RICHARD SANTOS *v.* COMMISSIONER OF CORRECTION
(AC 38803)

Lavine, Sheldon and Harper, Js.

Syllabus

The petitioner, who had been convicted of various crimes in connection with his alleged conduct in stabbing the victim with the assistance of an accomplice, E, sought a writ of habeas corpus, claiming that the prosecutor violated his constitutional right to due process by knowingly presenting and failing to correct false testimony given by E, and that his trial counsel provided ineffective assistance by failing to adequately advise the petitioner about the risks of testifying on his own behalf. During the petitioner's criminal trial, E, who was incarcerated at the time for his role in the stabbing of the victim, testified that he had observed the petitioner stab the victim with a knife, that the prosecutor did not offer or promise him anything in exchange for his testimony, that he was testifying of his own free will, and that his sentence would not be reduced and that he did not expect to obtain a sentence modification in exchange for his testimony against the petitioner. E admitted on cross-examination, however, that he was testifying against the petitioner because he anticipated that his sentence may be reduced in exchange for his truthful testimony. 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*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to the petitioner's claim that the prosecutor knowingly presented E's false or misleading testimony and thereby violated his right to due process; even if the prosecutor, upon reviewing E's psychiatric records, should have known that E's testimony regarding his expectation of receiving a reduction of his sentence was misleading, any error was harmless beyond a reasonable doubt, because,

even if the jury disregarded E's testimony, there was sufficient other evidence presented by the state, including testimony from the petitioner, the victim, and several other witnesses, and letters that the petitioner wrote from prison, to support the petitioner's conviction.

2. The habeas court did not abuse its discretion in denying the petition for certification to appeal as to the petitioner's claim that his trial counsel was deficient because she failed to adequately advise the petitioner about the risks of testifying on his own behalf; that court was not clearly erroneous in finding that trial counsel's performance in advising the petitioner about testifying on his own behalf was not deficient, as the habeas court credited the testimony of trial counsel and her cocounsel that they had advised the petitioner about the downsides and advantages of testifying, it discredited the petitioner's testimony that his attorneys spent a short and inadequate amount of time preparing him to testify, and it specifically found that it was the petitioner's decision to testify and that any prejudice he may have suffered was due solely to his own distrust of his trial counsel, and the court's factual findings were supported by the record.

Argued May 23—officially released October 3, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the amended petition was withdrawn in part and the matter was 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.*

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

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Rebecca A. Barry*, assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Richard Santos, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The

petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal because it improperly concluded that (1) the prosecutor in his criminal trial did not knowingly present false or misleading testimony against him,[1] and (2) his trial defense counsel did not render ineffective assistance of counsel.[2] We dismiss the appeal.

[1] The petitioner's first claim is constitutional in nature. See *State* v. *Jordan*, 314 Conn. 354, 370–71, 102 A.3d 1 (2014). "Habeas, as a collateral form of relief, is generally available to litigate constitutional issues only if a more direct route to justice has been foreclosed through no fault of the petitioner." (Internal quotation marks omitted.) *Salters* v. *Commissioner of Correction*, 141 Conn. App. 81, 87, 60 A.3d 1004, cert. denied, 308 Conn. 932, 64 A.3d 330 (2013). The petitioner asserted in his amended petition that he "did not raise this claim in any prior proceedings," and, therefore, admitted that he did not properly file this claim through a direct appeal. The respondent, however, failed to assert the affirmative defense of procedural default, and it is "[o]nly after the respondent raises the defense of procedural default in accordance with [Practice Book] § 23-30 (b) does the burden shift to the petitioner to allege and prove that the default is excused." *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 176, 982 A.2d 620 (2009). We will, therefore, review the merits of the petitioner's constitutional claim.

[2] The petitioner also claims on appeal that the habeas court improperly concluded that the trial court, *Damiani*, *J.*, did not improperly order the destruction of evidence relevant to his criminal case, namely the two knives police found in E.P.'s kitchen while they were investigating E.P.'s case, before he had the opportunity to examine and test the evidence. Specifically, he argues that the trial "court's failure to adopt adequate procedures to avoid the destruction of evidence where there are multiple codefendants violated the petitioner's right to due process." He contends that the habeas court "applied the wrong legal standard" in addressing his claim because it did not review his claim under "the [*Mathews* v. *Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)] balancing test." The respondent argues that the petitioner's claim is not reviewable because he is arguing a different claim on appeal than the one he alleged in his amended petition. Specifically, he argues that because the habeas court did not rule on the merits of the claim the petitioner now argues on appeal, and because the petitioner failed to file a motion for articulation, his claim is unreviewable. After a careful review of the record, we agree with the respondent.

"This court is not bound to consider claimed errors unless it appears on the record that the question was distinctly raised . . . and was ruled upon and decided by the court adversely to the [petitioner's] claim. . . . This court is not compelled to consider issues neither alleged in the habeas petition nor considered at the habeas proceeding . . . ." (Internal quotation marks omitted.) *Greene* v. *Commissioner of Correction*, 131 Conn. App. 820, 822, 29 A.3d 171 (2011), cert. denied, 303 Conn. 936, 36 A.3d 695 (2012); see also *Newsome* v. *Commissioner of Correction*, 109 Conn. App. 159, 165

The following facts, as found by the habeas court, and procedural history are relevant to our resolution of the petitioner's appeal. "In the early morning hours of February 3, 2007, a stabbing occurred at 79 Foster Street, a red brick crack house in Meriden [house]. The house was being rented to E.P.,[3] the so-called landlord of the premises, who had resided there for seven years. The [petitioner] had been staying in a room on the second floor for about six weeks. . . .

n.4, 951 A.2d 582, cert. denied, 289 Conn. 918, 957 A.2d 878 (2008) (declining to review petitioner's arguments because habeas court did not address arguments in memorandum of decision, and petitioner failed to file motion for articulation).

It is evident that the habeas court construed the petitioner's claim as an allegation that his right to due process was violated "by the [trial] court's destruction of evidence in its custody" rather than by "the [trial] court's failure to adopt adequate procedures to avoid the destruction of evidence." In rendering its decision, it found that the evidence presented at the habeas trial showed that the destroyed knives were not material to the petitioner's case. It also relied on this court's holding in *State* v. *Santos*, 146 Conn. App. 537, 549–52, 78 A.3d 230 (2013), aff'd, 318 Conn. 412, 121 A.3d 697 (2015), in which we held that the petitioner was not entitled to a dismissal of the charges against him or an adverse inference instruction on the basis of the destruction of the knives because he failed to show that the unavailability of the knives deprived him of due process of law. Because the petitioner is essentially arguing a new claim on appeal, we will not review the merits of his claim. See *Davis* v. *Commissioner of Correction*, 160 Conn. App. 444, 456, 124 A.3d 992 ("to the extent that the habeas court construed the petitioner's allegations in a way that the petitioner deems inaccurate or incomplete, the failure of the petitioner to clarify for the habeas court his allegations is fatal to his claim"), cert. denied, 319 Conn. 957, 125 A.3d 1012 (2015).

We also reject the petitioner's argument that this claim was preserved because he argued it in his posttrial brief to the habeas court before it rendered its decision. "Claims raised for the first time in posttrial briefs are not reviewable by the habeas court or by this court on appeal." (Internal quotation marks omitted.) *Antwon W.* v. *Commissioner of Correction*, 172 Conn. App. 843, 877, 163 A.3d 1223, cert. denied, 326 Conn. 909, 164 A.3d 680 (2017).

To the extent that the habeas court ruled on the claim presented in his amended petition, we conclude that it did not abuse its discretion in denying the petitioner's certification to appeal because we agree with the habeas court that he failed to show that the knives were material to his case and would have supported a third-party culpability defense.

[3] We refer to this individual by his initials because we discuss his privileged psychiatric records.

"Kewon Potts [victim] had been hanging out at [the house] on the afternoon of February 2, 2007, and had had an argument with the [petitioner] over what the [petitioner] perceived to be a low offer by [the victim] to buy a large crack rock. The [petitioner] apparently also had taken issue with [the victim's] poor treatment of [the victim's] girlfriend, who spent time at [the house]. . . .

"At about 1 a.m., [on February 3, 2007, the victim] was walking home from a friend's house on the corner of Foster and Lincoln Streets when he passed [the house]. E.P. and the [petitioner], who were on the porch, called out to [the victim] to come inside. [The victim] was led into the house; E.P. immediately barricaded the door. The [petitioner] pulled a folding knife that he frequently carried and began attacking [the victim], ultimately stabbing him in the head, left arm and chest. The struggle moved from the living room into the kitchen. Once there, E.P. blocked the back door, wielding a large rock as a weapon. The two men then attempted to force [the victim] into the basement. . . .

"The other persons present at [the house] became aware of the violent altercation and panicked; many fled the scene. . . .

"The [petitioner] and E.P. left quickly thereafter. E.P. went to his mother's home in New Haven. The [petitioner] went to Alberta Borelli's house, where his [friend], Mala Meekins, was staying. While there, the [petitioner] made several telephone calls in which he stated that he had stabbed someone. . . . The [petitioner] later traveled to Michigan, where he discarded the knife.

"The [petitioner] was arrested and charged, by way of substitute information, with three counts: assault in the first degree [in violation of General Statutes § 53a-59 (a) (1)], unlawful restraint in the first degree [in

violation of General Statutes § 53a-95], and possession of a dangerous instrument [in violation of General Statutes § 53-206]. . . .

"A few weeks prior to trial, Donald Light, a private investigator hired by the [petitioner], interviewed E.P. Light noted that E.P. was held at Garner Correctional Institution (Garner), which he believed housed individuals with mental health issues. Light observed that E.P. moved slowly, his speech was slow and labored, and he seemed catatonic. On the basis of Light's interview with E.P., the [petitioner] filed a motion for an in camera review of E.P.'s psychiatric records. The [trial] court granted the motion and reviewed the records." (Citation omitted; footnote added; internal quotation marks omitted.)

"[On December 3, 2008, the state began its case-in-chief against the petitioner]. During trial, E.P. was called to testify by the state. He testified that, [on April 18, 2008], he had pleaded guilty to assault in the first degree as an accessory for his role in the stabbing of the victim and was incarcerated at Garner. . . .

"E.P. further testified that on the day of the incident, he had seen the [petitioner] with what looked like a miniature hunting knife that folded up. He stated that he had seen the [petitioner] with the knife on previous occasions and that when the [petitioner] got high, he would walk around with it in his hand. E.P. stated that when the victim arrived back at the house, he opened the door for the victim and they walked toward the kitchen. There, a fight broke out between the [petitioner] and the victim, and E.P. testified that he saw the [petitioner] grab the victim and start stabbing him on the arms and in the chest with the same knife that he had seen the [petitioner] with earlier." (Internal quotation marks omitted.)

On December 10, 2008, the petitioner was found guilty by a jury of assault in the first degree, unlawful restraint in the first degree, and carrying a dangerous weapon. The trial court, *Holden*, *J.*, sentenced the petitioner to a total effective sentence of fifteen years of incarceration, which was to be suspended after twelve years, followed by three years of probation. This court subsequently affirmed his convictions on direct appeal in *State* v. *Santos*, 146 Conn. App. 537, 539, 78 A.3d 230 (2013) (*Santos I*).[4] Our Supreme Court granted certification[5] and affirmed his convictions in *State* v. *Santos*, 318 Conn. 412, 121 A.3d 697 (2015) (*Santos II*).

On February 4, 2015, the petitioner filed an amended petition for a writ of habeas corpus. The amended petition contained five claims, two of which are relevant to, and are preserved for, this appeal: (1) the prosecutor[6] in the petitioner's criminal trial violated his federal constitutional right to due process because she knowingly presented and failed to correct the false testimony of E.P., and (2) Auden Grogins, the petitioner's trial counsel, violated his federal and state rights to effective assistance of counsel by failing to adequately advise the petitioner about the risks of testifying on his own behalf.

[4] The petitioner claimed in his direct appeal that "(1) his right to confront an adverse witness was compromised by the trial court's limitations on the disclosure and use of [E.P.'s] psychiatric records, and (2) the [trial] court erred by denying his motion to dismiss or, in the alternative, his request for an adverse inference instruction, because purportedly material evidence was unavailable." *Santos I*, supra, 146 Conn. App. 539.

[5] Our Supreme Court granted the petitioner's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly conclude that the [petitioner's right] under the confrontation clause [was] not violated by virtue of the trial court's refusal to require disclosure of certain psychiatric records of the eyewitness E.P.?" (Internal quotation marks omitted.) *Santos II*, supra, 318 Conn. 415.

[6] Stacey Miranda, formerly Stacey Haupt, prosecuted the petitioner's criminal trial. She also handled E.P.'s guilty pleas, sentencing, and sentence modification. Throughout this opinion, we will refer to Miranda as "the prosecutor."

On June 16, June 17, and August 12, 2015, the habeas court, *Fuger*, *J.*, conducted a habeas trial, in which the petitioner called a number of witnesses to testify.[7] On November 19, 2015, in a memorandum of decision, the habeas court denied the petitioner's amended petition. On November 27, 2015, the petitioner filed a petition for certification to appeal, which the habeas court denied on December 8, 2015. This appeal followed. Additional facts will be set forth as necessary.

We first set forth the standard of review for the petitioner's claim that the habeas court abused its discretion in denying his petition for certification to appeal. "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 those claims satisfy one or more of the three criteria . . . ." (Internal quotation marks omitted.) *Duncan* v. *Commissioner of Correction*, 171 Conn. App. 635, 644–45, 157 A.3d 1169, cert. denied, 325 Conn. 923, 159 A.3d 1172 (2017).

[7] The day the habeas trial began, the petitioner indicated that he was withdrawing count three, certain claims in count four, and count five of his amended petition.

"The conclusions reached by the [habeas] court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the [habeas] court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous. . . . [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.) *Grant* v. *Commissioner of Correction*, 121 Conn. App. 295, 298–99, 995 A.2d 641, cert. denied, 297 Conn. 920, 996 A.2d 1192 (2010).

With these principles in mind, we now address the petitioner's substantive claims to determine whether they satisfy one or more of the three criteria.

I

The petitioner first claims that the habeas court improperly concluded that the prosecutor did not knowingly present the false or misleading testimony of E.P., and that, regardless, the state presented sufficient evidence to convict the petitioner without E.P.'s testimony.[8] We do not need to decide whether the prosecutor knowingly presented misleading testimony because we disagree with the petitioner that he suffered prejudice from any violation.

[8] The petitioner argues on appeal that the prosecutor violated both his state and his federal constitutional rights. Although it does not change our analysis, we note that he failed to allege a state constitutional violation claim in his amended petition.

The following additional facts are necessary in resolving the petitioner's claim. On April 18, 2008, due to his participation in the assault of the victim on February 3, 2007, E.P. pleaded guilty before the trial court, *Damiani, J.*, under the *Alford* doctrine[9] to aiding and abetting assault in the first degree in violation of General Statutes §§ 53a-59 (a) (1) and 53a-8.[10] In exchange for pleading guilty, the prosecutor offered to recommend that E.P. serve a sentence of fourteen years of incarceration, execution suspended after six and one-half years, followed by three years of probation. The trial court accepted E.P.'s guilty plea and scheduled his sentencing to take place on June 13, 2008.

On June 13, 2008, before Judge Damiani sentenced E.P., he explained to E.P. that if he testified against the petitioner in the petitioner's upcoming criminal trial, "the state will be agreeable to have a hearing on a motion to modify your sentence." The prosecutor interjected to clarify on the record that she "did not take into consideration anything that [E.P.] may do in the future" when offering E.P. his plea deal. The trial court sentenced E.P. in accordance with the plea agreement.

On December 4, 2008, during the petitioner's criminal trial before Judge Holden, the prosecutor called E.P. to testify. He testified that the prosecutor did not offer or promise him anything in exchange for his testimony and that he was testifying of his "own free will." On cross-examination, Grogins, the petitioner's trial counsel, attempted to impeach E.P. by questioning him about the terms of his plea agreement, but he denied that his

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

[10] E.P. also pleaded guilty under the *Alford* doctrine to conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (3) due to his participation in a robbery that took place on February 1, 2007. The circumstances of the February 1, 2007 robbery are not relevant to the present appeal.

sentence was reduced or that he expected to obtain a sentence modification in exchange for his testimony against the petitioner. After questioning E.P. about Judge Damiani's comments made during E.P.'s June 13, 2008 sentencing hearing,[11] however, E.P. admitted that he anticipated that his sentence may be reduced in exchange for his truthful testimony, and "that's why [he was] here today."

Sometime after the petitioner was convicted, E.P. filed a motion to modify his sentence. On April 21, 2009, Judge Damiani held a sentencing modification hearing to decide E.P.'s motion, and the prosecutor stated that she agreed to the hearing. The trial court granted E.P.'s motion and modified his sentence to be suspended after five years, as opposed to six and one-half years.

In the petitioner's amended petition, he alleged that E.P. testified falsely for the state when he testified that "he was not offered or promised any consideration by the prosecuting authority" and "he did not expect to receive any consideration from the prosecuting authority in exchange for his testimony," and that the prosecutor knew or should have known that E.P.'s testimony was false.

