CARMINE KELLMAN *v.* COMMISSIONER OF CORRECTION
(AC 39429)

Sheldon, Elgo and Mihalakos, Js.

Syllabus

The petitioner, who previously had been convicted of, inter alia, murder in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming that his trial counsel, S, had provided ineffective assistance. The habeas court rendered judgment denying the habeas petition, concluding that the petitioner had failed to prove that he was denied the effective assistance of trial counsel. Thereafter, on the granting of certification, the petitioner appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that S provided ineffective assistance by failing to meaningfully present and explain a pretrial plea

offer from the state; the habeas court's finding that the petitioner failed to demonstrate that he was prejudiced by his counsel's allegedly deficient performance during pretrial plea negotiations was not clearly erroneous, as the habeas court did not find credible the petitioner's testimony regarding whether a plea deal was presented or meaningfully explained to him, and the petitioner failed to establish that it was reasonably probable that he would have accepted the plea offer.

2. The habeas court did not err in determining that the petitioner failed to establish his claim that S was ineffective by employing a deficient trial strategy that pursued an extreme emotional disturbance defense at trial, without consulting with an expert on that defense prior to trial: that court's finding that S's decision not to retain an expert witness in pursuing the extreme emotional disturbance defense was a reasonable strategic decision was not clearly erroneous and was supported by the evidence and testimony at the habeas trial, including S's testimony that he believed that it was not prudent to call an expert witness on that defense when the petitioner and lay witnesses could testify to the same evidence, that he was concerned that the jury would have looked unfavorably on an expert who was paid to testify on the petitioner's behalf, and that it was the only defense he had given the strength of the evidence against the petitioner; moreover, even if S was deficient in his performance by failing to consult with an expert on the extreme emotional disturbance defense, the petitioner did not show that S's allegedly deficient performance prejudiced him, as there was substantial evidence in the record that supported the jury's guilty verdict, and, although the petitioner speculated that the result might have been different had S chosen to utilize an expert witness, the petitioner failed to demonstrate that there was a reasonable probability that if S had consulted with or called an expert witness during the criminal trial, the jury would have had reasonable doubt as to the petitioner's guilt.

Argued September 14—officially released November 14, 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.*

Stephen A. Lebedevitch, for the appellant (petitioner).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's

attorney, and *Adrienne Russo*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

MIHALAKOS, J. The petitioner, Carmine Kellman, also known as Carmi Kellman,[1] appeals following the habeas court's granting of his petition for certification to appeal from its judgment denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly rejected his claims of ineffective assistance of trial counsel. Specifically, he asserts that his trial counsel, Richard Silverstein, rendered ineffective assistance because he (1) failed to meaningfully present and explain the state's pretrial plea offers and (2) failed to consult with or present an expert at the petitioner's trial regarding the extreme emotional disturbance defense. For the reasons set forth herein, we affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our disposition of the petitioner's claims. After a jury trial, the petitioner was convicted of murder in the first degree in violation of General Statutes § 53a-54a, carrying a pistol without a permit in violation of General Statutes § 29-35, and criminal violation of a protective order in violation of General Statutes (Rev. to 1993) § 53a-110b (a) (now § 53a-223).[2] The petitioner was sentenced to sixty years of incarceration for murder, one year concurrent for carrying a pistol without a permit, and one year concurrent for criminal violation of a protective order.

[1] While the habeas pleadings refer to the petitioner as "Carmine," the petitioner testified at the habeas trial that his first name is "Carmi," and this court's direct appeal decision refers to him as "Carmi." See *State* v. *Kellman*, 56 Conn. App. 279, 742 A.2d 423, cert. denied, 252 Conn. 939, 747 A.2d 4 (2000).

[2] The petitioner was also acquitted of one count of stalking in the first degree in violation of General Statutes § 53a-181c (a) (2).

The petitioner's conviction was the subject of a direct appeal before this court. See *State* v. *Kellman*, 56 Conn. App. 279, 742 A.2d 423, cert. denied, 252 Conn. 939, 747 A.2d 4 (2000). In affirming the petitioner's conviction, this court concluded that the jury reasonably could have found the following facts. The petitioner and the victim, Carmen Smith, began a two year romantic relationship in 1992, which was marked by repeated domestic incidents, breakups, and reconciliations. Id., 280. Numerous complaints were lodged with the police by the victim about the petitioner. Id. In July, 1993, after an arrest based on such a complaint, the petitioner was ordered by the victim to move out of her residence. Id. The petitioner returned during a brief period of reconciliation, but was dispossessed permanently by the victim later that year. Id., 280–81.

As the petitioner continued to pursue the relationship, his behavior became more hostile, and the domestic incidents increased in severity. Id., 281. In February, 1994, the petitioner was arrested outside the victim's residence after being pursued by the police. Id. Thereafter, the victim obtained a protective order that prohibited the petitioner from entering her home and from restraining, harassing or contacting her. Id. The petitioner, however, continued to harass the victim on many occasions. Id. On Saturday, March 12, 1994, the victim and her sister went shopping, had dinner and went to a club for the evening. Id. At approximately 2 a.m., on March 13, 1994, they returned to the victim's house, where the petitioner was waiting in the driveway. Id. As the petitioner approached the two women, he pulled out a gun, chased the victim down a walkway alongside the building, and shot her five times, causing her death. Id.

The following day, the petitioner admitted to a friend that he had been involved in the shooting that led to the victim's death. Id., 282. After his arrest, he claimed

that the shooting was an unintended mistake. Id. At his criminal trial, the petitioner claimed that he was suffering from extreme emotional disturbance and that he was intoxicated when he shot the victim. Id.

Following his conviction, the petitioner, on May 15, 2013, filed a pro se petition for a writ of habeas corpus, alleging that his trial attorney, Silverstein, provided ineffective assistance of counsel. Specifically, the petitioner alleged that Silverstein advised him to reject a thirty year plea agreement because he could win the case at trial. On the basis of this advice, he rejected the state's offer, went to trial, and was convicted. On June 18, 2015, the petitioner, represented by appointed counsel, filed an amended petition, in which he alleged that he was denied his constitutional right to the effective assistance of counsel as a result of Silverstein's (1) deficient performance in plea negotiations and (2) failure to consult with an expert on the extreme emotional disturbance defense.[3] The petitioner first claimed that: "(a) [Silverstein] failed to inform the petitioner that the state made a pretrial offer in an attempt to resolve the case; (b) [Silverstein] failed to meaningfully and adequately advise the petitioner with respect to the state's pretrial offer; (c) [Silverstein] rejected the state's pretrial offer without the authorization or consent of the petitioner; and/or (d) assuming [Silverstein] did relay the offer to the petitioner, he advised the petitioner to reject the offer and proceed to trial." The petitioner claimed that but for his counsel's deficient performance relating to the plea offers, "there is a reasonable probability that . . . the results of the proceedings would have been more favorable to [him] in that [he] would have accepted the state's offer, and the trial court would have imposed the sentence pursuant

[3] The petitioner's amended habeas petition also included a claim of ineffective assistance of counsel regarding failure to apply for sentence review, but that issue has not been raised on appeal.

to the offer." Second, the petitioner claimed that Silverstein pursued an unreasonable legal strategy in presenting the extreme emotional disturbance affirmative defense, more particularly, by "fail[ing] to obtain the opinion of an expert or get the [petitioner] evaluated by an expert," and that this "unreasonable legal strategy prejudiced the petitioner."

The habeas trial was held on November 18, 2015, and March 2, 2016. The petitioner presented testimony from Silverstein, the prosecutor in the petitioner's criminal trial, Attorney James Dinnan, and the petitioner's expert in criminal defense, Attorney J. Patten Brown. The petitioner also testified. On June 21, 2016, the habeas court, *Oliver, J.*, issued a written memorandum of decision denying the petition for a writ of habeas corpus, finding that the petitioner had failed to prove that he was denied the effective assistance of trial counsel under the two-pronged test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The habeas court granted the petition for certification to appeal. This appeal followed. Additional facts and procedural history will be introduced as necessary.

We first set forth the standard of review and legal principles applicable to the petitioner's appeal. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . . Therefore, our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Citation omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner*

of Correction, 169 Conn. App. 813, 822, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

It 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." (Internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 775, 138 A.3d 908 (2016).

"A claim of ineffective assistance of counsel as enunciated in *Strickland* v. *Washington*, supra, 466 U.S. 668, consists of two components: a performance prong and a prejudice prong. 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." (Internal quotation marks omitted.) *Griffin* v. *Commissioner of Correction*, 137 Conn. App. 382, 387, 47 A.3d 956, cert. denied, 307 Conn. 921, 54 A.3d 182 (2012). "Our Supreme Court has stated that the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances, and that [j]udicial scrutiny of counsel's performance must be highly deferential." (Internal quotation marks omitted.) Id., quoting *Ham* v. *Commissioner of Correction*, 301 Conn. 697, 706, 23 A.3d 682 (2011).

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . To satisfy the second prong of *Strickland*, that his counsel's deficient performance prejudiced his defense, the petitioner must establish that, as

a result of his trial counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal. . . . The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different." (Internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, supra, 321 Conn. 776. "In making this determination, a court hearing an ineffectiveness claim [based on counsel's failure to investigate] must consider the totality of the evidence before the judge or the jury. . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." (Internal quotation marks omitted.) Id., quoting *Strickland* v. *Washington*, supra, 466 U.S. 695–96.

