PETER MILLER *v.* COMMISSIONER OF CORRECTION (AC 39330)

Alvord, Sheldon and Norcott, Js.

Syllabus

The petitioner, a citizen of Jamaica, sought a writ of habeas corpus, claiming that his trial counsel provided ineffective assistance by failing to advise him adequately as to the immigration consequences of his guilty plea to a certain drug related offense that constituted an aggravated felony under federal immigration law, which subjected him to mandatory deportation. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court abused its discretion in denying the petition for certification to appeal, as a resolution of the issues raised by the petitioner concerning counsel's performance were debatable among jurists of reason and could have been resolved by a court in a different manner.
2. The habeas court improperly concluded that the petitioner's trial counsel provided effective assistance in advising the petitioner regarding the immigration consequences of his guilty plea: the record showed that trial counsel failed to accurately advise the petitioner that his guilty plea to an aggravated felony would subject him to mandatory deportation but, instead, advised him that there was a substantial likelihood that he would be deported as a result of the conviction, which was contrary to the requirement that counsel unequivocally convey to the petitioner that, as a result of his guilty plea to an aggravated felony, he was subject to mandatory deportation under federal law; nevertheless, because the habeas court did not make any findings as to whether the petitioner demonstrated that he was prejudiced by trial counsel's performance, and the question of prejudice presented a mixed question of fact and law, the matter was remanded to the habeas court for a determination of whether the petitioner was prejudiced by his trial counsel's deficient performance.

Argued April 18—officially released September 26, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, and tried to the court, *Fuger*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification

to appeal, and the petitioner appealed to this court. *Reversed; further proceedings.*

Vishal K. Garg, for the appellant (petitioner).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *Angela Macchiarulo*, senior assistant state's attorney, and *Yamini Menon*, assistant state's attorney, for the appellee (respondent).

Opinion

NORCOTT, J. The petitioner, Peter Miller, a citizen of Jamaica, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying certification to appeal and (2) improperly concluded that trial counsel did not render ineffective assistance when advising him of the immigration consequences of his guilty plea. We agree that the habeas court abused its discretion in denying the petition for certification to appeal and that trial counsel rendered deficient performance when advising the petitioner of the immigration consequences of his guilty plea. We conclude, however, that the record is inadequate to determine whether the petitioner was prejudiced by counsel's deficient performance. Accordingly, we reverse the judgment of the habeas court and remand the matter for further habeas proceedings in accordance with this opinion.

The following facts and procedural history are relevant to our resolution of this appeal. The petitioner was charged under two separate docket numbers with a variety of drug related offenses. On June 7, 2012, the petitioner appeared before the court, *Iannotti*, *J.*, and, pursuant to a plea deal, pleaded guilty to possession of a controlled substance with intent to sell in violation

of General Statutes § 21a-278 (b). At that time, the prosecutor recited the following facts underlying this plea. On or about October 13, 2011, a United States Postal Service inspector intercepted a package that contained eighteen pounds of marijuana. Thereafter, a controlled delivery was made to 15 Pinetree Lane in Fairfield. The package was accepted by the petitioner's girlfriend, Tracy Dapp, who, upon accepting it, informed the detectives that the parcel was for the petitioner. Subsequently, the petitioner arrived at Dapp's residence, where he was arrested and made incriminating statements to the police. The record indicates that a search of the petitioner's vehicle revealed the eighteen pounds of marijuana, but it is unclear whether Dapp gave the petitioner the marijuana to put in his vehicle before he was apprehended by the police at her residence.

The petitioner was represented before the trial court by Attorney Jared Millbrandt, a public defender. During the plea canvass, the court asked the petitioner whether he had discussed with counsel "the charge he pleaded guilty to, the elements of the offense, maximum penalty twenty years, [and] mandatory minimum five years," and whether the petitioner understood that the court could deviate below the mandatory minimum sentencing guidelines, to which the petitioner answered, "Yes." The court then asked whether the petitioner was pleading guilty "freely and voluntarily." The petitioner replied, "Yes." The court asked, "Are the facts as read by the state essentially correct?" The petitioner answered, "Correct." Finally, the court asked the following: "Do you understand [that] if you are not a citizen this can result in deportation from the United States, exclusion from the admission to the United States, [and] denial of naturalization pursuant to the laws of the United States?" The petitioner replied, "Yes." The court then found that the plea was voluntarily and knowingly made with the assistance of competent counsel. On July 30,

2012, the court sentenced the petitioner to seven years of incarceration, execution suspended after sixteen months, followed by three years of probation.

On July 30, 2013, the United States Immigration Court ordered that the petitioner be removed from the United States to Jamaica because his conviction of possession of a controlled substance with intent to sell constituted an aggravated felony, for which the consequence is mandatory deportation.[1]

In May, 2015, the petitioner commenced the present action. On September 8, 2015, the petitioner filed the operative amended petition for a writ of habeas corpus, which in relevant part alleges ineffective assistance of counsel because Millbrandt did not adequately advise him as to the immigration consequences of his guilty plea.[2]

The court held the habeas trial on February 11, 2016, during which the court heard testimony from, among others: Millbrandt; Justin Conlon, an immigration attorney; Kenneth Simon, a retired public defender with

[1] See 8 U.S.C. § 1227 (a) (2) (A) (iii) (2012).

[2] To support his ineffective assistance of counsel claim, the petitioner further argued, in the first count of his amended petition, that Millbrandt failed (1) adequately to research the immigration consequences of his guilty plea; (2) accurately to advise him about the probability of deportation, removal and inadmissibility for reentry under the terms of the plea agreement; and (3) to effectively utilize the possible immigration consequences of pleading guilty during the plea negotiation process. Because we determine that Millbrandt rendered deficient performance when he failed to advise the petitioner of the immigration consequences of his guilty plea, we need not reach the petitioner's remaining arguments as to other acts which also may have constituted deficient performance.

The petitioner also claimed, in the second count of his amended petition, that his guilty plea was not made knowingly, intelligently, and voluntarily because he did not know or understand the immigration consequences that he would face upon the entry of a guilty plea, and that he would not have entered a guilty plea had he known and understood the immigration consequences of that plea. On the day of the habeas trial, the petitioner withdrew this count.

knowledge of the standard of care for criminal defense attorneys; Elisa Villa, a supervisory assistant public defender; and the petitioner. On May 25, 2016, the court issued an oral ruling from the bench. In relevant part, the court made the following findings of fact and conclusions of law concerning the petitioner's claim that Millbrandt had rendered ineffective assistance: "Millbrandt was aware of the immigration issues and it is clear from his testimony . . . that he did, in fact, investigate, discuss and understand the immigration issues and immigration status of [the petitioner]. . . . Millbrandt [met] the minimal standards of providing advice on the immigration issue to [the petitioner]. It does not, however, appear that [Millbrandt] *categorically advised* [the petitioner] that he would under any and all circumstances be deported to Jamaica if he accepted this guilty plea. He did, in fact, fall slightly short of that statement. . . .

"Nevertheless, [the petitioner] and his counsel did discuss the immigration issues numerous times. [Millbrandt] told [the petitioner] to assume that he would be deported.[3] In other words, when making the decision as to whether to accept the plea bargain, he all but told him it would be . . . a virtual certainty [that the petitioner would] be deported. He told him there was a substantial likelihood of deportation.

"It is clear that [the petitioner] and [Millbrandt] discussed the immigration issues early and often. In fact, [Millbrandt] reviewed the document that [Villa] had prepared, which parenthetically the court notes is a thorough summary of the issue for criminal practitioners.

[3] The petitioner argues that the court made a clearly erroneous factual finding that "counsel advised the petitioner that he should assume he would be deported." The petitioner never developed this argument further, and the record supports the court's factual finding. Millbrandt testified that he advised the petitioner that "it was safe to assume that he would be deported." This testimony aligns with the court's factual findings.

"[Millbrandt] further indicated that he spoke with an immigration lawyer.[4] [Millbrandt] indicated that he even discussed the immigration issues with the prosecutor, but the prosecutor was not interested or concerned about the immigration issues, nor is there any case law that suggests that a prosecutor has any duty to consider immigration implications.

"[Millbrandt] told the petitioner that there was a likelihood that he would be deported. It's a bit disingenuous at this point then for [the petitioner] to indicate he wasn't aware that by pleading to this case there could be adverse immigration effects upon his immigration status.

"I will specifically find that the advice of [Millbrandt], while perhaps not as thorough as that suggested by [habeas] counsel for the petitioner, did meet the minimal standards of constitutional acceptability and that he did not violate the standard of care required of a criminal defense counsel operating within the state of Connecticut." (Emphasis added; footnote added.)

Accordingly, the court denied the petition for a writ of habeas corpus because the petitioner had failed to prove deficient performance, and subsequently denied further the petitioner's petition for certification to appeal. This appeal followed. Additional facts will be set forth as necessary.

[4] The petitioner argues that the court made a clearly erroneous factual finding when it found that Millbrandt had consulted an immigration attorney because Millbrandt testified that he did not speak with an immigration attorney in connection with the petitioner's case. Millbrandt, however, also testified that he spoke with an immigration attorney in December, 2011, about the decision in *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), so that he could "determine or obtain some tools that would be helpful in advising clients as to potential immigration consequences" which would follow the entry of a guilty plea to an aggravated felony offense. Thus, in light of the record, the court's factual finding that Millbrandt "spoke with an immigration attorney" is not clearly erroneous.

I

The petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal from the denial of his petition for a writ of habeas corpus with respect to his claims of ineffective assistance of counsel. Specifically, he argues that because these issues are debatable among jurists of reason, a court could resolve the issues differently, and, therefore, the habeas court abused its discretion in denying his petition to appeal.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review

the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Citations omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 821–22, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

As discussed more fully in part II of this opinion, we agree with the petitioner's claim that trial counsel rendered deficient performance in that he failed to accurately advise the petitioner as to the immigration consequences of his guilty plea. Accordingly, we need not address the petitioner's claim as to whether counsel failed to accurately advise him of the enforcement practices of the federal immigration authorities. Cf. *State* v. *Ross*, 230 Conn. 183, 285, 646 A.2d 1318 (1994) (declining to review claim when dispositive claim resolved in defendant's favor); *Breiter* v. *Breiter*, 80 Conn. App. 332, 335 n.1, 835 A.2d 111 (2003) (same). Because the resolution of the petitioner's claim involves issues that are debatable among jurists of reason, we conclude that the habeas court abused its discretion in denying certification to appeal from the denial of the petition for a writ of habeas corpus.

II

We now turn to the petitioner's substantive claim, which is that the habeas court improperly concluded that he received effective assistance of counsel. Specifically, he argues that (1) counsel was deficient for failing to adequately advise him of the immigration consequences of his guilty plea, and (2) that he was prejudiced by counsel's deficient performance.

We set forth the relevant legal principles and our standard of review. "The sixth amendment to the United

States constitution, made applicable to the states through the due process clause of the fourteenth amendment, affords criminal defendants the right to effective assistance of counsel. *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 554, 126 A.3d 538 (2015), cert. denied sub nom. *Semple* v. *Davis*, U.S. , 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016); see also *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 100, 111 A.3d 829 (2015) (criminal defendant constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings). Although a challenge to the facts found by the habeas court is reviewed under the clearly erroneous standard, whether those facts constituted a violation of the petitioner's rights under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . .

"It is well established that the failure to adequately advise a client regarding a plea offer from the state can form the basis for a sixth amendment claim of ineffective assistance of counsel. The United States Supreme Court . . . recognized that the two part test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), applies to ineffective assistance of counsel claims arising out of the plea negotiation stage. *Hill* v. *Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) . . . ." (Citations omitted; internal quotation marks omitted.) *Duncan* v. *Commissioner of Correction*, 171 Conn. App. 635, 646–47, 157 A.3d 1169, cert. denied, 325 Conn. 923, 159 A.3d 1172 (2017).

We now set forth the well established standard that applies to a claim of ineffective assistance of counsel. "To succeed on a claim of ineffective assistance of

counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. . . . The petitioner has the burden to establish 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. . . .

"To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . It is not enough for the petitioner to simply prove the underlying facts that his attorney failed to take a certain action. Rather, the petitioner must prove, by a preponderance of the evidence, that his counsel's acts or omissions were so serious that counsel was not functioning as the counsel guaranteed by the sixth amendment, and as a result, he was deprived of a fair trial." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Jones* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-12-4004742-S (November 21, 2014) (reprinted in 169 Conn. App. 407, 415–16), aff'd, 169 Conn. App. 405, 150 A.3d 757 (2016), cert. denied, 324 Conn. 909, 152 A.3d 1246 (2017).

"For claims of ineffective assistance of counsel arising out of the plea process, the United States Supreme Court has modified the second prong of the *Strickland* test to require that the petitioner produce evidence that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied. . . . [S]ee . . . *Hill* v. *Lockhart*, [supra, 474 U.S. 59] (modifying

Strickland prejudice analysis in cases in which petitioner entered guilty plea). It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier. *Lewis* v. *Commissioner of Correction*, 165 Conn. App. 441, 451, 139 A.3d 759, [cert. denied, 322 Conn. 901, 138 A.3d 931 (2016)], citing *Strickland* v. *Washington*, supra, 466 U.S. 697 (a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner])." (Citation omitted; internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, 169 Conn. App. 266, 278, 149 A.3d 185 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017).

A

The petitioner first argues that the habeas court improperly concluded that Millbrandt's performance was not deficient. Specifically, he alleges that Millbrandt failed to advise him adequately that entering a guilty plea to an aggravated felony would subject him to mandatory deportation. We agree.

The following additional facts are necessary for our resolution of this claim. At the habeas trial, Millbrandt testified that the petitioner's primary concern was to avoid a lengthy term of imprisonment, and that once that it became apparent that avoiding a term of imprisonment was not possible, discussions of a plea deal ensued. As part of his advice to the petitioner in relation to the plea deal and its effect on his immigration status, Millbrandt relayed to the petitioner that "*anything is possible* with regard to the federal government that *they may decide to not take immigration action against him* or actually come and physically remove him but . . . my advice to him was that in my opinion convictions of these . . . charges would be drug trafficking offenses and [that] they would *render him deportable so we should assume that that would be the case*."

(Emphasis added.) The following exchange occurred between the petitioner's habeas counsel and Millbrandt:

"Q. What did you do to determine the immigration consequences in [the petitioner's] case?

"A. . . . In December of 2011, I had contacted an immigration attorney in light of the *Padilla* [v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)] decision . . . to determine or obtain some tools that would be helpful in advising clients as to potential immigration consequences and as a result of that conversation and e-mail with that attorney, I was sent [A Brief Guide to Representing Non-Citizen Criminal Defendants in Connecticut (brief guide)]. . . .

"Q. Did you rely on [the brief guide] in determining the immigration consequences in [the petitioner's] case specifically?

"A. Yes."

The following additional exchange occurred during the direct examination of Millbrandt:

"Q. Did you ever advise [the petitioner] that he definitely would be deported?

"A. I said that in my opinion a conviction would render him deportable. I could not speak for Immigration and Customs Enforcement as to whether they would actually decide to come and pick him up.

"Q. Did you explain to him what you meant by deportable?

"A. Yes.

"Q. And what did you tell him?

"A. That deportation proceedings could be carried out against him. He would possibly be held until he was removed physically . . . from the country to Jamaica.

"Q. Did you give him any advice about the likelihood of deportation?

"A. My advice was that based on either of these options[5] there was a *substantial likelihood and probability* that [he] would be deported.

"Q. And was that the language that you used: substantial likelihood?

"A. I told him that there was a . . . substantial likelihood or substantial possibility of his deportation, yes.

"Q. Did you write down the specific language you used?

"A. No, I did not.

"Q. Did you advise [the petitioner] whether immigration authorities were mandated to deport him?

"A. No. . . .

"Q. So it was you[r] testimony [that] you told [the petitioner] that he would be deportable. Is that right?

"A. Yes.

"Q. And that that meant that he could be picked up by immigration authorities and removed from the country?

"A. Correct. That that was a possibility, yes. . . .

"Q. Did you advise him about the likelihood that he would be picked up by immigration authorities?

[5] The petitioner, in his brief, alleges that there were two proposed plea offers. The first, made by the state, involved a guilty plea to one count of possession of marijuana with intent to sell, in violation of General Statutes § 21a-277 (b), and required a sentence of seven years of incarceration, execution suspended after twenty months, and three years of probation. The second, made by the court, involved a guilty plea to § 21a-278 (b), for which the court would consider a motion to impose a sentence less than the five year mandatory minimum.

"A. . . . I did not. I did not say whether it was likely or not that he would be picked up. I said it was a possibility that he could be picked up by the immigration authorities.

"Q. Did you advise him about what would happen if [he] were picked up or about the likelihood of success in immigration proceedings?

"A. No.

"Q. Did you ever advise him that he would be automatically deportable?

"A. No, I did not.

"Q. Did you advise him that deportation was a virtual certainty?

"A. I did not say that. I said [that] I thought . . . there was a substantial likelihood that he would be deported. I did not tell him it was a virtual certainty." (Emphasis added.)

The following exchange between counsel for the respondent, the Commissioner of Correction, and Millbrandt occurred on cross-examination:

"Q. [Y]ou indicated that you told him assume you would be deported if you accepted a plea to either one of these charges?

"A. I told him that in my opinion it was safe to assume that he would face deportation as a result of a plea to either one of the options that were put to us.

"Q. And he appeared to you to understand what you said with respect to the fact that he would be deported if he entered a plea to either of these charges?

"A. He appeared to.

"Q. And he never indicated to you that he didn't understand?

"A. No.

"Q. And he never questioned what deportation meant?

"A. No.

"Q. And he never indicated to you that he alternatively would want to reject the plea offer and actually go to trial; did he?

"A. He did not. . . .

"Q. [Y]ou told [the petitioner] that if he were to accept either plea, he would be deported. Isn't that correct?

"A. I did not tell him that it was a certainty that he would be deported. . . . I told him that it was safe to assume that he would be deported."

The petitioner testified that Millbrandt did not advise him that he would "definitely be deported or that it was a virtual certainty" upon the entry of a guilty plea, and that, contrary to Millbrandt's testimony, he *received no advice* about any immigration consequences that would result from the entry of a guilty plea. The petitioner testified that, had he been advised that pleading guilty would result in his deportation, he would have not taken the plea deal and instead would have taken his chances with a trial, even if it meant a term of imprisonment up to fifty years.[6]

Having reviewed the relevant facts, we now turn to the legal principles that guide our analysis of the petitioner's claim. In order to assess the conclusion of the

[6] Had he proceeded to trial on all of the charges, the petitioner's potential sentencing exposure was approximately thirty-eight to forty-seven years of incarceration, with a mandatory minimum term of five years of imprisonment. Millbrandt described the judge as a "heavy hitter" and that "from the outset [he] had indicated that this was a case that required a jail sentence and so had the state." Furthermore, the option of a diversionary program was "never on the table."

habeas court that Millbrandt had satisfied the minimal standard in advising the petitioner of the immigration consequences of his guilty plea, and therefore did not render deficient performance, we must review *Padilla* v. *Kentucky*, supra, 559 U.S. 356; and *Budziszewski* v. *Commissioner of Correction*, 322 Conn. 504, 142 A.3d 243 (2016). In *Padilla*, the United States Supreme Court held for the first time that a defense attorney's failure to advise his client accurately of the immigration consequences of his guilty plea could constitute ineffective assistance of counsel. *Padilla* v. *Kentucky*, supra, 368–69. The Supreme Court further explained the obligations of a criminal defense attorney when advising a client of the immigration consequences of the pending criminal charge(s): "When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. *But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear*." (Emphasis added; footnote omitted.) Id., 369.

Our Supreme Court recently considered the degree of clarity required by *Padilla* when advising a noncitizen client on the mandatory immigration consequences of his guilty plea in *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 506–507. In *Budziszewski*, trial counsel negotiated a plea deal whereby the petitioner, Piotr Budziszewski, a lawful permanent resident, would plead guilty to one count of possession of a controlled substance with intent to sell, which is an aggravated felony for which deportation is mandated. Budziszewski pleaded guilty to that charge. After his release from state custody, Budziszewski was detained by federal authorities and was ordered to be removed on the basis of his felony conviction. Id., 508–509. In his petition for a writ of habeas corpus, Budziszewski

alleged, inter alia, that trial counsel failed to advise him of the immigration consequences of his guilty plea as required by *Padilla*. Id. The habeas court concluded that trial counsel's advice to Budziszewski—that his conviction would create a " 'heightened risk' " of deportation, rather than mandate deportation under federal law, was adequate under *Padilla*. Id., 510. Our Supreme Court disagreed, reasoning that counsel's warning that Budziszewski was only facing a " 'heightened risk' " of deportation "would not accurately characterize the law." Id., 512. Instead, "[b]ecause federal law called for deportation for the petitioner's conviction, [trial] counsel was required to unequivocally convey to [Budziszewski] that federal law mandated deportation as the consequence for pleading guilty." Id.

Our Supreme Court further explained that, for crimes designated as aggravated felonies, "*Padilla* requires counsel to inform the client about the deportation consequences prescribed by federal law. . . . Because noncitizen clients will have different understandings of legal concepts and the English language, there are no precise terms or one-size-fits-all phrases that counsel must use to convey this message. Rather, courts reviewing a claim that counsel did not comply with *Padilla* must carefully examine all of the advice given and the language actually used by counsel to ensure that counsel explained the consequences set out in federal law accurately and in terms the client could understand. In circumstances when federal law mandates deportation and the client is not eligible for relief under an exception to that command, counsel *must unequivocally convey to the client that federal law mandates deportation as the consequence for pleading guilty*." (Emphasis added.) Id., 507.

In *Duncan* v. *Commissioner of Correction*, supra, 171 Conn. App. 635, we had an opportunity to consider

the impact of *Budziszewski* on our *Padilla* jurisprudence. In *Duncan*, the habeas court concluded that the petitioner's trial counsel did not perform deficiently despite testifying that "he could not recall clearly advising the petitioner that he would be deportable without a defense [to deportation], although it was his practice to have conversations with clients regarding the immigration consequences of a guilty plea." Id., 656. We noted that trial counsel also admitted that he probably was unaware that the petitioner's conviction constituted an aggravated felony for immigration purposes or that an aggravated felony rendered a noncitizen deportable without a defense to deportation. Id. "In response to the petitioner's argument that [his counsel] failed to tell him that removal was mandatory and nonappealable, the habeas court indicated that these collateral consequences were not of constitutional magnitude and could not be transformed into direct consequences." Id., 657.

In *Duncan*, we concluded that, "[i]n accordance with the clarification in *Budziszewski* of counsel's duty to unequivocally inform a client of the mandatory deportation as a consequence of pleading guilty to an aggravated felony, the habeas court improperly concluded that [counsel's] performance was not deficient. Specifically, [counsel] failed to comply with *Padilla* because he did not explain the clear immigration consequences set forth in federal law in an accurate manner and in terms that the petitioner could comprehend. . . . The immigration consequences in this case were clearly discernable; [the petitioner's conviction] constituted an aggravated felony for immigration purposes and thus federal law mandated deportation. [The petitioner's counsel], therefore, was obligated to convey to the petitioner unequivocally this consequence of pleading guilty." (Citation omitted.) Id., 658.

We explained in *Duncan* that, even if the habeas court credited counsel's testimony that the petitioner's conviction could " 'create some problems with regard to . . . immigration,' this statement does not meet the required standard set forth in *Padilla*,"; id., 658–59; and concluded that "this advice is akin to the advice given in *Budziszewski* where counsel warned of a heightened risk of deportation . . . ." (Internal quotation marks omitted.) Id., 659. We held that the petitioner's counsel was "required to inform the petitioner that, as a result of his guilty plea to a crime that fell within the federal definition of an aggravated felony, he was subject to mandatory deportation under federal law, which [counsel] failed to do. His advice did not meet the standard set forth in *Padilla* as interpreted by *Budziszewski*. Accordingly, we agree with the petitioner that the habeas court improperly determined that [counsel] was not deficient, under *Strickland*, with respect to his advice regarding the immigration consequences . . . ." Id., 659. We then held that the petitioner failed to successfully challenge the habeas court's conclusion that he was not prejudiced as a result of trial counsel's deficient performance and, accordingly, concluded that the habeas court did not abuse its discretion in denying certification to appeal. Id., 663–65.

With the foregoing legal principles in mind, we now review the conclusion of the habeas court that Millbrandt did not render deficient performance. It is undisputed that a conviction under § 21a-278 (b) constitutes an aggravated felony and that federal immigration law mandates deportation for aggravated felonies, with limited exceptions that do not apply in the present case. Millbrandt testified that he was aware of this and therefore advised the petitioner that in relation to the immigration consequences he was facing, he should "assume that he would be deported" and that there was a "substantial likelihood and probability" or "possibility" of

deportation. He further counseled the petitioner that his conviction would render him "deportable" and explained that term to mean that "deportation proceedings could be carried out against him." Millbrandt further testified that he did not advise the petitioner as to whether immigration authorities were mandated to deport him and that he did not advise the petitioner that, as a result of his guilty plea, his subsequent deportation was a virtual certainty and that he would be automatically deportable.

On the basis of this testimony, the habeas court found that Millbrandt did not "categorically [advise the petitioner] that he would under any and all circumstances be deported to Jamaica if he accepted [the] guilty plea." The court nonetheless concluded that Millbrandt's advice was constitutionally adequate under *Padilla*.

In light of our Supreme Court's articulation in *Budziszewski*, we conclude that the habeas court incorrectly concluded that Millbrandt's advice was constitutionally adequate. Pursuant to *Budziszewski*, Millbrandt was required to "unequivocally convey to [the petitioner] that federal law mandated deportation as the consequence for pleading guilty." *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 512. As the court acknowledged, Millbrandt's advice "fell slightly short" of this. We agree with the petitioner that, instead, Millbrandt's advice inaccurately conveyed to the petitioner that he would have some chance of avoiding deportation after pleading guilty, and therefore counsel's advice did not meet the standard set forth in *Padilla* as interpreted by *Budziszewski* and applied by us in *Duncan*.

We therefore conclude that Millbrandt performed deficiently when he advised the petitioner in regard to the immigration consequences of his guilty plea.

B

The petitioner next argues that, as a result of counsel's deficient performance, he was prejudiced because

he would not have pleaded guilty had he been properly advised of the immigration consequences of his guilty plea.[7] We conclude that the record is inadequate for us to determine whether the petitioner proved prejudice under *Strickland*.

As we previously stated, *Strickland* requires that a petitioner prove both deficient performance and resulting prejudice, and thus a court can find against a petitioner on either ground. *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). In the present case, the habeas court concluded that the petitioner had failed to satisfy the performance prong of *Strickland*, and, therefore, it did not determine whether the petitioner also had failed to satisfy the prejudice prong. We recognize, as the parties have observed, that the habeas court did make certain factual findings that might be relevant to a prejudice analysis. Nevertheless, the habeas court failed to consider whether, if Millbrandt's performance was constitutionally deficient, "there is a reasonable probability that, but for [that deficient performance], [the petitioner] would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, 169 Conn. App. 278. Because the question of prejudice presents a mixed question of fact and law, we cannot conclude whether the petitioner was prejudiced by Millbrandt's deficient performance without the habeas court's complete factual findings concerning the *Strickland* prejudice prong. *Small* v. *Commissioner of Correction*, supra, 717 ("[t]he application of historical

[7] The petitioner argues in the alternative that the court improperly speculated, during its oral decision, that the petitioner pleaded guilty because he was guilty. During the court's canvass of the petitioner, however, he replied "[c]orrect" when asked "[a]re the facts as read by the state essentially correct?" Therefore, we do not agree with the petitioner that the court speculated as to his guilt.

facts to questions of law that is necessary to determine whether the petitioner has demonstrated prejudice under *Strickland* . . . is a mixed question of law and fact subject to our plenary review"); see also *State* v. *Daly*, 111 Conn. App. 397, 400, 960 A.2d 1040 (2008) ("it is well established that as an appellate tribunal, we do not find facts"), cert. denied, 292 Conn. 909, 973 A.2d 108 (2009).

In sum, we conclude that the habeas court abused its discretion when it denied the petitioner's petition for certification to appeal because a court could resolve the issues in a different manner. We further conclude that the petitioner proved that Millbrandt rendered deficient performance when advising him of the immigration consequences of his guilty plea. We therefore remand the matter to the habeas court with direction to determine whether the petitioner was prejudiced by Millbrandt's deficient performance.

The judgment is reversed and the case is remanded for further proceedings on the issue of whether the petitioner was prejudiced by his trial counsel's deficient performance.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DANOVAN T.*
(AC 38727)

Mullins, Beach and Harper, Js.

Syllabus

Convicted, following a jury trial, of the crime of risk of injury to a child, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the prosecutor committed improprieties that deprived him of a fair trial:

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

a. The prosecutor did not make an improper golden rule argument when he asked the jurors to put themselves in the defendant's position and to evaluate the defendant's statements against his claim of innocence; the prosecutor called on the jurors to draw inferences from the evidence and properly asked them whether a reasonable person would be likely to concede that there was a possibility that he sexually abused a child if he were actually innocent, and the statements were particularly appropriate as counterargument to the defendant's main defense theory that he did not commit the crime and that the allegations were fabricated.

b. Although the prosecutor made two misstatements during closing argument in describing certain medical testimony, they did not amount to improprieties; the misstatements, when placed in the broader context of the trial, were isolated and minor, the defendant did not present any evidence to demonstrate that they caused the jurors to be confused or to misunderstand certain testimony, and the prosecutor, who made the statements in the heat of argument, was afforded leeway for the minor misstatements made while zealously advocating for the state.

c. The defendant failed to demonstrate that the prosecutor acted improperly by facilitating the admission into evidence of a medical report that contained prior misconduct evidence, when the prosecutor previously represented that he would not present prior misconduct evidence; the report, which was admitted into evidence pursuant to an agreement of the parties, was not the only source of the jury's knowledge of the prior misconduct evidence, the defendant made extensive use of the report in his own closing argument, and the prosecutor's role in the admission of the report could not fairly be characterized as prosecutorial impropriety.

2. This court declined to review the defendant's claim that the trial court deprived him of his right to confront and to impeach the witnesses against him when the court precluded him from presenting certain testimony from himself and from L to contradict that of the victim's mother; the defendant having failed to make an argument before the trial court regarding the presentation of his own testimony as impeachment evidence, this court was not bound to consider the claim, and his claim with respect to the court's exclusion of L's testimony was moot, as the defendant failed to challenge the ground on which the trial court ruled in excluding L's testimony and, thus, an independent basis for the ruling remained unchallenged.

Argued April 17—officially released September 26, 2017

Procedural History

Substitute information charging the defendant with two counts of the crime of risk of injury to a child, and with the crime of sexual assault in the first degree, brought to the Superior Court in the judicial district of Hartford and tried to a jury before *Mullarkey, J.*; verdict

of guilty of two counts of risk of injury to a child; thereafter, the state entered a nolle prosequi as to the charge of sexual assault in the first degree; subsequently, the court rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Richard Emanuel, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Anthony Bochicchio*, senior assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Danovan T., appeals from his conviction of two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). In this appeal, he argues that his conviction should be reversed because (1) certain improprieties by the prosecutor deprived him of his general due process right to a fair trial and (2) the trial court improperly restricted his right to present impeachment evidence against the state's witnesses, thereby depriving him of his constitutional right to confront the witnesses against him. For the reasons that follow, we reject these arguments and affirm the judgment of the trial court.