During the petitioner's habeas trial, the prosecutor testified that she did not recall offering a favorable disposition to E.P. in exchange for his testimony and that there was nothing in her files that indicated that an offer was made to E.P. She further testified that

[11] In reference to the transcript of E.P.'s June 13, 2008 sentencing hearing, Grogins asked E.P.: "So, do you deny that you were told by both the judge and the prosecutor that you could have—you agree to have a sentence modification hearing after you testified here in court today?" The prosecutor objected on the ground that "it's the [trial] court that was speaking, not the prosecutor." Outside the presence of the jury, after reviewing the transcript, Grogins conceded that it was only Judge Damiani, and not the prosecutor, who told E.P. that he may receive a sentence modification if he testified against the petitioner.

she remembered that before and during the petitioner's criminal trial, there had been some discussions pertaining to E.P.'s psychiatric records and that she had assumed that she had reviewed them before she disclosed them to Grogins. When the petitioner showed her E.P.'s records, however, she did not recognize them. On the last day of the habeas trial, the petitioner introduced into evidence a portion of E.P.'s psychiatric records from the Correctional Managed Health Care division of the University of Connecticut Health Center, dated July 31, 2008, which were in the petitioner's appellate records from his direct appeal to our Supreme Court. The records contained a quote by E.P., indicating that he stated during a session: "If I testify against my codefendant, they'll take [two] years off my sentence."

In denying the petitioner's amended petition, the habeas court rejected his claim that the prosecutor knowingly presented false testimony. In its memorandum of decision, the habeas court stated that "[t]he evidence that the petitioner stabbed the victim is clear and convincing; numerous witnesses, other than E.P., testified to that fact. The evidence supporting his conviction is more than sufficient, even if E.P.'s testimony is disregarded in its entirety. Moreover, there is really no reason to discredit E.P.'s testimony. The petitioner wishes to have this court believe that E.P. committed perjury when he said that there was no agreement with the state for leniency in exchange for his testimony against the petitioner. Unfortunately for the petitioner's argument, the evidence presented at the habeas trial is clear that there was no *explicit* agreement with the state that E.P. would receive favorable consideration in exchange for his testimony. It is true that E.P. *anticipated being rewarded* for his testimony, but this anticipation of a reward is not the same as an agreement for a reduced sentence. Had the state objected to the sentence modification filed by E.P. after his testimony,

the facts of this case are such that he would not have had an enforceable agreement with the state." (Emphasis in original.)

On appeal, the petitioner argues that the habeas court mischaracterized the petitioner's claim, asserting that he did not claim "that E.P. had an agreement with the state" but, rather, his "claim was that E.P's testimony about what he *expected* was false." (Emphasis in original.) He argues that "E.P.'s testimony misled the jury into believing that E.P. did not have a specific expectation about how his sentence would change," but "E.P. actually expected that two years would be taken off of his sentence in exchange for testifying against the petitioner." He contends that this information is evident in E.P.'s psychiatric records, and because the prosecutor reviewed his records before he testified, she knew or should have known that E.P. had a specific expectation that his sentence would be reduced by two years in exchange for his testimony against the petitioner. He contends that her failure to correct E.P.'s testimony was improper, and there was a reasonable likelihood that "the petitioner would not have been convicted but for the false testimony of E.P."

"[T]he knowing presentation of false evidence by the state is incompatible with the rudimentary demands of justice. . . . Furthermore, due process is similarly offended if the state, although not soliciting false evidence, allows it to go uncorrected when it appears. . . . [*Giglio* v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)] and [*Napue* v. *Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)] require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading. . . . A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." (Internal quotation marks omitted.) *State* v. *Goodson*, 84 Conn. App.

786, 803, 856 A.2d 1012, cert. denied, 271 Conn. 941, 861 A.2d 515 (2004). "This standard . . . is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless beyond a reasonable doubt." *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 371–72, 71 A.3d 512 (2013).

We conclude that even if the prosecutor should have known that E.P.'s testimony regarding his expectation of receiving a two year reduction of his sentence was misleading because of the quote within his psychiatric records, any error was harmless beyond a reasonable doubt. We agree with the habeas court and our Supreme Court that even if the jury disregarded E.P.'s testimony, there was sufficient evidence presented by the state to support the petitioner's conviction.

"First, there were several witnesses whose testimony corroborated that of E.P. and on which the jury could have relied in convicting the [petitioner, including the victim, Frederick Elbert, Jolie Shelton, and Meekins]. . . .

"The [petitioner's] own testimony and letters he wrote from prison provided further support for the jury's verdict. The [petitioner] testified that he and the victim had had an argument during the day of February 2, 2007, leading the victim to get upset and leave the house. When the victim returned later that night, they started arguing again and a fight broke out. The [petitioner] admitted that he had been smoking crack cocaine and drinking alcohol for a few days prior to the stabbing, including throughout the day of February 2 and into February 3, 2007. . . .

"During the course of the fight, the [petitioner] noticed that the victim was bleeding. The [petitioner] testified that he did not remember stabbing the victim,

but because he was high, he could not remember the details of the fight. He did, however, remember engaging in a fistfight with the victim, trying to avoid getting hit and trying to 'get [his] blows off.' The [petitioner] testified that his intention was to beat up the victim by punching him more times than he was punched. On cross-examination, the [petitioner] stated that when he is in a fight, he is defending his life, he is trying to win, and he will not stop until he thinks he has defeated his opponent. The [petitioner] testified that he always carried a knife for protection because he had previously been attacked. He could not remember, however, whether he had his knife with him during the fight with the victim, but admitted that he usually carried it.

"In addition to his testimony, the [petitioner] admitted writing some letters to friends about the events surrounding the stabbing, which provided additional support for the jury's verdict." *Santos II*, supra, 318 Conn. 426–28.

Because the state presented sufficient evidence to convict the petitioner beyond a reasonable doubt without E.P.'s testimony, we conclude that the habeas court did not abuse its discretion in denying his petition for certification to appeal as to this claim.

II

The petitioner's second claim is that the habeas court improperly concluded that Grogins did not render ineffective assistance of counsel because she failed to adequately advise the petitioner about the risks of testifying on his own behalf.[12] We disagree.

[12] The petitioner also alleged in his amended petition, and now claims on appeal, that Grogins was ineffective in her representation of the petitioner because she failed to adequately cross-examine, impeach, or otherwise challenge the testimony of E.P. In denying his ineffective assistance of counsel claim, the habeas court did not address this claim and stated in its memorandum of decision: "There are several areas of alleged deficient performance identified by the petitioner, however, the only one that merits discussion is the one that alleges that . . . Grogins failed to adequately prepare the

The following additional facts are relevant in resolving the petitioner's claim. During the habeas trial, the petitioner called Dean Popkin, Grogins' cocounsel for the petitioner's criminal trial. He testified that Grogins requested that he become involved in the case because the petitioner "was a very difficult individual to get along with." He testified that his general practice with respect to advising his clients on whether they should testify on their own behalf is that he "go[es] over the pros and cons" of testifying and explains "what possible areas would be covered . . . in cross-examination." He testified that he "remember[ed] believing [that the state had] a strong case against [the petitioner] . . . so it is very possible that [he] believe[d] [that the petitioner] had to get up there to give his side of the story." Although he could not recall the specific details of the conversations that took place between him and the petitioner, Popkin was sure that he followed his general practice when advising the petitioner on whether he should testify.

petitioner for his testimony." It did not make any factual findings as to whether Grogins' cross-examination of E.P. amounted to ineffective assistance of counsel or whether any alleged deficiencies in her cross-examination of E.P. prejudiced the petitioner. In his petition for certification to appeal, the petitioner did not raise the claim that the habeas court improperly failed to address this ineffective assistance of counsel claim. Instead, he asserted that the habeas court "erred by finding that the petitioner's right to the effective assistance of counsel . . . was not violated," "erred by failing to find that the . . . performance [of the petitioner's trial counsel] was not deficient," and "erred by failing to find that the petitioner was prejudiced by his trial counsel's deficient performance." "This court has declined to review issues in a petitioner's habeas appeal in situations where the habeas court denied certification to appeal, and the issues on appeal had not been raised in the petition for certification." *Kowalyshyn* v. *Commissioner of Correction*, 155 Conn. App. 384, 389, 109 A.3d 963, cert. denied, 316 Conn. 909, 111 A.3d 883 (2015). Because the petitioner failed to raise this claim in his petition for certification to appeal, we decline to review it, as "[u]nder such circumstances, the petition for certification to appeal could not have apprised the habeas court that the petitioner was seeking certification to appeal based on such issues . . . [and] [a] review of such claims would amount to an ambuscade of the [habeas] judge." (Internal quotation marks omitted.) Id., 390.

The petitioner testified that he and his attorneys had only "[s]light conversations" about whether he should testify on his own behalf. He testified that Grogins told him that he would be cross-examined by the prosecutor "but she didn't explain in detail how tough it was going to be." The petitioner admitted, however, that he did not tell Grogins his side of the story because he "didn't trust her," and that she told him to "be short [and] precise" when testifying on cross-examination. Importantly, the petitioner acknowledged that it was his decision to testify.

Finally, Grogins testified about her general practice in regard to advising clients on their right to testify. She explained that she tells every client that he or she has a right to testify, but she always explains "the downsides" of testifying, such as "impeachment, cross-examination, [and] criminal records." Grogins testified that she usually first asks her client "direct question[s] that . . . would help the theory of defense. Then [she does] a mock cross-examination, and tell[s] him [or her] what to expect with regard to impeachment, depending on what he [or she] said." Grogins could not recall what she specifically told the petitioner in preparing him to testify, but she did remember that he wanted to testify "to get his story out there." She testified that "he didn't follow [her] advice" on cross-examination "because he said too much and got into things that [she] wouldn't have gotten into . . . ."

The habeas court denied the petitioner's claim that Grogins rendered ineffective assistance of counsel. In its memorandum of decision, it explained that "[i]t is clear from the testimony of the petitioner and the comments of both his attorneys that he was a difficult client. By his own admission, he did not trust . . . Grogins, so he did not tell his side of the story to her. . . . The testimony of his attorneys is clear that he was properly advised as to his right to testify, the downsides of doing

so and the potential advantages. The petitioner is clearly the one who made the decision to take the stand on his own behalf. Given all of these factors, the task of preparing him for his testimony was made more difficult by the petitioner's own distrust and not some deficiency of performance on the part of . . . Grogins."

On appeal, the petitioner argues that Grogins failed to properly advise the petitioner about the risks of testifying because she "advised [him] that the jury would want to hear the petitioner's side of the story," even though "the most damaging testimony was elicited during the petitioner's direct examination by his own counsel." (Internal quotation marks omitted.) He also contends that Grogins failed to adequately prepare him for cross-examination. He argues that there was a reasonable probability that but for Grogins' failure to properly advise him about the risks of testifying, the outcome of the trial would have been different.

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). . . . [H]e must show . . . (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Citation omitted; internal quotation marks omitted.) *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 437, 119 A.3d 607 (2015). The habeas court in the present case addressed only the first *Strickland* prong and found that Grogins' performance was not deficient. "To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in

the criminal law. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." (Internal quotation marks omitted.) Id., 437–38.

"[Our appellate courts do] not retry the case or evaluate the credibility of the witnesses. . . . Rather, [an appellate court] must defer to the [trier of facts'] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 448, 936 A.2d 611 (2007).

We conclude that the habeas court was not clearly erroneous in finding that Grogins' performance in advising the petitioner about testifying was not deficient because all of the habeas court's factual findings are supported by the record. It credited Popkin's and Grogins' testimonies that they advised the petitioner about the downsides and advantages of testifying, and it discredited the petitioner's testimony that his attorneys spent little time preparing him to testify. Notably, it specifically found that it was the petitioner's decision to testify and that any prejudice he may have suffered was due solely to his own distrust of Grogins.

Because the petitioner failed to show that Grogins' performance was deficient, we conclude that the habeas court did not abuse its discretion in denying his petition for certification to appeal as to this claim.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* LIAM M.*
(AC 39337)

Sheldon, Keller and Bishop, Js.

Syllabus

Convicted, following a jury trial, of the crimes of assault in the second degree with a dangerous instrument and disorderly conduct, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which the complainant provided a written statement at the police station claiming that the defendant had struck her with a pipe seven hours earlier. After photographing her injuries, two officers went to the defendant's residence to question him. The defendant refused to speak with the officers and attempted to close the door, but one officer prevented him from doing so by stepping over the threshold and placing his foot at the base of the door. The defendant was arrested in the foyer of his residence and transported to the police station, where he made certain incriminating statements. The trial court denied the defendant's motion to suppress those statements, finding that the warrantless arrest did not violate either the federal or state constitutions because the officers had probable cause to effectuate the warrantless arrest and exigent circumstances had existed at the time of the arrest. On appeal, the defendant claimed that there was insufficient evidence for the jury to determine that the pipe used in the assault was a dangerous instrument pursuant to the statute (§ 53a-3 [7]) defining a dangerous instrument as any instrument capable of causing death or serious physical injury under the circumstances in which it was used. He also claimed that the trial court improperly denied his motion to suppress. *Held*:

1. The evidence was sufficient to support the defendant's conviction of assault in the second degree with a dangerous instrument, as the jury reasonably could have found that the pipe used in the assault was a dangerous instrument capable of causing serious physical injury under the circumstances in which it was used by the defendant; the defendant's description of the pipe as metal, together with the photograph of the bruise it inflicted on the complainant and a description of the manner in which it was used, created the reasonable inference that the pipe was capable of causing serious physical injury in the manner in which it was used by the defendant, and notwithstanding the defendant's claim that the evidence showed only that the pipe was capable of inflicting a bruise, the question of fact for the jury was whether the general manner

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

in which the pipe was used had the potential for causing serious physical injury, and not whether a serious physical injury actually resulted.

(*One judge dissenting*)

2. The trial court erred in denying the defendant's motion to suppress his incriminating statements to the police: the record showed that the warrantless arrest occurred inside the defendant's home, which rendered it presumptively unreasonable unless one of the established exceptions to the warrant requirement was met, and because probable cause for a warrantless arrest in the home is not an exception to the exclusionary rule under the state constitution (Conn. Const., art. I, § 7), which affords greater protection than its federal counterpart, and the state did not meet its burden of proving exigent circumstances to justify the warrantless arrest, the trial court should have excluded the defendant's incriminating, custodial statements as tainted fruit of the unconstitutional warrantless arrest; moreover, the record did not support the trial court's determination that exigent circumstances existed at the time of the arrest, as there was no evidence of a risk of danger to the complainant, who had given her statement to the police at the police station seven hours after the incident occurred, or that the defendant would either destroy evidence or flee.

Argued May 15—officially released October 3, 2017

Procedural History

Substitute information charging the defendant with the crimes of assault in the second degree with a dangerous instrument and disorderly conduct, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, where the court, *McNamara*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the matter was tried to the jury before *McNamara*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court; subsequently, the court, *McNamara*, *J.*, issued an articulation of its decision. *Reversed; new trial.*

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

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *James Dinnan*, senior assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The defendant, Liam M., appeals from the judgment of conviction, rendered after a jury trial, of assault in the second degree with a dangerous instrument in violation of General Statutes § 53a-60 (a) (2)[1] and disorderly conduct in violation of General Statutes § 53a-182 (a) (1).[2] On appeal, the defendant claims that (1) his conviction for assault in the second degree should be reversed because there was insufficient evidence for the jury to determine that a polyvinyl chloride (PVC) pipe is a dangerous instrument within the meaning of General Statutes § 53a-3 (7), and (2) the trial court erred in denying his motion to suppress incriminating statements that he made to police on the ground that such statements should have been excluded as tainted fruit of an unconstitutional arrest. We agree that the trial court erred in denying the defendant's motion to suppress, and, accordingly, we reverse the judgment of conviction as to both charged offenses.

The jury reasonably could have found the following facts. At approximately 11:30 p.m. on October 4, 2014, the complainant provided a written statement to the North Haven Police Department alleging that her husband, the defendant, had assaulted her at approximately 4:30 p.m. that day. The statement reads: "[The defendant] followed me outside to my car yelling at me and he picked up a grey PVC pipe and swung it at me and hit me in the right hip on the side of my rear. Prior to swinging the pipe he threw a piece of wood at me and

[1] General Statutes § 53a-60 (a) (2) provides in relevant part: "A person is guilty of assault in the second degree when . . . with intent to cause physical injury to another person, the actor causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm . . . ."

[2] General Statutes § 53a-182 (a) (1) provides: "A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . [e]ngages in fighting or in violent, tumultuous or threatening behavior . . . ."

I had an open umbrella in my hand and used it as a shield and the umbrella broke. After he struck me with the PVC pipe he then blocked me from entering my house so I got my keys out of my car which was in the driveway and went up the stairs to enter from the deck thr[ough] my kitchen. He followed me up yelling at me but did not strike me again. I grabbed my makeup case and left the house and got in my car and headed to work. On my way to work I called the [North] Haven police main [phone] number to see if I could file a complaint over the phone just to have it on record and was told I needed to come down here and file it in person and I said [okay] I couldn't I had to go to work. I did get to work around 5 p.m. and headed to the [North] Haven Police [Department] after work [at approximately] 11:30 [p.m.]."

After the complainant provided her written statement, the officers photographed a bruise on her right hip, which she claimed resulted from the defendant striking her with the PVC pipe. The complainant also indicated to police that there was a history of domestic violence between her and the defendant, and that he became angry and violent when drinking alcohol.