A petitioner's claim will "succeed only if both prongs are satisfied. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unworkable." (Citation omitted; internal quotation marks omitted.) *Boyd* v. *Commissioner of Correction*, 130 Conn. App. 291, 295, 21 A.3d 969, cert. denied, 302 Conn. 926, 28 A.3d 337 (2011). "A court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong, whichever is easier." *Ham* v. *Commissioner of Correction*, supra, 301 Conn. 704.

I

The petitioner first claims that Silverstein provided ineffective assistance either by failing to inform him

that the state had made a pretrial plea offer, or, alternatively, if he was informed of the offer, that Silverstein did not meaningfully explain the plea offer to him.

The United States Supreme Court has held that pretrial negotiations implicating the decision as to whether to plead guilty is a critical stage in criminal proceedings for purposes of the sixth amendment right to effective assistance of counsel. "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Missouri* v. *Frye*, 566 U.S. 134, 147, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012); see also *Padilla* v. *Kentucky*, 559 U.S. 356, 364, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) ("[b]efore deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel" [internal quotation marks omitted]).

The petitioner claims that Silverstein's performance during the pretrial plea negotiations fell below objectively reasonable standards. On this issue, the habeas court determined only that the petitioner had not met his burden on the prejudice prong. We need not address the performance prong of *Strickland* v. *Washington*, supra, 466 U.S. 687, on appeal because the habeas court did not address the performance of the petitioner's counsel as it relates to pretrial plea negotiations, nor

was the habeas court required to do so. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (Internal quotation marks omitted.) *State* v. *Brown*, 279 Conn. 493, 525–26, 903 A.2d 169 (2006); see also *Elsey* v. *Commissioner of Correction*, 126 Conn. App. 144, 162, 10 A.3d 578, cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011) ("[b]ecause both prongs . . . [of the *Strickland* test] must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong" [internal quotation marks omitted]).

The petitioner's claim concerning whether a plea deal was presented or meaningfully explained to him, specifically, whether this prejudiced him, depends entirely on the habeas court's determinations on credibility, to which we defer on appeal. "The habeas judge, as the trier of the facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Vidro* v. *Commissioner of Correction*, 105 Conn. App. 362, 366, 938 A.2d 607, cert. denied, 286 Conn. 908, 944 A.2d 982 (2008). "It is well established that a reviewing court is not in the position to make credibility determinations. . . . This court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *Lewis* v. *Commissioner of Correction*, 117 Conn. App. 120, 125–26, 977 A.2d 772, cert. denied, 294 Conn. 904, 982 A.2d 647 (2009). Because the petitioner's claim is premised entirely on issues of credibility, he cannot prevail.

In the present case, the habeas court summarily dismissed the petitioner's testimony as "loose, equivocal and unconvincing," based on his equivocations regarding whether he was made aware of the plea offer, both in his conflicting habeas petitions and his testimony at the habeas trial. The following exchange between the petitioner and the court highlights the inconsistencies between the two petitions for writ of habeas corpus:

"[The Court]: . . . Were you ever aware of an offer from the prosecutor?

"[The Petitioner]: Never aware of the offer.

"[The Court]: I'm sorry?

"[The Petitioner]: Never aware of the offer, no. . . .

"[The Court]: Did anyone ever tell you that there was an offer from a prosecutor short of going to trial and being convicted?

"[The Petitioner]: Well, like I mentioned, the prosecutor, Silverstein, mentioned it was an offer, but he never told me what the offer was. . . .

"[The Court]: Okay. Did Attorney Silverstein ever tell you—so is it fair to say that you never heard a number until you heard the number thirty from someone?

"[The Petitioner]: Yeah, I never heard a number.

"[The Court]: And you never heard a number from Attorney Silverstein, ever?

"[The Petitioner]: Never.

"[The Court]: Where did you get the number you wrote in your self-represented petition? Let's see here. You wrote . . . 'I claim Attorney Silverstein advised me to reject a thirty year plea agreement and he advised me that he can win my case at trial.' What do you mean

when you wrote that? It seems pretty clear to me, but what did you mean when you wrote that?

"[The Petitioner]: I wrote it because, after I found out that the thirty, thirty-five years was the . . . you know, was the offer, which I learned from another attorney before . . . before [Attorney Ashley] Hopkins.

"[The Court]: Okay. And you said something just now that's not what you wrote. You said thirty to thirty-five. Who told you—well, why did you write, 'I claim Attorney Silverstein advised me to reject a thirty year plea agreement.' Why did you write that?

"[The Petitioner]: [Attorney] Carpenter told me about the plea offer . . . so that's how I found out, through [Attorney Jerry Rosenblum's] records.[4]

"[The Court]: Found out what?

"[The Petitioner]: That there was . . . an offer. [There] was an offer on the table.

"[The Court]: Offer of what?

"[The Petitioner]: Of thirty-five or thirty and the forty. . . .

"[The Court]: You said thirty, you said thirty-five and you said forty. Tell me where all of this is coming from inside your head, please.

"[The Petitioner]: Well, she said that—she gave me the same thing, that the prosecutor wanted fifty, the judge wanted I guess forty, and they was willing—he asked for thirty or thirty-five years."

To establish prejudice in a lapsed plea case, "a petitioner need establish only that (1) it is reasonably probable that, if not for counsel's deficient performance, the

[4] Rosenblum was initially appointed to represent the petitioner at the time of his arraignment, but he became ill and was replaced by Silverstein prior to trial. Carpenter represented the petitioner in his first habeas petition, filed in 2011.

petitioner would have accepted the plea offer, and (2) the trial judge would have conditionally accepted the plea agreement if it had been presented to the court." *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 357, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013).

In the present action, the petitioner has established that the trial judge would have accepted the plea agreement, because the trial judge participated in pretrial conferences in which the court indicated what offers it might accept.[5] The petitioner, however, has not established that it was reasonably probable that *he* would have accepted the plea offer. As the habeas court noted, "[r]egarding prejudice, nearly two decades later, the petitioner has still not testified that he would have accepted an offer in the thirty to forty year range, indicating, 'I don't know.' The twenty-five year sentence he would have accepted was never available to him." We thus conclude that the habeas court's finding that the petitioner did not demonstrate prejudice was not clearly erroneous.

II

The petitioner next claims that he received ineffective assistance of counsel because of the allegedly deficient trial strategy employed by Silverstein in pursuing the extreme emotional disturbance affirmative defense at trial. The petitioner claims that Silverstein was deficient in selecting and presenting this defense, and had he

[5] At the habeas trial, Dinnan testified that Judge Damiani conducted pretrial negotiations and made an offer that he indicated he would accept, stating in relevant part that "[t]he procedure that occurred is we had a pretrial conference with Judge . . . I believe it was Judge Damiani. I had made an offer of fifty years that would encompass all the charges. . . . Judge Damiani indicated he would do forty years to encompass all the charges, and then . . . Rosenblum went downstairs into the lockup to discuss the matter with [the petitioner], and it was not accepted."

consulted an expert prior to trial, he could have presented evidence to the jury that rose to the level of extreme emotional disturbance. Alternatively, the petitioner argues that an expert would have persuaded Silverstein not to pursue the defense at all, specifically stating, "[a]n expert could help develop the themes of the defense, or inform the attorney if there is an actual basis for the [extreme emotional disturbance] defense to be asserted." On this issue, the habeas court discussed both the performance and prejudice prongs of *Strickland* in determining that the petitioner had not met his burden to prove ineffective assistance of counsel. We address each prong in turn.

"To satisfy the performance prong [of the *Strickland* test], a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment." (Internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 713, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). Inasmuch as "[c]onstitutionally adequate assistance of counsel includes competent pretrial investigation"; *Siemon* v. *Stoughton*, 184 Conn. 547, 554, 440 A.2d 210 (1981); "[e]ffective assistance of counsel imposes an obligation [on] the attorney to investigate all surrounding circumstances of the case and to explore all avenues that may potentially lead to facts relevant to the defense of the case." (Internal quotation marks omitted.) *Williams* v. *Commissioner of Correction*, 100 Conn. App. 94, 102, 917 A.2d 555, cert. denied, 282 Conn. 914, 924 A.2d 140 (2007).

Similarly, the United States Supreme Court has emphasized that a reviewing court is "required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as

[he] did . . . .'' (Citations omitted; internal quotation marks omitted.) *Cullen* v. *Pinholster*, 563 U.S. 170, 196, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). ''[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'' (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 680, 51 A.3d 948 (2012).

The petitioner claims that Silverstein's failure to call an expert could not have been a reasonable tactical decision because Silverstein failed to investigate the usefulness of such an expert. We begin by noting that there is no per se rule that requires a trial attorney to seek out an expert witness. However, this court noted that in some cases, ''the failure to use any expert can result in a determination that a criminal defendant was denied the effective assistance of counsel.'' (Internal quotation marks omitted.) *Stephen S.* v. *Commissioner of Correction*, 134 Conn. App. 801, 811, 40 A.3d 796, cert. denied, 304 Conn. 932, 43 A.3d 660 (2012); see also *Lindstadt* v. *Keane*, 239 F.3d 191, 201–202, 204 (2d Cir. 2001) (holding that failure to consult an expert on sexual abuse of children constituted inadequate assistance). This court has also determined that ''[t]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been

helpful in establishing the asserted defense." (Internal quotation marks omitted.) *Eastwood* v. *Commissioner of Correction*, 114 Conn. App. 471, 481, 969 A.2d 860, cert. denied, 292 Conn. 918, 973 A.2d 1275 (2009). Therefore, the burden is on the petitioner to show that an expert would have been necessary to establish the extreme emotional disturbance defense in this case.

