 30, 2008 pledge and security agreement to include a collateral pledge of two additional notes payable by Court Hill (2009 advance notes), one in favor of Renaissance in the amount of $251,010 for operating expenses between December 1, 2008, and February 28, 2009, and one in favor of Harp in the amount of $13,572, also for operating expenses during that same period.

The entire principal balance of the Muni note was due and payable on December 31, 2010, but no payment ever was made. The note is in default.

[4] These two December 24, 2008 amended and restated promissory notes collectively are referred to as the Court Hill notes.

In light of the default on the Muni note and the amended security agreement, Muni held a public sale of the collateral on January 8, 2014, at which it was the highest bidder. Muni thereafter transferred legal title of the collateral to the plaintiff, which now seeks to enforce the Court Hill notes and the 2009 advance notes against the defendant, a general partner in Court Hill.

On the basis of the foregoing, the plaintiff, in an application filed on December 10, 2015, sought a prejudgment remedy against the defendant in the amount of $3 million. The defendant raised the following amended special defenses: (1) the Court Hill collateral notes are void for lack of consideration; (2) the Court Hill collateral notes were procured by fraud; (3) to the extent that the defendant can be held liable, he is liable only for the amounts on the Court Hill collateral notes; (4) the plaintiff has accepted payment for the sums due; (5) any and all obligations to pay the Court Hill collateral notes have been assumed by third parties; (6) the plaintiff is barred from recovery by unclean hands; (7) the plaintiff is barred from recovery by virtue of Harp's breach of his fiduciary duties to Court Hill and the defendant; and (8) the plaintiff is barred from recovery by virtue of Renaissance's breach of its fiduciary duties to Court Hill and the defendant.[5]

Following a hearing, the court issued its ruling on the plaintiff's application on June 7, 2016. The court

[5] The defendant's request to file an amended answer and special defenses was filed on March 18, 2016, slightly more than two weeks after the prejudgment remedy hearing. The plaintiff filed an objection to the defendant's request, arguing that it would cause undue delay. The court granted the request and overruled the objection on June 7, 2016, the same day it granted the plaintiff's application for a prejudgment remedy. The plaintiff did not have an opportunity to file a reply to the amended special defenses before the court rendered judgment, but it had filed a general denial in response to the previous special defenses raised by the defendant. Regardless of when the amended answer actually was filed, the record is clear that the defendant presented each of the defenses in opposition to the plaintiff's application for a prejudgment remedy, and the court considered each of them.

first addressed the evidence presented in support of the plaintiff's allegations and found that the plaintiff had established probable cause to sustain the validity of its claim on the promissory notes at issue. The court then addressed all of the defendant's defenses, except his breach of fiduciary duty claims, and held that none of them were meritorious at that time.

The court then turned to the defendant's breach of fiduciary duty defense and made the following findings relevant to this appeal. "The nature and chronology of the underlying loan transactions raise questions about whether Harp's conduct in connection with those loans [was] consistent with his fiduciary duties to [the defendant]. . . . There is no reason to believe, on the present state of the record, that [the defendant] was aware of any aspect of the [Muni] loan or the associated Court Hill notes—all of the documentation was signed on behalf of the Court Hill partnerships by Harp alone." (Citations omitted.)

The court then noted that it did not have sufficient information to determine the ultimate strength of the breach of fiduciary duty defense and noted several unanswered questions including, "[w]hether the putative debts to Harp and Renaissance, underlying the Court Hill notes at issue here, were actually owed by the Court Hill partnerships to Harp and/or Renaissance at the time the Court Hill notes were issued; whether Harp had anything to do, directly or indirectly, explicitly or implicitly, with [the defendant's] current predicament as the lone obligor from whom payment is being sought, and if so, whether Harp's acts or omissions in that regard breached his fiduciary duties to [the defendant]; and whether the various loans and purchase transactions spanning the years between 2008 and 2012 involving Harp, [Muni] and the various [Muni] affiliates

have resulted in financial consequences that were foreseeably disadvantageous or unequal among Harp's partners, and cannot be squared with Harp's fiduciary duties to his partners and partnerships."

In light of these questions, the court stated that it had "no idea, on this record, about [the defendant's] role in any of the underlying business activity involving [Muni], nor do we know how the extensive transactions between Harp and [Muni] may have interacted, in whole or in part, with other transactions between or among the Court Hill partners, including [the defendant]." After noting that there still may be other questions that need to be resolved before the merits of the case could be decided, the court stated that "[t]he important point is that, in the court's mind, too little is known presently for any prediction to be made regarding the ultimate fate of the fiduciary duty defense. . . . The current record does not reveal whether the fiduciary duty defense has merit. The only certainty at this time, based upon the limited facts known to the court, is that legitimate questions have been raised under the circumstances."

The court concluded by granting the plaintiff's application, but only for $1 million, rather than the $3 million requested. The court did not explain how it arrived at this number other than to say that "[t]his amount represents the court's best effort, on the present record, to account for all of the factors discussed above." The defendant now appeals.

On appeal, the defendant argues that "in its application for a prejudgment remedy, [the plaintiff] was obligated to prove that there is probable cause to believe that [it] can establish, by clear and convincing evidence at trial, that the transactions at issue were fair. Indeed, in considering whether there is the requisite degree of

probable cause . . . the trial court must have evaluated any and all claims *and defenses* in light of this higher standard proof." (Emphasis in original.) The defendant argues that the trial court's decision demonstrates that the court did not find probable cause under this heightened standard, and, in fact, that it specifically did not find probable cause. He also argues that there was no evidence in the record to demonstrate fair dealing.

In response, the plaintiff argues: "After conducting a full hearing and reviewing extensive briefs, the trial court issued [an] attachment, in an amount less than one-third of what [the] plaintiff had requested. Although he did not present any evidence in support of [his] breach of fiduciary duty and failure of consideration defenses . . . [the defendant] claims in this appeal that the attachment should be set aside because the court did not impose upon [the] plaintiff the burden of disproving [the defendant's] defenses." The plaintiff contends that the court's decision was not clear error regardless of who had the burden at the hearing. After fully considering the record in this case, we agree with the defendant that the court's written decision demonstrates that it did not find probable cause to believe that the plaintiff could meet its shifted burden of proof with regard to the breach of fiduciary duty defense. Accordingly, we find clear error.

"A prejudgment remedy means any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment . . . . General Statutes § 52-278a (d). A prejudgment remedy is available upon a finding by the court that there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater

than the amount of the prejudgment remedy sought, *taking into account any defenses*, counterclaims or setoffs, *will be rendered in the matter in favor of the plaintiff* . . . . General Statutes § 52-278d (a) (1). . . .

"As for [the] standard of review [on appeal], [an appellate] court's role on review of the granting of a prejudgment remedy is very circumscribed. . . . In its determination of probable cause, the trial court is vested with broad discretion which is not to be overruled in the absence of clear error. . . . In the absence of clear error, [a reviewing] court should not overrule the thoughtful decision of the trial court, which has had an opportunity to assess the legal issues which may be raised and to weigh the credibility of at least some of the witnesses." (Emphasis added; internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, 137 Conn. App. 359, 369–70, 48 A.3d 705, cert. denied, 307 Conn. 916, 54 A.3d 180 (2012). "We will not upset a prejudgment remedy order in the absence of clear error . . . viewing the evidence in the light most favorable to the plaintiff." (Citation omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 339, 71 A.3d 492 (2013).

"Section 52-278d (a) explicitly requires that a trial court's determination of probable cause in granting a prejudgment remedy include the court's 'taking into account any defenses, counterclaims or [setoffs] . . . .' " (Emphasis omitted.) *TES Franchising, LLC* v. *Feldman*, 286 Conn. 132, 141, 943 A.2d 406 (2008). "Therefore, it is well settled that, in determining whether to grant a prejudgment remedy, the trial court must evaluate both parties' evidence as well as any defenses, counterclaims and setoffs. . . . Such consideration is significant because *a valid defense has the ability to defeat a finding of probable cause*." (Citation

omitted; emphasis added.) Id.; see also *Augeri* v. *C. F. Wooding Co.*, 173 Conn. 426, 429, 378 A.2d 538 (1977) ("at a prejudgment remedy hearing a good defense . . . will be enough to show that there is no 'probable cause that judgment will be rendered in the matter in favor of the plaintiff' ").

In the present case, the defendant contends that, because it raised a breach of fiduciary duty defense, and the court found that Harp owed a fiduciary duty to the defendant and Court Hill, and because the court is required by § 52-278d (a) to consider probable cause in light of this defense before granting a prejudgment remedy, the plaintiff was required to establish probable cause that the dealings underlying its cause of action were fair.[6] He contends that the court's ultimate conclusions that it "[did] not have sufficient information . . . to assess the ultimate strength of [the] . . . fiduciary duty defense" and could not make "any prediction . . . regarding the ultimate fate of the fiduciary duty defense" demonstrate that the court committed clear error by issuing a prejudgment remedy when it did not find probable cause to believe that the plaintiff would be successful in meeting its shifted burden of proof on the breach of fiduciary duty defense. Furthermore, during oral argument before this court, the defendant repeatedly argued that the plaintiff could meet its burden at the prejudgment remedy hearing only by producing clear and convincing evidence of fair dealing. We agree with the defendant's conclusion, but not its representations as to the plaintiff's burden of proof on an application for a prejudgment remedy.

[6] The court found, and the parties do not dispute, that the plaintiff, having acquired the Court Hill collateral notes after the notes were in default, is not a holder in due course under General Statutes § 42a-3-302 (a), and that the plaintiff is subject to any personal defenses that the defendant could have asserted against Harp and Renaissance. The parties also agree that the plaintiff stands in Harp's shoes and owes a fiduciary duty to the defendant.

The defendant correctly points out that when a defendant asserts a defense of breach of fiduciary duty, it bears the burden of proving the existence of a relationship from which the fiduciary duty arises. "Once a [fiduciary] relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary. . . . This means that the plaintiff had the burden to prove that [it] had dealt fairly with the [defendant]." (Citation omitted; internal quotation marks omitted.) *Konover Development Corp.* v. *Zeller*, 228 Conn. 206, 219, 635 A.2d 798 (1994). "Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of proof of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence." (Internal quotation marks omitted.) Id., 229–30.

Here, as the court found, and the parties do not dispute, Harp owed a fiduciary duty to Court Hill and the defendant; it also is undisputed that the plaintiff stands in the shoes of Harp and, therefore, has the burden of proving the fairness of the transactions between Harp, Renaissance, and Court Hill. See footnote 6 of this opinion. We, therefore, agree with the defendant that the plaintiff had the burden at the prejudgment remedy hearing to establish probable cause that it could prove the fairness of the transactions, just as it had the burden to establish probable cause that it could prove the other essential elements of its claims. Where we disagree with the defendant, however, is in his assertion at oral argument that the plaintiff was obligated at the prejudgment remedy stage to prove the fairness of the transactions by clear and convincing evidence. Although that is the standard of proof that the plaintiff must meet at trial, the law is clear that the standard of proof for a prejudgment remedy is lower than the standard that a plaintiff must meet to prevail at trial. See generally

Landmark Investment Group, LLC v. *Chung Family Realty Partnership, LLC*, supra, 137 Conn. App. 370.

For example, although the usual civil burden a plaintiff must meet at trial is proof by a preponderance of the evidence, that is not the standard for the granting of a prejudgment remedy. The standard for a prejudgment remedy is instead the lower probable cause standard. See id. ("[p]roof of probable cause as a condition of obtaining a prejudgment remedy is not as demanding as proof by a fair preponderance of the evidence" [internal quotation marks omitted]). We see no reason why that same standard should not similarly apply in a case where the plaintiff has to meet a higher burden of proof, for example, clear and convincing evidence, at trial.

Nevertheless, a trial court should consider the requisite burden that the plaintiff must prove at trial when determining whether the plaintiff has demonstrated probable cause. As our Supreme Court has stated, "probable cause is a *bona fide* belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it." (Emphasis in original; internal quotation marks omitted.) *Three S. Development Co.* v. *Santore*, 193 Conn. 174, 175, 474 A.2d 795 (1984). The burden of proof the plaintiff faces at trial necessarily will affect how the trial court views whether there is a bona fide reason to believe the plaintiff could prevail. Where the plaintiff's burden at trial is proof by clear and convincing evidence, the task for the trial court in ruling on a prejudgment remedy is to determine whether, in the exercise of ordinary caution, prudence and judgment, it believes, based on the evidence presented, that the plaintiff can meet that burden at trial. Put another way, although the plaintiff does not have to prove its case by clear and convincing evidence at the prejudgment remedy hearing, it, nonetheless, must present sufficient

evidence to lead the court to conclude that it could do so at trial.[7] See *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, supra, 137 Conn. App. 370 ("the trial court's function is to determine whether there is probable cause to believe that a judgment will be rendered in favor of the plaintiff in a trial on the merits" [internal quotation marks omitted]).

Here, the court did not conduct such an analysis. In fact, it does not appear that the court placed any burden whatsoever on the plaintiff to prove, by any standard, that there was probable cause to believe that the transactions at issue were conducted fairly. The only finding of probable cause made by the court was its conclusion "that there is probable cause to sustain the validity of [the] plaintiff's claim on the promissory notes at issue. . . . They are in default, all conditions precedent have been satisfied or waived, and [the] plaintiff is entitled to obtain payment *absent a valid defense*." (Emphasis added.)

After rejecting the defendant's other defenses as lacking merit, the court went on to explain: "The breach of fiduciary [duty] defense is not a trivial one, and will require further litigation before its merits can be assessed in the full light of day. The nature and chronology of the underlying loan transactions raise questions about whether Harp's conduct . . . [was] consistent with his fiduciary duties to [the defendant]. . . . There is no reason to believe, on the present state of the record, that [the defendant] was aware of any aspect of the [Muni] loan or the associated Court Hill notes . . . ." (Citation omitted.) The court then stated: "Again, the court does not have sufficient information

[7] We note that this test is consistent with the formulation of the burden of proof set forth by the defendant in his appellate brief. It is unclear to us why the defendant argued for a higher burden during oral argument before this court. But, because of this contention during oral argument, we conclude that it is necessary that we address this argument in our opinion.

at this point to assess the ultimate strength of [the defendant's] breach of fiduciary duty defense. . . . The court also has no idea, on this record, about [the defendant's] role in any of the underlying business activity involving [Muni], nor do we know how the extensive transactions between Harp and [Muni] may have interacted, in whole or in part, with other transactions between or among the Court Hill partners, including [the defendant]. . . . The important point is that, in the court's mind, too little is known presently for any prediction to be made regarding the ultimate fate of the fiduciary duty defense. . . . The only certainty at this time, based on the limited facts known to the court, is that legitimate questions have been raised under the circumstances."

From the court's discussion, it is clear that the court made no finding that the plaintiff had established probable cause as to the fairness of the transactions at issue. It merely stated that it could not make "any prediction . . . regarding the ultimate fate of the fiduciary duty defense." Such a finding, without more, should have led to a conclusion that the plaintiff had failed to meet its burden, and should have resulted in the denial of the prejudgment remedy. Instead, by granting the prejudgment remedy in the absence of any finding that the plaintiff had met its burden, it appears that the court improperly placed the burden of proving the unfairness of the transactions on the defendant.

The plaintiff argues that the trial court clearly considered the breach of fiduciary duty defense in its decision because that was the only basis for reducing the plaintiff's prejudgment remedy from the $3 million it requested to $1 million. There is no question that the court's concerns about whether Harp violated his fiduciary duty to the defendant affected the size of the prejudgment remedy awarded. In fact, the court stated

that the "amount [of the prejudgment remedy] represents the court's best effort, on the present record, to account for all of the factors discussed above." The problem is that a prejudgment remedy in any amount required that the plaintiff establish probable cause that it could prove that the transactions were fair and thereby defeat the defendant's breach of fiduciary duty defense. Yet, the trial court made no such finding. Instead, the court found that the breach of fiduciary duty defense was not trivial, raised several unanswered questions, and left the court with an inability to make any prediction as to the outcome of the defense. Such findings are contrary to a conclusion that a party has met its burden to establish probable cause.

The plaintiff also argues that there was sufficient evidence in the record to support a finding that it met any burden it might have had to establish probable cause for the fairness of the transactions. In particular, the plaintiff points to the testimony of Matthew Harp, the current president of Renaissance. Matthew Harp testified to his understanding that the defendant had been kept informed of the basis for the Court Hill notes and had been provided with documents regarding Court Hill's obligations to Renaissance. This argument cannot be squared though with the court's specific finding that "[t]here is no reason to believe, on the present state of the record, that [the defendant] was aware of any aspect of the [Muni] loan or the associated Court Hill notes." That the court made a finding that contradicts the primary evidence that the plaintiff argues established probable cause further confirms that there was no basis for a finding of probable cause and the court never made one.

We conclude that the plaintiff was required to present evidence to establish probable cause to believe that (1) the plaintiff would be successful on the merits of its cause of action *and* (2) the plaintiff engaged in fair

dealing in the matters on which its cause of action is based. The trial court then was required to assess whether such probable cause existed before granting a prejudgment remedy. We further conclude, on the basis of the record, that although the court made the requisite finding of probable cause to sustain the merits of the underlying action *before* taking into consideration the defense of breach of fiduciary duty, the trial court thereafter did not make the requisite finding that there was probable cause to believe that the plaintiff would overcome that defense by demonstrating that it had engaged in fair dealing. Because the plaintiff bears the burden of proof on this issue, the failure to make such a finding has the same effect as if the court failed to find probable cause as to an essential element of the plaintiff's breach of contract claim, for example, the existence of the notes. There is clear error.

The judgment granting the prejudgment remedy in the amount of $1 million is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

CARLTON MARTIN *v.* COMMISSIONER OF CORRECTION (AC 39202)

Alvord, Sheldon and Bishop, Js.

Syllabus

The petitioner, who had been convicted of, inter alia, the crime of felony murder in connection with the shooting death of the victim, filed a second petition for a writ of habeas corpus, claiming, inter alia, that he was denied his due process rights under the federal and state constitutions because his conviction was obtained based on evidence of comparative bullet lead analysis, a forensic technique used by the Federal Bureau of Investigation (FBI) that, at the time of the petitioner's criminal trial, was widely accepted and routinely admitted by courts but was subsequently discredited. At the petitioner's criminal trial, an FBI agent,

L, testified that her examination of bullets, using the lead analysis, showed that the bullets recovered from the victim's body and the crime scene came from the same box of bullets seized from the petitioner's bedroom. The petitioner argued that the introduction of essential evidence that later turned out to be false or scientifically invalid deprived him of his due process rights and entitled him to a new trial without the taint of false evidence. He also claimed that he received ineffective assistance from D, the counsel who had represented him with respect to his first habeas petition, because D failed, inter alia, to properly challenge L's testimony as to her examination of bullets using lead analysis. The habeas court rendered judgment denying the habeas petition, concluding, inter alia, that no violation occurred on the basis that the petitioner had presented no evidence that the state actors were aware of defects in lead analysis evidence at the time of the petitioner's criminal trial and that the petitioner had failed to show that the lead analysis evidence prejudiced his case. The habeas court, thereafter, granted the petition for certification to appeal, and the petitioner appealed to this court. *Held:*

1. The habeas court properly concluded that the petitioner was not deprived of his constitutional due process right to a fair trial by the admission of L's testimony regarding the lead analysis evidence, as this court was not left with the belief that but for L's testimony, the petitioner most likely would not have been convicted; the more significant forensic evidence was the testimony that the pistol that the petitioner had given to a witness to conceal was the same one used to shoot the victim, and that the ammunition seized from the petitioner's bedroom closet was of the same type and had the same coating as the bullets recovered from the crime scene, and because that evidence was unaffected by and unrelated to L's testimony regarding lead analysis, it was very unlikely that the jury's determination of guilt would have been different had L's testimony not been presented to the jury.
2. The habeas court properly rejected the petitioner's claim that D provided ineffective assistance in handling the claim that the lead analysis evidence lacked scientific validity; this court having concluded that there was no reasonable probability that but for L's testimony, the petitioner would not have been convicted, the petitioner could not prove that he was prejudiced by D's performance, especially given the overwhelming evidence of the petitioner's guilt, much of which was unaffected by and unrelated to L's testimony, and the petitioner also failed to demonstrate deficient performance by D, as the petitioner presented no basis from which this court could conclude that his trial counsel's conduct fell outside the wide range of reasonable professional assistance, and, therefore, the habeas court properly concluded that because the petitioner failed to establish that his trial counsel rendered ineffective assistance in failing to challenge the then-uncontroverted lead analysis evidence, D could not have been deficient in failing to raise that meritless claim.