Acting on the basis of the information that the complainant provided, Officers John Gaspar and Michael DiCocco of the North Haven Police Department went to the defendant's residence to question him. The defendant answered the door to his home, but remained inside the doorway and refused to speak with the officers. The defendant then attempted to close the door to his home, but Gaspar prevented him from doing so by stepping "inside with [his] foot at the base of the door . . . ." In his testimony, Gaspar acknowledged that he needed to step over the threshold to arrest the defendant, and described the place of arrest as in "the foyer." The defendant was placed under arrest and transported to the police station by DiCocco, while

Gaspar remained at the residence to wait for the complainant to arrive home.[3]

While in custody, and after having received a *Miranda*[4] warning at 1:34 a.m., the defendant made an oral statement to DiCocco. The officer testified at trial as to the contents of the statement, stating that the defendant said that during "an argument [the complainant] was very upset. And that she had taken a metal pipe and that she was hitting him with it. [The defendant] said that he then removed it from her hands, and he told me that he struck her with it once." When DiCocco tried to question him about the incident, the defendant stated that he did not strike the complainant. The defendant was released from police custody, and was charged subsequently with assault in the second degree in violation of § 53a-60 (a) (2) and disorderly conduct in violation of § 53a-182 (a) (1).[5]

Prior to trial, the defendant filed a motion to suppress the custodial statements that he made to police indicating that he had hit the complainant with a " 'metal tube,' " on the ground that the statements were the tainted fruit of an unconstitutional, warrantless arrest under the state and federal constitutions. The court heard the testimony of Gaspar and DiCocco, and Chris Zyck, a friend of the defendant who claimed to have been present during the arrest.[6] Following the presentation of testimony, the court denied the defendant's

[3] Approximately one hour after the defendant was arrested, the complainant returned to the residence. She spoke with Gaspar, who had remained on-site, and the officer took photographs of a wooden shingle and the PVC pipe.

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

[5] On October 5, 2014, the defendant was initially charged with assault in the third degree in violation of General Statutes § 53a-61. The charge was increased to assault in the second degree in a long form information filed March 15, 2016.

[6] The court credited the testimony of the two officers, but not that of the defendant's friend. "As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's

motion to suppress, finding (1) "the officers had probable cause to effectuate a warrantless arrest of the defendant" from "the information the officers had from the [complainant]," and (2) "exigent circumstances existed at the time of the arrest." Thereafter, in their respective testimonies at trial, both the complainant and the defendant denied that the incident occurred.[7] The complainant's statement to the police was admitted as a full exhibit pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). On April 7, 2016, the jury found the defendant guilty of assault in the second degree and disorderly conduct. On June 17, 2016, the court sentenced the defendant to five years incarceration, execution suspended after three years, and two years of probation on the count of assault in the second degree, and ninety days incarceration on the count of disorderly conduct, to be served concurrently. This appeal followed.

I

We address first the defendant's claim that the evidence was insufficient to support his conviction of

assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 223, 100 A.3d 821 (2014).

[7] The complainant testified that she made a false statement because she was angry with the defendant, and filing the complaint "was just a way to get back at him." The defendant later testified that, on the morning of October 4, the complainant "had received a telephone call from one of her friends . . . and she was invited out for drinks and cocktails in the afternoon at a local establishment. And, prior to this, unfortunately, I found her in bed with another man, and I made an agreement to resolve the issue based on her not frequenting any bars or restaurants or anything like that. So . . . the agreement was I was going to leave her, divorce her if the behavior continued . . . . I told her that was it, I was going to file for divorce. I had a place to stay, my sister's residence. I was going to relocate while she did her thing. And she got very enraged and said she was going to ruin me. She knows the best way of ruining me is calling the police, because the police and I don't have a very good rapport . . . ."

assault in the second degree. Specifically, he argues that there was insufficient evidence that the PVC pipe was a dangerous instrument within the meaning of § 53a-3 (7) because "the state did not prove, and did not attempt to prove, that the . . . PVC pipe . . . in this case was capable under the circumstances in which it was used of causing 'serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ.' " We are not persuaded.

We begin by setting forth our standard of review. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Jones*, 289 Conn. 742, 754–55, 961 A.2d 322 (2008).

"A person is guilty of assault in the second degree when . . . with intent to cause physical injury to another person, the actor causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm . . . ." General Statutes § 53a-60 (a) (2). Thus, the state bore the burden of proving beyond a reasonable doubt that "(1) the defendant intended to cause physical injury to another person, (2) he did in fact cause injury to such person and (3) he did so by means of a dangerous instrument." (Internal quotation marks omitted.) *State* v. *Bosse*, 99 Conn. App. 675, 678, 915 A.2d 932, cert. denied, 282 Conn. 906, 920 A.2d 310 (2007). The defendant claims that the state failed to meet its burden with regard to the third element because there was insufficient evidence to prove that

a PVC pipe, as used in the present case, was a dangerous instrument.

Whether an instrument is a dangerous instrument is a question of fact for the jury. *State* v. *Jones*, 173 Conn. 91, 95, 376 A.2d 1077 (1977). "[F]indings of fact are entitled to great deference [on review] and will be overturned only on a showing that they were clearly erroneous." *State* v. *Moreno-Cuevas*, 104 Conn. App. 288, 291, 934 A.2d 260 (2007), cert. denied, 287 Conn. 901, 947 A.2d 344, cert. denied, 555 U.S. 947, 129 S. Ct. 400, 172 L. Ed. 2d 293 (2008). Indeed, "[i]n reviewing factual findings, [w]e do not examine the record to determine whether the [finder of fact] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the [finder of fact] . . . ." (Internal quotation marks omitted.) *Farren* v. *Farren*, 162 Conn. App. 51, 66, 131 A.3d 253 (2015), cert. denied, 320 Conn. 933, 134 A.3d 622, 623, cert. denied, U.S. , 137 S. Ct. 296, 196 L. Ed. 2d 215 (2016).

A " '[d]angerous instrument' " is defined as "any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury . . . ." General Statutes § 53a-3 (7). " 'Serious physical injury' " is defined as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ." General Statutes § 53a-3 (4).

In determining whether an instrument is dangerous, a jury may find that an ordinary object is a dangerous instrument; *State* v. *McColl*, 74 Conn. App. 545, 554, 813 A.2d 107, cert. denied, 262 Conn. 953, 818 A.2d 782 (2003); and our case law recognizes a variety of ordinary

objects as dangerous instruments in certain circumstances. See id., 555 (" 'feet and footwear' "); see also *State* v. *Leandry*, 161 Conn. App. 379, 390, 127 A.3d 1115 (hypodermic syringe), cert. denied, 320 Conn. 912, 128 A.3d 955 (2015); *State* v. *Peay*, 96 Conn. App. 421, 441, 900 A.2d 577 (defendant did not dispute that crowbar was dangerous instrument), cert. denied, 280 Conn. 909, 908 A.2d 541 (2006); *State* v. *Brooks*, 88 Conn. App. 204, 210, 868 A.2d 778 (four foot long steel pipe), cert. denied, 273 Conn. 933, 873 A.2d 1001 (2005); *State* v. *Huff*, 10 Conn. App. 330, 332, 335, 523 A.2d 906 (in trial court, defendant did not dispute that "miniature wooden baseball bat approximately sixteen inches long and two and one-half inches in diameter" was dangerous instrument), cert. denied, 203 Conn. 809, 525 A.2d 523 (1987). Thus, "[e]ach case must be individually examined to determine whether, under the circumstances in which the object is used or threatened to be used, it has the potential for causing serious physical injury." (Internal quotation marks omitted.) *State* v. *McColl*, supra, 554.

In the present case, the state presented a photograph of the PVC pipe,[8] and a photograph of the bruise on the complainant's hip, visible seven hours after the incident, which the complainant alleged was caused by the pipe. As to the character of the instrument itself, although the jury did not have the PVC pipe in evidence,[9] it had a photograph of the PVC pipe, as well as a photograph of the bruise that it caused. Additionally, the defendant

[8] The photograph depicts the PVC pipe leaning against the wall near a door and surrounded by a pile of objects. The state estimates that the pipe was five feet long and two inches wide on the basis of the photograph. Although we do not find support in the record for this precise estimate, the photograph, in the context of other objects near to the pipe, readily supports the conclusion that the pipe is in excess of four feet.

[9] There is no indication in the record as to why the PVC pipe was not taken into custody and offered as an exhibit at trial.

himself described the pipe as " 'metal.' "[10] Thus, even though there was no testimony as to the rigidity or weight of the pipe, the defendant's description of the pipe, together with the bruise inflicted by it, reasonably created the inference that the pipe was capable of causing serious physical injury in the manner in which it was used by the defendant.[11]

The defendant asserts that "the evidence showed only that the [PVC] pipe was capable of inflicting a bruise." In making this claim, the defendant conflates the actual harm done with the potential harm created by his conduct. Significant to our analysis is the notion, embedded in § 53a-3 (7), that an instrument may be characterized as dangerous on the basis that it is capable of causing serious physical injury by the manner in which it is used apart from the actual injury that may have been inflicted. See *State* v. *Jones*, supra, 173 Conn. 95. Thus, the question is not whether a serious injury ensued but, rather, whether the defendant's general manner of using the instrument created the risk of such an injury. Our focus on the complainant's bruise constitutes only a part of our analysis.

Indeed, "it is not necessary . . . under the definition of a dangerous instrument, that any physical injury actually have been inflicted." *State* v. *Jones*, supra, 173 Conn. 95. Rather, as this court has previously opined, for an instrument to be found to be dangerous it "need only be used in a manner capable of causing serious injury under the circumstances. Hence, the analysis

[10] The jury heard conflicting testimony concerning the material of the PVC pipe. The jury heard that, in his statement to police, the defendant described the pipe as " 'metal.' " Gaspar, on the other hand, described the PVC pipe as "grey plastic."

[11] Although we determine in part II of this opinion that the defendant's statement should have been excluded, in determining the sufficiency of the evidence, we look to both the properly and improperly admitted evidence at trial. *State* v. *Ricketts*, 140 Conn. App. 257, 261 n.1, 57 A.3d 893, cert. denied, 308 Conn. 909, 61 A.3d 531 (2013).

focuses on the actual circumstances in which the instrument [was] used in order to consider the instrument's potential to cause harm. . . . The statute neither restricts the inquiry to the exact manner in which the object was actually used, nor requires any resulting serious physical injury. . . . *The facts and circumstances need show only that the general way in which the object was used could potentially have resulted in serious physical injury.*" (Emphasis added; internal quotation marks omitted.) *State* v. *Brooks*, supra, 88 Conn. App. 209–10.

Accordingly, in assessing whether the jury had sufficient evidence to conclude that the instrument used by the defendant was a dangerous instrument, we look not only to the character of the instrument itself but also to the general manner in which it was used together with the resulting injury. In addition to the photographs described previously, the state presented evidence of the complainant's statement, in which she alleged that the defendant "swung" the PVC pipe at her, and struck her on her "right hip on the side of [her] rear." The jury also heard DiCocco's testimony that the defendant said he " 'struck' " the complainant with a " 'metal tube.' " Thus, the jury was presented with evidence of the type of instrument, the manner in which the instrument was used, and the injury that resulted from the defendant's use of the instrument.

In sum, in undertaking the fact intensive question of whether the PVC pipe was a dangerous instrument, the significant inquiry for the jury was not whether a serious physical injury actually resulted, but whether the general manner in which the PVC pipe was used—swinging the PVC pipe at the complainant and striking her—had the potential for causing serious physical injury. See *State* v. *Brooks*, supra, 88 Conn. App. 209–10; see also *State* v. *Jones*, supra, 173 Conn. 95. "[D]raw[ing] reasonable inferences from the evidence . . . [and] bring[ing]

to bear its common sense and experience of the affairs of life"; (internal quotation marks omitted) *State* v. *Hurdle*, 85 Conn. App. 128, 142, 856 A.2d 493, cert. denied, 271 Conn. 942, 861 A.2d 516 (2004); the jury determined that the PVC pipe was a dangerous instrument.[12]

After thoroughly reviewing the record, we cannot conclude that the jury's determination was factually unsupported. On the basis of the evidence, viewed in the light most favorable to sustaining the verdict, we conclude that the jury reasonably could have found that the PVC pipe, under the circumstances in which it was used by the defendant, was a dangerous instrument capable of causing serious physical injury. Accordingly, the evidence was sufficient to support the defendant's assault conviction.

II

We next address the defendant's claim that the court erred in denying his motion to suppress his incriminating statements to the police because his warrantless arrest inside his home violated his constitutional rights under the fourth amendment to the United States constitution and article first, § 7, of the constitution of Connecticut. Specifically, the defendant argues that no exigent circumstances existed to justify his warrantless arrest, and, thus, the court should have excluded from

[12] Furthermore, in addition to the elements for assault in the second degree, the jury instructions also included the elements for the lesser included offense of assault in the third degree, which does not require use of a dangerous instrument. "[D]raw[ing] whatever inferences from the evidence or facts established by the evidence it deem[ed] to be reasonable and logical"; *State* v. *Jones*, supra, 289 Conn. 755; the jury found the defendant guilty of assault in the second degree, and not the lesser offense. This court will "not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record . . . ." (Internal quotation marks omitted.) *State* v. *Ovechka*, 292 Conn. 533, 547, 975 A.2d 1 (2009). Rather, we "construe the evidence in the light most favorable to sustaining the verdict." (Internal quotation marks omitted.) Id.

the evidence at trial his incriminating, custodial statements as tainted fruit of the unconstitutional arrest. We agree.

"Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . . We undertake a more probing factual review when a constitutional question hangs in the balance." (Internal quotation marks omitted.) *State* v. *Owen*, 126 Conn. App. 358, 363, 10 A.3d 1100, cert. denied, 300 Conn. 921, 14 A.3d 1008 (2011).

"Well known federal and state constitutional principles govern the exclusion of evidence derived from a warrantless entry into a home. The fourth amendment to the United States constitution provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (Footnote omitted.) *State* v. *Geisler*, 222 Conn. 672, 681, 610 A.2d 1225 (1992). Article first, § 7, of the constitution of Connecticut provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

"[S]earches and seizures inside a home without a warrant are presumptively unreasonable." *Payton* v. *New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Thus, "[i]t is axiomatic that the police may not enter the home without a warrant or consent, unless one of the established exceptions to the warrant requirement is met. Indeed, [p]hysical entry of the home is the chief evil against which the wording of the fourth amendment is directed." (Internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 224, 100 A.3d 821 (2014).

To discourage warrantless arrests, "the exclusionary rule bars the government from introducing at trial evidence obtained in violation of the fourth amendment to the United States constitution. . . . The rule applies to evidence that is derived from unlawful government conduct, which is commonly referred to as the fruit of the poisonous tree . . . . [A]rticle first, § 7, of the Connecticut constitution similarly requires the exclusion of unlawfully seized evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Brocuglio*, 264 Conn. 778, 786–87, 826 A.2d 145 (2003).

The exclusionary rule under the state constitution affords greater protection to individuals than its federal counterpart. Under the federal standard, statements made outside of the home incident to an illegal warrantless home arrest need not be excluded when the officers had probable cause to make the warrantless arrest. See *New York* v. *Harris*, 495 U.S. 14, 20–21, 110 S. Ct. 1640, 1644, 109 L. Ed. 2d 13 (1990); see *State* v. *Geisler*, supra, 222 Conn. 682. "[A]rticle first, § 7 [of the constitution of Connecticut, however] requires that evidence derived from an unlawful warrantless entry into the home be excluded unless the taint of the illegal entry is attenuated by the passage of time or intervening circumstances." *State* v. *Geisler*, supra, 690. In sum, the exclusionary rule, in the context of Connecticut's

constitutional protection against warrantless arrests in the home, does not contain a probable cause exception akin to its federal constitutional counterpart.

In the present case, the record clearly reflects that a warrantless arrest occurred inside the defendant's home. Gaspar testified that the defendant "attempted to close the door to prevent the arrest. So, [Gaspar] stepped inside with [his] foot at the base of the door to prevent [the defendant] from closing it . . . ." He further testified that the arrest took place in the foyer. Such a warrantless arrest can only be effectuated if an exception to the warrant requirement exists. In its articulation of its denial of the motion to suppress, the trial court determined that "exigent circumstances existed at the time of the arrest" to support the warrantless arrest.[13] The record does not support such a finding.

[13] The state asserts that the defendant's claim as to the lack of exigent circumstances is moot because he challenges only one of three bases on which the court's ruling on the motion to suppress could be affirmed. In furtherance of this argument, the state claims that, in addition to exigent circumstances, (1) "the officers had probable cause to effectuate a warrantless arrest of the defendant," and (2) "based on [an] attenuation analysis . . . the defendant's 'statements were not subject to exclusion [and] were properly entered.' " (Internal quotation marks omitted.) We are not persuaded.

As noted, under the constitution of Connecticut, the existence of probable cause alone does not allow for the admission of statements made following a warrantless arrest within a defendant's place of abode. Additionally, the record reflects that the court made no attenuation analysis in either its oral ruling or its written articulation. We also reject the state's claim that an attenuation analysis can be inferred from the court's findings. "The factors to be considered in determining whether the statement of an accused is sufficiently attenuated from the original illegality to cleanse it of its taint are (1) whether *Miranda* warnings had been issued, (2) the temporal proximity of the illegal police action and the statement, (3) the presence of intervening circumstances, and (4) the purpose and flagrancy of the official misconduct." *State* v. *Brunetti*, 279 Conn. 39, 73, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007). Although the court did note that the defendant had received a *Miranda* warning prior to making his statement, the court did not analyze any of the other three attenuation factors. In sum, the court made no finding of attenuation—

Exigent circumstances refers to "those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure, for which probable cause exists, unless they act swiftly and, without seeking prior judicial authorization." (Internal quotation marks omitted.) *State* v. *Guertin*, 190 Conn. 440, 447, 461 A.2d 963 (1983). Three categories of exigent circumstances exist: "those that present a risk of danger to human life; the destruction of evidence; or the flight of a suspect." *State* v. *Kendrick*, supra, 314 Conn. 227. The exception is further limited by the context of the situation, and "[c]ircumstances which may be regarded as sufficiently exigent for a warrantless entry into an automobile may not be sufficient for a warrantless entry into a home." *State* v. *Guertin*, supra, 447.