The affirmative defense of extreme emotional disturbance, as described in *State* v. *Elliot*, 177 Conn. 1, 411 A.2d 3 (1979), allows the defendant to mitigate the charge of murder to manslaughter if he can prove by a fair preponderance of the evidence: "(a) the emotional disturbance is not a mental disease or defect that rises to the level of insanity as defined by the Penal Code; (b) the defendant was exposed to an extremely unusual and overwhelming state, that is, not mere annoyance or unhappiness; and (c) the defendant had an extreme emotional reaction to it, as a result of which there was a loss of self-control, and reason was overborne by extreme intense feelings, such as passion, anger, distress, grief, excessive agitation or other similar emotions." Id., 9.

The habeas court determined that the petitioner had not presented sufficient evidence "to establish a reasonable probability that consultation with an expert or presenting such an expert at trial would have been helpful in asserting the [extreme emotional disturbance] defense." Furthermore, the court found that Silverstein's decision not to retain an expert witness in pursuing the extreme emotional disturbance defense was a reasonable strategic decision. Silverstein's testimony indicated that he made a strategic decision in choosing to pursue the extreme emotional disturbance defense through the testimony of the petitioner and lay witnesses, rather than an expert witness. Silverstein testified that he did not find evidence of a clinical psychological issue, stating that "[the petitioner] never

made me aware of any background that he had suffered from any type of [psychological issues] . . . . He told me he was depressed, but it was about the relationship. It wasn't independent of the relationship." From speaking with many people who knew the petitioner, Silverstein learned that "he was in love with a woman who didn't love him, who was seeing other people, who had a child that he had a very close bond with, who he took care of, and that, in my mind, you know, he couldn't control the jealousy, the rage, the anger he was feeling towards her." On the basis of these interviews, Silverstein determined that he did not believe it would be prudent to call an expert witness when the petitioner and lay witnesses could testify to the same evidence.

Silverstein was also concerned that the jury would look unfavorably on an expert who was paid to testify on the petitioner's behalf. He testified, "I had a way, an idea how I was going to argue the case, and putting an expert up there who I'd pay to say that he is depressed is not going to help me or [the petitioner], in my mind. . . . [I]f you're calling an expert in on a psychological type of thing or to testify about extreme emotional distress . . . they know I'm paying them. Their conclusions are, you know, if not borne out by the facts, don't really help and it gives the state's attorney an opportunity to get up there and say, you know: He calls in an expert who's now going to tell you that he acted under extreme emotional distress. He paid this expert. The expert saw him nine months after the incident. What else is the expert going to say?" On the basis of this testimony, the habeas court properly found that it was not objectively unreasonable for Silverstein to choose not to call an expert for the extreme emotional disturbance defense.

The court's determination of reasonableness is also supported by the record, specifically, the testimony of Dinnan and Brown. When asked if the petitioner had

presented an expert in support of his extreme emotional disturbance defense, Dinnan testified, "I don't recall any expert, which isn't unusual for that particular defense." When the court questioned him further on this, Dinnan responded: "That's just my experience. They put on the facts surrounding it, the history of the particular relationship, and that's . . . again, that's what I recall happening in this particular case." Furthermore, the habeas court was not persuaded by the testimony of the petitioner's expert, Brown, as he stated it was unreasonable for Silverstein to fail to consult an expert in this case, but admitted that he had never raised the defense at trial and had only used it during pretrial negotiations to advocate for a better deal for his client.[6]

The petitioner also claims that the defense itself was an unreasonable trial strategy, and that if Silverstein had consulted with an expert, he may not have pursued the defense at all. But, as Silverstein testified, "it was the only defense he had," based on the strength of the evidence against the petitioner and the state's unwillingness to reduce the charge from murder to manslaughter. Facing this scenario, the habeas court found that Silverstein's decision to move forward with the extreme

[6] During the habeas proceeding, the following exchange occurred between the respondent's counsel and Brown:

"[The Respondent's Counsel]: Do you recall when about the first case was that you raised an [extreme emotional disturbance] defense?

"[Brown]: Oh, I mean, the first case would have been . . . . I don't recall exactly. . . . A couple of them I can tell you I know I hired an expert, and the expert basically said there's nothing here, so I just kind of tried to bluff my way through it and get a better deal, but, so those weren't all that went to trial or anything like that.

"[The Respondent's Counsel]: Okay. So these were potential defenses that you were exploring pretrial?

"[Brown]: Correct. Correct.

"[The Respondent's Counsel]: How many extreme emotional disturbance defenses did you raise at—have you raised at trial?

"[Brown]: At trial—well, I've only raised them at pretrial. I haven't raised them at trial, and we've been able to work it out once we disclose the expert report."

emotional disturbance defense was a "necessity, compelled by an offer of an unacceptably lengthy prison term based on compelling evidence of guilt." Therefore, we conclude that the habeas court's finding that "the defense presented by underlying counsel was not unreasonable in light of all of the evidence" was not clearly erroneous.

Even if Silverstein was deficient in his performance by failing to consult with an expert on the extreme emotional disturbance defense, the petitioner did not show that this allegedly deficient performance prejudiced him. "It is well established that a petitioner in a habeas proceeding cannot rely on mere conjecture or speculation to satisfy either the performance or prejudice prong but must instead offer demonstrable evidence in support of his claim." (Internal quotation marks omitted.) *Lopez* v. *Commissioner of Correction*, 142 Conn. App. 53, 59, 64 A.3d 334 (2013); see also *Crawford* v. *Commissioner of Correction*, 285 Conn. 585, 599, 940 A.2d 789 (2008) (petitioner's burden not met by speculation but by demonstrable realities); *Narumanchi* v. *DeStefano*, 89 Conn. App. 807, 815, 875 A.2d 71 (2005) ("[s]peculation and conjecture have no place in appellate review").

We conclude that the petitioner has failed to demonstrate that there is a reasonable probability that if Silverstein had consulted with or called an expert witness during the criminal trial, the jury would have had reasonable doubt as to the petitioner's guilt. The petitioner has simply speculated that the result might have been different had Silverstein chosen to utilize an expert witness. We also note the substantial evidence in the record that would support the jury's guilty verdict. Specifically, the victim and the petitioner had a long history of domestic violence incidents, and witnesses testified at trial that the victim screamed in terror as the petitioner pursued her before shooting her five times at

close range. *State* v. *Kellman*, supra, 56 Conn. App. 281. The petitioner subsequently confessed to firing the shots that killed the victim to numerous people, including members of the New Haven Police Department. On the basis of the strength of the evidence presented to the jury, we conclude that the petitioner has not met his burden of showing that the jury verdict might have been different without counsel's allegedly deficient performance.

On the basis of our review of the record, we hold that the court's factual findings and legal conclusions are sufficiently supported by the record. We therefore hold that the court did not err in determining that the petitioner failed to prove ineffective assistance of counsel. Accordingly, we conclude that the court properly denied the petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

SOVEREIGN BANK *v.* JAMES LICATA ET AL.
(AC 40186)

Lavine, Prescott and Kahn, Js.*

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant L, who filed counterclaims alleging breach of contract, negligent misrepresentation, and a violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). Thereafter, S Co. was substituted as the plaintiff. The counterclaims were tried to a jury, which returned a verdict in part for L, and the foreclosure complaint was tried to the court, which rendered judgment in part for L in accordance with the jury's verdict, and a judgment of strict foreclosure and set the law days. Following the trial court's decision awarding attorney's fees and, inter alia, granting in part S Co.'s motion to set aside the verdict and for judgment notwithstanding the verdict, S Co. appealed

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

to this court, challenging the judgment rendered against it on the counterclaims for negligent misrepresentation and for CUTPA violations. L also filed a cross appeal challenging the court's decision to set aside the verdict as to the breach of contract counterclaim, which was dismissed. This court reversed in part the judgment of the trial court as to the counterclaims. Several years later, L filed a motion to determine the status of the strict foreclosure judgment, in which she claimed that her equity of redemption was never extinguished because the passage of the law days had been stayed by the prior appeal. S Co. filed a motion to correct the record to reflect that a judgment of strict foreclosure had been rendered, that the law days had commenced thereafter and that the commencement of the law days had never been stayed or modified. The trial court denied the motions, and L appealed to this court. Thereafter, S Co. filed a motion to dismiss the appeal for lack of subject matter jurisdiction, claiming that L's interest in the property had been extinguished after the law days passed. *Held* that the appeal was dismissed as moot, as there was no practical relief that could be afforded to L due to the fact that title to the property at issue had long since passed unconditionally to S Co.: because the record demonstrated that the trial court rendered judgment of strict foreclosure with respect to the subject property and that no appeal was ever filed from the judgment rendered on the foreclosure complaint, any initial appellate stay of execution that arose when the judgment was rendered expired after the appeal period for that judgment had run, which was long before the law days set by the court had passed, and, therefore, because there was no appellate stay in effect with respect to the foreclosure judgment when the law days began to run, absolute title to the property transferred to the plaintiff as a matter of law after all the law days expired; moreover, because the rules of practice (§§ 61-2 through 61-4) establish that a final judgment disposing of a counterclaim is separate and distinct from a judgment on the associated complaint, the foreclosure judgment gave rise to a distinct appeal period and appellate stay that automatically terminated upon the expiration of the period to appeal from that judgment, and was not affected by the stay that resulted due to the appeal from judgment on the counterclaim.