Argued October 23, 2017—officially released February 13, 2018

Procedural History

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

Darcy McGraw, for the appellant (petitioner).

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Carlton Martin, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, he claims that the court erred in: (1) rejecting his claim that his due process right to a fair trial under the state and federal constitutions was violated by the introduction of testimony from an agent with the Federal Bureau of Investigation (FBI) at his underlying criminal trial, which was later determined to be scientifically invalid; and (2) concluding that his habeas counsel did not render ineffective assistance of counsel. We affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of the petitioner's appeal. In 2000, following a jury trial during which the petitioner was represented by Attorney Robert Field, the petitioner was convicted of felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), and five counts of tampering with a witness in violation of General Statutes § 53a-151. The petitioner was sentenced to a total effective sentence of ninety years imprisonment.

The petitioner appealed from the judgment of conviction, and this court set forth the facts underlying his conviction. "At 6 a.m., on January 18, 1999, the [petitioner] called Nicole Harris and asked her to drive from Bridgeport to Danbury to pick up his cousin, Tommie L. Martin. At approximately 8:30 a.m., Harris and the [petitioner] picked up Tommie Martin in Danbury. Harris then drove Tommie Martin and the [petitioner] to a gasoline station located next to Gallo's Hi-Way Package Store (Gallo's) in Danbury. After filling Harris' brown Chevrolet Chevette with gas, Harris drove along the street, passing Gallo's, and turned onto the street next to Gallo's, where she parked. The [petitioner] and Tommie Martin left Harris' vehicle and went toward Gallo's. After five minutes, the [petitioner] and Tommie Martin returned to the vehicle and Tommie Martin told Harris to drive around the block. When the vehicle was in front of Gallo's, Tommie Martin told Harris to drive by slowly. As Tommie Martin peered into Gallo's, he said, '[h]e's by himself,' and the [petitioner] responded, 'I have my heat on me, we'll go back in.' Tommie Martin told Harris to turn her vehicle around and park next to Gallo's. The [petitioner] and Tommie Martin left the vehicle and returned ten minutes later with bottles of E & J brandy. When they reentered the vehicle, Tommie Martin told Harris to drive onto the highway. While driving toward Bridgeport, the [petitioner] and Tommie Martin talked excitedly and were asking each other, '[W]as it worth it?' Shortly thereafter, police were called to the liquor store, where they found the victim, Robert Gallo, lying motionless, having been shot multiple times. The cash register had been disturbed, and two bottles of E & J brandy were missing. Gallo died as a result of his injuries. The [petitioner] subsequently told Harris that he and Tommie Martin were involved in the robbery and shooting at Gallo's." *State* v. *Martin*, 77 Conn. App. 778, 781, 825 A.2d 835, cert. denied, 266 Conn. 906, 832 A.2d 73 (2003).

"On January 20, 1999, the [petitioner] called Harris and told her to come to his apartment to pick up something. When she arrived, the [petitioner] handed Harris a shoebox containing a .25 caliber handgun wrapped in a towel." Id., 781–82. "On January 25, 1999, the Danbury police department obtained a search warrant for the [petitioner's] and Tommie Martin's residence at 2108 Seaview Avenue in Bridgeport. The police executed the warrant. The police seized a sawed-off shotgun, a box of .25 caliber ammunition, a .22 caliber firearm and a magazine for a .22 caliber firearm." Id., 782. "While awaiting trial, the [petitioner] attempted to contact Harris from prison and did contact associates of Harris to urge her not to cooperate with the state and to dispose of the .25 caliber handgun, which she had been hiding." Id. "In March, 1999, Harris turned the gun over to the police, and ballistics tests confirmed that it had been used to fire the bullets that killed Gallo."[1] Id.

Attorney James Streeto represented the petitioner with respect to his appeal. This court affirmed the petitioner's conviction, rejecting arguments that the trial court improperly "(1) failed to recuse itself, (2) denied his motion to suppress certain letters and telephone call tapes, (3) refused to give a requested jury instruction on specific intent, (4) charged the jury as to consciousness of guilt, (5) denied his motion to suppress evidence pursuant to *Franks* v. *Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), and (6) denied him his constitutional right to present a defense as a result of certain evidentiary rulings."[2] Id., 780, 818.

[1] This court also set forth facts that reasonably could have been found by the jury from the evidence that the petitioner now claims violated his due process rights. This court stated: "Subsequent laboratory analysis of the bullets recovered from the victim's body and those in a box of .25 caliber cartridges found at the [petitioner's] apartment revealed their chemical elements to be indistinguishable. They all had come from that box of ammunition." *State* v. *Martin*, supra, 77 Conn. App. 782.

[2] In 2001, the petitioner filed a petition for a new trial on the basis of newly discovered evidence. See *Martin* v. *Flanagan*, 107 Conn. App. 544, 545, 945 A.2d 1024 (2008). Specifically, he claimed that a prison inmate,

In 2006, the petitioner, represented by Attorney Sebastian DeSantis, filed his first petition for a writ of habeas corpus (first habeas petition). In his amended petition, dated August 31, 2009, the petitioner alleged that (1) he was denied the effective assistance of appellate counsel in violation of the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution, (2) his conviction should be vacated because of newly discovered evidence disclosed by the FBI to the State's Attorney, and (3) he was prejudiced by the late disclosure of *Brady* material. The first habeas petition was tried before the court, *T. Santos, J.*, which issued a memorandum of decision on November 16, 2011, denying the petition. With respect to the claim of newly discovered evidence, the habeas court found such claim "indistinguishable, especially in light of the petitioner's assertion that this evidence is clear and convincing and would have proven that he is not guilty, from an actual innocence claim." *Martin* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-06-4001122-T (November 16, 2011). The court found that the evidence produced in support of the claim, consisting of two letters from the FBI regarding the comparative bullet lead analysis used in the petitioner's case, fell short of the actual innocence standard. Following the granting of certification to appeal, the petitioner appealed, and this court affirmed the judgment of the habeas court by memorandum decision issued March 5, 2013. *Martin*

Terrell Stanton, had made statements to a third party exculpating the petitioner in the crimes for which he was convicted and incriminating himself. Id., 547–48. The trial court granted the state's motion in limine to preclude the admission of a former prison inmate's testimony recounting what Stanton told him. Id., 548. The court found such statements failed to satisfy the trustworthiness component necessary for the admission of third party statements against penal interest under the Connecticut Code of Evidence. Id. The court further denied the petition for a new trial and granted certification to appeal. On appeal, this court affirmed the judgment of the trial court. Id.

v. *Commissioner of Correction*, 141 Conn. App. 903, 60 A.3d 412 (2013).

In August, 2013, the petitioner filed a second petition for a writ of habeas corpus, the petition at issue in this appeal. In his second amended petition, he alleged: (1) a violation of his constitutional rights to due process under the fourteenth amendment to the United States constitution and article first, § 8, of the Connecticut constitution on the basis that his conviction was obtained using evidence of comparative bullet lead analysis that was subsequently discredited by the FBI and that there existed a "reasonable probability that but for [such] evidence . . . the petitioner would not have been convicted"; and (2) ineffective assistance of Attorney DeSantis, who represented the petitioner with respect to his first habeas petition. Specifically, the petitioner claimed that Attorney DeSantis was ineffective in failing to (1) challenge the testimony concerning comparative bullet lead analysis from FBI Agent Kathleen Lundy, (2) consult with a metallurgist to challenge the testimony of Lundy, (3) present forensic evidence with respect to the petitioner's seized clothing, and (4) present testimony of a crime reconstruction expert. The petitioner also claimed that Attorney DeSantis was ineffective in failing to consult with and present the testimony of an expert regarding comparative bullet lead analysis evidence. The second habeas petition was tried before the habeas court, *Sferrazza*, *J.*, which heard testimony from the petitioner, Attorney DeSantis, and William Tobin, a forensic metallurgist material scientist.

In its memorandum of decision, the habeas court described Lundy's testimony during the petitioner's criminal trial. Lundy testified as to her examination of bullets recovered from the victim's body and the crime scene, and bullets from cartridges in the ammunition box seized from the petitioner's bedroom closet using

a technique known as comparative bullet lead analysis (CBLA). Lundy's testimony purportedly showed that the bullets retrieved from the victim's body and the crime scene came from the same box of ammunition seized from the petitioner's bedroom closet. The FBI previously had used CBLA to deduce whether a lead bullet came from a particular cartridge box from 1996 until it discontinued such examinations on September 1, 2005, after an independent research committee of experts concluded that chemical comparison of trace elements found within bullets through CBLA did not produce sufficiently distinct outcomes to enable an analyst to conclude that bullets with the same chemical profiles come from the same box.

The habeas court rejected the petitioner's claim that the admission of CBLA evidence violated his due process rights, concluding that no violation occurred on the basis that the petitioner had presented no evidence that the state actors were aware of defects in CBLA evidence at the time of the petitioner's criminal trial. The court further concluded that the petitioner had failed to show that the CBLA evidence prejudiced his case, explaining that the more salient forensic evidence was the showing that the pistol the petitioner had given to Harris, which Harris had turned over to the police, was the pistol used to shoot the victim.

With respect to the petitioner's ineffective assistance of habeas counsel claim, the habeas court found that because the petitioner's trial counsel, Attorney Fields, could not have been deficient in failing to challenge the then-uncontroverted CBLA evidence, Attorney DeSantis could not be faulted for failing to claim ineffective assistance by Attorney Fields in the petitioner's first habeas trial. The court denied the petition and granted certification to appeal. This appeal followed.

"Initially, we set forth the appropriate standard of review for a challenge to the denial of a petition for a

writ of habeas corpus when certification to appeal is granted. The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous." (Citation omitted; internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 126 Conn. App. 453, 456–57, 11 A.3d 730, cert. denied, 300 Conn. 932, 17 A.3d 69 (2011).

I

The petitioner first claims that the habeas court erred in rejecting his claim that his due process right to a fair trial under the state and federal constitutions was violated by the introduction of false evidence, consisting of Lundy's testimony regarding CBLA.[3] He claims that "his right [to] a fair trial was violated because, due to the admission of flawed 'forensic' evidence by an incredible witness who was cloaked with the designation 'expert,' the adversarial system failed and he is therefore entitled to a new trial without the taint of false evidence." We disagree.

We first note that the petitioner does not claim that Lundy committed perjury. Moreover, in contrast to many of the cases relied on by the petitioner, the petitioner in the present case does not claim that the prosecution knew or should have known of flaws in Lundy's

[3] Although the petitioner argues that his due process rights under article first, § 8, of the Connecticut constitution were violated, he fails to provide an independent analysis under the state constitution. Therefore, we deem abandoned any state constitutional claim. *State* v. *Bennett*, 324 Conn. 744, 748 n.1, 155 A.3d 188 (2017).

scientific testimony at the time of the petitioner's criminal trial.[4] In fact, he recognizes that "all parts of the system—prosecutor, defense counsel and the court—were under the false impression that the witness' testimony was true to a degree of scientific certainty . . . ." Instead, the petitioner claims that the introduction of "essential evidence" that "later turns out . . . [to be] false and/or scientifically invalid" deprives a criminal defendant of his due process rights "because the adversarial process fails."

As this court has recently acknowledged in *Toccaline* v. *Commissioner of Correction*, 177 Conn. App. 480, 492–93, 172 A.3d 821, cert. denied, 327 Conn. 986, A.3d (2017), neither our Supreme Court nor the United States Supreme Court has "addressed the question of whether the state's unknowing use of perjured testimony violates due process principles." (Internal quotation marks omitted.) See also *Westberry* v. *Commissioner of Correction*, 169 Conn. App. 721, 735, 152 A.3d 87 (2016) ("[i]t remains an open question in Connecticut whether the state's *unknowing* use of perjured testimony at trial can violate due process" [emphasis in original]), cert.

[4] See, e.g., *Napue* v. *Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) (expressing principle that "a state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction" and holding that petitioner's due process rights were violated where witness lied in denying that he had been promised consideration for his testimony, and state's attorney knew that witness was lying); *Mooney* v. *Holohan*, 294 U.S. 103, 110, 55 S. Ct. 340, 79 L. Ed. 791 (1935) (briefly reciting due process principles in response to petitioner's claim that state's knowing use of "perjured testimony to obtain the conviction and the deliberate suppression of evidence to impeach that testimony constituted a denial of due process of law"); *Pyle* v. *Kansas*, 317 U.S. 213, 216, 63 S. Ct. 177, 87 L. Ed. 214 (1942) (petitioner "set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him"); *Giglio* v. *United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972) (addressing a *Brady* violation on basis of nondisclosure of promise made to witness in return for his cooperation).

denied, 324 Conn. 914, 153 A.3d 1289 (2017). In *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 801–802, 138 A.3d 908 (2016), our Supreme Court expressly declined to decide that question, instead concluding that the petitioner had not established that the witnesses had committed perjury, and even without the witnesses' testimony, there was no reasonable probability that the petitioner would not have been convicted. Accordingly, the petitioner had not been deprived of his constitutional due process right to a fair trial. Id., 802.

Our Supreme Court has noted that a "majority of the federal circuit courts require a knowing use of perjured testimony by the prosecution to find a violation of due process." (Internal quotation marks omitted.) Id., 801; see also *Toccaline*, supra, 177 Conn. App. 492–93 n.12 (noting that "[t]he clear majority of jurisdictions require that a petitioner must prove that the prosecutor *knew or should have known* that the testimony at issue was false in order to establish a due process violation" [emphasis in original]). In *Ortega* v. *Duncan*, 333 F.3d 102, 108 (2d Cir. 2003), however, the United States Court of Appeals for the Second Circuit held that "when false testimony is provided by a government witness without the prosecution's knowledge, due process is violated only if the testimony was material and the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." (Footnote omitted; internal quotation marks omitted.)[5]

This court, in *Toccaline*, supra, 177 Conn. App. 491–92, rejected the petitioner's claim that his due process

[5] *Ortega* involved a claim of perjured testimony, and it is unclear whether *Ortega* requires a petitioner to show that the challenged testimony was in fact perjured or only that the testimony was false, as is claimed here. Because we conclude that the petitioner's due process claim fails even under the standard applied to perjured testimony in *Ortega*, we need not address this question. See *Toccaline*, supra, 177 Conn. App. 492 n.12 (noting uncertainty as to whether *Ortega* requires a petitioner to show that testimony was perjured or only that it was false, but concluding under *Ortega* standard that petitioner had not shown prejudice by admission of false testimony).

rights were violated when the prosecutor unknowingly presented the false testimony of the victim and her family members. In rejecting the petitioner's claim, the court recognized that "there is no Connecticut case that supports the proposition that the petitioner's due process rights could have been violated by the prosecutor's presentation of false testimony when the prosecutor neither knew nor should have known that the testimony was false . . . ." Id., 493.[6] The court went on to conclude that "even under the more lenient approach taken by the Second Circuit in *Ortega*, [the petitioner's] claim would still fail." Id. As in *Toccaline*, even if this court were to apply the *Ortega* standard, the petitioner cannot prevail on his due process claim because "there is no reasonable probability" that but for Lundy's testimony, "the petitioner would not have been convicted."[7] See *Horn* v. *Commissioner of Correction*, supra, 321 Conn. 801 (declining to decide whether to adopt *Ortega* standard and instead concluding that petitioner could not prevail under that standard).

[6] The petitioner challenges the habeas court's reliance upon *Lewis* v. *Commissioner of Correction*, 116 Conn. App. 400, 411, 975 A.2d 740, cert. denied, 294 Conn. 908, 982 A.2d 1082 (2009), as support for its conclusion that in order to prevail on a due process claim involving false evidence, the petitioner would be required to prove that the prosecutor intentionally presented false evidence. The petitioner further claims that *Lewis* is "no longer good law in Connecticut." *Lewis* is distinguishable in that, there, the petitioner failed to present his perjury claim to the habeas court in the context of a claimed violation of due process and further failed to allege how the claimed perjury affected the outcome of his trial. Id., 412 n.9. We need not address the petitioner's claim that the court's reliance on *Lewis* was misplaced, given that this court's decision in *Toccaline*, which was released after the habeas court's decision in this case, is procedurally analogous to the petitioner's claim. *Toccaline*, rather than *Lewis*, guides this court's analysis.

[7] The petitioner provides no legal support for his contention that this court should review his claim to determine whether the introduction of the CBLA evidence was "harmless beyond a reasonable doubt." As the respondent argues, that standard is used to assess harm in the context of a direct appeal of a claimed constitutional violation and is inapplicable in the present habeas action. We agree, and accordingly, we reject the petitioner's request that this court engage in harmless error review.

In its memorandum of decision, the habeas court detailed the evidence presented at the petitioner's criminal trial, in addition to Lundy's testimony, supporting his conviction. Evidence was presented that an individual named Eugene Laurel, or "Banana," sold a stolen, .25 caliber Titan pistol to the petitioner and his cousin. The petitioner was identified as having participated in the purchase of the gun and as having had access to the gun after they bought it. Together with the pistol, Banana gave the men an ammunition box partially filled with .25 caliber Winchester cartridges. Police later searched the apartment where the petitioner lived and seized an ammunition box with .25 caliber Winchester cartridges from the petitioner's bedroom closet.

The jury also heard the testimony of Nicole Harris, the owner and driver of the vehicle used during the robbery, who testified that the petitioner made statements showing his intent to rob the store and indicated that he had a gun. She testified that after the robbery, the petitioner admitted to shooting the victim. Harris further testified that a few days after the shooting, the petitioner gave her a shoe box containing the .25 caliber pistol and asked her to conceal it for him.[8] Harris later turned the pistol over to the police.

[8] The petitioner claims that the jury "had before it the difficult task of determining who was telling the truth," given that Harris drove the getaway car and received immunity in exchange for her testimony. He claims that Lundy's testimony was especially harmful because it was the sole evidence tying the murder weapon to the petitioner, other than the remaining witnesses' self-serving testimony.

The jury was well aware of the fact that Harris had entered into an agreement pursuant to which she would not be prosecuted if she testified truthfully. She testified regarding the agreement on direct and cross-examination, and the written agreement was entered into evidence as a full exhibit and read to the jury during cross-examination. Whether a witness' testimony is believable is "a question solely for the jury. It is . . . the absolute right and responsibility of the jury to weigh conflicting evidence and to determine the credibility of the witnesses." (Internal quotation marks omitted.) See *State* v. *Vazquez*, 119 Conn. App. 249, 255–56, 987 A.2d 1063 (2010) (where testimony of two witnesses for state differed in some respects, evidence that one witness' plea agreement hinged on his testifying against defendant,

James Stephenson, a criminalist with the Connecticut State Department of Public Safety's Division of Forensic Services Forensic Science Laboratory, testified during the petitioner's criminal trial that the cartridges in the ammunition box seized from the petitioner's bedroom closet matched those used to commit the murder with respect to the caliber, type, manufacturer, and coating. Stephenson further testified that the cartridge casings recovered from the crime scene were fired from the .25 caliber pistol turned over by Harris. The petitioner admitted calling his girlfriend from prison and, referring to the .25 caliber Titan as "dirty dishes," asking her to tell Harris to get rid of the gun. See *State* v. *Martin*, supra, 77 Conn. App. 817. The petitioner also engaged in multiple acts of witness tampering, which the habeas court found to show a strong consciousness of guilt.

Lundy, then an FBI agent specializing in CBLA, testified as to her opinion based on her examination of the bullets. She testified that the bullets recovered from the crime scene and the victim's body came from the same manufacturing lot as those bullets found in the ammunition box in the petitioner's bedroom closet.[9]

"merely provide[d] further information on which the jury made its credibility determinations").

[9] Lundy testified, in relevant part, as to her conclusions based on the examination she conducted of seven bullets and bullet fragments recovered from the crime scene and nine bullets from cartridges in the ammunition box:

"[The Prosecutor]: Based on your examination of the bullets, which you just described, what conclusions did you draw regarding the seven bullets and bullet fragments as compared to the nine bullets from the box?