"[W]hen there are reasonable alternatives to a warrantless search, the state has not satisfied its burden of proving exigent circumstances." (Internal quotation marks omitted.) Id., 449. Indeed, given the strengthened protections that the constitution of Connecticut grants to its citizens under article first, § 7, and that the "exceptions [to the warrant requirement] have been jealously

either expressly or impliedly. Indeed, the record would not support such a finding. We note that the timing between the defendant's arrest and his custodial statements is similar to the interval found in *Geisler*, where our Supreme Court, on review, found that: "the time between the defendant's arrest in the home and the defendant's station house statements . . . was minimal. . . . Furthermore, there were no intervening circumstances to break the causal connection between the warrantless entry into the home and the evidence in question." (Internal quotation marks omitted.) *State* v. *Geisler*, supra, 222 Conn. 683–84. In the present case, the defendant was arrested after midnight, the police read him his *Miranda* rights as part of the booking process at 1:34 a.m., and the defendant made incriminating, custodial statements to police sometime after he received his *Miranda* warnings. There was no evidence of intervening circumstances to break the causal connection between the defendant's warrantless arrest and his subsequent custodial statements. Because the defendant challenged the court's ruling as to probable cause and exigent circumstances, the only two bases relied upon by the court in ruling on the motion to suppress, the defendant's argument is not moot.

and carefully drawn"; (internal quotation marks omitted) *State* v. *Owen*, supra, 126 Conn. App. 364; a warrantless arrest must be limited to situations that permit it. This was not such a situation.

In the present case, the complainant gave her statement to police approximately seven hours after the incident occurred, a lapse of time which, itself, belies any claim of urgency in effectuating the defendant's arrest. Once the complainant gave her statement to the police, several hours after the incident, she did indicate that she intended on returning to the residence that evening, but she was at the police station at the time of her statement. Under that circumstance, the police readily could have instructed the complainant to remain at the station until they obtained a warrant for the defendant's arrest. Instead, the police proceeded to the residence, arrested the defendant, and waited for the complainant to return home.

In sum, the court heard no evidence of a risk of danger to human life, destruction of evidence, or flight of the suspect to justify a warrantless arrest. Accordingly, the state did not meet its burden of establishing the existence of exigent circumstances in order to justify the warrantless arrest of the defendant. See *State* v. *Guertin*, supra, 190 Conn. 447. Finally, the record does not support the finding that the officers would have been unable to arrest the defendant unless they acted swiftly and without a warrant; see id.; and, thus, the defendant's warrantless arrest violated his state constitutional rights. Because the defendant's custodial statements were borne of an illegal arrest under article first, § 7, of the constitution of Connecticut, the statements must be excluded as tainted "fruit of the poisonous tree." (Internal quotation marks omitted.) *State* v. *Brocuglio*, supra, 264 Conn. 786. Accordingly, the trial

court erred in denying the defendant's motion to suppress.[14]

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

In this opinion KELLER, J., concurred.

SHELDON, J., concurring in part and dissenting in part. I agree with the majority's conclusion that the court erred in denying the motion to suppress filed by the defendant, Liam M., and thus that his conviction for disorderly conduct must be reversed and remanded for a new trial. However, I respectfully disagree with the majority's determination that the evidence presented at trial was sufficient to support the defendant's conviction for assault in the second degree. More specifically, I do not agree that the evidence was sufficient to prove that the plastic polyvinyl chloride (PVC) pipe[1] used by the defendant to strike the complainant was a dangerous instrument, because the pipe was not shown to be capable, when used as the defendant allegedly used it—

[14] "[M]ost constitutional violations are subject to . . . harmless error review"; *State* v. *Artis*, 314 Conn. 131, 153, 101 A.3d 915 (2014); and "the state bears the burden of proving that the constitutional impropriety was harmless beyond a reasonable doubt." *State* v. *Brown*, 279 Conn. 493, 511, 903 A.2d 169 (2006). In the present case, the state makes no argument that the admission of the defendant's statement, if erroneous, was harmless beyond a reasonable doubt as to either or both convictions. Because the state bears the burden of demonstrating harmlessness in this circumstance, and in light of the absence of such an argument, we do not undertake an unbidden harmless error analysis on review.

[1] Although the defendant described the PVC pipe at one point as a " 'metal tube,' " the state consistently at trial represented that the PVC pipe was plastic. In addition to the testimony of Officer Gaspar of the North Haven Police Department that the PVC pipe was plastic, the state's attorney told the jury during closing argument that "PVC piping is a hard plastic used often times in plumbing." Although the defendant's single description of the pipe as a " 'metal tube' " may reveal the defendant's perception of the heft or rigidity of the pipe, the record is bereft of any actual description of the weight of the pipe.

to swing once at the complainant with sufficient force to cause a bruise on her hip—of causing death or serious physical injury.

A " '[d]angerous instrument' " is defined by statute as "any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury . . . ." General Statutes § 53a-3 (7). " 'Serious physical injury,' " in turn, is defined as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ." General Statutes § 53a-3 (4). Serious physical injury is not merely an aggravated form of pain. See *State* v. *Milum*, 197 Conn. 602, 619, 500 A.2d 555 (1985) (pain is not concept embodied in statutory definition of serious physical injury).

In light of the foregoing definitions, a fact finder called upon to determine if an object used to inflict physical injury upon a victim was a dangerous instrument must evaluate its particular injury causing potential in the "circumstances in which it [was] *actually* used . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Leandry*, 161 Conn. App. 379, 389, 127 A.3d 1115, cert. denied, 320 Conn. 912, 128 A.3d 955 (2015). Our case law reveals that such an evaluation appropriately involves consideration of several interrelated factors, including: the physical characteristics of the alleged dangerous instrument, as they relate to the object's potential to cause serious physical injury when used as the defendant actually used it; the manner in which the alleged dangerous instrument was actually used by the defendant to injure the victim, including the force and frequency of its use and the parts of the victim's body against which it was used; and the victim's special vulnerability, if any, to serious

physical injury when an object with such physical characteristics is used as the defendant actually used it to inflict physical injury upon her. See, e.g., id., 390 (hypodermic syringe that was potentially contaminated with blood-borne pathogen constituted dangerous instrument when used to stab victim); *State* v. *McColl*, 74 Conn. App. 545, 557, 813 A.2d 107 (" 'feet and footwear' " were dangerous instrument when used to kick victim because of size of defendant, age and health condition of victim, location of kicking on victim's body, and number and force of kicks, as intensified by weight of footwear), cert. denied, 262 Conn. 953, 878 A.2d 782 (2003); *State* v. *Vuley*, 15 Conn. App. 586, 588–89, 545 A.2d 1157 (1988) (hard object used to strike victim several times on head was dangerous instrument because when used, it felt like "solid piece" and "pipe," and such use resulted in loss of victim's sight for several moments, hematoma and lacerated scalp that required seven stitches to close [internal quotation marks omitted]); *State* v. *Johnson*, 14 Conn. App. 586, 595–96, 543 A.2d 740 (shod foot held to be dangerous instrument where defendant's act of kicking victim with it, while victim was lying on his stomach with left side of his face on ground and hands cuffed behind his back, was variously described as "a good solid kick that sounded like an arm breaking . . . picking up his foot and bringing it down on the victim's right temple, cheek and forehead; and as taking a step and kicking the victim in the head"), cert. denied, 209 Conn. 804, 548 A.2d 440 (1988); *State* v. *Frazier*, 7 Conn. App. 27, 39–40, 507 A.2d 509 (1986) (key was dangerous instrument when used to inflict abrasions and lacerations to victim's neck and face, where medical testimony was presented as to potential for serious injury to victim's blood vessels, larynx and trachea to result from such attack); *State* v. *Levine*, 39 Conn. Supp. 494, 498, 466 A.2d 814 (1983) (hose and nozzle used "in a whip-like fashion" to strike victim on head held to be dangerous instrument).

In this case, the jury received very little evidence about the physical characteristics of the plastic PVC pipe the defendant used to strike the complainant's hip. The pipe was not seized by investigating police officers, nor was it otherwise produced and admitted into evidence. Thus, although a police photograph of the pipe at the scene of the assault was introduced, from which its external dimensions could be viewed and estimated by comparing them to those of other objects depicted in the photograph, no evidence was presented as to its other, potentially more significant injury producing characteristics, such as its weight or its density.

Nor was any evidence presented as to the "circumstances in which [the pipe was] actually used"; *State* v. *Leandry*, supra, 161 Conn. App. 389; apart from testimony that it was swung once, not repeatedly, striking the complainant's buttocks with sufficient force to cause a bruise where it struck her hip. There was, it must be added, no evidence that the defendant threatened to use the pipe in any manner, or that he attempted to use it in some way other than swinging it in such a manner as to strike and cause a bruise on the complainant's hip. Thus, for example, the evidence did not show that he swung the pipe at the complainant more than once; or that he swung it at or near a different part of her body, where it might have caused more serious harm than a bruise; or that he swung it at her wildly, in such a manner as to make possible the striking of a different, more sensitive or vulnerable part of her body, thus potentially causing a serious physical injury. Furthermore, apart from a photograph of the bruise on the complainant's hip that resulted from that single swing, there was no evidence as to the amount of force with which the plastic PVC pipe was used to strike her. Of course, it is possible to imagine other scenarios in which the use of a PVC pipe might be shown capable of causing serious physical injury, such as a single blow to the

eyes, nose or ears that might be shown capable of causing serious disfigurement, or multiple blows to other, more vulnerable or sensitive body parts, such as the head, the genitals or the abdomen, that might be shown capable of causing serious loss or impairment of the function of a bodily organ. However, the theoretical existence of other possible uses of a PVC pipe that could have caused the complainant serious physical injury, thus supporting a finding that the PVC pipe is a dangerous instrument, provides no basis for making such a finding in this case, where the evidence does not show that the defendant actually engaged in any such conduct.

The complainant, of course, did not actually sustain a serious physical injury. Although the actual infliction of serious physical injury is not required to prove that an object used to inflict injury was a dangerous instrument, the lack of such an injury in this case obviously deprived the jury of any basis for inferring the pipe's injury producing potential from the injury alone. The state did not present any medical testimony as to the potential injurious consequences of striking the average person with a plastic PVC pipe of the type here used, much less the particular susceptibility of this complainant to suffering serious physical injury when struck once in the buttocks with such a pipe, as she was. See, e.g., *State* v. *McColl*, supra, 74 Conn. App. 556 (in determining whether " 'feet and footwear' " were dangerous instrument, this court considered vulnerability of victim, who was seventy-one years old and had heart condition, and medical testimony presented that part of body that defendant repeatedly kicked contains several vital organs, including lungs and kidneys, as to which older person, when kicked repeatedly, could suffer serious internal injuries or death). Other than having the opportunity to observe both the complainant and the defendant when they testified, and to see the complainant's bruise in the photograph that was admitted into evidence, the jury had no basis for inferring

the ultimate potential of the pipe to cause her serious physical injury when used as the defendant used it here.

In conclusion, our law concerning dangerous instruments is clear that an "object's potential for injury . . . must be examined only in conjunction with the circumstances in which it is actually used or threatened to be used, and not merely viewed in terms of its dangerous capabilities in the abstract." (Internal quotation marks omitted.) *State* v. *Leandry*, supra, 161 Conn. App. 389. Here, at most, the jury could have found that the defendant swung a plastic PVC pipe at the complainant once, striking her in the buttocks and causing a bruise to her hip. I do not believe that such evidence was sufficient to support the jury's finding, as required for a conviction of assault in the second degree, that the PVC pipe the defendant used to strike the complainant was, as used, a dangerous instrument.

On the basis of the foregoing, I would reverse the defendant's conviction for assault in the second degree, and remand this case to the trial court with direction to render a judgment of acquittal on that charge and to afford the defendant a new trial on the charges of disorderly conduct, as the majority hereby orders, and on the lesser included offense of assault in the third degree, on which a judgment of conviction would otherwise enter, in the absence of other trial error, upon the defendant's acquittal of assault in the second degree.

CITIMORTGAGE, INC. *v.* RICHARD TANASI ET AL.
(AC 39037)

Alvord, Prescott and Kahn, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendants C and T. After execution and delivery of the

note underlying that mortgage, the plaintiff entered into an agreement selling the debt of C and T to a second bank, H Co. Under the terms of the agreement, the plaintiff agreed to service the debt for H Co. and was authorized to institute foreclosure proceedings on H Co.'s behalf. C and T subsequently failed to make the required monthly payments and the plaintiff commenced the present action alleging, inter alia, that it was the holder of the note. Attached to the complaint was a copy of the note, endorsed in blank. After the trial court denied a motion to strike the foreclosure related prayers for relief from the complaint filed by C and T, it granted the plaintiff's motion for summary judgment as to liability. Thereafter, C and T filed a motion to dismiss, claiming that the plaintiff lacked standing to foreclose because the plaintiff did not own the debt and had not been given authority to foreclose by H Co. In response, the plaintiff produced a copy of the agreement, which had also been provided to C and T previously during mediation. C and T were given the opportunity to review the agreement during a one hour recess, and the provision of the agreement granting the plaintiff the authority to foreclose was read into the record. The court subsequently denied the motion to dismiss and rendered a judgment of strict foreclosure in favor of the plaintiff, from which C and T appealed. *Held*:

1. The trial court properly denied C and T's motion to dismiss, as the plaintiff had standing to foreclose on behalf of H Co.; the plaintiff having provided the court with a copy of the agreement at the hearing on the motion to dismiss, and the relevant portions of the agreement having been read into the record and considered by the court, the record was adequate to review the question of whether the agreement gave the plaintiff the authority to foreclose, and the plain and unambiguous language of the agreement provided the plaintiff, as the holder of the note endorsed in blank, with authority to foreclose on behalf of H Co., the owner of the note.
2. C and T could not prevail on their claim that the plaintiff should be judicially estopped from proceeding under a theory that H Co. owned the debt; the plaintiff's introduction of the agreement was not untimely but, rather, was responsive to the attempt by C and T to meet their burden of rebutting the presumption of ownership afforded to the plaintiff as a holder of the note, C and T were provided with ample opportunity to review the agreement, and they failed to demonstrate that they were prejudiced by the introduction of the agreement during the hearing on the motion to dismiss.
3. C and T could not prevail on their claim that the trial court erred by failing to dismiss the foreclosure action, with prejudice, on the basis of fraud; under the relevant burden shifting framework, the plaintiff was presumed to be the owner of the debt when it produced the note endorsed in blank and had no burden of proving ownership, but once that presumption was challenged by C and T, the plaintiff had the burden to demonstrate that it owned the debt or had the authority from the

owner of the note, H Co., to foreclose, and, therefore, it was not fraudulent for the plaintiff to demonstrate that it had authority to foreclose on behalf of H Co. in response to the motion to dismiss filed by C and T.

Argued June 1—officially released October 3, 2017

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., brought to the Superior Court in the judicial district of Middlesex, where the court, *Domnarski*, *J.*, denied the motion to strike filed by the named defendant et al.; thereafter, the defendant PNC Bank, National Association, was defaulted for failure to appear; subsequently, the court, *Aurigemma*, *J.*, granted the plaintiff's motion for summary judgment as to liability; thereafter, the court, *Aurigemma*, *J.*, denied the motion to dismiss filed by the named defendant et al.; subsequently, the court, *Aurigemma*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant et al. appealed to this court; thereafter, the court, *Aurigemma*, *J.*, issued an articulation of its decision. *Affirmed.*

Christopher G. Brown, for the appellants (named defendant et al.).

Donald E. Frechette, with whom was *Tara Trifon*, for the appellee (plaintiff).

Opinion

KAHN, J. The defendants, Richard Tanasi and Athanasula S. Casberg Tanasi,[1] appeal from the judgment of strict foreclosure rendered by the court in favor of the plaintiff, CitiMortgage, Inc. The defendants claim that the court erred in denying their motion to dismiss the

[1] Although the complaint also named PNC Bank, National Association, as a defendant, it did not appear before the trial court and has not participated in this appeal. We, therefore, refer in this opinion to Tanasi and Casberg Tanasi as the defendants.

foreclosure action because the plaintiff (1) lacked standing to commence foreclosure proceedings, (2) improperly relied on a document as a basis for standing, and (3) committed fraud warranting dismissal of the action with prejudice. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts are relevant to our resolution of this appeal. On August 2, 2007, the defendants executed and delivered a note in the principal amount of $656,250 to ABN AMRO Mortgage Group, Inc. (Mortgage Group), which was secured by a mortgage on real property known as 27 Briarwood Drive in Old Saybrook. In late August 2007, the plaintiff acquired Mortgage Group by merger. In November, 2007, the plaintiff entered into a "Master Mortgage Loan Purchase and Servicing Agreement" (agreement) with Hudson City Savings Bank (Hudson). Under the agreement, Hudson purchased certain mortgage loans from the plaintiff, including the defendants' loan. The agreement identifies Hudson as the "[i]nitial [p]urchaser" and the plaintiff as the "[s]eller and [s]ervicer." The plaintiff possessed the original note, endorsed in blank, at the time of the commencement of the foreclosure action. When the defendants failed to make the required monthly payments on the loan, the plaintiff sent the defendants a notice of default. The defendants subsequently failed to cure their default, and the plaintiff accelerated the sums due under the note. The plaintiff commenced a foreclosure action in July, 2011, and alleged in its complaint that it "is the holder of [the defendants'] [n]ote and [m]ortgage."