Considered September 7—officially released November 14, 2017

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Tobin*, *J.*, granted in part the plaintiff's motion for summary judgment as to liability with respect to the defendant Cynthia Licata; thereafter, the court, *Tyma*, *J.*, granted the

motion filed by Seven Oaks Partners, LP, to be substituted as the plaintiff; subsequently, the defendant Cynthia Licata field a counterclaim as against the substitute plaintiff; thereafter, the counterclaim was tried to the jury and the foreclosure complaint was tried to the court, *Nadeau*, *J.*; verdict for the defendant Cynthia Licata on the counterclaim; subsequently, the court, *Nadeau*, *J.*, denied the substitute plaintiff's motion for remittitur, granted in part the substitute plaintiff's motions for judgment notwithstanding the verdict and to set aside the verdict, and rendered judgment of strict foreclosure and in part for the defendant Cynthia Licata on the counterclaim, from which the substitute plaintiff appealed and the defendant Cynthia Licata cross appealed to this court, which dismissed the cross appeal, reversed in part the judgment of the trial court as to the counterclaim and remanded the case to the trial court with direction to vacate in part the damages and attorney's fees awards; thereafter, the court, *Mintz*, *J.*, denied the motion to determine the status of the foreclosure judgment filed by the defendant Cynthia Licata and denied the substitute plaintiff's motion to correct the record, and the defendant Cynthia Licata appealed to this court; subsequently, the substitute plaintiff filed a motion to dismiss the appeal. *Appeal dismissed.*

Howard R. Wolfe in support of the motion.

John F. Carberry in opposition to the motion.

Opinion

PRESCOTT, J. In this protracted foreclosure matter, the defendant Cynthia Licata[1] appeals following the trial

[1] Cynthia Licata is also known and referred to in certain pleadings as Cynthia Cortese. In addition to Cynthia Licata, the following parties were named as additional defendants in the underlying foreclosure action: James Licata, Susan Braun, Edward Stanley and First Connecticut Consulting Group, Inc. Because Cynthia Licata is the only defendant participating in the present appeal, we refer to her in this opinion as the defendant and to the remaining defendants by name.

court's denial of her motion asking the court to clarify the "status" of a judgment of strict foreclosure that was rendered orally in open court, more than ten years earlier, and from the trial court's order making copies of the transcripts of the relevant underlying proceedings a part of the court file. The plaintiff Seven Oaks Partners, LP,[2] filed a motion to dismiss the appeal on the ground that this court lacks subject matter jurisdiction because the appeal is moot and the decisions from which the defendant appealed do not constitute appealable final judgments. The defendant opposes the motion to dismiss. Because we agree that there is no practical relief that can be afforded to the defendant in this matter due to the fact that title to the property at issue has long since passed unconditionally to the plaintiff, we grant the plaintiff's motion and dismiss the appeal as moot.[3]

The record reveals the following relevant facts and procedural history. In 2001, James Licata entered into a loan agreement with Sovereign Bank and executed a note in the amount of $2.5 million. As security for that loan, he and the defendant executed a mortgage on two parcels of property in Greenwich. The first parcel was owned by the defendant, and the second, a vacant lot located across the street from the first parcel, was owned by James Licata.[4] As additional security, a guar-

[2] During the pendency of the foreclosure proceedings, the original named plaintiff, Sovereign Bank, assigned the relevant note and mortgage to Seven Oaks Partners, LP, which later was substituted as the plaintiff in place of Sovereign Bank. Our references to the plaintiff are to Seven Oaks Partners, LP.

[3] Because we dismiss the appeal on mootness grounds, we do not address whether the court's postjudgment rulings constituted appealable final judgments. See *State* v. *Abushaqra*, 153 Conn. App. 282, 283 n.2, 100 A.3d 1014 (dismissing appeal on mootness grounds without resolving final judgment question), cert. denied, 315 Conn. 906, 104 A.3d 757 (2014).

[4] James Licata later conveyed his interest in the second parcel to the defendant.

anty for the loan was executed by First Connecticut Consulting Group, Inc.[5]

James Licata failed to make timely monthly payments on the loan and eventually was held in default. Sovereign Bank chose to accelerate the loan, demanded payment in full, and, in February, 2002, commenced this action seeking a judgment of foreclosure, a deficiency judgment against James Licata, and enforcement of the loan guaranty.

The defendant filed an answer and special defenses in which she alleged that she had executed the mortgage under duress and that Sovereign Bank had breached an implied covenant of good faith and fair dealing. James Licata never filed a responsive pleading and was later defaulted for failure to disclose a defense.[6] In September, 2003, the court rendered summary judgment as to liability only on the foreclosure complaint with respect to the defendant.

In September, 2004, the plaintiff, which previously had purchased and been assigned the subject note and mortgage, was substituted into the foreclosure action in place of Sovereign Bank. The defendant, in February, 2005, filed a pleading that asserted a new special defense and three counterclaims, each premised upon the plaintiff allegedly having entered into a forbearance agreement with her. The counterclaims sounded in breach of contract, negligent misrepresentation, and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The plaintiff objected to the filing of the special defense and

[5] First Connecticut Consulting Group, Inc., was owned by James Licata and the defendant and specialized in arranging financing for financially distressed parties. *In re First Connecticut Consulting Group, Inc.*, 340 B.R. 210, 214 (D. Vt. 2006), aff'd, 254 Fed. Appx. 64 (2nd. Cir. 2007).

[6] James Licata and First Connecticut Consulting Group, Inc., filed for bankruptcy protection in June and July, 2002. As a result, the foreclosure action was stayed as to those parties only. See Practice Book § 14-1.

counterclaims, arguing that the defendant needed permission from the court to amend her previous answer. The plaintiff also filed a motion asking the court to render a judgment of strict foreclosure.

In March, 2005, the court overruled the plaintiff's objection to the special defense and counterclaims. The plaintiff also unsuccessfully moved to sever the counterclaims from the foreclosure action. The defendant's counterclaims were tried to a jury. The plaintiff's claim on the foreclosure complaint was tried to the court, *Nadeau*, *J.* On September 27, 2006, the jury returned a verdict in favor of the defendant on all three counterclaims and awarded combined damages of $500,000 on the negligent misrepresentation and breach of contract counts.

On October 5, 2006, the court held a hearing at which it heard arguments as to whether it could proceed to rule on the foreclosure complaint in light of the jury's verdict on the counterclaims and its responses to related interrogatories. After hearing arguments from the parties, the court concluded that it would proceed to judgment on the foreclosure complaint. After reviewing the evidence presented, including the appraisals submitted at trial, the court made a number of findings, including that the amount of the debt owed was $2,947,595.84 and that the fair market value of the property was $2.5 million. In light of there being insufficient equity to cover the debt, the court determined, and the parties agreed, that a judgment of strict foreclosure, rather than a foreclosure sale, was the appropriate remedy. The court ordered that the law days would commence on February 6, 2007. The court indicated that it would hold an additional hearing regarding the issue of attorney's fees, both as a component of the foreclosure judgment and as part of the defendant's damages on

the CUTPA counterclaim.[7] The court then proceeded to hear argument on whether to award punitive damages with respect to the CUTPA violation. Ultimately, the court concluded that the defendant was entitled to an additional $300,000 in punitive damages.

On October 10, 2006, the plaintiff filed postjudgment motions to reconsider the punitive damages award, to set aside the jury's verdict on the counterclaims, for judgment notwithstanding the jury's verdict, and for remittitur. The plaintiff also submitted various memoranda of law in support of its motions.

The court heard argument on the postjudgment motions at a hearing on November 14, 2006, following which it heard arguments regarding the outstanding issue of attorney's fees. Judge Nadeau denied the motions for reconsideration and for remittitur, but granted in part the plaintiff's motion to set aside the verdict and for judgment notwithstanding the verdict with respect to the breach of contract count. The court otherwise denied the postjudgment motions. With respect to attorney's fees, the court awarded attorney's fees to the plaintiff on the foreclosure complaint and to the defendant on her CUTPA counterclaim. The court ended the hearing by confirming with the parties that it had made all findings necessary for the entry of a judgment of strict foreclosure, referring to its findings and the law days set forth at the October 5, 2006 hearing.[8] The court took no additional action to memorialize

[7] In *Benvenuto* v. *Mahajan*, 245 Conn. 495, 496, 715 A.2d 743 (1998), our Supreme Court held that a judgment of strict foreclosure is an appealable final judgment even if the court has not made a determination as to an award of attorney's fees.

[8] In relevant part, the court stated: "[T]he court points . . . the parties to the law date which has previously been set for Feb[ruary]—*and the court pronounces the final result of a judgment via strict foreclosure on a debt which was pronounced at the last hearing.*" (Emphasis added.)

the judgment, nor was such action expressly requested by the parties under our rules of practice.[9]

The plaintiff filed a timely appeal on November 28, 2006, challenging the judgment rendered against it on the CUTPA and negligent misrepresentation counterclaims. The defendant filed a cross appeal, which was later dismissed, that purported to challenge only the court's decision to set aside the jury's verdict with respect to the breach of contract counterclaim. *Sovereign Bank* v. *Licata*, 116 Conn. App. 483, 485–86, 977 A.2d 228 (2009), appeal dismissed, 303 Conn. 721, 36 A.3d 662 (2012) (certification improvidently granted). Neither the appeal nor the cross appeal raised any challenge to the judgment of strict foreclosure.