"[The Witness]: When the analysis was completed, it was determined that the seven bullets, or bullet fragments, and the nine bullets from the cartridges in the box, were what we call, analytically indistinguishable in composition. And, basically, what that means is, if I were to hand you those seven bullets and the nine bullets from the cartridges, and ask you to sample them again, and then give me the samples blindly so that I didn't know which were from the fired bullets and which were the bullets from the cartridges, after I conducted the analysis, I still couldn't tell you. All the specimens were chemically the same.

"[The Prosecutor]: And what does that indicate to you about their time of manufacture and their place of manufacture?

Lundy's testimony, the habeas court concluded, was "minimally corroborative of the testimony of Banana, the petitioner's cousin, and Harris as to the petitioner's possession of the weapon and ammunition used in the shooting."

We agree with the habeas court's conclusion that the more significant forensic evidence was the testimony of Stephenson, who opined that the pistol the petitioner had given to Harris, which Harris turned over to police, was the same one used to shoot the victim. Stephenson further testified that the ammunition seized from the petitioner's bedroom closet was of the same type and had the same coating as the bullets recovered from the crime scene. This evidence was unaffected by and unrelated to Lundy's testimony, and we agree with the habeas court that it is very unlikely that the jury's determination of guilt would have been different had Lundy's testimony regarding CBLA not been presented to the jury. Accordingly, under the *Ortega* standard, we are not left with a firm belief that but for Lundy's testimony, the petitioner would most likely not have been convicted, and, therefore, the petitioner was not deprived

"[The Witness]: Based on the results and my experience, the conclusion that I came to was that all those bullets were manufactured from the same source, or melt of lead. And because the live ammunition was a Winchester manufacture, that would have occurred at the Winchester manufacturing plant in East Alton, Illinois.

"[The Prosecutor]: And were those seven bullets and bullet fragments, and the nine bullets from the box, would they have been manufactured on or near the same time?

"[The Witness]: Yes, they would have.

"[The Prosecutor]: And would you expect other bullets manufactured on or about that same day from that same batch of lead to have the same analytically indistinguishable lead component?

"[The Witness]: Yes, I would. Based on experience, I would expect that other boxes of this same type—this .25 auto Winchester ammunition, it was loaded with the copper coated expanding point bullets. If I were to analyze other boxes made at the same time, I would expect to find the same composition."

of his constitutional due process right to a fair trial.[10] See *Ortega* v. *Duncan*, supra, 333 F.3d 108.

II

The petitioner next claims that the habeas court erred in concluding that his habeas counsel, Attorney DeSantis, did not render ineffective assistance of counsel. The petitioner claims that Attorney DeSantis improperly handled the petitioner's claim that the CBLA evidence lacked scientific validity. Specifically, the petitioner claims that Attorney DeSantis failed to present the testimony of an expert with whom he had consulted, and "merely introduced a report from the FBI stating that it no longer used" CBLA evidence. Moreover, the petitioner claims that Attorney DeSantis incorrectly presented the CBLA evidence claim as a claim of actual innocence, then "failed to introduce any evidence sufficient to establish affirmatively that the petitioner was actually innocent of that crime." We disagree that Attorney DeSantis rendered ineffective assistance of counsel.

"The use of a habeas petition to raise an ineffective assistance of habeas counsel claim . . . was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle

[10] Because we resolve the petitioner's claim on the basis that he has not shown a reasonable probability that but for Lundy's testimony, he would not have been convicted, we decline to reach the petitioner's broader claims of error that "it is contrary to clearly established Connecticut law to assert that a petitioner is not permitted to raise a claim of due process violation in habeas corpus" and that a due process claim based on the unknowing presentation of false evidence need not be presented in the context of an actual innocence claim. Likewise, we need not address the respondent's arguments that the flaws in CBLA evidence are "not beyond the ken of the adversary process," that "parts of Lundy's testimony . . . were not entirely 'false,' and [that] not all courts have fully rejected CBLA testimony."

to challenge the effectiveness of habeas counsel is through a habeas petition. . . . [T]he court explained that [t]o succeed in his bid for a writ of habeas corpus, the petitioner must prove *both* (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . . As to each of those inquiries, the petitioner is required to satisfy the familiar two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense." (Emphasis in original; internal quotation marks omitted.) *Abreu* v. *Commissioner of Correction*, 172 Conn. App. 567, 574–75, 160 A.3d 1077, cert. denied, 326 Conn. 901, 162 A.3d 724 (2017).

"Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy *Strickland* twice." (Internal quotation marks omitted.) Id., 575. Our Supreme Court has characterized this burden as presenting a "herculean" task. *Lozada* v. *Warden*, supra, 223 Conn. 843; see also *Alterisi* v. *Commissioner of Correction*, 145 Conn. App. 218, 226–27, 77 A.3d 748, cert. denied, 310 Conn. 933, 78 A.3d 859 (2013).

With respect to the prejudice prong of *Strickland*, it is not sufficient "to show that [counsel's] . . . errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Abreu* v. *Commissioner of Correction*, supra,

172 Conn. App. 579. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.) *State* v. *Dupigney*, 295 Conn. 50, 61, 988 A.2d 851 (2010).

On appeal, the petitioner challenges only Attorney DeSantis' treatment and presentation of his habeas claims related to the scientific invalidity of Lundy's testimony during his criminal trial. We have already concluded in part I of this opinion that there is no reasonable probability that but for Lundy's testimony, the petitioner would not have been convicted. In light of this conclusion, the petitioner cannot prove prejudice under *Strickland*. Even if Attorney DeSantis had consulted with and presented to the habeas court the testimony of both a metallurgist and an expert on CBLA evidence,[11] introduced additional exhibits beyond the FBI report, and presented the challenge to the CBLA evidence as a claimed due process violation rather than an actual innocence claim, the petitioner has failed to establish that there is a reasonable probability that the court in the first habeas proceeding would have found that the petitioner was entitled to a reversal of his judgment of conviction and a new trial. Given the overwhelming evidence of the petitioner's guilt, much of which was unaffected by and unrelated to Lundy's testimony, the petitioner cannot establish a reasonable probability that the first habeas court would have found the prejudice prong of *Strickland* satisfied. See *Crocker* v. *Commissioner of Correction*, 126 Conn. App. 110, 121, 10 A.3d 1079 (concluding that petitioner's ineffective assistance of habeas counsel claim failed because petitioner had not established prejudice, where challenged testimony during criminal trial was "far from the only evidence linking the petitioner to the murder"

[11] In fact, as the habeas court found, Attorney DeSantis had consulted with a metallurgist, but declined to call him as a witness and elected to rely on the FBI report containing similar information.

and where the "the state also introduced other significant evidence that was probative of the petitioner's guilt"), cert. denied, 300 Conn. 919, 14 A.3d 333 (2011).

While a reviewing court can find against a petitioner on either prong of *Strickland*; *Small* v. *Commissioner of Correction*, 286 Conn. 707, 713, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008); we also conclude, in agreement with the habeas court, that the petitioner has failed to satisfy the performance prong. The habeas court concluded that because the petitioner failed to establish that his trial counsel rendered ineffective assistance, habeas counsel could not have been deficient in failing to raise that meritless claim.

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential and courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (Citations omitted; internal quotation marks omitted.) *Gerald W.* v. *Commissioner of Correction*, 169 Conn. App. 456, 464, 150 A.3d 729 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

We conclude, as the habeas court did, that the United States Supreme Court's decision in *Maryland* v. *Kulbicki*, U.S. , 136 S. Ct. 2, 3, 193 L. Ed. 2d 1 (2015),

is dispositive of the petitioner's claim. In that case, FBI agent Ernest Peele, the state's expert regarding CBLA, testified at the defendant's criminal trial in 1995 that "the composition of elements in the molten lead of a bullet fragment found in the [defendant's] truck matched the composition of lead in a bullet fragment removed from the victim's brain . . . ." Id. Peele further testified that a bullet from the defendant's gun was similar enough to the bullet fragments that "the two bullets likely came from the same package." Id. In 2006, by which time CBLA evidence was no longer generally accepted by the scientific community, the defendant raised a claim that his trial attorneys were ineffective in failing to question the legitimacy of the CBLA evidence. Id.

The Court of Appeals of Maryland agreed with the defendant, concluding that his trial counsel should have discovered a report coauthored by Peele that "presaged the flaws in CBLA evidence." Id. One of the findings in the report was that "the composition of lead in some bullets was the same as that of lead in other bullets packaged many months later in a separate box." Id. The Court of Appeals of Maryland concluded that this one finding should have led the report's authors to doubt the faulty assumption that bullets produced from different sources of lead have unique chemical compositions. Id. The United States Supreme Court reversed, concluding that there was no reason to believe that a diligent search would have uncovered the report. Id., 4. Moreover, even if it had, the report's ultimate conclusion was that CBLA was a "valid investigative technique," and therefore, it was questionable whether trial counsel would have brought it to the attention of the jury. Id.

In reversing, the United States Supreme Court also emphasized that the reasonableness of counsel's conduct must be judged as of the time of counsel's conduct.

Id. In 1995, CBLA evidence was widely accepted and admitted, and courts routinely admitted CBLA evidence until 2003. Id. Accordingly, the court concluded that "[c]ounsel did not perform deficiently by dedicating their time and focus to elements of the defense that did not involve poking methodological holes in a then-uncontroversial mode of ballistics analysis." Id.

The petitioner in the present case was tried in 2000, within the time period in which CBLA evidence was regularly admitted.[12] The petitioner himself notes that the National Academy of Science did not disavow the methodology underlying CBLA evidence until 2007. Moreover, the CBLA evidence admitted at the petitioner's trial is very similar to that considered by the United States Supreme Court in *Maryland* v. *Kulbicki*, supra, 136 S. Ct. 4. As in that case, the petitioner in the present case has provided no support for the conclusion that his trial counsel was "constitutionally required to predict the demise of CBLA." Id. The question is not "what counsel should have done to constitute the proper representation of the [petitioner] considering the case in retrospect, but rather, whether in the circumstances, as viewed at the time, the [petitioner] received effective assistance of counsel." (Internal quotation marks omitted.) *Lewis* v. *Commissioner of Correction*, 89 Conn. App. 850, 861–62, 877 A.2d 11, cert. denied, 275 Conn. 905, 882 A.2d 672 (2005); see also *Crocker* v. *Commissioner of Correction*, 101 Conn. App. 133, 136, 921 A.2d 128 ("[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to

[12] We note that Lundy's testimony did not go entirely unchallenged. On cross-examination, the petitioner's counsel elicited from Lundy recognition that if a local gun store ordered twenty-five boxes of the same product manufactured at the same time, the "boxes could have the same compositions in them." Lundy also acknowledged that she could not give a figure as to how many bullets produced from one melt of lead would have different compositions.

evaluate the conduct from counsel's perspective at the time''), cert. denied, 283 Conn. 905, 927 A.2d 916 (2007).

The petitioner has presented this court with no basis from which we could conclude that his trial counsel's conduct fell outside the wide range of reasonable professional assistance. Accordingly, we agree with the habeas court that the petitioner failed to demonstrate that his trial counsel's performance was deficient and, therefore, his ineffective assistance of counsel claim against his habeas counsel also fails. See *Jefferson* v. *Commissioner of Correction*, 144 Conn. App. 767, 773, 73 A.3d 840 (where trial counsel was not ineffective, petitioner could not demonstrate that deficient performance of habeas counsel was prejudicial), cert. denied, 310 Conn. 929, 78 A.3d 856 (2013).

The petitioner has satisfied neither the performance prong nor the prejudice prong of the *Strickland* inquiry. Accordingly, the habeas court properly rejected the petitioner's ineffective assistance of habeas counsel claim.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANTWON W.*
(AC 38915)

Lavine, Sheldon and Harper, Js.

Syllabus

The defendant, who had been convicted of six counts of the crime of sexual assault in the first degree in violation of statute (§ 53a-70 [a] [1] and [2]), and of the crimes of sexual assault in the third degree and risk of injury to a child, appealed to this court from the judgment of the trial

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

court dismissing his second motion to correct an illegal sentence. He claimed that the sentencing court improperly relied on inaccurate and unreliable information in sentencing him on three counts of sexual assault in the first degree under § 53a-70 (a) (1) because those sentences were imposed on him before a vacatur, on grounds of double jeopardy, of his conviction of three parallel counts of and associated concurrent sentences for sexual assault in the first degree under § 53a-70 (a) (2), based on the same underlying sexual assaults. Those sentences were vacated when the trial court granted the defendant's first motion to correct an illegal sentence. *Held* that the trial court did not abuse its discretion in denying the defendant's second motion to correct an illegal sentence, that court having reasonably determined that the sentencing court did not rely on inaccurate information in sentencing the defendant on his § 53a-70 (a) (1) charges and, thus, that his sentences on those charges were not imposed in an illegal manner: the defendant's claim was belied by the record, which indicated that the court explicitly imposed the five year mandatory minimum sentence for each of the three counts under § 53a-70 (a) (1) and clearly considered the defendant's conviction under the different subdivisions of the sexual assault statute separately and distinctly, and did not enhance its sentence on the counts under subdivision (1) based on the defendant's conviction of the charges under subdivision (2), or the particular conduct on which they were based, and the vacatur of the defendant's conviction of the charges under § 53a-70 (a) (2) on the basis of double jeopardy was not based on insufficient evidence or any factual or legal findings that would have invalidated the jury's guilty verdict on those charges, nor did the vacatur of the defendant's conviction of those charges render the information or statements regarding the facts underlying the jury's guilty verdict on those charges inaccurate; nevertheless, because the defendant's motion to correct an illegal sentence raised a claim that fell squarely within the common-law jurisdiction of the trial court and properly invoked the court's jurisdiction, the trial court, after properly rejecting the arguments raised in the motion correct an illegal sentence, should have denied the motion to correct rather than dismissed it, and, therefore, the form of the judgment was improper.

Argued November 13, 2017—officially released February 13, 2018

Procedural History

Substitute information charging the defendant with six counts of the crime of sexual assault in the first degree, and with the crimes of sexual assault in the third degree and risk of injury to a child, brought to the Superior Court in the judicial district of Waterbury, where the matter was tried to the jury before *Cremins*,

J.; verdict and judgment of guilty, from which the defendant appealed to this court, which affirmed the judgment of the trial court; thereafter, the court, *Fasano, J.*, granted the defendant's motion to correct an illegal sentence; subsequently, the court, *Fasano, J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Reversed*; *judgment directed.*

Peter Tsimbidaros, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Patrick J. Griffin*, state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Antwon W., appeals from the judgment of the trial court dismissing his second motion to correct an illegal sentence, in which he claimed that the sentencing court improperly relied on inaccurate and unreliable information in sentencing him on three counts of sexual assault in the first degree under General Statutes § 53a-70 (a) (1) because those sentences were imposed upon him before the vacatur, on grounds of double jeopardy, of his three parallel convictions of and associated concurrent sentences for sexual assault in the first degree under § 53a-70 (a) (2) based upon the same underlying sexual assaults. We reject the defendant's claim that the court relied upon inaccurate information in sentencing him, but conclude that the form of the judgment is improper and, therefore, remand this case with direction to deny the defendant's motion to correct an illegal sentence.[1]

[1] The defendant also claims that his sentence was illegally enhanced following the vacatur of three of his convictions and sentences by eliminating the earned risk reduction credits that he had earned prior to said vacatur and that the elimination of those credits, which he alleges constituted an increase in the length of his sentence, can be attributed to the vindictiveness of the court. The defendant did not raise these arguments in his second motion to correct, and the court therefore did not address them, and they

On May 17, 2006, the defendant was found guilty of, inter alia, three counts each of sexual assault in the first degree, in violation of § 53a-70 (a) (1) and § 53a-70 (a) (2), in connection with three separate sexual assaults on different dates. Thereafter, following the preparation of a presentence investigation report (PSI), he was sentenced, on the basis of that verdict, as follows: for each violation of § 53a-70 (a) (1), to a mandatory minimum term of five years incarceration followed by five years of special parole, with all three sentences to run consecutively to one another; for each violation of § 53a-70 (a) (2), to a term of five years incarceration followed by five years of special parole, with each such sentence to run concurrently with the sentence imposed for violation of § 53a-70 (a) (1) in connection with the same underlying sexual assaults; for a total effective sentence of fifteen years incarceration, all mandatory, followed by fifteen years of special parole.

On June 22, 2015, the trial court, *Fasano*, *J.*, granted the defendant's first motion to correct an illegal sentence, concluding that the defendant's convictions and sentences under both § 53a-70 (a) (1) and (2) violated his double jeopardy rights because he was sentenced twice for the same offense. Accordingly, the court ordered that the defendant's convictions of the three counts of sexual assault in the first degree under § 53a-70 (a) (2) be dismissed and that the sentences imposed on those convictions be vacated. As a result of the court's order, the defendant's total effective sentence on his three remaining convictions of sexual assault in the first degree in violation of § 53a-70 (a) (1), of fifteen years incarceration, all mandatory, followed by fifteen years of special parole, remained unchanged.

thus are not properly before us now. We note, however, that because the five year sentences on each of the incidents of sexual assault were mandatory minimum sentences for those convictions, the defendant was not entitled to reduce his sentences by earned risk reduction credits.

Thereafter, the defendant filed a second motion to vacate an illegal sentence, asserting that the vacatur of his parallel convictions of and concurrent sentences for sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2) required a finding that the trial court's original sentence was imposed in an illegal manner. The defendant argued that his sentence was illegal because the sentencing court relied upon inaccurate information in sentencing him. Specifically, the defendant claims that the court improperly relied, when it imposed the challenged sentences, upon information concerning the guilty verdicts underlying the three convictions that were subsequently vacated, as related to the court in the PSI and the prosecutor's comments at sentencing. He therefore argues that he "should be allowed a new sentencing hearing and/or be resentenced with accurate information." The court, *Fasano, J.*, dismissed the defendant's second motion to correct on December 9, 2015, reasoning that the original sentencing court did not rely on any of the vacated charges in imposing the defendant's sentence. From that determination, the defendant has filed this appeal.

Practice Book § 43-22 provides that "[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

"[A]n illegal sentence is essentially one [that] either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. By contrast . . . [s]entences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . *or his right*

to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . . These definitions are not exhaustive, however, and the parameters of an invalid sentence will evolve . . . as additional rights and procedures affecting sentencing are subsequently recognized under state and federal law." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Jason B.*, 176 Conn. App. 236, 243–44, 170 A.3d 139 (2017).

"[A] claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did. . . .

"[D]ue process precludes a sentencing court from relying on materially untrue or unreliable information in imposing a sentence. . . . To prevail on such a claim as it relates to a [PSI], [a] defendant [cannot] . . . merely alleg[e] that [his PSI] contained factual inaccuracies or inappropriate information. . . . [He] must show that the information was *materially* inaccurate and that the [sentencing] judge *relied* on that information. . . . A sentencing court demonstrates actual reliance on misinformation when the court gives explicit attention to it, [bases] its sentence at least in part on it, or gives specific consideration to the information before imposing sentence." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Bozelko*, 175 Conn. App. 599, 609–10, 167 A.3d 1128, cert. denied, 327 Conn. 973, 174 A.3d 194 (2017).

On appeal, the defendant reiterates the claim that he made before the trial court, arguing: "It is clear based

on the totality of the record that materially inaccurate information was made available to and then used by the trial court in imposing the original sentence in the instant matter. The substance of the information is the three counts which were later vacated and found to be improper. The [PSI] and the prosecution made repeated use of this information which has been deemed to be inappropriate. The motion to correct an illegal sentence court therefore erred in failing to adequately resentence the defendant.''

In addressing the defendant's claim that the sentencing court had relied upon his subsequently vacated convictions in imposing his sentence, the court explained: ''In this case, there's absolutely no evidence of explicit reliance on the vacated charges. That's the sex one under [§ 53a-70] (a) (2). That's the age and age difference. In fact, the evidence is just the opposite. He gives concurrent time on all the sex one's under [§ 53a-70] (a) (2), which is the age issue. He treats the conduct as three separate assaults rather than six. He gives the mandatory minimum on the [§ 53a-70] (a) (1)s, which is five years, followed by five years of special parole. That's as little as you can get because it has to add up to ten. And he runs those three incidents consecutive. He then makes all the other charges, the [§ 53a-70] (a) (2) charges, the age difference charges, concurrent. And even the state in its own argument asked that you get concurrent time on those second convictions under [§ 53a-70] (a) (2).'' On that basis, the court concluded, ''there was absolutely no reliance on the vacated charges.''

