MERINDA J. SEMPEY *v.* STAMFORD HOSPITAL (AC 39221)

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

Syllabus

The plaintiff sought to recover damages from the defendant in connection with the alleged wrongful termination of her employment by the defendant. The plaintiff initially had brought a claim before the Commission on Human Rights and Opportunities, which issued a release of jurisdiction that required the plaintiff to commence an action alleging discrimination under the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.) in the Superior Court within ninety days. Nine days later, the plaintiff commenced an action alleging wrongful discharge in violation of public policy, negligent infliction of emotional distress and violations of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). After the trial court granted a motion to strike filed by the defendant, the plaintiff filed an amended substitute complaint alleging claims in three counts for race discrimination, certain tortious conduct involving her alleged wrongful termination and violations of CUTPA. The defendant filed a motion to strike all three counts of the amended substitute complaint and a separate motion to dismiss the first count alleging race discrimination for lack of subject matter jurisdiction. The court summarily granted both motions, dismissed the case and issued two memoranda of decision, which reflected that the court granted both motions as to all three counts. From the judgment rendered thereon, the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on her claim that the trial court erred by considering the defendant's motion to dismiss while the defendant's second motion to strike was pending and before the time to file a substitute complaint had passed; the requirement of subject matter jurisdiction cannot be waived by any party, may be raised at any stage of the proceedings and must be immediately acted on by the court, and given that the defendant moved to dismiss count one of the amended substitute complaint for lack of subject matter jurisdiction due to the plaintiff's failure to bring her claim of race discrimination within ninety days of the commission's release of jurisdiction, that the plaintiff's original complaint, which was timely, did not allege race discrimination, and

that such a claim was alleged only in the amended and amended substitute complaints, which were filed outside the ninety day time limit, the court's consideration of the motion to dismiss count one was proper.

2. The trial court properly dismissed count one of the amended substitute complaint; contrary to the plaintiff's claim, the allegations of the original complaint did not sufficiently state a claim of race discrimination so as to put the defendant on notice of such a claim, and, therefore, the plaintiff's claim of discrimination on the basis of race, as alleged in the amended substitute complaint, did not relate back to the original complaint and was untimely.

3. The trial court erred in dismissing counts two and three of the plaintiff's amended substitute complaint without affording the plaintiff the opportunity either to defend herself against a motion to dismiss those counts or to replead the stricken counts: because the defendant filed a motion to dismiss only as to count one, which alleged race discrimination, the trial court, which misinterpreted the scope of the defendant's motion to dismiss, lacked the authority to dismiss counts two and three when the defendant did not seek the dismissal of those counts, and the defendant's claim that the court's error was harmless was unavailing, as the court's decision was not premised on preclusion or framed as a response to repetitive or futile pleading, and there was neither a showing by the defendant nor a conclusion by the court that the plaintiff could not demonstrate that repleading would not rectify the stricken counts; accordingly, this court's reversal of the dismissal of counts two and three restored the case to the trial court docket, and the plaintiff had to be given the opportunity to replead.

Argued September 15, 2017—officially released April 3, 2018

Procedural History

Action to recover damages for, inter alia, the plaintiff's alleged wrongful termination, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. Richard P. Gilardi*, judge trial referee, granted the defendant's motion to strike; thereafter, the court granted the defendant's second motion to strike; subsequently, the court granted the defendant's motion to dismiss and rendered a judgment of dismissal, from which the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

Laurence V. Parnoff, with whom, on the brief, was *Laurence V. Parnoff, Jr.*, for the appellant (plaintiff).

Justin E. Theriault, with whom, on the brief, was *Beverly W. Garofalo*, for the appellee (defendant).

Opinion

DiPENTIMA, C. J. The plaintiff, Merinda J. Sempey, appeals from the judgment of the trial court dismissing her case against the defendant, Stamford Hospital. On appeal, the plaintiff claims that the court erred by (1) granting the defendant's motion to dismiss count one of the amended substitute complaint, and (2) dismissing the matter in its entirety when the defendant had moved to dismiss only count one. Although we disagree that the court erred in granting the motion to dismiss count one of the amended substitute complaint, we agree that the court erred in dismissing counts two and three. Accordingly, we reverse the judgment of the trial court as to counts two and three of the amended substitute complaint and remand the case for further proceedings; we affirm the judgment in all other respects.

The following facts and procedural history are relevant to our consideration of this matter. The plaintiff was a nurse employed at will by the defendant from November 9, 1990, to September 30, 2013. The defendant terminated the plaintiff's employment for allegedly violating patient privacy rules outlined in its employee manual.

Pursuant to General Statutes § 46a-82 et seq., the plaintiff brought a claim before the Commission on Human Rights and Opportunities (commission) which, on August 25, 2014, issued a release of jurisdiction pursuant to General Statutes § 46a-100 et seq. That release required the plaintiff to commence an action alleging discrimination under the Connecticut Fair Employment Practices Act (act), General Statutes § 46a-51 et seq., in the Superior Court within ninety days. Nine days later, on September 3, 2014, the plaintiff commenced a timely *action* against the defendant, but did not allege a *claim* of discrimination in violation of the act. Instead, the plaintiff alleged (1) wrongful discharge in violation

of public policy, (2) negligent infliction of emotional distress and (3) violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.

On November 26, 2014, the defendant moved to strike all three counts of the original complaint. The court granted that motion over the plaintiff's opposition on August 6, 2015. Thereafter, on August 20, 2015, the plaintiff filed a substitute complaint, which she later amended on September 18, 2015 (amended substitute complaint). In the amended substitute complaint, the plaintiff alleged three counts: race discrimination (count one), a tortious conduct claim, specifically, wrongful discharge involving defamation and breach of an implied employment contract causing the negligent infliction of emotional distress (count two), and violations of CUTPA predicated upon the first two counts (count three).

On September 21, 2015, the defendant moved to strike all three counts of the amended substitute complaint and, on the same day, filed a separate motion to dismiss count one for lack of subject matter jurisdiction. The plaintiff opposed both motions. Following argument, the court summarily granted both motions on January 6, 2016, and dismissed the case. On January 12, 2016, the plaintiff requested memoranda of decision, which the court issued on April 28, 2016. In those memoranda, which track one another closely in their legal conclusions, the court determined that (1) it lacked subject matter jurisdiction over the race discrimination claim, (2) the termination of an at-will employee did not constitute a violation of public policy or negligent infliction of emotional distress and (3) an employment relationship does not implicate trade or commerce as required by CUTPA. The memoranda reflect that the court granted both motions as to all three counts and rendered judgment for the defendant accordingly. On May 17, 2016,

the plaintiff filed her appeal from the dismissal of the amended substitute complaint.[1]

On appeal, the plaintiff claims that the court erred in dismissing the case in two ways. The plaintiff argues that the court erred by (1) considering the defendant's motion to dismiss while the defendant's second motion to strike was pending and before the time to file a substitute complaint had passed and (2) dismissing the matter in its entirety even though the defendant had moved to dismiss only count one. The defendant counters that (1) a motion to dismiss for lack of subject matter jurisdiction may be filed and resolved at any time, (2) the court has broad discretion to manage cases, including entering judgment upon a question of law, and (3) the error, if any, was harmless. We conclude that the court properly dismissed count one of the amended substitute complaint but erred in dismissing the remaining two counts.

I

The plaintiff first claims that the court erred in considering, and granting, the defendant's motion to dismiss after the defendant had filed the second motion to strike and before the fifteen day period for filing a substitute complaint had expired.[2] Specifically, the plaintiff contends that (1) by filing its second motion to strike the

[1] Notwithstanding the January 6, 2016 judgment dismissing the case in its entirety, on May 11, 2016, the plaintiff filed a second substitute complaint alleging (1) tortious conduct, (2) race discrimination and (3) a violation of CUTPA. At the time the second substitute complaint was filed, however, there was no action pending before the trial court. Accordingly, although the defendant moved to strike this complaint on May 23, 2016, the court properly did not address either the complaint or the motion to strike it.

[2] Practice Book § 10-44 provides in relevant part: "Within fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading; provided that in those instances where an entire complaint . . . or any count in a complaint . . . has been stricken, and the party whose pleading or a count thereof has been so stricken fails to file a new pleading within that fifteen day period, the judicial authority may, upon motion, enter judgment against said party on said

amended substitute complaint, the defendant had to wait until the plaintiff was able to replead to file a motion to dismiss, and (2) the court had subject matter jurisdiction over count one of the amended substitute complaint. We disagree that the court erred in dismissing count one.

A

The plaintiff argues that by filing the second motion to strike, the defendant had to wait until the plaintiff was able to replead to file a motion to dismiss. This contention is without merit.

Practice Book § 10-33 provides that "[a]ny claim of lack of jurisdiction over the subject matter *cannot be waived*; and *whenever* it is found after suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the judicial authority shall dismiss the action." (Emphasis added.) Indeed, "[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . The objection of want of jurisdiction may be made at any time . . . . The requirement of subject matter jurisdiction *cannot be waived by any party and can be raised at any stage in the proceedings*." (Emphasis added; internal quotation marks omitted.) *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 548, 133 A.3d 140 (2016). "It is axiomatic that once the issue of subject matter jurisdiction is raised, it must be immediately acted upon by the court. *Statewide Grievance Committee* v. *Rozbicki*, 211 Conn. 232, 245, 558 A.2d 986 (1989); *Cahill* v. *Board of Education*, 198 Conn. 229, 238, 502 A.2d 410 (1985). . . . [A]s soon as the jurisdiction of the court to decide an issue is called into question, all other action in the case must come to a halt . . . ." *Gurliacci* v. *Mayer*, 218 Conn. 531, 545, 590 A.2d 914 (1991).

stricken complaint . . . or count thereof. Nothing in this section shall dispense with the requirements of Sections 61-3 or 61-4 of the appellate rules."

Here, the defendant moved to dismiss count one of the amended substitute complaint for lack of subject matter jurisdiction. In particular, the defendant argued that the court lacked jurisdiction over the subject matter of count one because the plaintiff failed to bring her claim of race discrimination within ninety days of the commission's release of jurisdiction pursuant to § 46a-101.[3] It is indisputable that the plaintiff's original complaint did not allege race discrimination in violation of the act, but that the amended and amended substitute complaints, which were filed outside the ninety day time limit, did. Accordingly, the court's consideration of the defendant's motion to dismiss count one of the amended substitute complaint for lack of subject matter jurisdiction was proper.

B

Alternatively, the plaintiff contends that the court erred in granting the motion to dismiss count one of the amended substitute complaint on its merits. The parties agree that the plaintiff commenced the original action well within the ninety day time limit. Likewise, there is no dispute that the plaintiff's substitute and amended substitute complaints fall outside that same time limit. The issue, therefore, is whether the plaintiff's original complaint sufficiently states a claim of race discrimination. If it does, the discrimination claim is timely; if it does not, the discrimination claim is time barred. The plaintiff contends that although the allegations in her original complaint, filed September 8, 2014, did not explicitly allege a claim of race discrimination, they were nonetheless sufficient to allege a violation of the act and, as a result, the relation back doctrine renders her claim timely. We are not persuaded.

[3] General Statutes § 46a-101 (e) provides, in relevant part: "Any action brought by the complainant . . . shall be brought not later than ninety days after the date of the receipt of the release from the commission."

We begin our analysis of this contention by setting forth applicable legal principles. "A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Machado* v. *Taylor*, 326 Conn. 396, 403, 163 A.3d 558 (2017). "Our review of a trial court's ruling on a motion to dismiss is de novo and we indulge every presumption favoring jurisdiction." *Pacific Ins. Co., Ltd.* v. *Champion Steel, LLC*, 323 Conn. 254, 259, 146 A.3d 975 (2016).

"Our review of the applicability of the relation back doctrine is plenary." *Commission on Human Rights & Opportunities* v. *Hartford*, 138 Conn. App. 141, 169, 50 A.3d 917, cert. denied, 307 Conn. 929, 55 A.3d 570 (2012). "The relation back doctrine has been well established by [our Supreme Court]. . . . It is proper to amplify or expand what has already been alleged in support of a cause of action, provided the identity of the cause of action remains substantially the same, but [when] an entirely new and different factual situation is presented, a new and different cause of action is stated. . . .

"Our relation back doctrine provides that an amendment relates back when the original complaint has given the party fair notice that a claim is being asserted stemming from a particular transaction or occurrence, thereby serving the objectives of our statute of limitations, namely, to protect parties from having to defend against stale claims . . . . [I]n the cases in which we have determined that an amendment does not relate back to an earlier pleading, the amendment presented different issues or depended on different factual circumstances rather than merely amplifying or expanding upon previous allegations." (Citations omitted; internal quotation marks omitted.) *Briere* v. *Greater Hartford*

Orthopedic Group, P.C., 325 Conn. 198, 207–208, 157 A.3d 70 (2017).

"In our review of the plaintiff's claim, we must evaluate the allegations in the complaint. The interpretation of pleadings is always a question of law for the court. . . . In addition, [t]he allegations of the complaint must be given such reasonable construction as will give effect to [it] in conformity with the general theory which it was intended to follow, and do substantial justice between the parties. . . . It is axiomatic that the parties are bound by their pleadings." (Citation omitted; internal quotation marks omitted.) *O'Halloran* v. *Charlotte Hungerford Hospital*, 63 Conn. App. 460, 463, 776 A.2d 514 (2001).

Despite our expansive reading of the original complaint, we cannot divine from it a claim of race discrimination, and it does not put the defendant on notice of such a claim. The plaintiff concedes that her allegations are not explicit, but avers that the specter of discrimination lurks over count one. She cites to one specific allegation in her original complaint, paragraph eleven. There, she alleged that her suspension and termination were "wrongful and also merely a pretext to remove plaintiff from her employment position in order to allow another person to fill that position." She refers to no other language in the original complaint to support her contention.[4]

The inadequate allegations in the original complaint become all the more obvious when they are read alongside those in the amended substitute complaint. In that

[4] For example, the initial complaint did not allege that the plaintiff was in a protected class or that the adverse employment action occurred under discriminatory circumstances. See, e.g., *Jones* v. *Dept. of Children & Families*, 172 Conn. App. 14, 25, 158 A.3d 356 (2017) ("[t]o establish a prima facie case of [race] discrimination . . . the [plaintiff] must demonstrate that [1] [she] is in the protected class; [2] [she] was qualified for the position; [3] [she] suffered an adverse employment action; and [4] that the adverse action occurred under circumstances giving rise to an inference of discrimination"). We note that the only explicit mention of race is contained in

version, paragraph eleven states: "Defendant's suspending and subsequent terminating of plaintiff through its agent, plaintiff's supervisor, was wrongful and also merely a pretext to remove plaintiff from her employment position *due to her race* in order to allow another person, *of the same race as plaintiff's supervisor*, to fill that position." (Emphasis added.) Although that cause of action may rely on the same underlying facts, it is a new and separate issue entirely.

Indeed, even though the plaintiff now argues on appeal that her amended substitute complaint relates back to her original complaint,[5] her other trial court filings make it clear that it does not—and that she did not intend it to. The plaintiff specifically argued to the trial court that the allegations in count one of the original complaint alleged a common-law claim for wrongful discharge of an at-will employee in violation of public policy, *not* a claim of race discrimination. In her memorandum in opposition to the defendant's motion to strike, the plaintiff stated the following: "Defendant's motion seeks to misdirect the court to see plaintiff's tort claim for wrongful termination[6] as [a] . . . § 46a-101 claim *which is not anywhere alleged by plaintiff*.

paragraph one of the initial complaint, where it is alleged that the plaintiff is "a white, sixty-two (62) year old female . . . ."

[5] In her brief, the plaintiff argues that her claim is indeed one of discrimination on the basis of race in violation of the act: "The issue, then, regarding the first count concerns the adequacy of the allegation . . . to state a claim under [§§] 46a-101 (e) and 46-100." We note also that the trial court determined, as a matter of law, that count one of the amended substitute complaint alleged race discrimination.

[6] "[T]he doctrine of wrongful discharge . . . provides a common law cause of action in tort for wrongful discharge 'if the former employee can prove a demonstrably *improper* reason for dismissal, a reason whose impropriety is derived from some important violation of public policy.' " (Emphasis in original.) *Tomlinson* v. *Board of Education*, 226 Conn. 704, 729, 629 A.2d 333 (1993), quoting *Sheets* v. *Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 475, 427 A.2d 385 (1980).

Although it is true that there is a strong public policy against discrimination on the basis of race, the common-law tort of wrongful discharge is not available to a plaintiff who alleges such discrimination. "A finding that

. . . *Plaintiff's* [*substitute*] *complaint is not asserting a racial discrimination claim under* [*the act*]. Plaintiff's inclusion of the additional facts stated in the amended [substitute] complaint about discrimination based on race, the [commission] process and release thereof *are just allegations in further support of her wrongful termination claim and facts stating violations of public policy*." (Emphasis altered; footnote added and omitted.)

For those reasons, we conclude that the plaintiff's claim of discrimination on the basis of race, as alleged in her amended substitute complaint, does not relate back to her original complaint and is, therefore, untimely.[7] Accordingly, we agree that the court properly dismissed count one of the amended substitute complaint. We do not determine, however, whether the plaintiff's failure to bring a discrimination claim within ninety days of receiving the release of jurisdiction from the commission deprived the court of subject matter

certain conduct contravenes public policy is not enough by itself to warrant the creation of a contract remedy for wrongful dismissal by an employer. The cases which have established a tort or contract remedy for employees discharged for reasons violative of public policy *have relied upon the fact that in the context of their case the employee was otherwise without remedy* and that permitting the discharge to go unredressed would leave a valuable social policy to go unvindicated." (Emphasis added; internal quotation marks omitted.) *Atkins* v. *Bridgeport Hydraulic Co.*, 5 Conn. App. 643, 648, 501 A.2d 1223 (1985). Because the act provides a specific remedy for employees who have been discriminated against because of their race; General Statutes §§ 46a-60 (a) (1) and 46a-100; the common-law tort is unavailable. See *Burnham* v. *Karl & Gelb, P.C.*, 252 Conn. 153, 159–60, 745 A.2d 178 (2000) (adopting rule that plaintiff is precluded from bringing action for wrongful discharge in violation of public policy where statutory remedy exists); *Sullivan* v. *Board of Police Commissioners*, 196 Conn. 208, 216, 491 A.2d 1096 (1985) (holding that act requires all claims of workplace discrimination to be brought before commission first).

[7] The plaintiff also contends that the court erred in dismissing the first count of the amended substitute complaint without permitting her the time to amend her complaint. Because we conclude that any claim of discrimination on the basis of race would not relate back to the initial complaint and necessarily would be untimely, we need not address this argument.

jurisdiction. The plaintiff presents no argument at all as to whether the time limit of § 46a-101 (e) is either mandatory or jurisdictional. Furthermore, there is no claim of waiver, consent, or equitable tolling. Accordingly, we conclude that the court properly dismissed the race discrimination claim regardless of whether the time limit is jurisdictional.[8] See *Wright* v. *Teamsters Local 559*, 123 Conn. App. 1, 9, 1 A.3d 207 (2010), citing *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 284, 777 A.2d 645 ("[I]f a time requirement is deemed to be mandatory, it must be complied with, absent such factors as consent, waiver or equitable tolling. Thus a complaint that is not filed within the mandatory time requirement is dismissible unless waiver, consent, or some other compelling equitable tolling doctrine applies."), aff'd after remand, 67 Conn. App. 316, 786 A.2d 1283 (2001). Thus, the court did not err in dismissing count one of the amended substitute complaint.

II

The plaintiff next claims that the court erred by dismissing counts two and three of the amended substitute complaint, and rendering judgment thereon, even

[8] The court agreed with the defendant that the time limitation in § 46a-101 (e) is jurisdictional. The plaintiff has not challenged this determination, arguing instead that his claim is timely because it relates back. But see *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 277–78, 777 A.2d 645 (time limitations contained in antidiscrimination statutes not necessarily jurisdictional; nonjurisdictional time limits are subject to waiver, consent and other equitable tolling doctrines), aff'd after remand, 67 Conn. App. 316, 786 A.2d 1283 (2001). We acknowledge that our Superior Court has been divided over this question. Compare *Scott* v. *Dept. of Transportation*, Superior Court, judicial district of Hartford, Docket No. CV-15-6060375-S (June 13, 2016) (62 Conn. L. Rptr. 637) (concluding after survey of prior decisions that § 46a-101 [e] is not jurisdictional), with *Lloyd* v. *Connection, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV-11-6023491-S (December 21, 2011) (concluding that, consistent with prior decisions, § 46a-101 [e] is jurisdictional). We choose not to answer the question in this case.

though the defendant moved to dismiss only count one and the time to replead the stricken counts had not yet passed. Because we conclude that the court misinterpreted the defendant's motion to dismiss and lacked the authority to dismiss counts two and three of the amended substitute complaint, we agree with the plaintiff that the court committed reversible error.