In February, 2008, during the pendency of the appeal, the plaintiff filed a motion with the trial court to terminate the automatic appellate stay. Apparently, the plaintiff was concerned that the filing of the appeal or cross appeal from the judgment on the counterclaims had effectuated a stay of the proceedings to enforce or carry out the foreclosure judgment, thus preventing the running of the law days. On April 15, 2008, following a hearing, Judge Nadeau granted the motion to terminate an appellate stay that, for reasons we explain later, had never actually arisen by virtue of the filing of the appeal or cross appeal.[10]

[9] The file contains a case disposition form, JD-CL-37 (Rev. to 2000), completed by the trial court clerk, indicating that the case was disposed of on November 15, 2006, by a "[j]udgment after completed trial, non-jury, for: other." It is unclear how this notation accurately reflects the disposition that transpired in this matter. If it was intended to reflect the foreclosure judgment, which was the only "non-jury" matter, there was a separate box on the form to indicate a judgment of strict foreclosure. In any event, that form is a clerical document that is in no manner dispositive of whether a judgment has been rendered in a particular case or the form of that judgment. In other words, erroneous coding of a judgment by a clerk cannot transform the nature of the judgment from that which was actually rendered by the court.

[10] In response to a request for articulation by the defendant as to the basis for its decision to terminate the stay, the trial court acknowledged, but

The plaintiff erroneously stated in subsequent motions filed with the trial court that the defendant's cross appeal had been taken from the foreclosure judgment. After the cross appeal was dismissed, the plaintiff filed motions with the trial court that asked the court to set new law days, further suggesting that the February, 2006 law days had not passed because of the pendency of the cross appeal. The plaintiff's assertions regarding the nature of the cross appeal, however, simply were inaccurate and not supported by the record. The appeal and cross appeal forms expressly indicated that the parties only intended to challenge aspects of the judgment on the counterclaims, pursuant to which the plaintiff was awarded compensatory damages for causes of action distinct from the foreclosure remedy sought in the complaint. Separate judgments were rendered on the complaint, which was tried to the court, and the counterclaims, which were tried to the jury. Furthermore, the motions to set new law days were marked over and never acted upon by the trial court. Certainly, any assumptions made by the plaintiff regarding the operation of our rules of practice are not binding on this court and have no bearing on our present analysis.

The defendant filed a motion asking this court to review the trial court's order terminating the automatic appellate stay. This court compounded the parties' apparent misunderstanding regarding the nature of the purported appellate stay by granting the motion for review and also granting relief, remanding the matter to the trial court with direction to reconsider its termination of stay in light of our decision in *Barclays Bank*

failed to credit, the defendant's argument that nothing could be done to return title to the defendant even if she prevailed on appeal. The court explained: "If that statement were indeed true, it would suggest that this court's lifting of the stay was not well pronounced. However, the court felt that a certain appellate result would reverse the foreclosure this trial court allowed, requiring a return of the property from the plaintiff to defendant."

of New York v. *Ivler*, 20 Conn. App. 163, 565 A.2d. 252, cert. denied, 213 Conn. 809, 568 A.2d 792 (1989).[11] In response to our ruling, the trial court issued an order rescinding its termination of stay. No additional motion for review was filed from that order.

On August 18, 2009, this court issued an opinion that resolved the appeal on the counterclaims. We reversed the judgment rendered on the jury's verdict as to the CUTPA counterclaim and vacated the associated punitive damages and attorney's fee awards. *Sovereign Bank* v. *Licata*, supra, 116 Conn. App. 494–95. We affirmed, however, the judgment against the plaintiff on the negligent misrepresentation counterclaim. Id., 505. We rejected the plaintiff's claims that the court improperly denied its motion for remittitur and failed to sustain its objection to the defendant's claim for a jury trial on her counterclaims.[12] Id., 507. The Supreme Court initially granted the plaintiff's petition for certification to appeal from our decision on October 14, 2009; *Sovereign Bank* v. *Licata*, 293 Conn. 935, 981 A.2d 1080 (2009); but that appeal was dismissed in February, 2012, on the ground that certification had been improvidently granted. *Sovereign Bank* v. *Licata*, 303 Conn. 721, 723, 36 A.3d 662 (2012).[13]

In July, 2012, the defendant obtained a financial institution execution for her $500,000 judgment against the

[11] *Barclays Bank of New York* v. *Ivler*, supra, 20 Conn. App. 166–67, stands for the proposition that law days that are set forth in a judgment of strict foreclosure can have no legal effect if an appellate stay is in effect because to do so would result in an extinguishment of the right of redemption pending appeal.

[12] Because in the prior appeal the defendant never filed a brief in response to the claims raised by the plaintiff, or in support of her own cross appeal, the cross appeal was dismissed, and the appeal was decided on the basis of the plaintiff's brief and argument only. *Sovereign Bank* v. *Licata*, supra, 116 Conn. App. 486 n.3.

[13] The defendant filed a cross appeal with the Supreme Court, which the plaintiff moved to dismiss. The court granted the motion to dismiss on February 9, 2010.

plaintiff. In October, 2012, the plaintiff, who previously had filed for bankruptcy and was represented by new counsel, filed a motion to set law days, asserting that the court had "withheld setting law days in furtherance of the strict foreclosure judgment because [an] appeal was pending" and that the plaintiff sought to have the court set new law days "to complete the foreclosure process." The plaintiff also filed a new foreclosure worksheet accompanied by an affidavit of debt, an affidavit of attorney's fees and an affidavit of appraisal. No action was taken by the court.

A year later, on October 9, 2013, the plaintiff again filed a motion to set the law days. At the same time, the plaintiff filed an application with the court for an execution of ejectment. The application form indicated that a foreclosure judgment had been rendered and that title to the property had transferred to the plaintiff six years earlier, i.e., on February 12, 2007. On November 19, 2013, the trial court clerk issued the execution for ejectment. The execution authorized a proper officer to eject the defendant from the property and to remove her personal effects. There is no indication, however, that the plaintiff ever had an officer execute the ejectment. On December 2, 2013, the court clerk also issued a certificate of judgment of strict foreclosure. See General Statutes § 49-16 (requiring that foreclosure certificate be recorded in land records once title becomes absolute in mortgagee). The record reveals no objection by the defendant either to the application for the execution of ejectment or to the foreclosure certificate.

No further action, in fact, was taken in this matter for another three years until July 21, 2016, when counsel for the defendant filed a caseflow request seeking a status conference. According to that request, the status of the foreclosure action needed to be addressed because the plaintiff was attempting to sell the property.

The defendant asserted that no judgment of foreclosure had ever been rendered in favor of the plaintiff.

On January 6, 2017, the defendant filed a motion titled "Motion to Determine Status of Purported Judgment of Strict Foreclosure." In her motion, the defendant acknowledged that the plaintiff had "filed a certificate of foreclosure, and has treated the property as its own, including pocketing insurance proceeds paid due to water damage to the property." The defendant nevertheless maintained that her equity of redemption was never extinguished because "the setting and passage of law days . . . never happened in this case, meaning [she] remains the owner of the property." In support of her arguments, the defendant largely relied on the plaintiff's attempt to terminate the appellate stay in the prior appeal and its unresolved requests for the court to reset the law days. The defendant also made reference to the judgment file submitted by the trial court. Although she conceded that the judgment file indicated that the court had rendered a judgment of strict foreclosure in this matter, she nevertheless believed that it was legally significant that the judgment file failed to mention law days.

On January 13, 2017, the plaintiff filed a "Motion to Correct Record." In that motion, the plaintiff argued that Judge Nadeau had rendered a final judgment of strict foreclosure from the bench at the hearings on October 5 and November 14, 2006, including setting law days commencing on February 6, 2007. The plaintiff argued that the February 6, 2007 law day set forth by the court as part of the judgment was "never stayed, modified, set aside or otherwise changed." The plaintiff asked the court to correct the judgment file to the extent that it contained any errors or omissions and submitted a proposed corrected judgment file. The plaintiff also filed an objection to the defendant's motion to determine status.

The court, *Mintz*, *J.*, held a hearing on February 14, 2017. The court informed the parties that "[t]he record is what the record is" and that the court would not issue what it deemed an "advisory opinion" setting forth the status of the judgment or resolving ownership of the property, which the court explained could be determined from reviewing the record. With respect to the motion to correct, the court refused to make the proposed corrections to the judgment file.

To ensure a complete record in this matter, however, the court agreed to make copies of the transcripts from the October 5 and November 14, 2006 hearings before Judge Nadeau a part of the court file. All parties stipulated at the hearing regarding the authenticity of the transcripts to be included in the file. The parties also helped to identify a number of other irregularities in the trial court's file, including several missing or miscoded documents, which the court granted permission to correct in accordance with an agreement reached by the parties during a recess. The defendant filed this appeal on March 6, 2017, from the court's order making the transcripts of the October 5 and November 14, 2006 foreclosure proceedings a part of the court record, and from its order denying her motion to determine the status of the foreclosure judgment.