We agree with the court's conclusion that the defendant's claim is belied by the record. Our review of the August 25, 2006 sentencing transcript reveals that the court explicitly imposed the five year mandatory minimum sentence for each of the three counts of sexual assault in the first degree in violation of § 53a-70 (a) (1).

The sentencing court clearly considered the convictions under the different subdivisions of the sexual assault statute separately and distinctly, and did not enhance its sentence on any of the defendant's convictions under § 53a-70 (a) (1) based upon any of his convictions under § 53a-70 (a) (2), or the particular conduct upon which they were based. Moreover, the vacatur of the defendant's convictions for sexual assault in the first degree in violation of § 53a-70 (a) (2) on the basis of double jeopardy was not based upon insufficient evidence to support such convictions or any factual or legal findings that would invalidate the jury's guilty verdicts on those charges. Nor does the vacatur of those convictions render the information contained in the PSI or the statements made by the prosecutor regarding the facts underlying the jury's guilty verdicts on the § 53a-70 (a) (2) charges inaccurate. Therefore, the trial court reasonably determined that the sentencing court did not rely upon inaccurate information in sentencing the defendant on his § 53a-70 (a) (1) charges, and thus that the defendant's sentences on those charges were not imposed in an illegal manner. We conclude, on that basis, that the trial court did not abuse its discretion by denying the defendant's motion to correct an illegal sentence.

We note that the trial court, having properly rejected the arguments raised in the defendant's motion on their merits, technically should have denied rather than dismissed the motion to correct. Only if a defendant fails to state a claim that brings a motion within the purview of Practice Book § 43-22 should a court dismiss the motion for lack of jurisdiction. A claim that the sentencing court relied upon inaccurate information in imposing its sentence falls squarely within the common-law jurisdiction of the Superior Court. *State* v. *Charles F.*, 133 Conn. App. 698, 702–703, 36 A.3d 731, cert. denied, 304 Conn. 929, 42 A.3d 390 (2012). The defendant's

motion did not merely raise a collateral attack on the judgment of conviction but, on its face, attacked the manner in which his sentence was imposed, and the court never made a determination that the motion was jurisdictionally defective. Accordingly, the motion properly invoked the court's jurisdiction, and, thus, the form of the judgment is incorrect.

The form of the judgment is improper, the judgment dismissing the defendant's motion to correct an illegal sentence is reversed and the case is remanded with direction to render judgment denying the defendant's motion.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RICHARD P.*
(AC 39368)

Lavine, Sheldon and Prescott, Js.

Syllabus

The state appealed to this court from the judgment of the trial court dismissing its charges against the defendant of sexual assault in the fourth degree and risk of injury to a child in connection with his alleged physical and sexual abuse of his minor children. Prior to trial, the state informed the court that it was entering a nolle prosequi because the children's mother had sent a letter indicating that she and the children had relocated to London, England, and would not be returning to the United States, and, thus, that they were beyond the reach of the state's power to compel their attendance at trial. The children's mother also requested that the state not contact her further. The court noted the nolle prosequi and granted the defendant's motion to dismiss the charges, concluding that the state had not sufficiently represented that a material witness had died, disappeared or became disabled within the meaning of the applicable statute (§ 54-56b). The court determined that the mother and the children were material witnesses who were not unavailable but who,

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

instead, were unwilling to assist the state. On the granting of permission, the state appealed to this court. *Held*:

1. The state could not prevail on its claim that the minor children had "become disabled" within the meaning of § 54-56b because their mother took them back to their native England and, thus, as a result of their age and location, they lacked the legal ability to return to Connecticut and their attendance at trial could not be compelled by the state; the state's claim that § 54-56b should be interpreted to apply in circumstances where a material witness is "unavailable" was unavailing, as the legislature, having used "unavailable" in other statutes, chose not to use it in § 54-56b or to explicitly express its intent, as it has in other statutes, to include circumstances in which a witness is beyond the reach of process, which indicated that it intended to sweep less broadly when it chose not to include the term unavailable in § 54-56b, and this court rejected the state's claim that the statutory phrase "has . . . become disabled" should be interpreted to include circumstances in which a witness cannot be compelled to testify for reasons that extend beyond any physical or mental disability of the witness, as such an expansive definition would risk rendering superfluous the other two exceptions in § 54-56b, namely, death and disappearance, the passive nature of the phrase was not suggestive of a process in which an event or condition stripped the state of its ability to compel a witness' attendance at trial, and the statutory language did not apply to the factual circumstances here, where the children, through their mother, decided not to cooperate in the prosecution of this matter by voluntarily placing themselves beyond the reach of the state's ability to compel their attendance at trial.
2. This court found unavailing the state's claim that the term "disappeared" in § 54-56b should be construed to mean absence from the jurisdiction and to include circumstances in which the state knows the location of a witness but the witness is beyond the reach of legal process to compel his or her attendance at trial and the witness is not expected to return to the jurisdiction; such a construction would do violence to the common and ordinary meaning of "disappeared," the children here did not vanish from sight, as their location was known to the state and they were not in hiding, and this court was confined to the statute as it is presently written.

Argued October 5, 2017—officially released February 13, 2018

Procedural History

Information charging the defendant with two counts of the crime of risk of injury to a child and one count of the crime of sexual assault in the fourth degree, brought to the Superior Court in the judicial district of Danbury, where the court, *Eschuk*, *J.*, denied the

defendant's motion for a hearing to challenge a certain affidavit; thereafter, the state entered a nolle prosequi as to all charges; subsequently, the court, *Russo*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the state, on the granting of permission, appealed to this court. *Affirmed.*

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, was *Stephen J. Sedensky III*, state's attorney, for the appellant (state).

Daniel P. Scholfield, with whom, on the brief, was *Hugh F. Keefe*, for the appellee (defendant).

Opinion

PRESCOTT, J. The state of Connecticut appeals from the judgment of dismissal rendered by the trial court after the state entered a nolle prosequi in a criminal case charging the defendant, Richard P., with various offenses arising from his alleged physical and sexual abuse of two of his children.[1] The state claims that the court improperly dismissed the case because it had sufficiently represented to the court that a material witness had "died, disappeared or become disabled" within the meaning of General Statutes § 54-56b and Practice Book § 39-30. We are not persuaded and, therefore, affirm the judgment of the court.

The parties do not dispute the following facts. On January 19, 2013, the mother of the defendant's children made a complaint to the Newtown Police Department that her husband, the defendant, had physically and sexually abused two of her children, who were six and eight years old. The following day, the mother reported to the police department that one of the two children had recanted the allegation and that she had misunderstood the other child, whom she thought had reported

[1] The court granted the state permission to appeal pursuant to General Statutes § 54-96.

sexual abuse to her. The police department then conducted an investigation that included a forensic interview of the children by a multi-disciplinary team.

On April 27, 2013, the defendant was arrested pursuant to a warrant and charged with sexual assault in the fourth degree in violation of General Statutes § 53a-73a, risk of injury to a child in violation of General Statutes § 53-21 (a) (1), and risk of injury to a child in violation of § 53-21 (a) (2). The court issued two protective orders prohibiting the defendant, among other things, from having any contact with the two children. Subsequently, the court also appointed a guardian ad litem for the children.

On September 5, 2014, the defendant filed a motion seeking a *Franks* evidentiary hearing regarding the veracity of information contained in the affidavit accompanying the state's application for the arrest warrant. See *Franks* v. *Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). In that motion, the defendant asserted that the investigating officer intentionally or recklessly had misrepresented the content of statements made by the children during the forensic interview of the children.[2]

Following a review of various submissions by the state and the defendant, the court, *Eschuk, J.*, concluded in a memorandum of decision that the affidavit inaccurately described some of the statements made by the children during the forensic interview and that the inaccurate descriptions were made with reckless disregard for their truth. The court nevertheless declined to dismiss the charges against the defendant because, even if the inaccurate portions of the affidavit were not considered, other information set forth in the

[2] The defendant asked that any factual finding made by the trial court after conducting a *Franks* evidentiary hearing be considered in deciding his motion to dismiss for lack of probable cause.

warrant application was sufficient to demonstrate probable cause for the defendant's arrest.

On May 26, 2016, the state and the defendant appeared before the court, *Russo*, *J*. The state entered a nolle prosequi, stating, "[w]itness is unavailable." The state asked permission to place on the record its reasons for entering a nolle. The state explained that the children and their mother had moved to London, England, and that the children's mother had sent a letter on May 23, 2016, in which she indicated that she and the children would not be returning to the United States and requested that the state not contact her further. After making these representations, Stephen J. Sedensky III, the state's attorney for the judicial district of Danbury, stated: "So, both [she] . . . and the children are unavailable, Your Honor, and they are . . . outside the United States and not subject to interstate . . . subpoena issues, and so for those reasons . . . the unavailability of three key witnesses in the case, the state is entering a nolle." Following this representation, the court noted the nolle.

The defendant then moved for a dismissal of the charges against him. In support of his motion, the defendant offered, and the court admitted over the state's objection, a copy of the May 23, 2016 letter from the children's mother.[3] At the conclusion of the hearing,

[3] In her five page letter, the children's mother sets forth a number of criticisms regarding the manner in which the state conducted its investigation of this case, and in particular, with the forensic interviews of the children. The concluding paragraph of the letter provides: "I want you to stop hurting my family. We have gone through two police investigations and two [Department of Children and Families]/social services investigations as well as years of intimidation, threats, and mistreatments by authorities in CT, plus the devastating impact of the case. The children have settled permanently into life in the UK after moving back to our home in London in September, and they have the basic right to have something left of their childhoods with their father. This case has also harmed my youngest son, whom we have just found out is autistic. Our family has needed extra support; instead you have gone out of your way to hurt us. Please do not contact me again."

the court indicated that a nolle had entered that day and that, after giving the parties an opportunity to file briefs, it would issue a decision on whether the case should be dismissed on the next court date.

Following additional argument on June 15, 2016, the court issued an oral decision granting the defendant's motion to dismiss. The court indicated that the state had not sufficiently represented that a material witness had died, disappeared, or become disabled within the meaning of § 54-56b and Practice Book § 39-30, and, as a result, the defendant was entitled to a dismissal. In the court's view, the material witnesses were not "unavailable,"[4] but instead were simply unwilling to assist the state. This appeal followed.

On appeal, the state claims that, under the circumstances of this case, in which the mother relocated with the two children to another country beyond the reach of the state's power to compel their attendance at trial and refuses to return with them voluntarily to the United States, the court improperly entered a judgment of dismissal for two reasons. First, it contends that the children "had become disabled" within the meaning of § 54-56b. Alternatively, the state asserts that the children had "disappeared" within the meaning of § 54-56b. We disagree with both of these arguments.[5]

[4] For the reasons we explain in this opinion, we disagree with the trial court's broad use of the term "unavailable" in this context, but agree that the state failed to establish that a material witness had died, disappeared or become disabled within the meaning of the statute.

[5] We disagree with the defendant's assertion that the state failed to preserve these claims on appeal because it initially had argued only that the witnesses were "unavailable" and had not relied on the statutory language that the witnesses were "disabled" or had "disappeared." The state, in its memorandum of law filed on June 7, 2016, specifically briefed the meaning of those statutory terms and the relevant case law. It is also apparent that the trial court, in rejecting the state's claim, understood that the state was relying on the statutory language when it had argued that the witnesses were "disabled" or had "disappeared."

I

We begin our analysis with a general discussion regarding the law as it pertains to a nolle prosequi and the appropriate standard of review for the state's claims on appeal. A nolle prosequi is "a declaration of the prosecuting officer that he will not prosecute the suit further at that time." (Internal quotation marks omitted.) *State* v. *Winer*, 286 Conn. 666, 685, 945 A.2d 430 (2008), quoting *State* v. *Ackerman*, 27 Conn. Supp. 209, 211, 234 A.2d 120 (1967). As our Supreme Court has explained, "[t]he effect of a nolle is to terminate the particular prosecution of the defendant without an acquittal and without placing him in jeopardy. . . . Therefore, the nolle places the criminal matter in the same position it held prior to the filing of the information. Indeed, no criminal matter exists until, and if, the prosecution issues a new information against the defendant. . . . If subsequently the prosecuting authority decides to proceed against the defendant, a new prosecution must be initiated." (Citation omitted; internal quotation marks omitted.) *State* v. *Richardson*, 291 Conn. 426, 430, 969 A.2d 166 (2009).

"Until the enactment of General Statutes [§ 54-56b] in 1975 . . . the power to enter a nolle prosequi was discretionary with the state's attorney; neither the approval of the court nor the consent of the defendant was required. . . . The principles that today govern the entry of a nolle prosequi place some restrictions on the prosecuting attorney's formerly unfettered discretion. Although the decision to initiate a nolle prosequi still rests with the state's attorney, the statute and the rules now permit the defendant to object to a nolle prosequi and to demand either a trial or a dismissal except upon a representation to the court by the prosecuting official that a material witness has died, disappeared or become disabled or that material evidence has disappeared or been destroyed and that a further

investigation is therefore necessary." (Citations omitted; internal quotation marks omitted.) *State* v. *Lloyd*, 185 Conn. 199, 201–202, 440 A.2d 867 (1981).

In determining whether to accept the state's representation and to decline to enter a dismissal, "the trial court need not receive evidence, and thus makes no findings of fact, to determine the accuracy of the state's representations." Id., 204. Our Supreme Court also has made clear that, at least in circumstances in which the meaning of § 54-56b is not in dispute, "[t]he proper test is whether there has been a manifest abuse of prosecutorial discretion. The court must accept the entry of the nolle prosequi for the record unless it is persuaded that the prosecutor's exercise of discretion is clearly contrary to manifest public interest." Id.;[6] see also *State* v. *Richardson*, supra, 291 Conn. 429 n.4.

In the present case, however, the state concedes that the resolution of its appeal does not turn on the factual sufficiency of the representation made by the prosecutor but instead on the meaning of the language employed by the legislature in § 54-56b. Thus, as the state itself recognizes, the "resolution of that question ultimately gives rise to an issue of statutory construction over which our review is plenary." *State* v. *Aloi*, 280 Conn. 824, 832, 911 A.2d 1086 (2007); *Bennett* v. *New Milford Hospital, Inc.*, 117 Conn. App. 535, 541, 979 A.2d 1066 (2009), aff'd, 300 Conn. 1, 12 A.3d 865 (2011).

The following principles governing statutory construction are well established and guide our analysis.

[6] It is true that the court in *Lloyd* also stated that "[g]ood faith disagreements about what constitutes disability do not demonstrate a manifest abuse of prosecutorial discretion." *State* v. *Lloyd*, supra, 185 Conn. 205. Read in context, we view this language as a reference to good faith factual disputes regarding whether a particular witness is disabled. We do not read the language as imposing an obligation on the court to defer to the prosecutor's interpretation of the meaning of § 54-56b.

"When construing a statute, our fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply." (Internal quotation marks omitted.) *State* v. *Drupals*, 306 Conn. 149, 159, 49 A.3d 962 (2012). We note that, under General Statutes § 1-2z, "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." "The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Weems* v. *Citigroup, Inc.*, 289 Conn. 769, 779, 961 A.2d 349 (2008).

"[S]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . ." (Internal quotation marks omitted.) *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, 301 Conn. 268, 303, 21 A.3d 759 (2011). "When a statute is not plain and unambiguous, we also look for interpretative guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Francis* v. *Fonfara*, 303 Conn. 292, 297, 33 A.3d 185 (2012).

"When the meaning of a statute initially may be determined from the text of the statute and its relationship to other statutes . . . extratextual evidence of the

meaning of the statute shall not be considered. . . . When the meaning of a provision cannot be gleaned from examining the text of the statute and other related statutes without yielding an absurd or unworkable result, extratextual evidence may be consulted. . . . [E]very case of statutory interpretation . . . requires a threshold determination as to whether the provision under consideration is plain and unambiguous. This threshold determination then governs whether extratextual sources can be used as an interpretive tool. . . . [O]ur case law is clear that ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation." (Citation omitted; internal quotation marks omitted.) *State* v. *Jackson*, 153 Conn. App. 639, 643–44, 103 A.3d 166 (2014), cert. denied, 315 Conn. 912, 106 A.3d 305 (2015).

II

We first address the state's assertion that the minor children have "become disabled" within the meaning of the statute because their mother took them back to their native England and thus, as a result of their age and location, they lack the legal ability to return to Connecticut and the state is therefore unable to compel their attendance at trial.[7] In other words, the state contends that the statutory phrase "has . . . become disabled" should be construed to include not only a physical or mental disability that would prevent a witness from testifying, but also a "legal" disability that would prevent the state from compelling the witness to testify. In advancing this assertion, the state argues that the phrase "has . . . become disabled" should be construed to be synonymous with "has . . . become

[7] The state argues on appeal that only the children have "become disabled" in this case. The state does not advance the same argument regarding the children's mother despite the fact that she, too, is presumably beyond the reach of the state's power to compel her attendance at trial.

unavailable," as that term is typically used in related contexts regarding witnesses.

We begin with the words of § 54-56b, which provides in relevant part: "A nolle prosequi may not be entered as to any count in a complaint or information if the accused objects to the nolle prosequi and demands either a trial or dismissal, except with respect to prosecutions in which a nolle prosequi is entered upon a representation to the court by the prosecuting official that a material witness has died, disappeared or become disabled . . . ."[8]

The state concedes, as it must, that the legislature did not choose to employ the expansive term "unavailable" in § 54-56b. The phrase "unavailable" is a term of art when used with respect to witnesses, although its meaning often varies depending on the circumstances in which it is used. See, e.g., Conn. Code Evid. § 8-6, commentary ("At common law, the definition of unavailability varied with the individual hearsay exception. . . . Section 8-6 eschews a uniform definition of unavailability." [Citations omitted.]); Practice Book § 43-40 (2) (for purposes of calculating speedy trial deadline, "any essential witness shall be considered unavailable whenever such person's whereabouts are known but his or her presence for trial cannot be obtained by due diligence or he or she resists appearing

[8] Practice Book § 39-30 provides: "Where a prosecution is initiated by complaint or information, the defendant may object to the entering of a nolle prosequi at the time it is offered by the prosecuting authority and may demand either a trial or a dismissal, except when a nolle prosequi is entered upon a representation to the judicial authority by the prosecuting authority that a material witness has died, disappeared or become disabled or that material evidence has disappeared or has been destroyed and that a further investigation is therefore necessary."

Because this provision is almost identical to § 54-56b and neither party argues that the two provisions should be interpreted differently, we confine our analysis to the language of § 54-56b.

at or being returned for trial"); Practice Book§ 23-39;[9] see also Practice Book § 40-56;[10] Fed. R. Evid. 804 (a).[11]

[9] Practice Book § 23-39 provides: "(a) Upon leave of the judicial authority, the testimony of any person may be taken by deposition if the testimony will be required at an evidentiary hearing and it appears:

"(1) the testimony may not be available at the required evidentiary hearing because of physical or mental illness or infirmity of the witness; or

"(2) the witness resides out of this state and cannot be compelled to attend and give testimony; or

"(3) the witness may otherwise be unavailable to testify at the required evidentiary hearing.

"(b) The admissibility of deposition testimony shall be governed by the rules of evidence."

[10] Practice Book § 40-56 provides: "(a) 'Unavailable' as used in Section 40-46 includes situations in which the deponent:

"(1) Is exempted by a ruling of the judicial authority on the ground of privilege from testifying concerning the subject matter of his or her deposition;

"(2) Persists in refusing to testify concerning the subject matter of his or her deposition despite an order of the judicial authority to do so;

"(3) Testifies to a lack of memory of the subject matter of his or her deposition;

"(4) Is unable to be present or to testify at a trial or hearing because of his or her death or physical or mental illness or infirmity; or

"(5) Is absent from the trial or hearing and the proponent of his or her deposition has been unable to procure his or her attendance by subpoena or by other reasonable means.

"(b) A deponent is not unavailable as a witness if his or her exemption, refusal, claim of lack of memory, inability, or absence is the result of the procurement or wrongdoing by the proponent of his or her deposition for the purpose of preventing the witness from attending or testifying."