As a preliminary matter, we must determine our standard of review. In the somewhat unusual circumstances of this case, the parties differ as to the appropriate inquiry. The plaintiff argues that, because the court resolved the case, albeit erroneously, upon a motion to dismiss, our review is plenary. See *Pacific Ins. Co., Ltd.* v. *Champion Steel, LLC*, supra, 323 Conn. 259 ("[o]ur review of a trial court's ruling on a motion to dismiss is de novo and we indulge every presumption favoring jurisdiction"). The defendant counters that the trial court's actions implicate its case management authority, which we review for abuse of discretion. See *Krevis* v. *Bridgeport*, 262 Conn. 813, 818–19, 817 A.2d 628 (2003) ("[w]e review case management decisions for abuse of discretion, giving [trial] courts wide latitude" [internal quotation marks omitted]).

Although the plaintiff's argument oversimplifies the history of this case, we agree with her conclusion that our review is plenary. The defendant imputes to the court a motive not reflected in the record. The court did not explicitly invoke its authority or exercise its discretion in dismissing the plaintiff's case but, rather, apparently misread the defendant's motion to have been directed at the amended substitute complaint in its entirety. We conclude, therefore, that this case is most closely analogous to those cases where the court misinterprets the pleadings. In such cases, our review is plenary. See *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 559, 864 A.2d 1 (2005) ("[T]he interpretation of pleadings is always a question of law for the court

. . . . Our review of the trial court's interpretation of the pleadings therefore is plenary." [Internal quotation marks omitted.]); *O'Halloran* v. *Charlotte Hungerford Hospital*, supra, 63 Conn. App. 463. Specifically, in this case, our review turns on whether the court had the authority to dismiss counts two and three of the amended substitute complaint. See *Heim* v. *California Federal Bank*, 78 Conn. App. 351, 359, 828 A.2d 129 (eschewing traditional standard of review in favor of inquiry into "whether the court had 'statutory or legal authority' to strike" particular count in absence of motion), cert. denied, 266 Conn. 911, 832 A.2d 70 (2003).

With that in mind, we turn to the legal principles governing motions to dismiss and motions to strike. "There is a significant difference between asserting that a plaintiff *cannot* state a cause of action and asserting that a plaintiff *has not* stated a cause of action, and therein lies the distinction between the motion to dismiss and the motion to strike. . . . A motion to dismiss does not test the sufficiency of a cause of action and should not be granted on other than jurisdictional grounds. . . . As our Supreme Court has explained: A motion to dismiss is not a proper vehicle for an attack on the sufficiency of a pleading. . . . The distinction between the motion to dismiss and the motion to strike is not merely semantic. If a motion to dismiss is granted, the case is terminated, save for an appeal from that ruling. . . . The granting of a motion to strike, however, ordinarily is not a final judgment because our rules of practice afford a party a right to amend deficient pleadings. See Practice Book § 10-44.

"That critical distinction implicates a fundamental policy consideration in this state. Connecticut law repeatedly has expressed a policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his or her day in court. . . . Our practice does not favor the termination of

proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure. . . . For that reason, [a] trial court should make every effort to adjudicate the substantive controversy before it, and, where practicable, should decide a procedural issue so as not to preclude hearing the merits of [a case]." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) *Egri* v. *Foisie*, 83 Conn. App. 243, 247–50, 848 A.2d 1266, cert. denied, 271 Conn. 931, 859 A.2d 930 (2004).

A

We first consider whether the court erred in granting the defendant's motion to dismiss as to counts two and three of the amended substitute complaint. In part I of this opinion, we determined that the court properly granted the defendant's motion to dismiss count one. The record indicates that the defendant did not move to dismiss counts two and three. Accordingly, we conclude that the court erred in granting the motion to dismiss as to counts two and three of the amended substitute complaint, and rendering final judgment thereon.

The following additional facts illuminate this issue. The defendant filed two motions on the same day, September 21, 2015. First, the defendant filed a motion to strike the amended substitute complaint in its entirety. Shortly thereafter, the defendant filed a motion to dismiss count one of the amended substitute complaint. The plaintiff opposed both motions. After a hearing in December, 2015, the court issued a summary order granting both motions in January, 2016, and dismissed the case. The plaintiff requested written decisions, citing Practice Book §§ 10-43 and 64-1.[9] The court issued

[9] Practice Book § 10-43 provides: "Whenever a motion to strike is filed and more than one ground of decision is set up therein, the judicial authority, in rendering the decision thereon, shall specify in writing the grounds upon which that decision is based."

Practice Book § 64-1 provides, in relevant part: "(a) The trial court shall state its decision either orally or in writing, in all of the following . . . in

two memoranda, one for each motion. In its memorandum of decision with respect to the motion to dismiss, the court stated: "This memorandum of decision is in response to a request by the plaintiff, pursuant to [§ 64-1], which states that the court submit a written basis for sustaining the defendant's motion to dismiss all three counts of the plaintiff's amended [substitute] complaint . . . . The motion to dismiss filed by the defendant was to dismiss the complaint for lack of subject matter jurisdiction. . . . The defendant . . . had moved to dismiss all three counts of the plaintiff's amended [substitute] complaint, which was granted by this court on January 6, 2016." In fact, the defendant's motion to dismiss moved only that "the first count of the amended [substitute] complaint be dismissed with prejudice for lack of subject matter jurisdiction."[10]

With some exceptions, trial courts generally lack the authority to act on their own. "As our Supreme Court has explained, due to the adversarial nature of our judicial system, [t]he court's function is generally limited to adjudicating the issues raised by the parties on the proof they have presented and *applying appropriate procedural sanctions on motion of a party*." (Emphasis altered; internal quotation marks omitted.) *Somers* v. *Chan*, 110 Conn. App. 511, 528, 955 A.2d 667 (2008). "Pleadings have their place in our system of jurisprudence. While they are not held to the strict and artificial standard that once prevailed, we still cling to the belief, even in these iconoclastic days, that no orderly administration of justice is possible without them. . . . Our

making any . . . rulings that constitute a final judgment for purposes of appeal under Section 61-1 . . . . The court's decision shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor."

[10] The defendant's motion to strike, on the other hand, moved that "the court strike plaintiff's amended [substitute] complaint in its entirety for failure to state a claim upon which relief can be granted." In a separate memorandum, the court granted that motion and *struck* the entire amended substitute complaint in addition to dismissing it.

rules of practice contain provisions for the framing of issues. . . . Our rules of practice include Practice Book § 10-39 et seq., which governs motions to strike; its proscriptions for its purpose and use are carefully set out. Given what may be the legal consequence to a party against whom such a motion is granted, the movants should be required to follow our rules of practice, especially as to the party or parties against whom it is directed. We cannot say that it is an unreasonable practice to condition the right to the remedy sought by a movant on a motion to strike on the requirement that the movant plead for that relief in a manner so that all parties directly concerned know that they are the object of such requested relief. . . . We are mindful that it is a fundamental tenet of due process that persons directly concerned with the result of an adjudication be given reasonable notice and the opportunity to present their claims of defenses." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Heim* v. *California Federal Bank*, supra, 78 Conn. App. 363–64. This logic applies equally to motions to dismiss. Additionally, "the rules of practice require a party to file a written motion to trigger the trial court's determination of a dispositive question of law." *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 564, 898 A.2d 178 (2006).

To that end, even in the cases where a trial court exercises its authority to manage cases outside the rules of practice, our Supreme Court has held that the court must provide certain safeguards to the party adversely affected. "The trial court's broad case management authority simply does not extend so far as to permit the court to: (1) initiate the pretrial disposition of a claim based on the court's perception of its legal insufficiency; and (2) proceed to consider such disposition (a) in disregard of the procedural protections provided in our rules of practice without the agreement of counsel and (b) without notice to the parties and a reasonable opportunity for the plaintiff to oppose the

disposition of its claims." Id., 569. We consistently have reversed courts who do not afford nonmovants these safeguards.[11]

Here, the court lacked the authority to dismiss the entire case. The court appears to have misread the motion to dismiss to have sought the dismissal of counts two and three in addition to count one. The defendant concedes that this is "somewhat unorthodox" but argues that, because the court has the authority to dismiss an action where it would be dilatory, unjust and useless to allow the plaintiff to replead, it was not error to dismiss this case. Alternatively, the defendant maintains that the plaintiff's postjudgment complaint, the second substitute complaint, demonstrates that the court's error is harmless because, "as she has done throughout the two and one-half years of this action, [the plaintiff] asserted the identical causes of action that the trial court has twice held to be legally deficient." It certainly is true that "[where] the plaintiff is unable to demonstrate that anything could be added to the complaint by way of amendment that would avoid the deficiencies in the original complaint, the granting of a motion to dismiss has been found harmless despite

[11] See, e.g., *Vertex, Inc.* v. *Waterbury*, supra, 278 Conn. 564–65 ("[t]he rules of practice do not provide the trial court with authority to determine dispositive questions of law in the absence of [a motion to strike or a motion for summary judgment]"); *Bombero* v. *Bombero*, 160 Conn. App. 118, 131, 125 A.3d 229 (2015) ("the court improperly rendered judgment on the plaintiff's claim when the plaintiff's motion for summary judgment was limited to the defendant's counterclaim"); *Greene* v. *Keating*, 156 Conn. App. 854, 861,115 A.3d 512 (2015) ("the court acted in excess of its authority when it raised and considered, sua sponte, a ground for summary judgment not raised or briefed by the parties"); *Heim* v. *California Federal Bank*, supra, 78 Conn. App. 361 ("we consider the court's sua sponte [striking] of count three inappropriate because of the absence of a motion to strike by the defendant"); *Yale University School of Medicine* v. *McCarthy*, 26 Conn. App. 497, 502, 602 A.2d 1040 (1992) ("[T]he court dismissed the defendant's counterclaim on its own motion. There was no statutory or other legal authority for the court's dismissal . . . .").

its procedural impropriety." *Egri* v. *Foisie*, supra, 83 Conn. App. 250 n.10, citing *McCutcheon & Burr, Inc.* v. *Berman*, 218 Conn. 512, 528, 590 A.2d 438 (1991).

The problem with the defendant's arguments, however, is that the court's decision was not premised on preclusion or framed as a response to repetitive or futile pleading. That is, there was neither a showing by the defendant nor conclusion by the court that the plaintiff could not demonstrate that repleading would not rectify the stricken counts. Like the trial court in *Heim* v. *California Federal Bank*, supra, 78 Conn. App. 363–64, the trial court in the present case simply was mistaken as to the scope of the defendant's motion. As a direct consequence of this mistake, the court concluded that because the plaintiff *had not* stated a claim in counts two and three, the plaintiff *could not* state a claim. That is exactly the violation of strong policy this court warned against in *Egri* v. *Foisie*, supra, 83 Conn. App. 247–50.[12] This court did not condone it then and we cannot condone it now. The plaintiff should not be deprived of her procedural rights without warning or reason; the defendant should not now be allowed to benefit from a motion it did not make.[13] We, therefore, decline to affirm the judgment of dismissal of counts two and three on the grounds the defendant suggests.

B

Having concluded that the court erred in dismissing counts two and three of the amended substitute complaint, we must decide how best to resolve this procedural predicament. For the reasons stated herein, we

[12] For the same reason, we decline to conclude that what the plaintiff *did* allege after judgment in the second substitute complaint is determinative of what the plaintiff *could* plead on remand. Moreover, because the plaintiff filed this appeal, the amended substitute complaint is the operative pleading. The second substitute complaint has no bearing on our decision, as there was no action pending when it was filed. See footnote 1 of this opinion.

[13] We note that, in choosing to move to strike, the defendant effectively waived the right to move for dismissal on any grounds other than subject matter jurisdiction. See Practice Book § 10-7.

determine that the plaintiff should be given the opportunity to replead.

"The granting of a motion to strike . . . ordinarily is not a final judgment because our rules of practice afford a party a right to amend deficient pleadings. See Practice Book § 10-44." *Egri* v. *Foisie*, supra, 83 Conn. App. 249. "If a judgment is set aside on appeal, its effect is destroyed and the parties are in the same condition as before it was rendered." *Bauer* v. *Waste Management of Connecticut, Inc.*, 239 Conn. 515, 523, 686 A.2d 481 (1996), citing W. Maltbie, Connecticut Appellate Procedure (2d Ed. 1957) § 345. Accordingly, our reversal of the court's dismissal of counts two and three restores this case to the trial court docket.

In conclusion, therefore, the trial court properly dismissed count one of the amended substitute complaint as untimely. The court, however, in the absence of a motion to dismiss, lacked the authority to dismiss the second and third counts of the amended substitute complaint without affording the plaintiff the opportunity either to defend herself against a motion to dismiss those counts or to replead the stricken counts.

The judgment is reversed as to the dismissal of counts two and three of the amended substitute complaint, and the case is remanded for further proceedings consistent with this opinion. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RICARDO SWILLING (AC 40234)

Alvord, Keller and Beach, Js.

Syllabus

Convicted of the crimes of kidnapping in the first degree, home invasion and assault in the second degree, and of being a persistent dangerous

felony offender, the defendant appealed. The defendant, who had paid the victim to stay at her apartment, allegedly had engaged in a violent physical struggle with the victim in the apartment over the course of two days, during which he held her hostage in the apartment, attempted to strangle her, stabbed her with kitchen knives, and punched and kicked her. When the victim was able to escape, she went to the apartment of a neighbor, where she called 911. On appeal, the defendant claimed, inter alia, that the trial court violated his due process right to a fair trial by questioning two witnesses during the state's case-in-chief and improperly permitted the victim to make an in-court identification of him in the absence of a showing that she previously had made a nonsuggestive out-of-court identification of him. *Held*:

1. The defendant could not prevail on his unpreserved claim that the trial court violated his due process right to a fair trial, which was based on his assertion that the court became an advocate for and suggested that it favored the state when it questioned the victim and the neighbor during the state's case-in-chief: the trial court did not compel the victim to identify the defendant as the perpetrator, reflect bias in favor of the state or act unreasonably when it asked her a single question about the identity of the defendant after she had made an ambiguous in-court identification of him, and the present case did not present a situation in which the court advocated in favor of a particular verdict, suggested that a particular witness was credible, or otherwise suggested that it believed or disbelieved any particular version of events; moreover, the court's questioning of the neighbor reflected a reasonable attempt to clarify his ability to make an identification of someone in the courtroom, as well as the nature of the state's inquiry, the court's brief inquiry protected the defendant's right to ensure that the jury had before it facts, rather than confusion, and that the facts were presented to the jury in an understandable manner, and the court's jury instructions conveyed to the jury that the court did not have a role in the fact-finding process and did not have an opinion concerning the outcome of the trial.
2. This court found unavailing the defendant's unpreserved claim that his due process rights were violated when the trial court permitted the victim to make an in-court identification of him in the absence of a showing that she previously had made a nonsuggestive out-of-court identification of him: although the state failed to request permission from the trial court to conduct a first time in-court identification of the defendant, as required under the newly created rule applicable to first time in-court identifications set forth in *State* v. *Dickson* (322 Conn. 410), that rule applied to the parties in that case and to all pending cases, the defendant's appeal was pending at the time *Dickson* was decided, which meant that the suggestive in-court identification already had occurred, and, thus, the defendant was not necessarily entitled to relief arising from the state's failure to abide by a procedural rule that was not in existence at the time of the defendant's trial, and given that

there were no factual disputes with respect to the victim's familiarity with or ability to identify the defendant, or with her ability to observe, recall and narrate facts concerning the person who allegedly assaulted her, and, despite the fact that the record was silent with respect to any out-of-court identification made by the victim, her in-court identification of the defendant was permissible without adherence to the procedural safeguards in *Dickson* where, as here, there was no showing of harm.

3. The defendant could not prevail on his claim that the trial court abused its discretion in admitting evidence of his prior felony convictions, which was based on his assertion that the convictions were too remote in time and were more prejudicial than probative; the defendant's argument that the convictions were too remote in time was not persuasive, as the defendant was released from confinement within ten years of the time of his trial, he was unable to demonstrate that the trial court's determination that the felony convictions were relevant in an assessment of his credibility was improper, and there was no reason to doubt that the jury followed the limiting instructions given by the court immediately following the admission of the evidence and during the court's charge.

4. The trial court did not abuse its discretion in admitting into evidence under the spontaneous utterance exception to the hearsay rule a recording of the 911 call made by the victim:

a. The trial court properly determined that the 911 recording fell within the spontaneous utterance exception to the hearsay rule; that court properly considered the manner in which the victim spoke in its review of all of the relevant facts surrounding her statements and properly determined that the victim's declarations were made under circumstances that negated the opportunity for deliberation, contrivance and misrepresentation by the declarant, as the 911 call occurred within minutes after the victim fled from her apartment while she was under the influence of a startling event following an ordeal that reasonably would be expected to have created a high degree of emotional disturbance, and although some of the victim's statements were made in response to questions posed to her by the 911 dispatcher, many others were made spontaneously, the circumstances reflected a lack of forethought by the victim in responding to the questions, and there was ample evidence to support the court's finding that the victim's statements were spontaneous.

b. The trial court did not abuse its discretion in failing to conclude that the admission of the 911 recording was unduly prejudicial; the defendant's claim that the 911 recording was prejudicial because it was cumulative was not supported by the record, and the victim's strong language in the recording that the defendant had tortured and kidnapped her was not any more inflammatory than, and was not likely to have aroused the jury's emotions any more than, her testimony concerning the defendant's actions, which included beating, choking, kicking and repeatedly stabbing her.

5. The defendant could not prevail on his claim that the cumulative effect of the trial court's alleged errors deprived him of his right to a fair and impartial trial; the claim was not adequately briefed, as it consisted of a legal assertion and was devoid of analysis of facts or law, and even if the claim was considered on its merits, it lacked merit in light of this court's determination that no error existed with respect to the defendant's claims on appeal.

Argued November 15, 2017—officially released April 3, 2018

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of kidnapping in the first degree, assault in the first degree and home invasion, and, in the second part, with three counts of being a persistent dangerous felony offender, brought to the Superior Court in the judicial district of Waterbury, where the first part of the information was tried to the jury before *K. Murphy, J.*; verdict of guilty of kidnapping in the first degree, home invasion and the lesser included offense of assault in the second degree; thereafter, the defendant was presented to the court on conditional pleas of nolo contendere to two counts of being a persistent dangerous felony offender in the second part of the information; judgment of guilty in accordance with the verdict and pleas, from which the defendant appealed. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *William A. Adsit*, assigned counsel, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Ricardo Swilling, appeals from the judgment of conviction, rendered following a jury trial, of kidnapping in the first degree in violation

of General Statutes § 53a-92 (a) (2) (A), home invasion in violation of General Statutes § 53a-100aa (a) (2), and assault in the second degree in violation of General Statutes § 53a-60 (a) (2).[1] Additionally, following the defendant's pleas of nolo contendere, the defendant was convicted of two counts of being a persistent dangerous felony offender in violation of General Statutes § 53a-40 (a) (1), as alleged in part B informations that were related to the kidnapping and home invasion charges.[2] The defendant claims that (1) the trial court violated his due process right to a fair and impartial trial by questioning two witnesses during the state's case-in-chief, (2) the court improperly permitted the victim to make an in-court identification of him absent a showing that she previously had made a nonsuggestive out-of-court identification of him, (3) the court improperly admitted evidence of his prior felony convictions, (4) the court improperly admitted a recording of a 911 call made by the victim, and (5) the cumulative effect of the court's errors deprived him of his right to a fair and impartial trial. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In December, 2014, the victim, Barbara Wilson, resided in an apartment complex in Waterbury in a unit that was leased to her and her daughter. The living room and the kitchen were located on the first floor of the unit, and three bedrooms and a bathroom were located on the second floor of the unit. The victim had a practice of letting others rent space in her apartment,

[1] The defendant was charged with assault in the first degree in violation of General Statutes § 53a-59 (a) (1). The jury returned a verdict of not guilty with respect to that count, but found the defendant guilty of the lesser included offense of assault in the second degree in violation of § 53a-60 (a) (2).

[2] The court sentenced the defendant to a total effective term of incarceration of forty years, which includes a twenty year mandatory minimum sentence, followed by ten years of special parole.

at a usual rate of $150 per week. The victim first met the defendant in 2013. In early December, 2014, a mutual friend of the victim and the defendant, identified in the record as "Luis," appeared at the victim's residence with the defendant. Luis asked the victim if the defendant could stay at her apartment for a few days. Initially, the victim did not consent to Luis' request and the two men departed. Later that day, however, the defendant appeared once more at the victim's apartment to discuss the matter further. The defendant gave the victim $20 and some brandy.

During this second meeting, the victim agreed to let the defendant pay her to stay at the apartment. The defendant explained that he worked overnight and would come and go from the residence as necessary. The victim, who was almost always at home, did not give the defendant a key to the apartment, but simply let him in whenever he knocked on the door. The victim had only two keys for the residence, one which she kept and another that was kept by her parents.