The following procedural history and facts, which the jury reasonably could have found, are relevant to this appeal. At the time of the events giving rise to the defendant's conviction, he was living in a home in Enfield with the victim, S.R., the victim's mother, S, and another female child, C. S had another child, A, who was older than the other children and who, at the time of S.R.'s molestation, was living out-of-state with her biological father. The defendant is the biological father of C, but not S.R. The defendant has known S.R. and been involved in her life since 2007 or 2008,

although he did not live with her until late 2012 or early 2013, a few months before the molestation occurred. In the Enfield home, the defendant shared one bedroom with S, and the children shared another bedroom.

On the night of June 5, 2013, the defendant slept in the living room, rather than in the bedroom he shared with S. Sometime during the night, he entered the girls' bedroom, removed S.R.'s pants, and began touching and scratching her genitals, and digitally penetrating her. S.R. awoke during this assault and grabbed the defendant's arm, digging her fingernails in to it. The defendant continued to abuse S.R. in this manner. Eventually, he stopped, pulled up her pants, and left the room. S.R. reported this incident to S the next morning.

Thereafter, S awoke the defendant, who was still sleeping in another room, and confronted him with the allegations. The defendant replied, "You know, this isn't the first time that someone has said I've done this to them. A long time ago, my—my other daughter said I did the same thing to her but her mother didn't believe her."[1] The defendant stated he had never mentioned the prior allegations because, "Well [the girl's] mother didn't believe her, so I didn't think it was true, but now [S.R. is] the second person that says it now, so it must be true. It must be true."

Later that morning, S took S.R. to New England Urgent Care. S.R. was examined by Jeffery Sievering, a physician's assistant, who found that S.R.'s clitoris was enlarged, which was potentially indicative of "repeated trauma or manipulation." Thereafter, S took S.R. to the Enfield Police Department and then to St. Francis Hospital in Hartford. At the hospital, a second

[1] The record indicates that the defendant's reference to "my other daughter" refers to his stepdaughter N, who is the biological daughter of his former wife.

medical examination was performed by Audrey B. Courtney, a nurse practitioner, using a sexual assault forensic collection kit. The medical examination did not produce information that either supported or refuted S.R.'s allegations. Courtney produced a report about this exam that included the statement, "[S] states that [the defendant's] [fifteen] year old daughter said the same thing happened to her." S.R. also underwent a forensic interview at the hospital in which she stated that the defendant had touched her in a similar manner on two prior occasions approximately one month earlier. At trial, S.R. testified that she had not reported the incidents to her mother because she feared she would not be believed. She stated that she had decided to tell her mother this time because she still felt pain the next morning.

David Thomas, a detective with the Enfield Police Department, observed the forensic interview and later made arrangements to meet with the defendant on June 10, 2013, at the New Haven Police Department, which was closer to the defendant's place of employment. During that meeting, Thomas asked whether S.R.'s allegations were true, and the defendant responded, "I can't say that she's lying," and that he did not remember the incident. The defendant also made other statements relevant to his claims in this appeal, including that he had been accused of similar conduct by a different stepdaughter from a prior relationship, and that S had observed A, who no longer lived with them, engaging in some kind of sexual conduct. At the end of the interview, the defendant signed a written statement that on the night in question, he had entered the bedroom and checked to see if S.R. had urinated in her bed.

A second interview was arranged between Thomas and the defendant to take place at the Manchester Police Department.[2] Because the defendant did not have

[2] The record does not indicate why this interview occurred in Manchester.

a car, Thomas met the defendant at his workplace in North Haven to transport him to Manchester. In the car, before leaving, the defendant initiated a conversation by stating, "I must have done it." The defendant then alluded to a "sleepwalking type of thing where . . . sexual contact would happen." The defendant provided Thomas with a signed written statement regarding this conversation which stated, "I would like to give the Enfield police the following truthful statement. I would like to admit that there is a high probability that I inappropriately touched [S.R.] in her groin on Thursday morning, June 6, 2013."

The defendant was arrested on June 17, 2013, and charged with one count of sexual assault in the first degree in violation of General Statutes § 53a-70 and two counts of risk of injury to a child in violation of § 53-21 (a) (2). After a jury trial, the jury was unable to reach a verdict on the charge of sexual assault in the first degree,[3] but returned guilty verdicts on the two charges of risk of injury to a child. Thereafter, the court sentenced the defendant to a total effective sentence of twenty-five years imprisonment followed by fifteen years of special parole with special conditions. This appeal followed. Additional facts and procedural history will be set forth as necessary.

On appeal, the defendant argues that the prosecutor committed several improprieties that deprived him of a fair trial in violation of the due process clauses of the federal and state constitutions.[4] He also argues that he was deprived of his right to confront the witnesses

[3] The state later entered a nolle prosequi as to the charge of sexual assault in the first degree.

[4] The constitution of Connecticut, article first, § 8, provides in pertinent part that, "[n]o person shall be . . . deprived of . . . liberty . . . without due process of law . . . ." The fourteenth amendment to the United States constitution provides in pertinent part: "[N]or shall any state deprive any person of life [or] liberty . . . without due process of law . . . ."

against him under the federal and state constitutions.[5] The state responds that the defendant's arguments mischaracterize the prosecutor's conduct and other details of the case, and should be rejected. We disagree with the defendant and affirm the judgment of the trial court.

I

The defendant's claim that prosecutorial improprieties deprived him of a fair trial is composed of three distinct claims. First, he asserts that the state's attorney made an improper "golden rule" argument, which is an argument that appeals to emotion, during closing argument in asking the jury to consider whether the defendant's reaction to the allegations was consistent with innocence. Second, he claims that the state's attorney mischaracterized the medical testimony of Sievering during closing argument in a manner that suggested that sexual assault was *the cause* of certain physical symptoms Sievering had observed in S.R. rather than merely *a possible cause*. Third, he contends that the state's attorney improperly facilitated the admission into evidence of a medical report that contained prior misconduct evidence. He argues that these improprieties so infected the trial with unfairness as to make the resulting conviction a denial of due process. The state disagrees with the defendant's assertions that the prosecutor committed any improprieties. We will address each of these claims in turn, setting forth additional facts as necessary.[6]

[5] The constitution of Connecticut, article first, § 8, provides in pertinent part that, "[i]n all criminal prosecutions, the accused shall have a right . . . to be confronted by the witnesses against him . . . ." The sixth amendment to the United States constitution, made applicable to the states by the due process clause of the fourteenth amendment to the United States constitution, provides in pertinent part that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

[6] The defendant also argues that, even if these alleged improprieties singly did not deprive him of a fair trial, when taken together, the combined force of them did so taint the integrity of the trial that his right to a fair trial was violated. Because we conclude that the cited conduct does not constitute

We begin by setting forth our standard of review that is applicable to each of the defendant's prosecutorial impropriety claims. In analyzing claims that prosecutorial improprieties deprived a defendant of a fair trial, "we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial." (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 560–61, 34 A.3d 370 (2012). The two steps of this analysis are separate and distinct, and we may reject the claim if we conclude the defendant has failed to establish either prong. Id.

"[O]ur determination of whether any improper conduct by the state's attorney violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that misconduct was objected to at trial. . . . These factors include: the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citation omitted; internal quotation marks omitted.) *State* v. *Payne*, supra, 303 Conn. 561. "[W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole

prosecutorial impropriety, we necessarily conclude also that the sum of this conduct did not violate his right to a fair trial.

trial, the improprieties were so egregious that they amounted to a denial of due process." Id., 562–63.[7]

A

The defendant first claims that he was deprived of a fair trial by an improper golden rule argument that the prosecutor made when she asked the jury to consider whether the defendant's reaction to the allegations was consistent with innocence. The following additional facts are relevant to this claim.

This claim concerns four statements made by the prosecutor during closing argument. First, the prosecutor commented on the defendant's first interview with the police: "[The defendant] says . . . 'I can't say that she's lying.' I want you to picture this. You have a child or a stepchild. The police come to you and say you went into that child's room in the middle of the night, pulled her pants down and you inappropriately touched them and digitally penetrated them. Would your response be 'I can't say she's lying?' Would that enter your mind?" Next, the prosecutor commented on the defendant's decision to go to work immediately after being accused of sexual assault: "[H]e's shocked that S.R.'s mother thought he wouldn't go to work. I mean, why wouldn't he go to work? Let's assume he did nothing wrong and these allegations were made and the child was concerned about this. Would you take it so

[7] We note that the burden is different when the defendant invokes a specific constitutional right. "[C]onsistent with our [Supreme Court's] decisions in [*State* v. *Cassidy*, 236 Conn. 112, 672 A.2d 899, cert. denied, 519 U.S. 910, 117 S. Ct. 273, 136 L. Ed. 2d 196 (1996)] and [*State* v. *Angel T.*, 292 Conn. 262, 973 A.2d 1207 (2009)], if the defendant raises a claim that the prosecutorial improprieties infringed a specifically enumerated constitutional right, such as the fifth amendment right to remain silent or the sixth amendment right to confront one's accusers, and the defendant meets his burden of establishing the constitutional violation, the burden is then on the state to prove that the impropriety was harmless beyond a reasonable doubt." *State* v. *Payne*, supra, 303 Conn. 563.

lightly? Would it be so irrelevant to you?" The prosecutor's closing argument returned to the topic of the defendant's reaction, describing the defendant's response when the police asked him whether he had assaulted S.R.: "He even says after that, very shortly after about ten seconds later, 'Well, there is a way,' and then he sort of trails off. You're accused of this and your comment's going to be, 'Well, there is a way I could've done it?' " The prosecutor continued, commenting on the defendant's reaction to the police: "Look at that first statement. He never denies the behavior. What he says is, 'I do not remember inappropriately touching S.R.' Would that ever be your response when confronted with something like this? I do not remember."

The defendant contends that these statements constituted an improper golden rule argument that personalized the case by asking the jurors to put themselves in the defendant's position. He argues that this undermined the fairness of the trial because it drew on the passions and prejudices of the jury by inviting the jurors to consider how they would react to such repugnant accusations. The state responds that a golden rule argument is not always improper and is particularly permissible where it simply asks jurors to draw inferences from the evidence presented based on the juror's judgment of how a reasonable person would act under the specified circumstances, which the state argues was the clear purpose of these comments. We agree with the state.

"[A] golden rule argument is one that urges jurors to put themselves in a particular party's place . . . or into a particular party's shoes. . . . The danger of these types of arguments lies in their [tendency] to pressure the jury to decide the issue of guilt . . . on considerations apart from the evidence of the defendant's culpability." (Citations omitted; internal quotation marks

omitted.) *State* v. *Long*, 293 Conn. 31, 53–54, 975 A.2d 660 (2009). "[N]ot all arguments that ask jurors to place themselves in a particular party's situation implicate the prohibition on golden rule argument. . . . The animating principle behind the prohibition . . . is that jurors should be encouraged to decide cases on the basis of the facts as they find them, and reasonable inferences . . . rather than by any incitement to act out of passion or sympathy for or against any party. . . . [A] prosecutor does not violate the golden rule by . . . asking the jurors to place themselves in [a particular position] if the prosecutor is using these rhetorical devices to ask the jury to assess the evidence from the standpoint of a reasonable person or to employ common sense in evaluating the evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Williams*, 172 Conn. App. 820, 839–40, 162 A.3d 84 (2017). The prohibition on golden rule arguments is merely a subset of improper appeals to the jurors' emotions. Id., 837 n.9.

After carefully considering the record in this appeal, we conclude that the prosecutor's statements did not constitute an improper golden rule argument. Each of these statements called upon the jury to assess the reasonableness of certain conduct reflected in the evidence. This court previously has held that arguments inviting the jury to draw reasonable inferences from the evidence adduced at trial "patently are proper." *State* v. *Dawes*, 122 Conn. App. 303, 313–14, 999 A.2d 794, cert. denied, 298 Conn. 912, 4 A.3d 834 (2010). These were not improper appeals to passion or prejudice, but rather calls on the jurors to draw inferences from the evidence that had been presented at trial regarding the statements of the defendant, based on the jurors' judgment of how a reasonable person would act under the specified circumstances. See *State* v. *Williams*, supra, 172 Conn. App. 839–40 (asking jurors to

step into role of defendant can be properly viewed as rhetorical device designed to urge measurement against a reasonable person).

When the prosecutor asked the jurors to put themselves in the defendant's position and to evaluate his statements against his claim of innocence, the prosecutor properly was asking the jurors whether a reasonable person in that situation would be likely to concede that there was a possibility that he sexually abused his stepdaughter if he were actually innocent. These statements were particularly appropriate as counterargument to the defendant's main defense theory, which was that he did not commit the crime and that the allegations were fabricated. Because we conclude that the prosecutor did not make an improper golden rule argument, we need not consider the second step of the analysis, namely, whether the alleged impropriety deprived the defendant of his due process right to a fair trial. See *State* v. *Hickey*, 135 Conn. App. 532, 553, 43 A.3d 701 (if impropriety is not identified, then prejudice need not be considered), cert. denied, 306 Conn. 901, 52 A.3d 728 (2012).

B

Next, the defendant contends that he was deprived of a fair trial because the prosecutor's description of certain medical testimony in his closing argument mischaracterized that testimony by using words that suggested sexual abuse was *the probable cause* of certain symptoms observed in S.R.'s genitals rather than merely *a possible cause*. The following additional facts are relevant to this claim.

On direct examination at trial, Sievering, the physician's assistant that first attended to S.R. on June 6, 2013, had the following exchange with the prosecutor regarding his examination of S.R.:

"Q. And what if any findings did you make in the exam?

"A. The only abnormality noted at the time was I found that the patient's clitoris seemed to be enlarged more so than I would expect for a patient . . . of that age.

"Q. And from your training and experience what would be a cause or causes of an enlarged clitoris in a seven year old?

"A. A cause could be from repeated trauma or manipulation."

On cross-examination, Sievering had the following exchange with defense counsel:

"Q. And did you see . . . any redness or anything unusual other than—you testified in reference to the clitoris seemed to be enlarged? Is that correct?

"A. That's correct.

"Q. And that can be done by trauma or manipulation. Is that correct?

"A. That is correct.

"Q. Can it be done by self-manipulation?

"A. Yes.

"Q. And manipulation with toys?

"A. Yes."

Later, during closing argument, the prosecutor reminded the jury of Sievering's testimony, stating: "Mr. Sievering, who testifies he saw her that morning. This is a seven year old girl with an enlarged clitoris. He said likely cause could be rubbing it—a seven year old girl." During the state's rebuttal argument, the prosecutor returned to this testimony, commenting that: "You

heard the testimony of the actual physician's assistant, Mr. Sievering, about the enlarged clitoris on a seven year old girl. One of the likely causes is rubbing of that area."

The defendant contends that the prosecutor substantively misstated Sievering's testimony in a manner that deprived him of a fair trial because the misstatement implied a stronger causal link between the observed medical evidence and the alleged crimes. He asserts that Sievering's testimony used the words "can" or "could" in stating that sexual assault could cause the physical condition observed. But in closing argument and rebuttal, the prosecutor used the word "likely" in this same context. He argues that the words used by Sievering denote a possibility of a causal link, while the prosecutor's word choice suggests a much stronger causal link such that a jury may view Sievering's testimony as evidence that the crime occurred. The state responds that the defendant's claim amounts to an isolated misstatement of the evidence, and that to find impropriety would require this court to minutely dissect each and every statement of the prosecutor. The state urges the court to follow the example of *State* v. *Orellana*, 89 Conn. App. 71, 105–106, 872 A.2d 506, cert. denied, 274 Conn. 910, 876 A.2d 1202 (2005), and decline to dissect each isolated statement made by the prosecutor in order to find impropriety. We agree with the state.

It is improper for a prosecutor to make comments during closing argument that suggest facts not in evidence. See *State* v. *LaVoie*, 158 Conn. App. 256, 275, 280, 118 A.3d 708 (comment that defendant said he intended to shoot victim was not supported by evidence or fair inferences and was therefore improper), cert. denied, 319 Conn. 929, 125 A.3d 203 (2015), cert. denied, U.S. , 136 S. Ct. 1519, 194 L. Ed. 2d 604 (2016). "[T]he prosecutor [as a public officer] has a heightened duty to avoid argument that strays from the evidence

or diverts the jury's attention from the facts of the case." (Internal quotation marks omitted.) *State* v. *Martinez*, 319 Conn. 712, 727, 127 A.3d 164 (2015). The privilege of counsel in addressing the jury through closing argument "must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Internal quotation marks omitted.) Id., 727–28. "[B]ecause closing arguments often have a rough and tumble quality about them, some leeway must be afforded to the advocates in offering arguments to the jury in final argument. [I]n addressing the jury, [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." (Internal quotation marks omitted.) *State* v. *Chankar*, 173 Conn. App. 227, 249, 162 A.3d 756 (2017). "We do not scrutinize each individual comment [made by the prosecutor] in a vacuum, but rather we must review the comments complained of in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Orellana*, supra, 89 Conn. App. 106.

In the present case, the prosecutor made two isolated misstatements that do not amount to improprieties. We are mindful that closing argument and closing rebuttal argument can require counsel to think on his feet and quickly recall and comment on evidence that was presented at trial, all while also reacting to arguments advanced by opposing counsel. Under such circumstances, it is appropriate that counsel be afforded some leeway for minor misstatements, such as occurred in the present case, in order to not impede counsel from zealously advocating for clients. *State* v. *Chankar*, supra, 173 Conn. App. 249. The minor misstatements that occurred here are within the leeway accorded

counsel in closing argument where, in the heat of argument, counsel may be forgiven for hitting the nail slightly off center but not wholly inventing "facts." To conclude that these isolated misstatements constitute a prosecutorial impropriety and that the defendant suffered harm from them, we would need to minutely examine the prosecutor's word choice in a vacuum, ignoring the broader context of the whole trial. This is not an appropriate approach to such considerations. *State* v. *Orellana*, supra, 89 Conn. App. 106. When placed in the broader context of the trial, these statements are revealed to be isolated and minor. The jurors heard Sievering's testimony as it was delivered and the defendant has not presented any evidence to support the conclusion that the prosecutor's misstatements caused confusion among the jurors or caused them to misunderstand Sievering's testimony.

Viewed in the larger context of the whole trial, we cannot conclude that these isolated and minor misstatements by the prosecutor constitute prosecutorial improprieties and we need not consider whether the alleged impropriety deprived the defendant of his due process right to a fair trial. See *State* v. *Hickey*, supra, 135 Conn. App. 553 (if impropriety is not identified, then prejudice need not be considered).

C

The defendant's final claim regarding prosecutorial improprieties is that the state's attorney deprived him of a fair trial by improperly facilitating the admission into evidence of a medical report that contained prior misconduct evidence. The following additional facts are relevant to this claim.

As previously explained, on June 6, 2013, S.R. was evaluated at St. Francis Hospital by Courtney, a nurse practitioner, using a sexual assault forensic evidence collection kit. Courtney produced a report about this

examination that included the statement, "[S] states that [the defendant's] [fifteen] year old daughter said the same thing happened to her." The record indicates that S had reported to Courtney that the defendant's other stepdaughter, N, had made similar allegations of sexual abuse against the defendant.

At trial, the prosecutor informed the court that the state had no intention of presenting prior misconduct evidence. Although Courtney was a logical witness for the state to call, she was out-of-state and unavailable to testify at the time of trial. The court suggested that the parties agree to admit Courtney's report into evidence as a full exhibit in place of Courtney's testimony. Later in the day, the court revisited the issue asking counsel if they had an agreement regarding the report. The prosecutor replied that there was no agreement yet, and "I have to look at it again, but I don't think it has much of anything in it is the problem. It's not a . . . typical medical report." The parties then had an unrelated discussion before turning back to the report. At that time, both counsel stated they had no objection to admission of the report. Subsequently, during its charge to the jury, the court stated that the jury may treat S.R.'s statements to medical or mental health professionals as substantive evidence, and in doing so the court specifically highlighted Sievering's testimony and Courtney's report.

The defendant contends that the prosecutor's conduct was improper because he did not prevent the admission of Courtney's report, which contained an accusation of prior misconduct, despite previous assurances that the state would not present such evidence. The defendant faults the court, the prosecutor, and his own counsel for the admission of this evidence, but argues that the primary blame rests with the prosecutor. He asserts that admission of the report was harmful because it informed the jury that the defendant's other

stepdaughter, N, had accused him of abusing her in the same way. The state responds that the defendant has failed to cite any legal authority to support the contention that this situation constitutes a prosecutorial impropriety. In particular, the state argues that the defendant's claim should be rejected because he agreed to the admission of the report and made extensive use of the report to support his defense theory that the allegations were fabricated. Additionally, the state argues that the harm, if any, should be considered minimal because S also testified that the defendant had told her that his stepdaughter N had accused him of committing a similar assault. We agree with the state.

The presentation of prior misconduct evidence in sexual assault trials is not in and of itself improper. See *State* v. *DeJesus*, 288 Conn. 418, 473, 953 A.2d 45 (2008) (evidence of prior sexual misconduct admissible to establish defendant's "propensity or a tendency to engage in the type of aberrant and compulsive criminal sexual behavior with which he or she is charged"). The defendant has not claimed that this evidence was inadmissible, but rather that it was simply a prosecutorial impropriety to present this evidence after the prosecutor informed the court that he would not do so. The defendant cites no authority for his assertion that the prosecutor acted improperly. The report was admitted pursuant to an agreement of the parties, and at most indicates a degree of inattentiveness by both sides. The defendant's arguments are difficult to accept for two reasons. First, contrary to the defendant's claim, this report was not the only source of the jury's knowledge that the defendant had previously been accused of a similar assault by his other stepdaughter, N. S also testified that the defendant told her on the morning that S.R. was molested that N had previously accused him of touching her in the same way. Later, the defendant was given the opportunity to address these allegations on cross-examination and denied making the

statement to S and denied that he had molested N. Second, the defendant made extensive use of this report in his closing argument. It is hard to square his use of the report at trial with his claims on appeal. The prosecutor's role in the admission of this report cannot be fairly characterized as prosecutorial impropriety. Because we conclude that this was not a prosecutorial impropriety, we need not consider whether the alleged impropriety deprived the defendant of his due process right to a fair trial. See *State* v. *Hickey*, supra, 135 Conn. App. 553 (if impropriety is not identified, then prejudice need not be considered).

II

The defendant next claims that the trial court deprived him of his right to confront and impeach the witnesses against him under the state and federal constitution[8] when the court precluded him from presenting testimony from other witnesses that he claims would have contradicted the testimony of S. The defendant's claim implicates two different witnesses: the defendant himself and L, a friend of S. After carefully considering the record in this matter, we decline to review the defendant's claim.

Regarding his claim concerning his own testimony, the record shows that the defendant presented a different legal argument to the trial court than he is pursuing in this appeal.[9] Therefore, we decline to review the

[8] See footnote 5 of this opinion.

[9] At trial, the defendant argued that he should be permitted to testify regarding statements S allegedly made to him regarding sexual behavior S had observed occurring between A and S.R., as well as a transcript of text messages sent between the defendant and S, on the theory that they went to "motive, bias, prejudice, and interest." During the ensuing discussion, the court questioned the relevancy of the testimony and the text messages to these issues and ultimately concluded that this line of inquiry should be disallowed. Later that same day, the defendant asked the court to revisit its ruling on the text messages, but did not mention the defendant's testimony. The defendant then proceeded to argue that the text messages should be admissible because "the texts are inconsistent with [S's] testimony here—

defendant's claim regarding his own testimony because the trial court was not provided an opportunity to consider this argument. See *State* v. *Pagan*, 158 Conn. App. 620, 632–33, 119 A.3d 1259 ("[t]his court is not bound to consider claims of law not made at the trial. . . . Once counsel states the authority and ground of [his argument], any appeal will be limited to the ground asserted."), cert. denied, 319 Conn. 909, 123 A.3d 438 (2015).

Regarding the defendant's claim concerning the testimony of L, which was excluded under General Statues § 54-86f,[10] commonly known as the rape shield statute, we conclude that he has failed to challenge the ground on which the trial court ruled, and we therefore also decline to review this claim.[11] See *State* v. *Lester*, 324

in court and contradictory, and can be considered an inconsistent statement." In this appeal, the defendant is now trying to apply this latter rationale to his testimony as well. The defendant's inconsistent statements argument was presented to the court only in relation to the text messages.

[10] General Statutes (Rev. to 2015) § 54-86f provides in relevant part that "[i]n any prosecution for sexual assault . . . no evidence of the sexual conduct of the victim may be admissible unless such evidence is (1) offered by the defendant on the issue of whether the defendant was, with respect to the victim, the source of semen, disease, pregnancy or injury, or (2) offered by the defendant on the issue of credibility of the victim, provided the victim has testified on direct examination as to his or her sexual conduct, or (3) any evidence of sexual conduct with the defendant offered by the defendant on the issue of consent by the victim, when consent is raised as a defense by the defendant, or (4) otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights. Such evidence shall be admissible only after a hearing on a motion to offer such evidence containing an offer of proof. . . . If, after hearing, the court finds that the evidence meets the requirements of this section and that the probative value of the evidence outweighs its prejudicial effect on the victim, the court may grant the motion. The testimony of the defendant during a hearing on a motion to offer evidence under this section may not be used against the defendant during the trial if such motion is denied, except that such testimony may be admissible to impeach the credibility of the defendant if the defendant elects to testify as part of the defense."

[11] The trial court excluded L's testimony because it considered it "violative of the rape shield statute. It is being offered for its truth, not merely to criticize the—or attack the credibility of [S]. Now, this is triple hearsay.

Conn. 519, 526–27, 153 A.3d 647 (2017) ("[w]here an appellant fails to challenge all bases for a trial court's adverse ruling on his claim, even if this court were to agree with the appellant on the issues that he does raise, we still would not be able to provide [him] any relief in light of the binding adverse [finding not raised] with respect to those claims. . . . [W]hen an [appellant's claim] challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the [claim] is moot." [Citation omitted; internal quotation marks omitted.]).[12]

For the foregoing reasons, we conclude that the defendant was not deprived of his general due process

. . . It is so far removed from anything that could be admitted as substantive evidence that it has little or no probative value and I will exclude it . . . ." The defendant faults this ruling as "recharacterizing" the purpose of his offering this evidence from one of impeachment, which he asserts would have been admissible, to one of substance. The record does not support this assertion. Before ruling, the trial court asked the defendant, "do you want to offer [L]'s testimony other than on the prior inconsistent statement [purpose]?" To which the defendant responded, "Yes, Your Honor," and "[t]o show a prior source of the sexual knowledge of a child, yes." On appeal, the defendant has simply asserted, with minimal citation to authority and no analysis, that the trial court "recharacterized" his purpose before he turns his argument to addressing the admissibility of the testimony as a prior inconsistent statement for the purposes of impeachment. He does not substantively challenge the ruling of the trial court that the evidence violates the rape shield statute. Accordingly, we decline to consider his argument that L's testimony is admissible as a prior inconsistent statement for the purpose of impeaching the credibility of S.

[12] Although we decline to address the defendant's legal arguments on this claim, we note that the record does not support the factual substance of his claim. When testifying, S was asked and answered questions regarding whether she had *personally observed* sexual interaction between S.R. and A, and whether she would report *her personal observations* to any person or entity. By contrast, L testified regarding S's statements about what a *school counselor had reported to S* and the fact that the *school counselor intended to report the information to the Department of Children and Families*. In fact, L testified that the school counselor's report was not based on any observation by the counselor, but rather was based on a statement S.R. had made to another school employee. It is not clear from L's testimony that anyone witnessed the alleged sexual interaction between S.R. and A, let alone whether S witnessed it.

right to a fair trial under the state and federal constitutions.

The judgment is affirmed.

In this opinion the other judges concurred.

MALCOLM E. MASON *v.* HONOR A. FORD
(AC 39406)

Keller, Mullins and Harper, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting in part her motion for modification of her child support obligation to the plaintiff. Although the trial court had granted a modification of the support order to $0 per week, it also found an arrearage of $2215, based on the defendant's failure to pay $174 per week to the plaintiff for a period of sixteen weeks. On appeal, the defendant claimed that the trial court abused its discretion in finding the arrearage, and she challenged the court's finding concerning the date on which her payments to the plaintiff had stopped, as well as the court's finding of the date that the modification of child support should take retroactive effect. *Held* that the trial court's factual finding that the defendant had not paid her support obligation, and its implicit finding that the nonpayment began in November, 2015, were not clearly erroneous, as the court acted within its discretion when it implicitly credited the plaintiff's testimony that the child support payments had ended toward the middle to end of 2015, over that of the defendant, who testified that the payments were current as of January, 2016; nevertheless, in determining that the end date of the arrearage period was in March, 2016, the court abused its discretion by not complying with the limitations of the statute (§ 46b-86 [a]) that provides the court with discretion to modify a support order with retroactive effect to the date on which the motion to modify was served on the opposing party, as the defendant's motion for modification was served on the plaintiff in June, 2016, and, thus, strict compliance with the limitations of § 46b-86 (a) would have permitted an effective date no earlier than June, 2016; moreover, given that, during oral argument before this court, the plaintiff expressed that he had waived his claim to a certain portion of the arrearage that was apparently omitted from the assessment due to a computational error of the trial court, combined with the fact the plaintiff had suggested the March, 2016 date to the trial court, it was unclear whether the trial court drafted the modification order to take effect in March, 2016, because it viewed the

suggested date as an implicit waiver of the plaintiff's claim to the portion of the arrearage accruing between March and June, 2016, and because that factual question could not be resolved on the basis of the record before this court, the matter was remanded to the trial court for a determination of a new effective date of the arrearage and a recalculation thereof, including a specific finding as to whether the plaintiff waived a portion of the arrearage.

Argued March 9—officially released September 26, 2017

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the defendant filed a counterclaim; thereafter, the matter was tried to the court, *Hon. Lloyd Cutsumpas*, judge trial referee; judgment dissolving the marriage and granting certain other relief; subsequently, the court, *Nastri, J.*, denied in part the defendant's motion for modification and issued certain orders; thereafter, the court, *Nastri, J.*, granted in part the defendant's motion for modification, and the defendant appealed to this court. *Reversed in part; further proceedings.*

Honor A. Ford, self-represented, the appellant (defendant).

Malcolm E. Mason, self-represented, the appellee (plaintiff).

Opinion

HARPER, J. The self-represented defendant, Honor A. Ford, appeals from a postjudgment modification of a child support order entered subsequent to the dissolution of her marriage to the self-represented plaintiff, Malcolm E. Mason. In this appeal, the defendant argues that the trial court erred in finding a child support arrearage against her in the amount of $2215, for a

period of sixteen weeks terminating on March 7, 2016.[1] For the reasons that follow, we conclude that the matter must be remanded to the trial court for further proceedings consistent with this decision.

The following facts as found by the court or apparent from the record are relevant to our resolution of this appeal. The parties' marriage was dissolved by the court on February 7, 2011. At the time of the events giving rise to this appeal, an order was in place requiring the defendant to pay child support to the plaintiff in the amount of $174 per week. On June 3, 2016, the defendant filed a motion to modify her child support obligation on the ground that she no longer had any income, and a copy of the motion was served on the plaintiff by a state marshal on June 14, 2016. At a June 27, 2016 hearing, the parties agreed that the support obligation should be reduced to $0 per week, and the only dispute concerned an alleged arrearage, about which both parties testified. The defendant stated her child support obligation had been current as of January 6, 2016, when she lost her income. The plaintiff testified that he had not received payments since the "middle to end" of 2015, though he could not provide a precise date. He estimated the total amount of the arrearage to be approximately $5000.