The parties proceeded to mediation. It is not disputed that, during mediation, the plaintiff provided the defendants with a copy of the agreement. After participating in fourteen court-annexed mediation sessions, the plaintiff filed a motion to terminate the mediation stay, which the court granted.

On April 10, 2013, the defendants filed a motion to strike the foreclosure related prayers for relief in the complaint, arguing that ownership of the debt is an essential allegation of an action for foreclosure of a mortgage and that the plaintiff failed to allege ownership of the debt in its complaint. The court denied the motion.

On June 2, 2014, the plaintiff filed a motion for summary judgment as to liability only. The plaintiff attached an affidavit of Glenna S. Feeley, the vice president of document control for the plaintiff, to its memorandum of law in support of its motion for summary judgment. In the affidavit, Feeley stated that in August, 2007, Mortgage Group merged into the plaintiff, that the rights under the mortgage were assigned to the plaintiff, and that the plaintiff is the holder of the note and mortgage. The plaintiff also attached a 2007 certificate of merger and a copy of the defendants' note, which was endorsed in blank. The defendants filed an objection to the motion for summary judgment. The court concluded that the uncontested evidence presented by the plaintiff established that the plaintiff possessed the original note at the time of the commencement of foreclosure proceedings, and that the note was endorsed in blank by the original lender. The court concluded that the plaintiff was the holder of the note, that the note was in default, and that the plaintiff was entitled to summary judgment as to liability as a matter of law.

On July 23, 2015, the defendants filed a motion to dismiss the foreclosure action for lack of subject matter jurisdiction. At the November 30, 2015 hearing on the motion to dismiss, the defendants' counsel argued that the plaintiff lacked standing to foreclose because the defendants had rebutted the presumption of ownership, and the plaintiff did not have authority from the note's owner to foreclose. In response to the defendants' challenge to the presumption of ownership, the plaintiff

provided the court and the defendants' counsel with unredacted copies of the agreement and an affidavit authenticating it. The plaintiff asserted that it was the holder of the note, not the owner, and that the agreement provided that the owner of the note, Hudson, had vested the plaintiff with the right to institute foreclosure proceedings when the plaintiff deemed reasonable. The defendants' counsel objected on the ground that the agreement had not previously been filed and that he had "never seen it before."[2] The plaintiff's counsel stated that the agreement was sensitive because it contained proprietary information and, thus, would need to be filed under seal. The court granted the plaintiff's oral motion to file the document under seal.

The court recessed for one hour to provide the defendants with an opportunity to review the agreement. The court also noted that it would take the agreement under advisement. When the hearing reconvened, the court informed the plaintiff's counsel that she would have to file a written motion if she wanted to have the agreement placed under seal. The court then heard argument from both sides relating to the terms of the agreement. The plaintiff's counsel explained that § 10.01 of the agreement provided that the plaintiff "is hereby authorized and empowered by [Hudson] . . . when [the plaintiff] believes it is appropriate and reasonable in its judgment . . . to institute foreclosure proceedings . . . ." The defendants cited other sections of the agreement in an attempt to refute the plaintiff's authority to foreclose. Following the hearing, the court issued an order summarily denying the defendants' motion to dismiss. On December 3, 2015, the plaintiff filed a motion to seal the agreement. The court granted the motion to seal.

[2] At oral argument before this court, the defendants' counsel conceded that the agreement had been provided to the defendants during mediation.

On March 7, 2016, the court granted the plaintiff's motion for a judgment of strict foreclosure. This appeal followed. Following the filing of the appeal, the defendants filed a motion for articulation of the denial of their motion to dismiss, which the court denied. The defendants then filed a motion for review with this court, and this court granted the motion and the relief requested therein.

The trial court filed an articulation stating its reasons for denying the defendants' motion to dismiss. In its articulation, the court rejected the defendants' argument that the plaintiff was judicially estopped from asserting anything other than owner status, reasoning that the plaintiff never claimed to be the owner of the note and, thus, the judicial estoppel claim was moot. Likewise, the court rejected the defendants' argument that the plaintiff was bound by its alleged invocation of the presumption of ownership. The court concluded that "the defendants failed to set up and prove the facts which limit or change the plaintiff's rights . . . . Therefore, the argument that the plaintiff was estopped from rebutting the presumption of ownership was baseless." (Internal quotation marks omitted.) The court also found that nothing in the record substantiated the defendants' claim that the plaintiff perpetrated fraud by failing to inform the court that it did not own the debt.

The following jurisprudence on standing in foreclosure matters is relevant to our resolution of the defendants' claims. "The ability to enforce a note in Connecticut is governed by the adopted provisions of the Uniform Commercial Code. Pursuant to General Statutes § 42a-3-301, a [p]erson entitled to enforce an instrument means . . . the holder of the instrument . . . . When a note is endorsed in blank . . . the note becomes payable to the bearer . . . . See General Statutes § 42a-3-205 (b); see also *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 231, 32 A.3d 307

(2011), overruled in part on other grounds by *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 325 n.18, 71 A.3d 492 (2013). When a person or entity has possession of a note endorsed in blank, it becomes the valid holder of the note. General Statutes § 42a-1-201 (b) (21) (A). Therefore, a party in possession of a note, endorsed in blank and thereby made payable to its bearer, is the valid holder of the note, and is entitled to enforce the note. . . .

"In *RMS Residential Properties, LLC* v. *Miller*, supra, 303 Conn. 231, our Supreme Court stated that to seek enforcement of a note through foreclosure, a holder must be able to demonstrate it is the owner of the underlying debt. It noted, however, that a holder of a note is presumed to be the rightful owner of the underlying debt, and that unless the party defending against the foreclosure action rebuts that presumption, the holder has standing to foreclose. . . . A holder merely needs to produce the note to establish that presumption. The production of the note establishes his case prima facie against the [defendant] and he may rest there. . . . It [is] for the defendant to set up and prove the facts which limit or change the plaintiff's rights." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Schaeffer*, 160 Conn. App. 138, 146–47, 125 A.3d 262 (2015).

"[I]f a defendant in a foreclosure action [is] able to demonstrate that the debt [is] owned by a party other than the one bringing the foreclosure action, or by other means [is] able to rebut the presumption that the holder of the note was the owner of the debt, the result [is] not an automatic dismissal of the action due to lack of standing. Rather, the burden shifts back to the party bringing the foreclosure action to demonstrate that the rightful owner had in some way vested in it the right to collect the debt on the owner's behalf." *JPMorgan*

Chase Bank, National Assn. v. *Simoulidis*, 161 Conn. App. 133, 145, 126 A.3d 1098 (2015), cert. denied, 320 Conn. 913, 130 A.3d 266 (2016), citing *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 325 n.18.

I

The defendants claim that the court erred in denying their motion to dismiss because the plaintiff lacked standing to foreclose. Specifically, the defendants argue that the court should have dismissed the action because they had rebutted the presumption of ownership and the plaintiff, as the holder of the note, did not have authority to foreclose. We are not persuaded.

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo. . . . The issue of standing implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . [I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 172–73, 73 A.3d 742 (2013).

In an effort to rebut the presumption of ownership, the defendants submitted, in connection with their motion to dismiss, a letter from the plaintiff in which the plaintiff states that it is a loan service provider acting on behalf of the owner of the debt.[3] Specifically,

[3] We note that the status of the plaintiff as the loan servicer would not necessarily preclude the existence of standing to foreclose. "[A] loan servicer need not be the owner or holder of the note and mortgage in order to have

the letter states that the plaintiff "services [the defendants'] loan on behalf of Hudson . . . ." The plaintiff, however, never claimed to be the owner of the debt, and stated at the hearing on the motion to dismiss that "[w]e have never claimed to be [the] owner. . . . [I]t's just an incorrect factual statement. We are not the owner. We are the holder, vested with the rights to foreclose by the owner, Hudson." Both parties agree that the plaintiff is not the owner of the debt and that Hudson is the owner.

In response to the defendants' challenge to the presumption of ownership, the plaintiff submitted the agreement to the court. The plaintiff read into the record the portion of the agreement that gave it authority to foreclose. The defendants' counsel objected to the introduction of the agreement, and the court overruled the objection. The court gave permission for the plaintiff to file the agreement under seal. The terms of § 10.01 of the agreement, which was introduced during the hearing and subsequently filed under seal, authorize the plaintiff to "institute foreclosure proceedings . . . ."

The defendants argue that the record is not adequate to review the issue of whether the agreement gave the plaintiff authority from Hudson to foreclose. They contend that the agreement was not in the record at the time the court summarily denied the motion to dismiss. We do not agree. The plaintiff provided the court with a copy of the agreement at the hearing on the motion to dismiss, and the plaintiff read the relevant portions of the agreement into the record. The court gave defendants' counsel time to review and respond to the agreement. The transcript of the hearing on the motion

standing to bring a foreclosure action if it otherwise has established the right to enforce those instruments . . . ." *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 327–28.

to dismiss makes clear that the court took the agreement into consideration in denying the motion to dismiss. Although the court's articulation does not expressly refer to the agreement, the court found that "the defendants failed to 'set up and prove the facts which limit or change the plaintiff's rights,' as required [by] *RMS Residential Properties, LLC* v. *Miller*, [supra, 303 Conn. 231]. Therefore, the argument that the plaintiff was estopped from rebutting the presumption of ownership was baseless."[4] The trial court admitted the agreement in response to the defendants' challenge to the presumption of ownership. In rejecting the estoppel claim, the court's articulation relies implicitly on the agreement as the source of the plaintiff's authority to foreclose.[5]

The relevant language in the agreement is plain and unambiguous and, therefore, our review is plenary.[6] See *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 101–102, 84 A.3d 828 (2014) ("[When] there is definitive contract language, the determination of what the parties

[4] To the extent that the articulation is somewhat unclear, however, we note that the defendants did not file a motion for a further articulation or a motion for review of the articulation with this court.

[5] Even if we were to assume, arguendo, that the trial court's articulation was not based implicitly on the agreement, we nonetheless would affirm the trial court's denial of the motion to dismiss on dispositive alternative grounds that, as a matter of law, the agreement provided the plaintiff with standing to foreclose. "Where the trial court reaches a correct decision but on [alternative] grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it. . . . [W]e . . . may affirm the court's judgment on a dispositive [alternative] ground for which there is support in the trial court record." (Citations omitted; internal quotation marks omitted.) *Hoskins* v. *Titan Value Equities Group, Inc.*, 252 Conn. 789, 794, 749 A.2d 1144 (2000).

[6] At oral argument, the defendants' counsel stated for the first time before this court that the agreement was ambiguous. The defendants have not, however, directed us to any language in the agreement that would render the provision regarding the plaintiff's authority to institute foreclosure proceedings ambiguous.

intended by their contractual commitments is a question of law. . . . It is implicit in this rule that the determination as to whether contractual language is plain and unambiguous is itself a question of law subject to plenary review." [Citations omitted; internal quotation marks omitted]). Section 10.01 of the agreement provides that the plaintiff "is hereby authorized and empowered by Purchaser [Hudson] when Seller [the plaintiff] believes it appropriate and reasonable in its judgment . . . to institute foreclosure proceedings . . . ." The agreement plainly provides the plaintiff with authority from Hudson to foreclose. Accordingly, we conclude that the plaintiff had standing to foreclose and that, therefore, the trial court properly denied the defendants' motion to dismiss.

II

The defendants next argue, in several ways, that because the plaintiff consistently asserted that it was the holder of the note and permitted the court to presume, as such, that it was the owner of the note, they were prejudicially surprised by the plaintiff's introduction of the agreement at the hearing on the motion to dismiss.[7] The defendants argue that the plaintiff should be estopped from claiming they were anything other than the owner of the note. We disagree.

The defendants provide no authority, nor are we aware of any, for the proposition that a plaintiff that

[7] The defendants specifically contend that (1) the "eleventh hour" introduction of the agreement was unfair; (2) the introduction of the agreement deprived them of due process because they were not provided with fair notice of the plaintiff's claim regarding its authority to foreclose on behalf of Hudson; (3) the plaintiff was judicially estopped from relying on the theory of the authority from Hudson after prevailing on the motion to strike and the motion for summary judgment under the ownership presumption; and (4) the plaintiff perverted procedure because it "never disputed that it knew it was not the [owner of the note] and that the holder was presumed to be the owner." None of these arguments are meritorious.

previously has asserted that it was the holder of the note and was silent when the court employed the presumption of ownership is precluded from later asserting, when challenged by the defendant, that the owner had vested the plaintiff with the right to institute foreclosure proceedings. First, it was the defendants' burden, not the plaintiff's, to rebut the presumption of ownership. See *U.S. Bank, National Assn.* v. *Schaeffer*, supra, 160 Conn. App. 146–47 (holder of note presumed to be rightful owner of underlying debt unless party defending against foreclosure action rebuts that presumption).

Second, the plaintiff's introduction of the agreement was not untimely, but rather it was responsive to the defendants' attempt to rebut the presumption of ownership. The plaintiff's admission of that evidence is consistent with the framework clarified in *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 325 n.18, under which the burden shifts to the holder to produce evidence that the owner had vested it with the authority to foreclose only after the ownership presumption has been challenged.

Third, the defendants were provided with ample opportunity to review the agreement. At the hearing on the motion to dismiss, the plaintiff provided the defendants with a copy of the agreement and read the relevant portions of the agreement into the record. The court gave the defendants a one hour recess to examine the agreement. Moreover, this was not the first time that the defendants had been provided with an opportunity to review the agreement. The defendants stated in their memorandum of law in support of their motion to dismiss that the plaintiff had provided them with a copy of the agreement in 2012 while the parties were engaged in mediation. The defendants have not demonstrated that they suffered any prejudice from the plaintiff's reliance on an agreement that the defendants had

in their possession nearly three years before the filing of the motion to dismiss, and which the court gave them one hour to further review during the hearing on the motion to dismiss.

III

The defendants' final claim is that the trial court erred in failing to dismiss the foreclosure action, with prejudice, on the basis of fraud. They contend that the plaintiff "perpetrated a fraud on the court by prosecuting this foreclosure action as an imposter . . . note-owner" and "put on note-owner's clothing—by brandishing its holder status—and watched in silence as the court twice mistook it for the note-owner" and, accordingly, that the court erred in failing to dismiss the foreclosure action with prejudice. We disagree with the defendants, and conclude that the court properly determined in its articulation that there was nothing in the record to support the defendants' claim of fraud.

The defendants misunderstand the nature of presumptions and the burden shifting framework clarified in *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 325 n.18. "[Presumptions] operate in advance of argument or evidence, or irrespective of it, by taking something for granted; by assuming its existence. When the term is legitimately applied, it designates a rule or proposition which still leaves open to further inquiry the matter thus assumed. The exact scope and operation of these prima facie assumptions are to cast upon the party against whom they operate, the duty of going forward, in argument or evidence, on the particular point to which they relate." (Internal quotation marks omitted.) *Vincent* v. *Mutual Reserve Fund Life Assn.*, 77 Conn. 281, 288, 58 A. 963 (1904).

Under the relevant burden shifting framework, the plaintiff was presumed to be the owner of the debt when it produced the note endorsed in blank. The plaintiff

had no burden to rebut this presumption. Once the defendants challenged the presumption, the plaintiff had the burden of demonstrating that it owned the debt or had authority from the note's owner, Hudson, to foreclose. It was not fraudulent for the plaintiff to demonstrate that Hudson had vested it with the authority to foreclose in response to the defendants' challenge to the presumption of ownership.

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

In this opinion the other judges concurred.

JAMES E. WALKER *v.* COMMISSIONER OF CORRECTION
(AC 38946)

Sheldon, Keller and Elgo, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance. Specifically, the petitioner alleged that trial counsel's prior relationship with D, a witness for the state in the criminal case, created an actual conflict of interest and that his right to due process had been violated by his exclusion from an in-chambers conference regarding trial counsel's alleged conflict of interest. The habeas court rendered judgment denying the petition, concluding that there was insufficient evidence to establish an actual conflict of interest and that the petitioner had abandoned his due process claim. Thereafter, the petitioner, on the granting of certification, appealed to this court. *Held*:

1. There was no merit to the petitioner's claim that the habeas court improperly concluded that he failed to establish that trial counsel's prior relationship with D had created an actual conflict of interest with respect to his representation of the petitioner; there was no indication in the record that trial counsel simultaneously represented the petitioner and D, the petitioner failed to identify any specific instances in the record that suggested that trial counsel's limited interaction with D impaired or compromised the petitioner's interests for the benefit of D, and the record supported the habeas court's findings that trial counsel had

advocated strenuously on the petitioner's behalf and that counsel's performance had contributed significantly to the jury's finding the petitioner not guilty of one of the charged offenses.