The defendant stayed at the apartment over the course of two weeks in December, 2014, sometimes spending the overnight hours there. He frequently came to the residence to sleep either in an unfurnished bedroom or on a sofa. He paid the victim $70. During the time that the defendant spent at the apartment, he was never left alone there and, prior to the events at issue, when the defendant was present at the apartment, there was always one or more third parties present along with the victim. The defendant did not keep any personal belongings at the apartment, but always carried his belongings with him in a duffel bag.

On December 24, 2014, at approximately 10 a.m., the victim was at the apartment with her boyfriend, Eddie Ortiz, when the defendant arrived at the apartment. The defendant asked for a ride. Soon thereafter, Ortiz drove

the defendant to a bus stop located near a liquor store. Then, Ortiz drove the victim to a store. At approximately 11 a.m., he drove her back to her apartment. The victim entered the apartment alone and locked the door.

At approximately 11:30 a.m., the victim observed the defendant standing near the front door inside of her apartment. The victim asked the defendant how he gained access to the apartment. What followed was a violent physical struggle between the victim and the defendant. The defendant wrapped his hands around the victim's throat and began to strangle her. The victim was experiencing difficulty breathing, and she managed to pry the defendant's hands off her. The victim fled the apartment by means of the front door, but the defendant pursued her from behind, dragged her back inside the apartment, and resumed strangling her.

The victim physically struggled with the defendant and, eventually, the victim and the defendant were on the floor of the kitchen. The victim was able to twist her body to break free of the defendant's grasp, at which time she got back on her feet and reached a rear door inside the kitchen. The defendant cornered the victim between a stove and a sink. At this point in time, the defendant grabbed two knives that were on top of a nearby microwave oven and began to stab the victim repeatedly while she was standing in front of the stove. While the defendant was stabbing her and yelling at her, the victim raised her hands to protect her face. The victim sustained multiple stab wounds and was bleeding.

There was a knock at the victim's front door. The defendant told the victim that if she said anything, he would kill her. He pushed the victim upstairs to the bathroom and forced her to stand in a bathtub. He threatened her with a knife until the knocking ceased.

The defendant led the victim to her bedroom and continued to yell at her. Among the things that the defendant stated was that if he was not going to have a good Christmas, neither was the victim. The victim partially undressed and began to tend to her wounds with a T-shirt. She was permitted to go into the bathroom to wash some of the blood off her body and to put on a clean shirt. While the victim was cleaning her body, the defendant remained in the bathroom and threatened her with a knife. The defendant noticed that a knife blade had broken off during the attack and remained stuck in the victim's arm. The defendant told the victim that he almost felt "some kind of sympathy" for her and he removed the broken blade from her arm.

The defendant, still holding a knife, led the victim back into her bedroom, where he remained with the victim for several hours. He yelled at the victim and repeatedly used his cell phone, but apparently was unable to reach anyone on his cell phone. Additionally, the defendant watched a movie and consumed alcohol during this time.

At approximately 5 or 6 p.m., there was another knock on the victim's front door. The victim told the defendant that it was likely that her daughters were at the door and that, if he let them in, she would not say anything about what had occurred and that he could get a ride somewhere. The defendant refused, and he warned her to remain quiet. When the knocking stopped, the victim asked the defendant for a cigarette. The defendant approached the victim and punched her in the face. The defendant and the victim shouted at one another and, after using his cell phone, he approached the victim, who was sitting on a bed, kicked her, and pushed her into a wall. The defendant continued to yell things that were incomprehensible to the victim and continued to threaten the victim. For example, he told the victim that he found more liquor, he

was ready for "round two," and that she was "really going to get it." The victim, under the constant supervision of the defendant, remained in the bedroom with the defendant until approximately 4 a.m., the following day.

At that point in time, the defendant ordered the victim to prepare chicken for him to eat. He escorted her to the kitchen where she complied with his request. The defendant forced the victim to sit next to him in the living room while he ate the meal she had prepared, but he did not permit her to eat or drink anything. The defendant warned the victim not to "make a move."

At approximately 6 or 7 a.m., the defendant escorted the victim back upstairs. The victim, who had barely slept the night before, felt weak and sat on the bed. The defendant stabbed her in the right arm with a knife. The defendant repeatedly yelled at the victim. The victim asked the defendant if she could return to the bathroom to tend to her wounds, but he refused this request. Throughout the day, the defendant continued to consume alcohol and watch television. Although he did not do so previously during this incident, the defendant eventually fell into a deep sleep.

At approximately 8 p.m., the victim sensed an opportunity to rush past the sleeping defendant and make her way out of the apartment. She quickly exited her apartment and approached the apartment of a neighbor, Luis Matos. The victim knocked frantically on Matos' door. Matos let the victim inside of his apartment where she called 911. Police and emergency medical personnel arrived at the scene shortly thereafter. The victim was transported to a nearby hospital where she received treatment for her many stab wounds.

Waterbury police Officer Brian LaPerriere was one of several police officers to respond to the scene. When he encountered the victim, her clothing was covered in dried blood and several of her stab wounds were

apparent to him. After hearing the victim's version of events, the officers entered the victim's apartment through a rear window on the second floor. They observed bloodstains throughout the residence and bloody knives on the floor of the kitchen and bedroom. While he was in the process of searching the apartment, LaPerriere discovered the defendant hiding in a closet on the first floor. The defendant complied with LaPerriere's commands, and provided the officers with his name and his street name, Apollo. The defendant stated to the police that he "was in some shit." Additional facts will be set forth as necessary in our analysis of the defendant's claims.

I

First, the defendant claims that the court violated his due process right to a fair and impartial trial by questioning the victim and Matos during the state's case-in-chief. We disagree.

The following two events that occurred during the trial are the subject of the present claim. The first occurred during the state's direct examination of the victim. By way of relevant background, the victim testified that she was familiar with the defendant prior to the events at issue. She identified the person that she allowed to stay in her apartment as "Ricardo Swilling," who had a street name of "Apollo," and described his arrangement with her regarding the use of the apartment. Absent objection, the following colloquy occurred:

"[The Prosecutor]: . . . And is [the defendant] present in court today?

"[The Victim]: Yes.

"[The Prosecutor]: Can you please point to him and describe what he's wearing?

"[The Victim]: He's right over here. He [has] a gray suit on.

"The Court: With the tie or without the tie?

"[The Victim]: I can't see over the screen. No tie.

"The Court: All right. The record can reflect identification of the defendant."

Absent objection, at the conclusion of the state's examination of the victim, during which she described the defendant's conduct during December 24 and December 25, 2014, the following colloquy occurred:

"[The Prosecutor]: And the individual who stabbed you on [December 24 and December 25] of 2014, is he present in court today?

"[The Victim]: Yes, he is.

"[The Prosecutor]: The person that did not allow you to leave your apartment?

"[The Victim]: Yes, he is present."

Following an additional brief inquiry of the victim by the state, the prosecutor stated that he did not have any further questions for the victim. The following colloquy followed:

"The Court: Before we take the recess . . . you said that person is in the courtroom and it may seem obvious, but is that the person you've identified before as [the defendant]?

"[The Victim]: Yes."

Second, during the state's direct examination of Matos during its case-in-chief, Matos testified in relevant part that, on December 25, 2014, the victim appeared at his door, he provided assistance to her, and police and emergency medical personnel were summoned to the scene. Matos testified that the victim explained to him what had happened to her. There is no indication in Matos' testimony that he knew the

defendant prior to the events at issue or had any interaction with him following the events at issue. He testified that, following the victim's arrival at his apartment on December 25, 2014, he went outside to see "where was the guy at." The following colloquy then occurred:

"[The Prosecutor]: And when you were outside . . . did you see anything?

"[The Witness]: No. The only time I seen him was when the officer ran behind her house; that's when he locked the door on the house.

"[The Prosecutor]: Okay. When you say, 'he,' who do you mean?

"[The Witness]: The guy. When the officer went to the house to see if he was still there, the guy ran back to the house, he locked the door.

"[The Prosecutor]: So . . . you saw an individual outside of [the victim's] apartment?

"[The Witness]: No. I didn't get to see him, but the officer ran and he seen him locking the door.

"[The Prosecutor]: Okay. And which door did you see him lock or go into?

"[The Witness]: The back door of [the victim's] house.

"[The Prosecutor]: Okay. And were you able to see that individual?

"[The Witness]: No. I didn't get to see him. I seen him after he got arrested and everything, then I seen him. But I never seen that guy before.

"[The Prosecutor]: Now, the person that you saw go back into the house, was that the same person you saw in police custody later?

"[The Witness]: Yup.

"[The Prosecutor]: Okay. And is that person in court here today?

"[The Witness]: I don't know. I have no idea.

"[The Prosecutor]: If you take a look in the courtroom, can you let us know if you recognize anybody?

"[The Witness]: That guy.

"[The Prosecutor]: Can you describe what he's wearing?

"[The Witness]: He's got a gray sweater.

"The Court: What color shirt is he wearing?

"[The Witness]: He's wearing a white shirt with like blue—

"The Court: No, I'm talking about right now.

"[The Witness]: Right now, he's got a blue on, with dreads.

"The Court: Okay.

"[The Prosecutor]: I'll ask [that] the record reflect he did point in that direction.

"The Court: He did. The record can reflect he pointed in the direction of the defendant, but—Mr. Matos, let me just make it a little easier here. You pointed over in that direction. Do you see the person that the police took into custody that night here in the courtroom?

"[The Witness]: Well, it looks, the only one that look familiar is him.

"The Court: Okay. And what color shirt is he wearing, that's all I'm asking you.

"[The Witness]: Blue.

"The Court: Blue. Okay. There is really no one over there with a blue shirt that I could see.

"[The Witness]: I'm not a color, you know—

"The Court: Okay. All right. That's enough. That's fine. Go ahead. Continue your questioning."

At the time of trial, the defendant did not raise any objection to the court's questioning of the victim or Matos. On appeal, the defendant claims that the court violated his due process right to a fair trial[3] by questioning the victim and Matos directly, thereby interfering with and aiding the state's direct examinations of the victim and Matos. The defendant argues that, by questioning these witnesses as it did, the court abandoned an impartial posture, became an advocate for the state, intruded on the role of counsel, and suggested to the jury that it favored the state's case. The defendant argues that the court asked the victim a leading question that effectively compelled her to identify the defendant as the perpetrator of the violence she described in her testimony. The defendant argues that, during its colloquy with Matos, the court "essentially pressed Matos to identify [the] defendant" as the man he observed outside of his apartment. According to the defendant, "Matos' failure to identify [the] defendant made [the court's] interference even more improper. It worked to disadvantage [the] defendant's case in that it tended to convey to the jury . . . [the court's belief that the] defendant was the perpetrator, or at least strongly suggest[ed] that the jury should infer this, even though there was nothing in evidence prior to [the victim's] compelled identification in response to the court's leading question that suggested [the] defendant was [the

[3] Although the defendant refers to his rights under the state and federal constitutions, he has not provided this court with an independent analysis of his claim under the state constitution in accordance with *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992). Accordingly, we deem his state constitutional claim abandoned. See, e.g., *State* v. *Bennett*, 324 Conn. 744, 748 n.1, 155 A.3d 188 (2017).

person who the victim knew to be] 'Apollo.' " The defendant argues that absent the court's interference with the presentation of evidence, the record is devoid of sufficient evidence from which the jury reasonably could have found that the state had satisfied its burden of demonstrating the essential element of identity, that is, that he was the perpetrator of the crimes at issue.

The defendant requests review under the doctrine set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[4] As modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), the *Golding* doctrine provides that "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless

[4] Alternatively, the defendant argues that reversal is warranted under the plain error doctrine, codified in Practice Book § 60-5, which "is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved [and nonconstitutional in nature], are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party." (Internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 595–96, 134 A.3d 560 (2016). In light of our conclusion that the present claim fails on its merits under the bypass rule of *Golding* and that the court acted well within its discretion by questioning the witnesses as it did to clarify the testimony of both witnesses, the defendant cannot demonstrate that plain error exists. Additionally, the defendant urges us to exercise our supervisory authority to grant him relief. In light of our assessment of the court's limited and proper intervention in the presentation of evidence, we reject the defendant's invocation of this rarely utilized doctrine. As our Supreme Court has explained: "The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Lockhart*, 298 Conn. 537, 576, 4 A.3d 1176 (2010).

error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40. "The defendant bears the responsibility for providing a record that is adequate for review of his claim of constitutional error. . . . The defendant also bears the responsibility of demonstrating that his claim is indeed a violation of a fundamental constitutional right. . . . Finally, if we are persuaded that the merits of the defendant's claim should be addressed, we will review it and arrive at a conclusion as to whether the alleged constitutional violation . . . exists and whether it . . . deprived the defendant of a fair trial." (Citations omitted.) Id., 240–41.

We conclude that the claim is reviewable under *Golding* because the record is adequate to review the claim presented and the claim is of constitutional magnitude. We conclude, however, that the defendant cannot prevail under *Golding* because he is unable to demonstrate that a constitutional violation exists and that it deprived him of a fair trial.

"Due process requires that a criminal defendant be given a fair trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. . . . In a criminal trial, the judge is more than a mere moderator of the proceedings. It is [the trial judge's] responsibility to have the trial conducted in a manner which approaches an atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding. . . . Consistent with his [or her] neutral role, the trial judge is free to question witnesses or otherwise intervene in a case in an effort to clarify testimony and assist the

jury in understanding the evidence so long as [the trial judge] does not appear partisan in doing so. . . . Thus, when it clearly appears to the judge that for one reason or another the case is not being presented intelligibly to the jury, the judge is not required to remain silent. On the contrary, the judge may, by questions to a witness, elicit relevant and important facts. . . .

"One of the chief roles of the trial judge is to see that there is no misunderstanding of a [witness'] testimony. The judge has a duty to comprehend what a witness says as much as it is [the judge's] duty to see that the witness communicates with the jury in an intelligible manner. A trial judge can do this in a fair and unbiased way. [The judge's] attempt to do so should not be a basis of error. Whe[n] the testimony is confusing or not altogether clear the alleged jeopardy to one side caused by the clarification of a [witness'] statement is certainly outweighed by the desirability of factual understanding. The trial judge should strive toward verdicts of fact rather than verdicts of confusion." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 272 Conn. 515, 535–36, 864 A.2d 847 (2005); see also *State* v. *Bember*, 183 Conn. 394, 401, 439 A.2d 387 (1981).

"Whether or not the trial judge shall question a witness is within his sound discretion . . . [and] [i]ts exercise will not be reviewed unless he has acted unreasonably, or, as it is more often expressed, abused his discretion. . . . The trial judge can question witnesses both on direct and cross-examination. . . . [I]t may be necessary to do so to clarify testimony as [the judge] has a duty to comprehend what a witness says . . . [and] to see that the witness communicates with the jury in an intelligible manner. . . . While no precise theorem can be laid down, we have held that it is proper for a trial court to question a witness in endeavoring, without harm to the parties, to bring the facts out more clearly and to ascertain the truth . . . and [intervene]

where the witness is embarrassed, has a language problem or may not understand a question." (Citation omitted; internal quotation marks omitted.) *State* v. *Iban C.*, 275 Conn. 624, 652, 881 A.2d 1005 (2005); see also *State* v. *Velasco*, 253 Conn. 210, 237–38, 751 A.2d 800 (2000); *State* v. *Fernandez*, 198 Conn. 1, 12–13, 501 A.2d 1195 (1985). "The risk of constitutional judicial misconduct is greatest in cases where the trial court has interceded in the merits of the trial." *State* v. *Woodson*, 227 Conn. 1, 31, 629 A.2d 386 (1993).

Mindful of the foregoing principles, we turn to the court's questioning of each of the two witnesses at issue. As set forth previously in this opinion, the record reflects that the victim made an in-court identification of the defendant as the person she knew to be "Ricardo Swilling" or "Apollo," the person she permitted to stay at her apartment. Later, after the victim had testified with respect to the violent events of December 24 and December 25, 2014, she testified in response to the prosecutor's inquiry that the person who had stabbed her and who did not permit her to leave her apartment was "present" in the courtroom. It is abundantly clear from reviewing the victim's testimony that the person she referred to as "Ricardo Swilling" or "Apollo" was the person she believed to be the perpetrator of the crimes at issue. After eliciting this testimony with respect to the perpetrator's mere presence in the courtroom, however, the prosecutor did not ask the victim specifically to identify the defendant.

When the prosecutor indicated that he did not have any further questions for the victim, the court asked a single question of the victim. The court asked her if the person she had identified as the perpetrator of the crimes, and who was present in the courtroom, was the person she had previously identified as "Mr. Swilling." The court aptly observed that its inquiry seemed

"obvious"—the victim already had identified the defendant to be "Ricardo Swilling," the person who was staying at her apartment, and she testified that this same person was the perpetrator of the crimes. Nonetheless, at the time of the court's inquiry the victim had made an in-court identification that was ambiguous. She merely had testified that the perpetrator of the crimes was present in the courtroom. Thus, although she made a second in-court identification, her identification was not clear, but left an ambiguity with respect to a critical factual issue. In this circumstance, the court did not appear to be taking sides in the matter. It merely asked a single question that readily clarified the victim's testimony for the benefit of the court and the jury. We disagree that the court compelled the witness in any way, reflected any degree of bias in favor of the state's case, or acted unreasonably.

With respect to the court's inquiry of Matos, as is set forth previously in this opinion, it is clear that, with respect to whether Matos observed the perpetrator or was able to make an in-court identification of the defendant, the prosecutor did not present an intelligible narrative. Matos testified that he did not see anything when he went outside. Then, Matos testified that he saw "him" when a police officer ran behind the victim's house. The prosecutor asked Matos to explain, to which Matos testified that he saw "[t]he guy" run to the back of the victim's house and lock the door. When the prosecutor asked for further explanation as to whether Matos saw an individual outside of the victim's apartment, Matos testified "No. I didn't get to see him . . . ." Then, Matos testified that an officer saw someone locking a door at the victim's house. The prosecutor again asked if Matos was able to see this individual, to which Matos answered that he did not see him, but also that he saw him after he was placed under arrest.

Following this utterly confusing testimony, the prosecutor attempted to elicit an in-court identification of the defendant by Matos. The prosecutor asked Matos if the person that he observed reentering the victim's house was the same person that he observed later in police custody. Matos replied, "Yup." When the prosecutor asked Matos if he observed that same person in the courtroom, he replied, "I don't know. I have no idea." When the prosecutor asked Matos to look around the courtroom and "let us know if you recognize anybody," Matos replied, "[t]hat guy," and began to describe someone who was wearing a gray sweater.

The court asked Matos four questions, all of which sought clarification from Matos with respect to whom in the courtroom he was attempting to identify and whether that person was the man that he observed in police custody on December 25, 2014. The court asked Matos, three times, to clarify the clothing being worn by the person he was attempting to identify. The prosecutor had asked Matos to identify someone that he "recognize[d]"—an inquiry that was not pertinent to the issues before the jury and which possibly could have created confusion in the minds of the jurors. The court, in an obvious attempt to dispel any ambiguity with respect to who in the courtroom Matos was attempting to identify and why, asked Matos, "[d]o you see the person that the police took into custody that night here in the courtroom?" When Matos continued to reflect an inability to provide an intelligible identification, the court ended the inquiry by stating, "[t]hat's enough."

Having reviewed the record carefully, we are persuaded that the court's questioning of Matos reflected a reasonable attempt to clarify both Matos' ability to make an identification of someone in the courtroom as well as the nature of the state's inquiry. It is clear from a review of the colloquy between the prosecutor, the

court, and Matos that such clarification was needed. By making the brief inquiry of the witness that it did, the court did not do more than protect the defendant's right to ensure that the jury had before it facts rather than confusion. Stated otherwise, the court fulfilled its role of ensuring that the facts were presented to the jury in an understandable manner. Contrary to the defendant's characterization of the court's questions, the court did not reflect any bias in favor of the state's case or exert any influence on Matos to identify the defendant as the person he may or may not have seen on the night in question.

The present case does not present a situation in which the court advocated in favor of a particular verdict, suggested that a particular witness was credible, or otherwise suggested that it believed or disbelieved any particular version of events. The court's brief inquiries in the present case appear to have been directly tailored to address ambiguities that obviously existed in the questioning of the two witnesses at issue. The defendant argues that the court improperly assisted the state's case and infringed upon the role of counsel. Yet, as our case law reflects, judicial intervention in the form of questioning witnesses is proper when, as in the present case, such intervention is limited and is properly tailored to dispelling confusion in the mind of the court and the jury with respect to the nature of the evidence being presented by a party. Although it was the jury's function to evaluate the evidence, including any in-court identifications of the defendant, it was the court's function to clarify whether an in-court identification of the defendant by Matos, in fact, had occurred.