During the hearing, the trial court indicated that it viewed the task before it as determining to which date the modification would take retroactive effect, which in turn would allow the court to determine the amount, if any, of the arrearage. The plaintiff stipulated that he

[1] Both parties also briefed claims related to an order of the trial court issued on March 7, 2016, which decided a motion to modify filed by the defendant on February 2, 2016. However, no appeal from the March 7, 2016 order was timely brought and we will not consider these claims. See *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, 263 Conn. 204, 212–13, 820 A.2d 224 (2003) (Appellate Court has broad authority to manage docket, including discretion to decline review of untimely claims).

would object to a retroactive modification only if the effective date was earlier than March 7, 2016. The defendant offered no specific date, but seemed to indicate that the modification date should be linked to an earlier motion for modification that she had filed on February 2, 2016. See footnote 1 of this opinion. On July 1, 2016, the trial court issued an order granting a modification of the support order to $0 per week, effective March 7, 2016. The trial court also found an arrearage of $2215, based on a failure to pay the required $174 per week for sixteen weeks.[2] The order did not reference any particular evidence in the record or state the date on which the last payment was made. No further articulation was requested by the parties. This appeal followed.

On appeal, the defendant argues that the trial court abused its discretion in finding an arrearage of $2215 based on nonpayment of child support for sixteen weeks ending on March 7, 2016. She asserts that because she had no income, the trial court should not have required her to make back payments. She also appears to argue that the arrearage period cutoff date should have been based on the date she lost her income, January 6, 2016, on which date she claims to have been current on her support obligation. This argument would result in no arrearage. In response, the plaintiff argues that the evidence supports the trial court's findings and that it did not abuse its discretion in assessing an arrearage.

[2] At oral argument before this court, both parties agreed that the trial court made a computational error in calculating the arrearage to the advantage of the defendant. The correct amount should be $2784, calculated as $174 per week for sixteen weeks. In his argument before this court, the plaintiff noted the error was to his disadvantage and expressly waived any claim he might have on the $569 difference. Because, as will be explained herein, we remand this matter for further proceedings, we need not address whether the plaintiff's express waiver before this court renders this computational error moot.

"The well settled standard of review in domestic relations cases is that [an appellate court] will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts." (Internal quotation marks omitted.) *McKeon* v. *Lennon*, 321 Conn. 323, 341, 138 A.3d 242 (2016). "Trial courts have broad discretion in deciding motions for modification." (Internal quotation marks omitted.) *Robinson* v. *Robinson*, 172 Conn. App. 393, 400, 160 A.3d 376 (2017). "In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o the extent that the trial court has made findings of fact, our review is limited to deciding whether those findings were clearly erroneous." (Citation omitted; internal quotation marks omitted.) Id. "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, 173 Conn. App. 755, 768, 164 A.3d 702 (2017). To the extent that this appeal challenges the trial court's application of a statute in the course of modifying the support order, the claim presents a question of law over which we exercise plenary review. See *Hornung* v. *Hornung*, 323 Conn. 144, 151, 146 A.3d 912 (2016).

In the present appeal, the parties agree that reducing the defendant's support obligation to $0 per week was appropriate under the circumstances of this case. The defendant challenges only the trial court's assessment of an arrearage under the previous order. The calculation of an arrearage involves both questions of fact and law. The factual determinations include whether the obligor failed to make payments, the date upon which

payments stopped, and the date upon which payments resumed or, if the nonpayment continued through the date of modification, the date upon which the support obligation became nullified by the court's modification of the order. It is axiomatic that the effective date of the modification in the latter instance cuts off any period in which an arrearage may accrue under the order modified. When the end date of the arrearage period is determined by the court's modification, the issue may involve a question of law in the court's application of General Statutes § 46b-86 (a), which allows the court the discretion to modify a support order with retroactive effect to the date upon which the motion to modify was served upon the opposing party. As noted previously, we review these factual findings to determine whether those findings were clearly erroneous and our review of the court's legal determinations is plenary.

We begin by setting forth the law concerning the assessment of an arrearage upon the obligor's motion to modify a support order. "[A]n order entered by a court with proper jurisdiction must be obeyed by the parties until it is reversed [or otherwise modified] by orderly and proper proceedings." (Internal quotation marks omitted.) *Mulholland* v. *Mulholland*, 229 Conn. 643, 649, 643 A.2d 246 (1994). Upon a motion for modification of a support order, the trial court has the authority to order a party moving for modification to pay any arrearage then existing when the motion is heard. See *Pace* v. *Pace*, 134 Conn. App. 212, 220–22, 39 A.3d 756 (2012) (affirming trial court's decision denying motion to modify and ordering movant to pay arrearage despite movant's claimed financial hardship); see also Practice Book § 25-26 (requiring trial court to consider existence and causes of arrearage upon motion to modify). The effective date of modification also serves to cut off the period during which any arrearage under the prior support order may accrue.

The trial court's discretion to give a modification retroactive effect is not unlimited. Its authority is expressly limited by § 46b-86 (a), which provides in relevant part that "[n]o order for periodic payment of . . . support may be subject to retroactive modification, except that the court may order modification with respect to any period during which there is a pending motion for modification . . . from the date of service of notice of such pending motion upon the opposing party . . . ." See also *Hane* v. *Hane*, 158 Conn. App. 167, 173, 118 A.3d 685 (2015) (recognizing General Assembly abrogated rule against retroactive modification, creating limited authority to modify to date of service).

In the present appeal, we conclude that the trial court's finding that the defendant had not paid her support obligation, and its implicit finding that that nonpayment began on or about November 16, 2015, are not clearly erroneous. The trial court found a sixteen week arrearage terminating on March 7, 2016, which necessarily implies a finding that payments stopped on or about November 16, 2015. The sparse record on this issue consists of limited testimony from the parties. The plaintiff testified that payments ceased toward the "middle to end" of 2015, and the defendant testified that her payments were current as of January 6, 2016. The trial court made no credibility determinations on the record; its findings, however, indicate that it necessarily must have credited the testimony of the plaintiff over that of the defendant. See *Young* v. *Commissioner of Correction*, 104 Conn. App. 188, 190 n.1, 932 A.2d 467 (2007) (when decision lacks specificity, Appellate Court presumes trial court made necessary findings and determinations supported by the record on which judgment is predicated), cert. denied, 285 Conn. 907, 942 A.2d 416 (2008); *Champagne* v. *Champagne*, 85 Conn. App. 872, 879, 859 A.2d 942 (2004) ("[i]n the

absence of an articulation, we presume that the trial court acted properly'' [internal quotation marks omitted]); *Zadravecz* v. *Zadravecz*, 39 Conn. App. 28, 32, 664 A.2d 303 (1995) (same). The November 16, 2015 commencement date is supported by the plaintiff's testimony, and indicates that the trial court did not credit the defendant's testimony. We cannot conclude that these factual findings are clearly erroneous.

Turning to the trial court's determination of the end date of the arrearage period, the record reveals that the trial court did not comply with the limitations of § 46b-86 (a). As previously noted, this statute provides the court discretion to modify a support order with retroactive effect to the date upon which the motion to modify was served upon the opposing party. In this case, the trial court ordered the modification to take effect retroactively on March 7, 2016; however, the defendant's motion to modify was not served on the plaintiff until June 14, 2016. Strict compliance with the limitations of § 46b-86 (a) would have permitted an effective date no earlier than June 14, 2016. We conclude that such noncompliance with a statutory restraint on the trial court's authority constitutes an abuse of legal discretion and requires reversal.

Finally, we note that the record in this matter presents the unusual situation in which the court's error was suggested to the court by the party to whose detriment this mistake accrues. As noted in footnote 2 of this opinion, the plaintiff, unprompted, expressly stated at oral argument before this court that he waived his claim to a certain portion of the arrearage that was apparently omitted from the arrearage assessment due to a computational error of the trial court. Given the plaintiff's interest in waiving portions of the arrearage, combined with his suggestion of the March 7, 2016 date, a question is raised of whether the improper effective date indicates that the court viewed the suggested date as an

implicit waiver of the plaintiff's claim to the portion of the arrearage accruing between March 7 and June 14, 2016, and simply drafted the modification order as though it took effect on March 7, 2016. It is not possible to resolve this question on the record before us presently, and the question of "whether a waiver has occurred is a factual question for the trier." (Internal quotation marks omitted.) *Shelton* v. *Olowosoyo*, 125 Conn. App. 286, 294, 10 A.3d 45 (2010). Therefore, on remand, the trial court may not order an effective date earlier than June 14, 2016. Moreover, in the event the trial court curtails the arrearage based on a finding that the plaintiff waived some portion of the arrearage, we require that the trial court's order clearly articulate this finding.

For the foregoing reasons, we conclude that the trial court erred in setting the effective date for the modification earlier than June 14, 2016. We remand this matter to the trial court.

The judgment is reversed only as to the effective date of the modification order and the calculation of the arrearage, and the case is remanded for further proceedings consistent with this opinion. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JEFFREY H.*
(AC 38113)

Sheldon, Mullins and Harper, Js.

Syllabus

Convicted, following a jury trial, of three counts of the crime of sexual assault in the first degree in connection with his alleged sexual abuse

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

of his daughter, N, the defendant appealed to this court. On the eve of the defendant's scheduled trial date, the state discovered that the statute of limitations on the conduct supporting the charges in the original information had expired, and the court granted the state's request for a continuance. During the continuance, the state requested that the state police detective assigned to the case, F, conduct an additional interview with N, and, in that interview, N made allegations against the defendant of assaults that occurred in a time period that fell within the statute of limitations. On appeal, the defendant claimed, inter alia, that the trial court violated his constitutional right to present a defense by preventing him from cross-examining F relating to whether N made the new allegations against the defendant only upon learning that the statute of limitations barred her original allegations, and by excluding testimony from S, a physician, and a letter S had written, which included a notation that N had a history of a previous sexual assault. *Held*:

1. The trial court did not abuse its discretion or violate the defendant's constitutional right to present a defense by excluding testimony concerning the statute of limitations issue that the defendant sought to introduce through the cross-examination of F; the defendant was permitted to conduct a sufficient inquiry into his defense theory that N had fabricated the new allegations, including eliciting testimony from F about the continuance of the originally scheduled trial and F's involvement in the case, and evidence that the state had asked F to obtain another statement from N after the continuance had been granted, and the defendant failed to cross-examine N regarding her motivations for detailing the abuse alleged in her latest statement to F or if she changed her allegations due to pressure from authority figures, and failed to ask F, who could not testify regarding N's motivations, whether he had pressured N to make the new allegations because of a problem with the statute of limitations.
2. The trial court did not abuse its discretion in excluding as irrelevant S's testimony and letter, which the defendant sought to admit to rebut certain consciousness of guilt evidence presented by the state; the foundation for S's letter was wholly speculative, as S was unable to provide any insight as to where or from whom he had obtained the information in the letter about N's history of sexual abuse, or to which of certain separate instances of sexual assault involving N the notation referred, and the defendant failed to demonstrate any open and visible connection between S's notation about N's history of sexual abuse and the state's consciousness of guilt evidence.
3. The defendant could not prevail on his claim that the trial court abused its discretion and deprived him of his right to due process by admitting into evidence certain out of context interview statements that he made following a polygraph examination he had taken and failed; that court properly concluded that the defendant's statements, which referred to the fact that he felt sexually aroused by N and that he locked himself

in his bedroom because he was afraid N was going to kill him, qualified as an exception to the rule against hearsay for an admission by a party opponent under the applicable provision of the Code of Evidence (§ 8-3 [1]), as they were relevant and material to show the defendant's consciousness of guilt and were not so prejudicial as to risk injustice as a result of their admission, and the court excluded any statements made in response to the fact that the defendant had failed the polygraph, including any statement related to his change of response from his earlier full denial of any inappropriate behavior.

Argued March 13—officially released September 26, 2017

Procedural History

Substitute information charging the defendant with three counts of the crime of sexual assault in the first degree, brought to the Superior Court in the judicial district of Litchfield and tried to the jury before *Marano*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Matthew D. Dyer, with whom, on the brief, was *Kristen Mostowy*, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *David S. Shepak*, state's attorney, and *Dawn Gallo*, supervisory assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Jeffrey H., appeals from the judgment of conviction, rendered after a jury trial, of three counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1). On appeal, the defendant claims that the trial court (1) abused its discretion by preventing him from pursuing certain inquiries on cross-examination, thereby violating his sixth amendment right to present a defense, and (2) abused its discretion by admitting into evidence out-of-context portions of his interview conducted following a polygraph examination, in violation of his right to due process. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The victim, N, is the defendant's daughter. The defendant repeatedly sexually assaulted N from the time she was seven or eight years old until she was eleven years old. Most of the assaults during this period took place when N and the defendant went fishing together. The assaults recommenced when N was approximately twelve or thirteen years old and continued until she was approximately seventeen years old. Many of the assaults included threats of violence against N, her mother, and her sister. On several occasions, the defendant warned N that if she told anyone about the assaults, he would kill her, her mother, and her sister. On occasion, the defendant brandished a weapon, including a double-barreled shotgun, while committing an assault.

N did not report the defendant's conduct until 2009. At that time, the defendant and N's mother had divorced, and N was living with her mother and her sister in Massachusetts. N kept a journal as part of a course of psychiatric treatment that she received from Stefanie Lindahl, a psychiatrist. N documented her father's conduct in the journal and shared it with Lindahl. N reported the assaults to the police on July 31, 2009.

Detective William Flynn, a major crimes detective with the Connecticut State Police and a member of the child abuse investigative team, was assigned to investigate N's report. Throughout the investigation, Flynn interviewed N and took written statements from her. At the request of the state's attorney, Flynn used his police vehicle to drive N as she directed him to various locations where the abuse had occurred. These trips prompted N to remember additional incidents of sexual assault perpetrated by the defendant.

The defendant was arrested on September 29, 2010. The original information charged the defendant with

offenses that were alleged to have occurred between March, 1997 and 2000. The state filed a substitute long form information on March 5, 2015,[1] charging the defendant with three counts of sexual assault in the first degree in violation of § 53a-70 (a) (1) for offenses occurring in 2002, 2003, and 2004.

On March 31, 2015, the jury found the defendant guilty of three counts of sexual assault in the first degree. The court sentenced the defendant to a term of twelve years of imprisonment and five years of special parole on each count, to run consecutively, resulting in a total effective sentence of thirty-six years of imprisonment and fifteen years of special parole. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the trial court made two erroneous evidentiary rulings in violation of his right, under the sixth and fourteenth amendments to the federal constitution, to present a defense. Specifically, the defendant asserts that the trial court improperly prohibited him from cross-examining Flynn about a statute of limitations issue that the state had discovered on the eve of the original trial date. In addition, the defendant argues that the trial court erroneously barred testimony from Joseph C. Scirica, one of N's former treating physicians, regarding a notation in a 2006 letter in his file that N had a "remarkable history of a molestation/sexual assault." The state responds

[1] In the original information, filed on September 29, 2010, the state charged the defendant with offenses alleged to have occurred between March, 1997 and 2000. At the time trial was scheduled in January, 2014, the state discovered that the statute of limitations period for those offenses had expired, notwithstanding an amendment to the statute extending the limitations period for sexual assault. See General Statutes § 54-193a; see also *State* v. *Brundage*, 138 Conn. App. 22, 29, 50 A.3d 396 (2012) (holding that amendment to statute extending limitations period for sexual assault did not apply retroactively and only applied to offenses occurring after May 22, 2002).

that the trial court properly excluded both the evidence relating to the statute of limitations and Scirica's letter. For the reasons that follow, we agree with the state.

The defendant's claims implicate both his constitutional right to present a complete defense, as well as the proper constraints that the rules of evidence impose on that right. Therefore, our analysis has two parts. First, we must determine whether the trial court abused its discretion in making certain evidentiary rulings regarding the statute of limitations and Scirica's letter. Second, if we find that the trial court abused its discretion, we must determine whether that caused a violation of the defendant's constitutional rights.

Because our analysis of each of the defendant's claims in this part of the opinion relies on the same legal principals, we first set forth our standard of review for each of those claims. "The sixth amendment to the United States constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . The defendant's sixth amendment right, however, does not require the trial court to forgo completely restraints on the admissibility of evidence. . . . Generally, [a defendant] must comply with established rules of procedure and evidence in exercising his right to present a defense. . . . A defendant, therefore, may introduce only relevant evidence, and, if the proffered evidence is not relevant, its exclusion is proper and the defendant's right is not violated." (Footnote omitted; internal quotation marks omitted.) *State* v. *Wright*, 273 Conn. 418, 424, 870 A.2d 1039 (2005). "Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter." (Internal quotation marks omitted.) *State* v. *Davis*, 298 Conn. 1, 23, 1 A.3d 76 (2010).

The defendant's sixth amendment right to present a defense is satisfied "when defense counsel is permitted to expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (Internal quotation marks omitted.) *State* v. *Daniel B.*, 164 Conn. App. 318, 341, 137 A.3d 837, cert. granted on other grounds, 323 Conn. 910, 149 A.3d 495 (2016). "[R]estrictions on the scope of cross-examination are within the sound discretion of the trial judge . . . but this discretion comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment. . . . To establish an abuse of discretion, [the defendant] must show that restrictions imposed [on the] cross-examination were clearly prejudicial." (Citation omitted; internal quotation marks omitted.) Id., 341–42.

"Upon review of a trial court's decision, we will set aside an evidentiary ruling only when there has been a clear abuse of discretion. . . . The trial court has wide discretion in determining the relevancy of evidence and the scope of cross-examination and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Santos*, 318 Conn. 412, 423, 121 A.3d 697 (2015).

A

The following additional facts and procedural history are relevant to the defendant's statute of limitations claim. The defendant's trial originally was scheduled to begin on January 13, 2014. On the eve of trial, however, the state discovered that the statute of limitations had expired on the conduct supporting the original charges. The state sought a continuance, which the trial court granted. During the continuance, the state's attorney

requested that Flynn conduct an additional interview with N. In this interview, N made additional allegations against the defendant pertaining to more recent sexual assaults that fell within the statute of limitations. These new allegations formed the basis for the substitute long form information that the state filed on March 5, 2015, and under which the defendant was tried and convicted.

At trial, the defendant attempted to establish, through cross-examination of Flynn, that the state's discovery of the statute of limitations issue prompted N's new allegations. The state objected on relevance grounds. In an offer of proof outside the presence of the jury, Flynn testified: "I knew there was an issue with the statute of limitations, I—that's about all I knew, there was a—we didn't have a large discussion on that." The trial court declined to allow any questioning regarding Flynn's "awareness of the statute of limitation[s] issue or that the—that issue demolished the [s]tate's case or anything of that nature." The trial court, however, allowed the defendant to inquire regarding Flynn's knowledge of the January, 2014 trial date and continuance, his involvement in trial preparations, and his role in the taking of an additional statement from N at the request of the state's attorney in January, 2014.

On appeal, the defendant argues that the trial court abused its discretion in excluding testimony regarding the statute of limitations issue during cross-examination of Flynn, thereby violating the defendant's sixth amendment right to present a defense. The defendant asserts that until the state discovered the statute of limitations issue, N was "remarkably consistent on the ages of the alleged sexual abuse" as being between the ages of eight and eleven. Because the trial court did not allow Flynn to testify about the statute of limitations issue, the defendant argues that he was left unable to

explain his defense that N fabricated the newer allegations. As previously noted, to the extent that the defendant challenges an evidentiary ruling of the trial court, we review the claim for abuse of discretion. We conclude that the trial court did not abuse its discretion in excluding this evidence and also did not violate the defendant's sixth amendment right.

Our resolution of this claim is guided by *State* v. *Andrews*, 102 Conn. App. 819, 927 A.2d 358, cert. denied, 284 Conn. 911, 931 A.2d 932 (2007). In *Andrews*, the defendant argued, inter alia, that the trial court violated his sixth amendment right to present a defense by improperly limiting his cross-examination of certain witnesses. Id., 824–25. The defendant was charged with sexual assault in the first degree, sexual assault in the second degree and risk of injury to a child. Id., 821. At trial, the defendant was precluded from introducing certain evidence regarding details of the defendant's sexual relationships with other members of the victim's family. Id., 825.

The court in *Andrews* held that the defendant's sixth amendment right to present a defense was not violated. Id., 827. The court explained that the evidence presented made the jury aware of the defendant's complicated relationship with the victim's family and that members of the victim's family may have had various motives for corroborating the victim's testimony. Id. The court concluded that the trial court did not abuse its discretion in precluding additional details of the defendant's sexual relationships, as they were not relevant to the issue of whether the defendant had sexually assaulted the victim. Id.

Applying the analysis in *Andrews* to the present case, we conclude that the trial court did not abuse its discretion in excluding testimony of the statute of limitations

issue. The defendant argued that he attempted to present evidence that N changed her story upon learning that the statute of limitations for the original charges had expired. Because N "was remarkably consistent on the ages of the alleged sexual abuse," the defendant argued that evidence that the statute of limitations barred the original charges was necessary to show that the only reason for the new allegations was to save the state's case.

Similar to *Andrews*, the defendant in this case was able to conduct sufficient inquiry into his defense theory. Specifically, the defendant elicited testimony from Flynn about the continuance of the originally scheduled trial and Flynn's involvement in the case. In addition, the defendant presented evidence that the state had asked Flynn to obtain another statement from N after the continuance of the original trial.

The defendant attempted to introduce evidence of the statute of limitations issue through Flynn, not N. The defendant never cross-examined N regarding her motivations for detailing the abuse that occurred in 2002, 2003, and 2004, only after she learned that the statute of limitations issue barred the original charges. The defendant could have asked N if she was changing her story due to pressure from authority figures such as her mother or the state's attorney, but did not do so. Instead, the defendant attempted to address this topic in his cross-examination of Flynn; however, Flynn could not have testified about N's motives and the defendant failed to ask Flynn whether he pressured N to make new allegations because of the problem with the statute of limitations. He could not testify, without speculating, about why N was detailing the later abuse at that particular time. Therefore, we conclude that the trial court did not abuse its discretion in refusing to allow the defendant to cross-examine Flynn on the statute of limitations issue and that this was a reasonable

constraint on the defendant's sixth amendment right to present a defense. See *State* v. *Andrews*, supra, 102 Conn. App. 826–27.

B

The defendant next claims that the trial court abused its discretion by excluding Scirica's letter and testimony. He argues that exclusion of this evidence prevented him from rebutting the state's consciousness of guilt argument. The state argues that the trial court did not abuse its discretion in excluding this evidence. We agree with the state.

The following facts are relevant to the defendant's claim regarding the exclusion of Scirica's letter. On April 1, 2007, Lindahl received a letter from the defendant stating, "I am not a sexual predator, nor am I an abusive father." The defendant sent this letter two years prior to N's initial allegations of sexual assault against him. Prior to the time the defendant sent this letter, N's primary care physician had referred N to Scirica for treatment in 2006. Following that referral, Scirica sent a letter to N's primary care physician with a notation that N had a "remarkable history of a molestation/sexual assault."

At trial, the defendant attempted to introduce Scirica's letter into evidence and to have Scirica testify about his recollection of this history of molestation or sexual assault. The state objected, arguing that the letter constituted inadmissible hearsay within hearsay. Scirica testified in an offer of proof regarding the 2006 letter. Scirica did not have any independent recollection of the letter, nor could he say whether it was N, her mother, or someone else who had provided him with N's medical history. Scirica noted that, as a mandated reporter, he would have to report any fresh complaints of sexual assault, but did not do so in this case. Scirica could not

state with any certainty the origin of the information about N's history of sexual assault.

Thereafter, the trial court excluded Scirica's testimony and letter because the hearsay quality and uncertain source of the information rendered it unreliable and irrelevant. In its ruling, the trial court noted that "[t]here is no way to tell through the letter or [Scirica's] testimony whether the phrase '[a] remarkable history of a molestation/sexual assault' refers to the alleged conduct of the defendant or other allegations of sexual misconduct that have been presented to the jury, namely the alleged incidents in school and at Silver Hill [Hospital]."[2]

The defendant argues that the trial court's refusal to allow Scirica to testify about the notation in his letter that N had a "remarkable history of a molestation/sexual assault" prevented him from presenting his defense. The defendant asserts that this evidence would have given context to the defendant's April 1, 2007 letter to Lindahl, which stated: "I am not a sexual predator, nor am I an abusive father." The state used the defendant's letter as evidence of his consciousness of guilt, and the defendant sought to introduce Scirica's letter as a way to rebut the state's argument. The state argues that the trial court properly excluded the evidence. The state asserts that the admission of Scirica's testimony and letter would have forced the jury to speculate as to which instance of abuse the notation specifically referred.

The defendant challenges the trial court's evidentiary ruling regarding Scirica's testimony and letter. As previously discussed, "we will set aside an evidentiary ruling only when there has been a clear abuse of

[2] N testified at trial that, in addition to the sexual assaults perpetrated by the defendant, she suffered sexual assaults committed by others at a school in Sharon and while receiving treatment as a patient at Silver Hill Hospital in New Canaan.

discretion." (Internal quotation marks omitted.) *State* v. *Santos*, supra, 318 Conn. 423.

The court's analysis in *State* v. *Davis*, supra, 298 Conn. 1, informs our resolution of this claim. In *Davis*, the victim of a shooting testified that he hesitated to cooperate with the police because he did not want to jeopardize the close relationship he had with his girlfriend. Id., 20. During his cross-examination of the victim, the defendant sought to undermine the victim's credibility with evidence that the victim had assaulted his girlfriend. Id., 20–21. The defendant intended to use this evidence to show that the victim did not have a close relationship with his girlfriend, and therefore lied about why he hesitated to cooperate with the police. Id., 21. The trial court precluded evidence that the victim assaulted his girlfriend, finding that it was irrelevant. Id., 21.

In *Davis*, our Supreme Court held that it was not an abuse of the trial court's discretion to exclude the evidence because the foundation for the evidence was "wholly speculative." Id., 24. The defendant in *Davis* provided no other evidence that the victim lied about his reason for not cooperating with the police. See id. Additionally, the defendant presented no evidence about when the victim assaulted his girlfriend. Id., 24. Our Supreme Court reasoned that, if the assault occurred after the shooting, it would not have had any bearing on the victim's decision not to cooperate with the police on the day of the shooting. Id. The Supreme Court determined that "defense counsel failed to demonstrate any open and visible connection between the alleged fight with [the victim's girlfriend] and the victim's decision not to tell [the] police the identities of his assailants on [the day of the shooting]." Id.

In the present case, the defendant attempted to introduce Scirica's testimony and letter to explain the timing

of the defendant's April 1, 2007 letter to Lindahl. The defendant sought to use this evidence from Scirica to counteract the state's use of his letter to Lindahl to prove consciousness of guilt on the assumption that the defendant's April 1, 2007 letter to Lindahl appeared to be spontaneous and not in response to some allegation against him. The defendant argued that the admission of Scirica's letter would show that, contrary to the state's assertions, allegations of sexual assault had occurred prior to the defendant's April 1, 2007 letter, and that the defendant's letter was a reaction to the allegations contained in Scirica's letter.

As we have already discussed, there was no evidence in the record as to where or from whom Scirica had obtained the information of N's "remarkable history of a molestation/sexual assault." Furthermore, there is no evidence in the record indicating which instances of sexual assault the notation refers to—the incident at school, the incident at Silver Hill Hospital, or the conduct alleged against the defendant. Because Scirica could not testify as to the origin of the information or to which allegations of abuse the notation referred, this testimony would have caused the jury to stray too far into the realm of speculation.

Similar to *Davis*, the foundation for this evidence is "wholly speculative," as Scirica could not provide any insight about the source of the notation in his letter or to what the notation was referring. See *State* v. *Davis*, supra, 298 Conn. 24. If the notation in Scirica's letter was not in reference to conduct N alleged against the defendant, it would have no impact on the defendant's decision to write the April 1, 2007 letter to Lindahl. See id. We agree with the trial court that Scirica's letter also could have been referring to the instances of abuse that N suffered at school or as a patient at Silver Hill

Hospital. Therefore, the defendant "failed to demonstrate any open and visible connection between" Scirica's notation about N's "history of a molestation/sexual assault" and the defendant's April 1, 2007 letter to Lindahl. See id. Accordingly, the trial court did not abuse its discretion in excluding Scirica's testimony or letter as irrelevant, and the proper application of this evidentiary rule to the defendant's case was a permissible restraint on his right to present a defense.

II

The defendant's second claim on appeal is that the trial court's admission of portions of an interview conducted with the defendant following a polygraph examination was an abuse of discretion and violated his right to due process. Specifically, the defendant argues that the admitted portions of his interview do not constitute positive assertions of fact and, therefore, are not admissible under the statement by a party opponent exception to the hearsay rule. The defendant also argues that the only way for the jury to have received the proper context of the admitted statements would have been to admit information regarding the polygraph examination itself, which is not admissible in Connecticut trial courts. See *State* v. *Porter*, 241 Conn. 57, 94, 698 A.2d 739 (1997). The defendant asserts that without the ability to present this necessary evidence, the trial court's admission of the interview statements deprived him of his right to due process. We disagree.

The following additional facts are relevant to this claim. The defendant agreed to submit to a polygraph examination on September 20, 2010. A three and one-half hour interview of the defendant followed the exam. The state's attorney's office prepared a transcript of the interview. The state, through a motion in limine, sought to admit portions of the interview at trial through the testimony of Flynn. Specifically, the state sought

to introduce statements related to the following three areas: (1) that the defendant felt sexually aroused by N as she was developing; (2) that the defendant locked his bedroom door at night because he was worried that N was going to kill him; and (3) that the defendant changed his response "from his earlier full denial of any inappropriate behavior."

The trial court ruled that no statements would be admitted that were made in response to the fact that the defendant had failed the polygraph. Accordingly, the trial court excluded the state's third area of inquiry regarding the defendant's change in response to the allegations. The trial court reasoned that the third area of inquiry was inadmissible because the likely "defense argument is that his response changed because there was an intervening polygraph . . . ."

The court allowed Flynn to testify regarding the other two areas of inquiry. In regard to the defendant feeling aroused by N, Flynn testified that "[the defendant] had stated words to the effect that while she was developing, uh, he began to feel things of—of becoming aroused looking at [N], but said 'that's my daughter, uh, it's got to stop there, it's my daughter' or words to that effect." Flynn further testified concerning the defendant's statements that he feared for his safety: "He had said words to the effect that he was locking his bedroom door at night, because he was afraid [N] was [going to] kill him." The trial court allowed these statements into evidence as admissions by a party opponent.

In his brief, the defendant argues that even though the trial court would not admit any statement that was in response to the failed polygraph examination, "all of the defendant's statements were intertwined with the failed polygraph results; therefore, all of his statements would have been in response to the failed polygraph examination." The state responds that the admitted

statements were material and relevant to show the defendant's consciousness of guilt. The defendant claims that the trial court improperly admitted the interview statements because (1) the statements were not positive assertions of fact and, therefore, did not fall under a hearsay exception, and (2) admission of the out-of-context statements violated the defendant's right to due process. We disagree.