2. The habeas court properly concluded that the petitioner had abandoned his due process claim that he was denied his constitutional right to be present at an in-chambers conference regarding trial counsel's alleged conflict of interest; the petitioner abandoned his due process claim as a result of his failure to brief it before the habeas court, as he did not address the claim in his posttrial brief and posttrial reply brief, nor did he attempt to amend his posttrial brief or otherwise seek to have the court reconsider its decision not to address the claim.

Argued June 1—officially released October 3, 2017

Procedural History

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

Stephanie L. Evans, assigned counsel, for the appellant (petitioner).

Nancy L. Walker, deputy assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Rebecca Barry*, assistant state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, James E. Walker, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly concluded that (1) his defense counsel did not have an actual conflict of interest at the time of his representation of the petitioner and (2) he abandoned his due process claim that he was denied his right to be present at an in-chambers conference. We affirm the judgment of the habeas court.

In the underlying criminal proceeding, the petitioner was charged with two counts of assault in the first degree by means of the discharge of a firearm in violation of General Statutes §§ 53a-59 (a) (5) and 53a-8, and one count of conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-48 and 53a-59 (a) (5). *State* v. *Walker*, 147 Conn. App. 1, 6, 82 A.3d 630 (2013), aff'd, 319 Conn. 668, 126 A.3d 1087 (2015). The charges arose from the nonfatal shooting of two persons. Id., 4.

Following a trial, the jury found the petitioner guilty of conspiracy to commit assault in the first degree and not guilty of assault in the first degree, either as an accessory or as a principal. Id., 6. The court thereafter sentenced the petitioner to a total of nineteen years incarceration, and the petitioner appealed to this court. Id.

On direct appeal, this court determined, inter alia, that the record was inadequate to review the petitioner's conflict of interest claim and affirmed the judgment of conviction. Id., 15–16. Our Supreme Court thereafter affirmed our judgment. *State* v. *Walker*, 319 Conn. 668, 126 A.3d 1087 (2015).

The petitioner subsequently filed a petition for a writ of habeas corpus. At the habeas trial, the petitioner alleged that defense counsel, Attorney Richard Silverstein, provided him with ineffective legal representation based on a conflict of interest and alleged due process violations.[1] In its detailed and thorough memorandum of decision, the habeas court rejected those claims, concluding that there was insufficient evidence in the record to establish an actual conflict of interest on the part of defense counsel. In addition, the court

[1] In his petition, the petitioner also alleged *Brady* violations. See *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The habeas court's disposition of this claim is not at issue in this appeal.

determined that the petitioner's due process claim had been abandoned. Accordingly, the court denied the petition for a writ of habeas corpus, and this certified appeal followed.

I

The petitioner first claims that the court improperly concluded that he failed to establish an actual conflict of interest.[2] Specifically, he argues that defense counsel's prior relationship with James Dickerson, one of the state's witnesses in its case against the petitioner, created an actual conflict of interest. The respondent, the Commissioner of Correction, contends that the court's conclusion was proper because the petitioner failed to satisfy his burden of proof. We agree with the respondent.

The following facts and procedural history are relevant to our discussion of this claim. In his direct appeal, our Supreme Court noted a discussion that occurred on the record during jury selection in the underlying criminal trial about Dickerson and defense counsel:

[2] The petitioner also appears to assert a claim of insufficient inquiry by the trial court into a potential conflict of interest. The petitioner did not raise this issue in his amended petition for a writ of habeas corpus, and, as a result, the habeas court did not address it. "It is well established that [w]e do not entertain claims not raised before the habeas court but raised for the first time on appeal." (Internal quotation marks omitted.) *Hankerson* v. *Commissioner of Correction*, 150 Conn. App. 362, 369, 90 A.3d 368, cert. denied, 314 Conn. 919, 100, A.3d 852 (2014). "[I]t is axiomatic that a petitioner is bound by his petition . . . . 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 and trial evidence to decide claims not raised. . . . Having not raised [an] issue before the habeas court, [a] petitioner is barred from raising it on appeal. . . . This court is not compelled to consider issues neither alleged in the habeas petition nor considered at the habeas proceeding . . . ." (Internal quotation marks omitted.) Id., 367; see also *Hedge* v. *Commissioner of Correction*, 152 Conn. App. 44, 59, 97 A.3d 45 (2014), cert. denied, 321 Conn. 921, 138 A.3d 282 (2016). Accordingly, we decline to review that claim.

"The Court: Good morning, everybody. We are back to jury selection in [the present case]. The attorneys have brought a matter to the court's attention this morning which should be put on the record. [Assistant State's Attorney Stacey] Haupt [the prosecutor], I don't know if you want to go first or—

"[The Prosecutor]: . . . It was brought to my attention late Friday by [Assistant State's] Attorney Jack Doyle [regarding] the [plea offer] between . . . Dickerson and the state's attorney's office. I asked Attorney Doyle to write a memo about how exactly that went down and what promises had been made to [Dickerson] and in looking at his file attempting to prepare the memo, Attorney Doyle realized that [defense counsel] . . . had spoken to [Dickerson] at the request of Attorney Jamie Alosi to try to talk to him about taking some type of deal. However, it was prior to [Dickerson] cooperating in this case. I don't believe that deal came to fruition, but I just thought it should be brought to the court's attention that . . . [defense counsel] in some respect had conversations with one of the state's witnesses.

"The Court: Let me flush that out a bit. Apparently, [Dickerson], and it's already a matter of knowledge and public [record] in this case, is going to testify against [the petitioner]. [Dickerson], and I think you put this on the record earlier, and if not, it should be. [Dickerson] was on trial in front of this court, represented by Attorney Alosi. At some point, he entered a plea upstairs, and I had nothing to do with the plea. I had nothing to do with the sentencing. My involvement was picking a jury up to the point where the matter was resolved. Apparently, [defense counsel], you can add to that factual situation. Listen up, Mr. Walker, I just want to make sure you understand this.

"[Defense Counsel]: [Dickerson] was brought in to begin jury selection in a matter which he eventually

[pleaded] guilty to and is seeking to have consideration for based on his testimony or anticipated testimony in this case. I happen[ed] to be on the sixth floor. He was in the bull pen upstairs with his attorney, and his attorney, who I know, had told me about the case he was proceeding to trial on. . . .

"Defense counsel then went on to explain that Dickerson's attorney had told him about the evidence against Dickerson relating to the sale of narcotics, which included a videotape of the purported transaction and a still photograph from that videotape that appeared to show Dickerson making the sale, and the fact that the state had offered Dickerson a plea agreement. Because defense counsel knew Dickerson, he was asked, or may have volunteered, to speak with Dickerson about the sentence that could be imposed in light of the evidence and Dickerson's past history. In summarizing the discussion that ensued, defense counsel noted that Dickerson had told him about the plea offer as well as what the plea agreement was that he could accept short of going to trial. Defense counsel then explained: I said, in my opinion, the evidence was substantial. Then again, I didn't spend more than five or six minutes with him, nor did I, other than the layout, which he probably already heard from his attorney, have anything that would impact on [the] decision he made. Then he proceeded to come down here and begin jury selection with Your Honor.

"Subsequent to that, it would appear, and I didn't know until, let's say, a month to six weeks after, that he had given that statement because it wasn't being handled by [the prosecutor] at that time . . . .

"[The petitioner] was incarcerated, having not made bond, and, at some point . . . I became aware that Dickerson had made a statement. As soon as I became aware, I asked [the prosecutor] to send me a copy of

that statement. I spoke to [Assistant State's Attorney] Doyle. . . . I spoke to them about the parameters of the new plea agreement that [Dickerson] had entered into based on his cooperation, and I was told essentially what happened. I was given a copy of the statement, and that's where we are today. [The petitioner] is aware I had a limited interaction with [Dickerson] prior to him giving inculpatory evidence or [an] anticipated statement that inculpates him, and I explained to [the petitioner] that this in no way would impede my cross-examination of [Dickerson]. I don't think that that conversation is probably relevant to the deal he eventually entered into, and I would probably not, in my cross-examination, unless it came out that we knew each other, but we had known each other prior to me speaking to him up in court, and I wouldn't get into any details of the conversation. I don't think that would hamper my cross-examination of him at all. [The petitioner] has indicated to me that he wants me to continue to represent him.

"The Court: You heard that, Mr. Walker? You're comfortable with that?

"[The Petitioner]: Yes, yes.

"The Court: Let me tell you what I'm concerned about to protect your rights. As your lawyer, [defense counsel] owes you a duty of undivided loyalty. He can't represent two people at the same time that have any kind of conflict. From what I've heard here today, I haven't seen any. Whatever he did with [Dickerson] was unrelated to whatever deal [Dickerson] now has going, and he can go after that deal hand and claw, and there's nothing that I can see in his prior contact with [Dickerson] that is even relevant to the situation that developed after he spoke to [defense counsel]. I don't see any conflict. I don't see any violation of the law by [defense counsel], and I want to make sure you're comfortable with it so

we can get on with the trial, and you've got to let me know. Are you okay with it?

"[The Petitioner]: Yes.

"The Court: Good, all right, then we'll pick it up. Let's bring the panel out. Thank you." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Walker*, supra, 319 Conn. 670–74.

Following the habeas trial, the court found in its memorandum of decision that defense counsel's conduct "during the trial, including his blistering and thorough cross-examination of . . . Dickerson, showed no indication that his prior contact with and knowledge of . . . Dickerson adversely affected his representation of the petitioner. Further, the court found that the petitioner "failed to allege or establish what additional meaningful cross-examination could have been conducted by . . . counsel at trial [and that] . . . counsel's representation of the petitioner and cross-examination of . . . Dickerson contributed mightily . . . to the petitioner's acquittal on two of the three charges."

On appeal, the petitioner challenges the propriety of that determination. As a preliminary matter, we set forth the following guiding legal principles and standard of review governing ineffective assistance of counsel claims based on an actual conflict of interest. "[I]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel." (Citation omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677–78, 51 A.3d

948 (2012). "As an adjunct to this right, a criminal defendant is entitled to be represented by an attorney free from conflicts of interest." *Phillips* v. *Warden*, 220 Conn. 112, 132, 595 A.2d 1356 (1991).

In order to establish an actual conflict of interest, the petitioner "must establish (1) that counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance." (Internal quotation marks omitted.) *State* v. *Parrott*, 262 Conn. 276, 287, 811 A.2d 705 (2003); *Santiago* v. *Commissioner of Correction*, 87 Conn. App. 568, 583, 867 A.2d 70, cert. denied, 273 Conn. 930, 873 A.2d 997 (2005). To demonstrate an actual conflict of interest, "the petitioner must be able to point to *specific instances* in the record which suggest impairment or compromise of his interests for the benefit of another party. . . . A mere theoretical division of loyalties is not enough." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Santiago* v. *Commissioner of Correction*, supra, 584.

"[A] petitioner claiming ineffective assistance of counsel must demonstrate that his counsel's performance was deficient, and that the deficient performance resulted in actual prejudice to the defense." *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Once the petitioner establishes an actual conflict of interest, the "prejudice [prong of *Strickland*] is presumed because counsel [has] breach[ed] the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." Id., 692. "Prejudice is presumed . . . if the [petitioner] demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." Id.

On appeal, "facts found by the habeas court may not be disturbed unless they were clearly erroneous . . . . When . . . those facts are essential to a determination of whether the petitioner's sixth amendment rights have been violated, we are presented with a mixed question of law and fact requiring plenary review." (Internal quotation marks omitted.) *Hedge* v. *Commissioner of Correction*, 152 Conn. App. 44, 51, 97 A.3d 45 (2014), cert. denied, 321 Conn. 921, 138 A.3d 282 (2016).

At its essence, the petitioner's claim is that defense counsel, due to his prior relationship with Dickerson, actively represented competing interests while representing the petitioner. We do not agree.

An actual conflict of interest usually arises in the context of counsel's representation of multiple codefendants where counsel adduces evidence or advances arguments on behalf of one defendant that are damaging to the interests of the other defendant. See *Santiago* v. *Commissioner of Correction*, supra, 87 Conn. App. 583. In this case, Dickerson and Walker were not codefendants. An actual conflict of interest, however, also arises "if trial counsel simultaneously represents the defendant and another individual associated with the incident and that representation inhibits counsel's ability to represent the defendant." (Internal quotation marks omitted.) *Goodrum* v. *Commissioner of Correction*, 63 Conn. App. 297, 317, 776 A.2d 461, cert. denied, 258 Conn. 902, 782 A.2d 136 (2001); see also *State* v. *Martin*, 201 Conn. 74, 80–81, 513 A.2d 116 (1986) (enumerating various types of conflicts of interest); *Santiago* v. *Commissioner of Correction*, supra, 583.

On our review of the record, the evidence in this case does not support a finding that defense counsel simultaneously represented Dickerson and the petitioner. At the habeas trial, defense counsel testified about his relationship to Dickerson and described it as

a "brief" and "limited contact." The record indicates that he had a brief discussion with Dickerson that did not last more than five or six minutes and the discussion consisted of "lay[ing] out" information "which he probably already heard from his attorney . . . [and did not include] anything that would [have an] impact on [the] decision he made." (Internal quotation marks omitted.) *State* v. *Walker*, supra, 319 Conn. 672. The petitioner has not identified anything in the record that suggests impairment or compromise of his interests for the benefit of Dickerson. In our view, this limited encounter alone does not give rise to an actual conflict of interest. Moreover, the conversation between Dickerson and defense counsel occurred prior to Dickerson's giving the state any evidence against the petitioner.

As the habeas court emphasized in its memorandum of decision, defense counsel's blistering and thorough cross-examination of Dickerson gave no indication of his prior contact with, or knowledge of, Dickerson, which further underscored the lack of an actual conflict of interest. The lack of an actual conflict is further supported by the underlying trial transcript, which included an accusation that Dickerson lied to the police and falsely implicated the petitioner. In his closing argument, defense counsel criticized Dickerson by characterizing his testimony as "bought and paid for." In our view, counsel's cross-examination of Dickerson and his closing argument suggest that he energetically advocated on behalf of the petitioner. There is no suggestion that he was hampered by his prior limited interaction with Dickerson. Furthermore, the jury found the petitioner not guilty of assault in the first degree, convicting him only on the conspiracy charge. The habeas court noted that defense counsel's performance "contributed mightily" to this outcome. On our review of the record, we concur with that assessment.

In sum, it is clear to this court that defense counsel's relationship with Dickerson did not create an actual conflict between him and the petitioner. The record substantiates the court's finding that he strenuously advocated on the petitioner's behalf, unburdened by any conflict of interest. Accordingly, there is no merit to this claim.

II

The petitioner next claims that the habeas court improperly concluded that he abandoned his due process claim that he was denied his right to be present at an in-chambers conference. In response, the respondent argues that this court should not review this claim because the habeas court correctly concluded that it was abandoned. We agree with the respondent.[3]

The following facts and procedural history are relevant to this claim. Among the issues raised on direct appeal, the petitioner claimed that he was entitled to a new trial because his constitutional right to be present at all critical stages of the prosecution had been violated. *State* v. *Walker*, supra, 147 Conn. App. 7. The factual basis for this claim was the petitioner's alleged exclusion from an in-chambers discussion regarding defense counsel's possible conflict of interest. Id., 7–8. The petitioner sought review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), or the plain error doctrine. *State* v. *Walker*, supra, 8.

[3] The petitioner also argues that the alleged due process violation qualifies as a structural error and is not subject to harmless error analysis. See, e.g., *State* v. *Latour*, 276 Conn. 399, 411, 886 A.2d 404 (2005) ("[Structural error] cases do not involve trial error occurring during the presentation of the case to the jury but involve extrinsic factors not occurring in the courtroom. . . . These cases recognize that violation of some constitutional rights, such as the right to a trial by an impartial jury, may require reversal without regard to the evidence in the particular case.") Because we conclude that the habeas court properly deemed the petitioner's due process claim abandoned, we need not consider that contention. See *State* v. *Apodaca*, 303 Conn. 378, 383, 33 A.3d 224 (2012).

In his direct appeal, this court emphasized that the record revealed "no information as to whether a meeting occurred in chambers or whether there was a discussion in court off the record in the presence or absence of the [petitioner], whether or how counsel alerted the court clerk's office that something needed to be put on the record that morning, or whether the attorneys did something else in the presence or absence of the [petitioner] to alert the court that there was an issue that needed to be put on the record." Id., 15. We thus held that the failure of the petitioner to request a hearing before the trial court to establish a factual predicate for appellate review of the conflict of interest claim rendered the record inadequate for any meaningful review. Id.

In his petition for a writ of habeas corpus, the petitioner alleged in relevant part that "[p]ursuant to *State* v. *Lopez*, 271 Conn. 724, [859 A.2d 898] (2004), the confrontation clause of the sixth, and due process clause of the fifth and fourteenth amendments to the United States constitution, [the petitioner] was denied his constitutional right to be present at a critical stage of his own prosecution, namely an in-chambers conference between defense counsel, the trial court, and the state's attorney, whereby defense counsel's potential conflict of interest in this case was discussed. [The petitioner's] absence thwarted a fair and just hearing in the matter, and his presence had a reasonably substantial relation to the fullness of his opportunity to defend against the charges."