Additionally, we observe that during its charge, the court stated in relevant part: "You should not be influenced by my actions during the trial in ruling on motions or objections by counsel, or in comments to counsel, or in questions to witnesses, or in setting forth the law

in these instructions. You are not to take my actions as any indication of my opinion as to how you should determine the issues of fact." Also, the court stated: "If by any remote chance you think I have an opinion in this case, I must tell you that you are wrong. I have no opinion in this case. I am, if you will, like the referee in a basketball game. I have no opinion as [to] how the matter should end. My job is to make sure that everybody plays by the rules and to explain the rules when necessary." These instructions unambiguously conveyed to the jury that the court did not have a role in the fact-finding process and did not have an opinion with respect to the outcome of the trial, thereby mitigating the danger that the jury might have considered the conduct at issue in this claim in the harmful manner suggested by the defendant.

For the foregoing reasons, we conclude that the court acted well within its discretion. The defendant has failed to demonstrate that a constitutional violation exists and deprived him of a fair trial. Accordingly, the claim fails under *Golding*'s third prong.

II

Next, the defendant claims that the court improperly permitted the victim to make an in-court identification of him in the absence of a showing that she previously had made a nonsuggestive out-of-court identification of him. We disagree.

In arguing that his due process rights were violated, the defendant relies solely on *State* v. *Dickson*, 322 Conn. 410, 426, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017), in which our Supreme Court held that "first time in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court." The court explained:

"[A]ny first time in-court identification by a witness who would have been unable to reliably identify the defendant in a nonsuggestive out-of-court procedure constitutes a procedural due process violation. . . . Although we recognize that, when the witness could have identified the defendant in a nonsuggestive procedure, a first time in-court identification does not constitute an actual violation of due process principles, this court has an obligation to adopt procedures that will eliminate the risk that the defendant will be deprived of a constitutionally protected right by being identified in court by a witness who could not have identified the defendant in a fair proceeding. Indeed, it is well established that courts have the duty not only to craft remedies for actual constitutional violations, but also to craft prophylactic constitutional rules to prevent the significant risk of a constitutional violation. . . . In the present case, we conclude that the practice of allowing first time in-court identifications creates a significant risk of a due process violation and that the procedures that we adopt herein are more effective at preventing such violations, less costly and more in keeping with the legislative will than any other alternative." (Citations omitted; emphasis omitted.) Id., 426–27 n.11.

Our Supreme Court went on to explain that certain in-court identifications were not subject to the prophylactic rules set forth in *Dickson*. The court stated: "In cases in which there has been no pretrial identification, however, and the state intends to present a first time in-court identification, the state must first request permission to do so from the trial court. . . . The trial court may grant such permission only if it determines that there is no factual dispute as to the identity of the perpetrator, or the ability of the particular eyewitness to identify the defendant is not at issue. . . . For example, in cases in which the trial court determines that the only issue in dispute is whether the acts that the

defendant admittedly performed constituted a crime, the court should permit a first time in-court identification. In cases in which the defendant concedes that identity or the ability of a particular witness to identify the defendant as the perpetrator is not in dispute, the state may satisfy the prescreening requirement by giving written or oral notice to that effect on the record." (Citations omitted.) Id., 445–46. The court clarified that, if a defendant did not dispute a witness' ability to identify him, but merely disputed such witness' testimony on other grounds, the witness would be "properly permitted to make a first time in-court identification of the defendant" without violating due process. Id., 446 n.28.

The defendant seeks review pursuant to the *Golding* doctrine. We previously set forth the parameters of the *Golding* doctrine in part I of this opinion. We will review the claim because the record provides us with an adequate basis to do so, and the claim is of constitutional magnitude. We conclude, however, that the claim fails under *Golding*'s third prong because the defendant is unable to demonstrate that a constitutional violation exists and deprived him of a fair trial.

In arguing that the victim's in-court identification deprived him of his right to due process,[5] the defendant argues: "[T]here was no evidence presented that [the victim] ever identified [the] defendant in a nonsuggestive out-of-court setting of any kind at all. None of the police officers testified that she identified [the] defendant as 'Apollo,' her alleged attacker, in any interview or constitutionally acceptable [photographic] array or lineup. There is not a shred of evidence [that the victim] ever identified [the] defendant at all outside of court. Moreover, her in-court identification was tainted with

[5] To the extent that the defendant has attempted to raise a claim under our state constitution, he has abandoned such claim by virtue of his failure to provide this court with an independent analysis of it. See footnote 3 of this opinion.

[the trial court's] leading question, so it cannot be trusted. . . .

"Since no prior, out-of-court nonsuggestive identifications were made, the state was obligated to seek the court's permission to have nonsuggestive . . . identifications made and have a hearing on how that could be accomplished. . . . Short of that, the in-court identifications are not to be allowed." (Citations omitted.)

The defendant does not challenge the victim's in-court identification of him as the person who resided with her over the course of several weeks in December, 2014, and whom she knew to be "Ricardo Swilling" or "Apollo." The victim testified, and the defendant did not dispute, that she was familiar with the defendant prior to the time that the person identified in the record as Luis accompanied the defendant to her home because he needed a place to stay. The victim testified that she first met the defendant in 2013, at which time she had a lengthy conversation with him. Far from attempting to demonstrate that the victim was unfamiliar with him prior to the events at issue, the defendant testified that, prior to December, 2014, he and the victim were in a sexual relationship. The defendant's theory of defense, articulated during closing argument, was not that the victim was unable to identify him correctly. Rather, defense counsel suggested that an unnamed third party who was a tenant of the victim had committed the crimes at issue, the victim was too fearful to identify this third party, and, because she was in need of assistance and felt pressure to name a perpetrator following the incident, she falsely named the defendant as her assailant because he happened to be staying with her at that time.

The facts of the present case reflect that there was no factual dispute with respect to whether the victim had the ability to identify the defendant. The victim's

familiarity with the defendant was not a disputed issue of fact. The victim's ability to observe, recall, and narrate facts concerning the person that allegedly assaulted her and held her hostage in her apartment during the course of two days also was not a disputed issue of fact. Accordingly, despite the fact that the record is silent with respect to any out-of-court identification made by the victim in the present case, the victim's in-court identification of the defendant as the perpetrator of the crime was permissible absent adherence to the procedural safeguards that the court in *Dickson* made applicable to first time in-court identifications.

The defendant also focuses on the state's failure to request permission to conduct a first time in-court identification as is required by the newly created procedural rules announced in *Dickson*. See *State* v. *Dickson*, supra, 322 Conn. 445–46. As the state correctly observes, the victim's in-court identification occurred on February 29, 2016. The defendant filed the present appeal on June 28, 2016. Our Supreme Court, however, did not officially release its decision in *Dickson* until August 9, 2016. With respect to the applicability of the procedural rules announced in *Dickson*, our Supreme Court stated that they applied "to the parties to the present case and to all pending cases. It is important to point out, however, that, in pending *appeals* involving this issue, the suggestive in-court identification has already occurred. Accordingly, if the reviewing court concludes that the admission of the identification was harmful, the only remedy that can be provided is a remand to the trial court for the purpose of evaluating the reliability and the admissibility of the in-court identification under the totality of the circumstances. . . . If the trial court concludes that the identification was sufficiently reliable, the trial court may reinstate the conviction, and no new trial would be required." (Citations omitted; emphasis in original; footnote omitted.) Id., 451–52.

In the present case, although we would be obliged to afford the defendant relief if he had demonstrated a violation of his due process rights, he is not necessarily entitled to relief arising from the prosecutor's failure to abide by a procedural rule that was not in existence at the time of trial. For the reasons already discussed, we do not conclude that the admission of the victim's in-court identification violated his constitutional rights. Because there is no showing of harm, there is no need to upset the judgment of the trial court or to remand the case to the trial court for further proceedings with respect to the identification.

With respect to the victim's in-court identification of him as the perpetrator, the defendant is unable to demonstrate that a constitutional violation exists and that it deprived him of a fair trial.[6] Accordingly, the claim fails under *Golding*'s third prong.[7]

III

Next, the defendant claims that the court improperly admitted evidence of his prior felony convictions. We disagree.

[6] In the context of challenging the victim's in-court identification under *Dickson*, the defendant purports to raise "an additional ground of error" under *Dickson* with respect to Matos. Specifically, the defendant argues that, despite the fact that there was no evidence that Matos had identified the defendant previously, the court nonetheless "prompted" Matos to make an in-court identification of the defendant. We have concluded in part I of this opinion that the court's inquiries of Matos were proper. Despite the fact that the defendant challenges the court's inquiries of Matos, he nonetheless acknowledges that Matos never made an in-court identification of the defendant. Setting aside our concern that the defendant's scant analysis of this aspect of his unpreserved claim does not constitute adequate briefing, we readily conclude that it fails under *Golding*'s third prong in light of the undisputed fact that an in-court identification by Matos did not occur in the present case.

[7] To the extent that the defendant argues, in the alternative, that plain error exists with respect to either aspect of the present claim under *Dickson*, we conclude, in light of the reasons discussed in our *Golding* analysis, that the defendant has failed to demonstrate that plain error exists. Additionally, to the extent that the defendant requests extraordinary relief in terms of the exercise of our supervisory authority, we conclude that our review of

The following additional facts are relevant to the present claim. After the state rested its case-in-chief, defense counsel indicated to the court that the defendant intended to testify. After the court addressed the defendant about his decision to testify, the court asked the prosecutor to identify prior convictions of the defendant that the state intended to use for impeachment purposes. The prosecutor replied that he intended to ask the defendant if he had been convicted of four felony crimes on July 13, 2001. The prosecutor stated that, on that date, the defendant was convicted of burglary in the first degree, carrying or selling a dangerous weapon, kidnapping in the first degree with the use of a firearm, and kidnapping in the second degree with the use of a firearm. The prosecutor indicated that he did not intend to elicit the names of these felony crimes. The prosecutor represented that the convictions occurred in 2001, but the defendant was not discharged to special parole until May 22, 2013. In terms of the remoteness of the convictions, the state argued that the fact that the defendant was not discharged to special parole until May 22, 2013, put the convictions "well within" a ten year window of the trial. Defense counsel objected[8] on the ground that the convictions were too remote in time and that reference to the convictions would be unduly prejudicial to the defense.

In relevant part, the court ruled: "I will allow the state to impeach him. . . . I'm not clear what the nature of the burglary is because there is no indication whether there is larcenous intent in regard to that statute. But,

the present claim does not reflect the existence of any infringement of the defendant's rights and does not give rise to any concerns that would warrant the exercise of our supervisory authority.

[8] The record reflects that, prior to this point in the trial, defense counsel filed a motion in limine to preclude the state from introducing evidence pertaining to the defendant's criminal record. Therein, the defendant argued that such evidence was "not probative as to any material issue in the present case and is so highly prejudicial as to inflame the jury."

it's clear [that] those offenses, the burglary first degree and carrying a dangerous weapon, kidnapping second, kidnapping first are all felonies and under the case law, the felonies do go to the truth and veracity, and not as much as crimes such as larceny or perjury. But they still are considered admissible, and do go to truth and veracity. I'm required at this point to weigh three factors. The extent of any prejudice likely to arise, the significance of the commission of the particular crime indicating on truthfulness and remoteness in time.

"I'll find that while these offenses—the convictions are [in] July of 2001, he was not discharged. He wasn't released from prison until May 22, 2013. . . . I'll indicate [that] I'm reading from a business record from the Department of Correction indicating [that] he was discharged from prison . . . to parole, on May 22, 2013, and that as of the date of this incident, December 26, 2014, he was still on parole. He may even still be on parole today, but regardless, he certainly was on parole up until December 26th. . . .

"So, as a result, I believe that the case law indicates that this conviction, while starting on July 13, 2001, is still, in effect, even today as we speak, but certainly when he was discharged just approximately three years ago. So, I find for that purpose, it's not too remote in time.

"I also find that since it's going to be referred to as unnamed felonies . . . and also since the state is going to refer to the date of conviction, which is 2001, that the extent of the prejudice is minimal.

"And as far as the significance of the commission of the particular crimes here regarding truthfulness, it would appear that they aren't the type of crimes ordinarily associated with truthfulness, but the case law indicates that because they are felonies, they . . . as

opposed to misdemeanors . . . [reflect on the defendant's] truthfulness . . . . Obviously, less than a larceny would, but still some elements.

"So, based on all the weighing of those factors, and the fact that [the] state is prohibited from referring to the particular offenses and is also prohibited from mentioning when he got off of parole, or [was] released from prison . . . the argument could be made by the defense that he doesn't have a conviction since 2001. So, I don't think there is the prejudice that might be associated with, you know, some reference to something more recent.

"So, I am going to allow the state to impeach with those four offenses. I will also indicate that the defendant was apparently convicted of [a] burglary charge and was in . . . 1997, which, under . . . my reading of the statute could possibly be used as a source of impeachment since he has one or more offenses within the ten years. But in discussing with the state, I urge the state not to impeach him with that, so from a balancing standpoint, I . . . ask the state not to do that. They are not going to do that. So, that was something that went into my decision to allow impeachment as I've described."

During the state's cross-examination of the defendant, the prosecutor asked the defendant if he was a convicted felon in that he had been convicted of four felony crimes on July 13, 2001. The defendant acknowledged that he had been convicted of these felony crimes. Immediately after the prosecutor elicited this evidence, the court provided a limiting instruction to the jury in which it ordered the jury to consider the evidence only with respect to an assessment of the defendant's credibility.[9]

[9] The court stated: "[T]his evidence that you've just heard is the defendant was convicted in 2001 of felony charges. A felony is a crime for which a person can be incarcerated for more than one year. The evidence of the commission of a crime other than the one charge[d] is not admissible to

During the state's closing argument, the prosecutor did not expressly rely on the defendant's prior felony convictions. During defense counsel's closing argument, counsel referred briefly to the impeachment evidence at issue by reminding the jury that the testimony with respect to the defendant's four felony convictions was admitted solely for use in the jury's assessment of his credibility generally.[10] During its charge to the jury, the court reiterated, in substance, the limiting instruction that it provided to the jury immediately after the state elicited testimony from the defendant concerning the four unnamed felony convictions.[11]

prove the guilt of the defendant in this particular case. The commission of the other matters . . . by this defendant, has been admitted into evidence for the sole purpose of affecting his credibility. You must weigh the testimony and consider it along with all the other evidence in this case. You may consider the convictions of the defendant only as they bear upon his credibility. And you should determine that credibility based on the same considerations you would give any other witness."

[10] Defense counsel argued in relevant part: "[The defendant] admitted that back in 2001, he was convicted of four felonies on the same date and time, so they obviously were all a result of one incident, presumably. And I bring your attention to that simply to alert you that the judge will tell you that that information is admissible only on the question of [the defendant's] credibility. That is, you can't use that information to say, well, if he's been convicted of a felony, some, now, fifteen years ago, therefore he's guilty of this felony. You can't use that information in any way to draw that type of conclusion. The only reason it's admissible, and it was allowed here in court today, is for your consideration as to whether or not it may affect his overall credibility. That's something for you to consider. But certainly you are not to consider it with regards to whether or not he's guilty of the crimes charged here."

[11] The court stated in relevant part: "In this case, evidence was introduced to show that in 2001, the defendant was convicted of felony charges. A felony is any crime for which a person may be incarcerated for more than one year. Evidence of the commission of a crime, other than the one charged, is not admissible to prove the guilt of the defendant in this particular case. The commission of other matters by this defendant has been admitted into evidence for the sole purpose [of] affecting his credibility. You must weigh the testimony and consider it along with all the other evidence in the case. You may consider the convictions of the defendant only as they bear upon his credibility and you should determine that credibility upon the same considerations as those given to any other witness."

Presently, the defendant argues that, by permitting the state to introduce evidence that, in 2001, he was convicted of committing four felony crimes, the court "violated [his] right to due process of law and a fair and impartial trial," and, in the alternative, the court abused its discretion, thereby undermining his defense. Although, in his initial discussion of the present claim in his brief, the defendant makes reference to an alleged violation of his constitutional rights, his analysis of the claim focuses solely on the issue of whether the court abused its discretion in admitting the evidence and whether its improper ruling was harmful to the defense. Thus, the defendant abandoned any claim of constitutional magnitude with respect to the court's ruling.

"[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted. . . .

"These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush. . . . Thus, because the sine qua non of preservation is fair notice to the trial court . . . the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with

sufficient clarity to place the trial court on reasonable notice of that very same claim." (Citations omitted; internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753–54, 66 A.3d 869 (2013).

As we discussed previously in this opinion, at the time that defense counsel objected to the admission of evidence related to the prior convictions, he argued that they were too remote in time and that they were more prejudicial than probative. To the extent that the defendant attempts to undermine the court's ruling by arguing for the first time before this court that the evidence simply was not at all relevant in an assessment of his veracity, we decline to address that aspect of his claim. We will review the grounds advanced before the trial court related to the prejudicial nature of the evidence as well as its remoteness.

"It is well settled that evidence that a criminal defendant has been convicted of crimes on a prior occasion is not generally admissible. . . . There are, however, several well recognized exceptions to this rule, one of which is that [a] criminal defendant who has previously been convicted of a crime carrying a term of imprisonment of more than one year may be impeached by the state if his credibility is in issue. . . . In its discretion a trial court may properly admit evidence of prior convictions provided that the prejudicial effect of such evidence does not far outweigh its probative value. . . . [Our Supreme Court] has identified three factors which determine whether a prior conviction may be admitted: (1) the extent of the prejudice likely to arise; (2) the significance of the commission of the particular crime in indicating untruthfulness; and (3) its remoteness in time. . . . A trial court's decision denying a motion to exclude a witness' prior record, offered to attack his credibility, will be upset only if the court abused its

discretion. . . . Those three factors have been incorporated in [the Connecticut] [C]ode of [E]vidence. Conn. Code Evid. § 6-7 (a). . . .

"There is no doubt that if evidence of a felony conviction is otherwise admissible, the name of the crime is generally also admissible. See Conn. Code Evid. § 6-7 (c) ([i]f, for purposes of impeaching the credibility of a witness, evidence is introduced that the witness has been convicted of a crime, the court shall limit the evidence *to the name of the crime* . . . except that . . . the court *may* exclude evidence of the name of the crime . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Young*, 174 Conn. App. 760, 768–69, 166 A.3d 704, cert. denied, 327 Conn. 976, 174 A.3d 195 (2017). "As indicated in § 6-7, the court has discretion to admit the prior conviction as an unnamed felony. Factors to consider include whether the prior crime reflects directly on credibility and whether the prejudice inherent in the name of the crime outweighs the probative impeaching value. . . .

"[I]n evaluating the separate ingredients to be weighed in the balancing process, there is no way to quantify them in mathematical terms. . . . Therefore, [t]he trial court has wide discretion in this balancing determination and every reasonable presumption should be given in favor of the correctness of the court's ruling . . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . . The burden lies with the party objecting to the admission of evidence of prior convictions to demonstrate the prejudice that is likely to arise from its admission. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury." (Citations omitted; internal quotation marks omitted.) Id., 769–70.

"[P]rior convictions that are admissible for impeachment purposes may be segregated into two general categories. First are those crimes that by their very nature indicate dishonesty or tendency to make false statement. . . . Beyond the obvious violations such as perjury or false statement, we have recognized that crimes involving larcenous intent imply a general disposition toward dishonesty such that they also fall within this category. . . . Convictions of this sort obviously bear heavily on the credibility of one who has been convicted of them. The probative value of such convictions, therefore, may often outweigh any prejudice engendered by their admission.

"The second category involves convictions for crimes that do not reflect directly on the credibility of one who has been convicted of them. . . . The theory behind the admissibility of these convictions as evidence of credibility posits that conviction of a crime demonstrates a bad general character, a general readiness to do evil and that such a disposition alone supports an inference of a readiness to lie in the particular case . . . .

"Convictions of crimes that fall within this second category blemish the character of one so convicted. A juror might reasonably conclude that such a witness lacks to some degree the moral rectitude from which a witness's oath of honesty derives its credibility. Nevertheless, conviction of a crime not directly reflecting on credibility clearly lacks the direct probative value of a criminal conviction indicating dishonesty or a tendency to make false statement. Thus, the balance used to measure admissibility of prior convictions is weighted less heavily toward admitting the prior conviction when it involves a crime related only indirectly to credibility." (Citations omitted; internal quotation marks omitted.) *State* v. *Geyer*, 194 Conn. 1, 12–13, 480 A.2d 489 (1984). "To avoid unwarranted prejudice to the witness, when

a party seeks to introduce evidence of a felony that does not directly bear on veracity, a trial court ordinarily should permit reference only to an unspecified crime carrying a penalty of greater than one year that occurred at a certain time and place." *State* v. *Pinnock*, 220 Conn. 765, 780, 601 A.2d 521 (1992). "That prudent course [of permitting evidence of unnamed felony convictions] allows the jury to draw an inference of dishonesty from the prior conviction without the extraordinary prejudice that may arise from naming the specific offense. . . . Ultimately, [t]he trial court, because of its intimate familiarity with the case, is in the best position to weigh the relative merits and dangers of any proffered evidence. . . . This principle applies with equal force to the admissibility of prior convictions." (Citation omitted; internal quotation marks omitted.) *State* v. *Muhammad*, 91 Conn. App. 392, 401, 881 A.2d 468, cert. denied, 276 Conn. 922, 888 A.2d 90 (2005).