[11] Most often, the issue of whether a witness is unavailable arises with respect to the admissibility of hearsay evidence in a court proceeding. Prior to the adoption of the Connecticut Code of Evidence, our Supreme Court cited with approval the types of unavailability listed in § 804 of the Federal Rules of Evidence. See, e.g., *State* v. *Bryant*, 202 Conn. 676, 694, 523 A.2d 451 (1987). Section 804 (a) of those rules provides in relevant part: "A declarant is considered to be unavailable as a witness if the declarant: (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies; (2) refuses to testify about the subject matter despite a court order to do so; (3) testifies to not remembering the subject matter; (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or (5) is absent from the trial or hearing and the

The legislature has included the term "unavailable" with respect to witnesses in other statutes. See, e.g., General Statutes §§ 54-86*l*, 52-180, 52-148b (b) (1), 46b-129 (k) (4) and (5), and 17a-11 (f) (5). Presumably, it chose not to do so when it enacted § 54-56b. "[A] court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . The intent of the legislature, as this court has repeatedly observed, is to be found not in what the legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is a function of the legislature." (Internal quotation marks omitted.) *Doe* v. *Norwich Roman Catholic Diocesan Corp.*, 279 Conn. 207, 216, 901 A.2d 673 (2006).

This rule of statutory construction has been applied vigorously in instances in which the legislature has repeatedly employed a term in other statutes, but did not use it in the provision to be construed. As our Supreme Court stated in *Viera* v. *Cohen*, 283 Conn. 412, 431, 927 A.2d 843 (2007), "we underscore that the legislature frequently has used the term withdrawal. . . . Typically, the omission of a word otherwise used in the statutes suggests that the legislature intended a different meaning for the alternate term." (Citation omitted; internal quotation marks omitted.) "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed." (Internal

statement's proponent has not been able, by process or other reasonable means, to procure . . . [the declarant's attendance and/or testimony]." Fed. R. Evid. 804 (a).

quotation marks omitted.) *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 310, 819 A.2d 260 (2003). Accordingly, we find it significant that the legislature did not choose to include the term "unavailable" in § 54-56b.

Moreover, in other statutes concerning witnesses, the legislature explicitly has expressed its intent to include circumstances in which a witness is beyond the reach of process, or cannot be found, and thus cannot be compelled to testify. For example, in General Statutes § 52-160, the legislature provided that "[i]f any witness in a civil action is beyond the reach of the process of the courts of this state, or cannot be found . . . [a transcript of his or her recorded testimony in] a former trial of the action . . . shall be admissible in evidence, in the discretion of the court . . . ." Presumably, the legislature chose not to employ the same or similar language in § 54-56b, thereby indicating an intent that § 54-56b sweep less broadly.

The state relies on *State* v. *Smith*, 289 Conn. 598, 960 A.2d 993 (2008), in support of its assertion that § 54-56b should be interpreted to apply in circumstances where a material witness is "unavailable." Specifically, the state relies on the following statement by our Supreme Court in *Smith*: "Section 54-56b allows the entry of a nolle prosequi upon a representation to the court by the prosecuting official that a material witness is unavailable to testify." (Internal quotation marks omitted.) Id., 609. This statement, however, is undeniably dictum.

In *Smith*, the court was asked to decide the specific question of whether the trial court must conduct an evidentiary hearing before accepting the state's representation as to the reasons why it was choosing to enter a nolle prosequi. Id. The prosecutor in that case had represented to the trial court that a witness was "unavailable" because, if called to testify at trial, he

was planning to invoke his constitutional privilege against self-incrimination. Id., 606. In deciding the question of the need for an evidentiary hearing, the court in *Smith* made clear that it was unnecessary to decide any broader questions regarding the meaning of the language in § 54-56b or Practice Book § 39-30 by noting that "the defendant does not dispute that [the witness'] invocation of this privilege falls within [these provisions], only that the trial court improperly relied on the state's representation as evidence." Id., 609 n.16. The court in *Smith* never analyzed the relevant language in the statute and rules of practice but merely assumed without deciding that the witness' "unavailability" fell within the language of these provisions. Accordingly, the decision in *Smith* does not advance the state's construction of the statute.

For these reasons, we decline to accept the state's invitation to import a broad exception for "unavailable" witnesses into § 54-56b. We must presume from the legislature's use of the term "unavailable" in other sections of the General Statutes that the legislature intended to sweep less broadly when it chose not to include the term "unavailable" in § 54-56b.

We turn then to the narrower question of whether the statutory phrase "has . . . become disabled" should be interpreted, as the state contends, to include circumstances in which a witness cannot be compelled to testify for reasons that extend beyond any physical or mental disability of the witness. In this regard, the state argues that because the legislature did not define the phrase "become disabled," we should "look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *State* v. *Agron*, 323 Conn. 629, 635, 148 A.3d 1052 (2016).

Unsurprisingly, resort to dictionary definitions does not yield an easy or uniform answer. For example, Merriam-Webster's Collegiate Dictionary defines "disabled"

to mean "incapacitated by illness or injury." Merriam-Webster's Collegiate Dictionary (11th Ed. 2012) p. 355. Webster's Unabridged Dictionary defines "disable," when used as a verb, to mean "1. to make unable or unfit; weaken or destroy the capability of; cripple; incapacitate . . . ." Random House Webster's Unabridged Dictionary (2d Ed. 2001) p. 560. The second definition provided, however, defines "disable" to mean "to make legally incapable." Id. Black's Law Dictionary defines "disable" to mean: "to take away the ability of, to render incapable of proper and effective action." Black's Law Dictionary (5th Ed. 1979) p. 416. Both the defendant and the state attempt to "cherry-pick" dictionary definitions that they contend support their respective positions, but, in our view, resort to dictionary definitions does not yield a clear or obvious answer, and the meaning of "disabled" often varies significantly depending on the context in which it is used.

The essence of the state's argument is that, by employing the phrase, "has . . . become disabled," the legislature intended that the defendant not be entitled to a dismissal following the entry of a nolle prosequi in any instance in which a material witness in the case cannot be compelled by the state to testify. Such an expansive definition of that phrase, however, risks swallowing up and rendering superfluous the other two exceptions included by the legislature: death and disappearance.[12] Certainly, if a witness has died or disappeared, the state will be unable to compel his or her testimony because it will be unable to serve a subpoena on that witness.[13]

[12] Indeed, the state conceded at oral argument before this court that, at least under the circumstances of this case, the term disappeared and the phrase "has . . . become disabled" are synonymous.

[13] "[T]here is no helpful [legislative] history pinpointing the intent of the legislature in enacting § 54-56b . . . ." *State* v. *Talton*, 209 Conn. 133, 141, 547 A.2d 543 (1988).

Moreover, the state's proffered definition of the phrase "has . . . become disabled" simply is, in our view, an alternative argument why it should be construed to mean "has . . . become unavailable" as that phrase is often used with respect to witnesses. For the reasons we previously have stated, however, we find it significant that the legislature has used the term "unavailable" in other statutes but has not chosen to use it in § 54-56b.

We also find significant that the legislature used the passive phrase "has . . . become disabled" in § 54-56b. In our view, this language suggests that the process by which the witness became disabled was one in which an event or condition beyond the voluntary choice of the witness or his guardian not to cooperate with the state now prevents that witness from being able to testify in the matter. Stated another way, the language is not suggestive of a process in which an event or condition has stripped the state of its ability to compel the witness' attendance at trial. In this case, the children (through their mother) have decided not to cooperate in the prosecution of this matter by voluntarily placing themselves beyond the reach of the state's ability to compel their attendance at trial.[14] The state's assertion that the legislature intended to include such a factual circumstance within the statutory exception by employing the phrase "has . . . become disabled" is simply not persuasive.

Finally, the state's reliance on *New Milford Savings Bank* v. *Jajer*, 52 Conn. App. 69, 726 A.2d 604 (1999), is

[14] At oral argument before this court, the state argued that even if the material witness was an adult, the fact that the witness was beyond the reach of state's ability to compel attendance at trial, the statutory exception would still be satisfied. Thus, the state's argument does not truly turn on the fact that the children lack the legal ability to decide to return to the United States and testify in this matter. Moreover, there is nothing in this record, including any representation by the state, that the children wish to testify in this case and that their mother is the sole impediment to obtaining their testimony.

misplaced. In *New Milford Savings Bank*, a foreclosure action, this court was tasked with construing General Statutes § 52-235b, which provides: "If, prior to judgment, an attorney for any reason ceases to be a member of the bar or becomes physically or mentally incapacitated *or otherwise disabled* so as to prevent him from appearing in court in an action in which he has appeared for a client, further proceedings shall not be taken in the action against the client, without leave of the court, until thirty days after notice to appear in person or by another attorney has been served upon the client either personally or in such manner as the court directs." (Emphasis added.)

The defendant argued in *New Milford Savings Bank* that the trial court should not have rendered a judgment of foreclosure in that case. There, the defendant's attorney was unable to attend the trial in the foreclosure matter because he was obligated to appear at a hearing before another Superior Court that was considering whether to suspend him from the practice of law after he pleaded guilty to a felony charge in federal court. *New Milford Savings Bank* v. *Jajer*, supra, 52 Conn. App. 76–83. Under those circumstances, the defendant in the foreclosure matter argued that his lawyer had been " 'otherwise disabled' " within the meaning of § 52-235b; id., 77; and therefore the trial should have been stayed. Id., 77–78. This court agreed, concluding that the statute applied to circumstances beyond the physical or mental disability of an attorney to include a circumstance in which the attorney was obligated to attend his own suspension hearing. Id., 81–83.

Because the language of § 52-235b is critically different from the language in § 54-56b, we conclude that this court's decision in *New Milford Savings Bank* does not support the state's construction of § 54-56b in the present case. The language of § 52-235b is fundamentally different from that of § 54-56b because it includes

by direct reference a "physical or mental" incapacity and then explicitly adds language, not present in § 54-56b, that extends its reach beyond physical or mental infirmities to include other forms of disability. Indeed, the decision in *New Milford Savings Bank* supports the defendant's arguments in this case because it provides yet another example of a situation in which the legislature has expressed an intent to expand the coverage of a statute to circumstances beyond those involving only a physical or mental disability. The legislature did not do so in § 54-56b.

In sum, we conclude that the statutory phrase "has . . . become disabled" in § 54-56b was not intended to extend to instances in which the state lacks the ability to compel a witness to testify at trial. Accordingly, we are not persuaded by the state's first claim.

III

We next address the state's claim that the defendant was not entitled to a dismissal of the prosecution because it had sufficiently represented that material witnesses (the children) had "disappeared" within the meaning of § 54-56b. Specifically, the state argues that the term "disappeared" must be construed to include circumstances in which the state knows the location of a witness but the witness is beyond the reach of legal process to compel his or her attendance at trial, and he or she is not expected to return to the jurisdiction. This claim does not warrant much discussion.

In pressing this claim, the state concedes that it knows the precise location of the witnesses. Despite this concession, the state argues in a contradictory fashion that the "witnesses have passed out of sight and vanished from the state." It also concedes that in ordinary parlance and pursuant to standard dictionary definitions, "disappeared" means "to pass out of sight either

suddenly or gradually; vanish." American Heritage Dictionary of the English Language (New College Edition 1981) p. 374; see also Merriam-Webster's Collegiate Dictionary (11th Ed. 2012) p. 355 ("to pass from view").

Despite its concessions, the state argues that two cases support its construction of the term "disappeared." First, it relies on this court's decision in *State* v. *Maiocco*, 5 Conn. App. 347, 354 n.7, 498 A.2d 125, cert. denied, 197 Conn. 819, 501 A.2d 388 (1985), in which this court stated with respect to a witness: "Since [the witness'] location was known and his return was expected within three weeks, it cannot be said that he had disappeared." From this sentence, the state argues that if "the witness' location in *Maiocco* had been known, but he had not been expected to return, then, extrapolating from *Maiocco*, he arguably would have qualified as having 'disappeared' within the purview of § 54-56b."

Maiocco is not entitled to the weight the state places on it. First, the state concedes that this statement was dictum, because the issue in that case was whether the trial court properly dismissed the case due to the state's failure to be prepared for trial. Second, the single sentence relied on by the state is unclear and ambiguous because it is impossible to determine from that sentence whether, in finding that the witness had not "disappeared," the court relied on the fact that (1) the witness' location was known, (2) the witness was expected to return, or (3) a combination of those two facts.

We are also unpersuaded by the state's citation to an out-of-state case, *Swindler* v. *St. Paul Fire & Marine Ins. Co.*, 223 Tenn. 304, 444 S.W.2d 147 (1969), for the proposition that something has disappeared simply because it cannot be retrieved. That case involved the " 'disappearance' " of money, not a witness in a criminal case. Id., 306. Moreover, the court in *Swindler* was

engaged in the interpretation of an insurance policy; id., 307; not a statute, and emphasized that its conclusion regarding the meaning of that term was reached after considering the adjoining terms in the policy; id., 308; none of which are present in § 54-56b. Accordingly, *Swindler* is inapposite.

We decline the state's invitation to adopt an interpretation of the term "disappeared" that would define it as absence from the jurisdiction. Such a construction would do violence to the common and ordinary meaning of the term. The children here have not vanished from sight. Their location is known to the state, and they are not in hiding.

Although we agree with the state as a general matter that protecting children from sexual abuse is of profound importance, § 54-56b applies to all criminal prosecutions and it is not our role to torture its provisions simply because the state alleges sexual misconduct against children in this case. If the legislature wants to broaden the exceptions for this type of case, or for any other criminal matters, it may choose to do so. This court, however, is confined to the statute as it is presently written.

The judgment is affirmed.

In this opinion the other judges concurred.

BEN OMAR *v.* COMMISSIONER OF CORRECTION (AC 37185)

DiPentima, C. J., and Lavine and Bishop, Js.

Syllabus

The petitioner, who had been convicted of various drug related offenses, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance when she exposed his criminal history to the jury. At the petitioner's criminal trial, trial counsel had introduced into evidence a police incident report with an attached arrest warrant

affidavit, which contained a list of the petitioner's prior convictions, some of which were for drug related offenses. The petitioner claimed that revealing his prior convictions damaged his credibility by demonstrating that he knew how to run a street level drug operation, using individuals as drug runners to avoid detection. The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly determined that the petitioner failed to prove that he was prejudiced by the allegedly deficient performance of his trial counsel, as the result of the petitioner's criminal trial would not have been different but for trial counsel's decision to expose his criminal history to the jury; the state presented a strong case against the petitioner, the evidence of his prior convictions was not the only evidence demonstrating that he knew how to use drug runners in a sophisticated street level drug operation, the jury knew in general terms about the petitioner's criminal history regardless of trial counsel's decision, as the prosecutor properly had questioned him on cross-examination about his criminal history and prior convictions without specifically identifying the offenses by name, which undermined the petitioner's credibility, and the trial court gave the jury a limiting instruction that the evidence of the petitioner's commission of the other crimes was admitted for the sole purpose of affecting his credibility, which the jury was presumed to have followed.

Argued December 7, 2017—officially released February 13, 2018

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.*

Matthew C. Egan, assigned counsel, with whom were *Emily Graner Sexton*, assigned counsel, and, on the brief, *James P. Sexton*, assigned counsel, and *Michael S. Taylor*, assigned counsel, for the appellant (petitioner).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, *Eva Lenczewski*, supervisory assistant state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Ben Omar, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. Following that denial, the habeas court granted his petition for certification to appeal. On appeal, the petitioner claims that the habeas court improperly rejected his contention that his trial counsel rendered ineffective assistance when she exposed his criminal history to the jury. Because we agree with the habeas court's conclusion that the petitioner failed to prove prejudice under *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), we affirm the judgment of the habeas court.

As this court set forth in *State* v. *Omar*, 136 Conn. App. 87, 43 A.3d 766, cert. denied, 305 Conn. 923, 47 A.3d 883 (2012), the jury reasonably could have found the following relevant facts. "On March 25, 2009, Waterbury police Lieutenant Edward Apicella led an undercover team to the intersection of North Main Street and West/East Farm Streets in Waterbury . . . in order to try 'to purchase narcotics from any individual who would solicit.' Apicella designated Officer Dedrick Wilcox of the Seymour police department to be the undercover purchaser because it was likely that he would not be recognized by the Waterbury street dealers as a police officer. As Wilcox was driving, a black female, later identified as Ida Mae Smith, nodded to him, and Wilcox pulled over. Smith asked, '[W]hat do you need?' and Wilcox responded, 'I need twenty of base,' which meant $20 worth of crack cocaine. Smith then held up two fingers and yelled across the street to the [petitioner], 'I need two.' Wilcox then handed Smith the money, at which point the [petitioner] walked to a nearby mailbox, reached into his pocket and placed two items on the top of the mailbox. Smith walked

across the street and handed the money to the [petitioner], who pointed Smith toward the mailbox. Smith then walked to the mailbox, grabbed the items and handed Wilcox the items—two bags of crack cocaine—and said, '[Y]ou're all set.' Wilcox then left the scene and radioed to the surveillance team that the deal was done and met the officers at a prearranged location. The police did not immediately arrest the [petitioner] because they did not want to jeopardize Wilcox's safety or cover for future ongoing undercover operations. Instead, the [petitioner] was arrested six weeks later in May, 2009." Id., 89–90. Following a jury trial, the petitioner was convicted of various drug related offenses.[1] This court affirmed the petitioner's conviction on direct appeal. See id., 89.

On February 23, 2012, the petitioner filed a self-represented petition for a writ of habeas corpus. In a single count amended petition, he alleged that he was denied the effective assistance of trial counsel when Stephanie L. Evans, his lawyer, "exposed to the jury [his] sale and possession of narcotics history and [his subsequent] August 12, 2009 arrest for drugs."[2] During the habeas trial, the petitioner specifically focused on Evans' decision to introduce a police incident report and an arrest warrant affidavit into evidence. Both of these items

[1] The petitioner was found guilty of "possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b), sale of narcotics by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b), conspiracy to sell narcotics by a person who is not drug-dependent in violation of General Statutes §§ 21a-278 (b) and 53a-48 (a), sale of a controlled substance within 1500 feet of a school zone in violation of General Statutes § 21a-278a (b) and possession of a controlled substance within 1500 feet of a school zone in violation of General Statutes § 21a-278a (b)." *State* v. *Omar*, supra, 136 Conn. App. 89.

[2] The petitioner alleged that Evans rendered ineffective assistance in twelve different ways. On appeal, the petitioner claims only that the habeas court improperly concluded that Evans did not render ineffective assistance when she exposed the petitioner's criminal history to the jury.

detailed the petitioner's previous convictions, which included drug related offenses.[3]

In its written decision denying the habeas petition, the habeas court noted that Evans introduced the arrest warrant affidavit into evidence "to emphasize the inconsistencies between the [testimony from the state's witnesses] and reports as to the weight of the narcotics seized [on March 25, 2009]." It concluded, however, that the petitioner failed to prove prejudice under *Strickland* and did not specifically address whether Evans rendered deficient performance. The petitioner appeals from this judgment. Additional facts will be set forth as necessary.

We begin with the applicable standard of review. "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).

The petitioner claims that the habeas court improperly rejected his contention that Evans rendered ineffective assistance when she exposed his criminal history to the jury. He argues that the "specific nature" of his previous convictions demonstrated that he knew how to run a street level drug operation and also damaged

[3] Paragraph 8 of the arrest warrant affidavit specifically detailed the petitioner's criminal history prior to being arrested for his involvement in the March 25, 2009 incident. That paragraph stated in relevant part: "[The petitioner] is a convicted felon and was arrested and convicted of the following charges: [p]ossession of [n]arcotics on 10/15/2007, [e]scape [f]irst on 5/1/2006, [f]ailure to [a]ppear [on] 5/5/2005, [two] counts of [c]riminal [p]ossession of a [f]irearm on 7/31/2001, [a]ssault on a [p]olice [o]fficer on 5/3/94, [and two] [c]ounts of [s]ale of [n]arcotics on 5/3/94."

his credibility. Evans' decision to expose his criminal record to the jury, according to the petitioner, prejudiced him because the state's case hinged on a credibility contest between him and the arresting officers. Essentially, he argues that the jury would have found him more credible, thus strengthening his sole defense at trial—misidentification—if they did not know of his specific criminal record. We are unpersuaded.[4]

The following additional facts and procedural history are relevant to this claim. Lieutenant Apicella, a state's witness, testified at the petitioner's criminal trial. During her cross-examination of Apicella, Evans asked about his prior interactions with the petitioner and whether police had searched the petitioner on March 25, 2009.[5] While questioning Apicella, Evans requested that "the incident offense report [from March 25, 2009] with attached arrest warrant affidavit" become full defense exhibits. Both documents were admitted into

[4] The parties disagree as to whether Evans provided deficient performance under the performance prong of *Strickland* and if that issue is even properly before us. We need not reach the performance prong, however, because we conclude that the petitioner failed to prove that he was prejudiced by Evans' performance. See, e.g., *Minor* v. *Commissioner of Correction*, 150 Conn. App. 756, 762, 92 A.3d 1008, cert. denied, 314 Conn. 903, 99 A.3d 1168 (2014).