We begin by setting forth the standard of review for determining whether the trial court properly interpreted § 8-3 of the Connecticut Code of Evidence, which sets forth certain hearsay exceptions. "To the extent a trial court's [ruling regarding] admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary." (Internal quotation marks omitted.) *State* v. *Miller*, 121 Conn. App. 775, 780, 998 A.2d 170, cert. denied, 298 Conn. 902, 3 A.3d 72 (2010). A trial court's ruling on the applicability of the hearsay rule or its exceptions is a legal determination requiring plenary review. Id. "We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Internal quotation marks omitted.) Id. "To establish an abuse of discretion, [the defendant] must show that the restrictions imposed . . . were clearly prejudicial. . . . If, after reviewing the trial court's evidentiary rulings, we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail. . . . If, however, we conclude that the trial court improperly [admitted] certain evidence, we will proceed to analyze [w]hether [the limitations the court imposed] . . . [were] so severe as to violate [the defendant's rights] . . . . Our standard of review for this constitutional inquiry is de novo." (Citations omitted; internal quotation marks omitted.) *State* v. *Santos*, supra, 318 Conn. 423.

A

We first address the defendant's hearsay argument. Because the defendant challenges the trial court's interpretation of § 8-3 of the Connecticut Code of Evidence, our review is plenary. Under § 8-3 (1) of the Connecticut Code of Evidence, the hearsay rule does not exclude "[a] statement [that is] being offered against a party and is (A) the party's own statement . . . ." "It is an elementary rule of evidence that an admission of a party may be entered into evidence as an exception to the hearsay rule. . . . In the criminal context, an admission is the avowal or acknowledgment of a fact or of circumstances from which guilt may be inferred, and only tending to prove the offenses charged, but not amounting to a confession of guilt . . . ." (Internal quotation marks omitted.) *State* v. *Paul B.*, 143 Conn. App. 691, 711–12, 70 A.3d 1123 (2013), aff'd, 315 Conn. 19, 105 A.3d 130 (2014). "An admission of a party opponent need only traverse the low hurdles of relevancy and materiality to survive an objection to its admission into evidence. . . . Such an admission is admissible even if it is conclusory or not based on personal knowledge. . . . The admission need not even be wholly reliable or trustworthy." (Citations omitted.) *State* v. *Markeveys*, 56 Conn. App. 716, 720, 745 A.2d 212, cert. denied, 252 Conn. 952, 749 A.2d 1203 (2000).

We conclude that the trial court correctly interpreted § 8-3 (1) of the Connecticut Code of Evidence in determining that the interview statements qualify as admissions by a party opponent. During the interview, the defendant stated that "the only thing is . . . when [N] was developing . . . you feel like something like she's sexually aroused me at one point . . . ." The defendant also stated: "I was locking myself in the bedroom because I thought she was going to kill me."

Those were oral assertions that were relevant and material to the case. See *State* v. *Paul B.*, supra, 143

Conn. App. 712 (court held that defendant's statement, "well if the boys said I did that, then maybe I did . . . I just don't remember," was admissible admission by party opponent in response to sexual assault allegations). Additionally, the defendant's statements had a "tendency to make the existence of the fact that the defendant engaged in the alleged conduct more probable than it would be without [their] admission." Id. It is true that these statements do not amount to a direct confession of guilt; however, guilt can be inferred from the statements. Accordingly, the trial court properly interpreted § 8-3 (1) of the Connecticut Code of Evidence in finding that the statements fall under the statement by a party opponent exception to the hearsay rule.

B

We now turn to the defendant's claim that admitting the interview statements made subsequent to the polygraph examination out of context violated the defendant's right to due process. We review this claim for an abuse of discretion.

"Due process is not to be regarded as a giant constitutional vacuum cleaner which sucks up any claims of error which may occur to a party upon microscopic examination of the trial record. . . . Indeed, it would trivialize the constitution to transmute a nonconstitutional claim into a constitutional claim simply because the label placed on it by a party . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Kelly*, 256 Conn. 23, 49, 770 A.2d 908 (2001). "Rules for the admission and exclusion of evidence should be found offensive to notions of fundamental fairness embodied in the United States Constitution only when, (1) without a rational basis they disadvantage the defendant more severely than they do the [s]tate, or (2) [they] arbitrarily exclude reliable defensive evidence without achieving

a superior social benefit." (Internal quotation marks omitted.) *State* v. *Porter*, supra, 241 Conn. 134.

"Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise . . . ." Conn. Code Evid. § 4-3. Although all adverse evidence is damaging to a defendant's case, "it is inadmissible only if it creates undue prejudice so that it threatens injustice were it to be admitted." (Internal quotation marks omitted.) *State* v. *Warren*, 100 Conn. App. 407, 419, 919 A.2d 465 (2007). "Unfair prejudice occurs where the facts offered may unduly arouse the [jurors'] emotions, hostility, or sympathy . . . ." (Internal quotation marks omitted.) *State* v. *Bellamy*, 149 Conn. App. 665, 677, 89 A.3d 927 (2014), aff'd, 323 Conn. 400, 143 A.3d 655 (2016). The prejudicial effect of polygraph evidence greatly exceeds its probative value. See *State* v. *Porter*, supra, 241 Conn. 93. Therefore, polygraph evidence is "per se inadmissible in all trial court proceedings in which the rules of evidence apply, and for all trial purposes, in Connecticut courts." (Footnotes omitted.) Id., 94.

Generally, evidence of consciousness of guilt must "have relevance, and the fact that ambiguities or explanations may exist which tend to rebut an inference of guilt does not render [such] evidence . . . inadmissible but simply constitutes a factor for the jury's consideration." (Internal quotation marks omitted.) *State* v. *Coccomo*, 302 Conn. 664, 670, 31 A.3d 1012 (2011). In other words, evidence of consciousness of guilt must "tend to support a relevant fact even to a slight degree, so long as not prejudicial or merely cumulative." Id., 669. "[I]t is the province of the jury to sort through any ambiguity in the evidence in order to determine whether [such evidence] warrants the inference that [the defendant] possessed a guilty conscience." (Internal quotation marks omitted.) Id., 672.

After reviewing the record, we conclude that the trial court did not abuse its discretion in admitting the interview statements. The statements admitted were certainly relevant, as they had "a logical tendency to aid the trier in the determination of an issue." (Internal quotation marks omitted.) *State* v. *Cerreta*, 260 Conn. 251, 261, 796 A.2d 1196 (2002). Although the statements were adverse to the defendant, they were not so prejudicial as to risk injustice as a result of their admission into evidence.

Moreover, the trial court took care not to admit any statement by the defendant that could be explained by reference to the failed polygraph. For example, the trial court excluded any statements relating to the defendant's change of response. Specifically, the trial court excluded any statements showing that the defendant did not completely deny the allegations after failing the polygraph, as the fact that the defendant failed the polygraph examination could be used to explain such statements.

Rather the trial court admitted only the statements that the defendant felt aroused by N and that the defendant feared N was going to kill him as evidence of his consciousness of guilt. The statements admitted were relevant to show the defendant's consciousness of guilt, and supported that inference at least to " 'a slight degree.' " See *State* v. *Coccomo*, supra, 302 Conn. 669. Therefore, the trial court did not abuse its discretion in admitting the interview statements for the purpose of showing the defendant's consciousness of guilt. Because we conclude that the trial court did not abuse its discretion in admitting the interview statements, we conclude that the defendant was not deprived of his right to due process.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* FRANK EDWARD BIGGS (AC 38528)

Sheldon, Prescott and Bear, Js.

Syllabus

Convicted, following a jury trial, of the crimes of larceny in the second degree, conspiracy to commit larceny in the second degree, larceny in the third degree as an accessory, conspiracy to commit larceny in the third degree, and engaging police in pursuit, and, following a plea of nolo contendere, of being a persistent felony offender and a persistent serious felony offender, the defendant appealed to this court. He claimed, inter alia, that the trial court violated his right to an impartial jury by failing to conduct an adequate investigation into a claim of juror misconduct that he had brought to the court's attention on the date originally scheduled for his sentencing. The claim involved an incident in which a juror made a comment to H, the defendant's friend, about the defendant's trial while the trial was ongoing, in violation of the court's order to the jurors not to discuss the case with anyone. The trial court conducted a preliminary inquiry into the claim but did not hold an evidentiary hearing, as the defendant requested, to hear testimony from the juror involved in the alleged misconduct because the court found, on the basis of H's testimony during the preliminary inquiry, that the defendant had not been prejudiced by the juror's conversation with H, in which the juror indicated that the state's case against the defendant was weak. *Held*:

1. The defendant could not prevail on his unpreserved claim that, pursuant to *Remmer* v. *United States* (347 U.S. 227), the trial court improperly failed to accord him a presumption that the juror's communication to H was prejudicial in determining whether the defendant met his burden of proving that he had been prejudiced by the juror's communication, there having been no constitutional violation; the defendant was not entitled to the *Remmer* presumption of prejudice, he having failed to prove that the court was implicated in the juror misconduct, or that there was an external interference with the jury's deliberative process via a private communication, contact or tampering with jurors that related directly to the case being tried.
2. The trial court did not abuse its discretion when it declined, after conducting its preliminary inquiry into the defendant's claim of juror misconduct, to hold a further evidentiary hearing to receive the juror's testimony because it was persuaded by the evidence from its preliminary inquiry that the defendant had not been prejudiced by the juror's misconduct; the court properly determined, on the basis of H's testimony during the preliminary inquiry, that the juror's conversation with H was largely

nonsubstantive and did not involve extrinsic information that might have interfered with the jury's deliberative process or caused the juror to develop an allegiance to either party.

3. The trial court violated the defendant's right against double jeopardy by sentencing him on separate charges of conspiracy to commit larceny in the second degree and conspiracy to commit larceny in the third degree, which both stemmed from a single, unlawful agreement to steal money from the victim; accordingly, the defendant's separate sentence and conviction of conspiracy to commit larceny in the third degree could not stand and had to be vacated.

Argued January 30—officially released September 26, 2017

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of larceny in the second degree, conspiracy to commit larceny in the second degree, larceny in the third degree, conspiracy to commit larceny in the third degree and engaging police in pursuit, and, in the second part, with being a persistent felony offender and a persistent serious felony offender, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, where the first part of the information was tried to the jury before *Alander*, *J.*; verdict of guilty; thereafter, the defendant was presented to the court, *D'Addabbo*, *J.*, on a plea of nolo contendere to the second part of the information; judgment of guilty; subsequently, the court, *Alander*, *J.*, denied the defendant's motion for a hearing regarding allegations of juror misconduct and rendered judgment in accordance with the verdict and plea, from which the defendant appealed to this court. *Reversed in part; judgment directed.*

David B. Bachman, assigned counsel, for the appellant (defendant).

Rita M. Shair, senior assistant state's attorney, with whom were *Brian Preleski*, state's attorney, and, on the brief, *David Clifton*, assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Frank Edward Biggs, appeals from the judgment of conviction rendered against him following a jury trial in the judicial district of New Britain on charges of larceny in the second degree as an accessory in violation of General Statutes §§ 53a-123 (a) (3)[1] and 53a-8 (a); conspiracy to commit larceny in the second degree in violation of General Statutes §§ 53a-48 (a) and 53a-123 (a) (3); larceny in the third degree as an accessory in violation of General Statutes §§ 53a-124 (a) (2)[2] and 53a-8 (a); conspiracy to commit larceny in the third degree in violation of General Statutes §§ 53a-48 (a) and 53a-124 (a) (2); and engaging police in pursuit in violation of General Statutes § 14-223 (b). After the jury returned its guilty verdict, the trial court found the defendant guilty on additional charges of being a persistent felony offender in violation of General Statutes (Rev. to 2011) § 53a-40 (f) and being a persistent serious felony offender in violation of General Statutes § 53a-40 (c), upon his plea of nolo contendere to those charges under a part B information. The defendant ultimately was given a separate sentence on each of the seven charges for a total effective term of nine years of incarceration followed by five years of special parole.[3]

[1] In relation to the count on larceny in the second degree, the long form information charged the defendant in relevant part "[with taking] property from the person of another, to wit: a deposit bag from the hands of John Peterson . . . ."

[2] In relation to the count on larceny in the third degree, the long form information charged the defendant in relevant part "[with taking] property valued over $2000, to wit: the other person physically taking the deposit bag containing money in the approximate amount of $7242 from John Peterson and the defendant driving that other person from the scene with the stolen property . . . ."

[3] The defendant was sentenced to a period of eight years of incarceration and five years of special parole for the crime of larceny in the second degree as enhanced by being a persistent felony offender; eight years of incarceration and five years of special parole, to run concurrently, for the crime of conspiracy to commit larceny in the second degree; four years of incarceration, to run concurrently, for the crime of larceny in the third

The defendant claims on appeal that the court (1) abused its discretion and violated his right to an impartial jury by failing to conduct an adequate investigation as to a claim of juror misconduct that he brought to its attention on the date originally scheduled for his sentencing and (2) violated his constitutional right against double jeopardy by imposing separate sentences upon him on two counts of conspiracy that were based upon a single conspiratorial agreement. The state disputes the defendant's juror misconduct claim, contending that the court adequately investigated and properly disposed of that claim. It agrees with the defendant, however, that the court violated his right against double jeopardy by imposing separate sentences upon him on two counts of conspiracy that were based upon a single conspiratorial agreement. We agree with the state, and therefore we affirm the trial court's judgment on all charges except for conspiracy to commit larceny in the third degree, and remand this case to the court with direction that the defendant's sentence and resulting conviction on that charge be vacated pursuant to *State* v. *Polanco*, 308 Conn. 242, 259–60, 61 A.3d 1084 (2013).

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. During the early afternoon of August 27, 2011, James Peterson, the eighty-eight year old uncle of the owner of Hooters Restaurant in Wethersfield, transported two bags of daily proceeds from Hooters to the TD Bank in Berlin to make a cash deposit in the amount of $7242. In the parking lot outside of the bank, Peterson encountered and briefly chatted with a friend, Dean Clemens. After their conversation was over, and while Clemens was returning to his truck, he saw a man in the entrance to the bank grab the deposit bags in from Peterson and

degree as an accessory; four years concurrent for the crime of conspiracy to commit larceny in the third degree; and one year of incarceration, to run consecutively, for engaging police in pursuit.

run away. Peterson first screamed at the man, who ran north, around the bank, and then cut through the neighboring Dunkin' Donuts parking lot. Thereafter, while attempting to follow the man in his truck, Clemens saw the man enter the passenger side of a newer black or dark blue Cadillac in the parking lot adjacent to the Dunkin' Donuts parking lot. As soon as the man entered the Cadillac, Clemens saw it speed out of the parking lot and turn east onto Farmington Avenue. Due to traffic in the bank parking lot, Clemens was initially unable to follow the Cadillac directly. He did, however, immediately notify the local police of what he had just seen by calling 911. Clemens told the 911 operator that there had been a "bank robbery" at the TD Bank and he was then pursuing the robbers' getaway vehicle. After accelerating to catch up to the Cadillac, he eventually was able to see its license plate number, which he relayed to the 911 operator. The license plate was registered to Whitney L. Johnson of Hamden. When Clemens was stopped behind the Cadillac at a stop light, he saw someone sit up in its backseat. He also noticed that the driver of the Cadillac was wearing a Boston Red Sox hat. After police officers joined in the pursuit of the Cadillac, Clemens returned to the bank and gave a statement to the officers from the Berlin Police Department who had responded to that location after the incident occurred.

Kelly Waas was getting coffee at the Dunkin' Donuts next to TD Bank when the incident occurred. While seated in her car in the drive-through lane, she saw a dark Cadillac driving back and forth in the adjacent parking lot. She noticed that the driver of the Cadillac was a black man with a husky build who was wearing a red baseball cap. She then saw a young black man run past her car and get into the rear passenger seat of the Cadillac, after which the Cadillac "took off like a bullet." Waas also reported her observations to the

Berlin police officers who had responded to the bank after the incident was reported.

Also on the morning of the incident, patrol Officer Eric Chase of the Berlin Police Department was on duty in his marked police cruiser when his dispatcher radioed a "BOLO"[4] for a Cadillac that had reportedly been involved in a "robbery" at TD Bank. Recalling that a Cadillac matching the dispatcher's description had just passed him as he was driving southbound on the Berlin Turnpike, Chase accelerated to overtake the Cadillac, and eventually was able to maneuver his cruiser behind it so he could see its license plate. By so doing, he was able to confirm that it was the Cadillac described in the BOLO. He then activated his lights and siren in an unsuccessful attempt to pull over the Cadillac.

As Chase's pursuit continued, other officers were setting up emergency operations at a firehouse farther south along the Berlin Turnpike in advance of an impending hurricane. When Lieutenant James Gosselin, a member of the hurricane response team, heard the broadcast about the fleeing Cadillac, he maneuvered his vehicle across the southbound lanes of the highway in an effort to stop it. To get around the vehicle, however, the operator of the Cadillac drove over the right curb of the highway, across the grass, and around some vehicles stopped at a nearby intersection. Chase initially followed the Cadillac around the vehicle and continued to pursue it southbound on the Berlin Turnpike, reporting as he did so that there appeared to be two people in the vehicle, one in the driver's seat and the other in the front passenger's seat. He ended his pursuit, however, at the Meriden city line because by then he could no longer see the Cadillac.

Later on the day of the incident, Hamden police officers went to the address of Johnson, the registered

[4] "BOLO" stands for "be on the lookout."

owner of the Cadillac, who was then the defendant's fiancée. Johnson told the police officers that the defendant had been using the Cadillac that day, and that he in fact had been using it throughout the month of August, 2011. Johnson stated that her brother had called her earlier in the day when police officers first went to her residence to inquire about the Cadillac. During that call, her brother had told her that the police were investigating a vehicle that had been involved in the commission of a crime. Johnson then called the defendant and informed him that the police were at her residence looking for the Cadillac. Sounding upset, the defendant then told Johnson that he, too, was looking for the Cadillac because it had been stolen from him earlier. The day of the incident was to have been the day of Johnson's and the defendant's wedding shower. When Johnson asked the defendant over the telephone what he was going to do about the shower, the defendant replied that he would not be coming to the shower. When Johnson later asked him about their wedding plans, moreover, he told her that the wedding would not be taking place, and, in fact, that he was unsure if or when she would ever see him again.

A couple of days later, Chase was dispatched to Meriden to investigate an abandoned motor vehicle. Upon his arrival, Chase recognized the vehicle from its license plate as the Cadillac he had pursued on the Berlin Turnpike after hearing the report of its use in a bank robbery. He took photographs of the Cadillac, including one of its untampered-with locking mechanism to show that a key must have been used to start and stop the vehicle. The Cadillac was then towed to the Berlin Police Department, where it was searched pursuant to a warrant.

The search of the Cadillac led to the discovery of the defendant's driver's license, along with receipts from an AutoZone store in Hamden and a Dunkin' Donuts

in Wethersfield. The receipt from Dunkin' Donuts was dated about one-half hour before the start of the incident at TD Bank, and the contents of the cup found in the vehicle matched the order of coffee that was documented on the Dunkin' Donuts receipt. Police subsequently examined surveillance videos from AutoZone and Dunkin' Donuts from the morning of the incident, which showed the defendant, wearing a Boston Red Sox hat, making purchases in both establishments. The surveillance video from AutoZone also showed the blue Cadillac the defendant was reportedly driving on the day of the incident.

Steven Kostka, a Berlin police officer assigned to the investigation, later interviewed Johnson again. In this second interview, Johnson told Kostka that the defendant had told her that the Cadillac was stolen on the night before the incident. The defendant later contacted Kostka on November 9, 2011, after Kostka had left him a message explaining that an active warrant was out for his arrest in connection with the incident. The defendant told Kostka that he would turn himself in to the police once his finances were in order. The defendant, however, never turned himself in, and on January 17, 2012, more than two months after he called Kostka, he was arrested. Additional facts will be set forth as necessary.

I

INVESTIGATION OF JUROR MISCONDUCT

The defendant's first claim on appeal is that the court abused its discretion and violated his right to an impartial jury by failing to conduct an adequate investigation of a claim of juror misconduct that he brought to the court's attention on the date originally scheduled for his sentencing. The following additional facts are necessary for our resolution of that claim.

On October 24, 2014, when the defendant appeared in court for sentencing, defense counsel presented the court with a notarized statement from one of the defendant's friends, Darcy Hudson-Monroe, who averred that on the second day of trial, while she was waiting outside the New Britain Superior courthouse before entering for the morning session, she "ran into" and had a brief conversation with a one of her former coworkers, A.S.,[5] who was then serving on the defendant's jury. The affidavit stated that after Hudson-Monroe and A.S. greeted one another and asked each other what they were doing at the courthouse, Hudson-Monroe told A.S. that she was there "waiting for my friend [the defendant because] he is on trial today." A.S. reportedly responded to that statement by saying that he was there serving as a juror in that case. Hudson-Monroe then asked A.S. how the case was going. He responded that " '[t]hey have no real hard evidence against him.' " Hudson-Monroe ended their conversation by remarking, " 'that's good so you should not be doing jury duty for any length of time.' " They then said goodbye to one another and went separately into the courthouse.

After reviewing the affidavit, the court stated that it was required by law to make a preliminary inquiry into the defendant's claim of juror misconduct. Defense counsel informed the court that, in anticipation of such an inquiry, he had told Hudson-Monroe that she might have to testify about her statement. By the time the court was ready to hear from her, however, Hudson-Monroe had left the courthouse.

Later that day, with Hudson-Monroe still absent from the courthouse, the court determined that if her affidavit was true, then A.S. had engaged in misconduct by

[5] In accordance with our usual practice, we identify jurors by initials in order to protect their privacy interests. See, e.g., *State* v. *Osimanti*, 299 Conn. 1, 30 n.28, 6 A.3d 790 (2010).

speaking with her about the case because he had been instructed on several occasions not to discuss the case with anyone. Even so, the court noted that A.S.'s reported statement that " '[t]hey have no real hard evidence against him' " was essentially accurate because by that point in the trial, only circumstantial evidence had been presented.

The court then stated that the law governing claims of juror misconduct was set forth in *State* v. *Bozelko*, 119 Conn. App. 483, 494, 987 A.2d 1102, cert. denied, 295 Conn. 916, 990 A.2d 867 (2010), cert. denied, U.S. , 134 S. Ct. 1314, 188 L. Ed. 2d 331 (2014), which held that when the court itself is not responsible for alleged juror misconduct, the defendant bears the burden of proving that actual prejudice resulted from such misconduct. It thus asked defense counsel to specify what prejudice had resulted from the misconduct he had reported. Although counsel initially responded that he could not identify any such prejudice, he suggested that he might be able to establish prejudice through Hudson-Monroe's live testimony. At the same time, however, defense counsel conceded that he had no evidence of juror misconduct or resulting prejudice to the defendant's right to a fair trial other than that described in Hudson-Monroe's affidavit.

Although the court noted that it could not presume that there was further evidence of prejudice, it gave the defendant several days to bring Hudson-Monroe before the court to testify. When defense counsel asked if the court also planned to call the offending juror, A.S., into court to testify, the court stated that it had no such plan at that time because it first needed to hear from Hudson-Monroe to determine if her statement was credible, and then, if her statement was found to be credible, it would determine, in light of her testimony, whether there was any need for the juror's testimony as well.

On October 29, 2014, Hudson-Monroe returned to court to testify about the substance of her statement. In her testimony on direct examination, the following exchange occurred between her and defense counsel:

"Q. All right, Ms. [Hudson-Monroe], do you know [the defendant]?

"A. Yes, I do. . . .

"Q. And prior to this trial, did you know [the defendant]?

"A. Yes.

"Q. And how is it you know [the defendant]?

"A. [The defendant] and I used to date about twenty years ago.

"Q. And have you kept in touch with him on and off since then?

"A. Somewhat.

"Q. Can you tell me a little about yourself? Are you employed?

"A. I'm retired.

"Q. Okay. And what are you retired from?

"A. Corrections.

"Q. Corrections with what state?

"A. Connecticut.

"Q. How long did you work for corrections?

"A. Almost twenty-one years.

"Q. And during the course of that employment with the state, Department of Correction, did you get to know an [A.S.]?

"A. Yes. . . .

"Q. And did you ever work with [A.S.]?

"A. Yes, I did.

"Q. And can you tell me approximately how long you worked with him?

"A. Maybe nine or ten years.

"Q. And did there come a time that you ran into [A.S.] in this courthouse?

"A. Outside.

"Q. Will you tell me approximately when that occurred?

"A. Um, August, I can't remember the date. I know it was a date that [the defendant] was coming to find out if he was guilty or not. I just don't remember the date.

"Q. So, you ran into [A.S.].

"A. Yes, I did.

"The Court: When you say outside, do you mean outside the courthouse?

"The Witness: Yes, sir.

"The Court: Okay.

"Q. Can you tell me what happened—

"A. Sure.

"Q. —outside the courthouse?

"A. Okay. I was sitting outside with my grandson, and I saw [A.S.] coming up and I got up to go, you know, greet him, because I haven't seen him in four years. I've been retired now for four years. So, we walked up to one another, gave one another a brief embrace and asked both at the same time, what are you doing here? And I said, oh, my friend is in court. My friend, [the defendant], is in court. And he said, oh,

I'm on duty, I have jury duty. I said, oh, I said, well, how is it going? He said, oh, well, it's not going too bad. They don't have much evidence on him. And I said, okay, so you shouldn't be here long. He said, no, not really, but you never know. And I said, okay, good to see you, and I introduced him to my grandson, we gave a brief embrace, I went and sat back down, waited for [the defendant] to come into court, and he came into the courthouse and that's it.

"Q. Now, when you met [A.S.]—

"A. Um-hum.

"Q. —did you indicate you were here for [the defendant]?

"A. Yeah, I said my friend, [the defendant].

"Q. And did he indicate what trial he was sitting as a juror on?

"A. No, he didn't.

"Q. Now, your statement is slightly different from that statement.

"The Court: Here it is.

"A. Okay. . . .

"Q. In that statement, didn't you indicate that he told you he was a juror on [the defendant's] case?

"A. He said he was a juror on a case. I don't remember—

"Q. On that case?

"A. I don't remember if it was that case. All I know he's saying he's a juror on the case. . . .

"Q. —you, I believe in your statement, you said, shortly thereafter we said our goodbyes and proceeded in the courthouse.

"A. Correct.

"Q. And did you talk about anything else with respect to this case with [A.S.]?

"A. Absolutely not. I stayed outside with my grandson, and he came on inside.

"Q. And did you see him in the courthouse at all after that encounter outside?

"A. No, I didn't. When I came in, I sat on the right-hand side and only stayed for about a half an hour. But no jurors were in here when we came in.

"Q. And by the time you left, had any jurors come in?

"A. I don't—oh, no. By the time I left, no. The other one in here was you, [the defendant], and the gentleman sitting here and the sheriffs and myself."

Thereafter, on the state's cross-examination of her, Hudson-Monroe further testified about her encounter with A.S. as follows:

"Q. Okay. When you were talking about the meeting outside on the steps of the courthouse—

"A. Um-hum, okay.

"Q. —do you remember about when that was?

"A. I don't remember the day. Like I said, the date—I know it was August, a day that [the defendant] had to come to court because he was finding out if he was going to be guilty or not, and I don't remember that date.

"Q. But do you remember, was it in the afternoon? Was it in the morning?

"A. I came in the morning because I have school, so I came in the morning.

"Q. Okay. And you said you got here—well, do you know when you got here?

"A. Um, about 9:15ish.

"Q. Okay. And how long had you been here before you ran into [A.S.]?

"A. I'm not sure. Maybe a little before ten or so.

"Q. Okay. So, just before ten o'clock is when you met him?

"A. Yeah.

"Q. And about how much time passed between when you first met him and when you parted ways?

"A. How much time passed, maybe three minutes or so. . . .

"Q. Now, to go to the conversation that you had, was it cordial?

"A. Oh, yeah.

"Q. It was just two friends that met after—

"A. Absolutely. Absolutely.

"Q. —about four years, you said?

"A. Yes, I've been retired for four years."

At the conclusion of Hudson-Monroe's testimony, defense counsel requested the court's permission to subpoena A.S. The court responded that even if it accepted Hudson-Monroe's testimony as true, and found on that basis that A.S. had violated its orders not to discuss the case with anyone, the defendant was still required by law to prove that he had been prejudiced by such misconduct before the juror would be called in to testify about the incident.

Counsel argued that the defendant may have been prejudiced if he was found guilty "by a less than impartial jury, and I think that we have enough information right now to raise that red flag to have him come in and testify whether he did or didn't." He conceded again, however, in response to the court's specific question on the subject, "that there's nothing about the conversation that [the juror] may have had with [Hudson-Monroe] that is prejudicial." Counsel concluded by arguing that, on the facts of this case, the court was required to hear testimony from the juror as part of its preliminary inquiry as to his alleged misconduct under the authority of *State* v. *Brown*, 235 Conn. 502, 519, 526, 668 A.2d 1288 (1995) (requiring court to conduct sua sponte preliminary inquiry as to juror misconduct in exceptional circumstance where court received anonymous letter detailing juror's public divulgence of highly prejudicial information).

The state responded to this argument by noting that *Brown* did not require a full evidentiary hearing as to every allegation of juror misconduct, but only an initial inquiry to determine if a full hearing was necessary. Here, it insisted, the court already had conducted a proper initial inquiry as to the defendant's allegation that clearly demonstrated that no further inquiry was necessary because the juror's reported statement to Hudson-Monroe evidenced only his opinion that the state's case against the defendant was weak, which could not have prejudiced the defendant, and that defense counsel himself had conceded that no identifiable prejudice had resulted from the making of that statement. The state concluded by arguing that even if the juror was called to testify about the juror's alleged misconduct, he could not shed much light on the issue of prejudice during jury deliberations because he would not be permitted to testify as to how his encounter with

Hudson-Monroe had affected either his or his fellow jurors' decision-making process.

After hearing these arguments, the court ruled that, even if Hudson-Monroe's testimony was accepted as true,[6] the defendant had failed to show that any actual prejudice had resulted from her conversation with A.S., and thus he was not entitled to an evidentiary hearing at which A.S. would be called as a witness. It reasoned that because A.S.'s statement that " '[t]hey have no real hard evidence against him' " was the extent of his comments about this case, there was no evidence that Hudson-Monroe had attempted to influence A.S., or that A.S. had received any extrajudicial information about the case. Thus, the court explained that, although any communication between a juror and a nonjuror that conveyed extrajudicial information could potentially be so prejudicial to the defendant's fair trial rights as to warrant a further evidentiary inquiry, no such further inquiry was required here because no such improper communication had taken place. In the end, the court concluded that the testimony of Hudson-Monroe as to her brief encounter with A.S. had given it a sufficient basis for concluding that the defendant had not been prejudiced by that encounter because it confirmed that there had not been "some other conversation beyond what she indicated in her affidavit . . . ."

Against this background, the defendant claims that the court abused its discretion and violated his right to an impartial jury by failing to conduct an adequate investigation of his claim of juror misconduct. On this score, the defendant argues, more particularly, that the court (1) erred by failing to presume that he had been

[6] The court noted that there was a discrepancy between Hudson-Monroe's written statement and her in-court testimony as to whether A.S. informed her that he was serving on the defendant's jury. The court ultimately dismissed that discrepancy as an unimportant detail.

prejudiced by the offending juror's improper conversation about the case with Hudson-Monroe, and then by failing and refusing, in the absence of affirmative proof of prejudice, to permit the juror to testify to determine if, by his misconduct, he had violated the defendant's right to a fair trial; and (2) thereafter abused its discretion by denying the defendant's request to subpoena the juror to testify about his improper conversation with Hudson-Monroe and its possible consequences.