We first address the defendant's claim that the court abused its discretion in admitting evidence of the convictions because they were too remote. It appears to be undisputed that the convictions occurred in 2001, but that the defendant's release from confinement in connection with those convictions did not occur until May 22, 2013. The defendant argues that the convictions occurred nearly fifteen years prior to the time of trial, which occurred in 2016. Ignoring the significance of the date of his release from confinement, the defendant asserts that he was serving the special parole portion of his sentence at the time of trial and, thus, the ten year presumptive bar to the prior convictions evidence should have applied. The defendant correctly acknowledges in his brief that there is no legal precedent in support of his argument.[12]

[12] At the time of oral argument before this court, the defendant's appellate counsel acknowledged that the defendant was released from confinement in 2013 and that the date he was released from confinement was not insignificant in evaluating whether the convictions were admissible.

This court has explained: "[T]he fact that a prior conviction is more than ten years old should greatly increase the weight carried by the third prong in the balancing test set forth in § 6-7 of the Connecticut Code of Evidence, unless that prior conviction relates to the witness' veracity. . . . That ten year benchmark, however, does not present an absolute bar to the use of a conviction that is more than ten years old but rather functions as a guide to assist the court in evaluating the conviction's remoteness. . . . [T]he measuring point for a remoteness determination under § 6-7 of the Connecticut Code of Evidence is the date of conviction or the date of release from resulting confinement, whichever is later." (Citations omitted; internal quotation marks omitted.) Id., 399–400. Because the defendant was released from confinement within ten years of the time of trial, the defendant's argument that the convictions were too remote is not persuasive.

With respect to the defendant's argument that the evidence was unduly prejudicial, he argues that because he was facing serious felony charges in the present case, the admission of the evidence at issue "was likely to lead the jury to conclude [that he] was more likely guilty in this case." Observing that the jury's assessment of his credibility was a critical factual issue in the present case, the defendant asserts that the evidence was "unduly prejudicial and of minor probative value."

The court carefully applied the correct legal principles in its assessment of the evidence. The court properly recognized that the four felony convictions, which arose from charges of burglary in the first degree, carrying or selling a dangerous weapon, kidnapping in the first degree with the use of a firearm, and kidnapping in the second degree with the use of a firearm, did not reflect *directly* on the defendant's credibility. The court

recognized, however, that the felony convictions nonetheless were relevant in an assessment of the defendant's credibility. In light of the legal principles previously discussed in this opinion, the defendant is unable to demonstrate that the court's determination that the felony convictions were relevant in an assessment of his credibility was not proper, nor did he attempt to do so at the time of trial.

The defendant, noting that the evidence was adverse to him, argues that the evidence was prejudicial. All adverse evidence is prejudicial. Here, the court took several measures to ensure that the evidence was not *unduly* prejudicial. First and foremost, the court limited the state's inquiry to unnamed felonies that occurred in 2001. The jury learned no details related to the crimes which arguably might have inflamed negative feelings toward the defendant. Additionally, the court provided the jury with a limiting instruction immediately following its admission of the evidence at issue, and it reiterated this instruction during its charge. The defendant does not argue that the court's instructions were deficient and provides us with no reason to doubt that the jury followed these instructions in its careful assessment of the evidence.

For the foregoing reasons, the defendant has failed to demonstrate that the court abused its discretion in admitting the prior conviction evidence.

IV

Next, the defendant argues that the court improperly admitted a recording of a 911 call made by the victim. We disagree.

The following additional facts are relevant to the present claim. During the victim's direct examination by the state, she testified about the ordeal that she endured in her apartment over the course of two days

and how, immediately after she fled her apartment on December 25, 2014, she ran to Matos' apartment and sought assistance from him. The victim testified that, once she was inside Matos' apartment, she hid in a closet. She asked Matos to call 911 for her and, after the call was made, she spoke to a dispatcher at the 911 call center. At that juncture in the victim's examination, the prosecutor asked her if she recognized a CD that the state marked as an exhibit for identification purposes. The victim testified that she recognized the CD and had listened to portions of it at the courthouse. She testified that it contained a recording of the conversation that she had with the 911 dispatcher on December 25, 2014.

When the prosecutor offered the recording as a full exhibit, defense counsel objected to its admission on the ground of hearsay. After the court excused the jury, the prosecutor argued that the recorded statements were not hearsay because they were the victim's spontaneous utterances immediately following her escape from captivity that were made while she was still experiencing the stress and excitement of the violent event. The prosecutor argued, as well, that the recorded statements were not hearsay because they were statements made by the victim related to her then-existing medical condition.

Initially, the court expressed concerns with respect to the authenticity of the exhibit offered by the state, but defense counsel stated that he was not raising an objection based on authentication. Rather, defense counsel stated, that his objection was based on the fact that the recording was hearsay and it was cumulative evidence because "this witness can clearly testify [with respect to] all of the things that would be revealed on the tape. What was your state of mind at the time? She can tell us. . . . What did you tell the police? She can

tell us that. . . . So, under the circumstances, I don't see any need to admit the tape."

Noting that defense counsel was not objecting on authentication grounds, the court asked the prosecutor to play the recording. In the recording, the victim made many statements, some of which were unprompted and some of which were responsive to questions posed to her by a 911 dispatcher. She identified herself and provided her location. She indicated that she had been kidnapped in her apartment by a five foot, eight inch tall black male with "long dreads" named "Rick," who had the street name of "Apollo." The victim stated that she knew her assailant, and that, while she was alone with him, he stabbed her with kitchen knives and choked, beat, and tortured her. The victim stated that she had escaped to her current location, a neighbor's apartment, but that she was "bleeding all over" and needed an ambulance. The victim stated her belief that the perpetrator was still asleep in her apartment.

After the court heard the recording, defense counsel reiterated his view that the recording was inadmissible because it was hearsay and it was cumulative. Additionally, defense counsel argued that the recording was more prejudicial than probative. The prosecutor replied that the evidence, which shed light on the victim's state of mind in the minutes after she fled from her apartment, was relevant to the jury's assessment of the victim's credibility. Additionally, the prosecutor reiterated his belief that the statements were not inadmissible hearsay because they were the excited utterances of the victim.

The court ruled: "It's not admissible for credibility. She hasn't been cross-examined. . . . [I]t may become admissible under some of the case law that discusses that, but at this point that is not why it's admissible.

"I've listened to the entire 911 call, which is in four or five separate sections. It is clear, even though a

number of the . . . statements [made by the victim] are made in response to questions [posed to her by the 911 dispatcher] which would militate against a spontaneous utterance exception, it is clear in listening to her voice, her voice is many times hurried. She seems out of breath during most of the conversation. It is clear that she's under the influence of a startling event. It's within minutes, if not seconds, of her being released from, or escaping, I should say, from the house that she was being held captive in. It's her . . . rambling, again, reflecting a lack of forethought in responding to things. It's just a spur of the moment. So, it's clear that most of the statements made by her are admissible for the truth of the matter as spontaneous utterance.

"To the extent that there are some things in there that are not . . . it's just a repeat of some previous things that were said. Additionally, there are some descriptions of the defendant. Those are admissible under the identification exception to the hearsay rule. And . . . under § 8-5 [of the Connecticut Code of Evidence], she's available for cross-examination. So that's available there.

"This is a 911 call and, therefore, would come in as a business record exception if the state would lay a foundation for that which they up to now have not done. But, additionally, I find that under the residual exception, it indicates a statement that is not admissible under any of the foregoing exceptions. I think it is admissible under a number of the foregoing exceptions. But, it's certainly admissible if the court determines there is a reasonable necessity for the admission of the statement. This is the only time. There's no other 911 calls, so there is a reasonable necessity for the admission of it in the statement supported by the equivalent guarantees of trustworthiness and reliability essential

to other evidence admitted. I find it extremely trustworthy and reliable given the fact that it's a recorded statement. It was done within seconds, or minutes, of being released from captivity, and, therefore . . . the 911 call in its entirety is admissible in full." Thereafter, the court summoned the jury to the courtroom and the recording was played in the jury's presence.

Presently, the defendant challenges the court's ruling by arguing that the court erred in its determination that the victim's statements were spontaneous utterances and that admitting the recording was not unduly prejudicial to the defense.[13] We will review these preserved evidentiary issues, in turn.[14]

A

First we address the defendant's argument that the court improperly determined that the recording fell

[13] In his appellate brief, the defendant also argues that the court abused its discretion in admitting the evidence because it was not authenticated. Because, at the time of trial, the defendant expressly waived any objection on the ground of authentication, we decline to review this aspect of his claim. "We generally do not review unpreserved, waived claims. . . . To reach a contrary conclusion would result in an ambush of the trial court by permitting the defendant to raise a claim on appeal that his or her counsel expressly had abandoned in the trial court." (Citation omitted; internal quotation marks omitted.) *State* v. *Foster*, 293 Conn. 327, 337, 977 A.2d 199 (2009).

To the extent that the defendant argues that the court erroneously relied on the residual exception to the hearsay rule, we need not address this aspect of his claim. Our conclusion that the court properly relied on the spontaneous utterance exception is a sufficient basis on which to uphold the court's ruling that the statements at issue should not be excluded under the hearsay rule.

[14] To the extent that the defendant claims that plain error exists with respect to this claim, we conclude, on the basis of our determination that the court's evidentiary ruling was a proper exercise of its discretion, that plain error does not exist. Also, to the extent that the defendant claims that the present claim warrants the exercise of our supervisory authority, we conclude in light of our analysis of the court's evidentiary ruling that such a showing has not been made.

within the spontaneous utterance exception to the hearsay rule. Our Supreme Court has set forth the standard of review we are bound to utilize in hearsay claims: "To the extent a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no judgment call by the trial court, and the trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. . . .

"We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought. For example, whether a statement is truly spontaneous as to fall within the spontaneous utterance exception will be reviewed with the utmost deference to the trial court's determination. Similarly, appellate courts will defer to the trial court's determinations on issues dictated by the exercise of discretion, fact finding, or credibility assessments." (Citations omitted; internal quotation marks omitted.) *State* v. *Saucier*, 283 Conn. 207, 218–19, 926 A.2d 633 (2007).

"An out-of-court statement offered to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception to the general rule applies. . . . Section 8-3 of the Connecticut Code of Evidence

sets forth exceptions to the hearsay rule that apply regardless of the availability of the declarant. Conn. Code Evid. § 8-3. One such exception is the spontaneous utterance exception set forth in § 8-3 (2), which applies to: A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. Under § 8-3 (2), an out-of-court declaration will not be excluded under the hearsay rule when the following factors are established: (1) the declaration follows a startling occurrence, (2) the declaration refers to that occurrence, (3) the declarant observed the occurrence, and (4) the declaration is made under circumstances that negate the opportunity for deliberation and fabrication by the declarant. . . .

"In determining whether a declaration is admissible as a spontaneous utterance, the court should look at various factors, including [t]he element of time, the circumstances and manner of the accident, the mental and physical condition of the declarant, the shock produced, the nature of the utterance, whether against the interest of the declarant or not, or made in response to question, or involuntary, and any other material facts in the surrounding circumstances . . . . The relation of the utterance in point of time to the accident or occurrence, while an important element to be considered in determining whether there has been opportunity for reflection, is not decisive. . . . Instead, [t]he overarching consideration is whether the declarant made the statement before he or she had the opportunity to undertake a reasoned reflection of the event described therein." (Citations omitted; internal quotation marks omitted.) *State* v. *Daley*, 161 Conn. App. 861, 883–84, 129 A.3d 190 (2015), cert. denied, 320 Conn. 919, 132 A.3d 1093 (2016).

The defendant challenges the court's determination that the circumstances in which the victim made the

recorded statements negated the opportunity for deliberation and fabrication by her. As set forth previously, the court made myriad findings in this regard. After listening to the recording, the court found that the victim sounded "hurried" and "out of breath" during most of her conversation with the 911 dispatcher. At times, the court found, the victim appeared to be "rambling . . . ." The victim testified, and the recording reflects, that the 911 call was made immediately after the victim escaped from her apartment and, desperately seeking assistance, gained access to Matos' apartment. Thus, the court found that the recording was made "within minutes . . . of her . . . escaping . . . from the house that she was being held captive in." Crediting the victim's testimony that she had been tortured during the course of two days and appeared at Matos' apartment only after rushing out of her apartment when the defendant was asleep, while still bloodied from a plethora of stab wounds, the court observed that the victim clearly was "under the influence of a startling event" at the time the 911 call was made. The court correctly recognized that many of the victim's statements were made in response to questions posed to her by the 911 dispatcher, yet found that that the circumstances reflected a "lack of forethought" by the victim in responding to these questions and "spur of the moment" statements by her.

The defendant argues that the victim's statements were not spontaneous because many of them were made in response to questions posed to her by the 911 dispatcher, the court's assessment of the victim's speech pattern was insignificant to a proper analysis, the court improperly appeared to resolve the "ultimate issue of the case" that she had been held captive, and the evidence reflected that the victim made the statements from the safety of Matos' apartment, at which point in

time "she was able to collect her thoughts and respond to questions."

Our careful review of the recording reflects that some of the victim's statements in the recording at issue were made in response to questions posed to her by the 911 dispatcher. Many others, however, were made spontaneously. Nevertheless, the central premise of the defendant's argument is not legally correct. "[T]hat a statement is made in response to a question does not preclude its admission as a spontaneous utterance." *State* v. *Kirby*, 280 Conn. 361, 376, 908 A.2d 506 (2006); *State* v. *Davis*, 109 Conn. App. 187, 195 n.3, 951 A.2d 31 (same), cert. denied, 289 Conn. 929, 958 A.2d 160 (2008); *State* v. *Nelson*, 105 Conn. App. 393, 407, 937 A.2d 1249 (same), cert. denied, 286 Conn. 913, 944 A.2d 983 (2008).

The defendant does not cite any authority in support of his argument that the court's observations with respect to the sound of the victim's voice, or the hurried nature of her speech, were irrelevant to an assessment of whether her statements reflected a lack of forethought on her part. One of the factors relevant to an assessment of whether a declarant spoke spontaneously or not is his mental and physical condition at the time of the declaration at issue. In an analysis of relevant facts, an observation that a declarant had spoken slowly, calmly, and without emotion might support an inference that he had carefully considered his statements. An observation that he had spoken rapidly, emotionally, or while out of breath might support an inference that he had not carefully considered his statements. Accordingly, this court has reasoned that a declarant's "emotional tone of voice," as reflected in a 911 call recording, was one of several factors supporting a finding that the 911 recording was a spontaneous utterance. *State* v. *Silver*, 126 Conn. App. 522, 537, 12 A.3d 1014, cert. denied, 300 Conn. 931, 17 A.3d 68 (2011);

see also *State* v. *Kirby*, supra, 280 Conn. 376–77 (that declarant " 'sounded highly emotional' " was relevant factor in assessment of whether declarant's statements were spontaneous utterances). The court properly considered the manner in which the victim spoke in its review of all of the relevant facts surrounding the victim's statements.

The defendant suggests impropriety in that the court found that the statements at issue were made within minutes after she had escaped from her apartment because this was "the ultimate issue of the case . . . ." The defendant, however, did not dispute that the victim was assaulted over the course of two days in her apartment or that she had escaped captivity, fled to Matos' residence, and called 911 upon her arrival. Instead, the ultimate issue in the case was the identity of the perpetrator of the crimes at issue. Accordingly, the defendant's argument is not supported by the record.

Last, the defendant disagrees with the court's finding that the victim's statements to the 911 dispatcher were spontaneous. He argues that the evidence supported a finding that, by the time that the 911 call was made by the victim, she was in a safe place and was able to collect her thoughts. There was ample evidence to the contrary. As the court observed, the 911 call occurred within minutes of the victim fleeing her apartment following a lengthy and violent ordeal that reasonably would be expected to have created a high degree of emotional disturbance in the victim. At the time that the statements were made, the victim was hiding from the perpetrator in her neighbor's apartment. There was evidence that, at the time that the victim spoke with the 911 dispatcher, her mental condition was fearful because she informed the dispatcher that she did not want to go outside because "[h]e might come and find me again." In terms of her physical condition, the victim stated that she was in need of an ambulance and that

she was "bleeding all over." In light of all the relevant circumstances surrounding the statement, the defendant is unable to demonstrate that the court abused its discretion in finding that the declarations were made under circumstances that negated the opportunity for deliberation, contrivance, and misrepresentation by the declarant.

B

The defendant argues that the admission of the 911 recording was unduly prejudicial to the defense because it tended to arouse the jury's emotions, hostility or sympathy.[15] We disagree.

"Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Conn. Code Evid. § 4-3. We note that "[a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury. . . . The court bears the primary responsibility for conducting the balancing test to determine whether the probative value outweighs the prejudicial impact, and its conclusion will be disturbed only for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *William C.*, 103 Conn. App. 508, 519–20, 930 A.2d 753, cert. denied, 284 Conn. 928, 934 A.2d 244 (2007).

[15] Additionally, the defendant argues that he had no reasonable ground to anticipate the evidence, was unfairly surprised, and was unprepared to meet it. The defendant does not explain why he had no reasonable ground to anticipate the evidence, was unfairly surprised, or was unprepared to meet it. Nor does he direct us to where in the record arguments of this nature were raised before and addressed by the trial court.

With respect to the issue of improperly arousing the emotions of the jury, the defendant argues that the 911 recording had a general tendency to invoke sympathy for the victim and that it was inflammatory because in it the victim referred to the fact that she had been "kidnapped for two days" and that the defendant had been "torturing" her. Additionally, the defendant argues that the 911 recording was prejudicially cumulative: "Given the cumulative effect of the 911 call with [the victim's] in-court testimony, the 911 call served simply to arouse the juror's sympathy for [the victim] without providing any additional substantive information that she had not already given in her direct testimony."

The defendant's broad assessment of the 911 recording as prejudicially cumulative evidence is not supported by the record. Before the trial court, the defendant argued that the evidence was cumulative because the victim could testify about the details set forth in the 911 recording. He did not distinctly argue that the 911 recording was prejudicial because it was cumulative, so a claim based on that ground in not properly before us.[16] In any event, we observe that the 911 recording was introduced during the victim's direct examination. The victim was the first witness called by the state in its case-in-chief. Although she related, in detail, many specific facts concerning the episode in her apartment, the victim did not relate all of the specific information that she had provided to the dispatcher during the 911 call. This information included a detailed description of the perpetrator as well as the entire substance of the details that the victim provided to the

[16] Additionally, to the extent that the defendant argues before this court that the evidence should have been excluded because its only purpose was to bolster the victim's credibility, we observe that such argument was not advanced before the trial court and, in fact, the court stated in its ruling that it was not admitting the evidence for the purpose of bolstering the victim's credibility.

dispatcher. To the contrary, the victim merely had testified that she made a 911 call from Matos' residence. Accordingly, we reject the contention that the 911 recording was prejudicial because it was cumulative.

Although the defendant argues that the recording was inflammatory we disagree that it was any more inflammatory than the victim's lengthy testimony concerning the defendant's actions by which he prevented her from leaving her apartment over the course of two days and repeatedly assaulted her in a variety of ways. This included beating, choking, kicking, and repeated stabbings. During the recording, the victim referred to the fact that the defendant had "tortured" her and "kidnapped" her. We are not persuaded that this strong language was likely to have aroused the jury's emotions any more than the factual recitation that she set forth in her testimony. Accordingly, we conclude that the court did not abuse its discretion by failing to conclude that the evidence was unduly prejudicial.

V

Finally, the defendant claims that the cumulative effect of the court's errors deprived him of his right to a fair and impartial trial. This claim lacks merit.

In his brief, the defendant argues: "In the alternative to the claims [raised previously in this opinion], assuming this court finds that, alone, none of those claims is sufficient to state a claim for relief in the form of a remand and new trial, then the cumulative effect of the violations of [the] defendant's rights and evidentiary decisions discussed [in those claims is] together sufficient to undermine confidence in the result of [the] defendant's trial." Beyond this conclusory statement, the defendant merely cites to three federal cases in support of this claim.

We observe that this claim is not adequately briefed in that it consists of a legal assertion and is devoid of

any analysis of facts or law.[17] Even if we were to consider this claim of cumulative error[18] on its merits, we would conclude that it lacks merit because we have not concluded that any error exists with respect to the claims previously addressed in this opinion.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CARL SMALL (AC 40238)

Lavine, Sheldon and Bear, Js.