[5] Evans cross-examined Apicella in relevant part as follows:

"Q. Isn't it true that [the petitioner] wasn't arrested at that time because you, in fact, actually personally entered Bentley Bail Bonds and searched him and you found no money or drugs on him?

"A. No, ma'am.

"Q. You never conducted a search of his person?

"A. On that day no, ma'am.

"Q. On any other day?

"A. Not that I recall, ma'am.

"Q. Have you ever found drugs on [the petitioner]?

"A. I found a gun, ma'am, but not drugs, no.

"Q. Did you arrest him for that?

"A. Oh, I did, ma'am, yes."

On recross-examination, Evans also asked Apicella whether the police had arrested the petitioner "prior to March for narcotics." Apicella testified that they had. See *State* v. *Omar*, supra, 136 Conn. App. 95.

evidence without objection, and Evans questioned Apicella about their contents. She also asked Apicella why police did not arrest the petitioner on March 25, 2009. Specifically, she asked: "So you left [Smith and the petitioner] there for another month or so to continue to sell drugs?" Apicella responded in relevant part: "That will depend on [the petitioner's] conduct. . . . That's a decision that he would have to make."

The prosecutor revisited Apicella's familiarity with the petitioner on redirect-examination and specifically asked him about the petitioner's prior convictions detailed in paragraph 8 of the arrest warrant affidavit. See footnote 3 of this opinion. He also asked Apicella about the petitioner's August 12, 2009 "[arrest] for drugs" following a separate incident involving a confidential informant.

"In *Strickland* v. *Washington*, [supra, 466 U.S. 687], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . .

"With respect to the performance component . . . [t]o prove that his counsel's performance was deficient, the petitioner must demonstrate that trial counsel's representation fell below an objective standard of reasonableness. . . .

"With respect to the prejudice component . . . the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial,

a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." (Internal quotation marks omitted.) *Minor* v. *Commissioner of Correction*, 150 Conn. App. 756, 761–62, 92 A.3d 1008, cert. denied, 314 Conn. 903, 99 A.3d 1168 (2014).

We agree with the habeas court that the petitioner failed to prove prejudice. The state presented a strong case against him. Multiple police officers witnessed Smith provide Wilcox, an undercover police officer, with two items—later determined to be crack cocaine—after she retrieved the items from the top of a mailbox. Police also observed Smith hold up "two fingers and [yell] across the street to the [petitioner], 'I need two' " after Wilcox asked for $20 worth of crack cocaine. See *State* v. *Omar*, supra, 136 Conn. App. 89–90. Multiple officers also positively identified the petitioner as the individual who placed the narcotics onto the top of the mailbox before Smith retrieved them.

The petitioner argues that his prior convictions, especially his narcotics convictions, were the only evidence demonstrating that he knew how to use drug runners in a sophisticated street level drug operation. That contention is not accurate. At the petitioner's criminal trial, several police officers testified generally about how street level drug operations frequently use "runners" to avoid police detection. They also testified that Smith signaled the petitioner after Wilcox asked for crack cocaine and that Smith gave the petitioner the money she received from Wilcox. The conduct of Smith and

the petitioner generally aligned with the testimony of how drug dealers use runners, and Apicella testified that Smith admitted to "working as a runner with [the petitioner]." The police report and arrest warrant affidavit were, at most, cumulative and paled in comparison to other evidence reasonably demonstrating that the petitioner knew how to use drug runners.

The petitioner also testified at his criminal trial, and the prosecutor questioned him about having several felony convictions.[6] The petitioner does not dispute that the prosecutor properly questioned him about having prior convictions, and the record reveals that the prosecutor did not specifically identify the prior convictions by name.[7] Therefore, the jury knew, in general terms, about the petitioner's extensive criminal history regardless of Evans' decision to expose his specific criminal background to the jury. See, e.g., *State* v. *Pinnock*, 220 Conn. 765, 779–81, 601 A.2d 521 (1992) (felony conviction generally admissible to impeach witness' veracity, but where crime does not bear directly on truthfulness, references at trial should ordinarily only be to unspecified felony); see also General Statutes § 52-145 (b); Conn. Code Evid. § 6-7. The petitioner claims that the jury would have found him more credible if they were unaware of the specific named felonies of which he had been convicted. Even if we agree, any such marginal enhancement of his credibility would not undermine our confidence in the verdict. The state presented a

[6] We note that the prosecutor did not name the petitioner's previous convictions during closing remarks. Rather, the prosecutor generally argued that the petitioner's convictions affected his credibility.

[7] During the criminal trial, the prosecutor did, however, refer the petitioner to paragraph 8 of exhibit E, the arrest warrant affidavit, which listed the petitioner's convictions by name and date. He then cross-examined the petitioner as follows:

"Q. Those are your felonies, aren't they? Correct, sir?

"A. Yes.

"Q. You were convicted of all those, is that right?

"A. Yes."

strong case against the petitioner, and his credibility was undermined when the state cross-examined him about his general criminal background. We are therefore unpersuaded that the jury would have had a reasonable doubt respecting guilt if the jurors did not know the specific names of the petitioner's prior convictions.

Finally, the court instructed the jury in relevant part to consider that "[t]he commission of other crimes by this [petitioner] has been admitted into evidence for the sole purpose of affecting his credibility." The petitioner concedes that the limiting instruction was not defective. Therefore, contrary to the petitioner's argument, the jury could not use evidence of his prior convictions to demonstrate that he knew how to run a sophisticated street level drug operation. Nor could the jury use that evidence to prove his guilt. See, e.g., *State* v. *Pharr*, 44 Conn. App. 561, 576, 691 A.2d 1081 (1997) (jury is presumed to follow trial court's instructions).[8]

We acknowledge that the possibility for harm always exists when prior, named convictions are introduced into evidence against a criminal defendant. And this is especially true when the defendant stands accused of the same or similar crimes of which he has been convicted of committing in the past. See, e.g., *State* v. *Geyer*, 194 Conn. 1, 14–15, 480 A.2d 489 (1984). Notwithstanding this, the petitioner must prove that there is a reasonable probability that, but for Evans' decision to expose his criminal history to the jury, the result of his criminal trial would have been different. See *Minor* v. *Commissioner of Correction*, supra, 150 Conn. App. 761–62.

[8] The petitioner relies on *State* v. *Pharr*, 44 Conn. App. 561, 576, 691 A.2d 1081 (1997) ("[t]here are . . . occasions where the prejudice is so severe that curative instructions are unlikely to be effective"), to argue that the trial court's instructions "did not undo the damage caused by . . . Evans admitting [his prior, named convictions] into evidence." The petitioner's reliance on *Pharr* is misplaced, as the circumstances in that case were markedly different. See id., 566, 576 (trial court unambiguously endorsed in-court testimony over "what a [police] report says" and jury charge did not specifically address court's remarks on such endorsement).

This he has failed to do.[9] The strength of the state's case, the prosecutor's permissible questioning of the petitioner about his criminal history on cross-examination, and the court's instructions lead us to conclude that the result of the petitioner's criminal trial would not have been different but for Evans' conduct. See, e.g., *Koslik* v. *Commissioner of Correction*, 127 Conn. App. 801, 812, 16 A.3d 753 (trial counsel introduced evidence of petitioner's prior conviction for same conduct he was accused of committing, but petitioner was not prejudiced due to strength of state's case), appeal dismissed, 301 Conn. 937, 23 A.3d 731 (2011) (certification improvidently granted). Accordingly, the habeas court properly determined that the petitioner failed to prove his ineffective assistance of counsel claim and correctly denied his petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion, the other judges concurred.

VICTOR C.* *v.* COMMISSIONER OF CORRECTION (AC 39582)

Lavine, Prescott and Bear, Js.

Syllabus

The petitioner, who had been convicted of the crime of risk of injury to a child in connection with his alleged sexual abuse of his minor stepdaugh-

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[9] Although the petitioner alleged that Evans exposed his subsequent August 12, 2009 arrest to the jury, he focuses this appeal on her decision to introduce the March 25, 2009 police incident report and arrest warrant affidavit into evidence. He does not specifically argue how she exposed the subsequent August 12, 2009 arrest to the jury or how it prejudiced him in a distinct manner. To the extent that the petitioner presses this argument on appeal, we conclude that he failed to prove prejudice for the same reasons that the police incident report and arrest warrant affidavit did not prejudice him.

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

ter, sought a writ of habeas corpus, claiming that he had received ineffective assistance from his trial counsel. Specifically, he claimed that his trial counsel improperly failed to present testimony from certain witnesses, to advise him properly as to his right to testify and to present testimony from an expert on child sexual abuse. The habeas court rendered judgment denying the petition for a writ of habeas corpus, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly determined that trial counsel's decision not to present testimony from the petitioner's sister and former wife did not constitute deficient performance, counsel's decision having been strategic in nature; that court credited counsel's testimony that he did not have the former wife testify due to her serious battle with drug addiction and because she would not have been a reliable witness, it concluded that testimony from the petitioner's sister would have been cumulative of that of another witness, who testified in the criminal trial instead of the petitioner's sister, and the petitioner failed to present any evidence that testimony from his former wife and sister would have benefited his defense.
2. The petitioner could not prevail on his claim that the habeas court improperly found that he was not prejudiced by his trial counsel's failure to advise him fully of his right to testify at trial and by counsel's having dissuaded him from testifying; that court found that trial counsel had provided the petitioner with strategic and considered legal advice not to testify on the basis of counsel's prior criminal trial experience, and his assessment of the strength of the state's case and of the petitioner's status as a sentenced prisoner and ability to testify on cross-examination without damaging the defense, and counsel's advice did not constitute deficient performance, or prejudice the petitioner, as the court found that the petitioner did not insist on testifying, it credited counsel's testimony that he made the petitioner aware that the ultimate decision to testify belonged to the petitioner, and it found that the petitioner's testimony that trial counsel had met with him only once was thoroughly unconvincing and that it was not reasonably probable that the petitioner would have received a more favorable verdict, given his unconvincing explanation for the victim's allegations against him, combined with the likelihood that cross-examination would have exposed him as a drug abusing felon with no current, positive relationship with his children.
3. The petitioner could not prevail on his claim that the habeas court improperly determined that his trial counsel did not render ineffective assistance by failing to consult an expert on child sexual abuse or to present expert testimony in that regard; the habeas court credited counsel's testimony regarding his knowledge of how to try a sexual assault case, found that impeachment evidence at the criminal trial supported the petitioner's defense that the victim had fabricated her allegations against

him, and found that counsel had conducted an extensive cross-examination of the victim by pointing out inconsistencies between the medical and investigation records, and the victim's testimony and that of other witnesses, and the petitioner failed to provide evidence that the outcome of the criminal trial would have been different had his counsel consulted with an expert on child sexual abuse.

Argued October 10, 2017—officially released February 13, 2018

Procedural History

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

Isaias Luis Pedraza, assigned counsel, for the appellant (petitioner).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Emily D. Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Victor C., appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly found that his trial counsel did not render ineffective assistance by (1) failing to present testimony from certain fact witnesses, (2) improperly advising him of his right to testify at trial, and (3) failing to consult and present testimony from an expert in the field of child sexual abuse. We affirm the judgment of the habeas court.

The petitioner was convicted of risk of injury to a child in violation of General Statutes § 53-21 (a) (2) and was sentenced to twenty years of incarceration,

execution suspended after fifteen years, and ten years of probation. *State* v. *Victor C.*, 145 Conn. App. 54, 58, 75 A.3d 48, cert. denied, 310 Conn. 933, 78 A.3d 859 (2013). The facts underlying the petitioner's conviction were set out by this court in his direct appeal. See id.

The petitioner is the victim's stepfather. Id., 56. In 2009, the victim was thirteen years old and living in a house with her grandparents, uncle, one or two younger siblings, and the petitioner. Id. Her mother, who was receiving drug treatment, was not living in the house. Id. One night, the petitioner entered the victim's bedroom. Id. After removing the victim's clothing, the petitioner rubbed his erect penis on her breasts and vagina. The victim did not stop the petitioner because she was scared. Id. The victim informed her mother and her uncle's girlfriend of the incident. Id., 56–57. At about the same time, the victim's special education teacher noticed a change in the victim's demeanor and confronted the victim. Id., 57. The victim disclosed the incident to her teacher, who was a mandated reporter of suspected child abuse. Id. The teacher took the victim to the school social worker, and the Department of Children and Families (department) was contacted. Id.

The victim was later interviewed by members of the department and, thereafter, interviewed and physically examined by a nurse practitioner at the child sexual abuse clinic at Yale-New Haven Hospital. Id. The petitioner subsequently was arrested and charged with multiple crimes.[1] Id. The jury, however, found him guilty

[1] Initially, the state charged the petitioner with sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), sexual assault in the second degree in violation of General Statutes § 53a–71 (a) (1), risk of injury to a child in violation of § 53-21 (a) (2), and threatening in the second degree in violation of General Statutes § 53a-62 (a) (1). *State* v. *Victor C.*, supra, 145 Conn. App. 57. The state subsequently filed a substitute information in which it withdrew the charge of threatening in the second degree. Id.

only of risk of injury to a child.[2] Id., 58. This court affirmed his conviction on direct appeal. Id., 75.

The petitioner, who was then self-represented, filed an application for a writ of habeas corpus on October 18, 2012. On October 1, 2014, following the appointment of counsel, the petitioner filed an amended petition for a writ of habeas corpus in which he alleged that he was denied the effective assistance of counsel because counsel failed to call certain witnesses, failed adequately to cross-examine witnesses, failed to advise him of his right to testify and did not permit him to testify, and failed to consult and present testimony from an expert knowledgeable about the effects of sexual assault on child victims. Following trial, the habeas court found that the petitioner's trial counsel did not render ineffective assistance by failing to call certain witnesses and that his cross-examination of the state's witnesses was not deficient. Although counsel advised the petitioner not to testify, the habeas court concluded that the petitioner made the ultimate decision not to testify and was not prejudiced by his counsel's advice. The habeas court denied the petition for a writ of habeas corpus but granted the petitioner certification to appeal.

We first set out our standard of review. "The standard of appellate review of habeas corpus proceedings is well settled. The underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . [M]ixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in

[2] Following the state's case-in-chief, the court granted the petitioner's motion for a judgment of acquittal on the charge of sexual assault in the first degree. *State* v. *Victor C.*, supra, 145 Conn. App. 58. The jury was unable to reach a unanimous verdict on the charge of sexual assault in the second degree. Id.

this sense. . . . Whether the representation a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by [an appellate] court unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Jarrett* v. *Commissioner of Correction*, 108 Conn. App. 59, 69–70, 947 A.2d 395, cert. denied, 288 Conn. 910, 953 A.2d 653 (2008).

In the present case, the petitioner claims that he was denied his constitutional right to the effective assistance of his trial counsel. "To determine whether the petitioner has demonstrated that counsel's performance was ineffective, we apply the two part test established in *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Claims of ineffective assistance during a criminal proceeding must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, *and* (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . The first prong requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the [s]ixth [a]mendment." (Emphasis in original; internal quotation marks omitted.) *Jarrett* v. *Commissioner of Correction*, supra, 108 Conn. App. 70.

"To satisfy the second prong of *Strickland*, that is counsel's deficient performance prejudiced his defense, the petitioner must establish that, as a result of his trial counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal. . . . The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different.

. . . In order to prevail, a petitioner must prevail on both *Strickland* prongs. . . . Put another way, [i]t is axiomatic that courts may decide against a petitioner on either prong, whichever is easier." (Citations omitted; internal quotation marks omitted.) *Gooden* v. *Commissioner of Correction*, 169 Conn. App. 333, 341, 150 A.3d 738 (2016).

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Adorno* v. *Commissioner*, 66 Conn. App. 179, 182–83, 783 A.2d 1202, cert. denied, 258 Conn. 943, 786 A.2d 428 (2001).

I

The petitioner first claims that the habeas court improperly found that his trial counsel did not render ineffective assistance by failing to investigate and present testimony from J and V, potential fact witnesses. We disagree.

The petitioner's theory of defense was fabrication on the part of the victim. At trial, trial counsel called only one witness, the petitioner's brother-in-law, D, to testify. At the habeas trial, the petitioner argued that if counsel had called his then wife, J, and his sister, V, their testimony would have contradicted the victim's testimony by providing evidence as to where the petitioner was living at the time of the assault and the nature of his

relationship with the victim. Both witnesses were subpoenaed and available to testify at the criminal trial. The petitioner alleged that trial counsel's failure to present testimony from either woman fell below the standard of a reasonably competent criminal defense lawyer. Had either of them testified, he further alleged, there is a reasonable probability that the jury would have found him not guilty of risk of injury to a child.

At the habeas trial, trial counsel testified that he retained Gregory Senneck of J & G Investigations to investigate potential witnesses, including members of the petitioner's family, but personally spoke only to D and V. Trial counsel testified that he does not call many witnesses during a criminal trial if he concludes that the state has not proven its case-in-chief. Trial counsel elected not to call J due to her serious battle with drug addiction. He also was of the opinion that she would have been "a loose cannon" on the witness stand. Trial counsel did not call V because she was the petitioner's relative; instead, he chose to have her husband testify.

The petitioner's habeas counsel was unable to locate J at the time of the habeas proceeding and, therefore, she did not testify. The petitioner's expert legal witness, Attorney Vicki Hutchinson, testified that she never interviewed J or V and did not know whether either one of them would have offered testimony that would have been helpful to the petitioner.

The habeas court rejected the petitioner's claim that trial counsel's failure to have either of the women testify constituted deficient performance or that the petitioner was prejudiced by his failure to do so. Because J did not testify at the habeas trial, the court was unable to determine what evidence she would have provided at the criminal trial or to evaluate her as a witness. The habeas court found that the petitioner produced no credible evidence to rebut the presumption of counsel's

competence to make an appropriate strategic decision not to have J testify, given her "condition." The habeas court accepted trial counsel's testimony that J would not have been a reliable witness capable of limiting her testimony to the relevant issues. The habeas court concluded, therefore, that trial counsel's decision not to have her testify was strategic in nature.

V testified at the habeas trial that an investigator told her that it was not in the petitioner's best interests for her to testify because she was related to him. D, her then husband, would testify instead. The habeas court found that "[a]t best, [V's] testimony would have been cumulative to that of" D. The habeas court concluded that counsel's decision to present the testimony of the petitioner's brother-in-law, rather than that of his sister, was strategic in nature and conformed to the required standard of reasonableness for defense counsel. Moreover, the habeas court found that the petitioner failed to present any evidence that V's and J's testimony would have benefited the petitioner's defense.

"The failure of the petitioner to offer evidence as to what [a witness] would have testified is fatal to his claim. . . . The petitioner seeks to have us use hindsight with [regard] to his counsel's decision not to call the witnesses to testify. We will not do so. We have stated that the presentation of testimonial evidence is a matter of trial strategy. . . . The failure of defense counsel to call a potential witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense." (Citation omitted; internal quotation marks omitted.) *Adorno* v. *Commissioner of Correction*, supra, 66 Conn. App. 186.

We have reviewed the record and the habeas court's memorandum of decision and conclude that the court properly found that trial counsel's trial strategy not

to call the petitioner's former wife and sister did not constitute deficient performance. The petitioner's claim fails.

II

The petitioner's second claim is that the habeas court improperly found that he was not prejudiced by his counsel's failure to advise him fully of his right to testify at trial and dissuading him from doing so. Given the particular facts of this case, we disagree.