At the conclusion of the habeas trial, the court inquired as to whether the parties would be submitting posttrial briefs or closing oral arguments. The parties agreed to submit posttrial briefs. The petitioner subsequently filed both a posttrial brief and a reply brief with the habeas court. Those briefs did not address the due

process claim alleged in his petition. In its memorandum of decision, the court deemed that claim abandoned, stating: "In his posttrial brief and his posttrial reply brief, the petitioner analyzes and develops only the *Brady* and *Adams*[4] claims related to . . . Dickerson and the alleged conflict of interest thereto. The court, therefore, deems the remaining claims abandoned." (Footnote added.)

It is well settled that "[w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without *substantive* discussion or citation of authorities, it is deemed to be abandoned. . . . These same principles apply to claims raised in the trial court." (Citation omitted; emphasis added; internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003).

"[T]he idea of abandonment involves both a factual finding by the trial court and a legal determination that an issue is no longer before the court, [therefore,] we will treat this claim as one of both law and fact. Accordingly, we will accord it plenary review." *Solek* v. *Commissioner of Correction*, 107 Conn. App. 473, 479, 946 A.2d 239, cert. denied, 289 Conn. 902, 957 A.2d 873 (2008).

At his oral argument before this court, the petitioner argued that the failure to address a claim in a posttrial brief does not constitute abandonment and stated that

[4] See *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 71 A.3d 512 (2013).

the habeas judge did not explicitly request briefing of all of his claims. It nevertheless "is not the responsibility of the trial judge, without some specific request from a petitioner, to search a record, often, in a habeas case, involving hundreds of pages of transcript, in order to find some basis for relief for a petitioner." Id., 480.

In *Mitchell* v. *Commissioner of Correction*, 156 Conn. App. 402, 408, 114 A.3d 168, cert. denied, 317 Conn. 904, 114 A.3d 1220 (2015), the petitioner included in his amended petition a claim "that his trial counsel failed to adequately and effectively . . . advise [the] petitioner as to the applicable law, prior to the petitioner's decision to be tried to a jury, which prejudiced the petitioner . . . ." (Internal quotation marks omitted.) This court rejected the petitioner's attempt to pursue that claim on appeal, noting that "the present claim was not distinctly raised in the petitioner's lengthy posttrial brief and was not addressed by the court in its decision denying the petition. The petitioner thus abandoned the claim as a result of his failure to brief it before the habeas court." Id.

Although the petitioner in the present case included a due process claim in his petition for a writ of habeas corpus, his posttrial brief and posttrial reply brief did not address the claim. Further, the record does not reflect that the petitioner attempted to amend his posttrial brief or otherwise seek to have the court reconsider its decision not to address the claim.

In light of the petitioner's failure to brief the due process claim, we conclude that the habeas court properly deemed it abandoned. Moreover, the claimed issue on appeal was not ruled upon and decided by the habeas court. It is well settled that "this court is not bound to consider any claimed error unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely

to the appellant's claim." (Internal quotation marks omitted.) Id. We therefore conclude that the habeas court properly determined that the petitioner's due process claim was abandoned.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* STACEY DAYTON (AC 38860)

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

Syllabus

Convicted, on pleas of nolo contendere, of the crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs, and with previously having been convicted of that offense, the defendant appealed to this court, challenging, inter alia, the trial court's denial of his motion to dismiss. After the trial court had accepted the defendant's pleas and made a finding of guilty, at the defendant's request the sentencing was continued to a later date. The defendant failed to appear at sentencing and the court ordered his rearrest. Approximately eight years later, the court vacated the rearrest order and the case was "closed out" pursuant to statute (§ 14-140 [b]). Ten years later, the state entered a nolle prosequi as to the defendant's case, and the court noted the nolle for the record. More than thirteen months after the nolle had been entered, the state requested that the case be redocketed. The defendant filed a motion to dismiss, to which the state objected, and, after a hearing, the court denied the motion, finding that the state had mistakenly nolled the case. The court, relying on the previously accepted plea canvass, proceeded to sentencing, and this appeal followed. *Held*:

1. The state could not prevail on its claim that the defendant's appeal should be dismissed on the basis of the common-law fugitive felon disentitlement doctrine, which allows an appellate court to dismiss the appeal of a party who flees subsequent to the felony conviction from which he appeals; the appellate process had not been prejudiced, due to the passage of time, as a result of the defendant's failure to appear at his initial sentencing proceeding, and, under these facts and circumstances, dismissal of the appeal under the fugitive felon disentitlement doctrine was not warranted.

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

2. The trial court improperly denied the defendant's motion to dismiss; that court lacked jurisdiction over the case after the state entered the nolle and failed to initiate a new prosecution, and because more than thirteen months had passed since the entry of the nolle, the records of the case were subject to erasure by operation of law; moreover, the court, which found that the state had mistakenly nolled the case, cited no authority to support its decision to invalidate a nolle that had been entered more than thirteen months earlier, and the state's claim that the court merely corrected a clerical error when it denied the motion to dismiss was unavailing, as the effect of the state's decision to nolle the case resulted in the termination of the proceedings against the defendant, and to subsequently revive the charge was a matter of substance, not a mere transcription or calculation clerical error.

Argued April 24—officially released October 3, 2017

Procedural History

Two part information charging the defendant, in the first part, with the crimes of operating a motor vehicle while under the influence of intoxicating liquor or drugs and evading responsibility, and with the infractions of following too closely, failure to comply with emission inspection, and failure to use a seat safety belt, and, in the second part, with having previously been convicted of operating a motor vehicle while under the influence of intoxicating liquor or drugs, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, where the defendant was presented to the court, *Leavitt, J.*, on pleas of nolo contendere to the charge of operating a motor vehicle while under the influence of intoxicating liquor or drugs in the first part of the information and to the second part of the information; thereafter, the state entered a nolle prosequi as to evading responsibility, following too closely, failure to comply with emission inspection, and failure to use a seat safety belt; subsequently, the state entered a nolle prosequi as to all of the charges; thereafter, the court, *E. Richards, J.*, denied the defendant's motion to dismiss and rendered judgment in accordance with the pleas, from which the defendant appealed to this court. *Reversed; judgment directed.*

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Margaret E. Kelley*, supervisory assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Stacey Dayton, appeals from the judgment of conviction, rendered after a plea of nolo contendere, of operating a motor vehicle while under the influence of intoxicating liquor or drugs in violation of General Statutes (Rev. to 1995) § 14-227a.[1] On appeal, the defendant claims that the court improperly (1) denied his motion to dismiss, and (2) accepted his plea when it was not knowingly, intelligently or voluntarily made. The state disagrees with the defendant on the merits of this appeal and also contends that this appeal is subject to dismissal pursuant to the fugitive felon disentitlement doctrine. We disagree that this appeal should be dismissed and agree with the defendant's first claim. Accordingly, we reverse the judgment of the trial court.[2]

The following facts and procedural history are relevant to the resolution of this appeal. On November 29, 1995, the defendant entered a plea of nolo contendere to the charge of operating a motor vehicle under the influence of intoxicating liquor or drugs. General Statutes (Rev. to 1995) § 14-227a; see footnote 1 of this opinion. At that proceeding, the court found that the plea was "voluntarily and understandingly made with

[1] The defendant also entered a plea of nolo contendere to part B of the information to the charge of having previously been convicted of a violation of § 14-227a. For the sake of simplicity, all references to the defendant's plea herein include both pleas.

[2] As a result of this conclusion, we need not and do not reach the defendant's second claim pertaining to the propriety of his plea.

the assistance of competent counsel. There's a factual basis for the plea. The plea is accepted. Finding of guilty." Pursuant to a plea agreement, the defendant would receive a sentence of one year incarceration, execution suspended after ten days, two years of probation and certain special conditions. This sentence was not imposed immediately, as the court acquiesced to the defendant's request to continue the matter.

On January 3, 1996, the defendant failed to appear at sentencing. The court ordered the defendant rearrested and set a cash bond in the amount of $500. No further actions occurred in the defendant's case for nearly eight and one-half years. In 2004, the court vacated the rearrest order, and the case was "closed out" pursuant to General Statutes § 14-140 (b).[3] Ten years later, in 2014, the state entered a nolle prosequi as to the defendant's case.[4] The court noted the nolle prosequi for the record.

On September 4, 2015, more than thirteen months after the nolle had been entered, the state requested that the defendant's case "be brought back to court." The prosecutor represented to the court that notice had been sent to the defendant's last known address informing him of the proceeding, but that he was not present. The court agreed to the prosecutor's request to have a bail commissioner's letter sent to the defendant.

[3] General Statutes § 14-140 (b) provides in relevant part: "If any person so arrested or summoned wilfully fails to appear for any scheduled court appearance at the time and place assigned . . . a report of such failure shall be sent to the commissioner [of motor vehicles] by the court having jurisdiction. . . . Any infaction or violations, for which a report for failure to appear has been sent to the commissioner under this subsection, that have not been otherwise disposed of shall be dismissed by operation of law seven years after such report was sent." See *State* v. *Crisanti*, 76 Conn. App. 349, 350, 819 A.2d 299 (2003) (charges of altering motor vehicle identification number were closed out under § 14-140 after defendant failed to appear at scheduled court date).

[4] At a proceeding on July 25, 2014, the court was presented with a docket containing more than 100 matters, including the defendant's case. The state entered a nolle prosequi as to each matter on this docket.

On October 29, 2015, the defendant filed a motion to dismiss pursuant to General Statutes § 54-56[5] and Practice Book § 41-8 (4).[6] The state filed a motion in opposition on November 9, 2015.[7] The court held a hearing on December 3, 2015, at which time it rendered an oral decision denying the defendant's motion. Specifically, it stated: "The court's feeling is that under the circumstances in this case where a plea has been canvassed, accepted by the court, where there was a failure to appear at the time of sentencing, where a rearrest was ordered, but the subsequent nolle in this case was a mistake and therefore not valid. And therefore I am going to find that the motion to dismiss is not proper and I'm going to deny it at this time. . . . I think the court has jurisdiction because I feel that . . . the nolle which allowed the case to ripen it into a dismissal was invalid. That therefore, if the nolle was invalid, then the court will still retain jurisdiction."

After denying the motion to dismiss, the court relied on the previously accepted plea canvass and proceeded to sentencing. The defendant received a sentence of six months incarceration, execution suspended, eighteen

[5] General Statutes § 54-56 provides: "All courts having jurisdiction of criminal cases shall at all times have jurisdiction and control over informations and criminal cases pending therein and may, at any time, upon motion by the defendant, dismiss any information and order such defendant discharged if, in the opinion of the court, there is not sufficient evidence or cause to justify the bringing or continuing of such information or the placing of the person accused therein on trial."

[6] Practice Book § 41-8 provides in relevant part: "The following defenses or objections, if capable of determination without a trial on the general issue, shall, if made prior to trial, be raised by a motion to dismiss the information . . . (4) Absence of jurisdiction of the court over the defendant or the subject matter . . . ."

[7] In its brief, the state summarized the argument in its opposition that the nolle prosequi was invalid because "(1) the state had no authority to enter it after the guilty plea had been accepted by the court . . . and (2) it had not been entered properly under General Statutes § 14-227a (f) and Practice Book § 39-29 [both of which require the prosecutor to state the reason for the nolle in open court]." (Footnotes omitted.)

months of probation and 100 hours of community service. The court imposed fines, but remitted them due to "the age of the case." This appeal followed. Additional facts will be set forth as necessary.

I

As an initial matter, we consider the state's claim that the defendant's appeal should be dismissed on the basis of the fugitive felon disentitlement doctrine. This doctrine "allows an appellate court to dismiss the appeal of a party who flees subsequent to the felony conviction from which he appeals." *State* v. *Brabham*, 301 Conn. 376, 378, 21 A.3d 800 (2011). After considering the facts and circumstances of this case, we are not persuaded that the appeal should be dismissed pursuant to this doctrine.

In *Brabham*, our Supreme Court noted that the fugitive felon disentitlement doctrine is a common-law rule that permits, but does not require, the dismissal of appeals by fugitive defendants in certain instances. Id., 379. It further recognized that this doctrine was not a " 'hard and fast rule' " and that there was no universal approach to its application. Id., 380. Three cases decided prior to *Brabham*, in which our Supreme Court applied the doctrine, all involved fugitive defendants whose whereabouts were unknown at the time of the appeal.[8] Id., 381–82. The facts of *Brabham*, however, presented our Supreme Court with the opportunity to consider the scope and operation of the doctrine when the defendant had fled after his conviction, but had

[8] The three cases cited in *Brabham* are *Valle* v. *Commissioner of Correction*, 244 Conn. 634, 711 A.2d 722 (1998), *State* v. *Patterson*, 236 Conn. 561, 674 A.2d 416 (1996), and *State* v. *Leslie*, 166 Conn. 393, 349 A.2d 843 (1974). Additionally, this court affirmed the decision of the habeas court, holding that the petitioner had forfeited his appellate right because he had absented himself from his jury trial and sentencing. *Tyler* v. *Bronson*, 12 Conn. App. 621, 621–22, 625–26, 533 A.2d 570 (1987), cert. denied, 207 Conn. 802, 540 A.2d 75 (1988).

been returned to custody by the time of his appeal. Id., 382.

At the outset, the court set forth the various justifications for the doctrine. "The various rationales that have been put forth in support of the fugitive felon disentitlement doctrine include: (1) the judgment on review may be impossible to enforce because the prisoner has escaped, (2) the prisoner's escape disentitles him to call upon the resources of the [c]ourt for determination of his claims, (3) dismissal will [discourage] the felony of escape and [encourage] voluntary surrenders, and (4) dismissal will [promote] the efficient, dignified operation of the courts. . . . In addition to these reasons, courts, especially when considering appeals by fugitives who have been returned to custody by the time of the appeal, have referred to the need for the dignified and efficient operation of the *appellate process* specifically, rather than of courts as a whole." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 382–83.

The court reasoned that a reviewing appellate court may dismiss an appeal in cases where the defendant had been returned to custody by the time his appeal was heard, "but his flight had undermined the integrity, efficiency or dignity of the appellate process, including the potential remedies in the event of a successful appeal." Id., 385. "Such an approach to the fugitive felon disentitlement doctrine best serves all of the purposes of the doctrine, and allows appellate courts to ensure that a defendant does not reap the benefit of his fugitive status . . . by gaining unfair advantages due to the passage of time at the expense of the integrity of the appellate process." (Citation omitted; internal quotation marks omitted.) Id., 385.

The court set forth a burden shifting analysis in this type of case. Initially, the state "must allege specific

instances of prejudice caused by the defendant's flight" when it seeks to have an appeal dismissed pursuant to the fugitive felon disentitlement doctrine. Id., 386. Following these allegations by the state, the "burden of proof shifts to the defendant to show that his flight was not prejudicial to the appellate process. . . . The defendant must disprove the alleged prejudicial effect of his flight by a preponderance of the evidence." (Citation omitted.) Id.[9]

In its brief, the state argues that the analytical framework of *Brabham* applies to the present case and that the appellate process has been prejudiced as a result of the defendant's failure to appear at sentencing. Assuming, without deciding, that *Brabham* applies to the present case,[10] we conclude that the appellate process, specifically, our review of the denial of the defendant's motion to dismiss, has not been prejudiced. Accordingly, we decline to dismiss the appeal on the basis of the fugitive felon disentitlement doctrine.

[9] In *Brabham*, the defendant set forth a variety of appellate claims, including insufficiency of the evidence to sustain his conviction, an improper jury instruction, the improper denial of his motion for a mistrial and evidentiary errors. *State* v. *Brabham*, supra, 301 Conn. 378. Our Supreme Court concluded the state had alleged, and the defendant had failed to disprove, that the loss of trial exhibits prejudiced the appellate process as to all of these claims. Id., 386–88. As we subsequently discuss, the appellate process has not been prejudiced with respect to the defendant's first appellate claim.

[10] We note that the defendant was not convicted of a felony in the present case. Further, he did not escape from custody of the Department of Correction; see, e.g., *Valle* v. *Commissioner of Correction*, 244 Conn. 634, 635, 711 A.2d 722 (1998) (petitioner failed to return from period of leave to halfway house while in custody of Department of Correction); *State* v. *Leslie*, 166 Conn. 393, 394, 349 A.2d 843 (1974) (defendant escaped from custody of Department of Correction during transport); he failed to appear for sentencing, which constitutes a less serious transaction. Moreover, the record does not indicate that the defendant had been sought out by the authorities in this jurisdiction. See, e.g., *State* v. *Leslie*, supra, 394. Additionally, the trial court vacated the rearrest order in 2004. Despite these issues, we will decide the question of the applicability of the fugitive felon disentitlement doctrine as it has been presented to us by the parties.

The state focuses its claim on the rationale for the fugitive felon disentitlement doctrine, that is, the "defendant's actions of failing to appear on the day of sentencing and then absconding from the jurisdiction for twenty years have significantly and negatively impacted the integrity of the appellate process." At the outset, we note that the state's claim that the defendant absconded from the jurisdiction for twenty years is not supported by the record and amounts to nothing more than sheer speculation, which has no place in appellate review. See *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 510, 970 A.2d 578 (2009); see also *State* v. *LaFleur*, 307 Conn. 115, 182, 51 A.3d 1048 (2012) (*Palmer*, *J.*, dissenting). There is no indication that the state actively sought out the defendant following his failure to appear at sentencing. Further, the rearrest order was vacated in 2004.