Syllabus

Convicted of the crimes of murder, burglary in the first degree, larceny in the third degree, larceny in the fourth degree, stealing a firearm, criminal possession of a firearm, sale of narcotics and possession of narcotics, the defendant appealed. The defendant had sold ecstasy pills to the victim at the victim's apartment, where the victim kept a collection of firearms and knives. When the victim came to suspect that he had been sold a substandard product, he told a friend that he intended to meet with the defendant to either obtain new ecstasy pills or to get his money back. Shortly thereafter, the victim's body was found in his apartment.

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[17] "[W]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Internal quotation marks omitted.) *State* v. *Claudio C.*, 125 Conn. App. 588, 600, 11 A.3d 1086 (2010), cert. denied, 300 Conn. 910, 12 A.3d 1005 (2011).

[18] The state argues that the federal cumulative error rule on which the defendant relies is not legally cognizable in this state. Although we need not reach the merits of this issue, we note that our Supreme Court recently deemed it unnecessary to address a claim in which it was asked to adopt the federal cumulative error rule. *State* v. *Campbell*, Conn. , , A.3d (2018).

The victim had been stabbed to death, and his firearms and other possessions were missing from the apartment. A bloodied mop was found in the bathroom of the apartment, and a bloody fingerprint was found on a window latch in the bathroom. A knife that belonged to the victim also was found in the home of L, where the defendant had gone on the night of the murder, and the defendant communicated on Facebook with R, a member of a national street gang, seeking to sell R one of the victim's guns. The trial court denied the defendant's motion in limine to preclude an agent with the Federal Bureau of Investigation (FBI) from testifying about criminal gangs and the defendant's Facebook communications with R. On appeal, the defendant claimed, inter alia, that the trial court abused its discretion in admitting certain evidence about criminal gangs. *Held*:

1. The trial court did not abuse its discretion in allowing the FBI agent to testify about R's gang involvement; R's gang affiliation, if credited by the jury, was probative of the defendant's identity as the perpetrator of the victim's murder on the basis of his desire to sell the victim's firearms through various means in the aftermath of the murder, and the probative value of the FBI agent's testimony was not outweighed by any unfair prejudice to the defendant, as there was no allegation that the defendant was a gang member, and the FBI agent's testimony demonstrated only R's gang involvement.

2. The defendant could not prevail on his claim that certain improprieties by the prosecutor during her closing arguments to the jury violated his right to a fair trial:

   a. This court declined to review the defendant's unpreserved evidentiary claim that the prosecutor improperly elicited false scientific evidence and commented on such evidence during closing argument when she allegedly argued that the random match probability, which is the probability that a member of the general population would share the same DNA with the defendant, was the same as the source probability, which is the probability that someone other than the defendant was the source of the DNA that was found on the mop; the claim was purely evidentiary in nature and the defendant could not transform an unpreserved evidentiary claim into one of prosecutorial impropriety to obtain review of the claim, and, nevertheless, the prosecutor's comment referred to facts in evidence and was not improper.

   b. Certain remarks by the prosecutor that DNA from two individuals was present on the mop handle and that the defendant was the last person to touch the mop were not improper because they were based on evidence and testimony from a forensic science examiner that the defendant and the victim could not be ruled out as contributors to that DNA, and the prosecutor's argument that the defendant had touched the window latch in the bathroom was not unduly speculative, as it was based on evidence adduced at trial.

c. The prosecutor did not improperly offer her personal opinion, make inflammatory statements or vouch for the credibility of certain witnesses during closing argument; the prosecutor's statement that she was "guessing" that the victim let the defendant enter his apartment was not improper and was based on the evidence presented, the prosecutor's remark that it was odd that the defendant would ask a friend to throw away the defendant's freshly laundered jeans was an appeal to the jury's common sense and life experiences, and the prosecutor did not vouch for the credibility of certain witnesses when she commented about the defendant's disregard for the safety of children relative to the knife that was found in L's home, as her remarks were in response to those made during defense counsel's argument to the jury, and were based on evidence that the victim died from stab wounds and that there were children in L's residence where her minor son found the knife.

3. The trial court did not abuse its discretion when it denied the defendant's motion for a new trial, in which he alleged that the state's allegedly late disclosure to him of certain discovery materials deprived him of his due process rights under *Brady* v. *Maryland* (373 U.S. 83); the materials at issue were not suppressed within the meaning of *Brady*, as the evidence was disclosed prior to the start of evidence, and the defendant failed to establish how he was prejudiced, as he had the opportunity to cross-examine the witnesses to whom the discovery pertained and he failed to move to recall the witnesses to testify or to request a continuance.

Argued December 6, 2017—officially released April 3, 2018

Procedural History

Substitute information charging the defendant with the crimes of burglary in the first degree, murder, larceny in the third degree, larceny in the fourth degree, stealing a firearm, criminal possession of a firearm, sale of narcotics and possession of narcotics, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Bentivegna*, *J.*; thereafter, the court denied the defendant's motion to preclude certain evidence; verdict of guilty; subsequently, the court denied the defendant's motion for a new trial and rendered judgment in accordance with the verdict, from which the defendant appealed. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Duby*, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, *Vicki Melchiorre*, supervisory assistant state's attorney, and *Elizabeth S. Tanaka*, assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Carl Small, was convicted, after a jury trial, of murder in violation of General Statutes § 53a-54a (a), burglary in the first degree in violation of General Statutes § 53a-101 (a) (2), larceny in the third degree in violation of General Statutes § 53a-124 (a) (1), larceny in the fourth degree in violation of General Statutes § 53a-125 (a), stealing a firearm in violation of General Statutes § 53a-212, criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1), sale of narcotics in violation of General Statutes § 21a-277 (a), and possession of narcotics in violation of General Statutes § 21a-279 (a). On appeal, the defendant claims that: (1) the trial court abused its discretion in admitting evidence of criminal gangs; (2) he was deprived of his constitutional right to a fair trial by prosecutorial improprieties; and (3) the court abused its discretion in denying his motion for a new trial. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In June, 2012, the defendant lived in Bloomfield with Lenionell Frost and Frost's mother. Frost was a customer at Sovereign Bank in West Hartford, where he became acquainted with the victim, Christopher Donato, a bank teller. On June 4, 2012, the defendant and Frost visited the victim at his apartment in Hartford. The victim had a collection of rifles, handguns, ammunition, knives, guitars and electronic equipment. The victim allowed the defendant and Frost to handle the guns. The victim expressed an interest in obtaining ecstasy

pills, and the defendant indicated that he could assist the victim.

Sometime thereafter, the victim gave the defendant approximately one thousand dollars and, on June 8, 2012, the defendant and Frost returned to the victim's apartment. During the visit, the defendant gave the victim a bag of ecstasy pills. The defendant asked the victim if he could borrow one of his guns, and the victim replied in the negative. After the defendant and Frost left the apartment, the victim showed the ecstasy pills to his girlfriend, Katherine Robert, and informed her that he intended to sell them.

On June 11, 2012, the victim told his college friend, Andrew Zippin, that he had purchased ecstasy pills and suspected that the seller had sold him a substandard product. After testing some of the pills, Zippin agreed with the victim's assessment. Sometime thereafter, the victim informed Zippin that he was meeting with the defendant in order either to obtain new ecstasy pills or to get his money back.

On June 16, 2012, the victim called Robert, and the two agreed that Robert would visit the victim at his apartment at approximately 6 p.m. or 7 p.m. that night. Cell phone records indicate that the last phone call the victim made to Robert from his cell phone was at 3:12 p.m. The victim's father sent a text message to him at 5:33 p.m., and the victim replied. Robert arrived at the rear parking lot of the apartment building where the victim lived at 7:15 p.m. Robert called and sent a text message to the victim, but did not receive a response. When Robert did not find a key under the doormat to the victim's apartment as the two previously had arranged, she knocked on the door. When the victim failed to respond, Robert banged on the door and screamed to the victim to let her in. At 7:29 p.m., when Robert was outside the victim's apartment, she received

a text message from the victim's phone stating that he had walked to a store, was "2 messed up 2 drive," and asking her to "plz" pick him up at the corner of Prospect Avenue and Kane Street. Robert thought it was unusual that the text contained the abbreviation "plz," which the victim did not use in text messages, and that the victim had walked to the store because the victim was unwilling to walk distances as a result of constant pain he experienced due to scoliosis.

Robert walked to her car and received another text message from the victim's cell phone, at 7:31 p.m., asking her location. Robert replied that she was coming to get him. Robert drove to the designated location, but could not locate the victim. Robert sent a text message to the victim's cell phone numerous times and received no response. Robert returned to the victim's apartment building, but returned home when she noticed that the victim's car, which had been in the parking lot when she left to find the victim, was gone. At 9 p.m., the victim's neighbor noticed red shoe treads on the common hallway floor.

That evening, the defendant arrived at Lechaun Milton's residence in Hartford with a duffle bag. He asked Milton if she had ammonia to clean a gun and inquired whether she knew someone who wanted to buy a gun. Milton responded in the negative to both questions. The defendant left on foot and arrived on Vine Street at the nearby house of Milton's sister, Latasha Drummond, at about sunset. While he was there, Latasha Drummond noticed that he was pacing, appeared nervous, and made several phone calls. When Latasha Drummond asked the defendant why he was bleeding, he explained that he had cut his hand. At 8:44 p.m., the defendant used his cell phone to call Felix Rodriguez, a ranking member of the Bronx, New York chapter of the national street gang, the Bloods. At about 9:45 p.m., the defendant called Frost and asked Frost to drive him home.

Upon returning to his Bloomfield residence, the defendant told Frost that he needed to take a shower and to change his clothes. The defendant borrowed a pair of Frost's sneakers. Frost drove the defendant to a shopping center in Bloomfield, where the defendant wanted to take a bus to Hartford so that he could return to Vine Street.

The following morning, the defendant telephoned Frost and asked him to launder his black jeans, then place them in the trash. The defendant arrived at Shanell Milner's residence in Hartford with a bag containing guns, bullets, knives, laptops and headphones. He asked Milner if she knew anyone who might be interested in purchasing the items, and Milner responded that she did not.

The victim did not report for work the following Monday, June 18, 2012, nor did he respond to text messages or phone calls from the bank manager. The police went to the victim's apartment at the request of his parents. The police found bloody shoe prints on the hallway floor and the victim's body in his apartment. The victim had died from multiple stab wounds to his torso. The apartment appeared to be ransacked, and the victim's firearms and other possessions were missing. There was a bloodied Swiffer mop in the bathtub and a bloody fingerprint on the latch of the bathroom window. DNA testing of the blood on the latch eliminated the victim as a contributor but was not sufficient to include or exclude the defendant as a contributor. The following day, the police found the victim's car near Vine Street. DNA testing of bloodstains on the steering wheel and the interior latch of the driver's door matched the defendant's DNA profile. The expected frequency of individuals who could be a contributor of DNA to the bloodstains was less than 1 in 7 billion.

On June 19, 2012, Latasha Drummond's boyfriend, Andrew Rison, noticed that the defendant was carrying

a bag and saw that the defendant's hand was injured. When Rison asked the defendant, who appeared nervous, what was wrong, the defendant replied that he "had to fuck up this cracker real bad" and mentioned a robbery. The defendant then asked Rison if he knew anyone who wanted to purchase a gun.

The defendant spent the evening of June 20, 2012, at Milner's residence. The defendant told Milner that he "caught a body," which Milner understood to mean that he had killed someone. That evening, the defendant communicated on Facebook with Rodriguez. The Facebook messages between the defendant and Rodriguez at that time concerned guns, money, and ecstasy.

The defendant was arrested on June 28, 2012, in Philadelphia, Pennsylvania. He thereafter was charged with murder in violation of § 53a-54a (a), burglary in the first degree in violation of § 53a-101 (a) (2), larceny in the third degree in violation of § 53a-124 (a) (1), larceny in the fourth degree in violation of § 53a-125 (a), stealing a firearm in violation of § 53a-212, criminal possession of a firearm in violation of § 53a-217 (a) (1), sale of narcotics in violation of § 21a-277 (a), and possession of narcotics in violation of § 21a-279 (a). Following a jury trial, the defendant was convicted of all charges. The court imposed a total effective sentence of seventy years incarceration. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court abused its discretion in admitting certain evidence relating to the Bloods. We disagree.

During the state's case-in-chief, defense counsel filed a motion in limine seeking to preclude Matthew King, an agent with the Federal Bureau of Investigation, from testifying about Rodriguez' involvement with the

Bloods. The prosecutor argued that the state was not making any claim that the defendant was a member of the Bloods, but that the evidence would tend to show that the defendant contacted an individual who as a member of the Bloods might be interested in purchasing guns. The court denied the motion, concluding that the testimony was relevant and that its probative value outweighed its prejudicial effect.

King testified that he had studied the Bloods for more than three years and that during that time he had become familiar with terminology used by the Bloods. He testified that Rodriguez' street name was "Murdaveli Cokeboy Rollack," which indicated that Rodriguez was a member of the "sex, money, murder Bloods" based in Bronx, New York, who were active in the south end of Hartford. King explained that the Bloods use guns to engage in criminal activity and that they obtain their guns in any way they can. He defined certain slang terminology used by the defendant and Rodriguez in their Facebook communications. When questioned about the defendant's June 7, 2012 Facebook message to Rodriguez, asking, "[g]ot anybody dat got skittles," King explained that the word "skittles" referred to ecstasy. King also clarified that when the defendant informed Rodriguez on June 20, 2012, that: "I got to get low but I need extra paper, mu," and, "[t]ake this bag of goodies off my hand for seven hundred," "paper" was slang for money, "mu" meant blood, and "goodies" could be anything someone is trying to sell. The messages also discussed "DVDs," which King explained referred to guns.

The defendant argues that evidence of Rodriguez' gang affiliation was irrelevant and highly prejudicial. He contends that the state made no allegation and presented no evidence that he was a member of a gang, and that Rodriguez' gang affiliation was not relevant to the jury's understanding of slang terminology or to its

ultimate decision as to whether the defendant had murdered the victim. The defendant argues that the gang evidence was prejudicial in that it suggested that he should be convicted because he was involved in gang activity. We are not persuaded.

"Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence. . . . To be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree. . . . All that is required is that the evidence tend to support a relevant fact *even to a slight degree*, so long as it is not prejudicial or merely cumulative. . . .

"Although relevant, evidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury. . . . Reversal is required only whe[n] an abuse of discretion is manifest or whe[n] injustice appears to have been done." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 429–30, 64 A.3d 91 (2013).

In the present case, evidence of Rodriguez' gang affiliation, if credited by the jury, was probative, at least to a slight degree, as to the defendant's identity as the perpetrator on the basis of his desire to sell the victim's firearms through various means in the aftermath of the murder and burglary. There was evidence that the

defendant, despite his inquiries to several of his friends, was unable to find a potential gun buyer in the days following the murder. On June 20, 2012, four days following the murder and before the defendant left the state for Pennsylvania, he communicated with Rodriguez through Facebook. These communications indicated that the defendant attempted to sell the victim's firearms to someone who was a member of the Bloods, a gang that sought to obtain firearms however possible.

We also conclude that the court properly found that the probative value of King's testimony was not outweighed by any unfair prejudice to the defendant. Despite the slight probative value of the evidence, there was a limited risk of unfair prejudice. There was no allegation that the defendant was a gang member. King's testimony demonstrated *only* Rodriguez' gang involvement. King testified on cross-examination that he was making no claim that the defendant was a member of any gang. During closing argument, the prosecutor explained: "It's not against the law for somebody to talk to a gang member or gang leader. . . . It's simply evidence that he was trying to sell the guns to someone he knew would likely be interested in buying them. . . . We're not claiming the defendant is a gang member. We are not claiming you should convict him because he is a gang member." We conclude that the court did not abuse its discretion in allowing King to testify as to Rodriguez' gang involvement.

II

The defendant next claims that his right to a fair trial was violated by several prosecutorial improprieties. We disagree.

"The standard of review governing claims of prosecutorial impropriety is well established. In analyzing claims of prosecutorial impropriety, we engage in a two

step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry. . . . [If] a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . .'' (Citation omitted; internal quotation marks omitted.) *State* v. *Ross*, 151 Conn. App. 687, 693, 95 A.3d 1208, cert. denied, 314 Conn. 926, 101 A.3d 271, 272 (2014).

A

The defendant claims that the prosecutor committed ''the prosecutor's fallacy'' by eliciting false scientific evidence and commenting on such evidence during her closing argument. We are not persuaded.

A prosecutor employs ''the prosecutor's fallacy'' by equating random match probability with source probability in relation to DNA evidence. ''Random match probability and source probability are distinguishable. The prosecutor's fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample. . . . Random match probability is the probability a member of the general population would share the same DNA with the defendant. . . . Source probability is the probability that someone other than the defendant is the source of the DNA found at the crime scene.'' (Citation omitted; internal quotation marks omitted.)

State v. *Marrero-Alejandro*, 159 Conn. App. 376, 383 n.3, 122 A.3d 272 (2015), appeal dismissed, 324 Conn. 780, 154 A.3d 1005 (2017).

This claim solely concerns DNA evidence present on the handle of the bloodied Swiffer mop that the police found in the victim's bathtub and not the other DNA evidence. Nicholas Yang, a state DNA forensic science examiner, testified on direct examination that he compared the "touch DNA" profile[1] on the Swiffer mop handle to the defendant's known DNA profile and concluded that the defendant could not be eliminated as a contributor. He explained that the "expected frequency of individuals who cannot be . . . eliminated as a contributor to the DNA profile from [that] submission . . . is about one in 1300 in the African-American population and about one in 1200 in both the Caucasian and Hispanic populations." The prosecutor inquired, "[a]nd does that also exclude more than 99.9 percent of the population?" Yang replied, "99.9 something, yes." Defense counsel did not object to the admission of this evidence.

During closing argument, the prosecutor stated: "And with regard to the calculation on the Swiffer mop . . . you heard the calculation from Mr. Yang . . . it was one in thirteen hundred, which sounds far less impressive than 1 in 7 billion, but when you do the statistical calculation excludes 99.9 percent of the population. So, when you put that in context with all the other evidence, ladies and gentlemen, you know that's the defendant's DNA."

The defendant argues that the prosecutor elicited scientifically false testimony from Yang that 99.9 percent of the population was excluded and that the percentage testimony improperly equated random match

[1] Yang explained that the term "touch DNA" refers to a type of DNA sample wherein an individual deposits DNA on an object by handling it.

probability with source probability. He further argues that the prosecutor engaged in impropriety during closing argument when she committed the prosecutor's fallacy by referring to Yang's testimony. We are not persuaded.

The defendant's claim that the prosecutor elicited scientifically false evidence through Yang is purely evidentiary. The defendant did not object to the admission of the evidence at issue. "Although our Supreme Court has held that unpreserved claims of prosecutorial impropriety are to be reviewed under the *Williams* factors,[2] that rule does not pertain to mere evidentiary claims masquerading as constitutional violations. . . . Evidentiary claims do not merit review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), because they are not of constitutional magnitude. . . . [A] defendant may not transform an unpreserved evidentiary claim into one of prosecutorial impropriety to obtain review of the claim." (Citation omitted; footnote added; internal quotation marks omitted.) *State* v. *Cromety*, 102 Conn. App. 425, 431, 925 A.2d 1133, cert. denied, 284 Conn. 912, 931 A.2d 932 (2007); see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third condition of *Golding*). We, therefore, decline to review this unpreserved evidentiary claim.

The prosecutor's comment during closing argument referred to facts in evidence and, therefore, was not improper.[3] "It is not . . . improper for the prosecutor

[2] See *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987).

[3] Even if the underlying evidentiary claim were reviewable, Yang's testimony did not equate random match probability with source probability. Yang expressed random match probability as a percentage. The prosecutor argued during closing argument that Yang's touch DNA testimony, "*in context with all the other evidence*," indicated that the defendant's DNA was on the mop handle. (Emphasis added.) It was not improper for the prosecutor to invite the jury to draw a reasonable inference based on the evidence presented at trial.

to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . .'' (Internal quotation marks omitted.) *State* v. *Luster*, 279 Conn. 414, 435, 902 A.2d 636 (2006).

B

The defendant next claims that the prosecutor engaged in impropriety when she relied on facts not in evidence and invited sheer speculation. We disagree.

With respect to this issue, we note that ''[a] prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence.'' *State* v. *Singh*, 259 Conn. 693, 718, 793 A.2d 226 (2002).

1

The defendant argues that the prosecutor made improper remarks during rebuttal argument when she stated that (1) DNA from only two individuals was on the mop handle and (2) the defendant was the last person to touch the mop handle. We disagree.