The following facts are relevant to this claim. The petitioner did not testify at his criminal trial. In his amended petition for a writ of habeas corpus, he alleged that he did not testify on the advice of his trial counsel, which was unreasonable, and that if he had testified, he would have been found not guilty of any of the charges against him. By advising him not to testify, or not permitting him to testify, the petitioner claims that trial counsel failed in his duty to protect the petitioner's constitutional right to testify. He further alleged that if trial counsel had advised him of his right to testify, he would have testified to facts that challenged the victim's credibility and, therefore, the outcome of the proceeding would have been different.

It is the responsibility of trial counsel to advise a defendant of the defendant's right to testify and to ensure that the right is protected. "[T]he if and when of whether the accused will testify is primarily a matter of trial strategy to be decided by the defendant and his attorney." (Internal quotation marks omitted.) *Coward* v. *Commissioner of Correction*, 143 Conn. App. 789, 799, 70 A.3d 1152, cert. denied, 310 Conn. 905, 75 A.3d 32 (2013). The decision of whether to testify on one's own behalf, however, ultimately is to be made by the criminal defendant. *Wainwright* v. *Sykes*, 433 U.S. 72, 93 n.1, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) (Burger,

C. J., concurring). The petitioner's legal expert, Hutchinson, testified that the standard of competent representation is for defense counsel to advise the client of the advantages and disadvantages of testifying, but that the decision to testify is to be made by the client.

At the habeas trial, the petitioner testified that on more than one occasion he informed trial counsel that he wanted to testify. He also testified that trial counsel advised him that it was not in his best interest to testify because he was a sentenced prisoner. The petitioner acknowledged that he was serving a prison sentence that concerned several firearms related convictions and that he had two prior felony convictions related to conspiracy to commit murder and drugs. Trial counsel testified that he most likely advised the petitioner not to testify because he was serving a sentence on an unrelated matter and did not want that information to come out on cross-examination. He also testified that he "permits" criminal defendants to testify only if they insist and that the petitioner did not insist on testifying. Trial counsel, however, testified that the decision as to whether a criminal defendant testifies at trial is to be made by defense counsel.[3]

The habeas court found that trial counsel was a credible witness and that he did not provide deficient performance that resulted in prejudice to the petitioner. The

[3] Trial counsel's belief that defense counsel is the one entitled to decide whether a criminal defendant testifies at trial is simply wrong. See *Wainwright* v. *Sykes*, supra, 433 U.S. 93 n.1 (Burger, C. J., concurring). Had he communicated that misguided belief to the petitioner, we would be constrained to decide that this was clear evidence of deficient performance. As the state points out, however, there is no evidence in the record that trial counsel did so. We also note that trial counsel acknowledged, upon further questioning, that it was counsel's responsibility to advise the client of all issues and let the client make the ultimate decision on whether to testify. The petitioner's reliance on *Commissioner of Correction* v. *Rodriquez*, 222 Conn. 469, 475, 610 A.2d 631 (1992), is misplaced. In *Rodriquez*, unlike the present case, the court concluded that the petitioner's lawyer " 'directed him not to testify, essentially.' " Id.

court further found that trial counsel provided the petitioner with strategic and considered legal advice on the basis of, among other things, counsel's prior criminal trial experience, his assessment of the strength of the state's case at the close of its case-in-chief, his assessment of the petitioner's ability to testify on cross-examination without damaging the defense, and the petitioner's status as a sentenced prisoner. The habeas court credited trial counsel's testimony that he made the petitioner aware that the ultimate decision to testify belonged to the petitioner, regardless of legal advice. Also, the habeas court found that the petitioner did not insist on testifying. The habeas court also found that the petitioner had been convicted of felony charges and that if the convictions occurred within ten years of the underlying trial, the convictions could have been admitted into evidence as unnamed felony convictions. The habeas court, therefore, found that trial counsel's advice that the petitioner not testify was strategic in nature and not unreasonable, based on appropriate legal and factual considerations, and was sound given the totality of the circumstances. The habeas court concluded that trial counsel's representation was not deficient.

With respect to the petitioner's habeas testimony and his decision not to testify in his criminal trial, the habeas court found that the petitioner's testimony was thoroughly unconvincing. The court particularly discredited his testimony that trial counsel met with him only once and that he never spoke to anyone else from the defense. Moreover, the court found that the petitioner testified that he met with an investigator regarding his background and the allegations against him. The court credited the petitioner's testimony that trial counsel advised him that it was not in his best interest to testify given the sentence he was serving for firearms related offenses. The habeas court, therefore, found that it was

not reasonably probable that the petitioner would have received a more favorable verdict, given his unconvincing "innocent explanation" for the victim's allegations against him, combined with the likelihood that cross-examination would have exposed him "as a drug abusing felon with no current positive relationship with his children . . . ."

We have reviewed the record and conclude that the habeas court's finding that trial counsel did not render ineffective assistance with respect to his advice to the petitioner about testifying was not improper and, even if his advice were deficient, the petitioner was not prejudiced by the advice.

III

The petitioner next claims that the habeas court improperly found that trial counsel did not render ineffective assistance by failing to consult an expert in the field of child sexual abuse prior to trial or to present expert testimony in that regard. He argues that had trial counsel consulted an expert in the field of child sexual abuse, presented expert testimony on those matters, and effectively cross-examined witnesses in regard thereto, there is a reasonable probability that he would have been acquitted of the risk of injury to a child charge. More specifically, the petitioner contends that because trial counsel has no degree or experience in clinical or forensic psychology, his failure to consult an expert led to deficient cross-examinations of the state's professional witnesses and the victim herself. We are not persuaded.

The following facts are relevant to our resolution of the petitioner's claim. At the habeas trial, the petitioner presented expert testimony from Hutchinson and Nancy Eiswirth, a forensic psychologist, who testified about the topics trial counsel could have discussed with an expert and the manner in which such consultation

would have contributed to his cross-examination of witnesses. Hutchinson testified that had trial counsel consulted with an expert in child sex abuse, he could have conducted a targeted, more "intense" cross-examination of nurse practitioner Janet Murphy regarding the results of her physical examination; special education teacher Maria Altobelli as to the fluctuations in the victim's demeanor; and forensic interviewer Kevin Sheehy about the victim's conduct and body language during the interview. Eiswirth testified that, with the services of an expert, trial counsel could have investigated further issues pertaining to the victim's testimony and disclosures during the forensic interview, such as the victim's negative affect or the leading nature of the questions she was asked. An expert also could have pointed out inconsistencies between the medical evidence and the victim's testimony. On the basis of Eiswirth's testimony, the petitioner argues, an expert not only could have strengthened trial counsel's cross-examination of the witnesses but also could have strengthened the defense, and the outcome would have been different.

Trial counsel testified that he did not consult a mental health expert, given his experience trying child sexual abuse cases and having attended seminars on the subject. Given his knowledge and experience, he believed that his review of the medical records and investigation reports was sufficient to prepare him to cross-examine the victim and the state's professional and expert witnesses.

The habeas court credited trial counsel's testimony regarding his knowledge of how to try a sexual assault case, noting that it was validated by the trial record. The court found that the petitioner did not introduce convincing evidence that trial counsel was inexperienced in matters regarding child sexual abuse. Although Hutchinson testified that trial counsel could have done

more to cross-examine the witnesses, she conceded that his cross-examination was "sufficient . . . ." The habeas court found, on the basis of Hutchinson's testimony, that trial counsel conducted an extensive cross-examination of the victim, managing to point out inconsistencies in her testimony. The court also found that trial counsel was at least as knowledgeable about the relevant issues as Hutchinson and more prepared at the criminal trial than Eiswirth, who testified that she had read only some of the trial transcripts.

The habeas court also cited the following relevant principles of law. A defense counsel's failure to call an expert witness alone "does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense." (Internal quotation marks omitted.) *Eastwood* v. *Commissioner of Correction*, 114 Conn. App. 471, 481, 969 A.2d 860, cert. denied, 292 Conn. 918, 973 A.2d 1275 (2009). The fact that counsel could have inquired more deeply into certain matters, or failed to inquire into all areas claimed to be important, falls short of establishing deficient performance. *Velasco* v. *Commissioner of Correction*, 119 Conn. App. 164, 172, 987 A.2d 1031, cert. denied, 297 Conn. 901, 994 A.2d 1289 (2010).

In the present matter, the habeas court found that trial counsel pointed out the inconsistencies between the medical and investigation records, and the victim's testimony and that of others. That impeachment evidence supported the petitioner's defense that the victim had fabricated her allegations against the petitioner. "An attorney's line of questioning on examination of a witness clearly is tactical in nature. [As such, this] court will not, in hindsight, second-guess counsel's trial strategy." *State* v. *Drakeford*, 63 Conn. App. 419, 427, 777 A.2d 202 (2001), aff'd, 261 Conn. 420, 802 A.2d 844 (2002). The habeas court noted that defense counsel

should avoid alienating the jury by evoking sympathy for the victim. "[C]ross-examination is a sharp two-edged sword and more criminal cases are won by not cross-examining adverse witnesses, or by a very selective and limited cross-examination of such witnesses, than are ever won by demolishing a witness on cross-examination." (Internal quotation marks omitted.) *State* v. *Clark*, 170 Conn. 273, 287–88, 365 A.2d 1167, cert. denied, 425 U.S. 962, 96 S. Ct. 1748, 48 L. Ed. 2d 208 (1976). Finally, the habeas court found that the petitioner had failed to provide evidence that the outcome of the criminal trial would have been different had trial counsel consulted with an expert on child sexual abuse.

On the basis of our review of the record, the habeas court's analysis of the petitioner's claim, and its conclusion that trial counsel did not render deficient performance and that the petitioner was not prejudiced by trial counsel's failure to consult with an expert on child sexual assault, we conclude that the petitioner failed to carry his burden under *Strickland*.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 179

JULIUS BROWN *v.* ABDULLAH SHEHADEH
(AC 39554)

Sheldon, Bright and Flynn, Js.

Argued February 1—officially released February 13, 2018

Defendant's appeal from the Superior Court in the judicial district of New Haven, *Agati*, *J.*

Per Curiam. The judgment is affirmed.

STATE OF CONNECTICUT *v.* MICHAEL LATOUR (AC 39648)

Sheldon, Keller and Bright Js.

Argued January 30—officially released February 13, 2018

Defendant's appeal from the Superior Court in the judicial district of New Haven, geographical area number seven, *McNamara*, *J.*

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Negligence; comparative negligence; claim that plaintiff was entitled to new trial because trial court's comparative negligence calculus rested on its erroneous determination that unmarked crosswalk did not exist in area where plaintiff was struck by defendant's vehicle; construction of statutory (§ 14-297 [2]) definition of crosswalk; whether plaintiff failed to demonstrate how claimed error regarding unmarked crosswalk would have altered court's judgment; whether trial court should have rendered judgment on merits rather than dismissed action.

Recycling, Inc. *v.* Commissioner of Energy & Environmental Protection 127

Administrative appeal; whether trial court improperly dismissed administrative appeal from decision by defendant Commissioner of Energy and Environmental Protection denying application for individual recycling permit and revoking general permit to operate recycling facility; whether substantial evidence supported hearing officer's finding of pattern or practice of noncompliance by plaintiff with permit requirements, in violation of statute (§ 22a-6m [a]), so as to warrant revocation of general permit registration and denial of application for individual permit; claim that denial of permit application was not warranted even if plaintiff's compliance history demonstrated pattern of noncompliance; whether it was abuse of discretion to deny permit application and revoke general permit registration; claim that trial court improperly upheld defendant's decision because hearing officer failed to apply correct standard of review; claim that hearing officer abused discretion by excluding evidence of prior enforcement actions by Department of Energy and Environmental Protection against other waste facilities; whether trial court's finding that there was no bias on part of administrative adjudicators was clearly erroneous; whether plaintiff overcame presumption that administrative agents acting in adjudicative capacity are not biased.

Smith *v.* Commissioner of Correction. 160

Habeas corpus; ineffective assistance of counsel; pretrial confinement credit; claim that habeas court abused its discretion in denying petition for certification to appeal; whether petitioner failed to meet his burden of proving that there was reasonable probability that, but for trial counsel's allegedly deficient performance during plea proceeding, he would not have accepted plea offer and instead would have gone to trial.

Stack *v.* Hartford Distributors, Inc. 22

Arbitration; whether trial court properly rendered judgment granting application for order to proceed to arbitration regarding termination of plaintiff's employment; claim that termination of plaintiff's employment did not involve dispute arising out of interpretation or enforcement of parties' employment agreement and, therefore, that arbitration provision contained in that agreement was not applicable; claim that employment contract was void and unenforceable; whether issue of validity of employment contract should be considered by arbitrator in first instance where party did not challenge arbitration clause in employment agreement.

Stanley *v.* State's Attorney (Memorandum Decision) 901

State *v.* Andrews (Memorandum Decision) 903

State *v.* Anthony L. 512

Sexual assault in first degree; risk of injury to child; sexual assault in third degree; whether trial court abused its discretion in permitting state to introduce evidence of defendant's alleged prior uncharged sexual misconduct against victim; whether trial court abused its discretion in determining that probative value of prior uncharged sexual misconduct evidence outweighed prejudicial effect; whether evidence was insufficient to support conviction; whether victim testified with

sufficient specificity so as to permit jury to determine that unlawful conduct defendant engaged in was digital penetration.
State *v.* Antwon W. 668
Sexual assault in first degree in violation of statute (§ 53a-70 [a] [1] and [2]); sexual assault in third degree; risk of injury to child; motion to correct illegal sentence; claim that sentencing court improperly relied on inaccurate and unreliable information in sentencing defendant on three counts of sexual assault in first degree under § 53a-70 (a) (1) because sentences were imposed before vacatur, on grounds of double jeopardy, of defendant's conviction of three parallel counts of and associated concurrent sentences for sexual assault in first degree under § 53a-70 (a) (2); whether trial court abused its discretion in denying motion to correct illegal sentence; whether trial court considered conviction of counts under different subdivisions of sexual assault statute separately and distinctly; whether trial court improperly dismissed motion to correct instead of denying motion to correct; whether claim that sentencing court relied on inaccurate information in imposing sentence fell within common-law jurisdiction of court.
State *v.* Blaine 499
Conspiracy to commit robbery in first degree; claim that trial court committed plain error in failing to instruct jury that to find defendant guilty of conspiracy to commit robbery in first degree, it had to find that he intended and specifically agreed that participant in robbery would be armed with deadly weapon; whether record supported claim of plain error; whether it was fairly debatable whether court's instruction as to requisite intent was erroneous; whether any alleged error amounted to manifest injustice and affected fairness and integrity of and public confidence in judicial proceedings so as to necessitate reversal.
State *v.* Brown 337
Possession of more than four ounces of marijuana; subject matter jurisdiction; whether trial court lacked jurisdiction to consider merits of petition for writ of error coram nobis; whether trial court improperly denied petition and, instead, should have rendered judgment dismissing petition; whether defendant had prior alternative legal remedies available to him regarding ineffective assistance of counsel claim.
State *v.* Bush 108
Sale of narcotics; sale of narcotics within 1500 feet of school; conspiracy to sell narcotics; whether trial court abused its discretion when it failed to grant defendant's request to represent himself and suggested that his trial counsel continue to represent him through voir dire; claim that jury was misled by trial court's instructions on conspiracy charge; claim that trial court failed to instruct jury on elements of possession of narcotics and possession of narcotics with intent to sell; claim that trial court failed to instruct jury to determine which of underlying charged crimes defendant had conspired to commit; whether trial court improperly sentenced defendant to twenty years incarceration on conspiracy conviction, where most serious crime of which he was convicted that was proved to have been object of conspiracy carried maximum possible prison sentence of fifteen years; vacation of sentence on conspiracy conviction.
State *v.* Esquilin 461
Violation of probation; reviewability of unpreserved claim that trial court violated defendant's right to due process by admitting drug test reports into evidence without requiring state to introduce results through testimony of analysts who performed testing; whether defendant provided adequate record for review of unpreserved claim where record was silent as to state's reasons for not producing drug test analysts as witnesses at probation revocation hearing; whether state had notice of due process claim not raised at trial.
State *v.* Fernandez (Memorandum Decision) 905
State *v.* Fulcher (Memorandum Decision) 905
State *v.* Grant 81
Manslaughter in first degree with firearm; assault in first degree; harmless error; claim that trial court abused its discretion in admitting certain witness' testimony and portions of defendant's statements to police indicating that defendant was involved in sale of drugs; whether admission of subject evidence was harmless; whether defendant demonstrated that admission of subject evidence had significant impact on jury's verdict; claim that trial court abused its discretion in permitting state to elicit testimony from witness that he had observed defendant carrying firearm on prior occasion; whether any alleged error in admission of witness' statement was harmless.

State *v.* Jackson 40

Assault in first degree; tampering with witness; claim that evidence was insufficient to prove defendant's identity as perpetrator of stabbing to support conviction of assault in first degree; claim that evidence was insufficient to support conviction of tampering with witness; whether trial court reasonably could have found that defendant attempted to induce witness to testify falsely; claim that trial court improperly denied motion to dismiss tampering with witness charges; claim that state violated separation of powers doctrine when it added witness tampering charges to substitute information without judicial determination as to whether probable cause existed for added offenses; reviewability of unpreserved claim that trial court violated defendant's sixth amendment right to confrontation and abused its discretion when it prevented him from asking witness certain questions on recross-examination.

State *v.* Jin 185

Conspiracy to commit burglary in third degree; whether trial court lacked jurisdiction to consider motion to open judgment of conviction following imposition of sentence; reviewability of claims that trial court improperly denied application for accelerated rehabilitation program and that trial court erred in determining that defendant received effective assistance of counsel; reviewability of unpreserved claim that trial court had jurisdiction to correct imposition of illegal sentence pursuant to applicable rule of practice (§ 43-22) where defendant did not file motion to correct illegal sentence.

State *v.* Juarez 588

Conspiracy to commit murder; attempt to commit murder; whether evidence was sufficient to support conviction; whether defendant's offer to pay coconspirator to kill person was sufficient to prove defendant's intent to enter into agreement with coconspirator to have person killed; whether jury reasonably could have inferred that defendant intended to cause person's death; whether it was reasonable to infer that defendant had solicited, requested, commanded, importuned or intentionally aided coconspirator to engage in attempt to murder person; whether coconspirator, by soliciting and ultimately hiring police officer to kill person, took substantial steps in course of conduct planned to culminate in murder; claim that state did not prove defendant committed offenses substantially in manner described in information; claim that there was no evidence defendant engaged in criminal conduct on dates alleged in information.

State *v.* Latour (Memorandum Decision) 907

State *v.* Lebrick 221

Felony murder; home invasion; conspiracy to commit home invasion; burglary in first degree; attempt to commit robbery in first degree; assault in first degree; claim that former testimony of witness was inadmissible hearsay because it did not fall within exception to hearsay rule set forth in § 8-6 (1) of Connecticut Code of Evidence; claim that state failed to establish that witness was unavailable; whether state demonstrated that it made good faith effort to locate witness; claim that admission of witness' former testimony violated defendant's rights under confrontation clause of sixth amendment to United States constitution; claim that trial court improperly admitted testimony of firearm and tool mark expert in violation of § 4-1 of Connecticut Code of Evidence because state failed to establish relevancy of his testimony by providing sufficient evidentiary foundation that photographs, report, and notes relied on by expert were associated with crimes at issue in present case; claim that defendant's right to confrontation was implicated by admission of expert's opinion testimony where expert's opinion was formulated in part on basis of his review of ballistic report prepared by former employee of state's forensic laboratory who was not available to testify at trial.

State *v.* Manousos 310

Arson in first degree; whether trial court improperly denied motions to suppress statements defendant made to police and items police seized during investigatory stop and patdown for weapons; claim that police lacked reasonable and articulable suspicion that defendant was involved in criminal activity; claim that patdown of defendant for weapons was improper because totality of circumstances did not support trial court's finding that police reasonably believed that defendant may have been armed and dangerous; whether propriety of investigatory stop and subsequent patdown made it reasonable for police to enlarge scope of search by seizing items defendant was carrying; whether trial court abused its discretion by compelling defendant to disclose to state prior to trial substance of opinions

of expert witness; claim that court's actions impaired defendant's ability to present defense and diluted right to assistance of counsel.