The plaintiff filed the present motion to dismiss on March 27, 2017, arguing, inter alia, that the appeal should be dismissed for lack of subject matter jurisdiction because the defendant's interest in the property had been extinguished by the passing of law days and, therefore, the appeal was moot.[14] The defendant filed a timely opposition to the motion to dismiss. With respect to mootness, the defendant stated as follows:

[14] Although generally a motion to dismiss an appeal must be filed within ten days of the filing of the appeal, a motion to dismiss based on "lack of jurisdiction may be filed at any time." Practice Book § 66-8.

"[The plaintiff] is correct that if a judgment of strict foreclosure entered in 2006 and if the law days entered therein passed, this appeal is moot. That position, however, begs the question to which [the defendant] seeks guidance: did a judgment of strict foreclosure ever enter in this case? Until that question is answered, the issue of mootness is premature." (Emphasis omitted.)

On July 19, 2017, this court, sua sponte, ordered the trial court to articulate "whether a judgment of strict foreclosure entered in this case and, if so, when did the judgment enter and did the law days run." Judge Mintz did not directly answer the articulation request. Rather, the court recounted findings made by Judge Nadeau at the October 5 and November 15, 2006 hearings and discussed the proceedings that occurred during the previous appeal regarding the appellate stay.[15] The court concluded its "articulation" by stating: "It appears that if the appellate stay was in effect based on the appeal of November, 2006, that the law days have not run." The converse, of course, is also true—if the appellate stay was *not* in effect based on the November, 2006 appeal, the law days have expired.[16]

[15] With respect to Judge Nadeau's findings, Judge Mintz stated in relevant part: "The court articulates as follows: On November 14, 2006, Judge Nadeau on page 116 of the transcript stated the following: '[H]aving said that, the court points the parties to the law date which has previously been set for February and the court pronounces the final result of a judgment via strict foreclosure on a debt which was pronounced at the last hearing.' The last hearing Judge Nadeau is referring to occurred on October 5, 2006. At that hearing, on page seventy-eight of the transcript, Judge Nadeau determined the debt to be $2,947,595.84. He went on to find the reasonable value of the property to have been 'testified to effectively' as $2.5 million. On page seventy-nine of said transcript, Judge Nadeau awarded a $150 title fee, and an appraiser's fee of $250. On page eighty-seven [to] eighty-eight, Judge Nadeau discusses different law days . . . . It appears that Judge Nadeau entered February 6 as the law date."

[16] On August 10, 2017, this court ordered the parties to file simultaneous supplemental memoranda addressing the final judgment issue further in light of the court's articulation. Each party complied with our order. Both parties had a full opportunity to brief the question of mootness in support of or in opposition to the motion to dismiss.

We acknowledge that our resolution of the mootness issue raised in the motion to dismiss is intertwined with the merits of the defendant's appeal. More particularly, as noted by the defendant in her opposition to the motion, whether this court can afford the defendant any practical relief regarding the trial court's actions challenged on appeal turns on whether a judgment of strict foreclosure was rendered in this matter, including the setting of law days, and whether those law days passed, thereby effectuating the passage of title. The defendant sought to clarify those issues in her motion, which the trial court denied. Furthermore, our resolution of the plaintiff's motion to dismiss the appeal requires us to consider the proceedings before Judge Nadeau as reflected in the October 5 and November 14, 2006 transcripts, which the trial court incorporated into the record in response to the plaintiff's motion to correct.

As the court observed in *First National Bank of Chicago* v. *Luecken*, 66 Conn. App. 606, 610, 785 A.2d 1148 (2001), cert. denied, 259 Conn. 915, 792 A.2d 851 (2002), we note that "[w]hile it may generally be prudent, in cases where a motion to dismiss goes to the heart of the appeal itself, to defer action until after the parties have fully briefed any interrelated issues, in this case we grant the plaintiff's motion to dismiss because the added delay incident to deferral of the question would not, under the facts of this case, further our policy of expediting foreclosure cases whenever possible." See also *Argent Mortgage Co., LLC* v. *Huertas*, 288 Conn. 568, 575–76, 953 A.2d 868 (2008) (resolving substantive issues raised on appeal that were inextricably intertwined with question of mootness).

Because mootness implicates our subject matter jurisdiction; *Connecticut Coalition Against Millstone* v. *Rocque*, 267 Conn. 116, 125, 836 A.2d 414 (2003); it is a proper basis upon which to seek the dismissal of

an appeal. See Practice Book § 66-8. "[I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . [If] events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *Giaimo* v. *New Haven*, 257 Conn. 481, 492–93, 778 A.2d 33 (2001).

"In Connecticut, a mortgagee has legal title to the mortgaged property and the mortgagor has equitable title, also called the equity of redemption. . . . The equity of redemption gives the mortgagor the right to redeem the legal title previously conveyed by performing whatever conditions are specified in the mortgage, the most important of which is usually the payment of money. . . . Under our law, an action for strict foreclosure is brought by a mortgagee who, holding legal title, seeks not to enforce a forfeiture but rather to foreclose an equity of redemption unless the mortgagor satisfies the debt on or before his law day." (Citations omitted.) *Barclays Bank of New York* v. *Ivler*, supra, 20 Conn. App. 166. Accordingly, "[if] a foreclosure decree has become absolute by the passing of the law days, the outstanding rights of redemption have been cut off and the title has become unconditional in the plaintiff, with a consequent and accompanying right to possession. The qualified title which the plaintiff had previously held under his mortgage had become an absolute one." (Internal quotation marks omitted.) *City Lumber Co. of Bridgeport, Inc.* v. *Murphy*, 120 Conn. 16, 25, 179 A. 339 (1935). In other words, if the defendant's equity of redemption was extinguished by the passing of the law days, we can afford no practical relief by reviewing the rulings of the trial court now challenged on appeal, as doing so would have no practical effect or alter the substantive rights of the parties.

In a foreclosure action, an appealable final judgment exists once the trial court has determined liability and set forth the essential components of a foreclosure judgment, such as the amount of the debt owed and whether a foreclosure should be strict or by sale. *Essex Savings Bank* v. *Frimberger*, 26 Conn. App. 80, 80–81, 597 A.2d 1289 (1991). If the judgment is by strict foreclosure, a final judgment also includes the setting of law days. See *Connecticut National Bank* v. *L & R Realty*, 40 Conn. App. 492, 493, 671 A.2d 1315 (1996) (dismissing for lack of final judgment appeal taken from strict foreclosure judgment that was silent as to law days). A judgment is binding and final for purposes of appeal if notice of that judgment is given to the parties in open court. See Practice Book § 63-1 (b).

Here, it is apparent from our review of the transcripts submitted at the hearing on the defendant's motion[17] that a judgment of strict foreclosure was rendered on October 5, 2006, in open court, with all parties in attendance. At that hearing, the court made specific and definite findings regarding the amount of the debt owed and the value of the property, and it informed the parties that it was rendering a judgment of strict foreclosure. The court also expressly set law days to commence on February 6, 2007.

[17] Our reliance on the transcripts in the record may, at first blush, appear at odds with the defendant's challenge on appeal to the court's decision to include them in the record in the first instance. We do not share that concern for several reasons. First, the defendant has never challenged the authenticity of the transcripts or claimed that they fail to represent what transpired before Judge Nadeau at those hearings. Second, this court is entitled to take judicial notice of any proceeding between the parties that occurred and to order the record perfected to the extent necessary to conduct our review. Practice Book § 60-2; see *In re Jah'za G.*, 141 Conn. App. 15, 24, 60 A.3d 392, cert. denied, 308 Conn. 926, 64 A.3d 329 (2013). Furthermore, even without direct reference to the transcripts, Judge Mintz, in his articulation, sets forth all the necessary findings based upon his review of the transcripts. That articulation and its findings were not challenged by the parties and, thus, are properly part of the record before this court. See footnote 15 of this opinion.

It is axiomatic that, with limited exceptions, an appellate stay of execution arises from the time a judgment is rendered until the time to file an appeal has expired. Practice Book § 61-11 (a). If an appeal is filed, any appellate stay of execution in place during the pendency of the appeal period continues until there is a final disposition of the appeal or the stay is terminated. Practice Book § 61-11 (a) and (e). If no appeal is filed, the stay automatically terminates with the expiration of the appeal period.

Here, although both the previous appeal and cross appeal were taken from the final judgment rendered on the counterclaims in this matter; no appeal was ever filed from the judgment rendered on the foreclosure complaint. Neither party challenged any aspect of the judgment of strict foreclosure, as reflected in our decision resolving that prior appeal. *Sovereign Bank* v. *Licata*, supra, 116 Conn. App. 485–86 and n.3. Our rules of practice unquestionably establish that, for purposes of filing an appeal, a final judgment disposing of a counterclaim is separate and distinct from a judgment on the associated complaint. See Practice Book §§ 61-2 through 61-4. For example, a judgment rendered on an entire counterclaim is an immediately appealable independent judgment even if an undisposed complaint remains in the case. Practice Book § 61-2; *Ace Equipment Sales, Inc.* v. *Buccino*, 273 Conn. 217, 223 n.4, 869 A.2d 626 (2005). Such a final judgment on a counterclaim establishes a distinct appeal period from the appeal period related to the judgment on a complaint in the same case. See Practice Book §§ 61-2 and 61-3. As a result of these different appeal periods, different appellate stays of execution arise, and any automatic stay that is extended as the result of filing an appeal from a counterclaim will not stay proceedings to enforce or carry out the judgment on the complaint.