Yang testified that the Swiffer mop handle contained a mixture of DNA and that neither the defendant nor the victim could be eliminated as having contributed to that mixture. Yang testified regarding the random match probabilities that were consistent with the DNA of the defendant and the victim, respectively. Defense counsel argued during closing argument that the defendant had visited the victim's apartment multiple times and that it was unclear when the defendant's ''touch DNA'' had been placed on the handle of the Swiffer mop. During her rebuttal closing argument, the prosecutor stated: ''The last person to use that . . . Swiffer mop was the killer. There were only two people's DNA on that mop handle, [the defendant and the victim]. So, unless you think that [the victim] got up off the floor

after those three huge stab wounds and cleaned up his own blood, that means that [the defendant] is the killer."

The prosecutor's comments were not improper. The prosecutor's comment that DNA from two individuals was present on the mop handle was based on Yang's testimony that the defendant and the victim could not be ruled out as contributors. Her comment that the defendant was the last person to handle the Swiffer mop was also based on the evidence presented at trial.

2

The defendant argues that the prosecutor invited speculation by suggesting, despite a lack of supporting evidence, that the defendant touched the window latch in the victim's bathroom in an effort to see if Robert had left the apartment building. We disagree.

During closing argument, the prosecutor stated: "I have no proof of it . . . [b]ut you do know that there is a bloody thumb print or fingerprint on the window latch. Perhaps [the defendant] looked out the window to see, to make sure [Robert] was gone. You know that that window looks out [at] the driveway that leads to and from the parking lot." Yang testified that when performing DNA testing on the blood found on the window latch in the victim's apartment, laboratory technicians were able to obtain information from only one of the fifteen loci on a DNA profile. He explained that the results of testing samples from that one location were sufficient to eliminate the victim, Frost, and Rison as contributors; were consistent with Robert's DNA at that location; and were insufficient to include or exclude the defendant or Zippin as contributors.

Although DNA testing was insufficient to link the defendant to the bloody fingerprint on the window latch, the prosecutor's comment was not unduly speculative. The prosecutor's argument that the jury reasonably could find that the defendant had touched the

window latch in an effort to see if Robert had left the apartment building was based on evidence adduced at trial. In particular, there was evidence that Robert received an unusual text message from the victim's phone asking her to leave when she was banging on the door to the victim's apartment; Robert received a follow-up text message from the victim's phone inquiring as to her location; the bathroom window overlooked the driveway leading to the rear parking lot; and later on the night of the murder, the defendant appeared at a friend's house with a cut on his hand.

C

The defendant also argues that the prosecutor improperly offered her personal opinion, made inflammatory statements and vouched for the credibility of witnesses during her closing argument. We conclude that the prosecutor did not engage in misconduct when she made the comments in question during her closing arguments.

We begin with a discussion of the relevant law. "[T]he prosecutor may not express his [or her] own opinion, directly or indirectly, as to the credibility of the witnesses. . . . Nor should a prosecutor express his [or her] opinion, directly or indirectly, as to the guilt of the defendant. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . Moreover, because the jury is aware that the prosecutor has prepared and presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions. . . . A prosecutor also may not appeal to the emotions, passions and prejudices of the jurors . . . ." (Internal quotation marks omitted.) *State* v. *Santiago*, 269 Conn. 726, 735, 850 A.2d 199 (2004). "[A]n improper

appeal to the jurors' emotions can take the form of a personal attack on the defendant's character . . . ." (Internal quotation marks omitted.) *State* v. *Santiago*, 143 Conn. App. 26, 37, 66 A.3d 520 (2013).

1

The defendant claims that the prosecutor improperly opined as to the meaning of evidence when she stated that she was "guessing" that the victim let the defendant enter his apartment. During closing argument, the prosecutor stated: "First element of burglary in the first degree, entered and unlawfully remained in an apartment. We have no signs of forced entry here. I'm guessing [the victim] let [the defendant] in. *Didn't let him in to stab him and rob him*." (Emphasis added.)

The prosecutor's comment was not improper. When the prosecutor used the word "guess," she was not improperly opining on evidence. Rather, she was discussing an element of burglary, and arguing to the jury that there were no signs of forced entry and that it was possible for the jury to infer that the victim let the defendant into his apartment. "It is not . . . improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . ." (Internal quotation marks omitted.) *State* v. *Luster*, supra, 279 Conn. 435.

2

The defendant argues that the prosecutor improperly expressed her opinion when she stated that it was "odd" that the defendant would ask Frost to throw away freshly laundered jeans. The prosecutor commented during closing argument on the defendant's request to Frost to wash his black jeans and then place them in the trash: "And you know, Frost said it's not unusual for [the defendant] to ask me to wash his clothes. It was unusual for him to ask to throw them away. I guess,

my reaction as a female is, why the heck didn't you just tell me to throw them away? Why'd you have me wash 'em? That's odd behavior, ladies and gentlemen. That is odd behavior."

The prosecutor's comments directly related to Frost's testimony that he did not think it was "odd" that the defendant requested that he launder the defendant's black jeans and place them in the trash. In the course of discussing the evidence presented at trial, the prosecutor was not bound by Frost's characterization of the defendant's request. We conclude that the prosecutor's comments were merely an appeal to the jury's common sense and life experiences. Therefore, the prosecutor's comments were not improper. "Our case law reflects the expectation that jurors . . . will consider evidence on the basis of their common sense. Jurors are not expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life, but, on the contrary, to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct." (Internal quotation marks omitted.) *State* v. *Guadalupe*, 66 Conn. App. 819, 826, 786 A.2d 494 (2001), cert. denied, 259 Conn. 907, 789 A.2d 996 (2002).

3

The defendant's next argument concerns the prosecutor's comments during rebuttal argument regarding Latasha Drummond's minor son, Elijah Drummond. Elijah Drummond testified that in June, 2012, he found a knife in a bathroom closet and that he placed the knife under his bed. During a search of the residence of Latasha Drummond and Rison, the police found and seized the knife, which had a blade of approximately ten inches, from a bedroom. Robert identified the knife as having belonged to the victim. There were no identifiable fingerprints on the knife and the knife tested negative for blood. During closing argument, defense

counsel suggested that the knife belonged to Rison and was not the murder weapon. During rebuttal argument, the prosecutor asked whether the jury thought Rison would have left a large knife in a location where Elijah Drummond could locate it and be harmed. The prosecutor stated, "[t]he defendant, who doesn't care anything about those children or to put a knife in a place where he didn't care . . . if a child found it. We're lucky that little child found it and put it in his room and didn't get hurt. As far as we know, he didn't get hurt. I would ask if [Latasha Drummond and Rison] strike you as that type of people who didn't love and care for their children?"

The defendant argues that the prosecutor made inflammatory comments about the defendant's disregard for the safety of children and that the prosecutor improperly vouched for Latasha Drummond and Rison when she asked if the jury thought Latasha Drummond and Rison did not love and care for their children. We do not agree.

The prosecutor's comments were in response to defense counsel's comment made during rebuttal argument that Rison may have placed the knife in the closet. The prosecutor did not improperly vouch for the credibility of Rison or Latasha Drummond, but asked the jury to draw on common sense to determine if they were likely to place a knife where a child in their household could find it. The prosecutor's comment that the defendant hid the knife in Latasha Drummond's residence without regard for the safety of the children in the household was a comment on the evidence presented that the victim died from stab wounds, the defendant appeared nervous and was carrying a duffle bag on the night of the murder, there were children in Latasha Drummond's residence and that Elijah Drummond found a knife in the closet. See *State* v. *Oehman*, 212

Conn. 325, 334, 562 A.2d 493 (1989) (prosecutor's characterization of defendant as "coward" not impermissible in light of evidence presented).

III

The defendant's final claim is that the court abused its discretion in denying his motion for a new trial. We disagree.

On September 30, 2014, the day before the start of evidence, defense counsel filed a motion in limine to preclude the testimony of Rison, Milner and Latasha Drummond on the ground that the state prejudiced the defendant by providing defense counsel that very day with a lengthy packet of discovery materials that pertained, in part, to those witnesses. The next day, October 1, 2014, the prosecutor stated during argument to the court that the disclosure contained certain information concerning Latasha Drummond and Rison. The court denied the motion in limine, reasoning that it had heard nothing that would prevent the state from calling those three witnesses to testify that day, October 1, 2014.

Prior to sentencing, the defendant filed a motion for a new trial in which he argued that the court erred by denying his motion in limine to preclude the testimony of Rison, Milner and Latasha Drummond. The court denied the motion "[b]ased on the evidence presented at trial . . . ."

The defendant argues that the state's late disclosure of exculpatory materials deprived him of his due process rights due according to *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). He argues that the state disclosed the information packet the day before the witnesses testified and that each witness testified to at least one fact that he or she had not disclosed previously: Latasha Drummond testified

that when the defendant came to her house on June 16, 2012, it was dark outside; Rison testified that on June 16, the defendant inquired about a gun buyer and mentioned a robbery; and Milner testified that the defendant, who did not own a car, showed her a car key and told her that he had gotten a car. He contends that, as a result, the witnesses were not cross-examined regarding the details of the matter pertaining to Rison and Latasha Drummond, and Rison and Latasha Drummond were not "pushed further on inconsistencies in what they had said."

"Appellate review of a trial court's decision granting or denying a motion for a new trial must take into account the trial judge's superior opportunity to assess the proceedings over which he or she has personally presided. . . . Thus, [a] motion for a new trial is addressed to the sound discretion of the trial court and is not to be granted except on substantial grounds. . . . In our review of the denial of a motion for [a new trial], we have recognized the broad discretion that is vested in the trial court to decide whether an occurrence at trial has so prejudiced a party that he or she can no longer receive a fair trial. The decision of the trial court is therefore reversible on appeal only if there has been an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State* v. *McIntyre*, 250 Conn. 526, 533, 737 A.2d 392 (1999).

"Under *Brady* v. *Maryland*, [supra, 373 U.S. 87], [t]he state is constitutionally obligated to disclose certain information to a defendant. The principles of due process require the prosecution to disclose exculpatory evidence that is material to a defendant's guilt or punishment. . . . In order to prove a *Brady* violation, the defendant must show: (1) that the prosecution suppressed evidence after a request by the defense; (2) that the evidence was favorable to the defense; and (3) that the evidence was material." (Internal quotation

marks omitted.) *State* v. *Morrill*, 42 Conn. App. 669, 677, 681 A.2d 369 (1996).

The evidence in the present case was disclosed prior to the start of evidence. "[E]vidence known to the defendant or his counsel, or that is disclosed, even if during trial, is not considered suppressed as that term is used in *Brady*." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Walker*, 214 Conn. 122, 126, 571 A.2d 686 (1990). The defendant's reliance on *Brady* is misplaced because he has no basis to claim suppression. See id. The defendant in this case "can complain only of the timing of the disclosure. . . . Under such circumstances the defendant bears the burden of proving that he was prejudiced by the failure of the state to make [the] information available to him at an earlier time." (Citation omitted.) Id., 126–27.

The defendant also has failed to establish how he was prejudiced by the alleged late disclosure. Latasha Drummond testified on cross-examination that she did not tell the police that the defendant came to her house at dusk on June 16, 2012, Rison testified on cross-examination that he did not tell the police that the defendant mentioned a robbery and Milner testified that she did not tell the police that the defendant had a car. The witnesses were not cross-examined regarding the details of the matter pertaining to Rison and Latasha Drummond, although the prosecutor had elicited evidence, during the direct examination of Latasha Drummond, regarding her and Rison. The defendant had an opportunity to draw attention to any inconsistencies between the statements the three witnesses gave to the police and their trial testimony. If defense counsel wanted to use material in the packet for impeachment purposes, he could have moved to recall the witnesses or requested a continuance; the defendant, however, did neither of those things. The defendant has failed to demonstrate any prejudice resulting from the state's

failure to disclose the packet on an earlier date. Accordingly, we conclude that the court did not abuse its discretion in denying the defendant's motion for a new trial.

The judgment is affirmed.

In this opinion the other judges concurred.

DEREK HUMBLE *v.* COMMISSIONER OF CORRECTION
(AC 39441)

Alvord, Bright and Sullivan, Js.

Syllabus

The petitioner, who had been convicted on guilty pleas pursuant to the *Alford* doctrine of the crimes of carrying a pistol without a permit, escape in the first degree and murder in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that the habeas court abused its discretion in denying the petition for certification to appeal with respect to his claim that his trial counsel provided ineffective assistance by failing to adequately investigate certain evidence that allegedly would have supported a claim of self-defense; the petitioner failed to satisfy his burden of demonstrating that he was prejudiced by his counsel's allegedly deficient performance by showing that there was a reasonable probability that had counsel interviewed two witnesses who had evidence that tended to support the petitioner's claim of self-defense, the petitioner would have rejected the state's plea offer and insisted on going to trial, as the record suggested that the petitioner was aware that another witness already had corroborated the petitioner's claim that the victim had a gun during the incident but he nonetheless elected to accept the state's offer and to plead guilty, the police did not recover a gun from the body of the victim, there was no evidence that a second gun was discharged at the scene, it was probable that a jury would interpret evidence of an ongoing feud between the petitioner and the victim as motive for the shooting and not as evidence of self-defense, especially since the petitioner had voluntarily confessed to the killing and to having previously robbed the victim, and the plea deal resolved

certain charges against the petitioner in another pending criminal case that exposed him to significant jail time and for which he had no defense.

2. The habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to the petitioner's claim that his trial counsel rendered ineffective assistance by advising him to plead guilty to murder without conducting an adequate investigation and by failing to provide objectively reasonable advice with respect to his plea of guilty to murder; the petitioner failed to demonstrate that but for his trial counsel's advice, he would have rejected the plea offer of thirty years incarceration as a settlement of all the charges that he was facing and, instead, would have insisted on proceeding to trial, and, therefore, he failed to demonstrate that the issues raised were debatable among jurists of reason, that a court could have resolved the issues in a different manner or that the questions raised deserved encouragement to proceed further.

Argued November 28, 2017—officially released April 3, 2018

Procedural History

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

Peter Tsimbidaros, for the appellant (petitioner).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Tamara A. Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Derek Humble, appeals from the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal and improperly rejected his claim that

his trial counsel rendered ineffective assistance. Specifically, the petitioner claims that his trial counsel rendered ineffective assistance by (1) failing to adequately investigate exculpatory evidence, and (2) misadvising him to plead guilty to murder. We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal. Accordingly, we dismiss the appeal.

The record reveals the following facts and procedural history. On March 24, 2004, the petitioner shot and killed the victim, Victor Blue, inside Melissa's Market in Hartford. The state charged the petitioner, in two criminal cases, with murder in violation of General Statutes § 53a-54a, criminal use of a firearm in violation of General Statutes § 53a-216, criminal possession of a firearm in violation of General Statutes § 53a-217, and escape in the first degree in violation of General Statutes § 53a-169.[1] The court appointed Attorney Robert J. Meredith of the Public Defender's Office to represent the petitioner. On May 26, 2005, the petitioner pleaded guilty, pursuant to the *Alford* doctrine,[2] to murder and criminal use of a firearm.[3] The petitioner also pleaded

[1] The escape charge arose from an unrelated incident.

[2] "Under *North Carolina* v. *Alford*, [400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)], a criminal defendant is not required to admit his guilt, but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless. . . . In *North Carolina* v. *Alford*, supra, the United States Supreme Court treated such guilty pleas as the functional equivalent of a plea of nolo contendere." (Citations omitted; internal quotation marks omitted.) *White* v. *Commissioner of Correction*, 145 Conn. App. 834, 847 n.3, 77 A.3d 832, cert. denied, 310 Conn. 947, 80 A.3d 906 (2013).

[3] The court vacated the plea with respect to the criminal use of a firearm charge. See General Statutes § 53a-216 (a) ("[n]o person shall be convicted of criminal use of a firearm . . . and the underlying felony upon the same transaction but such person may be charged and prosecuted for both such offenses upon the same information").

guilty to carrying a pistol without a permit and escape in the first degree.

At the time of the plea, the court, *Miano*, *J.*, canvassed the petitioner, asking in relevant part whether the petitioner had an opportunity to speak with counsel, whether the petitioner was satisfied with counsel, whether the petitioner understood the state's allegations, and whether the petitioner understood that, by pleading guilty, he was giving up his rights to have a trial by jury or judge, to confront and cross-examine the state's witnesses, to remain silent, to have the state prove every element of the offenses beyond a reasonable doubt, and to present a defense.[4] The court also explained the factual bases for the pleas, the elements of the crimes charged, and the maximum sentences the petitioner could receive. The court explained: "[Y]our exposure here for these crimes, if my arithmetic is correct, is not less than twenty-five years, nor more than seventy-five years, plus fines." After concluding the canvass, the court found that the petitioner's pleas were knowing, voluntary, and intelligently made with the effective assistance of counsel, and accepted the petitioner's guilty pleas. The court sentenced the petitioner to thirty years imprisonment pursuant to an agreed upon recommendation between the petitioner and the state. The petitioner did not file a direct appeal from his conviction.

[4] The court explained in relevant part: "[B]y pleading guilty to these crimes, either a straight plea or under the *Alford* doctrine, these are the rights you are giving up forever concerning all these cases, concerning each and every one. . . .

"[Y]ou are . . . giving up your right by pleading guilty to put forward any kind of defense you might have to these crimes.

"For example, let's say you had a defense that you were in Florida at the time of this killing, that's what's called an alibi. And by pleading guilty you can't put forward that defense or any defense you might have."

When the court asked the petitioner whether he understood the rights that he was giving up by pleading guilty, the petitioner responded, "yup."

On September 28, 2015, the petitioner filed an amended petition for a writ of habeas corpus, in which he alleged one count of ineffective assistance of his trial counsel. Specifically, he claimed that Attorney Meredith failed to conduct an adequate investigation of the case, and to interview all eyewitnesses to the shooting. The petitioner also claimed that Attorney Meredith advised him to plead guilty without thoroughly investigating a potential defense of self-defense.[5] A trial commenced before the habeas court, *Fuger*, *J.*, on June 14, 2016.

The habeas court was presented with evidence of the following facts. The killing was the result of "bad blood" that existed between the petitioner and his friends and the victim and his friends. On March 23, 2004, in response to learning that the victim "had family members or so that . . . wanted to do bodily harm" to him, the petitioner traveled to Clark Street in Hartford, where he knew the victim hung out, to "shake him up a little bit." The petitioner robbed the victim at gunpoint. Later that evening, as the petitioner was walking with his friend, Jason Barclay, a man "came out the—one of the driveways, made a comment, pulled out a gun and started shooting at us." The petitioner returned fire, heard police sirens, and ran.

The next day, on March 24, the petitioner left his cell phone at Melissa's Market to charge. Later that day, Patrick Ward, a friend of the petitioner, informed him that the victim had been bragging about shooting at him the night before. When the petitioner returned to the store to retrieve his cell phone, Raymond Rodriguez informed the petitioner that the victim and another man were at the store looking for him earlier that day. The petitioner observed the victim and Naquan Hartage,

[5] In the amended petition, the petitioner also claimed that Attorney Meredith failed to advise him about a possible defense of extreme emotional disturbance. The petitioner has abandoned that claim.

whom the petitioner knew, exit the store. The victim and the petitioner "made eye contact." The petitioner entered the store to retrieve his cell phone. As the petitioner was reaching for his cell phone, it rang. Ward was calling to warn the petitioner that the victim was returning to the store. The petitioner observed the victim walking toward the store. The petitioner was standing in a "little cubbyhole off to the side" near the entrance of the store. According to the petitioner, the victim entered the store, looked at the petitioner, took a few steps, turned around, and reached for a gun. At that point, the petitioner pulled out a gun and shot the victim multiple times. The petitioner fled the store. As the petitioner was running out of the store, he noticed Hartage running into the store.

Following the shooting, Hartage gave a voluntary statement to the police in which he identified the petitioner as the shooter.[6] The police arrested the petitioner on March 31, 2004, in Mississippi. After police arrested the petitioner, he signed a voluntary statement in which he confessed to killing the victim, but claimed to have done so in self-defense. On May 18, 2004, Ward also gave a voluntary statement to the police, in which he corroborated the petitioner's claim that, on March 24, the victim was seeking the petitioner out in retaliation for the March 23 robbery.[7] Ward also told police that immediately following the shooting, he ran into Melissa's Market and observed Hartage removing a gun from the victim's hand. The police did not recover a gun on the victim's body.

In an oral decision, the habeas court denied the amended petition for a writ of habeas corpus, finding

[6] Specifically, Hartage claimed that, while walking outside of the store, he heard gunshots and saw the petitioner, whom he knew by his nickname "Roscoe," run out of the store with a gun.

[7] Specifically, Ward claimed that before the shooting on March 24, the victim showed him a gun and said, "[t]ell your boy Rosco I'm gonna kill him!"

that the petitioner had failed to satisfy the requirements of *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The petitioner then filed a petition for certification to appeal, which the habeas court denied. This appeal followed.