"[W]hen reviewing claims of juror misconduct on appeal we recognize that the trial court has wide latitude in fashioning the proper response to allegations of juror [misconduct]. . . . We [therefore] have limited our role, on appeal, to a consideration of whether the trial court's review of alleged jur[or] misconduct can fairly be characterized as an abuse of its discretion." (Internal quotation marks omitted.) *State* v. *Roman*, 320 Conn. 400, 409, 133 A.3d 441 (2016); id., 411 (holding denial of defendant's request for new trial not abuse of discretion because defendant could not demonstrate juror misconduct).

"Under the constitution of Connecticut, article first, § 8, and the sixth amendment to the United States constitution, the right to a trial by jury guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. . . . In cases where a defendant alleges juror bias or misconduct, the defendant may be entitled to a new trial if he can raise his allegations from the realm of speculation to the realm of fact. . . . In such cases, we ask whether or not the [jury] misconduct has prejudiced the defendant to the extent that he has not received a fair trial." (Citations omitted; internal quotation marks omitted.) Id., 408.

"[A] defendant has been prejudiced if the misbehavior is such to make it probable that the juror's mind was influenced by it so as to render him or her an unfair

and prejudicial juror. . . . We observe that, in accordance with the well settled limitation on inquiring into the mental processes of jurors; *State* v. *Johnson*, 288 Conn. 236, 261, 951 A.2d 1257 (2008); this inquiry does not involve an inquiry concerning the *actual* effect of any misconduct upon one or more jurors." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Anderson*, 163 Conn. App. 783, 794, 134 A.3d 741, cert. denied, 321 Conn. 909, 138 A.3d 931 (2016).

In *Remmer* v. *United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654 (1954), the United States Supreme Court declared that "[i]n a criminal case, *any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial*, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. *The presumption is not conclusive, but the burden rests heavily upon the* [*g*]*overnment to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.*" (Emphasis added.) The defendant now argues, for the first time on appeal, that the trial court erred in failing to accord him the benefit of the *Remmer* presumption when determining if he had met his burden of proving that he had been prejudiced by A.S.'s private communication with Hudson-Monroe during his trial. The defendant raises this claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Under this standard, "[a defendant] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional

magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *In re Raymond B.*, 166 Conn. App. 856, 864, 142 A.3d 475 (2016). We find that the defendant's claim is reviewable because the record is adequate for our review and the claim is of constitutional magnitude. The defendant's claim, however, fails on the merits because we hold, as further discussed, that there is no violation of constitutional law.

The United States Supreme Court later discussed the *Remmer* presumption in two cases, *Smith* v. *Phillips*, 455 U.S. 209, 212, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982), and *United States* v. *Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993), and some courts have interpreted both to restrict the *Remmer* presumption, if not to eliminate it entirely. In *Smith*, the Supreme Court explained that "due process does not require a new trial every time a juror has been placed in a potentially compromising situation. . . . Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* . . . ." *Smith* v. *Phillips*, supra, 217. In *Olano*, the Supreme Court echoed its holding in *Smith* that due process does not require a new trial in every instance of juror misconduct, and added, importantly, that there are some instances of juror misconduct in which a presumption of prejudice may not apply. *United States* v. *Olano*, supra, 739 (holding that mere presence of alternate jurors during jury

deliberations did not entail sufficient risk of "chilling" deliberations to justify presumption of prejudice). The court in *Olano* thus concluded that, while the misconduct at issue in *Remmer*, involving the attempted bribery of a juror, was appropriately presumed to be prejudicial, other outside intrusions upon the jury required proof of prejudicial impact on the defendant's right to a fair trial. Id.

In light of these authorities, our Supreme Court discussed the viability of the *Remmer* presumption in *State* v. *Berrios*, 320 Conn. 265, 129 A.3d 696 (2016), where it held that the "*Remmer* presumption is still good law with respect to external interference with the jury's deliberative process via private communication, contact, or tampering with jurors that relates directly to the matter being tried." (Footnote omitted.) Id., 292. As to misconduct of that sort, the court in *Berrios* held that the burden rests on the state to prove that such misconduct was harmless, although it emphasized that the burden remains on the defendant to make a prima facie showing as to his entitlement to the presumption. Id., 293.

"It is well settled that if the trial court is directly implicated in juror misconduct, the state bears the burden of proving that misconduct was harmless error. . . . If, however, the trial court is not at fault for the alleged juror misconduct, we have repeatedly held that *a defendant who offers proof of juror misconduct bears the burden of proving that actual prejudice resulted from the misconduct*." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Roman*, supra, 320 Conn. 408–409; see also *State* v. *Anderson*, supra, 163 Conn. App. 793–94 (under *Berrios*, "unless a defendant can prove, rather than merely speculate, that the court was directly implicated in juror misconduct or that there was external interference with

the jury's deliberative process via private communication, contact, or tampering with jurors that relates directly to the matter being tried . . . a defendant cannot demonstrate an entitlement to a presumption of prejudice, but bears the burden of demonstrating prejudice as a result of the alleged misconduct" [citation omitted; internal quotation marks omitted]).

Our Supreme Court in *State* v. *Brown*, supra, 235 Conn. 526–28, instructed that "a trial court *must conduct a preliminary inquiry*, on the record, whenever it is presented with any allegations of jury misconduct in a criminal case, regardless of whether an inquiry is requested by counsel. *Although the form and scope of such an inquiry lie within a trial court's discretion, the court must conduct some type of inquiry in response to allegations of jury misconduct. That form and scope may vary from a preliminary inquiry of counsel, at one end of the spectrum, to a full evidentiary hearing at the other end of the spectrum, and, of course, all points in between.* Whether a preliminary inquiry of counsel, or some other limited form of proceeding, will lead to further, more extensive, proceedings will depend on what is disclosed during the initial limited proceedings and on the exercise of the trial court's sound discretion with respect thereto. . . .

"We recognize that the trial judge has a superior opportunity to assess the proceedings over which he or she personally has presided . . . and thus is in a superior position to evaluate the credibility of allegations of jury misconduct, whatever their source. *There may well be cases, therefore, in which the trial court will rightfully be persuaded, solely on the basis of the allegations before it and the preliminary inquiry of counsel on the record, that such allegations lack any merit. In such cases, a defendant's constitutional rights may not be violated by the trial court's failure to hold an evidentiary hearing*, in the absence of a

timely request by counsel." (Citations omitted; emphasis added; footnote omitted.) Id.

Our Supreme Court in *Brown* further explained that "[o]ur requirement that any allegations of jury misconduct necessitate some type of preliminary inquiry still leaves the form and scope of such an inquiry to be determined by the trial court within the exercise of its discretion. . . . In the proper circumstances, the trial court may discharge its obligation simply by notifying the defendant and the state of the allegations, providing them with an adequate opportunity to respond and stating on the record its reasons for the limited form and scope of the proceedings held. In other circumstances, the trial court itself may need to cause an investigation of the allegations of jury misconduct to be conducted through informal or formal means. If the trial court determines that a proper assessment of allegations requires an evidentiary hearing, it possesses wide discretion in deciding how to pursue an inquiry into the nature and effect of information that comes to a juror improperly as well as its potential effect upon the jury if it learns of it." (Citations omitted; internal quotation marks omitted.) Id., 529.

When a trial court exercises its discretion as to the form and scope of an inquiry into allegations of juror misconduct, it "should honor the defendant's request [for a minimal type of proceeding], unless the court is persuaded that other factors warrant a more extensive inquiry. . . . *In contrast, although the defendant can request an evidentiary hearing, the trial court should not hold such a proceeding if it is persuaded that a less extensive inquiry is more appropriate in light of all the circumstances*." (Emphasis added.) Id., 530. It should also consider the seriousness of the allegation by taking into account "the prejudicial nature of the alleged misconduct as well as the nature and degree of the jury's alleged involvement in the misconduct." Id.,

531. *Brown* also advises that, when exercising its discretion as to how to proceed with a claim of juror misconduct, a court should credit the government's interest in the finality of judgments, protecting the privacy and integrity of jury deliberations, preventing juror harassment, and maintaining public confidence in the jury system. Id., 529–31.

Applying those well settled legal principles to the present case, we conclude that, although the defendant is correct that a *Remmer* presumption of prejudice applies in certain circumstances, he failed to prove that he was entitled to such a presumption here.

The mere introduction of evidence of juror misconduct, even if proven true, does not entitle a defendant to a *Remmer* presumption of prejudice. Under *Remmer*, prejudice is not presumed unless the court is implicated in the alleged conduct, or there was an external interference with the jury's deliberative process via private communication, contact, or tampering with jurors that relates directly to the matter being tried. *State* v. *Anderson*, supra, 163 Conn. App. 793. The defendant has proved neither.

The court exercised its broad discretion to select an appropriate method for investigating and evaluating the defendant's claim of juror misconduct. See *State* v. *Brown*, supra, 235 Conn. 526–28. After receiving Hudson-Monroe's notarized statement, it determined that, if the allegations within it were true, then juror misconduct had occurred. Therefore, it scheduled an evidentiary hearing to investigate the nature of the reported misconduct by allowing the defendant to call Hudson-Monroe to testify. Because the court itself was not implicated in the alleged misconduct, the defendant could have proved that he was entitled to a presumption of prejudice only if he demonstrated that the communication at issue constituted an external interference with

the jury's deliberative process via private communication, contact, or tampering with jurors that relates directly to the matter being tried. See *State* v. *Berrios*, supra, 320 Conn. 292; *State* v. *Anderson*, supra, 163 Conn. App. 793. He failed to do so.

Although the complained-of conversation related directly to the matter being tried, the court determined, and the defendant conceded, that A.S.'s statement to Hudson-Monroe that " '[t]hey have no real hard evidence against him' " was not in any way an interference with the jury's deliberative process. The court found that Hudson-Monroe's testimony confirmed the essence of her notarized statement and thus added nothing to that statement tending to indicate that she had made any attempt to influence A.S. It further found that A.S. was not thereby given, nor did he receive, any extrajudicial information about the case, and that nothing about the conversation threatened A.S.'s ability to decide the case fairly and impartially, based solely upon the evidence presented at trial. No further inquiry was required here because no such improper communication had taken place that rose to the level of constituting an external interference.

We conclude that the court properly determined that the communication between Hudson-Monroe and A.S. was largely nonsubstantive and did not introduce extrinsic information of any kind, let alone that which might either have interfered with the jury's deliberative process or caused A.S. to develop an allegiance to either party.[7] See *State* v. *Roman*, supra, 320 Conn. 410–11.

[7] Although other trial courts have heard testimony from jurors accused of misconduct before rendering decisions as to whether juror misconduct occurred and thus prejudiced the defendant; see *State* v. *Anderson*, supra, 163 Conn. App. 786 (trial court held evidentiary hearing at which defendant presented testimony of her daughter, her son, and juror with whom her daughter allegedly interacted during trial); the court here was within its province to determine, in its fact specific inquiry, that such testimony was unnecessary in light of its preliminary inquiry.

As such, the court did not abuse its discretion when, upon hearing testimony from Hudson-Monroe in the course of its initial inquiry into A.S.'s misconduct, it declined to hold a further evidentiary hearing to receive A.S.'s testimony about his misconduct, even after the defendant requested such a hearing, because it was persuaded by the evidence before it that its own lesser inquiry had established adequately that the defendant had not been prejudiced by such misconduct. See *State* v. *Brown*, supra, 235 Conn. 526.

II

DOUBLE JEOPARDY CLAIM

The defendant next claims that the court erred when it violated his right against double jeopardy by sentencing him separately on two counts of conspiracy that were based upon the same conspiratorial agreement. Specifically, he argues that the trial court committed plain error when it rendered judgment and sentenced him on the charges of conspiracy to commit larceny in the second degree and conspiracy to commit larceny in the third degree because both of those counts stemmed from a single unlawful agreement to steal the deposit bags from Peterson. The state concedes that there was only one conspiracy, the agreement to commit larceny, and therefore that the conviction on the two conspiracy counts constitutes a violation of the defendant's right against double jeopardy. We agree and conclude that vacatur is the appropriate remedy for the double jeopardy violation resulting from the defendant's conviction of two counts of conspiracy that were based upon a single conspiratorial agreement.

The defendant acknowledges that he failed to raise the present claim before the trial court, but argues that the claim is reviewable on appeal under the plain error doctrine embodied in Practice Book § 60-5. Because, however, the defendant's claim is "based on a violation

of the prohibition against double jeopardy afforded under the state and federal constitutions . . . the claim is reviewable under [*State* v. *Golding*, supra, 213 Conn. 239–40] because the record is adequate for review, and the claim is of constitutional magnitude. . . . The defendant claims that he received multiple punishments for the same offense in a single trial. A defendant may obtain review of a double jeopardy claim, even if it is unpreserved, if he has received two punishments for two crimes, which he claims were one crime, arising from the same transaction and prosecuted at one trial . . . . Because the claim presents an issue of law, our review is plenary." (Citations omitted; internal quotation marks omitted.) *State* v. *Urbanowski*, 163 Conn. App. 377, 386–87, 136 A.3d 236, cert. granted on other grounds, 321 Conn. 905, 138 A.3d 280 (2016).

"The double jeopardy clause of the fifth amendment to the United States constitution provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. This clause prohibits not only multiple trials for the same offense but also multiple punishment for the same offense. . . . Double jeopardy analysis in the context of a single trial is a two-step process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Internal quotation marks omitted.) *State* v. *Brown*, 132 Conn. App. 251, 255, 31 A.3d 434 (2011), cert. denied, 303 Conn. 922, 34 A.3d 396 (2012).

"A single agreement to commit several crimes constitutes one conspiracy. . . . [M]ultiple agreements to commit separate crimes constitute multiple conspiracies." (Internal quotation marks omitted.) *State* v. *Ellison*, 79 Conn. App. 591, 599, 830 A.2d 812, cert. denied, 267 Conn. 901, 838 A.2d 211 (2003).

In the present case, the defendant was convicted and sentenced on separate charges of conspiracy to commit larceny in the second degree in violation of §§ 53a-48 (a) and 53a-123 (a) (3), and conspiracy to commit larceny in the third degree in violation of §§ 53a-48 (a) and 53a-124 (a) (2) that were based upon a single conspiratorial agreement. The state concedes that "[b]ased on [its] long form information and the evidence presented at trial, there was only one unlawful agreement," which was the agreement to commit larceny of the deposit bags from Peterson. We conclude that the defendant's conviction of and sentencing on both the charge of conspiracy to commit larceny in the second degree and the charge of conspiracy to commit larceny in the third degree constitute multiple punishments for the same offense. Accordingly, as the state concedes, the third prong of *Golding* is met. Cf. *In re Raymond B.*, supra, 166 Conn. App. 864. Therefore, the defendant's separate sentence and resulting judgment of conviction on the count of conspiracy to commit larceny in the third degree must be reversed, and the case must be remanded to the trial court with direction to vacate the defendant's sentence and judgment of conviction on that charge. See *State* v. *Wright*, 320 Conn. 781, 829–30, 135 A.3d 1 (2016) (holding that vacatur, rather than merger, of two of three conspiracy counts based upon single conspiratorial agreement was proper remedy for defendant's multiple convictions in violation of his constitutional right against double jeopardy); see also *State* v. *Polanco*, supra, 308 Conn. 259–60.

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

In this opinion the other judges concurred.

STEFANA PECHER ET AL. *v.* RHEA DISTEFANO ET AL.

(AC 38287)

Prescott, Mullins and Bear, Js.

Syllabus

The plaintiff P sought to recover damages for personal injuries she sustained while taking horseback riding lessons at a horse stable owned and operated by the defendant D, claiming that her injuries were caused by, inter alia, D's negligence in failing to warn her concerning certain dangerous conditions at the stable and the inherent risks of horseback riding. Following a trial, the jury returned a verdict in favor of D. Thereafter, the trial court rendered judgment in accordance with the verdict, and P appealed to this court. She claimed that the trial court committed harmful error by admitting into evidence a written agreement between the parties and a photograph of a sign on the stable's premises, both of which purported to release D from all liability for injuries arising out of horse related activities at the stable. *Held* that the record was inadequate to review P's claim that the trial court committed harmful error by admitting into evidence the subject agreement and photograph; P failed to provide this court with various transcripts of the trial proceedings, and without a complete record of the trial, this court could not make an informed assessment of P's claim of harmful error pursuant to the relevant factors for evaluating a claim of evidentiary impropriety, including an evaluation of the relationship of the agreement and the photograph to the issue of D's alleged negligence, whether the trial court gave any additional curative instructions to the jury that mitigated the effect of the challenged evidentiary ruling, whether the subject evidence was cumulative of other validly admitted evidence, and whether the trial court's allegedly improper ruling affected the jury's perception of the remaining evidence.

Argued January 31—officially released September 26, 2017

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New London, where the complaint was withdrawn in part; thereafter, the court, *Cole-Chu*, *J.*, denied the named plaintiff's motion to preclude certain evidence; subsequently, the matter was tried to the jury; verdict for

the named defendant; thereafter, the court denied the named plaintiff's motion to set aside the verdict and for a new trial, and rendered judgment in accordance with the verdict, from which the named plaintiff appealed to this court. *Affirmed.*

James J. Healy, with whom was *Christopher P. Anderson*, for the appellant (named plaintiff).

Greg S. Kreiger, with whom was *John Stephen Papa*, for the appellee (named defendant).

Opinion

MULLINS, J. The plaintiff, Stefana Pecher,[1] appeals from the judgment of the trial court, following a jury trial, rendered in favor of the defendant, Rhea Distefano.[2] On appeal, the plaintiff claims that the trial court committed harmful error, requiring a new trial, by admitting a document, titled "Release and Hold Harmless Agreement," and a photograph of a sign (photo), both of which, at least in part, purported to relieve the defendant from all liability for injuries arising out of horse related activities at Showtime Stables. The issue in this appeal is whether we can review the plaintiff's claims notwithstanding the fact that she has failed to provide us with a complete record. We conclude that the absence of a complete record restricts our ability to review fully and accurately the plaintiff's claims of harmful error. Accordingly, we affirm the judgment of the trial court.

On the basis of the incomplete record provided to us on appeal, we conclude that the jury reasonably

[1] The original complaint was brought by Pecher, Sophia Pecher-Kohout, and Jaromir Kohout. Pecher-Kohout and Kohout subsequently withdrew their claims, and they are not parties to this appeal. We, therefore, refer to Pecher as the plaintiff.

[2] In the original complaint, the plaintiff named Distefano and Showtime Stables as defendants. Subsequently, all claims against Showtime Stables were withdrawn. Accordingly, we refer to Distefano as the defendant.

could have found the following facts in reaching its verdict in favor of the defendant. The defendant operates a horse stable, known as Showtime Stables. As part of her business, she gives riding lessons to patrons. The defendant requires riders to sign a "Release and Hold Harmless Agreement" (document) that provides:

"The Undersigned assumes the unavoidable risks inherent in all horse-related activities, including but not limited to bodily injury and physical harm to horse, rider, and spectator.

"In consideration, therefore, for the privilege or riding and/or working around horses at _____, located at _____, the Undersigned does hereby agree to hold harmless and indemnify _____ and further release them from any liability or responsibility for accident, damage, injury, or illness to the Undersigned or to any horse owned by the Undersigned or to any family member or spectator accompanying the Undersigned on the premises."

The plaintiff had taken a few riding lessons as a child and, more recently, had taken approximately twenty additional lessons as an adult at another stable. She then began taking riding lessons from the defendant. On January 23, 2010, the plaintiff, her friend, Audrey Ulmer, and their two daughters went to the defendant's stable for riding lessons. The plaintiff rode a horse named Pepsi during her riding lesson. Most, if not all, of the plaintiff's six lessons with the defendant had been on Pepsi. Pepsi had a tendency to be rather "lazy," and, in an effort to get Pepsi to cooperate, the rider needed to use his or her leg strength to squeeze the horse or, in the alternative, a crop. Pepsi is "the couch potato of horses. . . . Her demeanor is very, very quiet. She doesn't get flustered easily. . . . [S]he's safe, she's quiet, she's reliable." The defendant had never seen Pepsi bolt or do anything like that.

During the plaintiff's lesson on January 23, 2010, she fell off Pepsi, sustaining personal injuries. When an injury occurred to a rider, the defendant made and kept a record of that event. That evening, after the plaintiff had been injured, the defendant recorded the incident in relevant part as follows: "[The plaintiff] was riding Pepsi in first lesson of new package today when Pepsi became very lazy. I instructed [the plaintiff] to tap [Pepsi] on [the] shoulder with her crop and Pepsi still wouldn't get going. I swapped out [the] short crop with [a] larger one for her to tap behind [Pepsi's] leg . . . on [the] flank area, and Pepsi trotted forward. When Pepsi went forward she did so quickly at [a] trot, and [the plaintiff] got bounced forward. She posted for a few steps and lost her balance and fell forward on Pepsi's neck with her legs gripping behind her saddle on the flank area. She fell forward onto Pepsi's neck and was holding [the] neck in [a] bear hug position, kicking with her legs. This went on for about [five] steps then Pepsi broke into [a] canter. I was yelling this whole time for her to sit up, stop kicking, sit back, pull on your reins. It was clear she was panicked, so I ran to [the] corner where [the] horse was and grabbed her outside rein and slowed her back to [a] trot as she went by me. Pepsi slowed to [a] trot and went toward [the] center of [the riding] ring and stopped. [The plaintiff] fell when [the] horse stopped, from [a] 'hug' position. [She] [r]olled onto her left hip [and] shoulder, onto [the] dirt footing. She laid for a minute and sat up and leaned against [a] block. I was next to her holding [the] horse and asked if she wanted [to call] 911. She said no. She never lost consciousness, was lucid, and could move all parts. . . . I said can [you] get back on and finish or is [your] knee [too] sore. She tried to rise and said [her] knee was too sore.* There didn't appear to be any swelling or obvious deviation. She said she had a friend who was [an] orthopedic [doctor] and that she would

have [Ulmer] drive her there to have it looked at. [Ulmer] drove her car up . . . and picked her up. We helped her into [the] car. She was limping on [the] knee but [was able to put] some weight on it."

In addition to the asterisk placed in the middle of her record of this event, the defendant also placed another asterisk near the end of the record, seemingly to insert more information where the previous asterisk was placed, stating the following: "*At this point she was sitting on [a] plastic block. I went down to [the] barn with [the] horse [and] gave [the horse to the] kids to untack and went back to give her ice for [her] knee." As a result of her injuries, the plaintiff underwent surgery to repair her knee. She then commenced this action.

On January 13, 2015, the plaintiff filed a motion in limine requesting that the court preclude the defendant from offering any evidence as to the document. The next day, the court conducted a hearing on the motion. During the hearing, the plaintiff argued that the document was void as a matter of public policy under *Reardon* v. *Windswept Farm, LLC*, 280 Conn. 153, 905 A.2d 1156 (2006), and that any probative value of the document was outweighed by its prejudicial effect. The plaintiff also argued that the document was cumulative in light of General Statutes § 52-557p, which provides: "Each person engaged in recreational equestrian activities shall assume the risk and legal responsibility for any injury to his person or property arising out of the hazards inherent in equestrian sports, unless the injury was proximately caused by the negligence of the person providing the horse or horses to the individual engaged in recreational equestrian activities or the failure to guard or warn against a dangerous condition, use, structure or activity by the person providing the horse or horses or his agents or employees."

At the conclusion of the argument on the motion in limine to preclude the document, the court denied the plaintiff's motion but left the issue open to be revisited if necessary: "So, I am denying the motion in limine, which was essentially to keep out the document, and to bar the defendant from making any reference to it. *How it unfolds in the actual course of things is to be seen, but I am not going to rule now against the offer of the release*." (Emphasis added.)

Later that day, during the cross-examination of Ulmer, the defendant's attorney asked her about her signing the document. Ulmer stated that she had signed it, and then the defendant's counsel offered the document into evidence at that time. The plaintiff's attorney stated that he had *no objection*: "If it's being offered as a document signed by . . . Ulmer, *I don't have an objection to that*." (Emphasis added.) The court stated that *it had* some trepidation about the relevance of the document, but "*if there's no objection*, it may be admitted to show what the witness identified herself [as signing]." (Emphasis added.)

The court then gave the jury a limiting instruction: "You're about to see, ladies and gentlemen of the jury, a document. It's entitled, 'Release and Hold Harmless Agreement.' Mrs. Ulmer has testified that she signed it, and that's the sole—the content of this as signed by Mrs. Ulmer is all you're presently allowed to consider it for. I would also note that—well, I'll say more about it if the occasion arises, but that's all you're allowed to consider it for right now." The document then was published to the jury.

Following its publication to the jury, the plaintiff's attorney stated: "Your Honor, at this time, I'd just like to state something for the record. I'd like to restate my objection to this line of inquiry [on] this issue, which we have discussed on the record earlier this morning,

and, once again, state that my basis is that the prejudicial effect of this, at this time, outweighs any probative value to the document, and that's exactly how it's unfolding at the present time. I just, for the record, I wanted to state my objection to the relevancy of this document and its admissibility in these circumstances."

The court immediately responded: "I said something about relevance earlier, and that was not the ground of objection. Your point is noted, sir . . . ."

Then, during the defendant's testimony on January 21, 2015, her attorney asked her about the document. The defendant stated that she had given the document to Ulmer and the plaintiff to sign, that she saw them sign it, and that they gave it back to her. That testimony was offered *without objection*, and without a further limiting instruction, as one was not requested at that time.

The defendant's attorney also showed the defendant the photo and asked her if she recognized it. The defendant stated that it was the photo of a sign that she has posted "by the doorway as you walk into the barn, right at eye level." The defendant's attorney then asked that the photo be entered as a full exhibit. The plaintiff's attorney stated that he objected on the ground of relevance, to which the defendant's attorney responded: "The purpose, Your Honor, is to demonstrate that the plaintiff knew about the inherent risks of riding at the stable, and it was there for her to see. Also, the plaintiff testified she never saw it, but this is testimony that it was present." No further objection was set forth, and the court admitted the photo. It also gave no limiting instruction, and the plaintiff did not request such an instruction at that time.

The plaintiff's attorney also questioned the defendant about the document, asking if she was required by law

to have her students sign such documents. The defendant responded that she did not think there was such a requirement.

The defendant's attorney followed up by asking the defendant to recall the questioning of the plaintiff's attorney regarding the document, and then asked the defendant why she had her students sign such documents. The defendant responded: "Because horses as a sport in general are dangerous. There's risks associated with riding them, handling them, being around them. You could get hurt, you could get killed, you could get—a lot of things could happen. There are so many different scenarios, so to afford myself some protection, I try to use that."

Following that testimony, the defendant's attorney offered the document into evidence "for the purpose of showing that [the plaintiff] was warned about the inherent risks involved with riding." The court asked if the plaintiff had an objection, and counsel responded: "With the understanding of what we talked about in chambers and your prior warnings, Your Honor."

The court admitted the document and offered the following admonishment: "Now, ladies and gentlemen of the jury, you've already seen defendant's exhibit A, because it came [into evidence] with Mrs. Ulmer. Now, it's a full exhibit. I'm instructing you that the law does not allow somebody to waive claims for somebody else's negligence in advance. You know, you can do it, technically, afterwards, but you—if you go into a restaurant, you can't be required to sign a release that, if I get food poisoning because the food's been out for three days, you know, the customer can't sue the restaurant. This exhibit is only being accepted by the court and may only be used by you as basically notice of the hazard. It is not a release of liability. It is not claimed to be a release of liability by the defense."

The court then asked the plaintiff's attorney if it left "anything out." The plaintiff's attorney replied: "I think that was perfect, Your Honor," and the defendant's attorney replied: "I think that's what we discussed in chambers, Your Honor."

During the court's final charge to the jury, the court explained to the jury that it had a duty to listen carefully to the court's instructions and to follow them. It then instructed the jury on the law of negligence, including the duty to invitees and defective premises, and properly set forth the relevant allegations of the plaintiff's complaint and applied those allegations to its instruction on the law. It also instructed the jury on causation, damages and the burden of proof, and on the defendant's special defenses of contributory negligence and assumption of the risk pursuant to § 52-557p.

When the court gave its limiting instruction on the proper use of the document, the court admonished the jury in relevant part: "As I instructed you when that document . . . was admitted in evidence, that document is not, and is not claimed by the defendant to be, a release or hold-harmless agreement as to a claim of negligence of the defendant. As to the defendant—as the defendant acknowledges, any agreement that purport[s] to release the operator and/or owner of a horse riding facility from his or her negligent conduct would violate public policy and, therefore, be unenforceable. The only significance of that exhibit you could properly find if you see fit is that the parties . . . were aware of the general risks and hazards of horseback riding. In particular, if you find that the defendant was negligent in any of the ways alleged by the plaintiff and that that negligence caused the plaintiff's injuries or any of those injuries, the fact that the plaintiff signed that document must have no effect on your decision regarding what fair, just, and reasonable damages to award to the plaintiff."

The jury returned a verdict in favor of the defendant. Thereafter, the court denied the plaintiff's motion to set aside the verdict and for a new trial, and rendered judgment in accordance with the verdict. This appeal followed.

Our analysis of this appeal begins and ends with our consideration of the adequacy of the record provided by the plaintiff. We have examined the record provided by the plaintiff and conclude that she has failed to provide a complete and adequate record that would enable our review of her claims on appeal. The furnishing of a complete record is particularly important to a reviewing court that is called upon to consider the extent of the harm, if any, to an appellant who is requesting that the court reverse the judgment of the trial court on the basis of an alleged improper evidentiary ruling. See *Desrosiers* v. *Henne*, 283 Conn. 361, 367–69, 926 A.2d 1024, (2007) (declining to review evidentiary claim where defendant provided only excerpts of trial transcripts because it was impossible for reviewing court to determine whether alleged impropriety was harmful); *Ryan Transportation, Inc.* v. *M & G Associates*, 266 Conn. 520, 531, 832 A.2d 1180 (2003) (declining to review evidentiary claim where plaintiff did not provide transcript of testimony of witnesses, stating, "even if we assume, arguendo, that the challenged evidentiary ruling was improper, we have no way of discerning whether any such impropriety was harmful in the broader context of the entire trial"); *Chester* v. *Manis*, 150 Conn. App. 57, 62–63, 89 A.3d 1034 (2014) (declining to review evidentiary claim because incomplete record left court unable to determine if "alleged impropriety would likely have affected the result of the trial"); *Quaranta* v. *King*, 133 Conn. App. 565, 569–70, 36 A.3d 264 (2012) (declining to review plaintiff's evidentiary claim where plaintiff provided only partial transcript of proceedings).

A review of our appellate record in this case reveals that the plaintiff ordered and delivered a paper copy and an electronic copy of the following seven transcripts: (1) the January 14, 2015 argument on the motion in limine; (2) the January 14, 2015 cross-examination of lay witness Ulmer; (3) the January 15, 2015 cross-examination of the plaintiff; (4) the January 16, 2015 direct examination of the defendant; (5) the January 21, 2015 continued direct examination and the cross-examination of the defendant; (6) the direct examination of lay witness Sundy Martin; and (7) the January 22, 2015 jury charge. We also have been provided an electronic copy of the trial court's preliminary instructions to the jury, the January 21, 2015 cross-examination of Martin, and the May 11, 2015 argument on the plaintiff's postverdict motion to set aside the verdict and for a new trial. The plaintiff further has provided, in her appendix, a paper copy of her counsel's argument on the plaintiff's motion to set aside the verdict and for a new trial.