State *v.* Montana. 261

Sexual assault in first degree; risk of injury to child; whether state presented sufficient evidence to support conviction of sexual assault in first degree and risk of injury to child; credibility of witnesses; whether trial court abused its discretion in excluding third-party culpability evidence proffered by defendant.

State *v.* Mukhtaar 1

Murder; claim that trial court abused its discretion in denying motions to correct illegal sentence and to allow expert witness to testify; claim that defendant's chronological age at time of crime was not representative of mental age; claim that trial court should have applied rationale of Miller *v.* Alabama *(567 U.S. 460) and its progeny to adult defendant whose mental age, at time of crime, was not substantially different from that of juvenile; whether trial court was required under* Miller *necessarily and expressly to take defendant's mental state into consideration at sentencing where defendant was twenty years old at time of crime; whether defendant set forth colorable claim for relief under* Miller; *whether trial court lacked subject matter jurisdiction over motion to correct illegal sentence; whether trial court properly denied motion to allow expert testimony.*

State *v.* Outlaw. 345

Assault of public safety personnel; plain error; whether defendant explicitly waived claim that trial court failed to give detailed instruction concerning whether correction officer was acting in performance of duties in alleged use of unnecessary or unreasonable force; whether defendant demonstrated that trial court committed plain error by failing to instruct jury that unwarranted or excessive force by correction officer was not within performance of officer's duties.

State *v.* Richard P.. 676

Sexual assault in fourth degree; risk of injury to child; whether trial court properly granted motion to dismiss charges following entry of nolle prosequi as to charges after material child witnesses relocated with their mother to London, England, and would not be returning to United States and were beyond reach of state's power to compel their attendance at trial; claim that minor children had "become disabled" within meaning of statute (§ 54-56b); claim that § 54-56b should be interpreted to apply in circumstances where material witness is "unavailable"; claim that statutory phrase "has . . . become disabled" should be interpreted to include circumstances in which witness cannot be compelled to testify for reasons that extend beyond physical or mental disability of witness; claim that term "disappeared" in § 54-56b should be defined to mean absence from jurisdiction.

State *v.* Salmond. 605

Murder; criminal possession of pistol or revolver; whether trial court abused its discretion by allowing witness to make in-court identification of defendant; whether trial court's finding that state had proven reliability of in-court identification by clear and convincing evidence was supported by record; whether any alleged evidentiary error as to in-court identification by witness was harmless; reviewability of unpreserved claim that trial court should have granted request to charge and charged jury that out-of-court identification procedure was not substantive evidence of guilt due to its suggestiveness; whether trial court abused its discretion in denying request for special credibility instruction regarding testimony of witness; whether evidence supported finding that witness was involved in murder so as to warrant accomplice instruction; claim that trial court was required to give special credibility instruction with respect to testimony of witness because witness was akin to jailhouse informant.

State *v.* Stanley (Memorandum Decision) 901

State *v.* Tucker. 270

Probation; assault in third degree; claim that trial court erred in admitting 911 recording into evidence; claim that trial court erroneously found that defendant violated probation; claim that trial court abused its discretion in imposing sentence of three years incarceration; whether trial court properly overruled objection to admission of 911 recording that was based on lack of foundation for recording; whether trial court properly authenticated 911 recording; whether defendant sustained burden of providing adequate record to review claim of due process violation; whether admission of recording constituted plain error; whether trial court properly found that defendant violated probation; whether trial court abused its discretion in revoking defendant's probation.

State *v.* Vivo (Memorandum Decision) 906
Tirado *v.* Torrington. 95
Allegedly improper tax assessment of plaintiff's motor vehicle; subject matter jurisdiction; whether trial court properly dismissed plaintiff's action for lack of subject matter jurisdiction; whether trial court incorrectly determined that statute (§ 12-119) governing applications for relief when property has been wrongfully assessed applied to plaintiff's claim; whether trial court correctly determined that statute (§ 12-117a) governing appeals to Superior Court from municipal boards of assessment appeals applied to plaintiff's claim; whether plaintiff failed to exhaust her available administrative remedies before appealing to Superior Court; claim that plaintiff did not receive notice of defendant's certificate of change and tax assessment in time to challenge assessment.
U.S. Bank National Assn. *v.* Christophersen 378
Foreclosure; standing; whether plaintiff had standing to commence foreclosure action; whether plaintiff was holder of subject note and entitled to enforce it at time action was commenced; claim that trial court denied defendant's right to due process and abused its discretion by relying on plaintiff's affidavit of debt in rendering modified judgment of strict foreclosure; whether court failed to consider defendant's concerns over amount of debt; claim that trial court abused its discretion in denying motion for continuance; whether court erred in failing to rule on request for judgment of foreclosure by sale; whether court improperly concluded that it lacked authority pursuant to statute (§ 49-15 [b]) to modify judgment; whether § 49-15 (a) (1) conferred authority on court to modify judgment.
United Amusements & Vending Co. *v.* Sabia. 555
Contracts; whether judgment on merits of breach of contract action was final judgment for purposes of appeal, even though issue of contractual attorney's fees remained outstanding; reviewability of claim that trial court improperly failed to find that contract was unenforceable based on defendant's special defenses of mistake and duress; reviewability of claim that trial court incorrectly awarded damages based on unconscionable provisions of contract; whether trial court's determination of damages was clearly erroneous and not supported by record.
Valley National Bank *v.* Private Transerve, LLC. 479
Foreclosure; breach of personal guarantees; claim that plaintiff bank did not have standing; claim that genuine issue of material fact existed as to whether plaintiff owned debt when action was commenced; unpreserved claim that action was initiated under improper corporate name; whether defendants established that certain evidentiary rulings at hearing in damages relied on clearly erroneous factual findings or that trial court abused its discretion in granting plaintiff permission to file amended complaint.
Victor C. *v.* Commissioner of Correction. 706
Habeas corpus; whether habeas court properly denied petition for writ of habeas corpus; whether habeas court properly determined that trial counsel's decision not to present certain testimony did not constitute deficient performance; claim that habeas court improperly found that petitioner was not prejudiced by failure of trial counsel to advise him fully of right to testify and by counsel's having dissuaded him from testifying; claim that habeas court improperly determined that trial counsel did not render ineffective assistance by failing to consult expert on child sexual abuse or to present expert testimony in that regard.
Walsh Fence, LLC *v.* Dolceaqua (Memorandum Decision). 904

NOTICE OF SUSPENSION OF ATTORNEY

Pursuant to Practice Book § 2-54, notice is hereby given that on January 30,2018 Attorney Arik B. Fetscher, Juris #418442, was ordered suspended from the practice of law by the Hon. Gary White for a period of 100 days, effective January 31, 2018.

The full order of the court can be found in FSTCV17 6033715S *Disciplinary Counsel v. Arik B. Fetscher.*

Notice of Application for Reinstatement to the Bar

On 2/1/18 Maurizio D. Lancia filed in the Superior Court for the Judicial District of Fairfield at Bridgeport in docket number FBT CV12 6027678S an Application for Reinstatement as an Attorney Admitted to the Practice of Law in Connecticut. The Application will be referred to a Standing Committee on Recommendations for Admission to the Bar.

Robert A. Wilock, II
Chief Clerk,
Judicial District of Fairfield at Bridgeport

OFFICE OF STATE ETHICS

Office of State Ethics advisory opinions are published herein pursuant to General Statutes Sections 1-81 (3) and 1-92 (5) and are printed exactly as submitted to the Commission on Official Legal Publications.

Advisory Opinion No. 2018-1, January 25, 2018

Questions Presented: **The petitioner asks (1) whether expenditures made by the Connecticut Academy of Science and Engineering (''CASE'') to administer a Fellowship Program and the acceptance of donations to fund the Program trigger lobbyist registration requirements, and (2) whether services provided to the General Assembly by Fellows under the Fellowship Program constitute an impermissible gift.**

Brief Answer: **We conclude that (1) the expenditures made by CASE to administer a Fellowship Program and the acceptance of donations to fund the Program do not trigger lobbyist registration requirements, and (2) that services provided to the General Assembly by Fellows under the Fellowship Program constitute a permissible gift to the state.**

At its December 2017 regular meeting, the Citizen's Ethics Advisory Board granted the petition for an advisory opinion submitted by Richard H. Strauss, Executive Director of the Connecticut Academy of Science and Engineering. The Board now issues this advisory opinion, which interprets the Code of Ethics for Public Officials[1] (''Ethics Code''), is binding on the Board concerning the person who requested it and who acted in good-faith reliance thereon, and is based on the facts provided by the petitioner.

Facts

The following facts, as set forth by the petitioner, are relevant to this opinion:

> The Connecticut Academy of Science and Engineering, Incorporated, a Section 501 (c)(3) non-profit organization (''CASE''), wishes to administer a Fellowship Program (''the ''Program'') whereby it will make science and technology experts (each a ''Fellow'') available to the Connecticut General Assembly (the ''General Assembly'') to help address questions on science and technology that arise in connection with potential legislation. It is anticipated that the Program will be funded, in large part, by donations from business organizations, private charities and individuals. The questions that CASE has for the Office of State Ethics are (i) would CASE's actions, either in making expenditures to administer the Program or in accepting donations to fund the Program, trigger lobbyist registration requirements and (ii) would the services provided by the Fellows to the General Assembly constitute impermissible gifts?

[1]Chapter 10, part I, of the General Statutes.

The General Assembly founded CASE pursuant to Special Act No. 76-53, enacted May 28, 1976, ''to foster science and engineering, to promote the application of science and engineering to human health and welfare, and to study and report upon any subject within its competence when appropriate. In particular, the corporation shall . . . provide guidance to the people and the government of the state of Connecticut, upon request, in the application of science and engineering to the economic and social welfare''. CASE is a membership organization; membership is considered honorific. To further its goals, CASE regularly (i) assembles research teams and study committees consisting of science and engineering experts, including CASE members, (ii) prepares reports and studies of a scientific and technological nature, (iii) provides recommendations based on an analysis of its reports and studies and (iv) undertakes various educational outreach initiatives. While doing so, CASE remains non-partisan.

The California Council on Science and Technology, another Section 501 (c)(3) organization established for the same general purpose as CASE, has awarded CASE a planning grant for the establishment of the Program and the General Assembly's leadership has approved the planning process. The Director of the Office of Legislative Research (the ''OLR''), an ex officio member of CASE's Fellowship Policy Advisory Committee, serves as the General Assembly's project liaison to the Program.

CASE leadership is aiming to place the first Fellow(s) at the General Assembly for either the 2018 or 2019 legislative session. At this time, CASE is expecting that one, but not more than two Fellows would be placed. Each of the Fellows will (i) hold either a doctoral level degree in the sciences or in engineering or a masters level degree with at least three (3) years of professional experience, (ii) serve as a Fellow for a predetermined amount of time (currently anticipated to be one year), (iii) be assigned to the OLR or will be placed by the OLR to serve legislative committees and/or individual legislators within the General Assembly and (iv) advise his or her audience on matters of science and technology pertinent to the State of Connecticut and beyond. Potential Fellows may have specific group affiliations (e.g., professional societies/organizations such as the American Chemical Society, American Academy of Environmental Engineers, etc.) and/or specialized education, or their research expertise may concern a particular theme. Nonetheless, it is anticipated that there will be a Memorandum of Understanding between CASE and the General Assembly providing that the OLR and/or the Office of Legislative Management (the ''OLM''), and not outside sources, will have sole authority to (1) make the final selection of Fellows from a list of finalists prepared by a CASE committee, (2) determine which issues the Fellows will address and (3) determine utilization of the Fellows' services.

CASE will require fundraising to operate the Program. CASE leadership anticipates that it will receive a significant inflow of funds pursuant to donations from individuals, corporations and/or private charities. Donations will be made to CASE, not individual Fellows, and will, in turn, be used for administration of the Program. As aforementioned, donors will have no ability to select Fellows, the subjects as to which they will

advise or the advice they will give, the offices or the committees of the General Assembly with whom they will be placed or the members of the General Assembly whom they will serve.

[Although the Petition for Advisory Opinion contains two general questions, they stem from the following seven specific questions presented by the Petitioner.]

QUESTIONS PRESENTED

1. Would advice given by Fellows to members or committees of the General Assembly on science and technology matters be deemed to be ''for the purpose of influencing any legislative . . . action'' under the definition of ''Lobbying'' in [General Statutes] § 1-91?
2. In the case of any ambiguity regarding the answer to Question # 1, would the execution of an agreement between CASE and the General Assembly specifying that each Fellow's services are for no purpose other than to advise on science and technology be sufficient to establish that the Fellow's services are not ''Lobbying''?
3. If an individual, corporation or other organization donates more than $3,000 in any calendar year to the Program, would that individual, corporation or other organization be deemed to have ''solicit[ed] others to communicate with any official or his staff in the legislative . . . branch . . . for the purpose of influencing any legislative . . . action'' under the definition of ''Lobbying'' in [General Statutes] § 1-91?
4. In the case of any ambiguity regarding the answer to Question # 3, would it be sufficient to establish that a donor did not solicit others to influence legislative action if the donor executed an acknowledgment in favor of CASE stating that (i) its donations are for no purpose other than to help fund administration of the Program and (ii) the donor will have no ability to select Fellows, the subjects as to which they will advise or the advice they will give, the offices or the committees of the General Assembly with whom they will be placed or the members of the General Assembly whom they will serve?
5. Would each Fellow's services pursuant to the Program be exempted from the definition of ''Gift'' in [General Statutes] § 1-79 pursuant to clause (E) of such definition (i.e., ''Goods or services . . . that facilitate state or quasi-public agency action or functions'')?
6. If each Fellow's services pursuant to the Program are not exempted from the definition of ''Gift'' in [General Statutes] § 1-79, do they constitute impermissible benefits to a public official provided ''on any understanding that the vote, official action or judgment of the public or state employee . . . would be or had been influenced thereby'' in violation of [General Statutes] § 1-84 (g)?
7. If CASE implemented with Connecticut's executive branch of government a program in form and substance substantially similar to the Program, whereby science and technology experts were made available to executive officials, would such program (i) implicate the lobbying laws of [General Statutes] § 1-91 differently as compared to the Program and (ii) be recognized as a permissible ''gift to the state'' akin to the ''Loaned Executive Program'' discussed in Advisory Opinion No. 91-1?

Analysis

We proceed to answer Petitioner's seven questions as presented.

1. Under General Statutes § 1-91 (11), the term ''lobbying'' means ''communicating directly or soliciting others to communicate with any official or his staff in the legislative or executive branch of government or in a quasi-public agency, *for the purpose of influencing any legislative or administrative action*.''[2] In Advisory Opinion No. 78-13, the former State Ethics Commission (''former Commission'') explained that ''[w]hat determines whether [an entity] is lobbying is its intent in furnishing the information. If it is for the purpose of influencing legislative action, it is lobbying. Conversely, if it is not for the purpose of influencing legislative action, it is not lobbying.''[3] It went on to state that, although the entity ''is the best judge of its intent in providing information,''

> intent can be manifested objectively in a number of ways. For example, the content of the information will normally give some indication of intent. Some information is patently neutral. Other might create an impression which, if the activity is not reported as lobbying, could require an explanation by the [entity] as to why the furnishing of it should not be held to have been done for the purpose of influencing legislative action. How provision of the information was initiated may be meaningful.[4]

In this case, the manner in which the Fellows will provide advice suggests that they are not engaging in ''lobbying.'' Although privately funded, according to the proposed Program, Fellows will only provide their expertise in the area of science and technology for the benefit of the state and at the direction of the state by being assigned to the OLR. It is anticipated that there will be a Memorandum of Understanding between CASE, the entity that administers the Program, and the General Assembly, providing that the non-partisan OLR and/or OLM offices will have sole authority to (1) make the final selection of Fellows from a list of finalists prepared by a CASE committee, (2) determine which issues the Fellows will address, and (3) determine how to use Fellows' services.

Moreover, the proposed Program and work to be performed by Fellows is akin to the ''Loaned Executive Program,'' discussed in Advisory Opinion No. 91-1. In that opinion, the former Commission recognized the ''Loaned Executive Program'' as a permissible ''gift to the state'' under the Ethics Code, whereby private entities would donate the time and talent of certain executive personnel to serve as consultants, managers, and assistants to the State. Such executives were compensated by their private employers and were not considered state employees.[5] The fact that the former Commission did not address the issue of ''lobbying'' suggests that it did not believe the proposed activity would constitute ''lobbying.''

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[2](Emphasis added.)
[3]Advisory Opinion No. 78-13.
[4]Id.
[5]Advisory Opinion No. 91-1.

Based on those facts, we conclude that the advice to be provided by Fellows to members or committees of the General Assembly on science and technology will not be deemed ''lobbying,'' as defined under § 1-91 (11).

Bolstering our conclusion is the fact that the OLR Director is an ex-officio member of CASE's Fellowship Policy Advisory Committee and serves as the General Assembly's project liaison to the Program; and that the General Assembly founded CASE, pursuant to Special Act No. 76-53, to provide, among other things, ''guidance to the people and the government of the state of Connecticut, upon request, in the application of science and engineering to the economic and social welfare.''

2. In light of the answer to Question No. 1, the execution of an agreement between CASE and the General Assembly specifying that each Fellow's services are for no purpose other than to advise on science and technology is not required. Nonetheless, such an agreement is recommended as it could provide a framework under which Fellows will operate when faced with any conflicts of interest and note that their services are being donated by CASE for the benefit of the State. The concern over conflicts of interest was raised specifically in Advisory Opinion No. 91-1 regarding the aforementioned ''Loaned Executive Program,'' and the former Commission recommended that such conflicts be addressed by the state prior to the commencement of the program. Here, an agreement between CASE and the General Assembly could, for example, provide for specific procedures to be followed by Fellows when faced with a conflicts of interest, should such conflicts arise.

3. Because, as noted in the answer to Question No. 1, the work of Fellows for the benefit of the General Assembly will not be deemed ''lobbying,'' a monetary donation of any value made by individuals, corporations or other organizations in support of the Program, does not meet the definition of ''lobbying'' under the Ethics Code. Even if the Program included activity deemed to be ''lobbying'' (which in this case, it does not, as noted above), donations to the Program would not be considered ''lobbying'' under the Ethics Code and would not require lobbyist registration if valued $3,000 or more. Rather, as noted in General Statutes § 1-95 (a) (3), donors who donate $3,000 or more to the lobbying efforts of another person, must be identified on the person's lobbyist registration if such person is formed primarily for the purpose of lobbying.

4. In light of the answer to question No. 3, there is no need to require the proposed execution of a donor acknowledgment.

5. Under the Ethics Code, the ''gift-to-the-state'' provision exempts from the term ''gift'' the following: ''Goods or services (i) that are provided to a state agency or quasi -public agency (I) for use on state or quasi-public agency property, or (II) that support an event or the participation by a public official or state employee at an event, and (ii) that facilitate state or quasi-public agency action or functions.''[6] As noted in answer to Question No. 1, the Program is similar to

[6]General Statutes§ 1-79 (5) (E).

the previously sanctioned ''Loaned Executive Program,'' which was recognized as a permissible ''gift to the state.''[7] Here, the Program will provide expert services on science and technology to the state to be utilized by members of the General Assembly in their legislative work. As such, it will clearly facilitate state action or functions, as required under the definition of ''gift to the state''. Therefore, each Fellow's services will be considered a permissible ''gift to the state'' under the Ethics Code.

6. See answer to Question No. 5.
7. If CASE implements with the executive branch of Connecticut state government a program in form and substance substantially similar to the Program proposed with the General Assembly, whereby science and technology experts are made available to executive officials, such program would not be treated differently under state lobbying laws. Further, the executive branch program would similarly be recognized as a permissible ''gift to the state'' akin to the ''Loaned Executive Program'' discussed in Advisory Opinion No. 91-1.

Conclusion

Based on the foregoing, we conclude that (1) the expenditures made by CASE to administer a Fellowship Program and the acceptance of donations to fund the Program do not trigger lobbyist registration, and (2) services provided to the General Assembly by Fellows under the Fellowship Program constitute a permissible gift to the state under the Ethics Code.

By order of the Board,

Dated 1/25/18 Kevin P. Johnston Chairperson /**Vice Chairperson**

[7]Advisory Opinion No. 91-1.