We first set forth our standard of review. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on its merits." (Internal quotation marks omitted.) *Morris* v. *Commissioner of Correction*, 131 Conn. App. 839, 842, 29 A.3d 914, cert. denied, 303 Conn. 915, 33 A.3d 739 (2011). "A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) *Clinton S.* v. *Commissioner of Correction*, 174 Conn. App. 821, 826, 167 A.3d 389, cert. denied, 327 Conn. 927, 171 A.3d 59 (2017).

"We examine the petitioner's underlying claim[s] of ineffective assistance of counsel in order to determine whether the habeas court abused its discretion in denying the petition for certification to appeal. Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts

found by the habeas court unless they are clearly erroneous, but 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." (Internal quotation marks omitted.) *Morris* v. *Commissioner of Correction*, supra, 131 Conn. App. 842.

"[I]n order to determine whether the petitioner has demonstrated ineffective assistance of counsel [when the conviction resulted from a guilty plea], we apply the two part test annunciated by the United States Supreme Court in *Strickland* and *Hill* [v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d (1985)]. . . . In *Strickland*, which applies to claims of ineffective assistance during criminal proceedings generally, the United States Supreme Court determined that the claim must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . .

"To satisfy the performance prong under *Strickland-Hill*, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. . . . A petitioner who accepts counsel's advice to plead guilty has the burden of demonstrating on habeas appeal that the advice was not within the range of competence demanded of attorneys in criminal cases. . . . The range of competence demanded is reasonably competent, or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . Reasonably competent attorneys may advise their clients to plead guilty even if defenses may exist. . . . A reviewing court must view counsel's conduct with a strong presumption that it

falls within the wide range of reasonable professional assistance. . . .

"To satisfy the prejudice prong [under *Strickland-Hill*], the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Citations omitted; internal quotation marks omitted.) *Clinton S.* v. *Commissioner of Correction*, supra, 174 Conn. App. 827–28.

With this legal framework in mind, we now turn to the merits of the petitioner's claims.[8]

I

The petitioner first claims that the court abused its discretion in denying his petition for certification to appeal because his trial counsel rendered ineffective

[8] The respondent asserts that the petitioner argues only the merits of his appeal, as if this were an appeal from a decision of a habeas court granting certification to appeal. Specifically, the respondent argues: "This case exemplifies how Justice Borden's fears have come to fruition. The manner in which the petitioner has structured his argument shows that the *Simms* procedure has simply served as an 'implied invitation to appeal, directed to all disappointed habeas petitioners denied certification to appeal,' and that the certification requirement has since 'become an empty gesture.' *Simms* v. *Warden*, [supra, 229 Conn. 191–92] (*Borden*, *J.*, concurring)." The respondent urges this court to "reevaluate the *Simms* procedure and adopt a procedure akin to Practice Book § 84-1 et seq. and that used in federal habeas litigation, whereby a petitioner denied certification to appeal from the habeas court must file a petition for certification with the Appellate Court to obtain a certificate of appealability."

Although we are very familiar with the respondent's concern that the certification to appeal requirement of General Statutes § 52-470 (g) has turned into a "hollow command" in light of the standard of review that our Supreme Court enunciated in *Simms* v. *Warden*, supra, 229 Conn. 178, and adopted in *Simms* v. *Warden*, supra, 230 Conn. 612, we decline the invitation to reevaluate the *Simms* procedure. "[T]his court will not reexamine or reevaluate Supreme Court precedent. Whether a Supreme Court holding should be reevaluated and possibly discarded is not for this court to decide." (Internal quotation marks omitted.) *State* v. *Billie*, 123 Conn. App. 690, 706, 2 A.3d 1034 (2010).

assistance by failing to "investigate available exculpatory evidence" that would have supported the petitioner's claim of self-defense. Specifically, he argues that Attorney Meredith "failed to conduct a thorough and adequate investigation by interviewing eyewitnesses who were at Melissa's Market the day of the shooting and witnesses who corroborated that Blue went to the store with a gun in order to kill Mr. Humble." He contends that "had trial counsel unearthed this evidence, a viable self-defense claim would have been established which would have led him not to plead guilty to murder." We are not persuaded.

The habeas court was presented with evidence of the following additional facts, which are relevant to the petitioner's claim. The petitioner testified that he "adamantly" discussed a defense of self-defense with Attorney Meredith. He testified that he informed Attorney Meredith of potential witnesses that might be helpful, including Barclay and Rodriguez, who Attorney Meredith did not interview prior to the petitioner's guilty plea. The petitioner further testified that he communicated to Attorney Meredith that he wanted to go to trial, but Attorney Meredith insisted, "you have no defense. If you go to trial you will lose."

Barclay testified that in the late afternoon on March 24, 2004, he went inside Melissa's Market to make a drug sale in the back of the store. He heard gunfire, waited for it to stop, and then ran. As he ran out of the store, Barclay saw the victim lying on the ground. He saw Hartage, whom he knew in passing, leaning over the body and doing what appeared to be removing a gun from the victim's right hand. He did not witness the shooting. Barclay never spoke to the police about what he saw, and he never spoke to Attorney Meredith or his investigator.

The petitioner also presented the testimony of Rodriguez, who is known by the nickname "Primo." When

questioned as to whether he recalled the events of March 24, 2004, he responded: "Not really. It's been so long. I don't remember shit. I smoke weed. I smoke dust. I got so much shit going on my brain, car accident, motorcycle accident. I don't remember nothing right now." In response to questioning as to whether he told the petitioner's investigator that after the shooting, he went into the store and saw a gun being removed from the victim, Rodriguez testified: "No. He's a Goddamn liar for that one. He's lying."[9]

Attorney Meredith testified about his representation of the petitioner twelve years prior to the habeas trial. He testified that from the beginning of his representation of the petitioner, he was aware that the petitioner was claiming that he killed the victim in self-defense. He testified that Ward corroborated the petitioner's claim, both in a voluntary statement to the police and during an interview with the defense's investigator, that Hartage removed a gun from the victim's body immediately following the shooting. He claimed that he advised the petitioner that Ward corroborated his story. His investigator interviewed Hartage twice, however, and "he didn't ever say that he took a gun off the body." He testified that his investigator attempted to contact Rodriguez three times, but was unsuccessful, and that he had no records of any contact with Barclay.

Attorney Meredith further testified that he discussed self-defense with the petitioner "[t]hroughout the case." He recognized three issues, however, with the claim of

[9] The petitioner called his counsel's investigator, Eric Eichler, to contradict this testimony. The court, however, admitted Eichler's testimony about Rodriguez' statements regarding the shooting only to impeach Rodriguez' testimony that he had no memory of the shooting. The court explained: "Well I'm going to give it absolutely zero weight as to the—whatever he says Mr. Rodriguez might have said. . . . [S]ince he said he knew nothing, even if you impeach him that he knew something, I still don't know what he knew. . . . [A]ll Mr. Eichler's going to be able to establish is that Mr. Rodriguez was not being forthcoming."

self-defense: (1) the police did not recover a gun on the body of the victim and there was no evidence that a second gun was discharged within the store, (2) the robbery that happened the day before the shooting, if charged, could increase the petitioner's sentence exposure by up to twenty-eight years and call into question a self-defense claim, and (3) "the jury could interpret an ongoing problem of a feud between the two parties which started the day before with Mr. Humble robbing the victim with the victim then shooting at Mr. Humble and with both parties being—going at one another if you will." He acknowledged that having another witness to corroborate the petitioner's claim that a gun was removed from the victim's body following the shooting would have been helpful, but he was "still left with the robbery that happened the day before that did not put Mr. Humble in a good light. . . . I think a big piece of analysis besides the gun on the body, the second piece was, you know, that factual scenario where our claim was self-defense and Mr. Humble was always self-defense from the very beginning, could also be interpreted as Mr. Humble waiting for that guy to come in so he could kill him."

The court concluded that the petitioner's claim failed on *Strickland*'s performance prong, finding that Attorney Meredith conducted an adequate investigation. The court reasoned that "none of the evidence that this court heard in the trial of this habeas petition was new evidence in the sense that it brought new facts to light that Mr. Meredith was not aware of." The court explained: "Now in this case there was a potentially viable self-defense argument that could have been raised by Mr. Humble. The facts contained within the exhibits, the testimony, clearly show that the issue of a self-defense defense was present. But self-defense is an extremely risky defense to raise primarily because

if it fails, then conviction on the underlying offense is almost a virtual certainty.

"When self-defense is raised the fact that a death occurred, that fact that the petitioner . . . caused the death is not really at issue. What's at issue is whether that was a justified homicide. In other words, by acting in self-defense the homicide was not criminal instead was excused because it was self-defense.

"Now having said that there was a potential self-defense that could have been raised in this case does not say that that was a winner of defense. There are numerous factors that came out in the exhibits and the testimony that demonstrate that the use of a self-defense defense in this particular case was extraordinarily risky."

The court further made findings indicating that the petitioner had also failed to satisfy *Strickland*'s prejudice prong. In its oral decision, the court concluded that "[t]here was a strong incentive for Mr. Humble to take the thirty year offer." The court noted that the petitioner's exposure was "in the vicinity of seventy-five years," and that even if the jury believed the self-defense theory, it would not reduce the petitioner's liability for the gun or escape charges. The court ultimately concluded that, based on its assessment of the evidence, a jury would be unlikely to believe the petitioner's claim of self-defense, and the petitioner was likely to receive a "significantly higher" sentence than the thirty years he received. Thus, the court concluded: "He decided—from the evidence presented it is clear that Mr. Humble decided to take the safe route, albeit still harsh, and accept the thirty years."

The following legal principles are relevant to our resolution of the petitioner's claim on appeal. "[C]onstitutionally adequate assistance of counsel includes competent pretrial investigation." (Internal quotation marks

omitted.) *Clinton S.* v. *Commissioner of Correction*, supra, 174 Conn. App. 836. "We are mindful of the principle that, although it is incumbent on a trial counsel to conduct a prompt investigation of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction . . . counsel need not track down each and every lead or personally investigate every evidentiary possibility. . . . In a habeas corpus proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation . . . but by demonstrable realities. . . . One cannot successfully attack, with the advantage of hindsight, a trial counsel's trial choices and strategies that otherwise constitutionally comport with the standards of competence." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 583–84, 941 A.2d 248 (2008). "The burden to demonstrate what benefit additional investigation would have revealed is on the petitioner." (Internal quotation marks omitted.) *Clinton S.* v. *Commissioner of Correction*, supra, 836.

We conclude that the habeas court did not abuse its discretion in denying certification to appeal. We need only address the petitioner's failure to satisfy the prejudice prong. See *Petty* v. *Commissioner of Correction*, 125 Conn. App. 185, 188, 7 A.3d 411 (2010) ("[a] reviewing court can find against a petitioner on either ground, whichever is easier" [internal quotation marks omitted]), cert. denied, 300 Conn. 903, 12 A.3d 573 (2011). The petitioner has failed to satisfy his burden of showing a reasonable probability that had Attorney Meredith interviewed Barclay and Rodriguez, he would have rejected the state's plea offer and insisted on going to trial. Notably, the petitioner did not testify to this effect. Furthermore, nothing in the record suggests that the petitioner would have rejected the state's plea offer and insisted on going to trial. In fact, the record suggests

that, to the contrary, the petitioner was aware that at least one witness, Ward, corroborated his claim that the victim had a gun when the petitioner shot and killed him. Despite this knowledge, the petitioner still chose to accept the state's offer and plead guilty.

We note that "[i]n many guilty plea cases, the prejudice inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate . . . the determination whether the error prejudiced the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." (Internal quotation marks omitted.) *Norton* v. *Commissioner of Correction*, 132 Conn. App. 850, 855, 33 A.3d 819, cert. denied, 303 Conn. 936, 36 A.3d 695 (2012).

The petitioner has failed to show that the discovery of additional evidence likely would have led counsel to change his recommendation as to the plea, or changed the outcome of a trial. To the contrary, Attorney Meredith testified that while it would have been helpful if another witness corroborated the petitioner's claim that a gun was removed from the victim's body following the shooting, he still had other concerns, including: (1) the fact that the police did not recover a second gun; (2) there was no evidence that a second gun was discharged in the store; (3) the robbery the night before the shooting would cast the petitioner in a negative light to a jury; (4) the robbery the night before could increase any sentence by up to twenty-eight years; and (5) the jury could interpret the incident in Melissa's

Market to be part of an ongoing feud between the petitioner and the victim, which the petitioner started when he robbed the victim the night before. The habeas court echoed some of these concerns in its oral decision. Specifically, the court noted that (1) the March 23 robbery "would be enough to defeat a self-defense argument in and of itself," and (2) "the scenario that took place inside Melissa's Market could be construed to be self-defense on the part of Mr. Humble but it also lent itself quite easily and readily to an argument by the prosecution that rather than being self-defense, this in fact was an ambush designed to strike at Mr. Blue before he had another opportunity to strike at Mr. Humble."

Not only had a witness identified the petitioner as the person who shot and killed the victim, but the petitioner voluntarily confessed to the killing. The petitioner also voluntarily confessed to his ongoing feud with the victim, one that began when he robbed the victim at gunpoint to "shake him up a little bit." We agree with the habeas court that although the petitioner could have presented a self-defense claim if he went to trial, there were "numerous factors that came out in the exhibits and the testimony that demonstrate that the use of a self-defense defense in this particular case was extraordinarily risky" and "significant reasons to believe that a jury would not buy the argument of self-defense."

Furthermore, at the time of the petitioner's guilty plea, the petitioner had two pending criminal cases that exposed him to significant jail time. The habeas court correctly observed that even if a jury believed the petitioner's claim of self-defense, that defense would not "in any way go to reduce liability for the gun or the escape from custody charge." The petitioner had no defense for those charges. The petitioner's guilty plea ultimately consolidated and disposed of his numerous pending charges into a sentence of thirty years imprisonment. As the habeas court observed, the petitioner's

exposure was "in the vicinity of seventy-five years," and "[t]here was a strong incentive for Mr. Humble to take the thirty year offer." We also agree with the court's observation that: "[T]he petitioner could have taken his case to trial. He could have rolled the dice. He could have raised the defense of self-defense which if the jury had accepted it might have resulted in a sentence lower than the thirty years that he agreed to. On the other hand, if the jury did not accept the issue of self-defense, and this court believes there are significant reasons to believe that a jury would not buy the argument of self-defense, Mr. Humble would have received a sentence that was significantly higher than the thirty years that he agreed to. . . . He decided—from the evidence presented it is clear that Mr. Humble decided to take the safe route, albeit still harsh, and accept the thirty years." Simply put, even if we were to assume that Attorney Meredith failed to discover potential evidence that corroborated the victim's self-defense claim, in light of our review of the record, we conclude that the petitioner's claim that he would have pursued a jury trial is speculative at best.[10]

[10] In *Carraway* v. *Commissioner of Correction*, 144 Conn. App. 461, 476, 72 A.3d 426 (2013), appeal dismissed, 317 Conn. 594, 119 A.3d 1153 (2015), this court held that in order to satisfy the prejudice requirement in an ineffective assistance claim arising from counsel's advice during the plea process, a defendant only must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial, not that he would have insisted on trial *and* achieved a more favorable outcome. The United States Supreme Court, however, recently observed: "The dissent contends that a defendant must also show that he would have been better off going to trial. That is true when the defendant's decision about going to trial *turns on his prospects of success and those are affected by the attorney's error*—for instance, where a defendant alleged that his lawyer should have but did not seek to suppress an improperly obtained confession. . . . [C]f., e.g., *Hill* [v. *Lockhart*, supra, 474 U.S. 59] (discussing failure to investigate potentially exculpatory evidence)." (Citation omitted; emphasis added.) *Lee* v. *United States*, U.S. , 137 S. Ct. 1958, 1965, 198 L. Ed. 2d 476 (2017). While we note this apparent conflict, we need not determine today which standard applies because the petitioner has failed to show prejudice under the more lenient *Carraway* standard.

II

The petitioner next claims that the court abused its discretion in denying his petition for certification to appeal because his trial counsel rendered ineffective assistance by advising him to plead guilty to murder without conducting an adequate investigation, and failing to provide candid, objectively reasonable advice.[11] We are not persuaded.

The habeas court was presented with evidence of the following additional facts, which are relevant to the petitioner's claim. At the habeas trial, Attorney Meredith testified that during the underlying criminal proceedings, the petitioner informed him that he would be willing to plead guilty to manslaughter. The state, however, did not offer a plea deal that would allow the petitioner to plead guilty to manslaughter, and instead offered the petitioner a recommended sentence of thirty years if he pleaded guilty to murder. The petitioner testified that when Attorney Meredith presented this offer, he informed Attorney Meredith that he felt as though he had a strong claim of self-defense and did not want to accept the offer. The petitioner testified that Attorney

[11] For the first time on appeal, the petitioner raises a claim pursuant to *Barlow* v. *Commissioner of Correction*, 150 Conn. App. 781, 93 A.3d 165 (2014), in which this court held that an attorney's decision to offer *no advice* regarding a state's plea offer constituted constitutionally deficient performance. Id., 801–802. Specifically, the petitioner claims that "[h]ere, as in *Barlow*, trial counsel failed to render candid advice whether it was in the [petitioner's] best interest to accept the state's offer or consider alternatives before [he] plead." The respondent argues that this claim is not properly before this court, as it was never pleaded in the operative habeas petition nor decided by the habeas court.

Barlow dealt only with the performance prong of *Strickland*. See id., 803–804 (concluding that record was lacking regarding prejudice and remanding for further proceedings on the issue of whether defendant was prejudiced by counsel's deficient performance). Because we conclude that the petitioner has failed to show prejudice, and do not address whether Attorney Meredith's performance was deficient, we need not address the petitioner's *Barlow* claim.

Meredith contacted his mother and told her that the petitioner had no defense and would serve sixty years in jail if he rejected the deal. The petitioner testified that he decided to accept the thirty year offer rather than go to trial because his mother was pressuring him, Attorney Meredith said he had no defense, and Attorney Meredith advised him that he would "be able to get back into court under the *Alford* doctrine . . . ."[12]

Attorney Meredith testified as to his practice for advising clients in connection with plea offers: "I do not—what I try to do with each and every client from the time I've been a criminal defense attorney is to present—to go through discovery, do an independent investigation, and try—try to present what might play it out in a trial from an [objective] point of view. I have not motive to try to get a client to plead or not. As long as I know a client understands the risk of going to trial, as long as I know the client understands the offer and if I'm sure of those two things, then I can sleep at night. I'm dealing with a grown man and they make their decisions from there on or woman as the case may be. So I don't pressure clients. I try to inform them objectively in term—and then they make the decision on their own."

The habeas court concluded that nothing in the record supported "any conclusion that Mr. Humble's plea of guilty was anything other than voluntary, intelligent, and willing, as willing as any person who pleads guilty to a serious offense's plea is willing." The court

[12] Although the petitioner, at the habeas trial, testified that Attorney Meredith incorrectly advised him that the *Alford* doctrine would permit him to "get back into court and win my freedom back," he does not claim on appeal that this advice constituted ineffective assistance. Furthermore, the court was free to reject the petitioner's testimony as not credible; see *Noze* v. *Commissioner of Correction*, 177 Conn. App. 874, 887, 173 A.3d 525 (2017); which, given its conclusion that counsel "gave proper legal advice to Mr. Humble and Mr. Humble made the decision to accept the plea offer," it clearly did.

further noted that "in this case Mr. Humble was presented with a potential for spending the entirety of his natural life locked up in a jail. He was offered the opportunity to plead guilty for a global settlement in exchange a sentence of thirty years.

"Now I realize to a twenty-two year old a thirty year sentence is not insignificant and I don't mean to seem at all callous because a thirty year sentence is significant irrespective of the age of the person who is receiving it. But given the acceptance of that plea, the possibility that Mr. Humble will gain freedom, albeit later in his life, exists. I see nothing in this evidence that was presented to this court that would allow me to conclude that Mr. Humble's will was overborne in any way."

Based on our review of the record, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal. We have already concluded in part I of this opinion that the petitioner has failed to satisfy *Strickland-Hill*'s prejudice prong, and we conclude the same in regard to this claim. The petitioner has not demonstrated that but for Attorney Meredith's advice, he would have rejected the plea offer and insisted on proceeding to trial. As discussed in more detail in part I of this opinion, the petitioner similarly has not persuaded this court that any additional evidence likely would have changed counsel's advice. Furthermore, the habeas court's conclusion that the petitioner's plea was voluntary and intelligent is supported by the plea transcript, which contains a lengthy canvass by the trial court. See *Bigelow* v. *Commissioner of Correction*, 175 Conn. App. 206, 215–16, 167 A.3d 1054 ("[a] court may properly rely on . . . the responses of the [petitioner] at the time [he] responded to the trial court's plea canvass" [internal quotation marks omitted]), cert. denied, 327 Conn. 929, 171 A.3d 455 (2017).

We conclude that the petitioner has failed to demonstrate that the issues raised are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions deserve encouragement to proceed further. Accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.