We know for certain that we have not been provided the direct examination of Ulmer, the direct examination of the plaintiff, and the closing arguments of counsel. Additionally, we are left to speculate about precisely how many other witnesses may have testified and the content of their testimony,[3] exactly what the plaintiff said during her direct testimony, what counsel may have argued during any other part of the trial and during closing, and whether the court gave additional instructions or guidance to the jury during other parts of the trial that could be relevant to our analysis.

[3] We are mindful that the plaintiff represented to the trial court in her motion to set aside the verdict that "[t]he jury heard testimony from *three . . . experts and nine . . . lay witnesses*." (Emphasis added.) If this representation is accurate, and we have no reason to believe that it is not accurate, we have been provided the testimony or the partial testimony of only four of the twelve witnesses who testified at trial.

Here, as the appellant, it was the plaintiff's burden to provide a complete record on appeal. See Practice Book § 61-10. She also is responsible for establishing that she was harmed by the alleged improper evidentiary rulings of the trial court. See *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 128, 956 A.2d 1145 (2008) ("Even when a trial court's evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful." [Internal quotation marks omitted.]). This, the plaintiff cannot do in light of the incomplete record that she has provided this court.[4]

[4] Because the plaintiff cannot establish, on the basis of the record that she has provided to us, that the court's rulings were harmful, it is unnecessary for us to decide conclusively whether the document and the photo improperly were admitted into evidence. See *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 20, 60 A.3d 222 (2013) ("[a]n evidentiary ruling will result in a new trial only if the ruling was both wrong *and* harmful" [emphasis in original; internal quotation marks omitted]). Nevertheless, we take this opportunity to recognize an interesting argument raised by the defendant concerning the relevance of the document and the photo.

General Statutes § 52-557p provides: "Each person engaged in recreational equestrian activities shall assume the risk and legal responsibility for any injury to his person or property arising out of the hazards inherent in equestrian sports, *unless the injury was proximately caused by* the negligence of the person providing the horse or horses to the individual engaged in recreational equestrian activities or *the failure to guard or warn against a dangerous condition, use, structure or activity by the person providing the horse or horses or his agents or employees*." (Emphasis added.)

In the plaintiff's complaint, she made three allegations concerning the defendant's negligent failure to warn against a dangerous condition: (1) "fail[ure] to warn the plaintiff of the dangerous condition caused by the use of the crop/whip"; (2) "fail[ure] to warn the plaintiff of the dangerous condition caused by the opening in the arena when it was unreasonable not to have done so"; and (3) "fail[ure] to warn the plaintiff of the dangerous condition caused by the jumping gate the that injured the plaintiff when it was unreasonable not to have done so." During oral argument on the plaintiff's motion in limine, the defendant argued that the document was relevant to demonstrate that the plaintiff had been warned of inherent risks. On the basis of the arguments presented to it, the trial court expressed some agreement with that contention. On appeal, the plaintiff argues, for the first

"[Our Supreme Court has] held generally that [t]he trial court has broad discretion in ruling on the admissibility [and relevancy] of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Additionally, before a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful." (Citation omitted; internal quotation marks omitted.) *Urich* v. *Fish*, 261 Conn. 575, 580–81, 804 A.2d 795 (2002).

"A determination of harm requires us to evaluate the effect of the evidentiary impropriety in the context of the *totality of the evidence* adduced at trial. . . . Thus, our analysis [would include] a review of: (1) the relationship of the improper evidence to the central issues in the case, *particularly as highlighted by the parties' summations*; (2) whether the trial court took any measures, such as corrective instructions, that might mitigate the effect of the evidentiary impropriety; and (3) whether the improperly admitted evidence is merely cumulative of other validly admitted testimony. . . . The overriding question [we must answer] is whether the trial court's improper ruling affected the jury's perception of the remaining evidence." (Citations omitted; emphasis added; internal quotation marks omitted.) *Hayes* v. *Camel*, 283 Conn. 475, 489–90, 927 A.2d 880

time, that the document had no relevance because § 52-557p already provides that the plaintiff assumes all inherent risks. The defendant argues, however, that the plaintiff's specific allegations of a failure to warn necessitated her providing proof that she, in fact, did warn the plaintiff.

Although presenting an interesting question as to whether the "*unless the injury was proximately caused by the . . . failure to guard or warn against a dangerous condition, use, structure or activity*" portion of the statute was implicated by the plaintiff's allegations of the defendant's failure to warn against particular dangerous conditions, and whether the document and the photo could be evidence sufficient to defend against this portion of § 52-557p, because we conclude that the plaintiff has failed to establish harm, we defer our analysis of the statute for another day.

(2007); see also *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 20, 60 A.3d 222 (2013).

Without a complete record, we are unable to fully apply and appropriately assess the *Hayes* factors. For example, even if we assume, arguendo, that the document and the photo improperly were admitted into evidence,[5] we are unable to assess fully and completely the first *Hayes* factor, "the relationship of the improper evidence to the central issues in the case, *particularly as highlighted by the parties' summations*"; (emphasis

[5] Although we do not decide whether the court's admission of the document and the photo was improper, we do recognize that the use of these types of releases is against public policy; see *Reardon* v. *Windswept Farm, LLC*, supra, 280 Conn. 153; and the admission of evidence that contravenes public policy generally is not favored.

Our courts have recognized that certain evidence is inadmissible because it violates the public policy of this state. See Conn. Code Evid. § 4-9, commentary (explaining that rule barring admission of evidence of payment regarding medical and similar expenses fosters public policy of encouraging assistance to injured party by eliminating threat that evidence can be used as admission of liability at trial), citing *Danahy* v. *Cuneo*, 130 Conn. 213, 216, 33 A.2d 132 (1943). In denying admission of such evidence, our courts have recognized that the public policy promoted by the exclusion of such evidence outweighs the minimal relevance of such evidence. Nevertheless, such evidence may be admissible in particular circumstances if it is offered for a purpose other than that which has been found to violate public policy. See *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, supra, 308 Conn. 14–15 (although evidence of subsequent remedial measures is violative of public policy when used to prove negligence, such evidence may be admissible to prove some other material issue); *Hicks* v. *State*, 287 Conn. 421, 440, 948 A.2d 982 (2008) (same); *Miko* v. *Commission on Human Rights & Opportunities*, 220 Conn. 192, 209, 596 A.2d 396 (1991) (although evidence of offers to compromise is inadmissible as violative of public policy, statements made during such offers may be admissible as admissions of fact).

Here, as we mentioned in footnote 4 of this opinion, the defendant sought to admit the subject evidence on a theory other than to prove that the plaintiff had waived her right to pursue a negligence action, i.e., that she was aware of the risks and the defendant in fact had warned her of those risks. Because of the inadequacy of the record, we need not decide, however, whether the actual purpose for which the evidence was offered provided a sufficient basis upon which to admit this evidence or whether the trial court appropriately balanced the probative value of the evidence against its prejudicial effect.

added) *Hayes* v. *Camel*, supra, 283 Conn. 489; because we do not have a transcript of the parties' summations.[6]

Also, our analysis of the remaining *Hayes* factors is equally unfeasible. Indeed, although we know that we have transcripts for at least some of the witnesses and some of the court's curative instructions, we do not know whether any additional instructions were given or what was contained in the testimony for which the plaintiff has not provided transcripts. We also are unable to fully assess whether the document and the photo were cumulative of other validly admitted evidence because we do not have a complete record of the trial, including the plaintiff's direct testimony. Consequently, we cannot conduct a full and complete analysis of harm pursuant to the *Hayes* factors. Accordingly, we conclude that without a complete record of the trial, we are left with an inability to make an informed

[6] Moreover, despite the plaintiff's argument that the document and the photo "took center stage in the defendant's trial presentation," the parties acknowledge that no one attempted to use the document and the photo as a waiver of negligence at any time during the trial. Furthermore, although the plaintiff attempts to establish that the document was central to the defendant's case because *four witnesses* were asked about it during the trial, as we noted previously, the plaintiff stated, in her motion to set aside the verdict, that "[t]he jury heard testimony from three . . . experts and nine . . . lay witnesses" in this case. Assuming the truth of that representation by the plaintiff, we question whether the fact that four of twelve witnesses were questioned about the document signifies its centrality.

The central issue of this case appears to have been whether the defendant was negligent in one or more of the ways alleged, including for a failure to warn of particular dangerous conditions; it was not whether the plaintiff had waived her rights or released the defendant from liability for such alleged negligence. Compare *Reardon* v. *Windswept Farm, LLC*, supra, 280 Conn. 153 (rendering summary judgment in favor of defendants, who had raised as defense fact that horseback riding student had signed release and waived claims for liability arising from personal injuries she had sustained during riding lesson, was reversible error because release from liability was void as against public policy). There is no indication in the record that the plaintiff has provided, and the plaintiff, on appeal, sets forth no argument, that the defendant made any attempt to establish, allege, or in any manner argue that the plaintiff released the defendant from liability for her injuries.

assessment of the plaintiff's claims on appeal, and we are unable to consider "[t]he overriding question [of] whether the trial court's [alleged] improper ruling affected the jury's perception of the *remaining evidence*." (Emphasis added; internal quotation marks omitted.) *Hayes* v. *Camel*, supra, 283 Conn. 490.

The judgment is affirmed.

In this opinion the other judges concurred.

SABRINA C.* *v.* LUCAS FORTIN
(AC 39227)

Alvord, Keller and Lavery, Js.

Syllabus

The plaintiff filed an application for an order of civil protection against the defendant, which alleged, inter alia, that the defendant had sexually assaulted her in 2015. The trial court granted the application for a civil protection order for one year. Before the order expired, the defendant filed a motion to vacate or modify the order on the basis of certain comments that the plaintiff allegedly had made on social media. At a hearing on that motion, the defendant's counsel represented that no criminal charges had arisen as a result of the alleged assault and that the order should be vacated. The court denied the motion as untimely and on its merits. The defendant filed several motions to reargue, claiming, inter alia, that the initial motion to vacate was not untimely. In her objection, the plaintiff requested attorney's fees for defending against the defendant's multiple motions. The court denied the motions to reargue and granted the plaintiff's request for an award of attorney's fees, and the defendant appealed to this court. Thereafter, approximately one month prior to the expiration of the original order of protection in 2016, the plaintiff filed a motion in the trial court to extend the order for an additional year. The court concluded that no evidentiary hearing was required and that, on the basis of its interpretation of the statute governing orders of civil protection (§ 46b-16a [c]), the need for protection of the applicant still existed. The court extended the order of protection an additional year, and the defendant filed an amended appeal. *Held*:

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

1. The trial court did not abuse its discretion in denying the defendant's motion to vacate or modify the original protection order; although it was clearly erroneous for that court to have concluded that the motion to vacate was untimely where, as here, it was filed within four months of the date judgment was rendered, that erroneous factual finding was not significant, as the trial court relied on two independent grounds for its denial, and after the court acknowledged its erroneous finding, it found that the denial of the motion was nevertheless proper because the defendant had failed to provide a good or compelling reason to vacate or modify the civil protection order.
2. Contrary to the defendant's claim, the trial court did not improperly substitute the basis for its denial of his motion to vacate or modify the civil protection order in its articulation; in its oral ruling following the hearing on the motion to vacate, the court indicated that it was not persuaded by the defendant's proffered reason to vacate the order, namely, that the defendant had not been charged with a crime following the police investigation into the assault, and that ground did not contradict and was not irreconcilable with the court's articulation that it denied the motion to vacate because the defendant had failed to establish a good or compelling reason to vacate or modify the judgment.
3. The trial court improperly granted the plaintiff's request for attorney's fees under the bad-faith exception to the American rule without providing the required high degree of specificity in its factual findings to support a determination that the defendant's motions to vacate and to reargue had been filed in bad faith and were without color; although the trial court's articulation revealed that the court was troubled by the defendant's numerous, repetitive, and insufficient filings, and the court found some of the defendant's claims to be unpersuasive and without merit, it did not provide, with a high degree of specificity, factual findings to support a determination that those claims were made in bad faith and were entirely without color, and there was nothing in the record to support the court's finding that the defendant's motivation for the filings was to victimize the plaintiff.
4. The trial court improperly granted the plaintiff's motion for a one year extension of the civil protection order, as there was no evidence presented at the 2016 hearing that the need for protection still existed; subsections (a) and (c) of § 46b-16a are clear and unambiguous and provide that a victim of sexual assault, after having obtained a civil protection order, can apply to have that order extended if, inter alia, the need for protection still exists, the plaintiff was required to present evidence that her need for protection against the defendant still existed, which she failed to do, and the trial court's basis for its determination that the need for protection still existed—that the plaintiff had been a victim of sexual assault and that the statute was designed to protect such victims—was insufficient without testimony or other evidence to support it.

Argued April 26—officially released September 26, 2017

Procedural History

Application for a civil protection order, brought to the Superior Court in the judicial district of Windham, where the court, *A. Santos*, *J.*, granted the application; thereafter, the court denied the defendant's motion to vacate the protection order; subsequently, the court denied the defendant's motion to reargue, awarded the plaintiff attorney's fees, and the defendant appealed to this court; subsequently, the court, *A. Santos*, *J.*, granted the plaintiff's motion to extend the protection order, and the defendant filed an amended appeal; thereafter, the court, *A. Santos*, *J.*, issued articulations of its decisions. *Reversed in part; judgment directed.*

Mathew Olkin, for the appellant (defendant).

Lorraine Carcova, with whom was *Anne Louise Blanchard*, for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant, Lucas Fortin, in his appeal and first amended appeal, appeals from the judgment of the trial court denying his motion to vacate or modify a civil protection order that had been granted to the plaintiff, Sabrina C., and from the court's award of attorney's fees to the plaintiff after the court denied his second amended motion for reargument. In the defendant's second amended appeal, he appeals from the ruling of the court granting the plaintiff's motion for a one year extension of the civil protection order. The defendant claims that the court improperly (1) denied his motion to vacate or modify the civil protection order on erroneous factual and legal grounds, (2) changed the basis for its denial in a subsequently issued articulation, (3) awarded the plaintiff attorney's fees under the bad-faith exception to the American rule without setting forth an adequate factual basis, and (4) granted the plaintiff's motion for a one year extension

of the civil protection order without any evidence to support a finding that her need for protection still existed. We agree with the defendant's third and fourth claims, and, accordingly, we remand the matter to the trial court with direction to vacate the award of attorney's fees and to vacate the order extending the civil protection order to November 24, 2017.

The following facts, which either were found by the trial court or are undisputed, and procedural history are relevant to our analysis. On November 10, 2015, the plaintiff filed an application for an order of civil protection pursuant to General Statutes § 46b-16a,[1] alleging that the defendant had sexually assaulted her on November 8, 2015. The court issued an ex parte civil protection order that prohibited the defendant's contact with the plaintiff. The ex parte order expired on November 24, 2015, the date of the scheduled hearing on the plaintiff's application.

At the hearing, the plaintiff testified as follows. She and the defendant had been longtime friends. The evening of November 7, 2015, she had plans to "hang out" with the defendant and another friend. Because they would be consuming alcohol, the plaintiff planned on spending the night at the defendant's house. The plaintiff "drank a little bit too much," and went inside the defendant's house around midnight. The next thing she remembered was waking up with her pants down and

[1] General Statutes § 46b-16a (a) provides: "Any person who has been the victim of sexual abuse, sexual assault or stalking, as described in sections 53a-181c, 53a-181d and 53a-181e, may make an application to the Superior Court for relief under this section, provided such person has not obtained any other court order of protection arising out of such abuse, assault or stalking and does not qualify to seek relief under section 46b-15."

Although General Statutes § 46b-16a has been subject to amendment since the plaintiff's application was filed in 2015; see Public Acts 2016, No. 16-34, § 6; Public Acts 2016, No. 16-105, § 6; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

the defendant digitally penetrating her. She punched him in the face and ran out the door. The defendant also testified at the hearing, and he claimed that the plaintiff initiated sexual contact with him and that he responded by digitally penetrating her. He acknowledged that she then punched him in the face.

The court "credited the plaintiff's testimony and not the defendant's" and granted the plaintiff's application for a civil protection order. The terms of the order required the defendant to surrender all firearms; prohibited him from assaulting, abusing or harassing the plaintiff; prohibited any contact with the plaintiff; and required him to stay 100 yards away from the plaintiff. The expiration date of the order was November 24, 2016.

On March 8, 2016, the defendant, as a self-represented party, filed a "motion to vacate civil protective order," claiming that the plaintiff commented on social media that "she is not afraid" of him and that "she will take matters into her own hands." The defendant also claimed that the plaintiff was "trying . . . to get me to violate the order." On April 19, the plaintiff filed an objection to the defendant's motion on the following grounds: "The defendant's motion to vacate the civil protective order recites new facts for the court to consider. In this case, judgment has entered. The appeal period has expired. The period of time in which to open and modify a judgment has expired. It would be improper for the court to hear a motion to vacate."

The court held a hearing on April 26, 2016, to consider the defendant's motion to vacate and the plaintiff's objection. At the beginning of the hearing, the court asked the defendant, now represented by counsel, the following question: "Counselor, are you asking to vacate it completely, or are you asking to vacate it or modify it?" The defendant's counsel responded: "Vacate or in

the alternative modify, Your Honor." The plaintiff's counsel then requested the opportunity to be heard preliminarily on her objection first, claiming "procedural" and "jurisdiction[al]" grounds. The court allowed the plaintiff to proceed, and the plaintiff argued that the defendant filed his motion more than four months after the judgment granting the application for a civil protection order had been rendered. In response, the defendant's counsel indicated that the defendant's motion had been filed prior to his representation of the defendant in this matter.

The court, after noting that the defendant's motion to vacate relied upon events that occurred subsequent to the issuance of the protection order, addressed the defendant's counsel: "So you're not really questioning the reason why the—the restraining order was—was granted, you're saying after the fact this is why it should be vacated. Do you stand by the statements of your client in connection with the application?" The defendant's counsel responded: "I was not aware of the exact basis of the motion until I was shown it today. . . . The basis of our motion that I'm prepared to argue today, Your Honor—my argument is that subsequent information, after the entry of the order, has—has drawn into question the propriety of the continuance of the protection order, specifically that the police investigated it fully and found that there was no probable cause to charge him with any crime. And given that conclusion, we feel it's necessary to revisit." The court responded: "You understand that you don't have to commit a crime to have a—a civil restraining order—or a restraining order granted in a case." The defendant's counsel replied: "Certainly I do, Your Honor. And what I'm going to argue is that at the time the order was issued they were still in the midst of investigating the complaint and had not yet drawn a conclusion about it. The court drew its own conclusion about the—the

need for the order. And I'm simply arguing that the balance may have shifted, given the results of the police investigation." The court stated: "Counselor—counselor, the testimony was that your client sexually assaulted the applicant, and I believed her."

No other ground for vacating the protection order was proffered by the defendant, and neither party testified at the April 26, 2016 hearing. Immediately after the hearing, the court orally ruled: "After hearing the argument, I'm going to deny the motion for two reasons. One is that this motion to vacate is not made within 120 days from the adjudication of the—of the case on its merits, and also the reasons to vacate do not test the—the validity of the court's order that was made after hearing the case on the merits."

On May 3, 2016, the defendant filed a motion to reargue "pursuant to Practice Book § 11-12," claiming that the court "overlooked" a "controlling principle of law." The defendant argued that the 120 day limitation period to file a motion to open a judgment was not applicable to the present case. The defendant cited case law for the proposition that the court had "inherent power to modify its own injunctions." On May 5, the plaintiff filed an objection to the defendant's motion to reargue, claiming, inter alia, that Practice Book § 11-12 was not applicable to decisions that are final judgments for purposes of appeal. On May 6, the defendant filed an amended motion to reargue with the following explanation: "This motion is in all ways identical to the motion to reargue filed May 2, 2016,[2] except that this motion asks for reargument pursuant to [Practice Book §] 11-11 instead of 11-12."

On May 11, 2016, the defendant filed a "second amended motion to reargue" for the purpose of amending his prior motions to apprise the court that it had

[2] The defendant's initial motion to reargue was dated May 2, 2016, but it was filed with the court on May 3, 2016.

"misapprehen[ded] . . . a crucial fact." The defendant claimed that the court erroneously held that the defendant's motion to vacate the protection order had not been filed within 120 days of the court's judgment when, in actuality, the motion had been filed 105 days after the judgment had been rendered. The defendant additionally claimed that the plaintiff was attempting to "extract revenge against [the] defendant" and that the order's "100-yard stay-away" restriction had burdened the defendant with "significant collateral consequences."

On May 17, 2016, the plaintiff filed an objection to the defendant's second amended motion to reargue. In her objection, the plaintiff, citing case law, argued that a party must demonstrate a "good and compelling reason" in order to prevail on a motion to open a judgment. She claimed that the defendant's motion to vacate the order "is devoid of facts that would provide a compelling reason to open the judgment" and that the defendant "merely recounts feelings and events which he believes transpired since final judgment entered." At the end of her objection, the plaintiff requested that the court deny the defendant's motion to reargue and that he "pay costs for the plaintiff's attorney's fees in defending the four motions filed on this issue."[3] She

[3] On May 16, 2016, the defendant, through his counsel, filed a memorandum of law in support of the "motion to open and modify" that had been filed by the self-represented defendant on March 8, 2016. The March 8, 2016 "motion to vacate" already had been adjudicated by the court on April 26, 2016. The memorandum of law was filed more than two months after the filing of the motion and nearly one month after the court's ruling. The defendant's counsel subsequently provided a reason for filing the memorandum. The defendant, when self-represented, had failed to file the requisite supporting memorandum of law pursuant to Practice Book § 11-10 when he filed his motion to vacate the civil protection order. The defendant's counsel explained: "The memorandum of law presented no new facts or arguments, and was filed only to ensure the viability of [the] defendant's motion to vacate pending its reargument."

did not cite any statutory or case law in support of her claim for attorney's fees.

On May 17, 2016, the court held a hearing on the defendant's second amended motion to reargue and the plaintiff's objection to that motion. The defendant's counsel began his argument with the statement that the court has "broad discretion to open and modify a judgment for a good and compelling reason."[4] He then proffered the following reasons for opening the judgment in the present case: (1) the defendant is subject to ongoing felony arrests for the unknowing, innocent violation of the 100 yard "stay away" provision of the order; (2) the 100 yard "stay away" provision provides little or no additional protection to the plaintiff; (3) the defendant's life has been impacted because he is fearful of going out in public and being caught in an unknowing violation; and (4) the plaintiff has an agenda to "extract revenge" against the defendant by attempting to trap him into violating the 100 yard "stay away" provision.

The plaintiff's counsel responded: (1) the defendant failed to appeal from the granting of the November 24, 2015 civil protection order; (2) the defendant's own conduct resulted in the current restrictions on his life's activities; (3) there is no need to modify the civil protection order; (4) the defendant filed his own application for a civil protection order against the plaintiff in March, 2016, which was denied by the court; (5) the defendant has subjected the plaintiff to several court proceedings on the same issue, which has "re-victimiz[ed] her again and again"; and (6) the court should award attorney's fees to the plaintiff's counsel for "defending . . . these numerous duplicative motions." The plaintiff's counsel

[4] We note that the defendant's counsel did not articulate this standard until the hearing on his second amended motion to reargue. Neither party stated that the court needed to find a good and compelling reason to open the judgment at the April 26, 2016 hearing on the defendant's motion to vacate or modify the civil protection order.

requested $4800 in attorney's fees. The defendant's counsel responded that "we find nothing improper in amending our pleadings as the circumstances require."

Neither party testified in court after the arguments by counsel. The court then orally ruled: "The court found a valid reason to grant the restraining order before. Nothing that has been offered would compel the court to vacate the restraining order, or to even modify it as requested in the second request by the—by the . . . defendant. So the court is not convinced that there's a good and compelling reason to vacate any of the judgment that was entered in this matter, I believe, back in November 24, 2015. So for those reasons the court will—will deny the—the defendant's second amended motion to reargue this case, and his argument to open and modify—or open and vacate—or open and modify the judgment. So the court is denying that."

The court then proceeded to address the plaintiff's request for attorney's fees. "And the court—because of the numerous requests that the defendant . . . has made, the court does feel that the plaintiff's attorney ought to be paid attorney's fees for defending all these various motions, and even in motions that are new for today. So based upon the arguments made, the court will grant that request and order attorney's fees to the plaintiff in the amount of $1500." The defendant filed his original appeal from the award of attorney's fees on May 20, 2016. The defendant subsequently filed his first amended appeal, dated May 23, 2016, to include the denial of the defendant's motion to vacate the civil protection order.

On May 26, 2016, the defendant filed a motion for articulation requesting that the trial court articulate the factual and legal basis for its oral rulings on April 26 and May 17, 2016. Granting the motion for articulation,

the court issued a written memorandum of decision on June 30, 2016, addressing the defendant's requests. In its articulation, the court conceded that it erroneously had found that the motion to vacate the civil protection order had not been filed within 120 days of the original adjudication. The court acknowledged that the defendant's motion had been filed 105 days after the judgment had been rendered by the court. Nevertheless, the court stated that the denial of the defendant's motion had been proper because he "failed to establish a good or compelling reason to vacate or modify the November 24, 2015 judgment."

The court articulated that all of the proffered reasons presented by the defendant at the May 17, 2016 hearing on the motion for reargument had been "unpersuasive and not . . . compelling reason[s] to vacate or modify the judgment." The court noted that the defendant's primary argument in support of his motion to vacate the civil protection order had been that "the rape kit came back negative and the police did not find probable cause to charge the defendant with a crime." The court reiterated that it had found the plaintiff's testimony about the sexual assault to be credible. Moreover, the court articulated that it had responded to the defendant's primary argument at the April 26, 2016 hearing by stating that the plaintiff did not have to prove that a crime had been committed beyond a reasonable doubt in order to be granted a civil protection order.

With respect to the award of attorney's fees, the court provided the following basis for its order. "By filing the motion to vacate, the motion to reargue, two amended motions to reargue without any merit, the defendant continues to victimize the victim. Additionally, the defendant filed an application for a civil protection order against the plaintiff, which the court heard and denied on March 22, 2016. The defendant's application was without merit.

"The arguments advanced by the defendant's counsel at the May 17, 2016 hearing were the same arguments advanced at the April 26, 2016 hearing that were not accepted by the court. They have been repeated in the various memoranda and motions filed by the defendant's counsel. A motion to reargue 'is not to be used as an opportunity to have a second bite at the apple' . . . . In awarding attorney's fees to the plaintiff's counsel, this court found that the defendant acted in bad faith by attempting to take more than just 'two bites of the apple.'

"In the present case, it is not any one filing that was made in bad faith or colorless. It is the cumulative amount of repetitive and insufficient filings. Continuously repeating arguments and making the plaintiff's counsel respond to often redundant filings is, in this court's view, bad faith conduct warranting the award of attorney's fees for such duplicative and colorless filings." (Citation omitted.)

On October 27, 2016, which was four months after the issuance of the court's articulation, the plaintiff filed a motion to extend the civil order of protection for an additional year. The expiration date of the order was November 24, 2016, and the plaintiff was requesting that it be extended to November 24, 2017. In her motion, the plaintiff first recited the procedural background of the matter. She then argued that she had "a continuing need for the court's protection" because "the defendant's use of the court process has continued to cause the plaintiff extreme emotional and physical distress and further victimization." The plaintiff further stated that she "remain[ed] a victim of sexual abuse and sexual assault," that there was "no other order . . . in place to protect her from the defendant," and that "the defendant continue[d] to use the court process to victimize her as he has filed repeated motions and an appeal."

On November 8, 2016, the defendant filed an objection to the plaintiff's motion. In his objection, the defendant claimed that the plaintiff had made "false allegations" in her motion and that her grounds for an extension were "legally insufficient" to find that she "reasonably needs continuing protection against the defendant." The defendant further stated that an extension of the civil protection order "would do nothing to deter the conduct of which the plaintiff complains. The defendant has every right to defend against this action, and will continue to do so whether the order is extended or not." The defendant filed a request for an evidentiary hearing, which was granted by the court.

On November 15, 2016, the court held a hearing on the plaintiff's motion to extend the civil protection order and the defendant's objection to that motion. Both parties were duly sworn at the beginning of the hearing. The court then asked the plaintiff's counsel whether she wished to call the plaintiff as a witness. The plaintiff's counsel responded that she did, but that she believed that a strict statutory interpretation of § 46b-16a (a) and (c)[5] provided all the authority that the court needed to grant the extension. According to her interpretation, the court needed only to find that the plaintiff had filed a motion to extend the order, that she had been a victim of sexual abuse or sexual assault, and that no other

[5] General Statutes § 46b-16a (c) provides: "No order of the court shall exceed one year, except that an order may be extended by the court upon proper motion of the applicant, provided a copy of the motion has been served by a proper officer on the respondent, no other order of protection based on the same facts and circumstances is in place and the *need for protection*, consistent with subsection (a) of this section, still exists." (Emphasis added.)

Subsection (a) of § 46b-16a; see footnote 1 of this opinion; provides that a victim of sexual abuse or sexual assault may apply to the Superior Court for a civil protection order if that person has not obtained any other court order of protection arising out of the sexual abuse or sexual assault and if that person does not qualify for relief under the statute that addresses physical abuse, stalking or threatening by a family or household member.

order for protection against the defendant existed. The plaintiff, through counsel, argued to the court that there was no requirement that she prove that a continuing need for protection still existed.

The defendant's counsel disagreed with the interpretation of plaintiff's counsel and argued that the burden of demonstrating a need for protection to obtain an extension is the same as the burden of demonstrating the need for protection to obtain the initial protection order. He argued that § 46b-16a (b) sets forth the criteria for determining whether protection is required.[6] At that point, the court stated that it would take a recess to review the statutory provisions and the parties' submissions.

When court reconvened, the court made the following oral ruling: "The court, having reviewed the submissions and having considered the pertinent subsection of the statute, which is [§] 46b-16a, subsection (c), concludes that, in accordance with that section that the need for protection of this applicant still exists. And, therefore, the court will extend the protection order for an additional year." The court's judgment was rendered *without either party testifying or providing any evidence* at the hearing. The defendant timely filed his second amended appeal to include the court's ruling extending the civil protection order to November 24, 2017.

By motion dated November 30, 2016, the defendant requested the trial court to articulate the factual and legal basis for its judgment rendered on November 15,

[6] The defendant referred to the following language in § 46b-16a (b) in support of his argument: "If the court finds that there are reasonable grounds to believe that the respondent has committed acts constituting grounds for issuance of an order under this section and will continue to commit such acts or acts designed to intimidate or retaliate against the applicant, the court, in its discretion, may make such orders as it deems appropriate for the *protection* of the applicant. . . ." (Emphasis added.)

2016. By memorandum of decision issued on February 27, 2017, the court articulated its reasoning for granting the plaintiff's motion to extend the civil protection order against the defendant for an additional year. The court, after setting forth the procedural history of the case and citing the language in the relevant statutory provisions, repeated its November 24, 2015 determination that it had "fully credit[ed]" the representations that the plaintiff had made in her affidavit attached to her application for the initial civil protection order as well as her testimony at the November 24, 2015 hearing on that application. It then made the following articulation: "After the court issued the civil protection order, the [defendant] made numerous court filings, including his application for a civil protection order against the [plaintiff], which required her to make numerous court appearances and to repeatedly see the [defendant]. This court stated in its memorandum of decision dated June 28, 2016, that by using the civil protection order process to file multiple motions 'without any merit, the [defendant] continues to victimize the victim.'