Turning to the matter of whether the defendant's conduct prejudiced the appellate process, the state alleges that the defendant's case never would have been nolled had he appeared at sentencing. It further contends that there would have been no basis for the motion to dismiss and, therefore, no appeal would have existed but for the actions of the defendant in 1996. This reasoning ignores the conduct of the state during the relevant time period. Specifically, it was the prosecutor that caused the case to be "closed out" pursuant to § 14-140 (b) and the rearrest order vacated in 2004. Additionally, the prosecutor nolled the case on July 25, 2014.

Furthermore, the mere existence of an appeal does not constitute prejudice to the appellate process, or significantly and negatively impact the integrity of that process. Particularly with respect to the issue of whether the court properly denied the motion to dismiss, we are unable to discern any prejudice, due to the passage of time, warranting the dismissal of the

appeal pursuant to the fugitive felon disentitlement doctrine. Cognizant that this doctrine is not " 'a hard and fast rule' "; *State* v. *Brabham*, supra, 301 Conn. 380; we conclude that, under these facts and circumstances, dismissal of the defendant's appeal is not warranted under the fugitive felon disentitlement doctrine.

II

We now consider the defendant's claim that the court improperly denied his motion to dismiss. Specifically, he argues that the court lacked jurisdiction over the case after the nolle had been entered and thirteen months thereafter had elapsed.[11] We agree with the defendant.

We begin by setting forth our standard of review. "Because a motion to dismiss effectively challenges the jurisdiction of the court, asserting that the state, as a matter of law and fact, cannot state a proper cause of action against the defendant, our review of the court's legal conclusions and resulting denial of the defendant's motion to dismiss is de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous." (Internal quotation marks omitted.) *State* v. *Kallberg*, 326 Conn.

[11] General Statutes § 54-142a (c) (1) provides: "Whenever any charge in a criminal case has been nolled in the Superior Court, or in the Court of Common Pleas, if at least thirteen months have elapsed since such nolle, all police and court records and records of the state's or prosecuting attorney or the prosecuting grand juror pertaining to such charge shall be erased, except that in cases of nolles entered in the Superior Court, Court of Common Pleas, Circuit Court, municipal court or by a justice of the peace prior to April 1, 1972, such records shall be deemed erased by operation of law and the clerk or the person charged with the retention and control of such records shall not disclose to anyone their existence or any information pertaining to any charge so erased, provided nothing in this subsection shall prohibit the arrested person or any one of his heirs from filing a petition to the court or to the records center of the Judicial Department, as the case may be, to have such records erased, in which case such records shall be erased."

1, 12, 160 A.3d 1034 (2017); see also *State* v. *Rivers*, 283 Conn. 713, 723–24, 931 A.2d 185 (2007).

Next, we identify the legal principles regarding a nolle prosequi. "[T]he state's right to terminate a prosecution by the entry of a nolle prosequi has its origins in practices recognized at common law. The effect of a nolle prosequi is to end pending proceedings without an acquittal and without placing the defendant in jeopardy. . . . Although the decision to initiate a nolle prosequi still rests with the state's attorney, the statute and the rules now permit the defendant to object to a nolle prosequi and to demand either a trial or a dismissal except upon a representation to the court by the prosecuting official that a material witness has died, disappeared or become disabled or that material evidence has disappeared or been destroyed and that a further investigation is therefore necessary." (Citations omitted; internal quotation marks omitted.) *State* v. *Lloyd*, 185 Conn. 199, 201–202, 440 A.2d 867 (1981); see also *State* v. *Kallberg*, supra, 326 Conn. 12–14 (distinguishing unilateral entry of nolle proesqui by prosecutor from bilateral agreement involving plea bargain between prosecutor and defendant).

Finally, we review the court's jurisdiction over a criminal case. "The Superior Court is a constitutional court of general jurisdiction. . . . In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law. . . . The Superior Court's authority over criminal cases is established by the proper presentment of the information . . . which is essential to initiate a criminal proceeding." (Citations omitted; internal quotation marks omitted.) *State* v. *Daly*, 111 Conn. App. 397, 401–402, 960 A.2d 1040 (2008), cert. denied, 292 Conn. 909, 973 A.2d 108 (2009); see also *State* v. *Koslik*, 116 Conn. App. 693, 697, 977 A.2d 275, cert. denied, 293 Conn. 930, 980 A.2d 916 (2009). Following a conviction, this jurisdiction ends once the

defendant begins serving his sentence. See *State* v. *Smith*, 150 Conn. App. 623, 634, 92 A.3d 975, cert. denied, 314 Conn. 904, 99 A.3d 1169 (2014); *State* v. *Delgado*, 116 Conn. App. 434, 437–38, 975 A.2d 736 (2009).

When the state elects to nolle a charge, however, the termination of the court's jurisdiction necessarily follows a different path. "[T]he entry of a nolle prosequi terminates the prosecution and the defendant shall be released from custody. If subsequently the prosecuting authority decides to proceed against the defendant, a new prosecution must be initiated. Practice Book § 39-31. The defendant is accused of no crime, is released from custody unconditionally and is no longer under the authority of the court. *It follows that, generally, a court does not have jurisdiction over the case after the entry of a nolle.*" (Emphasis added; footnote omitted; internal quotation marks omitted.) *State* v. *Daly*, supra, 111 Conn. App. 402–403; see also *State* v. *Richardson*, 291 Conn. 426, 430, 969 A.2d 166 (2009). Put another way, "[a]lthough the entry of a nolle prosequi results in the defendant's release from custody, he can . . . be tried again upon a new information and a new arrest." (Internal quotation marks omitted.) *State* v. *Kallberg*, supra, 326 Conn. 13. Furthermore, thirteen months after the nolle, all pertinent records are erased pursuant to statute. See General Statutes § 54-142a (c) (1); see also *State* v. *Daly*, supra, 402 n.4.

In the present case, the defendant pleaded nolo contendere to the charge of operating a motor vehicle while under the influence of liquor or drugs.[12] He failed to

[12] "A nolo contendere plea has the same effect as a guilty plea, but a nolo contendere plea cannot be used against the defendant as an admission in a subsequent criminal or civil case. . . . Indeed, [i]t is well established that an unconditional nolo contendere plea, when intelligently and voluntarily made, operates as a waiver of all nonjurisdictional defects and bars later challenges to pretrial proceedings." (Citation omitted; internal quotation marks omitted.) *State* v. *Palkimas*, 116 Conn. App. 788, 795, 977 A.2d 705 (2009).

appear for sentencing on January 3, 1996. The court ordered a rearrest, which remained in effect until August, 2004. At that time, the defendant's case was "filed pursuant to § 14-140" and closed out. After approximately ten years, in July, 2014, the state nolled the defendant's case, which the court noted on the record. More than thirteen months later, the state redocketed the case on September 4, 2015. Approximately two months later, the defendant filed his motion to dismiss on the basis that the court lacked jurisdiction following the nolle that had been entered by the state and the passage of thirteen months. Following a hearing on December 3, 2015, the court denied the defendant's motion to dismiss.

Specifically, in denying the motion to dismiss, the court found that, given the facts of this case, the state had mistakenly nolled the case. It further reasoned that the nolle was invalid, and, therefore, the court retained jurisdiction in the defendant's case. The court cited no authority that would support its decision to invalidate a nolle that had been entered more than thirteen months earlier. We are not aware of, and the parties have not directed us to, any statute, rule of practice, or case law that would support the court's decision that a nolle entered in error by the prosecutor after the case had been idle for nearly one decade is invalid. To the contrary, we note that the trial court has observed: "[W]e live in an adversary system and very often for both sides mistakes lead to unintended and final results. The court does feel that the issue of mistake can and should not color any appraisal made of a strictly jurisdictional question." *State* v. *Jesus C.*, Superior Court, judicial district of New Haven, Docket No. CR-295038, (September 18, 1990) (1990 WL 276375, *4). In the present case, the legal consequence of the prosecutor's unilateral action in entering the nolle in 2014—whether intended or unintended—was that the state unconditionally

abandoned the prosecution of the defendant. See *State* v. *Kallberg*, supra, 326 Conn. 13 n.7. The court, therefore, lacked jurisdiction following this action by the prosecutor.

In its appellate brief, the state argues that a court retains the inherent authority to correct, sua sponte, a clerical error in the judgment at any time.[13] See, e.g., *Sanzo* v. *Sanzo*, 137 Conn. App. 216, 222 n.5, 48 A.3d 689 (2012); *Milazzo* v. *Schwartz*, 88 Conn. App. 592, 597, 871 A.2d 1040 (2005); see also *State* v. *Grant*, 286 Conn. 499, 502 n.1, 944 A.2d 947, cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. ed. 2d 200 (2008); *State* v.

[13] The state also appears to argue that the court properly considered the state's opposition to the motion to dismiss as a request to open and set aside a judgment entered by mistake. "[O]ur courts have inherent power to open, correct and modify judgments, but that authority is restricted by statute and the rules of practice. . . . A motion to open a judgment is governed by General Statutes § 52-212a and Practice Book § 17-4. Section 52-212a provides in relevant part: Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. . . . Practice Book § 17-4 states essentially the same rule. . . . Nevertheless, it is also well settled that [a] judgment rendered may be opened after the four month limitation . . . if it is shown that the judgment was obtained by fraud, in the absence of actual consent, or because of *mutual mistake*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Gordon* v. *Gordon*, 148 Conn. App. 59, 64, 84 A.3d 923 (2014). This general rule applies to criminal cases as well as civil matters. See *State* v. *Wilson*, 199 Conn. 417, 437, 513 A.2d 620 (1986) ("[w]e see no reason to distinguish between civil and criminal judgments in this respect, and we therefore hold that . . . a criminal judgment may not be modified in matters of substance beyond a period of four months after the judgment has become final").

As correctly noted in the defendant's reply brief, even if the court had treated the state's opposition to the defendant's motion to dismiss as a motion to set aside and open, it was not timely filed within the four month period of § 52-212a and Practice Book § 17-4. Furthermore, the court did not find that there had been a *mutual* mistake, or one that is common to *both* parties. See *Magowan* v. *Magowan*, 73 Conn. App. 733, 739, 812 A.2d 30 (2002), cert. denied, 262 Conn. 934, 815 A.2d 134 (2003). Accordingly, we are not persuaded by this argument.

Wilson, 199 Conn. 417, 436–37, 513 A.2d 620 (1986). We agree with that statement of the law; we disagree, however, with its application to the present case. The case before us does not constitute a mere clerical error, such as an error in the calculation of damages. See *Milazzo* v. *Schwartz*, supra, 597. Additionally, the error in the present case originated not with the trial court but with the prosecutor's entry of a nolle. As our Supreme Court has explained: "A distinction . . . must be drawn between matters of substance and clerical errors, the distinction being that mere clerical errors may be corrected at any time even after the end of the term. . . . A clerical error does not challenge the court's ability to reach the conclusion that it did reach, but involves the failure to preserve or correctly represent in the record the actual decision of the court. . . . In other words, it is clerical error if the judgment as recorded fails to agree with the judgment in fact rendered . . . ." (Citations omitted; internal quotations omitted.) *Maguire* v. *Maguire*, 222 Conn. 32, 39–40, 608 A.2d 79 (1992); *Bank of Stamford* v. *Schlesinger*, 160 Conn. App. 32, 43, 125 A.3d 209 (2015); see also *Jordan* v. *Jordan*, 125 Conn. App. 207, 211, 6 A.3d 1206 (2010) (General Statutes § 52-212a imposes four month time limit for modification of matters of substance), cert. denied, 300 Conn. 919, 14 A.3d 333 (2011).

The state nolled the case in 2014, and the court noted that disposition. After the passage of thirteen months, the records of the defendant's case were subject to erasure by operation of law. The redocketing and the denial of the motion to dismiss changed the substance of the disposition from a dismissal of the charge to a conviction of operating a motor vehicle while under the influence of liquor or drugs. See *Maguire* v. *Maguire*, supra, 222 Conn. 39. Any error originated with the decision of the prosecutor to nolle the charge and is

not a clerical error.[14] We therefore reject the state's argument that the court merely corrected a clerical error when it denied the motion to dismiss on December 3, 2015.

We find support for our conclusion in *Commonwealth* v. *Miranda*, 415 Mass. 1, 610 N.E.2d 964 (1993). In that case, the Commonwealth of Massachusetts nolled one indictment against the defendant, noting that it had been superseded by a second indictment. Id., 4. Approximately three months later, the commonwealth moved to vacate the nolle with respect to the second count of the first indictment, claiming that it had been entered in error. Id. The trial court denied the defendant's attempts to have the first indictment dismissed, concluding that the commonwealth's actions had been "a mistake, oversight and unintended act." (Internal quotation marks omitted.) Id.

On appeal, the defendant argued that the trial court improperly denied his motion to dismiss and erred by permitting the reinstatement of count two of the first indictment. Id., 5. The commonwealth countered that

[14] In its opposition to the motion to dismiss, the state argued that the "Criminal Justice Information System (CJIS) reflects that 'This case was sentenced and disposed of on July 25, 2014' and that the defendant was 'Committed to the Department of Correction and Probation Ordered.' . . . This information is consistent with the fact that the clerk's file reflects that the sentence was imposed on July 25, 2014. At the hearing on the motion to dismiss, the prosecutor stated that, for a period of time, the CJIS erroneously indicated that the defendant had been sentenced and the case disposed as of July 25, 2014. Defense counsel agreed with the prosecutor, and explained that the CJIS had been changed to now show that no judgment had been entered in the defendant's case.

Any confusion or error with respect to the file is not germane to the present case. The defendant's rearrest was vacated and the case was closed out pursuant to § 14-140 (b) in 2004 as a result of the action of the prosecutor. The prosecutor subsequently nolled the case on July 25, 2014. The transcript of that proceeding unquestionably demonstrates that the state nolled all the matters before the court, including the defendant's case. While this may have been done by mistake, any error lies with the prosecutor, and not the court. Any subsequent error in the CJIS does not impact or alter this analysis.

the trial judge had the authority to vacate the nolle on the basis of a clerical error. Id. The Supreme Judicial Court of Massachusetts agreed with the defendant, concluding that the reinstatement of the first indictment had been improper. Id. The court first noted that, pursuant to Massachusetts law, clerical errors are subject to correction at any time. "Such mistakes, however, do not include or apply to the correction of errors of substance. . . . Material or substantial errors are not ones of transcription, copying, or calculation, but are those that trample the defendant's rightful expectations." (Citations omitted.) Id. It further reasoned that the defendant had a rightful expectation that he would not be charged under the first indictment that had been nolled unless the commonwealth filed a new and proper indictment. Id., 6.

The court's reasoning in *Commonwealth* v. *Miranda*, supra, 415 Mass. 1, applies to the present case. The defendant's case idled for years. The state took steps that led to the rearrest order being vacated and later nolled the charges. Thirteen months passed before the resurrection of the defendant's case. Under the facts and circumstances, we are not persuaded that this is a case of a mere transcription or calculation error. The effect of the state's decision to nolle the case resulted in the termination of the proceedings against the defendant without placing him in jeopardy. To subsequently revive the charge is a matter of substance, and, therefore, the rule regarding clerical errors does not apply to this case.[15]

[15] In its brief, the state directs us to *Gholson* v. *State*, 308 S.W.3d 189 (Ark. App. 2009). In that case, the defendant had pleaded guilty to two counts of battery and sentenced to 240 months incarceration and a 120 months suspended sentence. Id., 190. On October 9, 2007, the state moved to revoke the defendant's suspended sentence, alleging that he had violated its terms by committing the act of rape, failing to pay fines, costs and fees, and failing to notify the sheriff of his address and employment status. Id. During the process of scheduling a hearing on the revocation case, an order of nolle proesqui as to the petition to revoke was signed and filed on February 26, 2008. Id. Despite this, a hearing was held on March 6, 2008, and the court

The judgment is reversed and the case is remanded with direction to grant the motion to dismiss and to render judgment thereon.

In this opinion the other judges concurred.

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determined that the defendant had violated the conditions of his suspended sentence by committing the act of rape. Id.

The defendant then learned of the nolle and moved to set aside the judgment on March 18, 2008. The state responded that the nolle had been entered in error, as it had been mistakenly included in a list of "active stale cases" by the Administrative Office of the Courts. Id. After a hearing, the court set aside the nolle as a scrivener's error and denied the motion to set aside the revocation of the suspended sentence. Id. The Arkansas Court of Appeals noted that under that state's jurisprudence, authority to set aside the nolle existed. Id. "A circuit court judge may set aside its own order dismissing charges in a criminal case if the original order was entered in error." Id., 190–91. It also relied on Arkansas Rule of Civil Procedure 60, which the Supreme Court of that state had held to apply in criminal cases 'where it recognized a trial court's power to correct a judgment nunc pro tunc to make it speak the truth." Id., 191. Finally, the court noted that the Arkansas Supreme Court had "defined a true clerical error, one that may be correct by nunc pro tunc order, as essentially one that arises not from an exercise of the court's judicial discretion but from a mistake on the part of its officers (or perhaps someone else)." (Internal quotation marks omitted.) Id.

We conclude that *Gholson* provides limited guidance as a result of the differences between our law and that of Arkansas. It appears that Arkansas takes a broader view of clerical errors, while we are bound, of course, by the limits delineated by our Supreme Court. *State* v. *Holley*, 174 Conn. App. 488, 495, A.3d (2017). Moreover, in *Gholson*, the actions of the Administrative Office of the Courts contributed to the error, where, in the present case, it was solely the acts of the prosecutor that resulted in the nolle of the defendant's case. Therefore, we are not persuaded by the state's reliance on *Gholson*.