Such a construction of our rules of practice is consistent with our Supreme Court's decision in *Cronin* v. *Gager-Crawford Co.*, 128 Conn. 401, 23 A.2d 149 (1941). In that case, which began as an action for strict foreclosure, the trial court eventually rendered a judgment of foreclosure by sale but denied the plaintiffs' claim for a deficiency judgment. Id., 402. The plaintiffs filed an appeal challenging only that part of the judgment denying their claim for a deficiency judgment. Id., 403. The defendant filed a motion to erase the appeal, now a motion to dismiss, because it was taken from only a portion of the underlying judgment. Id. Our Supreme Court, in denying the motion to dismiss, stated: "We can see no valid reason why an appeal may not properly be taken from a portion of a judgment which is so distinct and severable that, should error be found and the case remanded for further proceedings, the remaining portion would be in no way affected, and we see distinct advantages in allowing such an appeal. The effect would be that the stay of execution incident to the appeal *would not affect the portion of the judgment not appealed from and it would become effective without the delay resulting from the appeal.*" (Emphasis added.) Id., 404.

Because no appeal was filed from the judgment of strict foreclosure in this case, any initial appellate stay of execution that arose when that judgment was rendered expired after the appeal period for that judgment had run, which was long before the law days set by the court passed. Further, neither party sought a discretionary stay of execution with respect to the foreclosure judgment.[18] Accordingly, because there was no appellate stay in effect when the law days began to run on

[18] Certainly, although no automatic stay may arise, any party may request the imposition of a *discretionary* stay pending appeal in accordance with Practice Book § 61-12. Here, the defendant never requested the trial court to impose a stay of the foreclosure judgment pending resolution of the counterclaim appeal and cross appeal.

February 6, 2007, absolute title to the property transferred to the plaintiff as a matter of law after all law days expired.

It is true that the record reflects some later confusion by the parties, the trial court and this court regarding whether the foreclosure judgment had been subject to an appellate stay and whether the law days needed to be reset. Any such misstatements or errors, however, did nothing to alter the legal reality—law days passed and title to the property became absolute in the plaintiff. Furthermore, the defendant admittedly has known for years that the plaintiff regarded the property as its own, and she never objected to the application for an execution of ejectment, the court's issuance of a foreclosure certificate or the plaintiff's receipt of insurance proceeds for the property. Accordingly, if there was any ambiguity in the record regarding the status of this foreclosure action, it has existed with the knowledge and acquiescence of the defendant. It was not until the plaintiff sought to sell the property during the pendency of its bankruptcy action that the defendant claimed any need for clarification.

It is also true that the defendant in this case did not seek to have the trial court open the foreclosure judgment and restore title in the property to her, but only sought guidance as to the status of the foreclosure judgment. Nevertheless, the intent of her motion for clarification was to call into question whether the law days had passed and, therefore, whether she retained some property interest sufficient to prevent the plaintiff from selling the property. Having determined that a judgment of strict foreclosure was rendered in favor of the plaintiff, that the judgment properly included the setting of law days, and that the law days passed without violating any appellate stay of execution, we conclude that it would serve no useful purpose to engage in what would amount to a purely academic discussion of the

propriety of the trial court's responses to the parties' postjudgment motions challenged in the present appeal. Accordingly, we conclude that this appeal is moot, and we grant the plaintiff's motion to dismiss on that basis.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RICARDO O. MYERS (AC 39621)

Lavine, Elgo and Flynn, Js.

Syllabus

Convicted of, inter alia, the crime of murder in connection with the shooting death of the victim, the defendant appealed. During the defendant's trial, he sought to admit into evidence a video recording of an interview with the police, wherein a witness who was unavailable to testify, R, identified a third party as the shooter of the victim. After hearing argument, the trial court ruled that the video was not admissible under the residual exception to the hearsay rule. On appeal, the defendant claimed that the trial court erred in excluding the video interview of R. *Held* that the defendant's claim, raised for the first time in his reply brief, that the court's improper exclusion of the video recording of R's interview was harmful was not reviewable, as an appellant must raise and analyze in his first and principal brief any matters necessary for the determination of his appeal, and cannot raise and analyze a claim for the first time in a reply brief, and, therefore, it was the defendant's responsibility to analyze the harm that flowed from the court's evidentiary ruling in his principal brief; moreover, although the defendant claimed that, because the excluded evidence imputed culpability to a third party, the harm from its exclusion was so obvious that he did not need to brief and analyze it in his principal brief, he was still required to provide some analysis, in writing in his principal brief, concerning how he was harmed from the claimed error given the other evidence before the jury, so as to give the appellee a fair opportunity to respond to it in writing and the reviewing court the full benefit of the appellee's written response.

(*One judge concurring*)

Argued September 12—officially released November 14, 2017

Procedural History

Substitute information charging the defendant with the crime of murder, and with two counts of the crime

of assault in the first degree, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, and tried to the jury before *Vitale*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

S. Max Simmons, assigned counsel, for the appellant (defendant).

Marjorie Allen Dauster, senior assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Gary Nicholson*, former senior assistant state's attorney, for the appellee (state).

Opinion

FLYNN, J. It has been long settled in our appellate procedure that an appellant must raise and analyze in his first and principal brief any matters necessary for the determination of his appeal, and cannot do so for the first time in his reply brief. The defendant, Ricardo O. Myers, was convicted, after a jury trial, of murder in violation of General Statutes § 53a-54a[1] and two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5). On appeal, the defendant claims that the trial court erred in excluding the video interview of a witness who was unavailable to testify. Because the defendant failed to brief any analysis of how the alleged erroneous ruling was harmful, until he filed a reply brief, his claim is unreviewable. Accordingly, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On May 17, 2013, the defendant, along with Dwight Crooks and Gary Pope, was at the Lazy Lizard club in New Haven. The club let out during the early hours of

[1] Although § 53a-54a was the subject of amendments in 2015; see Public Acts 2015, No. 15-84, § 9; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

May 18, 2013, and the trio made its way out with the crowd. Once outside, an argument ensued between the defendant's group and another group that was across the street. The argument escalated to a physical altercation before officers of the New Haven police stepped in and caused the groups to disperse. The defendant and his friends then got into Pope's car and drove around before parking in a different lot not far from the club. The three then headed out on foot to meet someone they knew when they encountered again the group from Lazy Lizard. Some provocative remarks were made and the two groups moved toward each other. Crooks testified at trial that, at this point, he heard gunshots, and he turned to see the defendant holding a gun. Two bullets struck and killed Tirrell Drew, who was a member of the other group, and stray bullets injured two bystanders. The bullets recovered from Drew's body were found to have been fired from a .40 caliber semiautomatic Glock handgun owned by the defendant and seized from his residence by the police on June 14, 2013, nearly a month after the shooting.

The defendant subsequently was arrested and charged with murder and two counts of assault in the first degree. The issue on appeal arises because six days after the shooting, a person named Latrell Rountree, while in custody on an unrelated matter, revealed to the police that he was Drew's friend and was present when Drew was shot. Rountree identified Pope as the shooter. At trial, the defendant attempted to call Rountree as a witness, but could not secure his presence. The defendant then sought to admit into evidence a video recording of Rountree's interview with the police, wherein Rountree identified Pope as the shooter. After hearing argument, the trial court ruled that the video was not admissible under the residual

exception to the hearsay rule.[2] On June 3, 2015, the jury found the defendant guilty on all three counts, and the court rendered judgment accordingly. This appeal followed.

The defendant claims that the trial court abused its discretion in refusing to admit the video under the residual exception to the hearsay rule.[3] The state contends that the court did not abuse its discretion. Additionally, as a threshold matter, the state also contends that this court should not reach the defendant's claim because he failed to analyze in his principal brief how he was harmed by the alleged erroneous ruling. In his reply brief, the defendant presents his harmful error analysis for the first time. At oral argument, the defendant asserted that the harm resulting from the court's ruling is implicit in his principal brief because this court has enough information before it to review harm. Because the defendant failed to provide any analysis in his principal brief as to how he was harmed by the trial court's ruling, we decline to review his claim.

"It is well settled that, absent structural error, the mere fact that a trial court rendered an improper ruling does not entitle the party challenging that ruling to obtain a new trial. An improper ruling must also be harmful to justify such relief. . . . The harmfulness of an improper ruling is material irrespective of whether

[2] Section 8-9 of the Connecticut Code of Evidence provides: "A statement that is not admissible under any of the foregoing exceptions is admissible if the court determines that (1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule."

[3] The defendant also argues that where a video recording adequately captures a witness' interrogation by law enforcement, such that the fact finder's ability to judge the declarant's credibility is unencumbered, that video should be admissible under the residual exception to the hearsay rule. Because we do not reach the merits of this appeal, we do not address this argument.

the ruling is subject to review under an abuse of discretion standard or a plenary review standard. . . . When the ruling at issue is not of constitutional dimensions, the party challenging the ruling bears the burden of proving harm." (Internal quotation marks omitted.) *State* v. *Toro*, 172 Conn. App. 810, 816, 162 A.3d 63, cert. denied, 327 Conn. 905, A.3d (2017).