"Based on the task force's[7] discussions regarding the legislative policy that § 46b-16a (c) was designed to implement[8] and on the court's findings of fact in the present case, the court concludes that the circumstances of this case, i.e., the [defendant] sexually assaulted the [plaintiff] but was not criminally prosecuted, present the exact situation for which the legislature intended continuing protection and provided for

[7] The task force referred to is the legislative Task Force on the Expansion of Civil Restraining Orders. See footnote 8 of this opinion.

[8] In the court's articulation, it noted that neither the parties nor the court had found cases that interpreted the relevant statutory provisions. The court then looked for guidance from the task force that the legislature had established to make recommendations to the bill that subsequently became § 46b-16a. The court stated: "The task force . . . noted that under the circumstances where there is a sexual assault but no criminal prosecution of the perpetrator, victims of sexual assault are in a continuing need of protection because '[t]he accused perpetrators often intimidate and harass victims and their families.' "

an extension of the civil protection order. Therefore, the court finds that the need for protection still exists pursuant to § 46b-16a (c) in this case. Thus, because it is undisputed that the [plaintiff] filed a proper motion for the extension of the civil protection order, a proper officer served the [defendant] a copy of the motion, no other protection order based on the same facts and circumstances is in place, and, as the court has determined, the need for protection still exists . . . the [plaintiff] has satisfied all the requirements under § 46b-16a (c) for the court to extend the civil protection order against the [defendant]." (Footnotes added.) The court then granted the plaintiff's motion for a one year extension of the original November 24, 2015 order to November 24, 2017.

I

The defendant's first claim on appeal is that the court improperly denied his motion to vacate or modify the November 24, 2015 civil protection order on erroneous factual and legal grounds. Specifically, the defendant argues that the court, in its first ground for the denial of his motion to vacate, made a clearly erroneous finding that his motion had not been filed within 120 days of the judgment granting the plaintiff's application for a civil protection order. The defendant further claims that the court applied an incorrect legal standard when, in its second ground for the denial of his motion, the court stated that the defendant failed to challenge the validity of the November 24, 2015 judgment. The defendant argues that the court should have, but failed to consider certain events that had transpired subsequent to the rendering of that judgment.[9] We are not persuaded.

We first note that the motion filed by the self-represented defendant on March 7, 2016, was titled "motion

[9] We will address this second claim more thoroughly in part II of this opinion.

to vacate civil protective order." The civil protection order had been granted by the court on November 24, 2015, which was more than twenty days prior to the filing of the defendant's motion. The defendant had not appealed from the court's judgment, and, therefore, the defendant was requesting that the court open the judgment and vacate or modify the order.[10] Accordingly, we set forth the standard of review and legal principles that are applicable to a court's decision on a motion to open a judgment.[11]

"The denial of a motion to open is an appealable final judgment. . . . Although a motion to open can be filed within four months of a judgment . . . the filing of such a motion does not extend the appeal period for challenging the merits of the underlying judgment unless filed within the [twenty day period provided by Practice Book § 63-1]. . . . When a motion to open is filed more than twenty days after the judgment, the appeal from the denial of that motion can test only whether the trial court abused its discretion in failing to open the judgment and not the propriety of the merits of the underlying judgment. . . . This is so because otherwise the same issues that could have been resolved if timely raised would nevertheless be resolved, which would, in effect, extend the time to appeal. . . .

"The principles that govern motions to open or set aside a civil judgment are well established. *Within four*

[10] Although the defendant filed a motion to vacate, the court asked the defendant's counsel for clarification as to what relief was being sought at the hearing on the motion held on April 26, 2016. The defendant's counsel responded that the defendant was requesting that the court vacate, or, in the alternative, to modify the civil protection order. The plaintiff did not object to that characterization of the motion, and the court and the parties proceeded on that basis.

[11] The defendant repeatedly has confirmed that he is not challenging the granting of the civil protection order by the court on November 24, 2015. By seeking a modification of the order, he claims that the need for some of its original terms no longer exists.

months of the date of the original judgment, Practice Book [§ 17-4] vests discretion in the trial court to determine whether there is a good and compelling reason for its modification or vacation. . . .

"Because opening a judgment is a matter of discretion, the trial court [is] not required to open the judgment to consider a claim not previously raised. The exercise of equitable authority is vested in the discretion of the trial court and is subject only to limited review on appeal. . . . We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action." (Citation omitted; emphasis added; internal quotation marks omitted.) *JP Morgan Chase Bank, N.A.* v. *Eldon*, 144 Conn. App. 260, 272–73, 73 A.3d 757, cert. denied, 310 Conn. 935, 79 A.3d 889 (2013).

At the April 26, 2016 hearing on the defendant's motion to vacate the civil protection order,[12] the defendant's counsel affirmed that the defendant was seeking either the vacating of the order or a modification of the order. Instead of relying on the grounds set forth by the self-represented defendant in his motion, however, the defendant's counsel stated that he was relying on a different ground in support of the motion: the fact that the police investigation into the plaintiff's underlying complaint of sexual assault found no probable cause to charge the defendant with a crime. The defendant's counsel argued: "[G]iven that conclusion, we feel it's

[12] The court held a hearing on the defendant's motion even though it is not one of the enumerated motions in our rules of practice that provides for oral argument as a matter of right. See Practice Book § 11-18.

necessary to revisit." He conceded, when questioned by the court, that a civil protection order can be granted without a crime being prosecuted.

When the arguments by the parties' counsel had concluded, the court orally ruled as follows: "I'm going to deny the motion for two reasons. One is that this motion to vacate is not made within 120 days from the adjudication of the—of the case on its merits, and also the reasons to vacate do not test the—the validity of the court's order that was made after hearing the case on the merits."

As correctly pointed out by the defendant, the court's first ground is clearly erroneous. The judgment was rendered November 24, 2015, and the motion to open and vacate was filed March 8, 2016, which was within the four month period. After the defendant brought this error to the court's attention in his second amended motion to reargue filed on May 11, 2016, and in his motion for articulation filed on May 26, 2016, the court acknowledged in its June 30, 2016 memorandum of decision that it had erroneously found the filing of the motion to be untimely.[13] Nevertheless, the court articulated that the denial of the defendant's motion had been proper because the defendant failed to provide a good or compelling reason to vacate or modify the civil protection order.

We conclude that the court's erroneous factual finding in its oral ruling made on April 26, 2016, is not

[13] In this case, the subject motion to vacate or modify had been filed within four months of the date that the court granted the plaintiff's application for a civil protection order against the defendant. It therefore is not necessary for this court to reach the issue of whether the motion would have been untimely if it had been filed more than four months after the court's judgment. Nevertheless, we do not mean to suggest that a party is restricted to the four month period when a court grants injunctive relief in a restraining order. See *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 214–16, 884 A.2d 981 (2005).

significant. The court relied on two independent grounds for its denial. Further, given its June 30, 2016 articulation, it acknowledged its mistake and stated that the result reached had been proper because the defendant failed to provide a good or compelling reason to open the judgment. The defendant claims that this reason is different from the reason provided in its oral ruling. We disagree, for the reasons discussed in part II of this opinion. Moreover, it is important to note that the defendant relied only on the decision of the police not to charge him with a crime as the basis for his request to vacate or modify the order. As conceded by counsel at the April 26, 2016 hearing, the subsequent determination by the police that there was no probable cause to charge the defendant with a crime does not affect the validity of the November 24, 2015 order. The court expressly stated that it credited the plaintiff's testimony that she had been sexually assaulted by the defendant, and the court concluded that there was no reason to open that judgment. For these reasons, we determine that the trial court did not abuse its discretion in denying the defendant's motion to open the judgment and vacate or modify the November 24, 2015 civil protection order.

II

The defendant's next claim is that the court improperly changed the basis for its denial of the defendant's motion to open and vacate or modify the civil protection order in its subsequently issued June 30, 2016 articulation. Specifically, he argues that the court "substitute[d] new reasoning for the second stated basis" of his April 26, 2016 oral ruling. In the court's oral ruling, it stated that the defendant's proffered reasons to vacate the judgment did not test the validity of the civil protection order, issued after the November 24, 2015 hearing on the merits. In its June 30, 2016 memorandum of decision, the court articulated: "[T]he court's denial of the

motion to vacate was proper because the defendant failed to establish a good or compelling reason to vacate or modify the November 24, 2015 judgment." The defendant claims that the articulation "offers an entirely new basis for the April 26 [2016] ruling, delivered after the fact and in clear conflict with the one expressed and evidently used at the time of [that ruling]." We are not persuaded.

"As a general rule, [a]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . . An articulation may be necessary where the trial court fails completely to state any basis for its decision . . . or where the basis, although stated, is unclear. . . . The purpose of an articulation is to dispel any . . . ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal. . . . An articulation is not an opportunity for a trial court to substitute a new decision nor to change the reasoning or basis of a prior decision. . . . If, on appeal, this court cannot reconcile an articulation with the original decision, a remand for a new trial is the appropriate remedy. . . . Such a remedy, however, is appropriate only when [t]he crucial findings of fact in the memorandum of decision are inconsistent and irreconcilable, and the articulation obfuscates rather than clarifies the court's reasoning." (Citations omitted; internal quotation marks omitted.) *Lusa* v. *Grunberg*, 101 Conn. App. 739, 743, 923 A.2d 795 (2007).

Upon review of the reasons set forth in the court's April 26, 2016 oral ruling and its June 30, 2016 articulation, we conclude that they are not irreconcilable with respect to the basis for denying the defendant's motion to open the November 24, 2015 judgment. First, the only ground proffered by the defendant for vacating or

modifying the judgment was that the police investigation resulted in the decision not to charge the defendant with a crime. The court rejected that ground during the hearing, and the defendant conceded that a civil protection order could properly be issued in the absence of a crime being committed.

Second, the court had not been persuaded by the defendant's argument regarding the police investigation, and the defendant had proffered no other grounds for opening the judgment. The court stated that the defendant had not challenged the validity of the November 24, 2015 civil protection order, which was correct. When asked for a further articulation of the basis for its denial of the defendant's motion, the court responded that he had failed to provide a good or compelling reason for opening the judgment. These reasons for denial are not irreconcilable or contradictory.

Moreover, the court did not err in failing to mention its articulated reason in its April 26, 2016 oral ruling. The case law does not require that the court expressly state that it found no good and compelling reason before denying a motion to open a judgment. The court's decision "will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Cockayne* v. *Pilon*, 114 Conn. App. 867, 869, 971 A.2d 732 (2009). We conclude, therefore, that the trial court's articulation did not improperly substitute a different ground for its denial of the defendant's motion to open the judgment.

III

The defendant's next claim is that the court improperly awarded the plaintiff attorney's fees after it denied his second amended motion for reargument at the May 17, 2016 hearing. Specifically, he argues that the court granted the plaintiff's request for attorney's fees under

the bad-faith exception to the American rule[14] without providing a high degree of specificity in its factual findings to support a determination that the defendant's motions had been filed in bad faith and were entirely without color. We agree with the defendant.

We first set forth the applicable standard of review and legal principles that guide our analysis of the defendant's claim. "It is well established that we review the trial court's decision to award attorney's fees for abuse of discretion. . . . This standard applies to the amount of fees awarded . . . and also to the trial court's determination of the factual predicate justifying the award. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did. . . .

"As a substantive matter, [t]his state follows the general rule that, except as provided by statute or in certain defined exceptional circumstances, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser. . . . That rule does not apply, however, where the opposing party has acted in bad faith. . . . It is generally accepted that the court has the inherent authority to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . .

[14] "[T]he common law rule in Connecticut, also known as the American Rule, is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception." (Internal quotation marks omitted.) *Berzins* v. *Berzins*, 306 Conn. 651, 661, 51 A.3d 941 (2012).

The plaintiff does not claim that there is any statute that authorizes an award of attorney's fees under the circumstances of this case.

"[A] litigant seeking an award of attorney's fees for the bad faith conduct of the opposing party faces a high hurdle. . . . To ensure . . . that fear of an award of attorney's fees against them will not deter persons with colorable claims from pursuing those claims, we have declined to uphold awards under the bad-faith exception absent both clear evidence that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes . . . . Thus *Maris* [v. *McGrath*, 269 Conn. 834, 850 A.2d 133 (2004)] makes clear that in order to impose sanctions pursuant to its inherent authority, the trial court must find *both* [1] that the litigant's claims were entirely without color *and* [2] that the litigant acted in bad faith. . . .

"Significantly, our appellate courts have declined to uphold awards under the bad-faith exception absent . . . a high degree of specificity in the factual findings of [the] lower courts." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Rinfret* v. *Porter*, 173 Conn. App. 498, 507–509, 164 A.3d 812 (2017). In the present case, we conclude that the trial court failed to comply with the requirements in our case law that it must find clear evidence that the defendant's actions were entirely without color *and* were taken in bad faith, and must separately set forth those factual findings with a high degree of specificity. Id., 510.

At the time the court awarded the plaintiff $1500 in attorney's fees at the May 17, 2016 hearing, the only explanation it provided for the award was "because of the numerous requests" that the defendant had made that had required the plaintiff's counsel to "[defend] all [of those] various motions." The court's stated reason was clearly inadequate to support an award of attorney's fees under the bad-faith exception to the American rule. The defendant requested an articulation of the

court's basis for its ruling, and the court granted that request and provided more detailed and specific findings in its written memorandum of decision. Accordingly, we look to the court's June 30, 2016 articulation to determine whether the award of attorney's fees was properly made.

A careful reading of the June 30, 2016 articulation reveals that the trial court was troubled by the "numerous filings made by the defendant." The court first noted that the reasons provided in support of the defendant's motion to open the judgment and to vacate or modify the civil protection order were "unpersuasive" and failed to set forth "a compelling reason." The court then stated that "[b]y filing the motion to vacate, the motion to reargue, two amended motions to reargue without any merit, the defendant continues to victimize the victim. Additionally, the defendant filed an application for a civil protection order against the plaintiff, which the court heard and denied on March 22, 2016. The defendant's application was without merit." The court expressly found that "it is not any one filing that was made in bad faith or colorless. It is the cumulative amount of repetitive and insufficient filings."[15] The court concluded: "Continuously repeating arguments and making the plaintiff's counsel respond to often redundant filings is, in this court's view, bad faith conduct warranting the award of attorney's fees for such duplicative and colorless filings."

The court does not provide separate specific factual findings supporting a determination of bad faith and a determination that the filings were without color. In essence, it is stating that the defendant filed repetitious and duplicative filings necessitating a response from

[15] We have been provided with no authority by either the plaintiff or the court that supports a finding that the filing of duplicative motions, none of which were "colorless" or filed in protectionaith, constitutes protectionaith conduct because of the cumulative amount of such filings.

the plaintiff's counsel. Although the court stated that it had found the defendant's claims to be "without merit," that finding does not conclusively establish that those same claims, as presented in the defendant's filings with the court, were entirely colorless. "[A] claim is colorable, for purposes of the bad faith exception to the American rule, if a reasonable person, given his or her firsthand knowledge of the underlying matter, could have concluded that the facts supporting the claim might have been established." (Internal quotation marks omitted.) *Keller* v. *Keller*, 167 Conn. App. 138, 150, 142 A.3d 1197, cert. denied, 323 Conn. 922, 150 A.3d 1151 (2016). "The standard definition of bad faith is the absence of good faith." *Kupersmith* v. *Kupersmith*, 146 Conn. App. 79, 98 n.14, 78 A.3d 860 (2013). "[T]he court must assess whether there has been substantive bad faith as exhibited by, for example, a party's use of oppressive tactics or its wilful violations of court orders; [t]he appropriate focus for the court . . . is the conduct of the party in instigating or maintaining the litigation." (Internal quotation marks omitted.) Id., 97–98.

In the present case, the self-represented defendant filed his motion to vacate claiming that the plaintiff had commented on social media that she was not afraid of him and that she was going to take matters into her own hands. He further claimed that she was trying to have him violate the order in order to have him arrested. At the hearing on the motion, the defendant's counsel advised the court that the police did not find probable cause to arrest the defendant in the subsequent investigation of the plaintiff's complaint. Although the court stated that it found the defendant's claims unpersuasive and without merit, the court did not provide, with a high degree of specificity, factual findings to support a determination that those claims were made in bad faith and were entirely without color.

With respect to the defendant's motion for reargument and the two amendments to that motion,[16] the defendant acknowledged in his first amendment that he had cited the wrong Practice Book rule in his initial motion. In his second amendment, the defendant brought to the court's attention the fact that the motion to vacate had been timely filed within 120 days of the court's November 24, 2015 judgment. In the court's June 30, 2016 articulation, it agreed that its finding had been erroneous because the defendant's motion had been filed 105 days after the judgment. We fail to see how the defendant's second motion for reargument can be characterized in any way as being filed in bad faith or colorless when the defendant's claim was found to be correct.

It would appear that the court concluded that the numerous filings were made for the purpose of "victimiz[ing]" the plaintiff, but there is nothing in the record to show that the defendant's motivation in filing his motions and his own application for a civil protection order against the plaintiff was for purposes of harassment. The court provides no specific factual findings to support such a determination.

For these reasons, we conclude that the court did not find with adequate specificity that the defendant's claims were entirely without color and that he acted in bad faith. *Maris* v. *McGrath*, supra, 269 Conn. 845.

[16] "[T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address . . . claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple . . . ." (Emphasis omitted; internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 94 n.28, 952 A.2d 1 (2008).

Accordingly, the court's award of $1500 in attorney's fees to the plaintiff must be vacated.[17]

IV

The defendant's final claim is that the court improperly granted the plaintiff's motion for a one year extension of the civil protection order to November 24, 2017. He argues that § 46b-16a (c) authorizes an extension only if the need for protection still exists and that no evidence was presented at the November 15, 2016 hearing to support that finding. We agree with the defendant.

It is undisputed that, although the parties were duly sworn at the commencement of the extension hearing held on November 15, 2016, neither the plaintiff nor the defendant testified at that hearing. Following the argument by the plaintiff's counsel that the court needed only to find that a motion to extend the order had been properly filed, that the plaintiff had been the victim of sexual abuse or sexual assault, and that no

[17] In her appellate brief, the plaintiff argues that the defendant waived his right to challenge the award of attorney's fees on appeal because he failed to object at the May 17, 2016 hearing. In support of her argument, the plaintiff cites *Smith* v. *Snyder*, 267 Conn. 456, 481, 839 A.2d 589 (2004); *Florian* v. *Lenge*, 91 Conn. App. 268, 285–86, 880 A.2d 985 (2005); and *Arcano* v. *Board of Education*, 81 Conn. App. 761, 771, 841 A.2d 742 (2004). These cases are distinguishable from the present action. In *Smith* and *Arcano*, attorney's fees were *authorized by statute* and could be awarded at the discretion of the court. In *Florian*, attorney's fees were *authorized by the subject promissory note* that permitted recovery of attorney's fees provided they were reasonable. None of those cases involved the bad-faith exception to the American rule. As discussed in this opinion, certain requirements must be met before a court can award attorney's fees under the bad faith exception, and the court's factual findings were insufficient to support that award.

Moreover, we are not convinced that the defendant failed to challenge the plaintiff's request for attorney's fees. At the May 17, 2016 hearing, the defendant's counsel, although not expressly stating that he objected, did respond that "we find nothing improper in amending our pleadings as the circumstances require." His statement reflects that he questioned the propriety of imposing sanctions under these circumstances.

other protection against the defendant existed, the court called a recess in order to review the relevant statutory provisions; see footnote 5 of this opinion; and the parties' submissions. When the court reconvened after the recess, it immediately made its ruling on the plaintiff's motion for extension. The court, without the benefit of the submission of any evidence, concluded that "the need for protection of [the plaintiff] still exists" and granted the plaintiff's motion to extend the civil protection order to November 24, 2017. No further explanation was provided by the court at that time.

The defendant subsequently filed a motion for an articulation of the factual and legal grounds for the court's ruling. The court granted the defendant's motion and issued a written memorandum of decision on February 27, 2017. In that articulation, the court stated that the parties had presented different interpretations of § 46b-16a (c). The court then undertook its own analysis of the statutory provisions at issue, namely, subsections (a) and (c) of § 46b-16a, and concluded that the statutory requirements for an extension had been satisfied for the following reasons. First, the court repeated certain determinations that it had made in prior rulings. The court stated that it had fully credited the plaintiff's testimony about the November 8, 2015 sexual assault and that the defendant, following the issuance of the civil protection order, "made numerous court filings, including his application for a civil protection order . . . which required [the plaintiff] to make numerous court appearances and to repeatedly see [the defendant]. . . . [B]y using the civil protection order process to file multiple motions without any merit, [the defendant] continues to victimize the victim." (Internal quotation marks omitted.)

Next, the court stated that it had reached its conclusion on the basis of the task force's recommendations; see footnote 8 of this opinion; as well as the court's

factual findings in this case: "[T]he court concludes that the circumstances of this case, i.e., [the defendant] sexually assaulted [the plaintiff] but was not criminally prosecuted, present the exact situation for which the legislature intended continuing protection and provided for an extension of the civil protection order. Therefore, the court finds that the need for protection still exists pursuant to § 46b-16a (c) in this case. Thus, because it is undisputed that [the plaintiff] filed a proper motion for the extension of the civil protection order, a proper officer served the [defendant] a copy of the motion, no other protection order based on the same facts and circumstances is in place, and, as the court has determined, the need for protection still exists . . . [the plaintiff] has satisfied all the requirements under § 46b-16a (c) for the court to extend the civil protection order against [the defendant]."

From this review of the court's articulation, it is apparent that the court determined that the statute authorized an extension solely on the basis of the evidence that had been presented at the time of the issuance of the November 24, 2015 civil protection order. The court concluded that the fact that the plaintiff had been a victim of sexual assault, that no other protection order against the defendant had been issued in connection with that assault, and that she followed the procedural requirements for the filing of the motion for an extension, entitled her to an extension without presenting any evidence that a need for protection still existed because of current circumstances. We conclude that the court improperly granted the extension without holding an evidentiary hearing.

The issue raised in this appeal, namely, whether the plaintiff was required to present evidence that her need for protection against the defendant still existed before the court could grant her motion for a one year extension of the civil protection order, is an issue of statutory

construction. "Issues of statutory construction raise questions of law, over which we exercise plenary review. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . .

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Citations omitted; internal quotation marks omitted.) *Commissioner of Transportation* v. *ISIS Realty Associates Ltd. Partnership*, 121 Conn. App. 13, 18–19, 993 A.2d 491 (2010).

The statutory language at issue is found in subsections (a) and (c) of § 46b-16a. Section 46b-16a (c) provides that a court may extend a civil protection order provided (1) the applicant files a proper motion, (2) a copy of the motion was properly served on the respondent, (3) no other protection order based on the same facts and circumstances exists, and (4) "*the need for protection, consistent with subsection (a) of this section, still exists.*" (Emphasis added.) Section 46b-16a (a) provides that a "victim of sexual abuse [or] sexual

assault" may apply to the Superior Court for the issuance of a civil protection order if no other court order of protection has been obtained in connection with that sexual abuse or sexual assault and if the applicant does not qualify for relief from abuse by a family or household member under § 46b-15. The statutory language is clear and unambiguous. A victim of sexual abuse or sexual assault, after having obtained a civil protection order, can apply to have that order extended if, inter alia, "the need for protection . . . *still exists*." (Emphasis added.)

The trial court recognized that it was required to find that the need for protection still existed in order to grant the plaintiff's motion for an extension of the order. It made that finding, but the basis for its determination was that the plaintiff had been a victim of sexual assault, the defendant had not been criminally prosecuted for that assault, and the legislature intended such victims to be protected. Further, the court stated that the defendant's filing of repetitious motions and his own application for a civil protection order against the plaintiff meant that he "continues to victimize the victim."

The court's basis for its finding that the plaintiff's need for protection against the defendant still existed is insufficient without some testimony or other evidence to support it. As previously discussed in part III of this opinion, the defendant should not be penalized for filing his motions and application for a civil protection order absent some evidence that he had acted in bad faith, vexatiously, wantonly or for oppressive reasons. He provided explanations for his numerous filings, and even the filing of supposed meritless requests does not automatically constitute bad faith conduct. Moreover, there is no logical connection between prohibiting contact with the plaintiff and the defendant's filing of pleadings in ongoing litigation between the parties. Requiring the defendant to stay

100 yards away from the plaintiff should not be used as a foil to prevent him from exercising his legal right to defend against or commence actions that involve this plaintiff.

We conclude that the court could not properly grant a one year extension on the grounds that the plaintiff had been a victim of sexual assault and that the statute was designed to protect such victims. If that were the case, civil protection orders could be continued ad infinitum regardless of the current situation between the parties. There is nothing in the relevant legislation to suggest such an intent or result. In order to obtain an extension, the plaintiff was required to present evidence that her need for protection against the defendant still existed, and she failed to do so. In the absence of any evidence to meet that statutory requirement, the court erred in extending the civil protection order to November 24, 2017.

The judgment is reversed only as to the award of attorney's fees to the plaintiff and the order extending the civil protection order to November 24, 2017, and the case is remanded with direction to vacate that award and that order. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

RICARDO PEREIRA *v.* COMMISSIONER OF CORRECTION (AC 39401)

DiPentima, C. J., and Alvord and Bear, Js.

Syllabus

The petitioner, who had been convicted of murder and kidnapping in the first degree, sought a writ of habeas corpus, claiming that his due process rights were violated as a result of his kidnapping conviction. The petitioner claimed that, in light of the reinterpretation of this state's kidnapping statutes in *State* v. *Salamon* (287 Conn. 509), which was decided after his conviction, his kidnapping conviction should be vacated. Pursuant to *Salamon*, to commit kidnapping in conjunction with another

crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime. The petitioner's conviction stemmed from an incident in which he was in a parked car with the victim when he became enraged, and punched and strangled her. The victim fought back and fled from the car, after which the petitioner drove the car into her, ran over her, dragged her along the road, and then exited the car and kicked her numerous times, resulting in her death. The petitioner claimed that, because the events inside the car were a separate, uncharged assault against the victim, he was entitled to a jury instruction pursuant to *Salamon* because the petitioner's restraint of the victim was incidental to the uncharged assault. He also claimed that there was a single, continuous crime, starting when he first struck the victim inside the car and ending with her death, and that, because he was charged with kidnapping and murder, he was entitled to a *Salamon* instruction. The habeas court rendered judgment denying the petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, and, accordingly, the appeal was dismissed: the petitioner's claim regarding the kidnapping charge and the uncharged assault while the petitioner and the victim were inside the car was not reviewable, as the petitioner failed to raise the claim in his posttrial brief, in his habeas petition, or in his petition for certification to appeal, and the habeas court did not address the issue in its memorandum of decision; moreover, the petitioner could not prevail on his claim that he was entitled to a *Salamon* instruction on the ground that the restraint that occurred in the car was merely incidental to the commission of the murder, as the petitioner's restraint of the victim inside the car was completed before the petitioner engaged in the conduct that caused the victim's death, and, thus, the restraint inside the car, which had criminal significance independent of the events that occurred after the victim escaped from the car, was not necessary to complete the murder, and this court was not persuaded that this issue was debatable among jurists of reason, that it could have been resolved by a court in a different manner, or that it presented a question that was adequate to deserve encouragement to proceed further.

Argued May 22—officially released September 26, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Fuger*, *J.*; judgment denying the petition; thereafter, the court denied the

petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Michael W. Brown, assigned counsel, for the appellant (petitioner).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The petitioner, Ricardo Pereira, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal from the denial of his habeas petition and (2) improperly denied his habeas petition. We conclude that the habeas court did not abuse its discretion in denying certification to appeal. Accordingly, we dismiss the petitioner's appeal.

The following facts and procedural history are relevant to our discussion. In March, 2000, the petitioner was convicted of murder in violation of General Statutes § 53a-54a (a) and kidnapping in the first degree violation of General Statutes § 53a-92 (a) (2) (A). The court, *Espinosa*, *J.*, sentenced the petitioner to sixty years incarceration on the murder charge and fifteen years incarceration on the kidnapping charge, with the sentences to be served consecutively, for a total effective sentence of seventy-five years incarceration. This court affirmed his conviction on direct appeal. *State* v. *Pereira*, 72 Conn. App. 545, 805 A.2d 787 (2002), cert. denied, 262 Conn. 931, 815 A.2d 135 (2003).

The petitioner filed his first habeas action on October 24, 2003. Following a trial, the first habeas court denied

the habeas petition, and this court dismissed the appeal. *Pereira* v. *Commissioner of Correction*, 101 Conn. App. 397, 921 A.2d 665, cert. denied, 283 Conn. 906, 927 A.2d 918 (2007).[1] The petitioner commenced the present habeas action on May 2, 2013, and filed the operative petition on January 21, 2016. The petitioner alleged, inter alia, that his due process rights had been violated as a result of his kidnapping conviction. Specifically, he relied on our Supreme Court's decision in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), which was released nearly one decade after the petitioner's conviction. He argued that as a result of *Salamon*'s reinterpretation of our kidnapping statutes, his conviction of kidnapping should be vacated.

At the February 2, 2016 habeas trial, the parties agreed that certain documents, mostly transcripts, would be entered into evidence by stipulation in lieu of testimony. The parties further agreed to submit posttrial briefs in lieu of oral argument.[2] The court, *Fuger*, *J.*,

[1] The petitioner had claimed that he received the ineffective assistance of trial counsel and that he had been denied access to counsel. *Pereira* v. *Commissioner of Correction*, supra, 101 Conn. App. 398. The habeas court rejected both of these claims, and denied certification to appeal. Id. On appeal, this court concluded that the petitioner failed to establish that the habeas court abused its discretion in denying certification to appeal. Id., 400–401.

[2] In his posttrial brief, the petitioner argued that "it was an ongoing struggle, from the moment that the petitioner initially hit the victim, it was a continuous act upon the victim. . . . Because the petitioner's entire conduct was one continuous activity in the commission of the act of murder . . . any restraint against the victim was entirely incidental to the murder of the victim. There is simply not one point where it can be said that a jury could clearly determine that the petitioner was guilty of kidnapping because his intended restraint of the victim was for a longer period of time or a greater extent to commit the murder for which he was convicted."

In turn, the respondent, the Commissioner of Correction, argued in his posttrial brief that the intent required by *Salamon* existed because "the petitioner's restraint concluded before he committed the murder." He also claimed that her escape served as a "break in the chain" between the kidnapping and the murder. Additionally, the respondent noted that petitioner intended to prevent the victim from summoning help by restraining her inside the car.

issued its memorandum of decision on May 12, 2016. It denied the petition for a writ of habeas corpus, concluding that the petitioner was not entitled to a *Salamon* instruction[3] and that even if he was entitled to such an instruction, its absence constituted harmless error. The habeas court subsequently denied the petition for certification to appeal. This appeal followed. Additional facts will be set forth as necessary.

The petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal. After reviewing the record and the applicable law, we conclude that the habeas court's denial of the petition for certification to appeal did not constitute an abuse of discretion. Accordingly, we dismiss the petitioner's appeal.

As an initial matter, we set forth our standard of review. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994).

[3] The habeas court first concluded that the holding of *Salamon* was retroactively applicable to the petitioner's claim. See, e.g., *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 60, 136 A.3d 596 (2016); *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 773, 12 A.3d 817 (2011). It then concluded that the kidnapping in the present case did not fall within the ambit of the rule established in *Salamon* because the movement or restraint of the victim inside the car had independent significance from the murder that occurred outside of the car and after the victim had escaped. The habeas court also noted that the strangulation of the victim prevented her from escaping the attack inside the car. "In other words, the petitioner's restriction of the victim had clearly defined and distinct significance from the subsequent murder. There is, contrary to the petitioner's argument, a point where a reasonable fact finder could clearly determine that the restraint of the victim was not incidental to the murder itself." In the words of the habeas court, the petitioner's claim of one continuous series of criminal activity constituted nothing more than "a proverbial red herring."

First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Citations omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 821–22, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017); see also *Bridges* v. *Commissioner of Correction*, 169 Conn. App. 742, 747, 152 A.3d 71 (2016), cert. denied, 324 Conn. 917, 154 A.3d 1008 (2017).

The claim presented by the petitioner, aptly described by the habeas court as "relatively narrow and focused," is that the absence of the *Salamon* instruction constituted a violation of his right to due process. In reviewing this issue, we are mindful that the facts found by the

habeas court are subject to the clearly erroneous standard of review. *Farmer* v. *Commissioner of Correction*, 165 Conn. App. 455, 458, 139 A.3d 767, cert. denied, 323 Conn. 905, 150 A.3d 685 (2016). "The applicability of *Salamon* and whether the court's failure to give a *Salamon* instruction was harmless error are issues of law over which our review is plenary." Id., 459.

Next, we briefly summarize the evolution of our kidnapping law. At the time of the petitioner's conviction, our Supreme Court had established that "all that is required under the [kidnapping] statute is that the defendant have abducted the victim and restrained her with the requisite intent. . . . Under the aforementioned definitions, the abduction requirement is satisfied when the defendant restrains the victim with the intent to prevent her liberation through the use of physical force. . . . Nowhere in this language is there a requirement of movement on the part of the victim. Rather, we read the language of the statute as allowing the restriction of movement alone to serve as the basis for kidnapping. . . . [O]ur legislature has not seen fit to merge the offense of kidnapping with other felonies, nor impose any time requirements for restraint, nor distance requirements for asportation, to the crime of kidnapping. . . . Furthermore, any argument that attempts to reject the propriety of a kidnapping charge on the basis of the fact that the underlying conduct was integral or incidental to the crime of sexual assault also must fail." (Citation omitted; internal quotation marks omitted.) *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 745–46, 12 A.3d 817 (2011).

Subsequent to the petitioner's conviction of murder and kidnapping, "our Supreme Court reinterpreted the intent element of our kidnapping statutes. In *State* v. *Salamon*, supra, 287 Conn. 542, it stated: Our legislature, in replacing a single, broadly worded kidnapping provision with a gradated scheme that distinguishes

kidnappings from unlawful restraints by the presence of an intent to prevent a victim's liberation, intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to and necessary for the commission of another crime against that victim. Stated otherwise, to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime.

"Our Supreme Court further noted that [w]hen that confinement or movement is merely incidental to the commission of another crime, however, the confinement or movement must have exceeded that which was necessary to commit the other crime. [T]he guiding principle is whether the [confinement or movement] was so much the part of another substantive crime that the substantive crime could not have been committed without such acts . . . . In other words, the test . . . to determine whether [the] confinements or movements involved [were] such that kidnapping may also be charged and prosecuted when an offense separate from kidnapping has occurred asks whether the confinement, movement, or detention was merely incidental to the accompanying felony or whether it was significant enough, in and of itself, to warrant independent prosecution. . . . Conversely, a defendant may be convicted of both kidnapping and another substantive crime if, at any time prior to, during or after the commission of that other crime, the victim is moved or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime." (Internal quotation marks omitted.) *Robles* v. *Commissioner of Correction*, 169 Conn. App.

751, 754–55, 153 A.3d 29 (2016), cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017). Finally, we note that in *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 773, our Supreme Court adopted a general presumption of retroactivity for *Salamon* in collateral proceedings. See also *Nogueira* v. *Commissioner of Correction*, 168 Conn. App. 803, 808, 149 A.3d 983, cert. denied, 323 Conn. 949, A.3d (2016).

Next, we turn to the facts underlying the petitioner's conviction. "At the time of the incident giving rise to his convictions, the [petitioner] was distraught because his former girlfriend had terminated their relationship. The [petitioner] still wanted to be with [her, but] she didn't want anything to do with [him]. In the wake of this loss, the [petitioner] spent a great deal of his free time at William MacLellan's small basement apartment in Waterbury. Through MacLellan, the [petitioner] met the victim, Lisa Orgnon, in October, 1997. Over the course of approximately one month, the [petitioner] and the victim socialized at drinking establishments in the Waterbury area a couple of times. The victim, MacLellan and the [petitioner] planned to spend the evening of November 18, 1997, together." (Internal quotation marks omitted.) *State* v. *Pereira*, supra, 72 Conn. App. 547.

Beginning at approximately 9 p.m., the victim, the petitioner and MacLellan went to two drinking establishments and consumed alcohol. Id., 547–48. After returning to MacLellan's apartment, the petitioner asked the victim to accompany him to a movie theater near his former girlfriend's home in Southington, while MacLellan elected to remain at his apartment. Id., 548.

The petitioner, who knew that the theater would be closed, feigned surprise at this fact and asked the victim to " 'drive around,' " but withheld information regarding

their destination. Id. They ultimately drove to the neighborhood where his former girlfriend lived and parked on an adjacent street. Id. The petitioner "did not inform the victim that his former girlfriend lived in the area." Id.

"Although the reasons are unclear, the [petitioner] suddenly got real mad at some point after the vehicle halted. In the [petitioner's] own words: You know, I just—I just lost control. And I just began, I began to swing at her. I don't know why but I started punching [the victim] in her face and head even though she had done nothing wrong. I punched her four or five times. *She just tried to get away.* The [petitioner] punched the victim with such force that days later, he had abrasions on his knuckles . . . . *As the victim attempted to get away from the* [*petitioner's*] *unprovoked assault, the* [*petitioner*] *grabbed her by the neck and began to strangle her.* The [petitioner] choked the victim, crushing her voice box and hemorrhaging the strap muscles in her neck. The [petitioner] strangled the victim with such force that the whites of her eyes turned blood red from petechial hemorrhaging of the capillaries in her conjunctiva. The victim buried her fingernails into the [petitioner]. Forensic analysis later revealed that nine of her ten fingernails had drawn blood in the melee. The [petitioner] sustained scratches on his face and neck, and all over his back and shoulders. Stymied by the victim's effective counterattack, the [petitioner] lost his grip on the victim's neck. She opened the door and began to spill out, head first, onto the street. The [petitioner] clutched and swiped at her in a futile effort to regain dominance, but the victim kicked at him, checking his renewed assault. The victim broke free and sprinted down the road, away from [petitioner]. The [petitioner] jumped into the driver's seat and gunned the engine, aiming the vehicle at the victim.

"The [petitioner] slammed the car into the victim. The front bumper shattered her right leg at a point

nine inches from her heel. Expert forensic evidence introduced at trial indicated that this was a fairly typical pedestrian type [of] injury, where the bumper would strike the lower leg . . . . The vehicle's right front wheel ran over the victim and her body smashed into the undercarriage. The [petitioner] continued to run over the victim and felt the rear transaxle vault over her body. The [petitioner] later stated that he wasn't sure whether he put the car in reverse to run her over again. The street was littered with blood in a long trail resulting from how he, in his own words, dragged her up the road. [As a result, the victim sustained numerous and significant injuries.] . . .

"The [petitioner] then stopped the car, stepped out and approached the victim's body. In his own words, the [petitioner] kicked the victim in the head and neck five or six more times until she wasn't moving at all [anymore]. Finally satisfied that he had killed the victim, the [petitioner] dragged her body out of sight, hiding it in some icy brush over a ridge at the side of the road. The [petitioner] drove the victim's car back to his home town of Waterbury and dumped it in a church parking lot. He walked the rest of the way home.

"The victim . . . died in the early morning of November 19, 1997. The medical examiner certified the cause of death to be multiple blunt force trauma of the head and chest. The medical examiner found no sign of any natural cause that would otherwise account for her death.

"It was life as usual for the [petitioner] that day. He awoke at the ordinary time and arrived at the site of his job with his father's construction company. However, after the victim's mother reported the victim missing, the Naugatuck police interrupted the [petitioner's] schedule, asking him for information. The [petitioner]

initially denied ever being with the victim in Southington, telling the police that the victim drove [him] directly home after dropping MacLellan at his house. After the body was found, however, the [petitioner] admitted that he had, in fact, killed her." (Emphasis added; footnotes omitted; internal quotation marks omitted.) *State* v. *Pereira*, supra, 72 Conn. App. 549–51.

The petitioner's appellate brief presents two specific and distinct theories that, in his view, warranted a *Salamon* instruction. First, the petitioner claims that "the events inside of the car were a separate, uncharged assault against the victim" and that he was entitled to a *Salamon* instruction because the restraint was incidental to that uncharged assault.[4] Second, the petitioner contends that there was a single, continuous crime, starting when he first struck the victim inside the car and ending with her death, and because he was charged with kidnapping and murder, he was entitled to a *Salamon* instruction. With respect to the former claim, the respondent, the Commissioner of Correction, counters that this theory was not raised before and never decided by the habeas court. As to the latter contention, the respondent maintains that the habeas court properly concluded that because the restraint and

[4] The fact that the petitioner was not charged with assault or attempted murder as a result of his conduct in the interior of the car is not dispositive. In *State* v. *Salamon*, supra, 287 Conn. 550–51 n.35, our Supreme Court stated: "As we noted previously, the defendant ultimately was not tried for assault. We nevertheless conclude that a defendant is entitled to an instruction that he cannot be convicted of kidnapping if the restraint imposed on the victim was merely incidental to the assault, regardless of whether the state elects to try the defendant for assault, because the facts reasonably would support an assault conviction. . . . To conclude otherwise would give the state carte blanche to deprive the defendant of the benefit of such an instruction merely by declining to charge him with the underlying crime, which, as in the present case, generally will carry a far less serious maximum possible penalty than the kidnapping charge." (Citations omitted.) See also *Franko* v. *Commissioner of Correction*, 165 Conn. App. 505, 521–22, 139 A.3d 798 (2016).

confinement of the victim occurred separately from and were completed prior to the murder, the kidnapping was not incidental to and necessary for the murder, and, therefore, a *Salamon* instruction was not required. We agree with the respondent with respect to both theories.

A

We first address the petitioner's claim regarding the uncharged assault that occurred inside the car. The operative petition for a writ of habeas corpus contained two broad allegations: first, that his due process rights were violated as a result of the kidnapping conviction, and, second, at the time of the conviction, "the kidnapping statute was invalid and unconstitutional."[5] The petitioner failed to include a specific allegation regarding the kidnapping charge and an uncharged assault while the petitioner and victim were inside the car. Similarly, in his posttrial brief, the petitioner again failed to present this specific claim; instead, he focused on continuing criminal conduct involving the crimes of murder and kidnapping. Finally, the habeas court's memorandum of decision did not address the issue of the kidnapping charge and the uncharged assault.

The petitioner failed to raise before the habeas court a *Salamon* claim as to the uncharged assault that occurred in the car. "A reviewing court will not consider claims not raised in the habeas petition or decided by the habeas court. . . . Appellate review of claims not raised before the habeas court would amount to ambuscade of the [habeas] judge." (Citations omitted; internal quotation marks omitted.) *Henderson* v. *Commissioner of Correction*, 129 Conn. App. 188, 198, 19 A.3d 705, cert. denied, 303 Conn. 901, 31 A.3d 1177 (2011); see

[5] The habeas court correctly noted that *State* v. *Salamon*, supra, 287 Conn. 509, "and its progeny have never held that the kidnapping statute was invalid and unconstitutional, so that claim has no legal support whatsoever."

also *Giattino* v. *Commissioner of Correction*, 169 Conn. App. 566, 580, 152 A.3d 558 (2016); *Taylor* v. *Commissioner of Correction*, 154 Conn. App. 686, 701, 108 A.3d 238 (2015) (specific claim of ineffective assistance of counsel not reviewed on appeal), aff'd, 324 Conn. 631, 153 A.3d 1264 (2017); *Trotter* v. *Commissioner of Correction*, 139 Conn. App. 653, 657 n.2, 56 A.3d 975 (2012) (same), cert. denied, 308 Conn. 901, 60 A.3d 286 (2013).

Additionally, the petition for certification to appeal from the denial of his habeas petition did not include a *Salamon* claim on the basis of the uncharged assault.[6] We have stated that "[b]ecause it is impossible to review an exercise of discretion that did not occur, we are confined to reviewing only those issues which were brought to the habeas court's attention in the petition for certification to appeal." (Internal quotation marks omitted.) *Blake* v. *Commissioner of Correction*, 150 Conn. App. 692, 697, 91 A.3d 535, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014); see also *Stenner* v. *Commissioner of Correction*, 144 Conn. App. 371, 374–75, 71 A.3d 693, cert. denied, 310 Conn. 918, 76 A.3d 633 (2013); *Campbell* v. *Commissioner of Correction*, 132 Conn. App. 263, 267, 31 A.3d 1182 (2011); *Mercado* v. *Commissioner of Correction*, 85 Conn. App. 869, 872, 860 A.2d 270 (2004), cert. denied, 273 Conn. 908, 870 A.3d 1079 (2005). For these reasons, we decline to consider this claim.[7]

B

We now turn to the petitioner's claim that there was a single, continuous crime, starting when he struck the

[6] In the grounds for certification to appeal, the petitioner set forth the following: "Whether or not the habeas court erred in finding that the petitioner was not entitled to a *Salamon* jury instruction regarding his kidnapping conviction, as to whether or not the facts of his case were incidental to the main charge to warrant a *Salamon* jury instruction . . . ."

[7] This reasoning also applies to the petitioner's claims regarding an uncharged attempt to commit murder.

victim inside the car, and ending with her death outside of the car. The petitioner contends that, contrary to the conclusion reached by the habeas court, he was entitled to a *Salamon* instruction because the evidence reasonably supported a finding that the restraint that occurred in the car was merely incidental to the commission of the murder. We disagree.

Following the *Salamon* reinterpretation, "to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime. . . . [T]here are instances where a defendant may be convicted of both kidnapping and another substantive crime if, at any time prior to, during or after the commission of that other crime, the victim is moved or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime. Whether the movement or confinement of the victim is merely incidental to and necessary for another crime will depend on the particular facts and circumstances of each case." (Citation omitted; internal quotation marks omitted.) *Eric M.* v. *Commissioner of Correction*, 153 Conn. App. 837, 843–44, 108 A.3d 1128 (2014), cert. denied, 315 Conn. 915, 106 A.3d 308 (2015).

A brief recitation of the facts and circumstances of this case is necessary to explain why there was not a single, continuous crime in this case and therefore a *Salamon* instruction was not required in conjunction with the murder charge. At the criminal trial, the state produced evidence that the petitioner had been sitting with the victim in a car parked near his former girlfriend's house. He suddenly began to strike her in the face. During this altercation, the victim attempted to escape from inside the car, and partially fell out of the car. At one point, the petitioner had either his hands

or arm around her neck. The petitioner admitted to a police officer that he performed this action for two reasons: first, he wanted to prevent the victim from getting away from him, and, second, to choke her. Despite the petitioner's assault, the victim was able to free herself from the petitioner's restraint, to escape from the interior of the car and to sprint down the road. The petitioner then moved to the driver's seat, and he drove the car into and over the victim, dragging her up the road. He exited the car, kicked the victim numerous times in the face and body, dragged her across the street and left her behind the brush.

As a general matter, when the state charges a defendant with kidnapping and another criminal offense, a *Salamon* instruction ordinarily must be given. *White* v. *Commissioner of Correction*, 170 Conn. App. 415, 425, 154 A.3d 1054 (2017); see also *State* v. *Fields*, 302 Conn. 236, 247, 24 A.3d 1243 (2011). If, however, the restraint that forms the basis for the kidnapping has criminal significance separate from the underlying offense, then the instruction is not required. *State* v. *Fields*, supra, 248. Put another way, "our Supreme Court limited *Salamon* to cases in which the state cannot establish that the restraint involved had independent criminal significance as the predicate conduct for a kidnapping." *State* v. *Golder*, 127 Conn. App. 181, 190, 14 A.3d 399, cert. denied, 301 Conn. 912, 19 A.3d 180 (2011).

The present case differs from the majority of other cases involving *Salamon* claims;[8] that is, the criminal conduct inside the car had been completed prior to the commission of the murder.[9] The petitioner committed

[8] But see *State* v. *Kitchens*, 299 Conn. 447, 453, 10 A.3d 942 (2011) (state argued on appeal that kidnapping was complete before conduct that led to assault and attempted assault charges; Supreme Court decided case on harmless error grounds).

[9] As succinctly and accurately stated by the habeas court: "The murder took place outside the car. The restraint took place inside the car."

a kidnapping when both he and the victim were inside the car; namely, after he began to strike her, he grabbed her by the neck and he strangled her. He admitted to the police that this was done with a dual purpose—to choke the victim and to keep her from getting away. Despite his efforts, the victim was able to break free from the petitioner's restraint and get out of the car. Our Supreme Court has stated that a kidnapping, a crime involving the interference with a victim's liberty, ends when that liberty has been restored. *State* v. *Gomez*, 225 Conn. 347, 351, 622 A.2d 1014 (1993). The victim freed herself from the petitioner's restraint by getting out of the car, and thus the criminal conduct inside the car had been completed. At that point, the petitioner moved to the driver's seat, and he drove the car into the victim, eventually causing her death.

Because the criminal conduct that occurred inside the car had been completed before the murder, that conduct had criminal significance independent from the events that occurred after she escaped. See *State* v. *Ayala*, 133 Conn. App. 514, 523, 36 A.3d 274, cert. denied, 304 Conn. 913, 40 A.3d 318 (2012). In other words, because that criminal conduct was completed before the petitioner's actions that caused the death of the victim, the restraint was not necessary to complete the murder. See *State* v. *Golder*, supra, 127 Conn. App. 190. This restraint had its own independent significance separate from the subsequent murder. See id., 191. Therefore, the rule of *Salamon* does not apply. See id., 190.

In sum, we conclude that the two crimes of which the petitioner was convicted were sufficiently disconnected; see *Wilcox* v. *Commissioner of Correction*, 162 Conn. App. 730, 747, 129 A.3d 796 (2016); therefore, a *Salamon* instruction was not required. Further, we are not persuaded that this issue was debatable among

jurists of reason, could be resolved in a different manner, or presented a question that was adequate to deserve encouragement to proceed further. Accordingly, we conclude that the habeas court did not abuse its discretion in denying certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

ROBERT V. PENTLAND III *v.* COMMISSIONER OF CORRECTION
(AC 39161)

Keller, Prescott and Bear, Js.

Syllabus

The petitioner, who had been convicted of two counts of the crime of witness tampering, sought a writ of habeas corpus, claiming that he had been denied the effective assistance of trial counsel. In connection with his conviction of witness tampering, the petitioner had been sentenced to one year incarceration, which he served from December, 2010 to December, 2011, and during that time, he was held in lieu of bond for certain other charges that stemmed from a sexual assault. After he completed his one year sentence on the witness tampering conviction, he continued to be held in lieu of bond on the sexual assault charges, of which he was convicted in 2012 and sentenced to a term of incarceration that he was serving when he filed his habeas petition in May, 2015. The habeas court rendered judgment dismissing that petition, sua sponte, for lack of subject matter jurisdiction, concluding that it lacked jurisdiction to hear the petition because the petitioner had not been in custody for the witness tampering conviction when the petition was filed. Following the granting of certification, the petitioner appealed to this court. He claimed that because he has remained incarcerated on one or the other sentence since June, 2010, the sentences should be treated as consecutive sentences or a continuous stream of sentences, and that he should be considered to be in custody for jurisdictional purposes on both sentences for the duration of the aggregate term. *Held* that the habeas court properly dismissed the habeas petition, the petitioner having failed to allege sufficient facts to establish the habeas court's subject matter jurisdiction over his habeas petition: even if this court were persuaded by the petitioner's argument that he was in custody, the record was devoid of specific facts alleged by the petitioner that could have established the habeas court's jurisdiction, as the facts alleged by

the petitioner concerning his sentences, dates of confinement and pretrial confinement credit were alleged in his brief to this court and were not alleged or proven before the habeas court, and the facts alleged in the habeas petition were insufficient to prove his claim; moreover, the habeas court did not have an obligation to grant a hearing prior to dismissing the habeas petition, as that was not required by the rule of practice (§ 23-29) that permits the habeas court to dismiss a petition sua sponte if it determines that it lacks jurisdiction, and the petitioner did not file any motion or other pleading in the habeas court alleging that he was entitled to a hearing.

Argued May 25—officially released September 26, 2017

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver*, *J.*, rendered judgment dismissing the petition; thereafter, the court, *Oliver*, *J.*, denied the petition for certification to appeal, and the petitioner appealed to this court; subsequently, the court, *Oliver*, *J.*, granted the petitioner's motion for permission to file a late amended petition for certification to appeal and for reconsideration of the denial of the petition for certification to appeal; thereafter, the court, *Oliver*, *J.*, granted the amended petition for certification to appeal. *Affirmed.*

Jennifer Bourn, assistant public defender, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Adrienne Maciulewski*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Robert V. Pentland III, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus.[1] On appeal,

[1] The court granted the petitioner certification to appeal.

the petitioner claims that the court improperly dismissed his petition for lack of subject matter jurisdiction on the basis of an erroneous conclusion that he was not in the custody of the respondent, the Commissioner of Correction, on the challenged conviction when he filed his petition, as required by General Statutes § 52-466. We conclude that the petitioner did not allege sufficient facts in his petition to establish the habeas court's subject matter jurisdiction to hear his petition. Accordingly, the judgment of the habeas court is affirmed.

We begin by setting forth the relevant procedural history. On May 22, 2015, the petitioner, representing himself, filed a petition for a writ of habeas corpus challenging his 2011 conviction for two counts of witness tampering. The petitioner alleged in his petition that his conviction was illegal because, inter alia, he was denied the effective assistance of counsel. On March 29, 2016, the habeas court, *Oliver*, *J.*, sua sponte, dismissed the petition pursuant to Practice Book § 23-29 (1),[2] concluding that it did not have jurisdiction to hear the petition because the petitioner had not been in custody for the witness tampering conviction at the time he filed his petition. The court did not set forth the factual basis for this conclusion and did not hold a hearing prior to its sua sponte dismissal of the petition.

The self-represented petitioner filed a petition for certification to appeal on April 7, 2016. The court, *Oliver J.*, denied the petition for certification on April 12, 2016. The petitioner thereafter filed the present appeal on May 2, 2016, and was appointed appellate counsel. On September 14, 2016, the petitioner's appellate counsel filed a motion for permission to file a late amended

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

petition for certification to appeal and for reconsideration of the denial of the petition for certification to appeal, arguing that counsel had identified grounds for challenging the habeas court's determination that it did not have jurisdiction to hear the petition for a writ of habeas corpus. The court, *Oliver*, *J.*, granted the motion, allowed the petitioner's counsel to file a new petition for certification, and granted the amended petition for certification to appeal on September 14, 2016.

We now turn to the state of the factual record before us. Except in other circumstances which are inapplicable here, "[i]n ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Lebron* v. *Commissioner of Correction*, 274 Conn. 507, 512, 876 A.2d 1178 (2005).

In deciding whether to sua sponte dismiss the petitioner's habeas petition, the court was required, under the circumstances of this case, to take the facts to be those alleged in the petition. See id. The facts alleged by the petitioner in his May 22, 2015 habeas petition, however, were quite sparse in regard to the issue of the court's jurisdiction. Specifically, the petitioner alleged that he was serving a sentence for two counts of witness tampering, that he was arrested in December, 2010, and was sentenced in "summer, 2011," to a total effective sentence of one year of incarceration. Because the court did not hold, and the petitioner did not request, a hearing on the issue of the court's subject matter jurisdiction, the record before us is limited to those facts alleged in the petitioner's habeas petition.

On appeal, the petitioner attempts to remedy the dearth of facts in the record by alleging the following facts in his brief to this court, most of which are not alleged in his habeas petition. Following a trial to the court, the petitioner was convicted of two counts of witness tampering in violation of General Statutes § 53a-151 (witness tampering conviction). He was sentenced on both counts on December 9, 2011 to a total effective sentence of one year of incarceration. He served his sentence from December 20, 2010 to December 19, 2011. During his sentence, however, the petitioner also was being held in lieu of bond for several other charges pending at that time. The charges stemmed from his sexual assault of a minor that occurred from 1998 to 2009 (sexual assault charges). After he completed his sentence of one year of incarceration on the witness tampering conviction, he continued to be held in lieu of bond on the sexual assault charges.

On February 16, 2012, the petitioner pleaded guilty under the *Alford* doctrine[3] to the sexual assault charges and was sentenced by the court, *Fasano*, *J.*, on May 22, 2012, to a total effective term of eighteen and one-half years incarceration and twenty-five years probation. In addition, the petitioner was granted eligible pretrial confinement credit on the sexual assault charges dating back to June 1, 2010, the date on which he was arrested on those charges. The pretrial confinement credit, however, did not include the time the petitioner was being held as a sentenced prisoner on his witness tampering conviction from December 20, 2010 to December 19, 2011.[4]

The petitioner now claims on appeal that the habeas court improperly concluded that it lacked jurisdiction

[3] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed 2d 162 (1970).

[4] See General Statutes § 18-98d (a) (1) (B).

over his petition for a writ of habeas corpus. Specifically, the petitioner claims that the court improperly failed to recognize that the custody requirement embodied in § 52-466 was satisfied because he was serving one continuous stream of sentences when he filed his petition. The petitioner argues that his continuous stream of sentences, which he deems equivalent to consecutive sentences, should be viewed as one aggregate term, and, accordingly, that he should be considered to be in custody for jurisdictional purposes on both sentences for the duration of that aggregate term. In other words, the petitioner argues that because his pretrial confinement credit that applied to the sentence on his sexual assault charges was reduced by the one year that he spent serving his witness tampering sentence, and because he has remained incarcerated on one or the other sentence since June 1, 2010, the sentences should be treated as consecutive sentences. Thus, the petitioner argues that, viewing both sentences in the aggregate, the habeas court had subject matter jurisdiction over his witness tampering conviction because he effectively was in custody on that conviction when he filed the petition, even though he had completed the one year sentence. The petitioner further argues that his claim, if successful, would shorten the length of his current confinement because the one year period for which he served his witness tampering sentence would be considered pretrial confinement credit on his sexual assault sentence, thereby effectively reducing his incarceration on the sexual assault conviction by one year.

Our Supreme Court has long held that because "[a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the

type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 532–33, 911 A.2d 712 (2006).

"A habeas court has subject matter jurisdiction to hear a petition for [a writ of] habeas corpus [if] the petitioner is in custody at the time that the habeas petition is filed." *Young* v. *Commissioner of Correction*, 104 Conn. App. 188, 191, 932 A.2d 467 (2007), cert. denied, 285 Conn. 907, 942 A.2d 416 (2008). Section § 52-466 (a) (1) provides in relevant part that "[a]n application for a writ of habeas corpus . . . shall be made to the superior court, or to a judge thereof, for the judicial district in which the person whose *custody is in question is claimed to be illegally confined or deprived of such person's liberty*." (Emphasis added.) Our Supreme Court previously has concluded that the custody requirement of § 52-466 is jurisdictional because "the history and purpose of the writ of habeas corpus establish that the habeas court lacks the power to act on a habeas petition absent the petitioner's allegedly unlawful custody." *Lebron* v. *Commissioner of Correction*, supra, 274 Conn. 526.

An exception exists, however, to the custody requirement. "A habeas petitioner who is serving consecutive sentences may challenge a *future* sentence even though he is not serving that sentence at the time his petition is filed; see *Peyton* v. *Rowe*, [391 U.S. 54, 67, 88 S. Ct. 1549, 20 L. Ed. 2d 426 (1968)]; and he may challenge a consecutive sentence served *prior* to his current conviction if success [on his petition] could advance his release date. *Garlotte* v. *Fordice*, [515 U.S. 39, 47, 115

S. Ct. 1948, 132 L. Ed. 2d 36 (1995)]. In other words, the . . . courts view prior and future consecutive sentences as a continuous stream of custody for purposes of the habeas court's subject matter jurisdiction." (Emphasis in original; internal quotation marks omitted.) *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 573, 877 A.2d 761 (2005).

In the present case, the petitioner claims that the court improperly dismissed his petition on the basis that he was not "in custody" at the time the petition was filed. The petitioner argues that the reasoning of *Garlotte* should be extended to the facts of this case and asks us to determine whether he was effectively in custody at the time he filed this petition.

We conclude that the court properly dismissed the petition because the petitioner failed to allege sufficient facts to establish the habeas court's subject matter jurisdiction to hear his petition for a writ of habeas corpus. "It is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint. . . . While the habeas court has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations . . . it does not have the discretion to look beyond the pleadings . . . to decide claims not raised." (Internal quotation marks omitted.) *Lebron* v. *Commissioner of Correction*, supra, 274 Conn 519. The party bringing the action bears the burden of proving that the court has subject matter jurisdiction. *Fink* v. *Golenbock*, 238 Conn. 183, 199, 680 A.2d 1243 (1996).

Here, the record is devoid of specific facts alleged by the petitioner that could have established the habeas

court's subject matter jurisdiction to hear his petition. Even if we were persuaded by the merits of the petitioner's argument that the reasoning of *Garlotte* should be extended to the facts of this case, the facts he alleged in his petition are insufficient to prove his claim.[5] The petitioner supports his claim on appeal with various facts regarding his sentences, dates of confinement, and pretrial confinement credit. Those facts have only been alleged by the petitioner in his brief to this court, however, and the facts were not alleged or proven before the habeas court and are otherwise not included in the record before us on appeal.[6]

The habeas court did not conduct a hearing before it dismissed the petition because, as can be determined from a review of the petition, the petitioner had not satisfied his obligation to allege sufficient facts in his pleading, which, if proved, would establish that he was in custody at the time he filed the petition. The court thus lacked jurisdiction, and the habeas court "at any time, upon its own motion," could dismiss the petition. Practice Book § 23-29. Under these circumstances, where § 23-29 did not require a hearing before dismissal, the habeas court did not have an obligation to grant a hearing to the petitioner prior to dismissing the petition. After the dismissal, and prior to his appeal, the petitioner did not file any motion or other pleading in the

[5] The petitioner did not attach court records from his other cases to his petition in this case.

[6] We decline the petitioner's request to take judicial notice of the facts underlying his claims, including the other court files that he asserts establish such facts. The petitioner had an obligation to set forth in his petition sufficient facts that, if proven, demonstrate that the habeas court had subject matter jurisdiction over his claim. He simply failed to do so. Moreover, our Supreme Court has stated: "[W]hen a court takes judicial notice of a prior case, it is not at all inclusive but is directed to specific records that must be carefully construed in the subsequent litigation." *O'Connor* v. *Larocque*, 302 Conn. 562, 568 n.6, 31 A.3d 1 (2011). We are unconvinced that it is appropriate to exercise our discretion to take judicial notice of the facts from other court records here because they have not undergone the careful scrutiny that *O'Connor* suggests is appropriate.

habeas court alleging a basis for his entitlement to a hearing. Had he done so, the habeas court, in its discretion, could have held a hearing and made factual findings regarding the issue of custody and the court's subject matter jurisdiction. Because that did not occur, the petitioner's claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.