"It is a fundamental rule of appellate review of evidentiary rulings that if [the] error is not of constitutional dimensions, an appellant has the burden of establishing that there has been an erroneous ruling which was probably harmful to him." (Internal quotation marks omitted.) Id., 817. It is also "a well established principle that arguments cannot be raised for the first time in a reply brief." (Internal quotation marks omitted.) *State* v. *Garvin*, 242 Conn. 296, 312, 699 A.2d 921 (1997); see also *SS-II, LLC* v. *Bridge Street Associates*, 293 Conn. 287, 302, 977 A.2d 189 (2009); *Calcano* v. *Calcano*, 257 Conn. 230, 244, 777 A.2d 633 (2001); *Commissioner of Health Services* v. *Youth Challenge of Greater Hartford, Inc.*, 219 Conn. 657, 659 n.2, 594 A.2d 958 (1991). "[I]t is improper to raise a new argument in a reply brief, because doing so deprives the opposing party of the opportunity to respond in writing." (Internal quotation marks omitted.) *Markley* v. *Dept. of Public Utility Control*, 301 Conn. 56, 74, 23 A.3d 668 (2011).

In the present case, the defendant appeals from an evidentiary ruling of a nonconstitutional nature. As such, it is the defendant's responsibility to analyze, in his principal brief, the harm that flows from an evidentiary ruling. The defendant did not do this but, instead, referenced harm only in his reply brief. Under our rules of appellate practice, issues cannot be raised and analyzed for the first time in an appellant's reply brief. *State* v. *Garvin*, supra, 242 Conn. 312. This rule is a sound one because the appellee is entitled to but one brief and should not therefore be left to speculate at

how an appellant may analyze something raised for the first time in a reply brief, which the appellee cannot answer. See *State* v. *Thompson*, 98 Conn. App. 245, 248, 907 A.2d 1257, cert. denied, 280 Conn. 946, 912 A.2d 482 (2006). Specifically with regard to evidentiary rulings, this court, on multiple occasions, has declined to review claims where the appellant fails to analyze harmful error in his or her principal brief. See, e.g., *State* v. *Toro*, supra, 172 Conn. App. 820; *State* v. *Baker*, 168 Conn. App. 19, 37, 145 A.3d 955, cert. denied, 323 Conn. 932, 150 A.3d 232 (2016). Recently, in *State* v. *Holmes*, 176 Conn. App. 156, 183, 169 A.3d 264 (2017), this court deemed the appellant's claim abandoned, where he failed to brief the harm suffered from an evidentiary ruling that he claimed was erroneous.

Unless these Appellate Court rulings are overturned en banc, they are binding on us. *State* v. *Ortiz*, 133 Conn. App. 118, 122, 33 A.3d 862 (2012), aff'd, 312 Conn. 551, 93 A.3d 1128 (2014). Rulings of our Supreme Court reflect a plethora of authority that prohibits us from reaching the merits of the appellant's claim. See, e.g., *Markley* v. *Dept. of Public Utility Control*, supra, 301 Conn. 74 (claims or arguments cannot be raised for first time in reply brief); *Grimm* v. *Grimm*, 276 Conn. 377, 393–94 n.19, 886 A.2d 391 (2005) (same), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006); *Eskin* v. *Castiglia*, 253 Conn. 516, 528 n.8, 753 A.2d 927 (2000) (same); see also *Calcano* v. *Calcano*, supra, 257 Conn. 244 (claims of error must be raised in "original" brief); *State* v. *Holmes*, supra, 176 Conn. App. 184–85 (harm must be raised in "principal" brief); *State* v. *Toro*, supra, 172 Conn. App. 818 (harm must be shown in "main" brief).

The defendant also argues, however, that harm was implicit in his principal brief because this court has enough information before it to review harm. Essentially, the defendant contends that because the

excluded evidence imputed culpability to a third party, the harm from its exclusion is so obvious that he did not need to brief and analyze it in his principal brief. This argument misses the point that there must be some analysis of how the defendant was harmed from the claimed error given the other evidence before the jury. See *State* v. *Toro*, supra, 172 Conn. App. 818–19. As our precedent instructs, this needs to be done in writing in the defendant's first and principal brief on appeal so that the appellee has a fair opportunity to respond to it in writing and the reviewing court has the full benefit of the appellee's written response.

Here, the jury reasonably could have found that the defendant shot Drew to death by firing two bullets that entered Drew's body. Both bullets came from the defendant's gun and were recovered from Drew's body. The defendant still was in possession of this gun a month after the shooting. Crooks testified at the defendant's trial under oath and was cross-examined on his testimony that it was the defendant who shot Drew. Rountree, on the other hand, refused to honor a subpoena and give testimony subject to cross-examination under oath.[4] The defendant was convicted of murder for the killing, as well as for two counts of assault in the first degree for shooting two other men, who did not die, as part of the same altercation. Under these circumstances, we are not convinced that any harm resulting from the exclusion of Rountree's interview is self-evident in light of the evidence presented at trial. Accordingly, because the defendant failed to brief and analyze in his primary brief the resulting harm from the court's exclusion of the video recording of Rountree's interview, we decline to consider whether the trial court abused its discretion.

The judgment is affirmed.

In this opinion ELGO, J., concurred.

[4] The trial court then issued a capias, but Rountree could not be located.

LAVINE, J., concurring. I agree with the majority that it is established law that an appellant must raise and analyze in his principal brief any matters necessary for the determination of his appeal and cannot do so for the first time in his reply brief. I also agree that in this case, the defendant, Ricardo O. Myers, failed to provide in his principal brief any analysis of how the court's allegedly erroneous ruling was harmful. This rule makes perfect sense in ninety-nine out of one hundred cases because it is designed to prevent an appellee from being ambushed by an appellant who holds back an argument and then unfairly springs it on an adversary. See *State* v. *Thompson*, 98 Conn. App. 245, 248, 907 A.2d 1257, cert. denied, 280 Conn. 946, 912 A.2d 482 (2006) (fair that appellant raise all issues in main brief, otherwise appellee would not be alerted to them and have opportunity to respond to them in writing).

Rigid adherence to the rule in this case is unnecessary. Given the facts, the defendant's failure to analyze how he was harmed by the court's evidentiary ruling does not matter. The defendant was charged with one count of murder and two counts of assault in the first degree. The jury found him guilty, and he was sentenced to forty-seven years of imprisonment.

Failure to address this issue now is highly inefficient. The somewhat unusual posture of this case obviates any concern that a plethora of similar cases will find their way to this court. It is likely, however, that the evidentiary issue raised in this appeal may return to this court after it is litigated in a different action and in a different forum. For the sake of judicial economy and in the interests of the parties, I believe this straightforward evidentiary issue should be resolved now. I would reach the merits of the issue presented and would conclude that the trial court's ruling excluding the videotape from evidence should be affirmed.

The defendant's theory of defense at trial was: "I didn't do it. Someone else did." To support his theory, the defendant sought to present Latrell Rountree's videotaped statement to the jury. If the jury believed Rountree, it would have exculpated the defendant, and resulted in a verdict of not guilty. The defendant's claim on appeal that he was harmed is obvious. I, therefore, would review the defendant's claim that he was harmed by the court's sustaining the state's objection to the videotaped statement. I believe that courts should, where possible and fair to all parties, decide cases rather than avoid or delay their resolution.

Rountree's videotaped statement was the *sole evidence* offered by the defendant. Rountree stated that Gary Pope, not the defendant, was the shooter. The harmfulness of the court's decision to exclude this third-party culpability is evident. The state's brief on appeal demonstrates that it was not surprised or ambushed by the defendant's failure to argue that he was harmed by the court's ruling in his principal brief. The state devoted six and one-half pages of its brief to its argument that Rountree's videotaped statement was not admissible under the residual exception to the hearsay rule.

Appellate courts review the exclusion of evidence offered pursuant to the residual exception to the hearsay rule of the Connecticut Code of Evidence under an abuse of discretion standard. See *State* v. *Shehadeh*, 52 Conn. App. 46, 50, 725 A.2d 394 (1999) (abuse of discretion and showing of substantial prejudice or injustice). Clearly, there was no abuse of discretion here. The court ticked off a list of reasons why it did not conclude that Rountree's videotaped statement was supported by "equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule," as required by § 8-9 (2) of the Connecticut Code of

Evidence.[1] Among them were the fact that Rountree's statement was provided without the benefit of an oath; that Roundtree waited six days to provide any information to the police about the death of his friend, the victim, Tirrell Drew; that Rountree only gave his statement when he was under police custody on unrelated charges; that Rountree lied about having viewed a photograph of Pope prior to being shown photographs by the police; that Rountree was under the influence of an intoxicant on the night of the crime; that Rountree gave inconsistent stories about a fight that had allegedly occurred at the time of the incident; that there was no clear evidence of the distance between Rountree and the shooter at the time of the shooting; and that Rountree was not subject to cross-examination at any time.

Because I believe that the defendant's claim of harm with respect to the court's evidentiary ruling is unambiguously self-evident, because I believe this court should reach the substance of the issue presented in this appeal and because I would affirm the trial court's evidentiary ruling, I respectfully concur. To the extent that this conclusion conflicts with the precedents cited by the majority, I believe the circumstances of this case, and the need to conserve the resources of the court and counsel and to resolve this case without further delay, justify this modest departure.

For the foregoing reasons, I respectfully concur.

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[1] Section 8-9 of the Connecticut Code of Evidence provides in relevant part: "A statement that is not admissible under any of the foregoing exceptions is admissible if the court determines that . . . (2) the statement is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule."