STATE OF CONNECTICUT *v.* LUIS A. GRAJALES (AC 39140)

Lavine, Keller and Pellegrino, Js.

Syllabus

Convicted of the crimes of assault in the first degree and carrying a pistol without a permit, the defendant appealed to this court. The defendant's conviction stemmed from his conduct in shooting the victim in the neck during the course of a physical altercation between members of the defendant's family and the victim's family at the victim's apartment complex. After the shooting, the defendant fled the scene of the crime, returned to his apartment, and claimed that he fell asleep. Despite the police searching the area of the defendant's apartment that night, the defendant remained hidden until the police searched his apartment the next day, at which time he was discovered and subsequently arrested. At trial, the defendant's theory of defense was one of justification in defense of others, in which he claimed that he shot the victim to protect his wife and daughter. On appeal, the defendant claimed that the court improperly instructed the jury on consciousness of guilt because the evidence did not reasonably support a finding of flight. *Held* that the defendant's claim that the prejudicial effect of the instruction on flight outweighed its probative value and affected the jury's consideration of his claim of defense of others was unavailing: although the defendant claimed that leaving the scene of a crime in an open or otherwise nonfurtive manner does not support a consciousness of guilt instruction

on the basis of flight, the fact that the evidence might support an innocent explanation does not make an instruction on flight erroneous, there was no binding precedent that holds that returning home after an alleged crime precludes a court from instructing a jury on consciousness of guilt on the basis of flight, the evidence in the present case that the defendant left the scene of the shooting rather than waiting for the arrival of authorities supported a reasonable inference that he knew his actions were wrong in the eyes of the law and that he was hiding out in order to evade being apprehended by police, and the fact that he returned to his nearby basement apartment did not preclude that inference; moreover, the inference that flight reflected consciousness of guilt was enhanced by the evidence of what the defendant did between the time he got home and the time of his arrest, as this court, in determining whether the flight instruction was warranted, was permitted to review not only the evidence that the defendant left the scene of the shooting but also his furtive conduct at his apartment, the trial court did not act improperly by instructing the jury that the defendant's flight may have indicated a consciousness of guilt, and the jurors were free either to reject or to accept the evidence, and were not required to find that the defendant fled because he was guilty.

Argued November 27, 2017—officially released May 1, 2018

Procedural History

Substitute information charging the defendant with one count each of the crimes of assault in the first degree and carrying a pistol without a permit, and with three counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of New Haven and tried to the jury before the court, *B. Fischer, J.*; verdict and judgment of guilty of assault in the first degree and carrying a pistol without a permit, from which the defendant appealed to this court. *Affirmed.*

Daniel J. Krisch, assigned counsel, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Brian K. Sibley, Sr.*, senior assistant state's attorney, and *Karen A. Roberg*, assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Luis A. Grajales, appeals from the judgment of conviction, rendered after a jury trial, of one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (5)[1] and one count of carrying a pistol without a permit in violation of General Statutes § 29-35.[2] He claims that the court improperly instructed the jury on consciousness of guilt because the evidence does not reasonably support a finding of flight. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. On August 22, 2014, Luis Perez (Perez) returned home from work to his apartment at Station Court in New Haven around 5 p.m. Perez lived with his wife, Jessica Rivera, and their four children—Chrystal Perez, Shelanie Perez, K, and L. On the evening of the incident, Perez and Rivera were joined by Grenda Camacho, a family friend, and her son, I.[3] Together, they ate dinner and sat outside their first floor apartment and watched their children play. Meanwhile, Chrystal studied inside the family apartment.

At the time of the incident, the defendant lived less than one mile away from Station Court at an apartment

[1] General Statutes § 53a-59 (a) provides in relevant part: "A person is guilty of assault in the first degree when . . . (5) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm. . . ."

[2] General Statutes § 29-35 (a) provides in relevant part: "No person shall carry any pistol or revolver upon his or her person, except when such person is within the dwelling house or place of business of such person, without a permit to carry the same issued as provided in section 29-28. . . ."

[3] K, L, and I were the alleged minor victims in three charges of risk of injury to a child brought against the defendant in connection with this incident. In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to identify the victims or others through whom the victims' identifies may be ascertained. See General Statutes § 54-86e.

on Wilson Street. The defendant's former wife, Iris Figueroa, resided at Station Court in a second story apartment above the Perez residence. On August 22, 2014, the defendant went to Station Court to visit his children. Late in the evening hours of August 22, Perez began to argue with the defendant and his family. When the argument initially began, Perez stood outside his apartment in the courtyard and the defendant and his family were on the balcony of Figueroa's apartment overlooking the courtyard. At some point, Perez retrieved a ceramic ball from his apartment, which he threw toward the defendant. The ball did not make contact with anyone and landed harmlessly on the balcony. The defendant's daughter, Shakira Grajales, threw the ball back at Perez, but also did not hit anyone with it. The defendant came down from the balcony to the courtyard and the argument between the defendant and Perez intensified. K interrupted Chrystal from her studies to inform her that their father was outside arguing with the defendant and his family. Chrystal grabbed two baseball bats and placed them inside by the door in case any member of her family needed them for protection. She then went outside to the courtyard where she was approached by Shakira. Chrystal, fearing that Shakira intended to attack her, punched Shakira in the face. The two girls began fighting in the courtyard. Rivera attempted to break up the fight. When Rivera attempted to do so, Figueroa pulled Rivera to the ground by her hair and began hitting her.

The defendant and Perez were not involved in the physical fight in the courtyard. As the melee in the courtyard continued, the defendant went upstairs to Figueroa's apartment and retrieved a .22 caliber pistol. The defendant came back downstairs with the gun hidden behind his back. Camacho pleaded with the defendant not to shoot Perez because "the children were inside the [Perez] apartment." The defendant ignored

her plea and entered the Perez residence. Inside, the defendant shot Perez in the neck.

Camacho ran outside screaming that the defendant had shot Perez. Chrystal entered the apartment and found her father on the floor covered in blood, struggling to stand up. K called 911 and handed the phone to Chrystal, who received instructions from the operator to apply pressure to the wound using a towel, which she did until paramedics arrived. After neighbors broke up the fight between Figueroa and Rivera, Rivera entered the apartment and found Perez lying on the floor. At this point, Rivera broke a glass bottle and grabbed one of the baseball bats that Chrystal had placed behind the door in order to protect her family from the defendant and his family.

After shooting Perez, the defendant left the scene at Station Court in Figueroa's Dodge Magnum. On the drive back to his Wilson Street apartment, the defendant got "scared," and removed the ammunition clip from the gun. Back at his apartment, the defendant locked himself in a basement bedroom, placed his gun in a bedside dresser, and went to sleep.

The gunshot fractured Perez' C7 vertebrae. He likely will never walk again.

The state charged the defendant with one count of assault in the first degree, one count of carrying a pistol without a permit, and three counts of risk of injury to a child in violation of General Statutes § 53-21.[4] At trial,

[4] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of (A) a class C felony for a violation of subdivision (1) . . . of this subsection . . . ."

the defendant's theory of defense was one of justification in defense of others, claiming that he shot Perez in order to protect Rivera and Shakira. The jury found the defendant guilty of assault in the first degree and possession of a pistol without a permit. The jury returned a verdict of not guilty on the three counts of risk of injury to a child. The court sentenced the defendant to a total effective sentence of twenty-five years incarceration, execution suspended after twenty-three years, followed by five years of probation.[5] This appeal followed. Additional facts will be set forth in our analysis of the defendant's claim.

The defendant's sole claim is that the court improperly instructed the jury on consciousness of guilt because the evidence does not reasonably support a finding of flight.

The record reflects that on October 13, 2015, the court held a charge conference in its chambers. Thereafter, the court stated on the record: "I just want to review with counsel on the record. . . . We met in my chambers today, [October 13, 2015,] around 9 [a.m.] and we had a charge conference in chambers. . . . On Thursday, [October 8, 2015,] I had sent to counsel a proposed jury charge. They received another . . . installment correcting some of the original rough drafts on Friday, [October 9, 2015]. This weekend was Columbus Day weekend. I encouraged counsel to review the proposed charge, spend time on it, and give the court any suggestion, or recommendations, or request to charge. Both counsel have taken the court up on that and over the weekend I did receive first from—[defense counsel] two comments . . . . I will do that. . . .

[5] The court sentenced the defendant to twenty years incarceration, execution suspended after eighteen years, followed by five years of probation on the assault conviction and five years of incarceration on the carrying a pistol without a permit conviction, to be served consecutively to the assault sentence.

From the state's standpoint as I understand it, the state is requesting a consciousness of guilt charge specifically concerning an evidentiary issue of flight from the scene. Is that correct, [prosecutor]?

"[The Prosecutor:] Yes, Judge.

"The Court: And, [defense counsel], as I understand it you object to that charge?

"[Defense counsel:] I do, your Honor . . . [the defendant's] response . . . is a natural response to somebody in that particular situation. I don't think it rises to the level of consciousness of guilt. . . . "

The court noted the defendant's exception. During closing argument neither party offered arguments concerning the defendant's flight or consciousness of guilt. The court, during its jury charge, instructed the jury as follows: "I want to talk to you about consciousness of guilt. In any criminal trial it is permissible for the state to show that conduct or statements made by a defendant after the time of the alleged offense may have been influenced by the criminal act, that is, the conduct or statements show a consciousness of guilt. For example, flight, when unexplained, may indicate consciousness of guilt if the facts and the circumstances support it. Such facts do not, however, raise a presumption of guilt. If you find the evidence proved and also find that the acts were influenced by the criminal act and not by any other reason you may, but are not required to infer from this evidence, that the defendant was acting from a guilty conscience.

"The state claims that the following conduct is evidence of consciousness of guilt. The defendant's flight from . . . Station Court, New Haven, on August [22], 2014. It is up to you as judges of the facts to decide

whether the defendant's acts if proved reflect a consciousness of guilt, and to consider such in your deliberations and conform with these instructions."[6]

The following evidence pertaining to flight was introduced at trial. The state introduced a videotape of Detective Gary Hammill interviewing the defendant on the morning after the shooting. During this interview, the defendant stated that, after he shot Perez, he left Station Court in Figueroa's car, a white Dodge Magnum. The defendant said he travelled to his Wilson Street apartment, parked the car there, and immediately went inside to go to sleep. He said he heard the police searching at Wilson Street that night, but he did not reveal himself to the police and they did not find him in the basement. He stated that although the police entered the basement, they did not find him because they did not enter the room behind the green door. He also heard Figueroa's car being towed from the driveway. During the interview, the defendant repeatedly asserted that his actions after leaving Station Court were because he was afraid.

Police officers testified that when they arrived at Station Court on the night of the incident, the defendant was no longer present. Officer Eric Pesino testified that he went to Station Court because of a report of shots fired. Upon arriving at a chaotic scene, he learned that the defendant "took off" after shooting Perez. Detective Ann Mays testified that police officers, shortly after arriving at Station Court on the night of the incident, learned that the defendant may be at his Wilson Street apartment. Mays and other officers went to the Wilson Street apartment but could not find the defendant. Mays testified that the police communicated with someone in the basement apartment and ordered that everyone

[6] The defendant is not challenging the contents of the instruction, only the decision to give it.

exit the house. The police requested identification from the people who came outside. Sergeant Colon stated that police searched the house, including the basement. The police did not find the defendant among the people they identified or inside the house. Mays also testified that she spotted "a cream colored Dodge Magnum" parked in the driveway at the Wilson Street apartment and that the hood of this car was warm.

Detective Juan Ingles testified about finding the defendant at the Wilson Street apartment the morning after the shooting. Ingles received a key to the home from the defendant's brother-in-law. Ingles and another officer entered the basement of the house and found a locked door. The officers banged on the door and identified themselves as members of the New Haven police department. The officers were told to enter and used the key to unlock the door. The officers cautiously entered the basement apartment with their weapons drawn because they suspected the defendant still had a gun. Inside, the police found the defendant lying down on a bed.

"We review a trial court's decision to give a consciousness of guilt instruction under an abuse of discretion standard. . . . Evidence that an accused has taken some kind of evasive action to avoid detection for a crime, such as flight, concealment of evidence, or a false statement, is ordinarily the basis for a [jury] charge on the inference of consciousness of guilt." (Citation omitted; internal quotation marks omitted.) *State* v. *Vasquez*, 133 Conn. App. 785, 800, 36 A.3d 739, cert. denied, 304 Conn. 921, 41 A.3d 661 (2012). "The decision whether to give an instruction on flight . . . should be left to the sound discretion of the trial court." *State* v. *Hines*, 243 Conn. 796, 816, 709 A.2d 522 (1998).

"Flight, when unexplained, tends to prove a consciousness of guilt. . . . Flight is a form of circumstantial evidence. . . . The probative value of evidence of

flight depends upon all the facts and circumstances and is a question of fact for the jury." (Citations omitted.) *State* v. *Thomas*, 50 Conn. App. 369, 382–83, 717 A.2d 828 (1998), appeal dismissed, 253 Conn. 541, 755 A.2d 179 (2000).

"[E]vidence of flight from the scene of a crime [is] inherently ambiguous. . . . That ambiguity does not render a flight instruction improper." (Citations omitted.) *State* v. *Luster*, 279 Conn. 414, 423, 902 A.2d 636 (2006). "If there is a reasonable view of the evidence that would support an inference that [the defendant fled] because he was guilty of the crime and wanted to evade apprehension—even for a short period of time—then the trial court is within its discretion in giving . . . [a flight] instruction . . . ." *State* v. *Scott*, 270 Conn. 92, 105–106, 851 A.2d 291 (2004), cert. denied, 544 U.S. 987, 125 S. Ct. 1861, 161 L. Ed. 2d 746 (2005). "Generally speaking, all that is required is that the evidence have relevance, and the fact that ambiguities or explanations may exist which tend to rebut an inference of guilt does not render evidence of flight inadmissible but simply constitutes a factor for the jury's consideration." *State* v. *Piskorski*, 177 Conn. 677, 723, 419 A.2d 866, cert. denied, 444 U.S. 935, 100 S. Ct. 283, 62 L. Ed. 2d 194 (1979).

"The probative value of flight as evidence of a defendant's guilt depends on the degree of confidence with which four inferences can be drawn: (1) from behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." (Internal quotation marks omitted.) *State* v. *Holley*, 90 Conn. App. 350, 361–62, 877 A.2d 872, cert. denied, 275 Conn. 929, 883 A.2d 1249 (2005).

In the present appeal, the defendant argues that the first inference—from behavior to flight—is not supported by the evidence and, thus, the court should not have provided the jury with the consciousness of guilt instruction. The state, in response, argues that the evidence is sufficient to support the consciousness of guilt instruction. We agree with the state.

The defendant argues that "flight means more than merely leaving the scene of a crime; it presupposes a nefarious motive for leaving," or in other words, mere departure from the scene of a crime is insufficient evidence to support a jury instruction on consciousness of guilt on the basis of flight.[7] No Connecticut appellate case, however, has held that flight requires proof of more than departure from the scene of the crime or a nefarious purpose for leaving. To the contrary, our case law addressing whether there is sufficient evidence to support a consciousness of guilt instruction on the basis of flight upholds the proposition that the instruction is warranted even when the evidence reveals little more than mere departure.[8] *State* v. *Asberry*, 81 Conn. App.

[7] The defendant refers to this principle that mere departure from the scene of a crime is insufficient evidence to support a jury instruction on consciousness of guilt on the basis of flight as the "mere departure rule."

[8] The defendant derives the so-called "mere departure rule" from case law from other jurisdictions. The authority on which the defendant relies, however, does not convince us to follow the "mere departure rule" because it is not the law in this state. See *State* v. *Asberry*, 81 Conn. App. 44, 57, 837 A.2d 885, cert. denied, 268 Conn. 904, 845 A.2d 408 (2004). In addition, out of state authority does not provide a persuasive basis to conclude that the trial court erred by providing a flight instruction. The two out of state cases on which the defendant relies conclude that there was insufficient evidence to support a consciousness of guilt instruction on the basis of flight, are factually dissimilar from the present case, and are, thus, unpersuasive. See *Hoerauf* v. *State*, 941 A.2d 1161, 1180 (Md. App. 2008) and *State* v. *Ingram*, 951 A.2d 1000, 1015 (N.J. 2008).

In *Hoerauf*, the defendant "simply walked away from the scene of the crime with the group of individuals who had just perpetrated the robberies. When [the defendant] left the scene, the police had not arrived, nor was their arrival imminent. There was no evidence that [the defendant] attempted to flee the neighborhood or to secrete himself from public view to avoid

44, 57, 837 A.2d 885 (evidence defendant left scene of crime because he expected someone to drive him home and victim saw defendant leave scene in tan colored car that was later stopped sufficient to support flight instruction), cert. denied, 268 Conn. 904, 845 A.2d 408 (2004); see also *State* v. *Adams*, 36 Conn. App. 473, 481, 651 A.2d 747 (evidence defendant got into his car and left scene and police officer saw defendant driving rapidly away from scene sufficient to support flight instruction), appeal dismissed, 235 Conn. 473, 667 A.2d 796 (1995).

We are not persuaded by the defendant's assertion that evidence of leaving the scene of a crime in an open, or otherwise nonfurtive, manner does not support a consciousness of guilt instruction on the basis of flight. Although the paradigm examples of flight expressing consciousness of guilt may involve fleeing the country

apprehension. Indeed, only 10–15 minutes after the crime, the police stopped [the defendant] in a nearby neighborhood with three of the other perpetrators, one of whom possessed some of the stolen property. . . . Accordingly, [the defendant's] behavior did not constitute flight, and the trial court erred in giving the flight instruction." *Hoerauf* v. *State*, supra, 1180. The factual situation in *Hoerauf* differs significantly from the evidence in the present case. There is evidence in the present case that the defendant was not apprehended for over eight hours after shooting the victim, the defendant left the neighborhood of the crime, and the defendant hid from police.

In *Ingram*, a consciousness of guilt instruction was also deemed improper. The defendant's flight, however, occurred after his trial began. On appeal, the New Jersey Appellate Court noted that a defendant leaving during the middle of a trial differs from leaving after the commission of an alleged crime for the purpose of determining whether there is sufficient evidence for a flight instruction: "The logically required tipping point—departure to avoid detection or apprehension—is absent here: by the time defendant voluntarily absented himself from any portion of the trial, he already had been arrested, indicted, admitted to bail, arraigned, had attended pre-trial hearings, and had attended at least one court-scheduled conference. Thus, from a purely definitional basis, a flight charge should not lie when a defendant absents himself from trial unless separate proofs are tendered to sustain the claim that the defendant's absence was designed to avoid detection, arrest, or the imposition of punishment." *State* v. *Ingram*, supra, 951 A.2d 1015.

or a complex ruse to avoid law enforcement, there is no requirement that a defendant's departure from the scene of a crime involve such a circumstance. See *State* v. *Asberry*, supra, 81 Conn. App. 57. Our case law repeatedly acknowledges that "evidence of flight from the scene of a crime inherently is ambiguous"; *State* v. *Luster*, supra, 279 Conn. 423; and "[t]he fact that the evidence might support an innocent explanation . . . does not make an instruction on flight erroneous." (Internal quotation marks omitted.) *State* v. *Silva*, 113 Conn. App. 488, 496–97, 966 A.2d 798 (2009).

We now address the defendant's argument that the "mere return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt." The defendant supports this contention by referring to the evidence that after the shooting he went to his own home, which was less than one mile away from Station Court, and went to sleep. We first observe that no binding precedent holds that returning home after an alleged crime precludes a court from instructing a jury on consciousness of guilt on the basis of flight. Instead, prior cases have affirmed that an instruction on flight is proper when the defendant returns to his place of residence. *State* v. *Wright*, 198 Conn. 273, 281, 502 A.2d 911 (1986); *State* v. *Thomas*, supra, 50 Conn. App. 383–84.

In *Wright*, the defendant and the victim got into an argument over a drug transaction. *State* v. *Wright*, supra, 198 Conn. 276. According to the defendant in *Wright*, the victim threatened him with a knife. Id. In response, the defendant, acting in self-defense, wrestled the victim to the ground. Id. The victim was stabbed twice in the chest during the ensuing struggle. Id. There was evidence that the defendant in *Wright*, after stabbing the victim, "ran to his mother's house, where he was living at the time, changed his clothes and wiped up blood. He then went to his sister-in-law's apartment,

where he was apprehended by the police the next day." Id., 281. On the basis of this evidence, "[t]he jury could have found that this conduct constituted evidence of flight which tended to show a consciousness of guilt." Id.

The evidence also supported an instruction of flight in a case in which the defendant, after stabbing someone, rode his bicycle to his mother's house, where he resided. *State* v. *Thomas*, supra, 50 Conn. App. 383–84. In *Thomas*, the defendant spotted the victim toting a boom box that the defendant suspected the victim had stolen from him. Id., 371. The defendant confronted the victim about the boom box and the two began to fight. Id. During the altercation, the defendant stabbed the victim in the chest. Id. "[I]mmediately after the victim had been stabbed, the defendant rode a bicycle to his mother's house." Id., 383. This court concluded that "[t]he evidence of flight in this case tended to show that the defendant believed that what he had done was not merely an act of self-defense, but was something that was considered wrong in the eyes of the law. . . . [T]he evidence of flight was sufficient to allow the jury to infer consciousness of guilt . . . ." Id., 384.

Wright and *Thomas* both held that there was sufficient evidence to support a consciousness of guilt instruction on the basis of flight when each defendant returned to his place of residence. We do not see a reason to distinguish the defendant in the present case departing Station Court for the apartment where he had been residing from the defendants in *Wright* and *Thomas* fleeing to their mothers' homes where they had been residing. In light of the particular circumstances, evidence of returning home after committing an act of violence can still evince that a "defendant believed that what he had done was not merely an act of self-defense, but was something that was considered wrong in the eyes of the law." Id., 384. At trial, the defendant relied

on the theory that he shot Perez in defense of others. The evidence that the defendant left the scene of the shooting rather than waiting for the arrival of authorities supported a reasonable inference that the defendant knew his actions were wrong. The fact that there was evidence that he returned to his nearby basement apartment does not preclude this inference.

Furthermore, we are not persuaded by the defendant's argument that our review of whether the evidence supports the flight instruction should be limited to the fact that the defendant left Station Court and went to his Wilson Street apartment after the shooting. The defendant contends that because the court instructed the jury to consider the defendant's "flight from . . . Station Court," and did not delve into the evidence of his conduct at his Wilson Street apartment, the evidence in support of the court's decision to give the flight instruction is limited merely to the fact that the defendant departed from the scene. "The probative value of evidence of flight [however] depends upon all the facts and circumstances and is a question of fact for the jury." *State* v. *Nemeth*, 182 Conn. 403, 408, 438 A.2d 120 (1980). The defendant's departure from the scene and his actions immediately following the shooting support a conclusion that when the defendant left the scene and went home, he was not simply waiting for things to calm down before going to the police, as he claimed. Rather, he was hiding out in order to evade apprehension because he knew he had not been justified in shooting Perez to protect his family but had done something wrong in the eyes of the law.

Therefore, we conclude that our analysis as to whether the flight instruction was warranted permits us to review not only the evidence that the defendant left Station Court, but also his furtive conduct at his apartment on Wilson Street in the early hours of August

23, 2014. Specifically, there was evidence that the defendant removed the ammunition clip from his gun and hid it in his bedside dresser. He knew the police arrived at his Wilson Street apartment searching for him and towed Figueroa's car from the parking lot. Yet, the defendant stated that he opted to remain hidden in the basement apartment out of fear. Thus, contrary to the defendant's assertion, there is evidence that the defendant fled Station Court in a "furtive" manner because he hid from the police while they searched for him on the night of the shooting. The inference that flight reflected consciousness of guilt is enhanced by the evidence of what the defendant did between the time he got home and the time of his arrest.

The standard for whether a flight instruction is appropriate is whether there is a reasonable, and not a compelling, view of the evidence that supports it. In the present case, the court did not act improperly by instructing the jury that the defendant's flight from Station Court may indicate consciousness of guilt. The evidence was sufficient to support a finding that, despite claiming that he acted to protect his family, the defendant fled from the scene of the crime after shooting Perez inside of his apartment while their families argued outside and despite the fact that Shakira and Figueroa were injured. There is no evidence that the defendant paused before fleeing to ensure that his family was all right or inquired about their well-being later that night. Instead, the defendant drove off and locked himself in his basement apartment. When police arrived at his apartment on Wilson Street around 1 a.m., he was aware of their presence, but he elected to remain hidden and was not found until the next morning. That morning, he did not respond when the police banged on the door and was not apprehended until the police obtained the keys to his basement apartment from his brother-in-law. This narrative reasonably supports the

court's decision to provide the jury with consciousness of guilt instruction on the basis of flight. The evidence of flight in this case was sufficient to show that the defendant believed what he had done was not merely done to protect Shakira and Rivera as he claimed, but something that was considered wrong in the eyes of the law. The evidence of flight permitted the jury to infer a consciousness of guilt on behalf of the defendant. See *State* v. *Thomas*, supra, 50 Conn. App. 384.

In considering the evidence, the jurors were free to either reject it or to accept it as they saw fit. They were not required to find that the defendant fled because he was guilty. See id., 384. Accordingly, we find no merit to the defendant's assertion that the prejudicial effect of the instruction on flight outweighed its probative value and affected the jury's consideration of the defendant's claim of defense of others.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MIGUEL A. VEGA (AC 40082)

Lavine, Alvord and Bear, Js.

Syllabus

Convicted of the crimes of murder, home invasion, burglary in the first degree, attempt to commit murder, attempt to commit assault in the first degree and carrying a pistol without a permit, the defendant appealed. The defendant and another man had broken into the apartment of E after E and several of his friends, including P and K, returned to the apartment from a bar where the defendant had punched E and fought with P. The defendant fatally shot P and, when E fled the apartment, chased after him onto the streets where E was shot. A police officer who had arrived at the scene overheard K, who was emotional and upset, speaking on a phone, during which she referred to the defendant by his nickname and stated that the defendant was one of the shooters. The officer questioned K after the phone call, and K again identified the defendant as one of the shooters. E told another police

officer who rode with E in an ambulance to a hospital that he had been at the bar with the person who shot him, whom E identified as "Mike." The defendant's first trial ended in a hung jury. Prior to the start of the defendant's second trial, E wrote in a letter that was delivered to the trial court that he did not want to testify and had been pressured by the police to point out the defendant as the person who had shot him. The trial court excluded the letter from evidence, ruling that the statements in it were not against E's penal interest under the applicable provision (§ 8-6 [4]) of the Connecticut Code of Evidence. The trial court admitted into evidence the statements made by K and E under the spontaneous utterance exception to the hearsay rule in the applicable provision (§ 8-3 [2]) of the Connecticut Code of Evidence. *Held*:

1. The trial court did not abuse its discretion in admitting into evidence as spontaneous utterances under § 8-3 (2) certain statements made by K and E: the record supported the court's finding that the statements the police officer overheard K make during her phone conversation and that she made to the officer after that conversation occurred under circumstances that negated the opportunity for deliberation and fabrication, as K made the statements on the phone and to the officer while she was near the scene of the home invasion, gunfire and shooting, and within fifteen to thirty minutes after the shooting occurred, she was crying and experiencing stress and shock as a result of the incident at the apartment, there was no evidence that she had spoken to anyone else prior to making the phone call, and the fact that her statements to the officer were given in response to his questions was not significant, given the circumstances under which the statements were made; moreover, E's statements to the police were made within an hour after he ran from the apartment and while he was in shock or under great stress and struggling to survive after having been shot.
2. The trial court properly sustained the state's objection to the admission of E's letter into evidence, as the statements in the letter were not admissible under § 8-6 (4) because they were not against E's penal interest, as claimed by the defendant; the statements in the letter were in the nature of a recantation of E's testimony in the defendant's first trial and seemingly were not intended as an admission by E of perjury, as the letter accused the police of pressuring and threatening E, and stated that E did not know who the offender was and had not seen the offender's face.
3. The defendant could not prevail on his unpreserved claim that the trial court violated his constitutional right to confrontation when it admitted into evidence the statements that the police officer overheard K make during her phone conversation and the statements that K made to the officer after the phone conversation: although the statements that K made during her phone conversation were not testimonial in nature, as they were not made directly to the officer or in response to his questions, there was no evidence that she intended for him to hear the statements,

which were made to a private person while she was under the stress of the incident at the apartment and were not the type of statements that a declarant would expect to be used in a later prosecution, and the admission of the statements that K made directly to the officer, which were testimonial in nature, violated the defendant's right to confrontation because the defendant had no prior opportunity to cross-examine K regarding those statements; nevertheless, the admission of those statements was harmless beyond a reasonable doubt, as the state had presented sufficient independent evidence for the jury reasonably to identify the defendant as the shooter of P and one of the shooters of E.

Argued December 4, 2017—officially released May 1, 2018

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder, home invasion, burglary in the first degree, attempt to commit murder, attempt to commit assault in the first degree and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New London, geographical area number ten, and tried to the jury before *Jongbloed, J.*; verdict and judgment of guilty; thereafter, the court vacated the verdict as to the charge of felony murder, and the defendant appealed. *Affirmed.*

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

Michael L. Regan, state's attorney, for the appellee (state).

Opinion

BEAR, J. The defendant, Miguel A. Vega, appeals from the judgment of conviction, rendered after a jury trial, of the following six offenses: (1) murder in violation of General Statutes § 53a-54a (a); (2) home invasion in violation of General Statutes § 53a-100aa (a) (2); (3) burglary in the first degree in violation of General Statutes § 53a-101 (a) (3); (4) attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a; (5) attempt to commit assault in the first degree

in violation of General Statutes §§ 53a-49 (a) (2) and 53-59 (a) (5); and (6) carrying a pistol without a permit in violation of General Statutes § 29-35 (a). On appeal, the defendant claims that the trial court (1) abused its discretion by admitting out-of-court statements as spontaneous utterances pursuant to § 8-3 (2) of the Connecticut Code of Evidence; (2) abused its discretion by excluding a letter that contained statements that were against the author's penal interest; and (3) improperly admitted hearsay statements from an unavailable witness in violation of his sixth and fourteenth amendment right to confrontation. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. On the night of March 2, 2010, a group of people gathered in an apartment located at 53 Prest Street in New London, a second floor apartment that belonged to Michael Ellis, Sr. (Ellis, Sr.), who resided there with Lisa DeMusis (L. DeMusis), Nicholas DeMusis (N. DeMusis), Michael Ellis, Jr. (Ellis), and Altareika Parrish. On March 2, present in the apartment in addition to those who resided there, were Rahmel Perry, Shariymah James, Alice Phillips, Jessica Winslow and Keyireh Kirkwood.

Between midnight and 12:30 a.m. on the morning of March 3, 2010, Ellis, Perry, James, Phillips, Winslow, and Kirkwood left the apartment and went to a bar in New London called The Galley. While at the bar, Krystal Taylor and Tamika "Missy" Guilbert joined the group. Also present at the bar were the defendant and a few of his associates. Shortly after Ellis arrived at the bar, he was standing next to Kirkwood. Kirkwood and the defendant have a child together, but she is also a friend of Ellis and many of his associates. Soon after Ellis began standing next to Kirkwood, the defendant motioned toward Ellis to direct him to step away from

Kirkwood. When Ellis did not move away from Kirkwood, the defendant approached Ellis and punched him in the face. A fight then broke out in the bar between the two groups, during which Perry began punching and kicking the defendant. That fight was broken up and both groups exited the bar. The defendant was undoubtedly on the losing end of the fight. Outside of the bar, another altercation ensued between the two groups, which was quickly broken up.

After both groups left the bar, Ellis, Perry, Parrish, Taylor, Kirkwood, Phillips, James, and Guilbert returned to the Prest Street apartment at approximately 1:30 a.m. Ellis, Sr., L. DeMusis, N. DeMusis, and Shauntay Ellis were also present at the apartment when the group returned from the bar. At approximately 2 a.m., the group heard a commotion at the back door, through which two men entered the apartment. They were armed, one with a revolver and the other with an automatic or semiautomatic handgun. Both men were dressed in all black clothing and had their heads and faces covered.

The defendant, who was the first intruder into the apartment, proceeded directly to the living room where Ellis and Perry were located. He pulled down his mask and ordered everyone in the room to get on the floor. Ellis and Taylor were standing close to a window in the living room. Upon hearing the men enter the apartment, Taylor jumped out the window. The defendant then fired toward the window, in Ellis' direction, but did not hit Ellis. He then fired two shots at Perry, who was on the couch. Both shots struck Perry.

Meanwhile, Ellis ran out of the living room and toward the back door where the men had entered. He briefly scuffled with the second intruder, who appeared to reach for a gun. As Ellis was running down the stairs,

a shot was fired at him, but did not hit him. Ellis proceeded to run from Prest Street to Blackhall Court. The intruders left the apartment and chased Ellis, firing approximately four shots. Ellis was struck twice, once in the thigh and once in the back. Ellis proceeded to run onto Blackhall Street where he called 911. While he was on Blackhall Street, Ellis flagged down a police officer, Justin Clachrie, who was en route to the apartment at 53 Prest Street. Within minutes, an emergency medical services vehicle arrived and transported Ellis to Lawrence + Memorial Hospital (hospital).

At the apartment, Phillips called 911 and stated that Perry had been shot. Those who remained at the apartment then carried Perry to Shauntay Ellis' vehicle. Shauntay Ellis and Phillips drove Perry to the hospital in Shauntay Ellis' vehicle. Perry was unconscious when he arrived at the hospital, and medical personnel made efforts to resuscitate him. Those efforts were unsuccessful, however, and Perry was pronounced dead. An autopsy revealed that a gunshot wound caused Perry's death, and the medical examiner ruled his death a homicide. Although Ellis' injuries were life-threatening, medical personnel were able to stabilize him in the emergency department. He remained in the hospital for approximately one week and then was released.

After the police arrived at the Prest Street apartment, several people who were present during the shooting identified the defendant as one of the shooters. The police also learned of the fight between the defendant, Ellis, and Perry that had occurred at the bar earlier on March 3. As a result, various law enforcement agencies immediately made attempts to locate the defendant, and the police obtained a warrant for his arrest. The defendant was finally located approximately three and one-half months later on June 21, 2010, in Gwinnett County, Georgia.

In July, 2010, Detective Sergeant George Potts and Detective Richard Curcuro travelled to Gwinnett County to speak with the defendant about the events that had occurred on March 3, 2010. During this interview, the defendant conceded that he was involved in a fight with Ellis and Perry at the bar, but denied that he was involved in the subsequent occurrence at the Prest Street apartment, on Blackhall Court, and on Blackhall Street. The defendant gave the detectives an alibi, which the investigators were not able to verify. When asked why he fled from Connecticut, the defendant answered that he saw his photograph on the news and was concerned that if he were found in Connecticut, he would be arrested for a parole violation that had occurred in New York.

On January 29, 2015, the defendant was charged by way of an amended information with the following eight offenses: (1) murder in violation of § 53a-54a (a); (2) felony murder in violation of General Statutes § 53a-54c; (3) home invasion in violation of § 53a-100aa (a) (1); (4) home invasion in violation of § 53a-100aa (a) (2); (5) burglary in the first degree in violation of § 53a-101 (a) (3); (6) attempt to commit murder in violation of §§ 53a-49 (a) (2) and 53a-54a (a); (7) attempt to commit assault in the first degree in violation of §§ 53a-49 (a) (2) and 53a-59 (a) (5); and (8) carrying a pistol without a permit in violation of § 29-35 (a). A trial commenced in January, 2015 and continued into February, 2015. The trial ended in a hung jury and the court declared a mistrial.

In January, 2016, a second trial commenced. In a substitute information, the defendant was charged with the following offenses: (1) murder in violation of § 53a-54a (a); (2) felony murder in violation of § 53a-54c; (3) home invasion in violation of § 53a-100aa (a) (2); (4) burglary in the first degree in violation of § 53a-101 (a)

(3); (5) attempt to commit murder in violation of §§ 53s-49 (a) (2) and 53a-54a; (6) attempt to commit assault in the first degree in violation of §§ 53a-49 (a) (2) and 53-59 (a) (5); and (7) carrying a pistol without a permit in violation of § 29-35 (a). The jury found the defendant guilty of all of those offenses.[1] The court sentenced the defendant to a total effective term of seventy-five years of imprisonment. This appeal followed. Additional facts will be set forth as necessary.

I

EVIDENTIARY CLAIMS

We first address the defendant's evidentiary claims. On appeal, the defendant argues that the court abused its discretion in admitting into evidence certain out-of-court statements as spontaneous utterances pursuant to § 8-3 (2) of the Connecticut Code of Evidence. Additionally, the defendant argues that the court abused its discretion in excluding a letter that Ellis allegedly wrote and delivered to the court regarding his refusal to testify at the second trial, which the defendant argues contained statements against Ellis' penal interest under § 8-6 (4) of the Connecticut Code of Evidence. We disagree.

We begin by setting forth the relevant standard of review. "As a general rule, hearsay is inadmissible unless an exception from the Code of Evidence, the General Statutes or the rules of practice applies." *State* v. *Miller*, 121 Conn. App. 775, 779, 998 A.2d 170, cert. denied, 298 Conn. 902, 3 A.3d 72 (2010). "To the extent a trial court's admission of evidence is based on an interpretation of the [Connecticut] 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

[1] During the sentencing proceeding, the court vacated the finding of guilt on the felony murder count.

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 . . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Internal quotation marks omitted.) Id., 780.

A

Statements Admitted as Spontaneous Utterances

The defendant argues that the court abused its discretion in admitting the following statements as spontaneous utterances: (1) statements that Kirkwood made during a telephone call that Officer Charles Flynn overheard, identifying the defendant as one of the shooters; (2) statements that Kirkwood directly made to Flynn that were introduced through Taylor, identifying the defendant as one of the shooters; and (3) statements that Ellis made on Blackhall Street, in the ambulance, and at the hospital to Clachrie, a responding officer, identifying the defendant as one of the shooters. The state responds that each statement was properly admitted as a spontaneous utterance. We agree with the state.

Our code of evidence defines a spontaneous utterance as "[a] statement relating to a startling event or condition made while the declarant was under the excitement caused by the event or condition." Conn. Code Evid. § 8-3 (2). "[T]he commentary to § 8-3 (2) provides: The hearsay exception for spontaneous utterances is well established. . . . Although [§] 8-3 (2) states the exception in terms different from that of the case law on which the exception is based . . . the rule assumes incorporation of the case law principles underlying the exception.

"The event or condition must be sufficiently startling, so as to produce nervous excitement in the declarant

and render [the declarant's] utterances spontaneous and unreflective. . . .

"The excited utterance exception is well established. Hearsay statements, otherwise inadmissible, may be admitted into evidence to prove the truth of the matter asserted therein when (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. . . .

"The requirement that a spontaneous utterance be made under such circumstances as to [negate] the opportunity for deliberation and fabrication by the declarant . . . does not preclude the admission of statements made after a startling occurrence as long as the statement is made under the stress of that occurrence. . . . While [a] short time between the incident and the statement is important, it is not dispositive. . . .

"Whether an utterance is spontaneous and made under such circumstances that would preclude contrivance and misrepresentation is a preliminary question of fact to be decided by the trial judge. . . . The trial court has broad discretion in making that factual determination, which will not be disturbed on appeal absent an unreasonable exercise of discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Kirby*, 280 Conn. 361, 373–74, 908 A.2d 506 (2006). Moreover, a statement made in response to a question does not preclude its admission as a spontaneous utterance. Id., 376.

1

Kirkwood's Statements

The following additional facts, which the jury reasonably could have found, and procedural history are relevant to the resolution of this claim. The state presented

evidence that following the shooting, everyone who was present in the Prest Street apartment ran outside. Shauntay Ellis and Phillips drove Perry to the hospital, while the others remained outside of the apartment on Prest Street. Flynn was responding to the occurrence when he saw a male running in a direction that was taking him away from Prest Street. Flynn stopped this individual, obtained his identification, and determined that he was not related to the Prest Street shooting. Flynn then arrived at the Prest Street apartment and approached a vehicle that was attempting to leave the crime scene. Inside the vehicle were Taylor, Parrish, Guilbert, and James. Flynn briefly spoke to the individuals in the vehicle and learned that they were heading to the hospital to check on Perry.

Flynn observed Kirkwood on Prest Street speaking on a telephone to someone she referred to as "[m]om." Flynn walked toward where Kirkwood was standing so he would be able to speak to Kirkwood when she finished her telephone call. While speaking on the telephone, Kirkwood was emotional and visibly upset, and her speech had a staccato sound. During the telephone call, Kirkwood stated that "Mikey shot them" and that he had entered through the back of the apartment. Flynn overheard Kirkwood's exclamations that "Mikey" was one of the shooters.[2] Kirkwood then stated that "the cop [is] here," and, "I'm going to tell them that he did it."

After Kirkwood's telephone call, Flynn began speaking directly to Kirkwood. Although Kirkwood's responses were "more guarded," she was visibly upset while talking to Flynn. During this conversation, Kirkwood reiterated the statements from her telephone call, identifying the defendant as one of the shooters. Taylor had returned to the scene after hearing sirens. Taylor was present for Kirkwood's conversation with Flynn,

[2] Mikey is a nickname for the defendant.

and overheard her statements identifying the defendant as one of the shooters. On multiple occasions during this conversation, Kirkwood apologized to Taylor.

At the second trial, Flynn testified outside the presence of the jury regarding what he overheard Kirkwood say on the telephone to the person she referred to as "[m]om." The defendant objected, arguing that the statements were not excited utterances because they did not satisfy the fourth factor set out in *Kirby*, that "the declaration is made under circumstances that negate the opportunity for deliberation and fabrication by the declarant." (Internal quotation marks omitted.) *State* v. *Kirby*, supra, 280 Conn. 374. Specifically, the defendant argued that the statements Kirkwood made over the telephone were not spontaneous utterances because Kirkwood "wasn't screaming. She wasn't wailing. She wasn't moaning. She was talking to someone; clearly hearsay."

Following the state's proffer, the court found that "the declarant was upset, very excited, very emotional, crying on the phone and had a sort of a staccato-type conversation or outburst, and it sounded to the court as though it does satisfy what's required for a spontaneous or excited utterance . . . ." Flynn then testified before the jury regarding the statements that he overheard Kirkwood make during her telephone call.

Taylor also testified regarding the statements that Kirkwood made directly to Flynn.[3] The defendant objected and again argued that these statements did not fall within the spontaneous utterance exception, and in support of his assertion cited the fact that Flynn

[3] Flynn did not testify regarding the substance of the statements that Kirkwood made directly to him. Although he testified that he spoke directly to Kirkwood, the state did not ask him about what Kirkwood stated during that conversation. In fact, during Flynn's testimony, the state made clear that it was not going to attempt to introduce through Flynn the statements that Kirkwood made directly to him.

was questioning Kirkwood. The court disagreed and allowed Taylor to testify regarding Kirkwood's statements to Flynn under the spontaneous utterance exception.

The defendant argues that the court abused its discretion in admitting Kirkwood's statements as spontaneous utterances under § 8-3 (2) of the Connecticut Code of Evidence. The defendant maintains that several minutes had passed from the time of the shooting to the time of Kirkwood's statements over the telephone and to Flynn, and that as a result, Kirkwood had time to deliberate and think about the statements she was going to make. We disagree that the court abused its discretion in admitting Kirkwood's statements.

We first address the statements that Flynn heard Kirkwood make over the telephone to someone she referred to as "[m]om." The parties did not dispute that the statements were made following a startling occurrence, i.e., the home invasion, the subsequent gunfire, and the shooting of Perry, that the statements referred to the startling occurrence, or that Kirkwood observed the occurrence. Therefore, the court had to determine only whether Kirkwood made the statements "under circumstances that negate the opportunity for deliberation and fabrication . . . ." (Internal quotation marks omitted.) *State* v. *Kirby*, supra, 280 Conn. 374.

We conclude that the court did not abuse its discretion in admitting the statements that Kirkwood made over the telephone as spontaneous utterances. The fact that Kirkwood was crying and had a "staccato-type conversation or outburst" supports the court's finding that Kirkwood was still experiencing stress and shock as a result of the occurrence. Although several minutes had passed between the startling occurrence and when Flynn heard Kirkwood make these statements, our Supreme Court has held that "[w]hile [a] short time

between the incident and the statement is important, *it is not dispositive*." (Emphasis added; internal quotation marks omitted.) *State* v. *Kirby*, supra, 280 Conn. 374; see also *State* v. *Stange*, 212 Conn. 612, 618, 563 A.2d 681 (1989) ("A majority of jurisdictions that have addressed the issue of the effect of the time interval between the startling occurrence and the making of the spontaneous utterance have recognized that an acceptable time interval cannot be specified. Each case must be decided on its particular circumstances."). In *Stange*, the trial court admitted statements that the declarant made "approximately fifteen to thirty minutes after a [startling occurrence." Id., 620.

Our Supreme Court's decision in *State* v. *Slater*, 285 Conn. 162, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008), informs our analysis of this issue. In *Slater*, two bystanders heard the victim screaming and crying while on the street that someone had tried to rape her. Id., 166. The victim, while in a "disoriented and hysterical state," told the bystanders "that a black male with a big knife had raped her." (Internal quotation marks omitted.) Id. The two bystanders testified regarding the victim's statements to them. Id., 168.

On appeal, our Supreme Court held that "the first three requirements [for a spontaneous utterance] undoubtedly were satisfied." Id., 179. The court concluded that the trial court had not abused its discretion in admitting the statements as spontaneous utterances because "[w]ith respect to the fourth factor, although the amount of time that lapsed between the incident and [the victim's] statement is unclear, the victim still visibly was shaken and appeared to be making the statement as a cry for help. . . . The victim's emotional state, therefore, indicates that her statement was made under circumstances that had negated the opportunity

for deliberation or fabrication." (Citations omitted; internal quotation marks omitted.) Id., 179–80.

Here, as in *Slater*, there is no doubt that the first three requirements for a spontaneous utterance were established. Additionally, when Kirkwood made the statements, she was visibly upset, crying, and speaking with a "staccato-type conversation or outburst . . . ." Despite the fact that approximately fifteen to thirty minutes had passed from the time of the startling occurrence to the time Kirkwood made the statements over the telephone, Kirkwood's emotional state at the time she made those statements demonstrated that she was still experiencing shock or stress because of the home invasion, gunfire, and shooting that had just occurred in the Prest Street apartment.

The defendant relies on this court's decision in *State* v. *Gregory C.*, 94 Conn. App. 759, 893 A.2d 912 (2006), to support his position that the court abused its discretion in admitting the statements that Kirkwood made over the telephone. In *Gregory C.*, the trial court admitted a rape victim's hearsay statements as spontaneous utterances. Id., 770. The statements were introduced through a police officer, who had interviewed the defendant the day after the rape had occurred. Id., 769–70. Between the time of the rape and the time that the victim made the statements to the police officer, the victim contacted a friend to "talk to her about the defendant." Id., 762. The victim and her friend then went to a courthouse so the victim could obtain a restraining order against the defendant. Id., 769. After that, at approximately 2 p.m. on the day following the rape, the victim went to the police station and detailed to the officer the facts surrounding the rape. Id., 769–70.

At trial, the state asked the interviewing police officer what the victim specifically told him about the rape

that occurred the night before. Id., 770. The court overruled the defendant's objection and allowed the officer to testify regarding the victim's statements under the spontaneous utterance exception. Id. On appeal, this court concluded that the trial court abused its discretion in admitting the victim's statements to the police officer as spontaneous utterances. Id., 772. In so doing, this court stated that "more than fifteen hours had passed between the time of the alleged sexual assault and the victim's statement to [the police officer]. Further, the victim discussed her alleged assault at length with [her friend] prior to giving her statement. The victim thus had considerable time and opportunity to collect her thoughts and reflect on what had occurred the night before." Id., 771–72.

The present case is distinguishable from *Gregory C.* Here, the evidence established that, at most, fifteen to thirty minutes passed between the time of the startling occurrence and the time Flynn overheard Kirkwood make the statements. Also, there was no evidence in the record that Kirkwood had spoken to anyone else prior to making the telephone call to the person she referred to as "[m]om," unlike in *Gregory C.*, where the victim called her friend following her rape, and then fifteen hours later spoke to a police officer. *State* v. *Gregory C.*, supra, 94 Conn. App. 762, 769–70. Here, on the other hand, a short time after the shooting, Kirkwood made a telephone call to "[m]om" and Flynn overheard the statements that she made during that telephone call. Accordingly, the defendant's reliance on *Gregory C.* is misplaced. We conclude that the court did not abuse its discretion in admitting the statements that Kirkwood made over the telephone as spontaneous or excited utterances pursuant to § 8-3 (2) of the Connecticut Code of Evidence.

We next address the statements that Kirkwood directly made to Flynn, which Taylor overheard. As

with the statements that Kirkwood made over the telephone, the defendant's sole evidentiary challenge to the admission of Kirkwood's statements to Flynn revolves around whether Kirkwood made the statements "under circumstances that negate the opportunity for deliberation and fabrication . . . ." (Internal quotation marks omitted.) *State* v. *Kirby*, supra, 280 Conn. 374. Specifically, the defendant argues that because of the amount of time that had elapsed, and because the statements were made during an "interview," the court abused its discretion in admitting the statements as spontaneous utterances. Although this issue presents a closer question as to whether the statements fall within the spontaneous utterance exception, we conclude that the court did not abuse its discretion in admitting these statements as spontaneous utterances.

On the basis of the evidence presented, it was reasonable for the court to conclude that the statements that Kirkwood made directly to Flynn were spontaneous utterances. Taylor's testimony outside the presence of the jury established that Kirkwood was crying and screaming when she made the statements to Flynn. The court reasoned that "according to the testimony, [Kirkwood's] demeanor as described by [Taylor] was that [Kirkwood] was crying and screaming, and although [Taylor] said while not at the top of [Kirkwood's] lungs, [Kirkwood] certainly was crying and screaming, clearly shocked and distressed, having just minutes before witnessed a traumatic break-in and multiple shooting."

This court's decision in *State* v. *Guess*, 44 Conn. App. 790, 692 A.2d 849 (1997), aff'd, 244 Conn. 761, 715 A.2d 643 (1998), guides our resolution of this issue. In *Guess*, the declarant was the passenger in a vehicle that was shot at, resulting in the death of the driver. Id., 793. About fifteen or thirty minutes after the startling occurrence, the declarant spoke with a police officer. Id., 802.

The conversation with the officer lasted for a period of about fifteen minutes. Id. The police officer testified that the declarant was "very shaken up and nervous during the conversation and was spontaneously just muttering out things because he was so wound up." (Internal quotation marks omitted.) Id. The declarant provided the officer with details of the occurrence, during which time he identified the defendant as the shooter. Id., 802–804. The trial court admitted the declarant's statements as spontaneous utterances. Id., 802.

On appeal, this court concluded that the trial court did not abuse its discretion in admitting the declarant's statements pursuant to the spontaneous utterance exception. Id., 805. In reaching this conclusion, this court cited the trial court's reasoning for admitting the statements, which included the following facts: that the declarant had witnessed a shooting; the time gap between the shooting and the statements was, at most, one hour; the declarant was visibly upset, nervous, and shaken up; the declarant answered the officer's questions directly, but also provided additional information spontaneously, which was not elicited; and the declarant was still at the scene of the occurrence when he made the statements to the officer. See id., 804. The trial court also noted that "the fact that the information was given in response to questions, under these circumstances . . . is not significant." (Internal quotation marks omitted.) Id. This court held that "[t]he trial court properly applied the law concerning spontaneous utterances to the facts of the case and properly ruled that the testimony was admissible under the hearsay exception." Id., 805.

In the present case, Kirkwood made the statements to Flynn between fifteen and thirty minutes after witnessing the occurrence. The evidence established that

Kirkwood was visibly upset, crying, and screaming. Taylor also testified that Kirkwood "kept telling me she was sorry." There is no evidence in the record that either Flynn or Taylor elicited Kirkwood's apologies to Taylor. Furthermore, Kirkwood made the statements to Flynn while near the scene of the home invasion, gunfire, and shooting, within minutes after it had occurred. The fact that Kirkwood's responses were given in response to Flynn's questions is not significant given the circumstances described in the preceding paragraphs. See also *State* v. *Kirby*, supra, 280 Conn. 376 ("that a statement is made in response to a question does not preclude its admission as a spontaneous utterance"). Accordingly, we conclude that the court did not abuse its discretion in admitting the statements that Kirkwood directly made to Flynn under the spontaneous utterance exception to the hearsay rule.

2

Ellis' Statements

The following additional facts are relevant to our resolution of this claim. The state presented evidence that in the midst of the events at the Prest Street apartment, Ellis ran out the back door of the apartment, ran up Prest Street, then to Blackhall Court, and stopped when he reached Blackhall Street. While Ellis was running from the apartment, he was shot at four times, and hit twice. When Ellis stopped on Blackhall Street, he called 911. Within minutes, Clachrie arrived on Blackhall Street and Ellis flagged him down. Clachrie pulled over and Ellis approached his police cruiser, collapsing on the hood.

Clachrie exited his vehicle and began speaking to Ellis. During this time, Ellis was moaning and yelling in pain, and told Clachrie that he had been shot. Clachrie lifted Ellis' shirt and confirmed that he had been shot. Clachrie asked Ellis if he knew who had shot him. Ellis

responded in the negative, but stated "that it was a Puerto Rican male in black." Ellis also indicated that the shooting occurred at a house on Prest Street.

Within minutes of Clachrie's arrival, medical personnel arrived and began treating Ellis' injuries and preparing to transport Ellis to the hospital. At this time, Ellis continued to scream and yell in pain. He vomited while being treated on Blackhall Street and vomited again once he was inside the ambulance. Clachrie was in the ambulance with Ellis and attempted to ask him more questions about the shooting. Because Clachrie could smell alcohol on Ellis' breath, Clachrie asked Ellis whether he had been at a bar. Ellis responded that he had been at The Galley earlier in the night. When Clachrie asked Ellis whether the person who shot him had also been at the bar, Ellis responded in the affirmative.

It took approximately two minutes for the ambulance to transport Ellis from Blackhall Street to the hospital. When Ellis arrived at the hospital, he continued to scream and yell in pain. Within minutes, Clachrie was able to ask Ellis questions, and asked whether Ellis knew who shot him. Ellis responded that "Mike" had shot him. By this time, Clachrie had learned that the defendant was a suspect, so he asked Ellis if the individual who had shot him had a baby with Kirkwood. Ellis responded to that question by nodding his head up and down, as if answering the question in the affirmative. Soon after, Ellis was moved to the intensive care unit, and Clachrie was unable to continue questioning him.

At trial, the defendant objected on hearsay grounds to the admission of the statements that Ellis made to Clachrie. The defendant argued that the statements did not fall within the spontaneous utterance exception because Ellis had time to think about his responses to Clachrie's questions, and therefore, Ellis had time to deliberate and fabricate his statements. The trial court

disagreed and admitted the statements under the spontaneous utterance exception. In so doing, the court reasoned that the statement "was made initially very close in time to the call from dispatch, [Clachrie] testified [that the statement was made] a very short distance away from the area. [Clachrie] responded immediately, and the events transpired very quickly thereafter. So, under the circumstances, [the] objection is overruled, and the evidence may be admitted."

The defendant argues that the court abused its discretion by admitting Ellis' statements to Clachrie on Blackhall Street, in the ambulance, and at the hospital. The defendant argues that because Ellis initially told Clachrie that a "Puerto Rican male in black" had shot him, and then later identified the defendant as the shooter, he had time for deliberation and fabrication, and therefore the statement was not a spontaneous utterance. We disagree.

Our Supreme Court's decision in *State* v. *Kelly*, 256 Conn. 23, 770 A.2d 908 (2001), informs our resolution of this issue. In *Kelly*, a teenage girl was sexually assaulted by the defendant after he had offered to give her a ride home. Id., 28. The assault occurred near the victim's home, and the victim arrived home, visibly upset, shortly after the assault. Id., 28–29. The victim told her father that she was upset because she had gotten into a fight with one of her friends. Id., 29. The victim's sister then attempted to speak with her, but the victim was reluctant to tell her sister about the assault. Id. While the victim's sister attempted to speak to the victim, the victim was on the floor in the fetal position and appeared frightened. Id., 41. The victim finally told her sister about the assault, but made her promise not to tell anyone. Id., 29. The victim told her parents of the assault later in the evening, and went to a hospital and to the police the following day. Id. The

court admitted the victim's statements to her sister as spontaneous utterances. Id., 41.

On appeal, the defendant challenged the admission of the victim's statements to her sister, arguing that the statements did not fall within the spontaneous utterance exception. Id., 40. Specifically, the defendant argued that because the victim initially lied to her father about why she was upset, and because she was reluctant to tell her sister what happened, the victim had time for reasoned reflection and fabrication of the information she provided to her sister. Id., 42–43. Our Supreme Court concluded that the defendant's argument was "without merit." Id., 43. In so concluding, the court stated that "[o]nly a period of approximately ten to fifteen minutes passed between the startling occurrence . . . and the victim's disclosures to her sister. The victim remained in an emotionally distressed state throughout that time period. The trial court reasonably concluded that the victim's behavior comported with that of an individual reacting to a severely emotional, startling event without the time or wherewithal to fabricate it." Id.

In the present case, Ellis' statements to Clachrie on Blackhall Street, in the ambulance, and at the hospital were made while Ellis was in shock from or under the great stress from having been shot twice; he manifested this by continuing to yell and moan because of the pain he was experiencing.[4] Furthermore, all of his statements were made within one hour of his running from the

[4] The fact that Ellis initially told Clachrie that the shooter was a "Puerto Rican male in black" and only later identified the defendant by name and as the father of Kirkwood's child is not necessarily dispositive, as the defendant claims, for purposes of determining whether the court abused its discretion in admitting the utterances. Ellis had been shot twice, was suffering from an extremely painful and life-threatening condition, and was in shock or under the stress of the occurrence when he made to Clachrie the statement in which he identified the defendant as one of the shooters.

apartment after being confronted and shot at by the defendant; being shot at several additional times outside of the apartment; being struck twice by bullets; and while he was struggling to survive. Taking all of the facts surrounding the statements into consideration, we conclude that the court did not abuse its discretion in admitting Ellis' statements to Clachrie under the spontaneous utterance exception to the hearsay rule.

B

Ellis' Letter

The defendant's final evidentiary claim revolves around a letter that Ellis allegedly wrote and delivered to the court clerk prior to the start of the second trial, in which it was stated that he did not want to testify at the second trial and that he had been pressured to point out the defendant as the person who had shot him. The defendant argues that the court abused its discretion in excluding the letter from evidence because the letter contained statements against Ellis' penal interest under § 8-6 (4) of the Connecticut Code of Evidence. The state responds that the court properly excluded the letter, as there is no indication that Ellis was aware of whether he was subjecting himself to criminal punishment when making the statements in the letter, and therefore the statements are not against Ellis' penal interest. We agree with the state.

The following procedural history is relevant to the resolution of this claim. Just prior to the start of the second trial in January, 2016, the state informed the court that Ellis was refusing to testify. The court noted that the state had properly served Ellis with a subpoena and that the subpoena contained a notice that if Ellis did not appear in court on the date and time stated, the court could order his arrest. The court issued a capias pursuant to General Statutes § 54-2a and set bond in the amount of $100,000.

During the trial, the state informed the court that Ellis maintained his refusal to testify. The court allowed Ellis' testimony from the first trial and probable cause hearing to be read into the record, and provided the jury with redacted transcripts of that former testimony. In response, the defendant offered a letter that Ellis "purportedly handed to madam clerk" on January 5, 2016, in which he stated, inter alia, that "I have also been pressured to point out a specific individual, the defendant, Miguel Vega, in which, I state and have stated I did not actually know who the offender was. In the heat of the incidence, in which, I was attacked and was in the midst of running to safety in order to contact authorities. I did not in fact see the offender's face." (Internal quotation marks omitted.) Ellis also allegedly wrote that "I am reaching out in efforts to express my feelings and concerns that my well-being, safety, and cooperation has not been taken into account by the police department, [the] State of Connecticut, [or] the Superior Courts. I am in fear of my life and the lives of my family."

Defense counsel argued that the letter should be admitted as a statement against penal interest under § 8-6 (4) of the Connecticut Code of Evidence. Defense counsel reasoned that the statement was against Ellis' penal interest because "he told [the court] this morning that in the face of criminal contempt, penalties of incarceration and fines, he still was not going to testify. So, this is evidence of his . . . penal intent, if you will, against his penal [interest]." The state objected, arguing that "although [the letter] was submitted in the belief that it would help him in his quest not to testify here," none of the statements in the letter were against Ellis' penal interest. The state specified that it did not believe that Ellis "felt that this statement was going to be against his penal interest when he made it," or that "he felt that he was [going to] incur any liability."

The court sustained the state's objection to the letter, concluding that the statements contained in the letter were not against Ellis' penal interest. The court reasoned that "[a]lthough a refusal to cooperate does in fact implicate . . . a victim's exposure to possible consequences such as contempt, the court does not view the letter as a statement against penal interest. In fact, much of the letter relates to Mr. Ellis' fears for his safety and that of his family as well as his perceived dissatisfaction with the manner in which he was treated. . . . The letter is therefore inadmissible hearsay and the objection is sustained."

On appeal, the defendant argues that the court should have admitted the letter as a statement against Ellis' penal interest. The defendant argues for the first time[5] that because Ellis previously testified that the defendant was one of the shooters, he knew or should have known that the statement in his letter, in which he maintained that he did not know who shot him, exposed him to a *perjury* charge and was thus against his penal interest. We disagree.

"Section 8-6 of the Connecticut Code of Evidence provides that if the declarant is unavailable as a witness,

[5] For the first time on appeal, the defendant raises the argument that the statements contained in the letter exposed Ellis to *perjury* charges and were thus against his penal interest. At trial, the defendant had argued that it was Ellis' exposure to *contempt* charges that made the statements in his letter against his penal interest. The state argues that the defendant's claim is unpreserved. Although the defendant argued before the court and before this court that the statements contained in the letter were against Ellis' penal interest, he based his argument before the trial court on Ellis' alleged exposure to a charge of criminal contempt, and did not raise in the trial court Ellis' alleged exposure to a charge of perjury. The trial court, therefore, never had the occasion to consider whether Ellis' statements reasonably subjected him to a perjury charge. Because both Ellis' alleged exposure to a charge of criminal contempt, raised solely in the trial court, and Ellis' alleged exposure to a charge of perjury, raised solely in this court, implicate the statement again penal interest hearsay exception, we will address the merits of the defendant's claim.

a statement against penal interest is not excluded by the hearsay rule. Section 8-6 (4) of the Connecticut Code of Evidence defines a statement against penal interest as follows: A trustworthy statement against penal interest that, at the time of its making, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest." (Internal quotation marks omitted.) *State* v. *Diaz*, 109 Conn. App. 519, 544–45, 952 A.2d 124, cert. denied, 289 Conn. 930, 958 A.2d 161 (2008). "In short, the admissibility of a hearsay statement pursuant to § 8-6 (4) of the Connecticut Code of Evidence is subject to a binary inquiry: (1) whether [the] statement . . . was against [the declarant's] penal interest and, if so, (2) whether the statement was sufficiently trustworthy." (Internal quotation marks omitted.) *State* v. *Bonds*, 172 Conn. App. 108, 117, 158 A.3d 826, cert. denied, 326 Conn. 907, 163 A.3d 1206 (2017).

"As to what is against penal interest, quite obviously the essential characteristic is the exposure to risk of punishment for a crime . . . . Moreover, it is not the fact that the declaration is against interest but awareness of that fact by the declarant which gives the statement significance." (Internal quotation marks omitted.) *State* v. *Collins*, 147 Conn. App. 584, 590, 82 A.3d 1208, cert. denied, 311 Conn. 929, 86 A.3d 1057 (2014).

This court's decision in *State* v. *Diaz*, supra, 109 Conn. App. 519, guides our resolution of this claim. In *Diaz*, a witness, who identified the defendant as a drug

dealer and testified at the defendant's first trial, wrote a letter in which he stated that he "testified in court against [the defendant] because the police said [he] had no choice and [because] they gave [him] heroin." (Internal quotation marks omitted.) Id., 540. The defendant asserted that the letter was a statement against the declarant's penal interest because the letter revealed that the declarant committed perjury when he testified at the first trial. Id., 541. The trial court sustained the state's objection and ruled that the letter was inadmissible on several grounds. Id., 543. The trial court concluded, inter alia, that "the letter did not constitute a statement against [the declarant's] penal interest because none of the statements therein tended to subject [the declarant] to criminal liability for any crimes but were in the nature of a recantation of [the declarant's] prior testimony."[6] Id. On appeal, this court concluded that "the court's ruling that the statement did not fall within the hearsay exception relied on by the defendant was legally correct." Id., 548.

The letter at issue in the present case similarly did not include a statement against penal interest.[7] The letter accused Inspector Timothy Pitkin of pressuring Ellis into testifying a certain way. It stated that Pitkin threatened Ellis by telling him that if he did not testify at the defendant's second trial, he would go to prison. Although the letter alleged that Ellis " 'did not actually

[6] The trial court in *Diaz* also concluded that the statements contained in the letter were not trustworthy. See *State* v. *Diaz*, supra, 109 Conn. App. 543. Specifically, the court found that the letter was submitted approximately one year following the criminal conduct at issue, and noted that "it did not have any information as to the circumstances surrounding the making of the statement, such as why the declarant made the statement [and] whether [the declarant] wrote [the letter] himself . . . ." Id.

[7] The majority of the letter contained statements that Ellis feared for his safety and the safety of his family. Additionally, Ellis proclaimed that he had been mistreated throughout the first trial and that the state had not taken into account his status as a victim in this case. These statements, which make up the majority of the letter, do not implicate Ellis' penal interest.

know who the offender was' " and that he " 'did not see the offender's face,' " these statements are not against Ellis' penal interest, as they, standing alone, provide no indication that Ellis knew or should have known that he was subjecting himself to criminal liability by making those statements. As in *Diaz*, the statements were in the nature of a recantation of Ellis' prior testimony, and seemingly not intended by him as an admission of perjury. Therefore, Ellis' letter did not contain any statements against penal interest pursuant to § 8-6 (4) of the Connecticut Code of Evidence.[8] Accordingly, the court did not abuse its discretion in sustaining the state's objection and excluding the letter from evidence.[9]

II

CONSTITUTIONAL CLAIM

We now turn our analysis to the defendant's constitutional claim. On appeal, the defendant claims that the

[8] Even if we assume arguendo that one or more statements in the letter were against Ellis' penal interest, the letter itself does not provide adequate indicia that the statements contained therein are trustworthy. For example, the statements were made nearly six years after the occurrence. Cf. *State* v. *Lopez*, 254 Conn. 309, 317, 757 A.2d 542 (2000) ("[i]n general, declarations made soon after the crime suggest more reliability than those made after a lapse of time where a declarant has a more ample opportunity for reflection and contrivance" [internal quotation marks omitted]). Moreover, the letter was delivered to the court clerk shortly before the second trial. Cf. *State* v. *Pierre*, 277 Conn. 42, 69–70, 890 A.2d 474 (concluding statements "strongly indicative of their reliability" where "[declarant] made the statements on his own initiative, to an individual who was a friend and someone he routinely socialized with, and not in the coercive atmosphere of [litigation]" [internal quotation marks omitted]), cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006). Additionally, there is nothing in the record demonstrating whether Ellis in fact authored the letter himself and whether it accurately reflected his position, although that seems to have been assumed by the court and the state. See *State* v. *Diaz*, supra, 109 Conn. App. 543.

[9] The defendant argues for the first time on appeal that the court should have admitted the letter pursuant to § 8-9 of the Connecticut Code of Evidence, the residual exception to the hearsay rule. This claim was not raised at trial and is thus not properly preserved. Accordingly, we decline to review it on appeal. See *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013)

admission of certain statements violated his sixth and fourteenth amendment right to confrontation. The statements at issue are the statements Kirkwood made over the telephone to someone she referred to as "[m]om" and the statements Kirkwood made directly to Flynn, which Taylor overheard.[10] The state responds that the statements were nontestimonial and that even if the statements were testimonial, any error was harmless beyond a reasonable doubt. We agree with the state.

At trial, the defendant did not argue that the admission of Kirkwood's statements would violate his right to confrontation. The defendant instead focused his objection on the assertion that Kirkwood's statements did not fall within the spontaneous utterance exception. Therefore, before we reach the merits of the defendant's confrontation clause claim, we first must determine whether the issue is properly before this court. On appeal, the defendant requests that we review his constitutional claim pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

It is well established 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

("[t]his court is not bound to consider claims of law not made at the trial" [internal quotation marks omitted]).

[10] The defendant also claimed that the admission of Ellis' statements to Clachrie violated his right to confrontation. In the defendant's reply brief, however, he appears to concede that Ellis' statements to Clachrie do not pose a confrontation clause issue, as he states that "[t]he admission of [Kirkwood's and Ellis'] statements under the guise of spontaneous utterances was an abuse of the trial court's discretion and, *in the case of Kirkwood*, a violation of [the defendant's] confrontation clause rights." (Emphasis added.) Moreover, the admission of Ellis' statements did not raise a confrontation clause issue, as Ellis was twice subject to cross-examination regarding the statements he made to Clachrie.

the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. 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, 213 Conn. 239–40. "[T]he first two [prongs of *Golding*] involve a determination of whether the claim is reviewable . . . and under those two prongs, [t]he defendant bears the responsibility for providing a record that is adequate for review of his claim of constitutional error." (Citation omitted; internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 744, 91 A.3d 862 (2014). "[T]he second two [prongs of *Golding*] . . . involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *State* v. *Leggett*, 94 Conn. App. 392, 408, 892 A.2d 1000, cert. denied, 278 Conn. 911, 899 A.2d 39 (2006).

We conclude that the defendant's constitutional claim meets the first two prongs of *Golding*. The defendant has provided us with an adequate record upon which to review his alleged constitutional violation, and the defendant's claim is of constitutional magnitude. Although his claim centers on the admission of evidence, it implicates the defendant's sixth and fourteenth amendment right to confrontation of witnesses. Ultimately, however, whether a defendant is entitled to any remedy for a violation of his right to confront witnesses depends on whether the violation is legally harmless. See *State* v. *Campbell*, 328 Conn. 444, 512, A.3d (2018) ("[i]t is well established that a violation of the defendant's right to confront witnesses is subject to

harmless error analysis" [internal quotation marks omitted]); see also *State* v. *Pugh*, 176 Conn. App. 518, 528, 170 A.3d 710 (conducting harmless error analysis to resolve confrontation clause claim), cert. denied, 327 Conn. 985, 175 A.3d 43 (2017). We thus turn our discussion to the third and fourth prongs of *Golding*.

"The [c]onfrontation [c]lause of the [s]ixth [a]mendment provides: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. In *Crawford* v. *Washington*, 541 U.S. 36, 53–54 [124 S. Ct. 1354, 158 L. Ed. 2d 177] (2004), [the United States Supreme Court] held that this provision bars admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. A critical portion of this holding, and the portion central to [the] resolution of the [present case], is the phrase testimonial statements. Only statements of this sort cause the declarant to be a witness within the meaning of the [c]onfrontation [c]lause. . . . It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the [c]onfrontation [c]lause." (Citation omitted; internal quotation marks omitted.) *Davis* v. *Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

"Although [in *Crawford*] the Supreme Court declined to define the term testimonial, it noted, however, that [w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations. . . . Various formulations of this core class of testimonial statements exist: ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or

similar pretrial statements that declarants would reasonably expect to use prosecutorially . . . .'' (Citation omitted; internal quotation marks omitted.) *State* v. *Azevedo*, 178 Conn. App. 671, 676, 176 A.3d 1196 (2017), cert. denied, 328 Conn. 908, 178 A.3d 390 (2018).

''Accordingly, even though the Supreme Court did not establish a comprehensive definition of testimonial, it is clear that much of the [United States] Supreme Court's and our jurisprudence applying *Crawford* largely has focused on the reasonable expectation of the declarant that, under the circumstances, his or her words later could be used for prosecutorial purposes. . . . [T]his expectation must be *reasonable* under the circumstances and not some subjective or far-fetched, hypothetical expectation that takes the reasoning in *Crawford* and *Davis* [v. *Washington*, supra, 547 U.S. 813] to its logical extreme. (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Azevedo*, supra, 178 Conn. App. 676–77.

''In *Davis* v. *Washington*, supra, 547 U.S. 813, the court articulated the following test for determining whether such statements are testimonial and, therefore, inadmissible under *Crawford* in the absence of a prior opportunity for cross-examination by the defendant: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.'' (Internal quotation marks omitted.) *State* v. *Kirby*, supra, 280 Conn. 381. The determination of whether a statement is testimonial and thus subject to the admissibility restrictions of

Crawford is a question of constitutional law that is subject to plenary review. Id., 378.

The relevant facts are discussed in part I A 1 of this opinion. With regard to the statements that Kirkwood made over the telephone, which Flynn overheard, we conclude that those statements are nontestimonial, and therefore, the defendant has failed to satisfy the third prong of *Golding* with respect to those statements. Those statements fall into neither the " 'core class' " of testimonial statements—e.g., prior testimony at a preliminary hearing, grand jury testimony, former trial testimony, or police interrogations—nor one of the " '[v]arious formulations' " of the core class—e.g., affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that the declarant would expect to be used in a later prosecution. *State* v. *Azevedo*, supra, 178 Conn. App. 676.

Kirkwood made the statements over the telephone to someone she referred to as "[m]om." She did not make them directly to Flynn, and the statements were not made in response to Flynn's questions. Flynn did not initiate this conversation with Kirkwood, and there is no evidence that Kirkwood intended for Flynn to hear the statements she was making during her telephone call. Rather, Kirkwood made the statements over the telephone to a private person, not a government agent, while under stress from the incident, including the shooting, which she had witnessed minutes before. Accordingly, the defendant cannot prevail on his unpreserved claim that admission of the statements Kirkwood made over the telephone to "[m]om" violated his right to confrontation.

We conclude, however, that the statements that Kirkwood made directly to Flynn, which Taylor overheard, are testimonial in nature. Because the defendant had no

prior opportunity to cross-examine Kirkwood regarding those statements, the admission of those testimonial statements violated the defendant's right to confrontation. See *Crawford* v. *Washington*, 541 U.S. 53–54.

Our Supreme Court's decision in *State* v. *Kirby*, supra, 280 Conn. 361, informs our analysis of this issue. In *Kirby*, the defendant kidnapped and assaulted the victim; the victim, however, escaped and returned to her home. Id., 365. The officer who responded to the victim's home conducted an interview of the victim, in which she identified the defendant as the perpetrator of the kidnapping and assault, and detailed exactly what had occurred. Id., 366–69. On the following evening, the victim suffered fatal injuries when she fell down a flight of stairs and was thus unavailable for trial. Id., 371. The trial court allowed the responding officer to testify regarding the statements the victim made to him during the interview. Id., 368–69.

On appeal, the defendant argued, inter alia, that admission of the defendant's statements to the responding officer during the interview violated the defendant's right to confrontation. Id., 378. Our Supreme Court agreed, holding that "[t]he facts and circumstances of this case indicate that . . . the officer's questioning was directed not at seeking to determine . . . what is *happening*, but rather what *happened*. Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime—which is, of course, precisely what the officer should have done." (Emphasis added; internal quotation marks omitted.) Id., 385–86. The court further opined that "any emergency with respect to the complainant had ceased because the alleged crimes no longer were in progress and she was rendered protected by [the responding officer's] presence at her home, which constituted part of the alleged crime scene in this case." Id., 386. Accordingly, because

the responding officer was present and the defendant "was located some distance away . . . the primary purpose of [the responding officer's] interaction with the complainant [was] investigatory, and her answers to his questions testimonial statements. . . . [T]he trial court improperly permitted [the responding officer] to testify about the complainant's statements to him."[11] Id., 386–87.

The statements that Kirkwood made directly to Flynn are similarly testimonial in nature. As in *Kirby*, when Flynn was interviewing Kirkwood, his primary purpose was to determine what had *happened*, not what was *happening*. The emergency had ceased; Flynn and other officers were present at the scene, and both shooters had fled the area. Having heard Kirkwood make the statements over the phone in which she identified the defendant, Flynn interviewed Kirkwood as part of his investigation into the crime that had occurred. Accordingly, we conclude that the statements Kirkwood made directly to Flynn were testimonial. Because the defendant never had an opportunity to cross-examine Kirkwood regarding those testimonial statements, their admission violated the defendant's right to confrontation. Therefore, the third prong of *Golding* is satisfied.

The defendant's claim, however, fails under the fourth prong of *Golding*. "It is well established that a violation of the defendant's right to confront witnesses is subject to harmless error analysis . . . ." (Internal quotation marks omitted.) *State* v. *Pugh*, supra, 176 Conn. App. 530. Although the defendant has established that a constitutional violation exists, we conclude that the state presented sufficient independent evidence to render any error harmless beyond a reasonable doubt.

[11] Because the state did not argue in *Kirby* that admission of the victim's statements was harmless beyond a reasonable doubt, our Supreme Court reversed the judgment of conviction and remanded the case for a new trial. *State* v. *Kirby*, supra, 280 Conn. 387–88.

Such independent evidence includes the statements that Flynn overheard Kirkwood make during a phone call, in which she identified the defendant, with whom she had a child, as one of the shooters. Additionally, the jury heard Phillips' 911 call, in which she stated that the defendant had shot Perry. Numerous witnesses who were present at the Prest Street apartment during the occurrence identified the defendant as one of the shooters,[12] and at least two witnesses testified that they heard Kirkwood scream the defendant's name during the occurrence.[13] There was also testimony that the defendant fired the first shot.

In addition, the jury heard numerous witnesses testify that the defendant, Ellis, and Perry were involved in a fight while at the bar and that the defendant was on the losing end of that fight, evidence that could be used to establish a motive for the defendant's subsequent actions. The jury heard testimony that investigators could not find anyone to corroborate the defendant's alibi that he was in a taxi at the time of the occurrence. Moreover, the jury heard testimony that Ellis twice identified the defendant as one of the shooters: once while speaking to Clachrie, and again when shown a photographic array containing the defendant's photograph. The state also presented forensic evidence which established that the same weapons that were fired inside the apartment also were fired outside the apartment and at Ellis as he was running away.

[12] The witnesses' accounts varied regarding exactly how they recognized the defendant as one of the shooters. It is the job of the jury, however, to determine how much weight to give each item of evidence with which it is presented. See *State* v. *Osbourne*, 138 Conn. App. 518, 533–34, 53 A.3d 284 ("[i]t is axiomatic that it is the jury's role as the sole trier of the facts to weigh the conflicting evidence and to determine the credibility of witnesses" [internal quotation marks omitted]), cert. denied, 307 Conn. 937, 56 A.3d 716 (2012).

[13] Specifically, Shauntay Ellis testified that Kirkwood screamed, "Mikey, stop," and Parrish testified that Kirkwood screamed, "Mikey, why are you doing this . . . ?"

Accordingly, on the basis of the strong identification evidence before the jury, which was separate from the testimonial statements that Taylor overheard Kirkwood make directly to Flynn, we conclude that any error was harmless beyond a reasonable doubt. As the preceding paragraphs demonstrate, the state had presented substantial evidence for the jury reasonably to identify the defendant as the shooter of Perry and one of the shooters of Ellis. Therefore, all four prongs of *Golding* have not been satisfied with respect to this claim. Accordingly, the defendant's unpreserved constitutional claim must fail.

The judgment is affirmed.

In this opinion the other judges concurred.

ANDERS B. JEPSEN ET AL. *v.* BETH M. CAMASSAR ET AL.
(AC 39272)

Lavine, Sheldon and Elgo, Js.

Syllabus

The plaintiffs, A and C, who owned real property in a subdivision that also included a deed to an undivided 1/48 interest in a beach that was subject to certain restrictive covenants, brought this action seeking a declaration that a 2011 modification to the beach deed was improperly enacted. Thereafter, C withdrew from the action and B was added as a party plaintiff. The defendants included numerous individuals and entities that, at relevant times, owned real property in the subdivision. In 2014, a modification to the beach deed was signed by a majority of the property owners in the subdivision and filed on the land records, and A and B amended their complaint to challenge the propriety of the 2014 modification, alleging, inter alia, that it was enacted without providing proper notice to the owners of the land lots, without conducting a properly noticed meeting of the owners, and without conducting a written vote of the owners, as was required by the terms of the beach deed. The matter was tried to the court, which rendered judgment in favor of the defendants in part and held, inter alia, that the 2014 modification was valid and in full force and effect. On the appeal to this court by A and B, *held*:

1. Although the trial court correctly determined that modification of the restrictive covenants in the beach deed pertaining to the use of the beach did not require the unanimous approval of owners of all forty-eight properties, as § 4 of the beach deed contained a modification provision pursuant to which those covenants properly could be modified by the owners of a majority of the properties in the subdivision, that court improperly determined that other provisions of the beach deed could be modified through that same process, as the beach deed contained no provision for the modification of anything other than the restrictive covenants regarding the use of the beach, and, therefore, the sections of the 2014 modification that purported to modify, inter alia, how the beach deed itself could be modified were invalid.
2. Contrary to the trial court's conclusion, the process by which the 2014 amendment was enacted did not comport with the plain language of § 4 of the beach deed, which required a "majority vote in writing," and that a majority was to be determined in accordance with the "votes so counted"; moreover, a proper construction of § 4 of the beach deed required notice to all property owners of any vote thereon, and because the record here indicated that several property owners did not receive notice of the meeting to vote to adopt the 2014 modification and that although A and B attended the meeting, they endeavored to preserve their objection to the failure to give proper notice both prior to and during the meeting, the trial court improperly concluded that A and B waived their objection to the adequacy of the notice of the meeting.
3. Although the trial court correctly determined that the mere act of securing signatures on a modification instrument that was recorded on the land records did not constitute a vote in writing as contemplated by the beach deed, the record did not contain sufficient evidence to substantiate the trial court's finding that owners of a majority of properties cast votes in writing that were in favor of the 2014 modification; the notice of the vote on the 2014 modification was sent to forty-one of the forty-eight properties and also contained a proxy ballot on which owners could cast their written vote, twenty-four owners submitted a written proxy votes in favor of the 2014 modification, which was less than a majority of the forty-eight properties, and, thus, the trial court's conclusion that the 2014 modification was valid and in full force and effect could not stand.
4. The trial court properly rendered judgment in favor of the defendants on the claim against them alleging slander of title, that court having properly determined that A and B had failed to satisfy their burden of proof concerning that claim; A and B did not demonstrate that the defendants, in filing the modifications on the land records, published a false statement because although the 2011 and 2014 modifications may have been improper under the terms of the beach deed, the filing of those modifications on the land records did not constitute the filing of a demonstrably false statement about the title of A and B, the court's finding that the

defendants' actions were taken in good faith and with the intention of clarifying appropriate uses of the beach and not to damage A and B was supported by the evidence and testimony, which the court was free to credit, and the record was bereft of evidence that A and B suffered pecuniary loss as a result of the filing of the modifications.

5. The trial court did not abuse its discretion in declining to award attorney's fees to A and B for their defense against certain allegedly frivolous special defenses that were filed by certain of the defendants; although A and B claimed that no evidence at trial was presented to substantiate the special defenses and that they had expended attorney's fees in response thereto, it was within that court's discretion to determine that an award of attorney's fees was not warranted.

Argued January 5—officially released May 1, 2018

Procedural History

Action seeking a judgment declaring, inter alia, that a certain modification to a beach deed was null and void, and for other relief, brought to the Superior Court in the judicial district of New London, where the plaintiff Craig Barrila withdrew his complaint and Beth Jepsen was cited in as an additional plaintiff; thereafter, the named plaintiff et al. filed a third amended complaint; subsequently, the matter was tried to the court, *Bates*, *J.*; judgment in part for the defendants, from which the named plaintiff et al. appealed to this court; thereafter, the court, *Bates J.*, issued an articulation of its decision; subsequently, the court, *Bates J.*, denied the motion for attorney's fees filed by the named plaintiff et al., and the named plaintiff et al. filed an amended appeal. *Reversed in part; judgment directed.*

Beth A. Steele, for the appellants (named plaintiff et al.).

Mark S. Zamarka, with whom, on the brief, was *Edward B. O'Connell*, for the appellees (named defendant et al.).

Christine S. Synodi, for the appellees (defendant Savas S. Synodi et al.).

Opinion

ELGO, J. The plaintiffs Anders B. Jepsen and Beth Jepsen appeal from the declaratory judgment rendered by the trial court in this dispute regarding the modification of a beach deed. In this opinion, we address the plaintiffs' claims that the court improperly (1) concluded that the modification in question was properly enacted, (2) concluded that they had not met their burden in establishing slander of title, and (3) declined to render an award of attorney's fees in their favor.[1] We agree with the plaintiffs' first claim and, accordingly, affirm in part and reverse in part the judgment of the trial court.

The relevant facts are gleaned from the court's memorandum of decision and the undisputed evidence in the record before us. The parties are numerous individuals and entities that, at relevant times, owned real property in a subdivision in New London created in 1954 by the Quinnipeag Corporation (subdivision).[2] The subdivision

[1] The plaintiffs also have raised claims concerning a reverter clause in the beach deed, their request to quiet title to the property in question, the applicability of the Common Interest Ownership Act, General Statutes § 47-200 et seq., and various constitutional rights under the state and federal constitutions that allegedly have been violated by the modification of the beach deed. In light of our resolution of the principal issue in this appeal, we do not address those contentions.

[2] The operative complaint, the plaintiffs' third amended complaint, named as defendants Beth M. Camassar, Reuben Levin, Lenore Levin, Edwin J. Roland, Mary B. Roland, Richard L. Thibeault, Theresa Tuthill, David Eder, Estella C. Kuptzin, Ronald J. Wofford, Jeffrey R. Seidel, Bethany R. F. Seidel, Eunice Greenberg, Trustee, Emily S. King, Daniel S. Firestone, Hope H. Firestone, Leonard T. Epstein, Sandra R. Epstein, Eric Parnes, Marilyn Parnes, Anthony C. Polcaro, Joanne L. Polcaro, John A. Spinnato, Janine, Stavri, Sophocles Stavri, Robert McLaughlin, Jr., Roberta I. McLaughlin, Stanley Banks, Elaine Banks, Shirley Gottesdiener, Trustee, Jerry C. Olson, Vivian C. Stanley, David M. Goebel, Earline B. Goebel, Ronald E. Beausoleil, Pamela Beausoleil, Marian E. Dippel, Marilyn Simonson, Barry Weiner, Cynthia C. Weiner, Debra B. Gruss, Savas S. Synodi, Christine Synodi, Barbara Sinclair, Richard Sinclair, Michael P. Shapiro, Elaine P. Shapiro, Miriam Levine, John Oliva, Nancy Krant, Mary Margaret Kral, Trustee, Kenneth C. Wimberly, Dawn Hickey Thibeault, James J. Correnti, Willa M. Correnti,

plan filed on the New London land records depicts the location of various residential parcels, as well as a 250 foot strip of beachfront property commonly known as Billard Beach (beach). That area is designated as "beach rights" on the subdivision plan.

Each owner of real property in the subdivision is the holder of two deeds relevant to this dispute: a warranty deed that conveyed ownership rights in fee simple to his or her individual parcel of subdivision property (warranty deed) and a quitclaim deed that conveyed an "undivided one-forty-eighth (1/48th) interest" in the beach (beach deed).[3] This litigation concerns a purported modification of the beach deed.

Section 2 of the beach deed sets forth certain "restrictions on the use" of the beach,[4] known also as restrictive

Arnold D. Seifer, Judith A. Pickering, Hugh F. Lusk, Anne Marie Mitchell, Paul Burgess, Deborah Burgess, Michael J. Raimondi, Anne Marie Lizarralde, Manuel Lizarralde, George Synodi, and Maria S. Synodi. In that complaint, the plaintiffs alleged that those defendants "either had, on August 25, 2011, or now have an ownership interest in property located in [the subdivision]" or "either had, on December 23, 2014, or now have an ownership interest in property located in [the subdivision]."

The complaint also named, as interested persons to the declaratory action pursuant to Practice Book § 17-56, Jean P. Tuneski, J. Robert Tuneski, Frank J. Pezzello, Mary D. Passero, Michael E. Passero, Rabbi Carl Astor, Congregation Beth El of New London, Inc., William Keating, Mary J. Keating, Michael Levine, Craig Barrila, Frank Fazio, Antionette Foster, Leila Shakkour, Willa M. Correnti, James J. Correnti, and Paul J. Botchis. With respect to those interested persons, the plaintiffs alleged that they "either had, on August 25, 2011, or now have an ownership interest in [property] located in [the subdivision], but did not participate in the [m]odification hereinafter complained of" or "either had, on December 23, 2014, or now have an ownership interest in [property] located in [the subdivision], but did not participate in the [m]odification hereinafter complained of . . . ."

[3] On the first day of trial, the parties filed a stipulation of facts with the court, in which they stipulated, inter alia, that the language contained in the warranty and beach deeds that were marked as plaintiffs' exhibits 1 and 2 was "identical to the language contained in the [warranty] and beach deeds in the chains of title of all of the owners in the [subdivision]."

[4] Section 2 of the beach deed provides in relevant part: "[T]he Grantee, his heirs and assigns, shall use and have access to the premises conveyed in common with those to whom interests in said land have or may hereafter

covenants. "A restrictive covenant is a servitude, commonly referred to as a negative easement . . . . A servitude is a legal device that creates a right or an obligation that runs with the land or an interest in land." (Citation omitted; internal quotation marks omitted.) *Grovenburg* v. *Rustle Meadow Associates, LLC*, 174 Conn. App. 18, 25 n.7, 165 A.3d 193 (2017). As the Restatement (Third) of Property, Servitudes notes, "[t]he distinctive character of a servitude is its binding effect for and against successors in interest in the property to which the servitude pertains . . . ." 1 Restatement (Third), Property, Servitudes c.7, introductory note, p. 334 (2000); see also *Wykeham Rise, LLC* v. *Federer*, 305 Conn. 448, 468, 52 A.3d 702 (2012) (concluding that "the burdens of the covenants at issue . . . [could] run with the land" because "the covenants were formally created as part of a transfer of land; they explicitly provide that they are 'binding upon the [g]rantee, its successors and assigns, shall inure to the benefit of the [g]rantor, its successors and assigns, and shall run with the land'; and they appear on their face to relate to the land and not to impose any conceivable

be granted solely for the purpose of sitting, taking family meals, and/or bathing upon the beach included within the northerly and southerly sides of said lot when projected in the same courses indefinitely toward the southeast. It being understood and agreed that said use of the premises by the grantee shall be limited to the grantee, his heirs and assigns, and those who dwell with and form a part of the family of the grantee upon the [beach] premises . . . conveyed by this grantor to this grantee by deed of even date herewith, and lodged for record herewith in the New London Land Records, and shall be exercised by the grantee and his family only during such times as they shall dwell on the premises last referred to. In the event the grantee shall lease the premises last referred to, the tenant thereof and those who dwell with and form a part of the family of said tenant may exercise the use to the same extent as the grantee and in lieu of the grantee's right to so use during the term of the lease. The word family as used herein shall have the same meaning as the term is defined in the [warranty deed] . . . ." The warranty deed, in turn, defines "family" as "any collective body of persons who regularly reside together and form a single household, but shall not be deemed to include lodgers or boarders."

burden on the initial grantee independent of its ownership of the land"); *Bauby* v. *Krasow*, 107 Conn. 109, 112, 139 A. 508 (1927) ("[i]f [a restrictive covenant] runs with the land, it binds the owner"); *Olmstead* v. *Brush*, 27 Conn. 530, 536 (1858) ("if the grantee accepts the deed he assents to the [restrictive covenant] in it"). It is undisputed that all owners of property in the subdivision are bound by the restrictive covenants contained in the beach deed.[5]

Section 4 of the beach deed expressly provides a mechanism for the modification of the restrictive covenants contained in § 2 of the beach deed. It states: "That the restrictions on the use of the [beach] contained in [§] 2 hereof may be modified by a majority vote in writing of the owners of the premises conveyed. Each owner, (or in the case of joint ownership or ownership in co-tenancy, such joint owners or owners in co-tenancy together) shall be entitled upon any such vote to such number of votes as the numerator of their fractional interest in the premises conveyed, and upon any such vote, the majority shall be determined according to the sum of the votes so counted."

For more than one-half century, owners of property in the subdivision enjoyed the use of the beach without incident. That changed after Craig Barrila moved into the subdivision in 2008. As the court found, "[i]n 2008, [Barrila] purchased 755 Pequot Avenue, one of the forty-eight residential lots in [the subdivision], and although,

[5] We note in this regard that the beach deed states that "the Grantor . . . has remised, released, and forever QUITCLAIMED, and does by these presents, for itself and its successors and assigns justly and absolutely remise, release and forever QUITCLAIM until the said Grantee, his heirs and assigns, an undivided one-forty-eighth (1/48th) interest in" the beach. Prior to reciting the restrictive covenants governing the use of the beach, the beach deed states that "[t]he Grantee, by the acceptance of this deed covenants with Grantor, its successors and assigns, for the benefit of said Grantor, its successors and assigns and for all those who interest in said land may hereafter be granted . . . ."

as he testified, he did not personally use the beach, he allowed his girlfriend and her three children to swim, hold campfires and party at the beach. . . . Barrila testified that initially no one objected to this conduct. However, he stated that in July, 2011 . . . he received a telephone call from a representative of the [Billard Beach Association (association)][6] stating that these individuals could not use the beach without his being present. . . . Prior to the telephone call to Barrila, testimony and evidence received at trial does not indicate any significant concern being expressed about the use of or conduct on the beach by members of the [subdivision].

"In reaction to the use of the beach allowed by Barrila and what was perceived to be a lack of clarity in the deeds and [the association's] bylaws regarding allowable use of the beach, a group of residents including Garon Camassar,[7] an attorney and husband of defendant Beth M. Camassar, in the summer of 2011, began to circulate a petition for a 'Modification of Covenants and Restrictions re Billard Beach, New London, Connecticut.' This modification (2011 modification)—which all parties now agree is of no force or effect—purported to supersede all covenants and restrictions contained in the [beach deed]." (Footnotes added.)

The 2011 modification purported to revise the beach deed in three significant respects. First, it sought to modify the restrictive covenants governing the use of the beach contained in § 2 of the beach deed. Second, it revised the modification provision contained in § 4

[6] The December 16, 2015 stipulation of facts filed by the parties states that "[t]he Billard Beach Association is a voluntary organization and has no authority over its members or other [subdivision] owners." In its memorandum of decision, the court emphasized that "the court and all parties are bound by the stipulation for purposes of this litigation."

[7] It is undisputed that, at all relevant times, Garon Camassar was not an owner of property in the subdivision.

of the beach deed to require the approval of 75 percent of owners instead of a simple majority. Third, the 2011 modification added a new section regarding the enforcement of the beach deed, which provided for an award of compensatory damages, punitive damages, costs and attorney's fees.[8]

After learning of the 2011 modification proposal, Barrila sent an e-mail to approximately fifty e-mail addresses, the subject of which was "Proposed Changes to Billard Beach Land Deed." In that September 24, 2011 e-mail, Barrila indicated that he had been provided a copy of the 2011 modification earlier that day. He then stated that "there is an effort underway to collect a majority of signatures to support a modification to our current [beach] deed. . . . I have reviewed the proposed document today and have some substantial concerns. . . . I want to reiterate that these are not the beach rules (which are guidelines). These are legally binding and enforceable changes to our current [beach] deed which will impact your future ability to convey your asset. . . . I'm willing to support whatever the majority of my neighbors believe to be fair regarding the rules. However, I want to ensure that appropriate process is followed to effect any proposed changes. . . ."

The very next day, Ronald E. Beausoleil replied to Barrila by e-mail and offered to meet privately with him and Garon Camassar. Beausoleil at that time was a member of the executive committee of the association[9]

[8] Section 7 of the 2011 modification stated: "Any [o]wner of a [r]esidential [l]ot may enforce any of the provisions of this agreement by way of injunctive relief in the Superior Court, New London Judicial District, and with respect thereto, shall be entitled to compensatory damages as well as punitive damages, as the Court may deem appropriate. In addition to the foregoing the prevailing party shall be entitled to reasonable attorney's fees and costs incurred as a result of such action."

[9] An unsigned copy of the bylaws of the association, as amended on July 23, 1990, was admitted into evidence at trial. Pursuant to those bylaws, the affairs of the association are governed by its executive committee, which

and had collected signatures on the 2011 modification with Garon Camassar. Barrila responded to that e-mail hours later, stating that "[w]ith all due respect the time for private meetings has passed. I'm advocating [for] a public meeting with all interested/impacted parties involved." Later that night, Barrila's attorney contacted Garon Camassar, who had drafted the 2011 modification and had solicited signatures thereon. In an e-mail sent on the evening of September 25, 2011, Attorney Michael W. Sheehan reiterated Barrilla's concerns and asked "that nothing be implemented or recorded on the land records until all owners have been notified and been given the opportunity to meet and be heard." Despite that request, no meeting or vote of the owners transpired. Instead, the 2011 modification was filed on the New London land records the next morning.

On September 27, 2011, defendant Hope H. Firestone, a signatory to the 2011 modification acting in her capacity as president of the association, sent a letter to owners of property within the subdivision on association letterhead. That letter began by stating, "Good News!! As of Monday morning September 26, 2011, the restrictive provisions of the original beach deed have been modified." Firestone then provided an overview of the principal changes contained in the 2011 modification.

In its memorandum of decision, the court found that "contrary to the requirements of the beach deed, no formal 'vote' was ever noticed or taken on the [2011] modification; rather, the circulators assumed that once they had obtained the signatures of a majority of lot owners, the deed was recordable. . . . [A] 'vote' requires more formality than just obtaining signatures.

"shall consist of nine members of the Association in good standing. . . ." The record indicates that the executive committee alternatively is referred to as the "board" by members of the association. At trial, counsel for both the plaintiffs and the defendants clarified for the record that the terms "board" and "executive committee" were used synonymously.

Black's Law Dictionary 10th Ed. (2009), defines a vote as '[t]he expression of one's preferences or opinion in a meeting or election by ballot, show of hands, or other type of communication.' Accordingly, the [2011] modification appears to have been a legal nullity."[10] No party has challenged the propriety of that determination in this appeal.

After the 2011 modification was filed on the New London land records, Anders B. Jepsen and Barrila commenced this declaratory action.[11] Their original complaint sought to have the 2011 modification declared null and void. They alleged, inter alia, that the 2011 modification "was enacted without the knowledge or consent of the plaintiffs"; that it "was enacted without a full and fair opportunity to have a meaningful discussion between the owners [in the subdivision] and to voice opinion as to the merits of the [m]odification"; and that "the contents and meaning of the [m]odification was misrepresented to one or more of the signers . . . and to others who were not given an opportunity to review the [m]odification prior to its enactment."

As the court found in its memorandum of decision, "[i]n response to the suit, the parties engaged in prolonged discussions, including mediation, seeking to resolve the issues raised in the legal action, while still trying to respond to the concerns of the [a]ssociation members regarding uncontrolled use of the beach. . . . In the course of these negotiations, the proponents of the modification, working with the Executive Committee of the Association, developed and proposed the 'Amended and Restated Covenants and Restrictions Regarding Billard Beach, New London, Connecticut' "

[10] At trial, counsel for the defendants conceded that the 2011 modification was, as the plaintiffs' counsel put it, "void from the get-go."

[11] A withdrawal later was filed on behalf of Barrila by Attorney Mark E. Block on August 19, 2013. On March 3, 2014, Beth Jepsen was cited in as an additional party plaintiff.

(2014 modification).[12] The 2014 modification contained an extensive revision of the restrictive covenants governing the use of the beach.[13] It removed the 75 percent super majority requirement imposed in the 2011 modifi-

[12] Defendant Robert McLaughlin, Jr., who was the president of the association at the time that the 2014 modification was drafted, offered undisputed testimony that he crafted the language of that document with Garon Camassar and Attorney Edward O'Connell.

[13] The 2014 modification revised the restrictive covenants contained in § 2 of the beach deed as follows: "(2) The [o]wners, their heirs and assigns, shall use and have access to and the right to use the [beach] in common with those to whom interests in said [beach] have or may hereafter be granted solely for the purpose of sitting, taking family meals, bathing and/or related activities upon the beach included within the northerly and southerly sides of said [beach] when projected in the same courses indefinitely toward the southeast. It being understood and agreed that said use of the [beach] by the [o]wners shall be limited to the [o]wners, their heirs and assigns, and those who dwell with and form a part of the family of the [o]wners, and to their parents, children and grandchildren, whether or not such parents, children or grandchildren dwell upon a [r]esidential [l]ot. The word 'family' as used herein shall be construed to mean any collective body of persons who regularly reside together and form a single household, but shall not be deemed to include lodgers or boarders.

"(3) (a) Those persons who dwell in the residence who are [o]wners of the [r]esidential [l]ots appurtenant hereto (but not their parents, children or grandchildren) may invite [d]ay [g]uests to the [beach], not exceeding ten (10) in number. Provided, however, that an [o]wner of the [r]esidential [l]ot referred to herein be in attendance when such [o]wner's [d]ay [g]uests are present. A [d]ay [g]uest is an [o]wner's visitor who does not stay overnight at the [o]wner's residence.

"(b) Those persons who dwell in the residence who are [o]wners of the [r]esidential [l]ots appurtenant hereto (but not their parents, children or grandchildren) may invite [h]ouse [g]uests to the [beach], not exceeding five (5) in number. An [o]wner need not be in attendance when a [h]ouse [g]uest is present at the [beach]. A [h]ouse [g]uest is an [o]wner's visitor who is an overnight guest at the [o]wner's residence.

"(4) In the event the [o]wners shall lease a [r]esidential [l]ot, the tenant thereof and those who dwell with and form a part of the family of said tenant may exercise the use of the [beach] to the same extent as the grantees and in lieu of the grantees' right to so use during the term of the lease.

"(5) Use of the [beach] by all persons, whether [o]wner, family member, tenant or guest, is further subject to the following:

"a. Guests, as defined in [§] 3, may not exceed six (6) in number on Saturdays, Sundays and [l]egal [h]olidays between May 25th and September 10th of each year.

cation proposal, stating in relevant part that the restrictive covenants in the beach deed "may be modified by a written vote of a majority of the [r]esidential [l]ot [o]wners . . . ."[14] The 2014 modification also eliminated the enforcement provisions set forth in § 7 of the 2011 modification. See footnote 8 of this opinion.

On October 3, 2014, defendant Anne Marie Lizarralde, who at that time served as the secretary of the association, sent an e-mail to forty-one of the forty-eight owners within the subdivision notifying them that the association's annual meeting would be held on October 10, 2014.[15] In that correspondence, Lizarralde stated: "Billard Beach Members—The annual [association] meeting has been scheduled for Friday, October 10th at 7

"b. All campfires must be completely extinguished upon completion of use and all coals must be removed from the [beach] at the end of such use. No guest shall be permitted to maintain a campfire without the presence of an [o]wner.

"c. Any garbage or debris generated from use or presence on the beach shall be removed from the [beach] at the time that the [o]wner, family member, tenant or guest departs the [beach].

"d. No beach parties shall be conducted earlier than 5 P.M. or later than 10 P.M. of any day.

"e. No dogs, cats or other pets are permitted on the [beach] between May 25th and September 10th of each year.

"f. No excessive noise shall be generated on the [beach] at any time.

(6) If a [r]esidential [l]ot [o]wner anticipates that the number of guests will exceed the limits set forth in [§§] 3 and 5 hereof, the [o]wner shall notify an officer of the [association] of the proposed gathering. Such officer shall advise the [o]wner if any other gatherings are scheduled for the same date and time. If a conflict with a previously scheduled gathering exists, the [o]wner shall adjust his or her scheduled gathering as required. Any such gatherings shall not be held on weekends before 5:00 P.M."

[14] Section 7 of the 2014 modification provides: "The restrictions on the use of the premises contained in [§§] 2 through 5 hereof may be modified by a written vote of a majority of the Residential Lot Owners, in form suitable for recording in the New London Land Records. Each owner (or in the case of joint ownership or ownership in co-tenancy, such joint owners or owners in co-tenancy together) shall be entitled upon such vote to such number of votes as the numerator of their fractional interest in the property conveyed."

[15] At trial, Beth Jepsen provided uncontroverted testimony that Lizarralde's notice of the association's October 10, 2014 annual meeting, at which the

p.m. in the New London Senior Center (120 Broad Street). Please find attached four documents to read carefully. If you are unable to open any of them, please let us know and we'd be happy to put a hard copy in the mail to you. If you are unable to attend, please fill out the proxy and get it back to us as soon as possible so that you are represented. You can either e-mail back the proxy to [Lizarralde] or drop it off at any of the board members' homes. . . ." (Emphasis in original.)

Appended to that e-mail were four documents. The first was a copy of the 2014 modification. The second document was titled "BILLARD BEACH ASSOCIATION BALLOT OR PROXY" and purportedly permitted owners within the subdivision to vote by proxy on the 2014 modification.[16] The third document, titled "BILLARD BEACH ASSOCIATION NOTICE OF ANNUAL MEETING," was an agenda that set forth five items for business, including the "vote upon" the 2014 modification.[17]

2014 modification was to be voted upon, was provided to owners of forty-one properties in the subdivision. In its memorandum of decision, the court likewise found that Lizarralde's October 3, 2014 notice was furnished to owners of forty-one of the forty-eight properties.

[16] That document stated: "The undersigned, an owner of property in the Billard subdivision herewith moves or votes as follows:

"a. With respect to the Annual Meeting of the [association], I herewith give my proxy to vote at the Annual Meeting to be held on October 10, 2014, to [blank].

"b. With respect to the Amended and Restated Covenants and Restrictions [contained in the 2014 modification], I herewith vote as follows:

"a. That the [2014 modification] be adopted.

"b. That the [2014 modification] be rejected.

"Dated at New London, Connecticut this [blank] day of [blank], 2014.

"Property Owner [blank]."

[17] That notice stated: "Notice is hereby given that the Annual Meeting of the [association] shall be held on October 10, 2014, at the New London Senior Center, 120 Broad Street, New London, Connecticut, to transact the following business:

"a. Election of Officers and Directors;

"b. To vote upon the [2014 modification];

"c. To establish the dues structure for the upcoming year;

"d. Discussion of old business and new business;

"e. To transact any and all other business which may lawfully come before said meeting.

The fourth and final document was a letter addressed to "Billard Beach property owner" from the "Billard Beach Association Board," which provided an overview of the revisions contained in the 2014 modification. That letter indicated that "[t]his version of the [c]ovenants was conceived and drawn as a final document, not subject to revision . . . ."

Two days later, on October 5, 2014, Beth Jepsen replied to Lizarralde and all parties copied on Lizarralde's October 3, 2014 e-mail. In that communication, Jepsen stated in relevant part that the plaintiffs "object to both your improper Annual Meeting notice and to the [2014 modification] contained within it." After noting that "[i]t would take far too long to cover each issue with [respect to] both the 'notice' provided or the new [2014 modification] in a single e-mail," Jepsen stated that "there are too many issues and much of the legal language may be overly complicated for a . . . late night association meeting with other topics on the agenda." She thus requested "open discussion with the owners . . . over a reasonable amount of time with proper notice . . . in a much more respectful manner going forward."

The executive committee of the association held a meeting on the eve of the annual meeting on October 9, 2014. The minutes of that meeting, which were admitted into evidence, indicate that the committee had a "discussion about the annual meeting that will take place tomorrow," at which a vote would be held on the 2014 modification. With respect to that vote, the minutes state that "[o]nly property owners should be allowed to speak" and "[t]he plan will be to leave the vote open after the meeting for several weeks so that it will give those who are unable to attend the time to vote."

"f. Adjournment.

"Dated at New London, Connecticut this 2nd day of October 2014.

"Billard Beach Association Board."

The association's annual meeting was called to order at 7:04 p.m. on October 10, 2014. The record indicates that the owners of fewer than half of the forty-eight properties in the subdivision attended that meeting.[18] It is undisputed that, prior to the commencement of that meeting, several of the "ballot or proxy" forms contained in Lizarralde's October 3, 2014 notice were submitted to the association either electronically or in person that night. The first item of association business discussed during the meeting, which had been designated as item "b" on the association's agenda; see footnote 17 of this opinion; was the 2014 modification. As the court noted in its decision, defendant Robert McLaughlin, Jr., who was the president of the association at that time, began the discussion by stating that the executive committee had agreed to hold open the time for collection of the proxy votes until November 1, 2014.

The court found, and the testimony at trial reflects, that "[t]he meeting became quite contentious." In particular, the court found that, when Beth Jepsen was speaking, some attendees interrupted her and attempted to cut her off. The official minutes of the association meeting, which were admitted into evidence at trial, likewise state that "[s]everal people made rude comments that, in part, caused [the plaintiffs] to leave." Those minutes state that McLaughlin then "attempted to regroup" and "again mentioned that the vote [on the 2014 modification] would remain open until November 1st." At that time, defendant Eric Parnes made a motion "to move on with the rest of the annual meeting agenda," which was approved. Other association business then was conducted. Lizarralde and

[18] A sign-in sheet titled "BILLARD BEACH LOT OWNERS 2014 (48) 2014 Annual Meeting October 10th" was admitted into evidence at trial. That document indicates that owners of twenty properties attended the October 10, 2014 annual meeting.

McLaughlin both testified at trial that, at the conclusion of the October 10, 2014 meeting, a majority of owners of the forty-eight properties in the subdivision had not cast votes in favor of the 2014 modification, as required by § 4 of the beach deed.

The record likewise indicates, and the parties do not dispute, that owners of a majority of the forty-eight properties had not voted in favor of the 2014 modification by the November 1, 2014 deadline announced at the association's October 10, 2014 annual meeting. As the court found, "[t]wenty-two votes in favor of the [2014] modification—not a majority of all lot owners—were officially received by November 1 . . . ." The record nonetheless indicates that Lizarralde, on November 6, 2014, sent an e-mail to owners of fewer than thirty properties in the subdivision that stated in relevant part: "Many thanks to everyone who voted yes to amend the [beach deed]. We received a majority of yes votes and so . . . we now need to have each of you sign the official document that will be notarized. . . ."[19] In her testimony at trial, Lizarralde admitted that, at the time that she sent that e-mail, owners of a majority of the forty-eight properties had not submitted written votes in favor of the 2014 modification.

Prior to trial, the plaintiffs served a request for production on the defendants, in which they sought, inter alia, "[c]opies of all proxies submitted in conjunction with the 2014 Deed Modification." The defendants complied with that request, and produced copies of twenty-six proxy votes, which were admitted into evidence at trial. A total of twenty-four proxies contain votes in

[19] One recipient of that communication, defendant Miriam Levine, replied to Lizarralde by e-mail that she "never voted yes to anything," which affirmation is confirmed by the proxy signed by Levine on October 9, 2014, in which Levine voted against the 2014 modification. Both Levine's e-mail to Lizarralde and Levine's October 9, 2010 proxy vote were admitted into evidence at trial.

favor of the 2014 modification, less than a majority of the forty-eight properties in the subdivision.[20]

On December 23, 2014, the 2014 modification was filed on the New London land records. That instrument contained the signatures of owners of twenty-nine properties within the subdivision,[21] including several who did not attend the October 10, 2014 annual meeting and did not at any time submit a proxy vote.[22] The plaintiffs thereafter amended their complaint to challenge the validity of that enactment. Specifically, they sought a declaratory judgment that the 2014 modification "be declared null and void" for multiple reasons, including that it "was enacted without providing proper notice to the owners of the land lots . . . without conducting a properly noticed meeting of the owners, without allowing for ample prior discussion or comment by the owners . . . and without conducting a written vote of the owners. . . ."

A trial was held over the course of four days in December, 2015. The plaintiffs called nineteen witnesses and submitted sixty documents that were admitted into evidence. The defendants submitted three

[20] Two owners who cast proxy votes in favor of the 2014 modification, Mary Margaret Kral and Cynthia C. Weiner, ultimately did not sign the 2014 modification.

[21] Those signatures were made on various dates in November and December of 2014. It is undisputed that notice of the signing of the 2014 modification was not furnished to all property owners in the subdivision.

[22] We reiterate that both a copy of the 2014 modification filed on the New London land records and the defendants' September 22, 2015 notice of compliance with the plaintiffs' request for production, which included "[c]opies of all proxies submitted in conjunction with the [2014 modification]," were admitted into evidence at trial as plaintiffs' exhibits 7 and 24. Those exhibits indicate, and the parties do not dispute, that owners of seven properties that did not submit a written vote or proxy nevertheless signed the 2014 modification. They are: (1) Reuben Levin, Trustee, and Lenore Levin, Trustee; (2) Stanley Banks and Elaine Banks; (3) Kenneth C. Wimberly; (4) Eunice Greenberg, Trustee; (5) Estella C. Kuptzin; (6) Frank J. Pezzello and Debra B. Gruss; and (7) Hugh F. Lusk, for whom Janine Fay signed as "His Attorney-in-Fact."

exhibits, which were duplicative of documents already in evidence, but otherwise presented no documentary or testimonial evidence.[23] At the conclusion of trial, the parties, at the behest of the court, submitted posttrial briefs that outlined their respective positions on the issues presented at trial. In their brief, the plaintiffs argued, among other things, that "the 2014 modification [is] invalid because it was not properly noticed,[24] did not receive the requisite number of votes and was not executed pursuant to proper procedure."[25] (Footnote added.) In response, the defendants argued in their posttrial brief that "[t]he Beach Deed does not require notice, a meeting, or discussion or comment of any kind in order to modify its terms." The defendants further claimed that the act of signing the 2014 modification qualified as the written vote of the owners.

In its memorandum of decision, the court ruled in favor of the defendants on the slander of title counts of the operative complaint, finding that the plaintiffs had not demonstrated the existence of either a false statement, malice on the part of the defendants, or pecuniary loss to the plaintiffs. With respect to the plaintiffs' challenge to the 2011 modification, the court noted that the defendants at trial had conceded that it was "of no force or effect . . . ." The court then explained that "contrary to the requirements of the beach deed, no formal 'vote' was ever noticed or taken

[23] Following the close of the plaintiffs' case-in-chief on December 22, 2015, the defendants moved for a judgment of dismissal on the two slander counts, which the court denied. The defendants then rested without presenting any evidence.

[24] With respect to the notice issue, the plaintiffs stated that they "believe that fifteen days notice would be adequate advance notice, if it was given to all forty-eight owners, and if the notice included an explanation or warning as to how it differed from the original beach deed or how it would change owners' rights. However, those criteria were not met."

[25] The plaintiffs raised similar claims in the pretrial memorandum of law that they filed with the court on December 14, 2015.

on the [2011] modification; rather, the circulators assumed that once they had obtained the signatures of a majority of lot owners, the deed was recordable." The court flatly rejected that proposition, stating that "a 'vote' requires more formality than just obtaining signatures." The court thus rendered judgment in favor of the plaintiffs on the first count of their complaint, declaring that "[t]he 2011 modification by agreement of the parties is deemed null and void."

With respect to the 2014 modification, the court disagreed with the plaintiffs' claim that the beach deed could not be "altered without unanimous approval of all owners of the subdivided lots." The court also rejected the plaintiffs' claims that both the notice of the vote on the 2014 modification and the vote itself were improper. The court noted that, unlike the enactment of the 2011 modification, "a formal 'vote' was noticed and conducted prior to recording" the 2014 modification. The court emphasized, consistent with the stipulation of the parties; see footnote 3 of this opinion; that the association was a voluntary association that had no authority over owners within the subdivision, and further found that "the portion of the [October 10, 2014 association] meeting dedicated to the beach use was not considered by any party to be an official meeting of the association." Nevertheless, with respect to the "general standards of due process" that it deemed applicable to the modification process, the court stated that the association was "not held to the same 'due process' standards as a governmental authority" and concluded that no impropriety transpired with respect thereto.

Although a majority of owners had not voted in favor of the 2014 modification by the November 1, 2014 deadline, the court found that "seven more votes in favor, either in the form of proxies or signed documents, were

received and accepted in the weeks thereafter, representing twenty-nine of the forty-eight properties—a majority."[26] The court also found that the plaintiffs waived their right to object to any deficiency in the notice provided by Lizarralde's October 3, 2014 e-mail notice "as a result of their awareness [of] and participation" in the meeting. Accordingly, the court rendered judgment in favor of the defendants on the fourth count of the operative complaint, stating that "[t]he 2014 modification is declared valid and in full force and effect."[27]

[26] In its memorandum of decision, the court cited to plaintiffs' exhibit 24 and the "testimony of Beth Jepsen December 19, 2015" to substantiate that finding. Exhibit 24 is the response to the plaintiffs' request for production that was filed by the defendants and admitted into evidence. It contains copies of all ballot/proxies that were "submitted in conjunction with the 2014 deed modification." Only twenty-four votes in favor of the 2014 modification are contained therein.

We further note that Beth Jepsen did not offer any testimony on December 19, 2015, but rather testified on December 22, 2015. Nowhere in her testimony does Jepsen acknowledge that any additional "votes in favor" were cast by property owners. Rather, Jepsen testified only that owners of twenty-eight or twenty-nine properties ultimately *signed* the 2014 modification. As she testified on cross examination:

"[The Defendants' Attorney]: How many people signed the 2014 document?

"[Jepsen]: I don't know individual people but I know it was about twenty-eight or twenty-nine properties.

"[The Defendants' Attorney]: So that's a majority?

"[Jepsen]: That's a majority of signatures. It's not a majority vote."

[27] Following the commencement of this appeal, the plaintiffs asked the court to articulate as to various factual and legal issues. Relevant to this appeal are two such requests. First, the plaintiffs asked the court to articulate whether "the proxy/ballots collected constituted a majority written vote, which was later memorialized by signature on the 2014 Modification, and if so, what was the proper process that the court found to be undertaken in that vote." Second, the plaintiffs asked the court to articulate "the basis for court's finding that 'seven more votes in favor . . . were received and accepted in the weeks thereafter' and further articulate how many proxies/ballots were accepted in that time period as opposed to how many 'signed documents' were accepted." The court heard argument on that motion on October 28, 2016, and thereafter issued a two-page articulation of its decision that did not address either of those two requests. The plaintiffs filed a motion for review of that articulation with this court, in which it argued that the trial court had "failed to articulate the factual and legal basis of its determinations that appropriate 'due process,' 'notice' and a 'vote' had occurred." This court granted that motion but denied the relief requested.

I

The principal contention advanced by the plaintiffs is that the 2014 modification was improperly enacted. Specifically, they claim that the court improperly determined that (A) modification of the beach deed did not require the unanimous approval of all owners within the subdivision and (B) the 2014 modification was enacted in accordance with the strictures set forth in the beach deed. We address each claim in turn.

A

We first consider the claim that modification of the beach deed requires the unanimous approval of all lot owners within the subdivision. In support of that proposition, the plaintiffs rely on this court's decision in *Mannweiler* v. *LaFlamme*, 46 Conn. App. 525, 700 A.2d 57, cert. denied, 243 Conn. 934, 702 A.2d 641 (1997). In *Mannweiler*, this court held that "when, as here, the owner of a tract of land sells lots with restrictive covenants . . . and does not retain the right to rescind or amend them and *does not provide a method for terminating or amending them*, [the owner] has no right to do so without the consent of *all* the then property (lot) owners." (Emphasis added.) Id., 542. Accordingly, when no provision for the modification of a restrictive covenant is contained in the operative instrument filed on the land records, *Mannweiler* instructs that such modification may only be accomplished through the unanimous approval of all property owners. That precept comports with the position adopted by the Restatement (Third) of Property, Servitudes, which recognizes that "[a] servitude may be modified . . . by agreement of the parties [or] pursuant to its terms . . . ." 2 Restatement (Third), supra, § 7.1, p. 337. As a general matter, the Restatement notes that "[w]here *all* of the parties interested in a servitude agree, they are free to modify" the servitude. (Emphasis added.) Id., comment

(b), p. 339. The Restatement further indicates that "[t]he terms of a servitude may include a provision that permits modification . . . without the consent of all the parties. . . . [A] modification . . . pursuant to such a provision is generally effective." Id., comment (c), p. 340. Absent such an express provision, "[a] modification agreed to by some but not all of the parties is not effective . . . ." Id.; accord 9 Powell on Real Property (M. Wolf ed., 2000) § 60.08, pp. 112–13 (noting that "absent express provisions to the contrary, amendments may only be effected by all of the owners of property burdened by the covenants" and observing that "[c]ovenants can also be modified . . . where the covenants permit modification . . . by a specified percentage of lot owners").

It is undisputed that the beach deed in the present case contains a modification provision, which requires the written approval of the owners of a majority of the forty-eight properties in the subdivision to modify "the restrictions on the use of the [beach]" set forth in § 2.[28] Because a method for amending the restrictive covenants contained in § 2 is expressly provided for in the beach deed, those covenants properly could be modified by the owners of a majority of the properties in the subdivision. For that reason, the trial court correctly concluded that modification of those restrictive covenants does not require the unanimous approval of owners of all forty-eight properties.[29]

[28] Section 4 is one of five enumerated covenants in the beach deed. It states: "That the restrictions on the use of the [beach] contained in [§] 2 hereof may be modified by a majority vote in writing of the owners of the premises conveyed. Each owner, (or in the case of joint ownership or ownership in co-tenancy, such joint owners or owners in co-tenancy together) shall be entitled upon any such vote to such number of votes as the numerator of their fractional interest in the premises conveyed, and upon any such vote, the majority shall be determined according to the sum of the votes so counted."

[29] In its memorandum of decision, the court stated that "the plain language of the [1959] beach deed . . . specifically allows the owners of a majority

At the same time, it is undisputed that §§ 7 through 12 of the 2014 modification amended various provisions of the beach deed other than the "restrictions on use of" the beach contained in § 2 thereof, including the manner by which the beach deed itself may be modified.[30] Yet the beach deed contains no provision for the modification of anything other than the restrictive covenants regarding "the use of" the beach. Because no such provision exists in the beach deed, the modification of anything other than the restrictive covenants contained in § 2 of the beach deed required the unanimous approval of all property owners in the subdivision. *Mannweiler* v. *LaFlamme*, supra, 46 Conn. App. 542. The modifications contained in §§ 7 through 12 of the 2014 modification, therefore, are invalid. The court improperly concluded otherwise in its memorandum of decision.

B

The plaintiffs also challenge the process by which the 2014 modification was enacted. More specifically, they maintain that the court improperly concluded that adequate notice was provided to the owners of subdivision properties, that a formal vote was properly conducted in accordance with § 4 of the beach deed, and that signatures on the 2014 modification by owners that

of the house lots to modify the restrictions on the beach uses set forth in [§] 2."

[30] Section 7 of the 2014 modification states in relevant part that "[t]he restrictions on the use of the premises contained in [§§] 2 through 5 hereof may be modified by a written vote of a majority of the Residential Lot Owners, in form suitable for recording in the New London Land Records. . . ." Section 7 of the 2014 modification also eliminated the requirement of § 4 of the beach deed that "upon any such vote, the majority shall be determined according to the sum of the votes so counted." See footnotes 14 and 28 of this opinion. In addition, §§ 8 through 12 of the 2014 modification all contain modifications to other provisions of the beach deed that do not pertain to the restrictions on the use of the beach set forth in § 2 of the beach deed.

otherwise did not attend the October 10, 2014 meeting or submit a written vote or proxy nevertheless constituted proper votes, as required by the beach deed.[31] Those claims require us to construe § 4 of the beach deed, which governs the modification of the restrictive covenants at issue.

"The principles governing our construction of conveyance instruments are well established. In construing a deed, a court must consider the language and terms of the instrument as a whole. . . . Our basic rule of construction is that recognition will be given to the expressed intention of the parties to a deed or other conveyance, and that it shall, if possible, be so construed as to effectuate the intent of the parties. . . . In arriving at the intent expressed . . . in the language used, however, it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence. . . . The construction of a deed in order to ascertain the intent expressed in the deed presents a question of law and requires consideration of all its relevant provisions in the light of the surrounding circumstances."[32] (Internal quotation marks omitted.) *Il Giardino, LLC* v. *Belle Haven Land Co.*, 254 Conn. 502, 510–11, 757 A.2d 1103 (2000).

[31] We note that the plaintiffs alternatively argue that the 2014 modification failed to comply with the requirement of "a written vote of at least 75 percent of the Residential Lot Owners" in the subdivision, as provided in the 2011 modification filed on the New London land records. At oral argument, the plaintiffs acknowledged that, if this court concludes that the 2014 modification was improperly enacted without "a majority vote in writing" of the owners of the forty-eight properties in the subdivision, as required by § 4 of the beach deed, there is no need to address that alternative contention.

[32] As our Supreme Court recently observed, "[a]lthough in most contexts the issue of intent is a factual question on which our scope of review is limited . . . the determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is plenary." (Internal quotation marks omitted.) *Deane* v. *Kahn*, 317 Conn. 157, 166, 116 A.3d 259 (2015).

In articulating those principles of construction, our Supreme Court has expressly "adopted the position" set forth in the Restatement (Third), Property, Servitudes § 4.1.[33] *Zhang* v. *Omnipoint Communications Enterprises, Inc.*, 272 Conn. 627, 636, 866 A.2d 588 (2005). The commentary to § 4.1 specifically addresses the interpretation of expressly created servitudes, such as those contained in the beach deed. With respect to such expressly created servitudes, the Restatement notes that "[t]he fact that servitudes are intended to bind successors to interests in the land, as well as the contracting parties, and are generally intended to last for an indefinite period of time, lends increased importance to the writing because it is often the primary source of information available to a prospective purchaser of the land. The language [in a deed] should be interpreted to accord with the meaning an ordinary purchaser would ascribe to it in the context of the parcels of land involved. Searching for a particular meaning adopted by the creating parties is generally inappropriate because the creating parties intended to bind and benefit successors for whom the written record will provide the primary evidence of the servitude's meaning." 1 Restatement (Third), supra, § 4.1, comment (d), pp. 499–500; accord *Dent* v. *Lovejoy*, 85 Conn. App. 455, 463–64, 857 A.2d 952 (2004) (adhering to that standard of construction), cert. denied, 272 Conn. 912, 866 A.2d 1283 (2005).

We begin, therefore, with the language of the deed. Section 4 of the beach deed provides: "That the restrictions on the use of the [beach] contained in [§] 2 hereof

[33] Section 4.1 of the Restatement states: "(1) A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.

"(2) Unless the purpose for which the servitude is created violates public policy, and unless contrary to the intent of the parties, a servitude should be interpreted to avoid violating public policy. Among reasonable interpretations, that which is more consonant with public policy should be preferred." 1 Restatement (Third), supra, § 4.1, pp. 496–97.

may be modified by a majority vote in writing of the owners of the premises conveyed. Each owner, (or in the case of joint ownership or ownership in co-tenancy, such joint owners or owners in co-tenancy together) shall be entitled upon any such vote to such number of votes as the numerator of their fractional interest in the premises conveyed, and upon any such vote, the majority shall be determined according to the sum of the votes so counted."[34] The first sentence of that section sets forth three requirements for the modification of the restrictions on the use of the beach: (1) there must be "a majority vote"; (2) that vote must be expressed "in writing"; and (3) that vote must be among "the owners" of the properties in the subdivision.

The second sentence in § 4 of the beach deed clarifies the nature of "any such vote" conducted pursuant thereto. That sentence memorializes the fact that, when a vote on a proposed modification transpires, the property owners in the subdivision are "entitled upon any such vote" to cast votes in proportion to their fractional interest in the beach. That sentence then concludes by instructing that "upon any such vote, the majority shall be determined according to the sum of the votes so counted."

In its memorandum of decision, the trial court concluded that the vote contemplated by § 4 of the beach deed "requires more formality than just obtaining signatures." We agree. The plain language of § 4 not only requires a "majority vote in writing," but twice qualifies that imperative with modifiers that are implicated "upon any such vote."[35] The plain language of § 4 also

[34] Despite a canvass of state and federal decisional law across this nation, we have discovered no authority involving a deed or contract with the "majority vote in writing" or the "votes so counted" language at issue in the present case.

[35] "The word 'such' has been construed as a related adjective referring back to and identifying something previously spoken of and that it naturally, by grammatical usage, refers to the last precedent." (Internal quotation marks omitted.) *Nichols* v. *Warren*, 209 Conn. 191, 197, 550 A.2d 309 (1988).

mandates that the issue of whether a "majority" has been secured in favor of any proposed modification is to be determined in accordance with "the *votes* so counted." (Emphasis added.) In this regard, we are mindful that every word and phrase of a deed is presumed to have meaning, and must be construed in a manner that does not render it superfluous. *Bird Peak Road Assn., Inc.* v. *Bird Peak Corp.*, 62 Conn. App. 551, 557, 771 A.2d 260, cert. denied, 256 Conn. 917, 773 A.2d 943 (2001). The use of the plural "votes" in the concluding sentence of § 4 to determine whether a "majority" has been secured is strong evidence of an intent to establish a two-step modification process. Under the first step of that modification process, which involves a vote "in writing of the owners of the premises conveyed," all owners of a fractional interest in the beach possess the right to participate in any such vote. Pursuant to the plain language of the concluding sentence clause of § 4, "upon any such vote," the "votes" of those owners then are "counted," from which it "shall be determined" whether owners of a "majority" of the properties in the subdivision favor the proposed modification.

That construction is one which we believe an ordinary purchaser of property in the subdivision would ascribe to it in the context of the parcels of land involved. See *Dent* v. *Lovejoy*, supra, 85 Conn. App. 463. In this respect, we note the particular situation of the parties and the circumstances surrounding the enactment of the beach deed. The record reflects that the beach was an integral part of the subdivision when it was created in 1954. Each property is allocated an "undivided one-forty-eighth (1/48th) interest" in the beach, as memorialized in the beach deed. The subdivision plan filed on the New London land records describes the beach area as one subject to "beach rights." Moreover, the restrictive covenants contained

in the beach deed are uniform covenants enacted by a grantor that divided its property into building lots under a general development scheme. Under Connecticut law, purchasers of those lots are presumed to have "paid a premium for the property in reliance upon the uniform development plan being carried out." *Mannweiler* v. *LaFlamme*, supra, 46 Conn. App. 536; see also *Leabo* v. *Leninski*, 182 Conn. 611, 615, 438 A.2d 1153 (1981) (noting that beach easements "enhance the value of the property and that such enhancement was implied by the subdivision's character as a waterfront development"). As the Restatement recognizes, "the consideration paid for the servitude" is a proper consideration in the construction of expressly created servitudes. 1 Restatement (Third), supra, § 4.1, comment (d), p. 499. The servitudes at issue in this case secured the right of property owners to "use and have access to" the beach. To paraphrase our Supreme Court, those servitudes constitute a "property right which the parties to the original conveyance voluntarily created, which was and is of substantial benefit to the [property owners], and for which [they] paid."[36] *Harris* v. *Pease*, 135 Conn. 535, 541, 66 A.2d 590 (1949).[37] Both the magnitude of

[36] In the operative complaint, the plaintiffs alleged that "[o]ne or more provisions of the 2014 Modification is contrary to the property interests of the Plaintiffs and all owners of interests in [the subdivision]" and that "[t]he 2014 Modification deprived individual owners of the land lots of significant property . . . rights."

[37] Accord *Chapman* v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 626–27, 70 S. Ct. 392, 94 L. Ed. 393 (1950) (concluding that restrictive covenant was a "property right" similar to an easement); *Harris* v. *Pease*, supra, 135 Conn. 539–40 ("[t]he right of [the property owner] and his successors in title to have the [restrictive covenant] continued in force is a property interest which they have in [the property subject to that covenant]"); *Grovenburg* v. *Rustle Meadow Associates, LLC*, supra, 174 Conn. App. 45 ("the right of one property owner to the protection of a restrictive covenant is a property right just as inviolable as is the right of others to the free use of their property when unrestricted" [internal quotation marks omitted]); *Downes-Patterson Corp.* v. *First National Supermarkets, Inc.*, 64 Conn. App. 417, 428, 780 A.2d 967 ("the defendant possessed a property right that it had bargained for when it purchased its land"), cert. granted, 258 Conn. 917,

that right and the context in which it arose inform our construction of § 4 of the beach deed, and further explain why that modification provision memorializes the right of all owners of a fractional interest in the beach to cast a vote on any proposed modification.

In that vein, we emphasize that the present dispute does not involve a trivial dispute between neighbors. This case concerns the modification, and possible restriction, of an owner's right to use the beach. The law presumes that owners purchased their properties in this beachfront subdivision in reliance on the use rights memorialized in § 2 of the beach deed. *Mannweiler* v. *LaFlamme*, supra, 46 Conn. App. 536. Although that deed includes a mechanism for the modification of those use rights, we are convinced that purchasers in the subdivision would read those provisions, which mandate both a "vote in writing of the owners of the premises conveyed" and a determination of "the majority" view on any proposed modification based on "the sum of the votes so counted," as requiring a formal vote, at which each owner of a fractional interest in the beach has the opportunity to cast a vote.[38] As the

782 A.2d 1242 (2001) (appeal dismissed June 25, 2002); *135 Wells Ave., LLC* v. *Housing Appeals Committee*, 478 Mass. 346, 357 n.10 and 358, 84 N.E.3d 1257 (2017) (noting that "deed restrictions are a property interest, a restrictive covenant on land" and describing restrictive covenants as "real property rights"); *Malcolm* v. *Shamie*, 290 N.W.2d 101, 102 (Mich. App. 1980) ("restrictive covenants are valuable property rights subject to judicial protection"); *Cunningham* v. *Gross*, 102 N.M. 723, 725, 699 P.2d 1075 (1985) (restrictive covenants "constitute valuable property rights of all lot owners" in subdivision); *Crane Neck Assn., Inc.* v. *NYC/Long Island County Services Group*, 92 App. Div. 2d 119, 122, 460 N.Y.S.2d 69 (1983) ("restrictive covenants constitute private property rights which must be observed by the State"), aff'd, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (1984); Restatement (Third), supra, § 7.8, reporter's note, p. 383 ("in this Restatement, all servitude benefits are treated as property rights").

[38] Section 4.10 of the Restatement addresses use rights conferred by servitude and notes that the holder of an instrument memorializing such rights "is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. . . ." 1 Restatement (Third), supra, § 4.10, p. 592. In "balancing the interests" of various holders, the

trial court rightly concluded in its construction of the beach deed, the mere act of collecting signatures on a written document does not suffice.

The particular language employed in § 4 of the beach deed distinguishes this case from others in which the deed specifically provided that modification may be accomplished by the mere filing of a written instrument on the land records. See, e.g., *Cappello* v. *Ciresi*, 44 Conn. Supp. 451, 455, 691 A.2d 42 (1996) ("[p]aragraph eleven of the [deed] provides that the restrictive covenants may be terminated . . . at the end of certain periods by an agreement executed by at least 51 percent of the then owners of the parcels of land, provided the agreement is recorded in the land records"), aff'd, 44 Conn. App. 587, 689 A.2d 1169 (1997); *Armbrust* v. *Golden*, 594 So. 2d 64, 65 (Ala. 1992) (modification provision stated in relevant part that "[t]hese restrictions shall continue in full force . . . unless the then owners of a majority of the lots affected hereby sign a written agreement terminating these restrictions, and put such written termination on record in the Office of the Judge of Probate of the County where the property is situated"); *Miller* v. *Sandvick*, 921 S.W.2d 517, 519–20 (Tex. App. 1996, writ. denied) (modification provision stated in relevant part that restrictive covenants "may be amended at any time by an instrument signed by two-thirds . . . of the then owners . . . and such instrument is recorded in the office of the County Clerk"). Unlike those cases, the deed here contains no provision for modification by the filing of a written instrument on the land records. Rather, § 4 plainly contemplates a vote of subdivision property owners, with the "votes

Restatement recognizes that "neighborhood preservation concerns should be" a relevant consideration. Id., comment (h), p. 602. The requirement of a formal vote at which all property owners are afforded an opportunity to vote on any proposed modification to their beach use rights, rather than an effort to simply secure a majority of signatures on a document, strikes us as far more conducive to neighborhood preservation.

so counted" determinative of whether a majority has been obtained.

Although the proponents of the 2014 modification, now defendants in this action, maintain that the simple act of signing the 2014 modification qualifies as "the written vote" of the owners, the trial court rejected that claim, as do we. As the court aptly noted, the modification procedure outlined in § 4 of the beach deed "requires more formality than just obtaining signatures." The defendants' construction is contrary to both the plain language of § 4 of the beach deed and the meaning that an ordinary purchaser would ascribe to it, given the purchaser's significant property interest in the use of the beach.[39] See *Harris* v. *Pease*, supra, 135 Conn. 541.

[39] As our Supreme Court has observed, "[a]ctions may be held to speak louder than words . . . ." *Malone* v. *Santora*, 135 Conn. 286, 292, 64 A.2d 51 (1949). The construction advanced by the defendants is belied by the fact that the proponents of the 2014 modification deemed it necessary to both conduct a formal vote at the October 10, 2014 association meeting, and to materially alter the modification provisions of the beach deed. In part I A of this opinion, we concluded that those revisions to the modification provisions of the beach deed are invalid, as they were not enacted by unanimous consent of the owners of the forty-eight properties in the subdivision.

Significantly, the 2014 modification amended the modification provisions of § 4 of the beach deed in several crucial respects. First, § 7 of the 2014 modification replaced "modified by a majority vote in writing of the owners" with "modified by a written vote of a majority of the Residential Lot Owners, in form suitable for recording in the New London Land Records." See footnote 14 of this opinion. Second, the 2014 modification eliminated altogether the requirement of § 4 that "upon any such vote, the majority shall be determined according to the sum of the votes so counted." In contrast to § 4 of the beach deed, all that is required to modify the restrictions on the use of the beach under the 2014 modification is the filing on the land records of an instrument signed by the owners of a majority of the properties in the subdivision.

In addition, § 12 of the 2014 modification inserted new language regarding the manner in which such an instrument to modify the beach deed may be executed. That new section states that "[t]his Amendment and Restatement may be signed by the respective Owners in counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument." "In counterparts," known also as "execution

In its memorandum of decision, the court found that the 2011 modification was invalid because "no formal 'vote' was ever noticed or taken," which conclusion is consistent with our construction of § 4 of the beach deed.[40] The court distinguished that 2011 enactment from the 2014 modification, stating in relevant part that "[u]nlike the process of approving and recording the [2011 modification], a formal 'vote' was noticed and conducted prior to recording of the [2014] modification." Accordingly, the court declared the 2014 modification "valid and in full force and effect." That determination is problematic in two respects.

1

First, the court found, and the parties do not dispute, that notice of the vote on the 2014 modification was *not* provided to all property owners. See footnote 15 of this opinion.[41] As we previously have discussed, § 4

in counterparts," is a term of art that refers to the practice of compiling various documents and/or signatures to a contract and treating the combination thereof as a single agreement. See, e.g., *Aubin* v. *Miller*, Superior Court, judicial district of Fairfield, Docket No. CV 98-0355768-S (April 10, 2000), aff'd, 64 Conn. App. 781, 781 A.2d 396 (2001); *Central Basin Municipal Water District* v. *Fossette*, 235 Cal. App. 2d 689, 751, 45 Cal. Rptr. 651 (1965); *Industrial Heat Treating Co.* v. *Industrial Heat Treating Co.*, 104 Ohio App. 3d 499, 505, 662 N.E.2d 837, review denied, 74 Ohio St. 3d 1477, 657 N.E.2d 784 (1995). In the present case, the proponents of the 2014 modification utilized the very practice memorialized in § 12 of the 2014 modification in enacting the 2014 modification, as the signatures on that instrument appear on various documents bearing divers dates between November 9, 2014 and December 17, 2014. It nonetheless remains that § 4 of the beach deed contains no provision for that practice.

[40] We reiterate that § 4 of the beach deed pertains solely to the modification of the restrictions on the use of the beach contained in § 2 of the beach deed.

[41] In finding that Lizarralde's October 3, 2014 notice of the vote on the 2014 modification was provided to owners of only forty-one of the forty-eight properties in the subdivision, the court in its memorandum of decision stated that "[i]t appears that the [proponents of the 2014 modification] lacked the e-mail and home addresses for a few of the property owners . . . ." The court then cited to Lizarralde's trial testimony on December 18, 2015, in support of that finding. A review of the transcripts reveals that no such statement is contained in Lizarralde's testimony or the testimony of any witness regarding the enactment of the 2014 modification. That finding

of the beach deed affords owners of a fractional interest in the beach the right to cast a vote on any proposed modification to the restrictions on its use. As the defendants concede in their appellate brief, "each owner is entitled to one vote . . . ." It is axiomatic that the right to vote is meaningless without notice that a vote is being held. See, e.g., *Walgren* v. *Board of Selectmen*, 373 F. Supp. 624, 635 (D. Mass. 1974) ("in view of the importance of the right to vote" it was "inconceivable" that notice would not be required), aff'd, 519 F.2d 1364 (1st Cir. 1975); *Graham* v. *State Officers Electoral Board*, 269 Ill. App. 3d 609, 612, 646 N.E.2d 1357 (1995) ("[n]otice is the most basic prerequisite to ensure the right to vote"). For that reason, we disagree with the defendants that notice of the vote on a proposed modification of the beach deed is not required pursuant to § 4.

Indeed, § 4.1 (2) of the Restatement (Third) of Property, Servitudes, provides in relevant part that "a servitude should be interpreted to avoid violating public policy. Among reasonable interpretations, that which is more consonant with public policy should be preferred." 1 Restatement (Third), supra, § 4.1 (2), p. 497. Connecticut's "strong public policy favoring the protection of private property rights"; *Ace Equipment Sales, Inc.* v. *Buccino*, 273 Conn. 217, 232 n.11, 869 A.2d 626 (2005); coupled with the fact that the beach deed expressly provides for a vote of the property owners on any proposed modification to the restrictive covenants governing their use of that private property, convinces us that the proper construction of § 4 of the beach deed requires notice to property owners of any vote thereon, as the trial court concluded.[42]

thus is clearly erroneous. See *McBurney* v. *Paquin*, 302 Conn. 359, 368, 28 A.3d 272 (2011). Moreover, "a simple review of the town assessor's online records" would have disclosed the addresses of all property owners. *Sinoway Family Partnership* v. *Zoning Board of Appeals*, 50 Conn. Supp. 513, 522–23, 947 A.2d 20 (2007).

[42] Cf. *Grovenburg* v. *Rustle Meadow Associates, LLC*, supra, 174 Conn. App. 82–83 ("[t]he concept of notice concerns notions of fundamental fair-

At trial, the defendants maintained that the plaintiffs waived any objection to the adequacy of the notice through their attendance at and participation in the October 10, 2014 association meeting, relying primarily on *Schwartz* v. *Hamden*, 168 Conn. 8, 357 A.2d 488 (1975). In its memorandum of decision, the court agreed with the defendants, citing *Schwartz*. That precedent, however, is readily distinguishable from the present case. *Schwartz* involved a public hearing of a planning and zoning commission, at which certain plaintiffs appeared through counsel. Id., 14. Our Supreme Court emphasized that although notice by mail had not been provided to those plaintiffs, they "waived their right to object to that omission when they appeared without objection at the hearing." Id., 15.

That context is plainly distinguishable from this case, which does not involve a public hearing on proposed zoning action but, rather, a vote on proposed modifications to the plaintiffs' deed to the beach and corresponding use rights. Those rights are memorialized in restrictive covenants, in which the plaintiffs here possess a property interest. *Harris* v. *Pease*, supra, 135 Conn. 541. Interested members of the public may attend a zoning hearing, and participate in the public comment portion thereof, but they are not entitled to cast votes on the proposed zoning action. By contrast, the beach deed's modification provision expressly vests in owners of a fractional interest in the beach the right to vote on proposed modifications to the restrictions on its use.

Schwartz also is inapposite on a factual level, as the plaintiffs here did not appear at the October 10, 2014

ness, affording parties the opportunity to be apprised when their interests are implicated in a given matter" [internal quotation marks omitted]); 9 Powell on Real Property, supra, § 60.08, p. 115 (noting that, with respect to modification of restrictive covenants, "[i]n all cases, due process must be observed as to general amendment and voting procedures").

meeting without objection.[43] As Beth Jepsen stated in her October 5, 2014 response to Lizarralde's notice of the vote on the 2014 modification, the plaintiffs "object to both your improper Annual Meeting notice and to the [2014 modification] contained within it." Beth Jepsen reiterated those objections during her comments at the October 10, 2014 meeting. *Schwartz*, therefore, is both contextually and factually inapplicable to the present case. Far from intentionally relinquishing their objections to the October 10, 2014 proceeding, the record demonstrates that the plaintiffs endeavored to preserve those objections both prior to and during that proceeding.

The court, therefore, improperly concluded that the plaintiffs waived their objection to the adequacy of Lizarralde's October 3, 2014 notice. In light of the undisputed fact that notice of the vote on the 2014 modification was not provided to all property owners in the subdivision, we agree with the plaintiffs that the enactment of the 2014 modification did not comport with § 4 of the beach deed.[44]

2

We already have determined that the court properly concluded that the mere act of securing signatures on a modification instrument does not constitute the "vote in writing" contemplated by § 4 of the beach deed. In its decision, the court also determined that, unlike the 2011 modification, the 2014 modification was the product of a formal vote. Section 4 of the beach deed requires

[43] The plaintiffs also were not accompanied by legal counsel at the October 10, 2014 association meeting.

[44] We cannot speculate as to what impact the failure to provide notice to all property owners had on the formal vote on the 2014 modification, or whether such notice would have impacted the decisionmaking of other owners in the subdivision. See *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 510, 970 A.2d 578 (2009) (speculation and conjecture have no place in appellate review).

a "vote in writing of the owners" on any proposed modification to the restrictive covenants governing the use of the beach. Section 4 further mandates that the determination of whether a majority has been secured "shall be determined according to the sum of the votes so counted." The question, then, is whether the record contains evidence to substantiate the court's finding that owners of a majority of the properties cast votes in writing that were in favor of the 2014 modification.

In its memorandum of decision, the court found that a formal vote on the 2014 modification was scheduled for, and conducted at, the association's October 10, 2014 annual meeting. As the court found, Lizarralde provided notice of that vote to owners of forty-one properties. That notice, which was admitted into evidence at trial, included (1) a copy of the 2014 modification; (2) the October 10, 2014 meeting agenda, on which "[t]o vote upon the [2014 modification]" was the second item of business; and (3) a form titled "BILLARD BEACH ASSOCIATION BALLOT OR PROXY" on which owners could cast their written vote on the 2014 modification. See footnotes 16 and 17 of this opinion. The testimonial and documentary evidence in the record, including the minutes of the October 10, 2014 meeting[45] and Lizarralde's November 6, 2014 e-mail,[46] substantiates the court's finding that a formal vote on the 2014 modification transpired. The record indicates that several owners submitted written proxy votes at the October 10, 2014 meeting, while others submitted theirs in the ensuing weeks.

[45] Those minutes state in relevant part that McLaughlin, who at that time was president of the association, began the meeting by stating that "we [are] here to discuss the adoption of the [2014 modification]." The minutes further state that "[t]he vote for this [2014 modification] would remain open until November 1 . . . ."

[46] In her November 6, 2014 e-mail to certain owners, Lizarralde stated in relevant part: "Many thanks to everyone who voted yes to amend the [beach deed]. We received a majority of yes votes and so . . . we now need to have each of you sign the official document that will be notarized. . . ."

It is undisputed that a total of twenty-six proxy votes[47] were submitted by owners of properties in the subdivision, twenty-four of which were in favor of the 2014 modification—less than a majority of the forty-eight properties in the subdivision.[48] The record contains no other written votes on the 2014 modification.

When a vote is held on a proposed modification of the restrictive covenants governing the use of the beach, § 4 of the beach deed plainly provides that the issue of whether a "majority" has been secured in favor of any such proposal "shall be determined according to the sum of the votes so counted." The court found, and the record indicates, that a formal vote on the 2014 modification was held at the October 10, 2014 annual meeting, and that written votes were received at that time and in the weeks thereafter. Most significantly, the record before us indicates that only twenty-four written votes ultimately were submitted in support of the 2014 modification. The court, therefore, improperly determined that the formal vote on the 2014 modification was approved by owners of a majority of properties in the subdivision. Accordingly, its declaration that the 2014 modification is "valid and in full force and effect" cannot stand.[49]

At trial, Lizarralde testified that a majority of written votes in favor of the 2014 modification had not been received at that time.

[47] In their appellate brief, the defendants claim that the proxies completed by owners of twenty-six properties do not constitute votes because "there were issues other than the [2014] modification on the October meeting agenda that required votes, and that the proxies applied to those issues." That contention is untenable, as the sole matter specified on the "BILLARD BEACH ASSOCIATION BALLOT OR PROXY" was the "vote" to either adopt or reject the 2014 modification. See footnote 16 of this opinion.

[48] We repeat that, prior to trial, the plaintiffs served a request for production on the defendants, in which they sought, inter alia, "[c]opies of all proxies submitted in conjunction with the 2014 Deed Modification." The defendants complied with that request, and produced copies of twenty-six proxy votes, which were admitted into evidence at trial.

[49] We acknowledge that the plaintiffs' complaint also sought to have the court quiet title to the beach. In its memorandum of decision, the trial court did not address that request. See *NPC Offices, LLC* v. *Kowaleski*, 320 Conn.

II

The plaintiffs also claim that the court improperly concluded that the plaintiffs had not met their burden in establishing slander of title. We disagree.

"A cause of action for slander of title consists of the uttering or publication of a false statement derogatory to the plaintiff's title, with malice, causing special damages as a result of diminished value of the plaintiff's property in the eyes of third parties. The publication must be false, and the plaintiff must have an estate or interest in the property slandered. Pecuniary damages must be shown in order to prevail on such a claim." (Internal quotation marks omitted.) *Elm Street Builders, Inc.* v. *Enterprise Park Condominium Assn., Inc.*, 63 Conn. App. 657, 669–70, 778 A.2d 237 (2001).

For three reasons, we agree with the court's determination that the plaintiffs did not satisfy their burden to establish slander of title. First, they have not demonstrated that the defendants, in filing the modifications on the land records, published a false statement. There is no suggestion that the substance of those written instruments was anything other than an accurate statement of their content—namely, that the signatories thereto wished to amend the beach deed in various respects. As the defendants concede in their appellate brief, those modifications may have been improper under the terms of the beach deed, as we have concluded in part I of this opinion, but they do not contain any demonstrably false statements about the plaintiffs' title.

519, 534, 131 A.3d 1144 (2016). In light of the trial court's declaration that the 2011 modification is null and void, and our conclusion that the 2014 modification likewise is invalid, further consideration of the plaintiffs' quiet title request is unnecessary. As a result of our decision today, title to the beach remains as it was prior to the enactment of the 2011 and 2014 modifications.

Second, the court's finding that the defendants did not act with the requisite malice is supported by the evidence in the record before us. The court found that the modifications were enacted in response to a concern "about having the beach open to numerous unknown individuals and thus exposing the owners to possible tort claims in the event of accidents and injuries" and that "all disputed actions [by the defendants] were taken in good faith . . . with the intention of clarifying appropriate uses of the beach and protecting [owners] from potential liabilities . . . ." Testimony at trial by various signatories to the 2011 and 2014 modifications substantiates those findings.[50] In addition, the court heard testimony indicating that the 2011 and 2014 modifications were enacted without any malice toward the plaintiffs. At trial, McLaughlin testified that those modifications were crafted to "protect ourselves" and emphasized that "[i]t was no malice toward anyone, it was just that we were concerned" about liability for activities on the beach. Like others, Firestone in her testimony confirmed that the events that led to the enactment of those modifications had "absolutely nothing to do" with the plaintiffs. "[I]t is well established that the evaluation of a witness' testimony and credibility are wholly within the province of the trier of fact. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best

[50] For example, McLaughlin testified that the modifications were enacted to protect owners in the subdivision for liability and insurance purposes. Beausoleil testified that, despite his efforts, the association was unable to obtain insurance on the beach. Firestone similarly testified that the proponents of the modifications were "afraid of insurance situations. . . . We were worried as homeowners" about activity on the beach.

able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *CHFA–Small Properties, Inc.* v. *Elazazy*, 157 Conn. App. 1, 21, 116 A.3d 814 (2015). The court, as trier of fact, was free to credit that testimony, which supports its conclusion that the plaintiffs had not established malice on the part of the defendants.

Third, the record is bereft of evidence that the plaintiffs suffered pecuniary loss as a result of the filing of the 2011 and 2014 modifications on the land records. At trial, Beth Jepsen testified that she believed that the filing of those modifications created a cloud on their title that made their property less marketable. It nevertheless remains that "a clouded title, alone, does not constitute damages per se. Rather, a plaintiff must present evidence of how the clouded title resulted in some pecuniary loss." *Gilbert* v. *Beaver Dam Assn. of Stratford, Inc.*, 85 Conn. App. 663, 673, 858 A.2d 860 (2004), cert. denied, 272 Conn. 912, 866 A.2d 1283 (2005). Like the plaintiffs in *Gilbert*, the plaintiffs here "did not present evidence of monetary loss caused by the clouded title." Id., 674; contra *Fountain Pointe, LLC* v. *Calpitano*, 144 Conn. App. 624, 657, 76 A.3d 636 (evidence presented that cloud on title "caused the plaintiff to lose out on the proceeds of a $1.8 million sale of its property"), cert. denied, 310 Conn. 928, 78 A.3d 147 (2013). In her trial testimony, Beth Jepsen acknowledged that the plaintiffs had not attempted to sell or rent their property and did not have a comparative market analysis performed. Asked directly if she knew "how much [her] property was devalued," Beth Jespen replied, "No, I don't." She also conceded that the plaintiffs' use of the beach was not impaired following the recording of the 2011 and 2014 modifications on the land records.[51]

[51] At trial, Beth Jepsen was asked whether, "[o]utside of the modification, has anyone in [the subdivision], an owner, a member of the board, a member of the association in any way interfered with your use of the beach?" She

Speculation and conjecture do not suffice for proof of pecuniary loss. See *American Diamond Exchange, Inc.* v. *Alpert*, 302 Conn. 494, 513, 28 A.3d 976 (2011) ("the plaintiff bears the burden of producing evidence of sufficient quality to permit the fact finder to award damages without resort to conjecture or speculation"); *Smith* v. *Whittlesey*, 79 Conn. 189, 193, 63 A. 1085 (1906) (fact finder must be presented with evidence of pecuniary loss and is "not permitted to resort to mere conjecture"). We concur with the trial court that the record here lacks evidence of actual, rather than hypothesized, pecuniary loss. In light of the foregoing, the court properly rendered judgment in favor of the defendants on the slander of title claims.

III

As a final matter, we briefly address the plaintiffs' contention that the court abused its discretion in declining to render an award of attorney's fees in their favor due to the allegedly frivolous filing of a special defense by certain defendants. We do not agree.

Prior to trial, certain defendants raised, as a special defense, allegations that the plaintiffs possessed knowledge of the drafting of the 2011 and 2014 modifications but refused to participate.[52] At trial, no evidence was presented to substantiate those allegations.

answered, "No. They didn't enforce their document." Beth Jepsen further testified that, since those modifications were enacted, no one had asked a guest of theirs to leave the beach.

[52] As two examples of the special defenses at issue, we note that the April 30, 2012 answer and special defenses filed by defendants Christine Synodi and Savas Synodi alleges in relevant part: "Upon information and belief, the [p]laintiffs had notice of the [m]odification . . . and refused any opportunity to review the same; therefore, [p]laintiffs must therefore be equitably estopped from claiming [that] 'The [m]odification was enacted without the knowledge and consent of the [p]laintiffs . . . .' " The September 22, 2015 answer and special defenses filed by four dozen defendants similarly alleges that the plaintiffs "had notice of the proposed modifications to the covenants and restrictions, but declined to participate in meaningful discussions regarding same. If they had any right to notice and an opportunity to be heard

In its memorandum of decision, the court noted that "[c]laims for attorney's fees and costs, if any, have been reserved by agreement of the parties for posttrial motions." The plaintiffs thereafter filed a motion for attorney's fees and costs pursuant to General Statutes § 52-245[53] and Practice Book § 13-25,[54] predicated on the defendants' special defense that the plaintiffs possessed knowledge of the modifications to the beach deed but refused to participate. In that motion, the plaintiffs averred that they had expended attorney's fees in response thereto, and emphasized that no evidence to support those allegations was presented at trial. The plaintiffs thus argued that it was "appropriate for [the] court to award reasonable attorney's fees and double costs . . . ." The court declined that request, concluding that such an award was not warranted.

"Whether to award attorney's fees is a quintessential example of a matter entrusted to the sound discretion of the trial court." *Grovenburg* v. *Rustle Meadow Associates, LLC*, supra, 174 Conn. App. 96. "An abuse of discretion in [granting or denying attorney's fees] will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as

regarding said modifications, they have waived any such right that may exist."

[53] General Statutes § 52-245 provides: "In any case in which an affidavit has been filed by the defendant, or a statement that he has a bona fide defense has been made to the court by his attorney, and the plaintiff recovers judgment, if the court is of the opinion that such affidavit was filed or statement made without just cause or for the purpose of delay, it may allow to the plaintiff, at its discretion, double costs, together with a reasonable counsel fee to be taxed by the court."

[54] Practice Book § 13-25 provides: "If a party fails to admit the genuineness of any document or the truth of any matter as requested herein, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, such party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The judicial authority shall make the order unless it finds that such failure to admit was reasonable."

it did." (Internal quotation marks omitted.) *Hornung* v. *Hornung*, 323 Conn. 144, 170, 146 A.3d 912 (2016). On our thorough review of the record, we cannot say that the court abused its discretion in denying the plaintiffs' request for attorney's fees and costs in the present case.

The judgment is reversed only as to the fourth count of the plaintiffs' complaint and the case is remanded with direction to render judgment declaring the 2014 modification invalid. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TYQUAN TURNER
(AC 40248)

DiPentima, C. J., and Bright and Eveleigh, Js.

Syllabus

Convicted of the crimes of felony murder, robbery in the first degree and conspiracy to commit robbery in the first degree in connection with the shooting death of the victim, the defendant appealed. The defendant and an accomplice, C, allegedly had approached the victim, shot him and took a chain and medallion from around the victim's neck. The defendant and C then drove to a jewelry store where they sold the chain and medallion. The day after the shooting, the police attempted to stop a vehicle in which the defendant and C were riding, but they got out of the vehicle and fled on foot. The police recovered a cell phone dropped by the defendant while he was fleeing, and when C was apprehended, he admitted to the police that he had been in possession of the chain and medallion. The police subpoenaed the defendant's call records from his cell phone carrier and performed a call detail mapping analysis that detailed the movement of the cell phone on the day of the shooting. At trial, the defendant's cell phone records, along with testimony from W, the officer who had performed the call detail mapping analysis, were admitted into evidence without objection by the defendant. Defense counsel declined to cross-examine W, did not object to the trial court's qualification of W as an expert in its jury instructions and relied on portions of W's testimony during closing argument to the jury. On appeal, the defendant claimed, inter alia, that the trial court improperly admitted

documentary and testimonial evidence regarding certain cell phone coverage maps in violation of his federal due process right to a fair trial. *Held*:

1. There was sufficient evidence presented at trial to support the defendant's conviction of conspiracy to commit robbery in the first degree; the jury's conclusion that the defendant and C had agreed to engage in conduct constituting robbery in the first degree was reasonable and logical in light of the evidence and the inferences that could have been drawn therefrom, as the jury reasonably could have found, inter alia, that the defendant and C had emerged from a parking lot, robbed and shot the victim, and then drove to the jewelry store where they sold the chain and medallion, and that A, the mother of the defendant's daughter, deposited a check from the jewelry store into her bank account, withdrew cash the next day in the amount of the check and gave it to the defendant.
2. The defendant could not prevail on his unpreserved claim that his due process right to a fair trial was violated when the trial court qualified W as an expert witness and admitted the cell phone coverage maps into evidence; the defendant's claim was evidentiary in nature and not of constitutional magnitude, and, thus, was not reviewable pursuant to *State* v. *Golding* (213 Conn. 233), and there was no manifest injustice that warranted reversal of the judgment under the plain error doctrine, as defense counsel made a strategic decision not to object to the cell phone evidence or to W's qualification as an expert and then relied on that evidence during his closing argument to the jury.
3. The defendant could not prevail on his claim that multiple instances of prosecutorial impropriety during closing arguments deprived him of his due process right to a fair trial: the prosecutor did not refer to facts that were not in evidence or invite speculation when he urged the jury to find where the defendant was at particular times on the basis of the cell phone evidence, as the jury reasonably could have inferred from the cell phone coverage maps and W's testimony that the defendant was in different areas of the city at particular times on the day of the shooting, the prosecutor, who was arguing from the evidence presented at trial, did not vouch for his own credibility when he commented about the defendant's conduct in offering a fake address and identification to the police, and the prosecutor's comment that the defendant did things that pointed only to his guilt and not to his innocence did not suggest to the jury that the defendant had the burden to prove his innocence, as the comment was followed by references to certain of the defendant's actions after the shooting from which the jury could have inferred a consciousness of guilt; moreover, the prosecutor's one sarcastic remark about the defendant's ability to cash checks was not improper, as it was made in response to defense counsel's argument that evidence that the defendant helped C cash the check did not prove that the defendant committed the robbery.

4. The defendant's unpreserved claim that the trial court's second supplemental instruction misled the jury about the essential elements of robbery in the first degree was unavailing; the defendant conceded that the court properly charged the jury regarding the elements of robbery in the first degree in its original instruction and first supplemental instruction, and with respect to the second supplemental charge, the court properly answered the specific question that was raised by the jury and did not contradict either of its previous instructions, and, therefore, it was not reasonably possible that the jury was misled by the court's second supplemental instruction.

Argued December 5, 2017—officially released May 1, 2018

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder, robbery in the first degree and conspiracy to commit robbery in the first degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Kwak*, *J.*; thereafter, the court denied the defendant's motion for a judgment of acquittal; verdict and judgment of guilty of felony murder, robbery in the first degree and conspiracy to commit robbery in the first degree, from which the defendant appealed. *Affirmed.*

Ann M. Parrent, assistant public defender, for the appellant (defendant).

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

Opinion

EVELEIGH, J. The defendant, Tyquan Turner, appeals from the judgment of conviction, rendered after a jury trial, of felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), and conspiracy to

commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2). On appeal, the defendant claims: (1) there was insufficient evidence presented at trial to convict him of conspiracy to commit robbery in the first degree; (2) the trial court improperly admitted documentary and testimonial evidence regarding cell phone coverage maps in violation of his federal due process right to a fair trial; (3) prosecutorial improprieties during the state's closing and rebuttal arguments deprived him of his right to a fair trial; and (4) the trial court improperly instructed the jury with respect to robbery in the first degree.[1] We

[1] Additionally, the defendant claims that he was harmed by the cumulative impact of the improper admission of the cell tower evidence, the prosecutorial improprieties, and the instructional error because they "combined to permit the jury to convict [him] if [it] believed [he] was 'involved' in the crimes, but not that he actually committed the elements of robbery." We disagree.

The defendant, appearing to acknowledge that our Supreme Court has yet to adopt the cumulative error doctrine under state law; see *State* v. *Campbell*, 328 Conn. 444, A.3d (2018); argues that because the "claim asserts a violation of [his] federal due process right to a fair trial, [it] does not depend on acceptance of a state law cumulative error doctrine." "[F]ederal case law in which the cumulative unfairness doctrine . . . has required reversal of a conviction essentially seems to fall into one or more of the following categories: (1) the errors directly related to and impacted an identified right essential to a fair trial . . . (2) at least one of the errors was so significant as to render it highly doubtful that the defendant had received a fair trial and the remaining errors created the additional doubt necessary to establish that there was serious doubt about the fairness of the trial, which is necessary to reverse a conviction; or (3) the errors were pervasive throughout the trial." (Internal quotation marks omitted.) Id., 557; see also *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 95, 136 A.3d 596 (2016).

As we subsequently conclude in parts II and IV of this opinion, the court did not improperly admit the cell phone coverage maps into evidence or improperly instruct the jury with respect to robbery in the first degree. Moreover, as we conclude in part III of this opinion, the prosecutor's remarks during closing argument were not improper. We conclude, therefore, that, "even if we were to recognize the cumulative error doctrine as articulated in the federal courts . . . the [alleged] trial improprieties in the present case would not justify relief under that doctrine." (Internal quotation marks omitted.) *State* v. *Campbell*, supra, 328 Conn. 557; *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 95.

disagree and, accordingly, affirm the judgment of the trial court.[2]

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. On the afternoon of July 13, 2013, the victim, Miguel Rodriguez, was standing on the sidewalk in front of 10-12 Flatbush Avenue in Hartford. Charlene Lara, a resident of the neighboring 18 Flatbush Avenue, was smoking a cigarette on her second floor porch. At approximately 3:54 p.m., Lara observed two people approach the victim from an open parking lot alongside 10-12 Flatbush Avenue, heard two series of gunshots, and called 911. Shortly thereafter, police and emergency response personnel found the victim, who was being tended to by residents of 10 Flatbush Avenue. The victim later was pronounced dead at Hartford Hospital.

Approximately seven or eight friends and family members of the victim were present when the shooting occurred. Those who were interviewed at the scene, although generally unwilling to provide any information about the incident or a suspect, indicated that the victim was missing a gold chain and medallion.[3] Police officers, however, located two eyewitnesses who were willing to give statements regarding the incident, Lara and Jose DeJesus.[4] A firearm or spent shell casings were never recovered.

[2] Because we affirm the judgment of the trial court, we need not address the defendant's claim that his acquittal on the charge of murder precludes retrial for any offense that would require the state to prove his identity as the gunman who caused the victim's death.

[3] The victim's family members described the medallion as a Daffy Duck caricature holding two bags of money.

[4] Lara gave a sworn statement at the Hartford Police Department on August 15, 2013. Lara was shown an array of nine photographs and selected the third photograph, that of the defendant. Lara indicated that she was "very confident" that it was the individual shown in photograph three who shot the victim.

DeJesus lived on the first floor of 10-12 Flatbush Avenue. DeJesus was inside and witnessed the shooting through a front window. DeJesus gave an oral statement on July 14, 2013, and a sworn statement at the Hartford

On July 14, 2013, Dennis DeMatteo, a detective with the Hartford Police Department, received a phone call from an "[associate] of the family" who was "[o]ne of the friends and family" of the victim. The caller stated that the defendant was responsible for the victim's death and that the victim's family members and associates were planning retaliation. The caller also provided a photograph of the defendant, which DeMatteo circulated within his department. On July 16, 2013, Audley McLean, an owner of K & M Jewelry Corporation (K & M) contacted the Hartford Police Department. McLean stated that he had purchased a gold chain and medallion from Lorenzo Christian between 4 p.m. and 6 p.m. on July 13, 2013. McLean provided a photograph of the jewelry, a copy of the check, and Christian's state identification card to the police. Acting on that information, DeMatteo traced the check to a Webster Bank branch, located on Park Street in Hartford, and an account owned by Alexandra Colon, the mother of the defendant's daughter.

On August 6, 2013, Detective George Watson, while driving an unmarked police vehicle, stopped at an intersection in the north end of Hartford. Watson observed the defendant and Christian, whom he recognized from flyers circulating within his department, pull alongside his vehicle. The defendant then "took off." Watson, along with other Hartford police officers, pursued the vehicle until the defendant drove into the back of a building complex that had no exit. The defendant and Christian abandoned the vehicle, jumped a nearby fence, and continued on foot. The defendant was not apprehended but dropped his cell phone as he was exiting the vehicle. The cell phone was recovered by

Police Department on August 17, 2013. DeJesus was shown an array of nine photographs and selected the fifth photograph, that of the defendant, indicating that he was "pretty sure" that the individual in photograph five was the shooter.

Hartford police. Christian was apprehended by Hartford police and admitted that he had been in possession of the chain and medallion.

On August 17, 2013, DeMatteo interviewed Colon at the Hartford Police Department. Colon admitted to cashing a check for the defendant and Christian. Colon also was shown the cell phone recovered on August 6, 2013, and, on the basis of a crack in the phone's screen, she identified it as the defendant's and provided DeMatteo with the defendant's cell phone number. With that number, DeMatteo confirmed that Sprint Corporation (Sprint) was the defendant's cell phone carrier and, thereafter, a subpoena was issued, ordering Sprint to produce the defendant's cell phone records from July 13, 2013, the day the homicide occurred, through August 6, 2013, the day the phone was recovered. Sprint's response to the initial subpoena was incomplete and did not include any records for July 13, 2013. The subscription information, however, indicated that the cell phone number was changed on July 14, 2013, the day after the crime, at the request of a person by the name of "Patrick." In response to a subsequent subpoena, Sprint produced the cell phone records, associated with that prior phone number, for July 13, 2013.

DeMatteo sent the cell phone records and locations of investigative interest to Andrew Weaver, a sergeant in the Hartford Police Department's special investigations division, who performed a call detail mapping analysis.[5]

[5] In *State* v. *Steele*, 176 Conn. App. 1, 169 A.3d 797, cert. denied, 327 Conn. 962, 172 A.3d 1261 (2017), this court summarized cellular network technology, how call detail records and cell site information are generated, and how that data can be analyzed: "Cell phones are essentially sophisticated two way radios that use cellular networks comprised of cell sites [often referred to as cell towers] and radio frequency (RF) antennae to communicate with one another. . . . A cell site is the fixed location that provides cellular coverage using RF antennae, a base station, and other network equipment. . . . The geographical coverage area of a cell site is called a cell sector. . . . The shape and size of a cell sector is variable and depends on several external and internal factors. . . . When an individual places a call or sends a message, the cell phone communicates with the base station

Weaver input that data into a computer program called Oculus GeoTime, and produced a time lapse video visually representing the movement of the defendant's cell phone between approximately 3:04 p.m. and 6:48 p.m. on the day of the crime.[6] Weaver also took screenshots

at the cell site with which it has the strongest, best quality signal. . . . Importantly, the cell site in closest proximity to these cell phones might not be the one producing the strongest, best quality signal for them. . . . The characteristics of the cell site, the RF antenna, and the cell phone as well as a variety of environmental and geographic factors influence which cell site has the strongest, best quality signal for a cell phone. . . .

"Every time a cell phone sends or receives a communication the base station at the cell site automatically generates a call detail record. . . . The purpose of call detail records is to enable the cellular provider to bill a subscriber accurately for his or her cell phone usage and to help the carrier understand the calling patterns of their subscribers. . . . Call detail records can contain a variety of information depending on the cellular carrier, but these records ordinarily include some information about the cell site(s) used to make or receive the communication. . . . The call detail records in the present case contain information about the cell sites in use when the cell phone initiated and terminated a communication. [This analysis] uses the cell site and antenna information contained in a call detail record to determine which cell sector a cell phone was using at the time of a certain communication and, thereby, the geographical area the cell phone, and by inference its user, was in at that time. . . . [T]he approximate size and shape of a cell sector can be determined by drawing a pie-wedge diagram on a map. . . . The center angle of the pie-wedge corresponds to the antenna's beam width setting, e.g., 120 degrees, and the outward boundary of the pie-wedge will extend 50 to 70 percent of the way into the opposing cell sector. . . . Critically, the boundaries of an estimated cell sector are not fixed. Depending on a variety of factors, the actual cell sector can be smaller or larger than the estimated cell sector." (Citations omitted; footnotes omitted.) Id., 17–24.

[6] The video depicted an underlying map of the city of Hartford, overlaid by the coverage area of a specific cell site and sector, as well as the areas of interest to the police investigation, including 7 Cherry Street, 10-12 Flatbush Avenue, 1154 Albany Avenue, and Colon's residence, 438 Hillside Avenue. The time lapse video reveals the following: at approximately 3:04 p.m., the defendant's cell phone connected to a cell site sector covering 7 Cherry Street. At approximately 3:24 p.m., the defendant's cell phone connected to a cell site sector covering Christian's residence on Lenox Street. At approximately 3:51 p.m., the defendant's cell phone connected to a cell site sector with coverage area encroaching on, but not covering, 10-12 Flatbush Avenue. At approximately 4:17 p.m., the defendant's cell phone connected to a cell site sector covering K & M and, in the half hour thereafter, numerous

of the video at different times between approximately 3:24 p.m. and 5:08 p.m. on the day of the crime.

On August 25, 2013, the defendant was approached by Hartford police Officer Carlos Montanez. The defendant identified himself as Aaron Patrick and presented fake identification under the same alias, which listed 7 Cherry Street as his residence. The defendant initially was charged with interfering with police on the basis of his having presented that fake identification. On September 11, 2013, the defendant was arrested in connection with the victim's death and subsequently charged with murder in violation of General Statutes § 53a-54a, felony murder, robbery in the first degree, and conspiracy to commit robbery in the first degree.

A six day jury trial began on May 18, 2015. The state presented the testimony of DeJesus,[7] Lara,[8] and several members of the Hartford Police Department. The state introduced the defendant's cell phone records into evidence during its direct examination of Ray Clark, a custodian of records at Sprint. Clark identified the defendant's account subscription information, July 14,

phone calls were made within that same coverage area. At approximately 5:08 p.m., a call was made from the defendant's cell phone within a coverage area that included the Webster Bank branch on Park Street. Between approximately 5:39 p.m. and 6:27 p.m., the defendant's cell phone connected to various cell site sectors covering the north end of Hartford, including Lenox Street. Finally, at approximately 6:48 p.m., the defendant's cell phone connected to a cell site sector covering 7 Cherry Street.

[7] At trial, DeJesus identified the defendant as the person who shot the victim.

[8] Lara testified that she had given a statement to the police and selected the victim's shooter from a photographic array. See footnote 4 of this opinion. Lara explained that she had wanted to give that statement but did not want to testify. During cross-examination by defense counsel, Lara stated that she was "done talking"; thereafter, she was held in contempt of court. Lara subsequently purged herself of the order of contempt and defense counsel continued his cross-examination. When asked if she could identify the defendant as the person who shot the victim, Lara replied, "[y]es." When asked to reaffirm her identification, however, she stated, "I don't know."

2013 customer service record, and call detail records. Those three documents were admitted into evidence without objection. Thereafter, the state conducted its direct examination of Weaver and elicited testimony regarding the call detail mapping analysis he performed. The state introduced the time lapse video and snapshots that Weaver produced, which were admitted into evidence without objection. On May 26, 2015, the jury found the defendant guilty of felony murder, robbery in the first degree, and conspiracy to commit robbery in the first degree.[9] The trial court thereafter rendered judgment in accordance with the jury's verdict and sentenced the defendant to a total effective term of seventy years of incarceration, thirty of which are a mandatory minimum sentence. This appeal followed.[10] Additional facts and procedural history will be set forth as necessary.

I

The defendant claims that there was insufficient evidence presented at trial to convict him of conspiracy to commit robbery in the first degree.[11] Specifically, he argues that there was "no evidence apart from the alleged robbery from which an agreement to commit that crime could be inferred." The defendant filed a motion for a judgment of acquittal at the close of the state's case but failed to renew this motion at the close of all of the evidence. Nevertheless, he seeks review of this unpreserved claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified

[9] The jury found the defendant not guilty of murder.

[10] On March 20, 2017, our Supreme Court, pursuant to Practice Book § 65-1, transferred the defendant's appeal to this court.

[11] We address the defendant's sufficiency of the evidence claim before we address any other claims because if a defendant prevails on such a claim, the proper remedy is to direct a judgment of acquittal. See *State* v. *Ramos*, 178 Conn. App. 400, 404, 175 A.3d 1265 (2017), cert. denied, 327 Conn. 1003, 176 A.3d 1195 (2018).

by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). We review the defendant's unpreserved sufficiency of the evidence claim as though it had been preserved. See *State* v. *Revels*, 313 Conn. 762, 777, 99 A.3d 1130 (2014) ("[A]ny defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of *Golding*. . . . Accordingly . . . there is no practical significance . . . for engaging in a *Golding* analysis." [Citation omitted; internal quotation marks omitted.]), cert. denied, U.S. , 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015). Upon review of the record, we conclude that there was sufficient evidence presented at trial to convict the defendant of conspiracy to commit robbery in the first degree.

We first set forth the relevant legal principles governing sufficiency of the evidence claims. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Bush*, 325 Conn. 272, 285–86, 157 A.3d 586 (2017); *State* v. *Steele*, 176 Conn. App. 1, 10–12, 169 A.3d 797, cert. denied, 327 Conn. 962, 172 A.3d 1261 (2017).

The crimes of conspiracy and robbery in the first degree are codified at §§ 53a-48 and 53a-134, respectively.[12] To establish the defendant's guilt with respect

[12] General Statutes § 53a-48 (a) provides: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

General Statutes § 53a-134 provides in relevant part: "(a) A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime: (1) Causes serious physical

to conspiracy to commit robbery in the first degree, "the state must show that there was an agreement between two or more persons to engage in conduct constituting [robbery in the first degree] and that the agreement was followed by an overt act in furtherance of the conspiracy . . . . The state must also show intent on the part of the accused that conduct constituting [robbery in the first degree] be performed. . . . The existence of a formal agreement between the parties need not be proved; it is sufficient to show that they are knowingly engaged in a mutual plan to do a forbidden act. . . .

"Because of the secret nature of conspiracies, a conviction usually is based on circumstantial evidence. . . . Consequently, it is not necessary to establish that the defendant and his [coconspirator] signed papers, shook hands, or uttered the words we have an agreement. . . . [*T*]*he requisite agreement or confederation may be inferred from proof of the separate acts of the individuals accused as coconspirators and from the circumstances surrounding the commission of these acts*." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Taft*, 306 Conn. 749, 756–57, 51 A.3d 988 (2012); see also *State* v. *Taylor*, 177 Conn. App. 18, 31–32, 171 A.3d 1061 (2017), cert. denied, 327 Conn. 998, 176 A.3d 555 (2018).

The jury reasonably could have found the following additional facts. On the afternoon of July 13, 2013, at approximately 3:06 p.m., the defendant left his residence at 7 Cherry Street in Hartford and drove to Lenox Street, where Christian resided. At approximately 3:25 p.m., the defendant and Christian left the area of Lenox Street and drove to 10-12 Flatbush Avenue in Hartford.

injury to any person who is not a participant in the crime; or (2) is armed with a deadly weapon; or (3) uses or threatens the use of a dangerous instrument; or (4) displays or threatens the use of what he represents by his words or conduct to be a . . . revolver . . . or other firearm . . . ."

At approximately 3:54 p.m., the defendant and Christian emerged from the open parking lot alongside 10-12 Flatbush Avenue and approached the victim. The defendant grasped the chain and medallion around the victim's neck and fatally shot the victim in the abdomen with a chrome revolver. The defendant and Christian drove to K & M, located at 1154 Albany Avenue in Hartford. Christian entered K & M alone, and presented the chain and medallion to McLean. McLean conducted an appraisal and offered to pay Christian $1134. Christian exited K & M and consulted with the defendant about the offer. Christian subsequently reentered K & M and accepted McLean's offer. After leaving K & M, the defendant and Christian attempted to cash McLean's check but were unsuccessful. The defendant called Colon and asked her to cash the check. The defendant and Christian picked up Colon at her house and drove to a Webster Bank branch located on Park Street in Hartford, where Colon deposited the check in her account. The defendant then dropped off Colon and Christian at their respective residences before returning to 7 Cherry Street. The following day, at the defendant's request, Colon withdrew cash in the amount of the check and gave it to the defendant.

The jury's conclusion that the defendant and Christian agreed to engage in conduct constituting robbery in the first degree is reasonable and logical in light of the evidence before it and the inferences that may be drawn therefrom. See *State* v. *Crosswell*, 223 Conn. 243, 255–56, 612 A.2d 1174 (1992) (sufficient evidence to support finding that defendant agreed that gun would be used during robbery when he stood by silently when gun was displayed); *State* v. *Louis*, 163 Conn. App. 55, 68, 134 A.3d 648 (sufficient evidence to support finding that defendant agreed to commit robbery when he entered store with coconspirators and did not flee when gun was displayed), cert. denied, 320 Conn. 929, 133

A.3d 461 (2016); *State* v. *Elsey*, 81 Conn. App. 738, 747, 841 A.2d 714 (sufficient evidence to support finding that defendant agreed to conspiracy when defendant arrived at crime with coconspirators, stayed at scene while crimes were committed and left scene with coconspirators), cert. denied, 269 Conn. 901, 852 A.2d 733 (2004). Mindful that in determining the sufficiency of the evidence we consider its cumulative effect and construe the evidence in the light most favorable to sustaining the verdict, we conclude that there was sufficient evidence presented at trial to convict the defendant of conspiracy to commit robbery in the first degree.

II

We next address the defendant's claim that the trial court's qualification of Weaver as an expert witness and admission of cell phone coverage maps deprived him of his due process right to a fair trial. Specifically, the defendant argues that he was convicted on the basis of "scientific evidence that does not satisfy the reliability safeguards now required by [*State* v. *Edwards*, 325 Conn. 97, 156 A.3d 506 (2017)]."[13] The defendant, however, failed to preserve this claim at trial and seeks review pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40, and, alternatively, the plain error doctrine. We decline to review the merits of the defendant's unpreserved evidentiary claim.

A

Pursuant to the *Golding* doctrine, "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

[13] *State* v. *Edwards*, supra, 325 Conn. 97, retroactively applies to the present case because "a rule enunciated in a case presumptively applies retroactively to pending cases." (Internal quotation marks omitted.) *State* v. *Elias G.*, 302 Conn. 39, 45, 23 A.3d 718 (2011).

alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. . . . The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim. . . . 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." (Citations omitted; internal quotation marks omitted.) *State* v. *Steele*, supra, 176 Conn. App. 15 n.8; see also *State* v. *Biggs*, 176 Conn. App. 687, 705–706, 171 A.3d 457, cert. denied, 327 Conn. 975, 174 A.3d 193 (2017). Upon review of the record, we conclude that the defendant's claim fails under *Golding*'s second prong because it is evidentiary in nature and not "of constitutional magnitude alleging the violation of a fundamental right . . . ." *State* v. *Golding*, supra, 213 Conn. 239–40.

In *State* v. *Edwards*, supra, 325 Conn. 97, our Supreme Court was presented with two issues of first impression, specifically, whether: (1) "a police officer needed to be qualified as an expert witness before he could be allowed to testify regarding cell phone data"; id., 127; and (2) "the evidence introduced through [the police officer] was of a scientific nature such that a [*Porter* hearing][14] was required." (Footnote added.) Id.,

[14] "In [*State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998)], [our Supreme Court] followed the United States Supreme Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and held that testimony based on scientific evidence should be subjected to a flexible test to determine the reliability of methods used to reach a particular conclusion. . . . A *Porter* analysis involves a two part inquiry that assesses the reliability and relevance of the witness' methods. . . . First, the party offering the expert testimony must show the expert's methods for reaching his conclusion are reliable. . . . Second, the proposed

129. The court answered those two questions in the affirmative, concluding that the trial court improperly admitted cell phone data and cell tower coverage maps into evidence without qualifying the police officer as an expert and conducting a *Porter* hearing to determine whether the officer's testimony was based on a reliable scientific methodology. See id., 133. The court then conducted a harmless error analysis. See id. ("[*w*]*hen an improper evidentiary ruling is not constitutional in nature*, the defendant bears the burden of demonstrating that the error was harmful" [emphasis added; internal quotation marks omitted]).

In the present case, the defendant, nevertheless, argues that this evidentiary claim is of constitutional magnitude because "it asserts that the improper admission of evidence violated [his] due process right to a fair trial." We are not persuaded by the defendant's attempt to "clothe an ordinary evidentiary issue in constitutional garb to obtain appellate review." (Internal quotation marks omitted.) *State* v. *Marrero-Alejandro*, 159 Conn. App. 376, 398, 122 A.3d 272 (2015), appeal dismissed, 324 Conn. 780, 154 A.3d 1005 (2017). Accordingly, we decline to review the merits of the defendant's claim because it fails to satisfy *Golding*'s second prong.

B

The defendant alternatively argues that reversal of his conviction is warranted because the trial court's qualification of Weaver as an expert witness and admission of cell phone coverage maps constituted plain

scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract. . . . Put another way, the proponent of scientific evidence must establish that the specific scientific testimony at issue is, in fact, derived from and based [on] . . . [scientifically reliable] methodology." (Internal quotation marks omitted.) *State* v. *Edwards*, supra, 325 Conn. 124.

error.[15] In response, the state argues that reversal of the defendant's conviction under the plain error doctrine is unwarranted because the claim was "tactically waived." We agree with the state. In the present case, because it clearly appears that defense counsel made a strategic decision not to object to the cell phone evidence or Weaver's qualification and then relied on that evidence during his closing argument, there is no manifest injustice that warrants reversal under the plain error doctrine. See *State* v. *Ampero*, 144 Conn. App. 706, 715, 72 A.3d 435 (defendant could not demonstrate manifest injustice where defense counsel made strategic decision to not object to evidence and then used evidence to defendant's advantage), cert. denied, 310 Conn. 914, 76 A.3d 631 (2013); see also *State* v. *Joseph*, 174 Conn. App. 260, 283–84, 165 A.3d 241 ("[w]hen a party so utilizes allegedly improper evidence, it cannot prevail under the plain error doctrine"), cert. denied, 327 Conn. 912, 170 A.3d 680 (2017).

As we previously detailed, defense counsel did not object to the admission of the Sprint records or coverage maps into evidence. Moreover, during his cross-examination of Clark, defense counsel elicited testimony that cell site information could not be used to determine the exact location of a cell phone at a specific

[15] "[P]lain error . . . is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . [It] is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly." (Internal quotation marks omitted.) *State* v. *Ampero*, 144 Conn. App. 706, 714, 72 A.3d 435, cert. denied, 310 Conn. 914, 76 A.3d 631 (2013). "A [defendant] cannot prevail under [the] plain error [doctrine] unless [he] has demonstrated that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) *State* v. *Vega*, 128 Conn. App. 20, 29 n.3, 17 A.3d 1060, cert. denied, 301 Conn. 919, 21 A.3d 463 (2011).

time, but could be used to establish that the phone was in the "vicinity" of a cell site. That testimony prompted the following exchange:

"[Defense Counsel]: And how would you define vicinity?

"[The Witness]: Well, within the range of the cell site.

"[Defense Counsel]: And do you know what the range is?

"[The Witness]: . . . [E]very cell site [is going to] have a different range. The only way to determine more accurate[ly] would be to map every cell site potentially and look at one [cell site] in particular relationship to the others to get an idea. But as a general rule of thumb in an urban environment, up to two miles would be the rule that I would go by if I just had to choose an arbitrary number."

Moreover, during the state's direct examination of Weaver, defense counsel did not object to Weaver's qualifications or any testimony concerning his analysis. Of import, Weaver testified that, on the basis of the cell site and sector that a call is recorded on, he could conclude that a cell phone was in a certain coverage area when a call was made or received.[16] Thereafter, defense counsel declined to cross-examine Weaver and

[16] Weaver testified in part: "I can't tell you that a person was in a certain area. I can't tell you a street address that they were on. Moreso, what I can tell you is, where they weren't. So, if you make a phone call right now . . . your phone is [going to] go through a coverage area that covers this courthouse. It's not [going to] show you were in Hamden, Connecticut. . . . Your [call is going to] show where you were. So, I can determine not only where the call was routed through, but more . . . likely where you weren't when that call was routed.

* * *

"[T]he movement is actually just shown of where the cell phone goes over time. So, [it moves] from the center of one coverage area to the center of the next coverage area. I can't tell you which streets were driven down. The . . . only thing we can be 100 percent sure of is, the phone calls were made and that at some point the cell phone traveled . . . from one coverage area to the next coverage area."

did not object to the trial court's qualification of Weaver as an expert in its jury instructions.

During defense counsel's closing argument, he relied on portions of Weaver's testimony. Specifically, defense counsel argued, in relevant part: "They talk about the movement of the phone, but they don't tell you who has the phone. . . . There's no testimony saying [the defendant] had the phone. Who could have had that phone? Ask yourself. [Christian]? Yeah. He very well could have. . . . He's right by where the pawn store is. And you look at all those [maps] . . . it's a grid of a mile and a half. So . . . they're trying to cookie-cut

We also highlight the following exchange between the prosecutor and Weaver:

"[The Prosecutor]: Now, let me ask you . . . do you see [Colon's residence]?

"[The Witness]: Yes.

"[The Prosecutor]: Do you see that it's outside of the [coverage area] that you've drawn?

"[The Witness]: It is.

"[The Prosecutor]: Based on your training, experience, understanding of the range of cell [sites], cell phone companies and the information they report to you, would the phone necessarily have to be in the orange or brown area?

"[The Witness]: No.

"[The Prosecutor]: And explain why not?

"[The Witness]: Well, the [cell sites] . . . are put into . . . place and [the cell phone companies] . . . regulate the power output of the antenna. They don't want it to go too far, because they don't want to . . . interfere with other [cell sites]. [I]f you have [too much] interference from . . . these overlapping [cell sites] . . . you get dropped calls. So, what you'll see is primarily we like to use the [one and one-half] mile analogy here in Hartford, because that is kind of where we're at. That does not mean that if you're a little bit farther out that you won't still connect with that tower. There might be a better line of sight, or you might have a building in the way and that tower is the best tower as opposed to the one that might be closer . . . .

"[The Prosecutor]: Does this go back to what you previously said, that it's a . . . range . . . or an area? And . . . while it potentially can say where someone may have been, it more definitively can say where someone wasn't?

"[The Witness]: Yes.

"[The Prosecutor]: Or where someone's phone wasn't.

"[The Witness]: Exactly, sir."

everything. But . . . don't lose sight of it. How is it his phone all of a sudden? Who says so? . . .

"So, I talked about the phone, and [Weaver] said, you know what, I can't tell you which way they were driving. I can't tell you who had the phone. I can't even tell you really where it was. I can tell you where they weren't. Well, it looks like they're back and forth."

Accordingly, because defense counsel assented to the admission of the cell phone evidence that the defendant now claims deprived him of his right to a fair trial, and, thereafter, used it in a manner indicating that the decision was made as a matter of trial tactics, we conclude that the defendant cannot prevail on his claim of plain error.[17] See *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 73, 967 A.2d 41 (2009) ("[t]o allow the [defendant] to seek reversal now that his trial strategy has failed would amount to allowing him to induce potentially harmful error, and then ambush the state with that claim on appeal" [internal quotation marks omitted]).

[17] Additionally, the defendant asks us to review this claim under this court's supervisory authority; we, however, decline to do so. Our Supreme Court has explained that, "bypass doctrines permitting the review of unpreserved claims such as [*Golding*] . . . and plain error . . . are generally adequate to protect the rights of the defendant and the integrity of the judicial system . . . . [T]he supervisory authority of this state's appellate courts is not intended to serve as a bypass to the bypass, permitting the review of unpreserved claims of case specific error—constitutional or not—that are not otherwise amenable to relief under *Golding* or the plain error doctrine. . . . Consistent with this general principle, we will reverse a [judgment] under our supervisory powers only in the rare case that fairness and justice demand it. [T]he 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 [the] utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Citations omitted; internal quotation marks omitted.) *State* v. *Reyes*, 325 Conn. 815, 822–23, 160 A.3d 323 (2017). The defendant's case presents no such circumstances.

III

We next address the defendant's claims that prosecutorial improprieties during closing arguments deprived him of his due process right to a fair trial. Specifically, the defendant claims that the prosecutor improperly: (1) commented on the cell phone evidence in the record; (2) injected his personal credibility into the case; (3) suggested to the jury that it could rely on the absence of innocent explanations for the defendant's conduct as evidence of his guilt; and (4) used sarcasm in response to defense counsel's closing argument. The state contends that none of the challenged statements was improper and, even if this court were to determine otherwise, the defendant failed to establish that he was denied a fair trial.

Although the defendant did not object to the prosecutor's closing argument, we will review his claims of prosecutorial impropriety. "It is well established law . . . that a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of [*State* v. *Golding*, supra, 213 Conn. 239–40], and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.) *State* v. *Franklin*, 175 Conn. App. 22, 48, 166 A.3d 24, cert. denied, 327 Conn. 961, 172 A.3d 801 (2017).

"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."[18] (Internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 541–42, A.3d (2018); see also *State* v. *Elmer G.*, 176 Conn. App. 343, 363–64, 170 A.3d 749, cert. granted on other grounds, 327 Conn. 971, 173 A.3d 952 (2017). "[W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . ." (Internal quotation marks omitted.) *State* v. *Maguire*, 310 Conn. 535, 552, 78 A.3d 828 (2013).

"[P]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however] [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based [on] the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case.

[18] As we conclude subsequently, the prosecutor's remarks during his closing and rebuttal arguments were not improper. We, therefore, need not determine whether any improper conduct by the state's attorney violated the defendant's right to a fair trial under the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987).

. . . While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment [on], or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Internal quotation marks omitted.) Id., 553–54; *State* v. *Thomas*, 177 Conn. App. 369, 406, 173 A.3d 430, cert. denied, 327 Conn. 985, 175 A.3d 43 (2017). Guided by these legal principles, we consider each instance of prosecutorial impropriety alleged by the defendant.

A

The defendant first claims that the prosecutor "argued facts not in evidence by urging the jury to find where [the defendant] was at particular times based on the cell phone evidence" and "invited sheer speculation unconnected to evidence." (Internal quotation marks omitted.) We reject the defendant's claim because the prosecutor's arguments were supported by the evidence.

We begin by setting forth the prosecutor's closing and rebuttal arguments, emphasizing those parts the defendant challenges. In his closing argument, the prosecutor stated in relevant part: "[*T*]*he strongest piece of evidence is the phone*. . . . [T]he phone records that came from it gave us a treasure trove of information. . . . Now, *you have a virtual map as to what happened*. . . . We have a start time, and you can see *at 3:06 in the afternoon on July 13*, *the person holding this phone leaves the area of 7 Cherry Street*. Again, information is that the defendant lives at 7 Cherry Street. . . . And *he travels up toward Albany Avenue. There's a quick stop*, as you can see. And *by about 3:25* [*p.m.*], *he's moving from that area*. You heard evidence that right within that area is Lenox Street. You have

clear evidence that . . . [Christian] lives on Lenox Street. [*The defendant*] *picks* [*Christian*] *up*. . . .

"At [3:54 p.m.] a 911 [call is made] to the police . . . recording that a shooting happened. *The defendant and his phone are on top of the shooting scene at the upper portion of Flatbush Avenue*. . . . *And then there is flight, leaving from the area of Flatbush Avenue and going up towards 1154 Albany Avenue*. . . . [*T*]*he defendant's phone stays as is, connected to that area for quite some time*. And we all know why, ladies and gentlemen, because it took time to conduct the transaction with the pawn shop, selling the medallion and necklace. In fact, [McLean] tells us that [Christian] came into the pawn shop, worked out a deal, ultimately found out what [McLean] would offer him, and [Christian] said, I'll be right back. This is where we all use our logical common sense and understand that [Christian] went outside to see if that deal was all right. . . . He went outside to ask [the defendant] if that amount was all right. *Because after that period of time, the defendant, with his phone, moves about the city of Hartford.*

"Finally, *at about* . . . [*5:24 p.m.*] . . . [*the defendant*] *stops in the area of 438 Hillside Avenue*, not a coincidence that [Colon] says that he stopped with [Christian] and asked her to cash that check. And then she went with them, and attempts were made to cash it. And notice . . . *there is a return to that area, ultimately dropping off* [*Christian*]. [It is] my argument that that evidence support[s] that . . . [Christian] is dropped off, *because the person holding this phone at the end of the evening on July 13, ultimately will come to stay on Cherry Street*, the defendant's address." (Emphasis added.) Thereafter, in rebuttal argument, the prosecutor stated that "*this phone and its records loop around the crime scene and every point of interest related to the* [*investigation*]." (Emphasis added.)

With the prosecutor's arguments in mind, we set forth the guiding law. It is well established that "[a] prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he . . . may not invite sheer speculation unconnected to evidence." *State* v. *Singh*, 259 Conn. 693, 718, 793 A.2d 226 (2002). "A prosecutor, in fulfilling his duties, must confine himself to the evidence in the record. . . . [A] lawyer shall not . . . [a]ssert his personal knowledge of the facts in issue, except when testifying as a witness. . . . Statements as to facts that have not been proven amount to unsworn testimony, which is not the subject of proper closing argument." (Internal quotation marks omitted.) Id., 717.

The defendant contends that the prosecutor argued facts not in evidence by "urging the jury to find where [the defendant] was at particular times based on the cell phone evidence." We disagree. The prosecutor did not propose an unreasonable or unfair inference by arguing that the defendant's phone "loop[s] around . . . every point of interest . . . ." As we previously summarized in footnote 6 of this opinion, on the basis of the coverage maps and Weaver's testimony regarding the location of the defendant's cell phone, the jury reasonably could have inferred that the defendant was in different areas of Hartford at particular times on the day of the crime. To the extent that the defendant claims that the remark, "[t]he defendant and his phone are on top of the shooting scene," was improper, we also disagree. The jury heard testimony from two witnesses, both of whom made out-of-court and in-court identifications of the defendant. See footnotes 4, 7 and 8 of this opinion. We therefore conclude that the prosecutor's arguments did not unfairly present the cell phone evidence and simply invited the jury to draw reasonable inferences therefrom.

B

We next address the defendant's claim that the prosecutor improperly injected his own credibility into the case when he remarked, "I'm not the one that passed the fake ID that said I live at 7 Cherry Street." The defendant claims that this remark was improper because it "drew a comparison between [the prosecutor's] credibility and [the defendant's] allegedly deceptive conduct." We disagree with the defendant.

It is well established that "[a] prosecutor may not express his own opinion, directly or indirectly, as to the credibility of the witnesses. . . . 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. . . . [*I*]*t is not improper* [*however*] *for the prosecutor to comment upon the evidence presented at trial* and to argue the inferences that the jurors might draw therefrom . . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand." (Emphasis added; internal quotation marks omitted.) *State* v. *Perkins*, 271 Conn. 218, 268, 856 A.2d 917 (2004); see also *State* v. *Ivan G. S.*, 154 Conn. App. 246, 255–56, 105 A.3d 905 (2014), cert. denied, 315 Conn. 923, 108 A.3d 1123 (2015).

"Although prosecutors generally should try to avoid using phrases that begin with the pronoun I, such as I think or I believe, we recognize that the use of the word I is part of our everyday parlance and . . . because of established speech patterns, it cannot always easily be eliminated completely from extemporaneous elocution. . . . Furthermore, [t]he state's attorney should not be

put in the rhetorical [straitjacket] of always using the passive voice, or continually emphasizing that he is simply saying I submit to you that this is what the evidence shows." (Citations omitted; internal quotation marks omitted.) *State* v. *Luster*, 279 Conn. 414, 436, 902 A.2d 636 (2006).

With these legal principles in mind, we turn to the defendant's claim that the prosecutor improperly placed his own credibility at issue during trial. We disagree. During his closing argument, the prosecutor reminded the jury that, although the cell phone was prepaid and did not indicate the name of the subscriber, the evidence presented at trial supported the inference that the defendant owned the cell phone and possessed it on the day of the crime. Specifically, the prosecutor stated: "[W]hen a person calls on July 14, 2013, to change the phone number of this phone, he uses the name Patrick. You'll recall that [Montanez] stopped [the defendant], and [the defendant] said his name was Aaron Patrick. And he gave [Montanez] a fake ID that says he was Aaron Patrick of 7 Cherry Street in Hartford. . . . [A]t 3:06 in the afternoon on July [13, 2013], the person holding this phone leaves the area of 7 Cherry Street [and returns at around 7 p.m.]. Again [the] information is that the defendant lives at 7 Cherry Street."

Thereafter, during rebuttal argument and in response to defense counsel's argument that the state had not proven that the cell phone was owned or possessed by the defendant, the prosecutor made the following remarks: "We don't have a phone that says this belongs to [the defendant] the way it used to be in little kids' clothing. No. But when you consider all of the facts and circumstances, *I'm not the one that passed the fake ID that said I live at 7 Cherry Street.* And that was not the only piece of evidence. [DeMatteo] said that . . . his in-house [records] check . . . has [the defendant] living at 7 Cherry Street . . . ." (Emphasis added.) We

conclude that the prosecutor did not improperly vouch for his own credibility because he was arguing from the evidence presented at trial. See *State* v. *Luster*, supra, 279 Conn. 436 ("if it is clear that the prosecutor is arguing from the evidence presented at trial, instead of giving improper unsworn testimony with the suggestion of secret knowledge, his . . . occasional use of the first person does not constitute [impropriety]"); see *State* v. *Gibson*, 302 Conn. 653, 655, 31 A.3d 346 (2011) ("prosecutor's two uses of the words I think while marshaling the evidence during closing argument . . . . [was] not improper" [internal quotation marks omitted]).

C

We next address the defendant's claim that the prosecutor improperly posed the following question to the jury: "Why does the defendant do a series of things that only point to his guilt and not point to his innocence?" The defendant contends that the prosecutor's argument improperly shifted the burden of proof by suggesting to the jury that the burden was on the defendant to prove his innocence. In response, the state argues that the prosecutor's "comment expressly referred to the defendant's guilty conduct after the crime was committed." We agree with the state.

"A comment that the defendant was without a reasonable explanation or had no reasonable explanation to show why he was innocent is not necessarily a comment that the jury would naturally and necessarily interpret as related to the defendant's constitutional and statutory right to decline to testify. A prosecutor also may comment on the failure of a defendant to support his factual theories." *State* v. *Smalls*, 78 Conn. App. 535, 543, 827 A.2d 784, cert. denied, 266 Conn. 931, 837 A.2d 806 (2003); see also *State* v. *Joseph R. B.*, 173 Conn. App. 518, 531–34, 164 A.3d 718 (prosecutor's closing

argument not improper where comments based on evidence and did not draw attention to defendant's failure to testify), cert. denied, 326 Conn. 923, 169 A.3d 234 (2017); *State* v. *Colon*, 70 Conn. App. 707, 713, 799 A.2d 317 (prosecutor's argument regarding lack of explanation for defendant's flight from crime scene not improper), cert. denied, 261 Conn. 933, 806 A.2d 1067 (2002).

The record in the present case indicates that the prosecutor during his closing argument did not comment on the defendant's failure to testify at trial or on the burden of proof. Instead, immediately following the statement at issue, the prosecutor referenced three actions taken by the defendant following the crime. Specifically, the prosecutor stated that the defendant: (1) knew the importance of the phone records and, therefore, changed his phone number the day after the crime; (2) evaded police custody on August 6, 2013; and (3) gave an alias and presented fake identification when approached by police on August 25, 2013. Therefore, because the prosecutor's argument was based on the evidence presented at trial and referred to the defendant's actions from which the jury could infer consciousness of guilt, we conclude that his comment was not improper. See *State* v. *Joseph R. B.*, supra, 173 Conn. App. 537 ("prosecutor's [closing argument not improper because it was] based on the evidence presented and refer[red] to a lack of explanation in the evidence, other than guilt, for a range of behavior"); *State* v. *Colon*, supra, 70 Conn. App. 713 ("prosecutor's remarks during . . . closing argument were merely an attack on the defendant's theory of defense and not improper comment regarding the defendant's failure to testify").

D

The defendant's final claim of impropriety concerns the prosecutor's use of sarcasm during his rebuttal argument. Specifically, the prosecutor remarked that

"maybe [the defendant] was out on the corner selling lemonade, and he had a little placard that said, I also have the ability to cash checks, all within an hour and a half." The defendant claims this sarcastic remark improperly "encouraged the jurors to view with disdain, rather than reasoned and moral judgment, the reasonable inference, consistent with [the defendant's] innocence, that he responded to [Christian's] request for help in cashing the check without having been involved in the shooting or any robbery." We disagree.

"It is well settled that [a] prosecutor may not seek to sway the jury by unfair appeals to emotion and prejudice . . . . [O]ur Supreme Court has recognized that repetitive and excessive use of sarcasm is one method of improperly swaying the fact finder. . . . Additionally, we have recognized that the excessive use of sarcasm may improperly influence a jury. . . . A prosecutor's frequent and gratuitous use of sarcasm can [call on] the jurors' feelings of disdain, and likely sen[d] them the message that the use of sarcasm, rather than reasoned and moral judgment, as a method of argument [is] permissible and appropriate for them to use. . . . Although we neither encourage nor condone the use of sarcasm, we also recognize that not every use of rhetorical language or device is improper. . . . The occasional use of rhetorical devices is simply fair argument." (Citations omitted; internal quotation marks omitted.) *State* v. *Holley*, 144 Conn. App. 558, 569, 72 A.3d 1279, cert. denied, 310 Conn. 946, 80 A.3d 907 (2013); see also *State* v. *Grant*, 154 Conn. App. 293, 321, 112 A.3d 175 (2014) ("[s]ome use of sarcastic and informal language, when intended to forcefully criticize a defense theory on the permissible bases of the evidence and the common sense of the jury, is not necessarily improper" [internal quotation marks omitted]), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015).

Applying those principles to the present case, we conclude that the prosecutor's one sarcastic remark during his rebuttal argument was not improper. See *State* v. *Marrero-Alejandro*, supra, 159 Conn. App. 388–89 (prosecutor's sarcastic comments in response to defendant's closing argument not improper); *State* v. *John M.*, 87 Conn. App. 301, 314–15, 865 A.2d 450 (2005) (prosecutor's use of sarcasm twice in rebuttal argument not improper), aff'd, 285 Conn. 822, 942 A.2d 323 (2008). The record indicates that this remark was made in response to defense counsel's closing argument, in which he argued that evidence that the defendant helped Christian cash the check did not prove that the defendant committed the robbery. Accordingly, we conclude that this isolated remark was not improper.

IV

We next address the defendant's claim that the trial court's second supplemental instruction misled the jury by "omitt[ing] and misdescrib[ing]" the essential elements of first degree robbery. The defendant's arguments in support of this claim are threefold. Specifically, the defendant argues that the court's second supplemental instruction: (1) "repudiated the original instruction by stating that the state did not have to prove the defendant committed the elements of robbery" (emphasis omitted); (2) erroneously charged the jury that the defendant could be found guilty as an "active participant" when "[t]he state charged [the defendant] as a principal and did not request an instruction on accessorial liability"; and (3) "suggest[ed] that there were two participants [which] intruded on the jury's function" to decide issues of fact.

The defendant concedes that this claim was not properly preserved at trial because defense counsel failed to object to the second supplemental charge and now seeks review of this claim pursuant to *State* v. *Golding*,

supra, 213 Conn. 239–40. In the present case, the record is adequate for our review because it contains the full transcript of the defendant's criminal proceedings.[19] Moreover, "[a]n improper instruction on an element of an offense . . . is of constitutional dimension." (Internal quotation marks omitted.) *State* v. *DeJesus*, 260 Conn. 466, 472–73, 797 A.2d 1101 (2002). Although reviewable, the defendant's instructional claim fails under the third prong of *Golding* because it is not reasonably possible that the jury was misled by the court's second supplemental instruction.

The following procedural history is relevant to our resolution of this claim. On May 21, 2015, the trial court delivered its initial charge to the jury. The defendant concedes that the trial court's initial charge was correct because "it accurately informed the jury of the elements required to convict the defendant of [robbery in the first degree] as a principal . . . ." The jury began its deliberations that afternoon and, thereafter, sent the following note to the court: "On page [twenty-three] of the jury charge, does the sentence '[i]f any person who participated in the crime was armed with a deadly weapon while in immediate flight from the crime, then

[19] The state argues that this claim fails to satisfy *Golding*'s first prong "because the record is devoid of any instruction nullifying the concededly correct original charge . . . ." The state, relying on *State* v. *Dyson*, 238 Conn. 784, 793, 680 A.2d 1306 (1996) ("review of the record fail[ed] to reveal a jury instruction that expressly sanctioned a nonunanimous verdict"), argues that because "the defendant is alleging that the trial court stated something that affirmatively eliminated the jury's need to consider elements it must find in order to convict after it had given the correct instruction . . . the record should reflect that the trial court actually did something so drastic." We do not find support for the state's proposition in *Dyson*. A thorough reading of our Supreme Court's opinion in that case indicates that the defendant's claim was not analyzed pursuant to *Golding*. See *State* v. *Dyson*, supra, 791–94. Moreover, the fact that "the record does not support [a defendant's] claim," as the state argues, does not mean that the record is inadequate and, therefore, undeserving of *Golding* review. See, e.g., *State* v. *Montanez*, 277 Conn. 735, 743–44, 894 A.2d 928 (2006).

all participants in the robbery would be just as guilty of first degree robbery as if they themselves actually done so' refer only to element [three] or override all elements? That is, did the defendant himself need to use physical force (element [two]) if a gun was present? Or do all three elements need to be proven?"

In response to that note, the court charged the jury in relevant part: "And your question regarding page twenty-three of the jury charge . . . that portion that you talked about, that only applies to [the third element of robbery in the first degree]. Element three requires the possession of a weapon or a deadly instrument. . . . So, that needs to be proven beyond a reasonable doubt. And, obviously, all three elements need to be proved beyond a reasonable doubt for you to reach a, in your minds, a verdict of guilty. If . . . any of the elements are not proven, then you must return a verdict of not guilty." Defense counsel did not take exception to this supplemental instruction and, on appeal, the defendant concedes that the first supplemental instruction was correct.

The defendant's challenge, therefore, is limited to the trial court's second supplemental instruction, which was given in response to the following jury note: "For robbery in the [first degree] to be proven, does the defendant *himself* need to (1) commit larceny (physically deprive another of property) and (2) use or threaten physical force, or can another participant [commit] one and two, while he (the defendant) is in the proximity? I.e., if the robbery is a team effort, do both participants become equally guilty of robbery in the first [degree]?" (Emphasis in original.) The court noted that both the prosecutor and defense counsel had read the jury's note, and that a discussion took place in chambers. The following exchange subsequently occurred on the record:

"The Court: . . . I reviewed the statute, which specifically states that robbery in the first degree can be committed by the defendant, himself, or another participant. So, I'm going to instruct the jury that . . . the state does not have to prove beyond a reasonable doubt it was the defendant, himself, who actually took the object. That it could be any one of the two, and that's sufficient. Is that your understanding of our discussion [in chambers]?

"[The Prosecutor]: It is. It is. I would just ask that the court augment it by also saying that you have to find that he was an active participant. My concern on that is based on—

"The Court: Right. The proximity.

"[The Prosecutor]: —note saying, proximity.

"The Court: I agree with you.

"[The Prosecutor]: And . . . the court may even want to say when you write something like proximity, refer them to the section of mere presence—

"The Court: Right.

"[The Prosecutor]: —as part of your instructions.

"The Court: [Defense Counsel]?

"[Defense Counsel]: Nothing to add. Thank you, Your Honor."[20]

[20] The state contends that the defendant's instructional claim was waived because "the trial court reviewed [the second supplemental instruction] with the state and defense counsel in chambers and both indicated that it was an appropriate response to the jury's question." Because we conclude that it is not reasonably possible that the jury was misled by the court's second supplemental instruction, we need not address the state's waiver argument. See *State* v. *Tarasiuk*, 125 Conn. App. 544, 547 n.5, 8 A.3d 550 (2010) ("The state argues that this claim was waived because the defendant approved of the instructions at trial. Because we find that the charge as stated was proper, we decline to address the issue of waiver.").

The court then charged the jury as follows: "[T]he gist of [your question] is, does the state have to prove that the defendant, himself, committed the larceny and/or with the use of physical force or the threat of physical force. And the answer to that is, no. [B]ecause there was a participant, either of those two, if they committed the larceny, as well as the physical force or the threat of physical force, then you can find the defendant guilty, if you think there's enough evidence for that beyond a reasonable doubt to do so. But you also have to find that the defendant was an active participant . . . in the crime, not, [as] you wrote in here, in the proximity. That's not enough. . . . [T]he state has to prove that he actively participated in the . . . robbery itself."

With the entirety of the court's jury instructions in mind, we next set forth the legal principles that guide our analysis. "[I]ndividual jury instructions should not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury." (Internal quotation marks omitted.) *State* v. *Revels*, supra, 313 Conn. 784.

On the basis of our review of the entire jury charge, we conclude that it is not reasonably possible that the jury was misled by the court's second supplemental instruction. See *State* v. *Delgado*, 247 Conn. 616, 627, 725 A.2d 306 (1999) (not reasonably possible that jury was misled where trial court did not contradict concededly correct initial and first supplemental charges in challenged second supplemental charge). In this case, the defendant concedes that the trial court properly charged the jury regarding the elements of robbery in the first degree in its original instruction and first supplemental instruction. With respect to the second supplemental charge, the court properly answered the specific question that was raised by the jury; see Practice Book § 42-27;[21] and did not contradict either of its previous instructions. See *State* v. *Delgado*, supra, 627. We conclude, therefore, that the defendant's claim fails under the third prong of *Golding* because he has failed to demonstrate that a constitutional violation exists and deprived him of a fair trial.[22]

The judgment is affirmed.

In this opinion the other judges concurred.

[21] Practice Book § 42-27 provides: "If the jury, after retiring for deliberations, requests additional instructions, the judicial authority, after providing notice to the parties and an opportunity for suggestions by counsel, shall recall the jury to the courtroom and give additional instructions to respond properly to the request or to direct the jury's attention to a portion of the original instructions."

[22] Alternatively, the defendant seeks review of this claim pursuant to the plain error doctrine; see Practice Book § 60-5; or under this court's supervisory authority over the administration of justice. Because the trial court correctly instructed the jury with respect to robbery in the first degree, there is no manifest injustice that warrants reversal pursuant to the plain error doctrine. See *State* v. *Jaynes*, 36 Conn. App. 417, 430, 650 A.2d 1261 (1994), cert. denied, 233 Conn. 908, 658 A.2d 980 (1995). Additionally, we decline to exercise our supervisory powers to review the defendant's claim of instructional error. See footnote 17 of this opinion.

VANCE JOHNSON *v.* COMMISSIONER OF CORRECTION
(AC 39946)

DiPentima, C. J., and Bright and Flynn, Js.

Syllabus

The petitioner, who had been convicted of murder and, on a guilty plea, of criminal possession of a firearm, filed a seventh petition for a writ of habeas corpus, claiming that he did not understand the criminal trial proceedings in court, was confused due to his mental state, and felt that the circumstances of his mental condition at the time of his criminal proceedings should have been taken into consideration by the trial court. The habeas court rendered judgment dismissing the habeas petition, concluding that it presented the same ground challenging his competency at the time of the underlying trial as alleged in two prior petitions that previously had been denied, and that it failed to state new facts or to proffer new evidence not reasonably available at the time of the prior petitions. Thereafter, the habeas court denied the petition for certification, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal; because the petitioner, on appeal, did not address the issues set forth in the petition for certification to appeal and, in the statement of issues in his appellate brief, addressed only the issue of whether the habeas court improperly concluded that he received effective assistance of habeas and trial counsel, which conclusion was never made by the habeas court, there was no basis to conclude that the habeas court abused its discretion in denying the petition for certification to appeal with respect to an issue that it never considered.

Argued March 5—officially released May 1, 2018

Procedural History

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

Kinga A. Kostaniak, assigned counsel, for the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, was *Gail P. Hardy*, state's attorney, for the appellee (respondent).

Opinion

BRIGHT, J. The petitioner, Vance Johnson, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his seventh petition for a writ of habeas corpus. In his habeas petition, the petitioner alleged that his conviction is illegal because he did not understand, due to his compromised mental state, what was occurring when he pleaded guilty to one charge and then proceeded to trial on a second charge. The habeas court sua sponte dismissed the petition because it raised the same ground as two prior petitions that had been denied, and it failed to state new facts or to proffer new evidence not reasonably available at the time of the prior petitions. On appeal, the petitioner claims that the habeas court abused its discretion in denying the petition for certification to appeal because he has a meritorious claim that his prior habeas counsel was ineffective. The respondent, the Commissioner of Correction, argues that the issue raised on appeal is not reviewable because the petitioner did not raise it in his habeas petition or in his petition for certification. We agree and, therefore, dismiss the appeal.

The following facts and procedural history are relevant to our review. "On August 29, 1994, the petitioner was charged with murder in violation of General Statutes (Rev. to 1993) § 53a-54a and with criminal possession of a firearm in violation of General Statutes (Rev. to 1993) § 53a-217. On December 9, 1996, the petitioner pleaded guilty to the charge of criminal possession of a firearm and received a sentence of five years incarceration in the custody of the respondent. At a subsequent jury trial, in which he was represented by [Attorney] Fred DeCaprio (trial counsel), the petitioner was convicted of murder and sentenced to sixty years incarceration, to run concurrently with the sentence on the firearm charge for a total effective sentence of sixty

years of imprisonment. The petitioner's murder conviction was affirmed on direct appeal in *State* v. *Johnson*, 53 Conn. App. 476, 733 A.2d 852, cert. denied, 249 Conn. 929, 733 A.2d 849 (1999)." *Johnson* v. *Commissioner of Correction*, 168 Conn. App. 294, 296, 145 A.3d 416, cert. denied, 323 Conn. 937, 151 A.3d 385 (2016).

Although the current appeal concerns the petitioner's seventh habeas corpus petition, the history regarding the fifth and sixth petitions is relevant to provide the necessary context to this appeal. "On March 21, 2011, the petitioner, represented by Laljeebhai R. Patel (fourth habeas counsel), filed a fifth habeas petition, alleging that his second habeas counsel provided ineffective assistance by failing to allege in the second habeas action that his first habeas counsel rendered ineffective assistance for failing to allege that trial counsel was ineffective 'at the petitioner's plea on the weapons charge and at the murder trial for failing to investigate . . . the [petitioner's] incompetence at plea and trial' and 'failing to present the claim of the petitioner's incompetence at plea and at trial.' Following the testimony of trial counsel, first habeas counsel and second habeas counsel, the fifth habeas court denied the petition for a writ of habeas corpus, finding the petitioner's claim that his trial counsel had provided ineffective assistance meritless as 'there had never been "a question in anyone's mind" as to the petitioner's competency at the time of his trial.' *Johnson* v. *Commissioner of Correction*, 144 Conn. App. 365, 368, 73 A.3d 776, cert. denied, 310 Conn. 918, 76 A.3d 633 (2013). The fifth habeas court further determined that ' "there is no possibility . . . that [the petitioner] was incompetent. There isn't even a hint of it." ' Id.

"The petitioner filed a petition for certification to appeal from that decision, which the fifth habeas court granted. Id., 369. On appeal, this court noted that the claims in the fifth petition 'were based upon . . . trial

counsel's alleged failure to request a competency examination pursuant to General Statutes § 54-56d and the failure of [the petitioner's] two prior habeas attorneys to allege ineffectiveness by their predecessors in prior trial and habeas corpus proceedings.' . . . Id., 367–68. We affirmed the fifth habeas court's conclusion that the petitioner failed to prove that his trial counsel rendered ineffective assistance. Id., 371. We further affirmed the judgment in regard to the claims against the first and second habeas counsel because, as a result of the determination that '[trial counsel] did not render ineffective assistance in failing to request a competency evaluation,' the petitioner could not as a matter of law prove prejudice resulting from the first and second habeas counsel's alleged failure to raise a claim against trial counsel on that ground. Id., 369 n.2. Our Supreme Court denied the petitioner's petition for certification to appeal from this court's judgment. *Johnson* v. *Commissioner of Correction*, 310 Conn. 918, 76 A.3d 633 (2013).

"On July 22, 2013, the self-represented petitioner filed a sixth habeas petition . . . . On November 14, 2014, the petitioner filed [another] amended petition (sixth petition), claiming ineffective assistance of the first, second, third, and fourth habeas counsel for failing to allege in their respective prior habeas petitions that trial counsel was ineffective for failing to file a motion for competency evaluation pursuant to § 54-56d at or before the time of the petitioner's plea on the firearm charge, at or before sentencing on the firearms charge, at or before the jury trial for murder, at or before sentencing on the murder conviction, and after sentencing for murder for discovery of evidence that trial counsel failed to investigate by way of petition for a new trial." (Footnote omitted.) *Johnson* v. *Commissioner of Correction*, supra, 168 Conn. App. 299–301.

The habeas court dismissed the sixth petition in its entirety on the ground of res judicata. This court

affirmed the decision of the habeas corpus holding that the claims as to first and second habeas counsel were precluded by res judicata, the claims as to third habeas counsel were barred by collateral estoppel, and the claim as to fourth habeas counsel failed to state a claim upon which relief could be granted. Id., 308, 312–13.

On October 20, 2016, the petitioner filed his seventh habeas corpus petition, which is the subject of this appeal. In his petition, the petitioner claimed that he did not understand the criminal trial proceedings in court, was confused due to his mental state, and felt that the circumstances of his mental condition at the time of his criminal proceedings should have been taken into consideration, but were disregarded by the trial court. The petitioner requested that he be released or that his sentence be modified.

On November 15, 2016, before counsel had been appointed to represent the petitioner, the court, *Oliver*, *J.*, sua sponte, rendered a judgment dismissing the petition pursuant to Practice Book § 23-29 (3) because it presents "the same ground, challenging his competency at the time of the underlying trial, as two prior petitions previously denied (his fourth and fifth of six prior petitions)[1] and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition."

The petitioner filed a petition for certification to appeal on November 29, 2016, which the habeas court denied on December 6, 2016. The petition for certification identified three grounds for appeal: (1) whether the habeas court erred in dismissing the petition when

[1] We note that Judge Oliver apparently misspoke when he referenced the fourth habeas petition, as the petitioner had sought, in that petition, to have his rights to sentence review restored. As set forth previously in this opinion, issues relating to the petitioner's competency were raised in the fifth and sixth petitions.

the petition raised the new ground that the petitioner was incompetent to stand trial; (2) whether the habeas court erred in dismissing the petition without taking into consideration the standard set forth in *Haines* v. *Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), for interpreting pro se complaints;[2] and (3) whether the court erred in not allowing the petitioner to present new facts in support of his claim that he was incompetent at the time of his criminal trial. In his application for waiver of fees and costs, which the petitioner incorporated by reference into his petition for certification, the petitioner identified his proposed grounds for appeal as follows: "*The petitioner never raised the issue that the trial court disregarded his psychological condition*. All prior petitions [have] been raised on ineffective assistance of counsel." (Emphasis in original.) The petitioner also noted that he attached a report of a doctor in support of his claim. Additional facts will be set forth as necessary.

We begin with the 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, [the petitioner] must demonstrate that the denial of his petition for

[2] In *Haines*, the United States Supreme Court addressed the question of whether the pro se inmate's civil complaint alleged sufficient facts to survive a motion to dismiss. In reversing the United States Court of Appeals for the Seventh Circuit's affirmance of the District Court's judgment dismissing the complaint, the Supreme Court held that, "[w]e cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (Emphasis omitted; internal quotation marks omitted.) *Haines* v. *Kerner*, supra, 404 U.S. 520–21.

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

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

"This court has declined to review issues in a petitioner's habeas appeal in situations where the habeas court denied certification to appeal and the issues on appeal had not been raised in the petition for certification. See, e.g., *Blake* v. *Commissioner of Correction*, 150 Conn. App. 692, 696–97, 91 A.3d 535, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014). A habeas petitioner cannot establish that the habeas court abused its discretion in

denying certification on issues that were not raised in the petition for certification to appeal.

"In *Stenner* v. *Commissioner of Correction*, 144 Conn. App. 371, 373, 71 A.3d 693, cert. denied, 310 Conn. 918, 76 A.3d 633 (2013), this court declined to review the petitioner's claim that the habeas court abused its discretion in denying his petition for certification to appeal. The petitioner in *Stenner* argued on appeal that the habeas court abused its discretion in denying his petition for certification because his trial counsel rendered ineffective assistance. Id., 374. The petitioner's application for waiver of fees, costs and expenses and appointment of counsel on appeal, however, cited '"[c]onfrontation [clause] violated pursuant to 6th amendment' " as his ground for appeal. Id. The court in *Stenner* concluded that the petitioner could not demonstrate that the habeas court had abused its discretion in denying the certification petition on the basis of issues that were not actually raised in the petition for certification to appeal. Id., 374–75.

"The petitioner in *Campbell* v. *Commissioner of Correction*, 132 Conn. App. 263, 31 A.3d 1182 (2011), similarly failed to raise the claims that he alleged on appeal in his petition for certification, and so the court declined to afford them appellate review and dismissed his appeal. In that case, '[t]he petitioner's petition for certification to appeal cited "[s]entencing procedures" as the basis for which he sought review. The petition did not include [the] claims [raised on appeal] relating to the court's dismissal of habeas counsel's motion to withdraw, or any claims regarding ineffective assistance of counsel or conflict of interest.' Id., 267. This court determined that '[u]nder such circumstances, the petition for certification to appeal could not have apprised the habeas court that the petitioner was seeking certification to appeal based on such issues. . . . A review of such claims would amount to an ambuscade of the

[habeas] judge.' . . . Id." (Citation omitted.) *Kowalyshyn* v. *Commissioner of Correction*, 155 Conn. App. 384, 390, 109 A.3d 963, cert. denied, 316 Conn. 909, 111 A.3d 883 (2015).

In the present case, the issues identified by the petitioner in his petition for certification all relate to his claim that he was not competent to stand trial. He claimed that the court erred in dismissing his petition because the issue of his competency was never addressed in his prior petitions and because he has new facts to present regarding his claim. The petitioner further distinguished his claim in this petition from his prior petitions by arguing that his prior petitions all related to ineffective assistance of counsel, not to the trial court's disregard of his psychological condition.

On appeal, the petitioner does not address the issues set forth in the petition for certification. Instead, he argues that the trial court abused its discretion when it denied his petition for certification because he has a viable claim that he was denied the effective assistance of counsel in connection with his sixth habeas petition. In fact, the petitioner's statement of issues in his appellate brief identifies the only substantive issue as: "Did the habeas court improperly conclude that the petitioner received effective assistance of habeas counsels and trial counsel." The problem for the petitioner is that the habeas court never reached such a conclusion, and the petitioner did not make such a claim in his petition for certification to appeal. There is no basis for us to conclude, therefore, that the habeas court abused its discretion in denying his petition for certification to appeal on an issue it never considered.

The appeal is dismissed.

In this opinion the other judges concurred.

LINDA STELLER *v.* RODNEY STELLER
(AC 39014)

Sheldon, Keller and Bright, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court modifying the defendant's alimony, life insurance and disability insurance obligations. The parties' settlement agreement, which had been incorporated into the dissolution judgment, required the defendant to pay the plaintiff alimony that was nonmodifiable for four years, except under certain circumstances. It also required the defendant to maintain life and disability insurance to secure the plaintiff's alimony. In addition, the agreement provided that the defendant, upon reaching the age of sixty-five years, was entitled to retire and to a "second look" at his alimony obligation without the need of showing a substantial change in circumstances, and that if the defendant were to sell his dental practice, he would pay the plaintiff 20 percent of the net consideration received at the time of sale and the closing of title. After turning sixty-five, the defendant filed a motion for modification seeking to modify his alimony, life insurance and disability insurance obligations because he wanted to reduce his work schedule and to increase his vacation time. Following a hearing, the trial court found that the plaintiff had a gross earning capacity of $20,800 per year and that the defendant had a gross earning capacity of $200,000 per year, in light of his anticipated reduced work schedule in 2016. The court also found that the defendant was expected to sell his dental practice later that year, at which time the plaintiff would receive $120,000 as a result of that sale. On the basis of those findings, the court, stating that it had considered the relevant statutory (§ 46b-82) criteria, granted the defendant's motion for modification and ordered certain reductions to his alimony, life insurance and disability insurance obligations. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on her claim that the trial court improperly determined that the defendant's earning capacity was less than his actual current income, as the plaintiff failed to demonstrate that the court misinterpreted or misapplied the term "earning capacity" as that term is used in § 46b-82; the court's determination was entirely consistent with the parties' agreement, which explicitly contemplated a change in the defendant's work hours when he reached the age of sixty-five, confirmed the defendant's right to retire at that age and provided for a "second look" at alimony, without the need to show a substantial change in circumstances, even if he did not retire, and, therefore, a finding

of an earning capacity less than the defendant's current income was amply justified.

2. The trial court's finding that the defendant's gross earning capacity in 2016 was $200,000 per year was clearly erroneous, as it was not supported by the evidence but, instead, was based on that court's unsupported assumptions and the speculative testimony of the defendant, which left this court with the definite and firm conviction that a mistake had been committed: the trial court's finding was based on its clearly erroneous subordinate finding that the defendant had earned only $260,000 in 2015, which did not take into account all of the defendant's sources of income, but only his income from wages, and the evidence did not support the court's conclusion that a reduction in the defendant's hours from forty to thirty-three per week, and an increase in his vacation time from six to ten weeks per year, would cause his gross earning capacity to decrease from approximately $469,000 in 2014 to $200,000 in 2016; accordingly, because, pursuant to § 46b-82 (a), the court was required to consider each party's amount and sources of income and earning capacity when determining alimony, the case was remanded for a new hearing on the defendant's motion for modification, and because the trial court based its finding as to the defendant's net weekly earning capacity on its clearly erroneous finding as to his gross annual earning capacity, that finding also was clearly erroneous.

3. Although the trial court's finding that the sale of the defendant's dental practice was expected to occur in 2016 was not supported by the evidence and was clearly erroneous, because this court reversed the judgment of the trial court and remanded the case for a new hearing on the defendant's motion for modification and this error was not likely to recur on remand, it was not necessary for this court to determine if the trial court's error was harmful; moreover, this court declined to review the plaintiff's claim challenging the trial court's findings as to her gross annual earning capacity and net weekly earning capacity in light of this court's reversal of the trial court's judgment and remand of the case for a new hearing on the motion for modification.

4. Contrary to the plaintiff's claim, the trial court properly conducted a "second look" de novo review of the defendant's alimony obligation in accordance with the parties' agreement and properly considered the criteria set forth in § 46b-82 in accordance with relevant case law in reaching its decision; the plain language of the parties' agreement permitted the court to take a fresh look at the defendant's alimony obligation and the parties' financial circumstances after he reached the age of sixty-five, without first having to find a substantial change in circumstances, and, in conducting its de novo review, the court specifically stated that it had considered the statutory criteria pursuant to § 46b-82, and its memorandum of decision reflected that consideration.

5. The plaintiff could not prevail on her claim that the trial court abused its discretion by lowering the defendant's life and disability insurance

obligations, which was based on her claims that insurance orders are not modifiable and that the defendant failed to prove a substantial change in circumstances; the relevant insurance provisions in the parties' agreement clearly provided that they were meant to secure the plaintiff's entitlement to alimony and that they were modifiable by the court and terminable upon the termination of alimony, and, therefore, on remand, the trial court could consider whether the defendant's insurance obligations should be modified in connection with its resolution of the defendant's motion for modification of his alimony obligation.

Argued January 30—officially released May 1, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Swienton*, *J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' settlement agreement; thereafter, the court, *Shluger*, *J.*, granted the defendant's motion for modification of alimony, life insurance and disability insurance and issued certain orders, and the plaintiff appealed to this court; subsequently, the court, *Shluger*, *J.*, issued an articulation of its decision. *Reversed*; *further proceedings*.

Samuel V. Schoonmaker IV, with whom was *Wendy Dunne DiChristina*, for the appellant (plaintiff).

Leslie I. Jennings-Lax, for the appellee (defendant).

Opinion

BRIGHT, J. The plaintiff, Linda Steller, appeals from the judgment of the trial court modifying the alimony, life insurance, and disability insurance obligations of the defendant, Rodney Steller. The plaintiff claims that the trial court: (1) improperly determined that the defendant's earning capacity was less than his actual income and then based its alimony order on that determination; (2) made clearly erroneous findings, which were unsupported by the evidence, regarding the defendant's gross and net earning capacities, her earning

capacity, and the amount she would receive from the purported sale of the defendant's dental practice later that year; (3) failed to apply the proper legal principles, in accordance with General Statutes § 46b-82 and relevant case law, for resolving a motion for modification of alimony; and (4) abused its discretion by lowering the defendant's disability and life insurance obligations. We agree with the plaintiff on the second claim and reverse the judgment of the trial court.

The following facts inform our review. The parties were married in 1973, and two children were born of that marriage, both of whom have reached adulthood. On October 21, 2008, the court rendered a judgment dissolving the parties' marriage, which incorporated by reference the parties' settlement agreement (agreement). Article 4.1 of the agreement provides in relevant part that the defendant will pay to the plaintiff alimony in the amount of $8333.33 per month, which is nonmodifiable for the first four years, unless circumstances arise that substantially reduce the defendant's earnings or earning capacity based upon his health or some outside factor, not including the voluntary sale of his dental practice. Article 4.1 also defines "substantially diminishes his earnings" to mean "that the [defendant's] earnings are reduced to less than TWO HUNDRED THIRTY-SEVEN THOUSAND, FIVE HUNDRED DOLLARS ($237,500) per year, gross income from employment."

Article 4.3 of the agreement provides that the defendant is entitled to retire at the age of sixty-five, and that he is entitled to a "second look" at his alimony obligation upon reaching age sixty-five, without the need for establishing a substantial change in circumstances.[1] The agreement requires the defendant to maintain life insurance in the amount of $750,000 to secure

[1] Specifically, article 4.3 of the agreement provides: "It is acknowledged that the husband has the right to retire upon reaching the age sixty-five (65) years and he may petition the Court to take a 'second look' for a hearing

the plaintiff's entitlement to alimony. This amount is reducible, in the defendant's discretion, by $100,000 per year, commencing on the fifth anniversary of the judgment, provided it may not be reduced below $450,000 until the termination of alimony or pursuant to court order. The agreement also requires that the defendant maintain disability insurance in the amount of $10,000 per month, modifiable as of the fifth year of the judgment. Additionally, the agreement provides that, if the defendant sells his interest in his dental practice, he shall pay to the plaintiff a sum equal to 20 percent of the net consideration received at the time of sale and the closing of title.

Following the defendant's sixty-fifth birthday, he filed a motion, on the basis of the October 21, 2008 judgment and the parties' agreement, requesting a modification or termination of alimony and of life insurance and disability insurance, contending that he has reached the age of sixty-five and that, although he "has not yet retired, he wishes to reduce his workload and work schedule but is refraining from doing so [to] the extent desired until he can determine his alimony obligation, if any, going forward."

On January 29, 2016, the court held a hearing on the defendant's motion, and, in a February 3, 2016 memorandum of decision, it set forth the following relevant findings. At the time of the parties' dissolution, the plaintiff earned approximately $6000 per year working as the office manager/receptionist/bookkeeper for the

to determine the amount of alimony which he shall pay to the wife. The retirement of the husband at age sixty-five (65) shall be considered a substantial change in circumstances, but in any event, even if the husband does not retire at age sixty-five (65), he shall have a right to seek a modification of alimony at age sixty-five (65) without the need of showing a substantial change in circumstances. This provision is not intended to limit the modifiability of alimony before or after that date, pursuant to Connecticut statutory and case law, except as provide under Article 4.1 above."

defendant's dental practice, and the defendant earned $378,000 per year. Both parties worked full time. Their forty-three page agreement, which had been incorporated into the judgment of dissolution, provided for a distribution of the parties' $2.5 million in marital assets. The plaintiff was awarded substantial assets through the agreement. She currently "has mutual funds, [individual retirement accounts] and annuities worth $1 million. She claims to earn only $59 per week or approximately $3000 per year on dividends from her investments . . . . In addition she owns a home which she values at $450,000 with a $273,000 mortgage or $176,000 in equity." Since the date of dissolution, the plaintiff has not sought employment or ascertained the amount of her forthcoming social security benefits, despite knowing that the alimony provision in the agreement is modifiable and that the defendant is entitled to request a second look at alimony upon reaching the age of sixty-five. The plaintiff works as a nanny for her grandchildren approximately forty hours per week for no fee. She has no earned income. The court found that the plaintiff has an earning capacity of $20,800 per year.[2]

As to the defendant, the court found that he consistently has worked forty hours per week over the years and that he earned approximately $528,000 in 2013, $469,000 in 2014, and $260,000 in 2015. The court further found that the defendant wants to reduce his workload to thirty-three hours per week, with increased vacation time to ten weeks per year. Consequently, the court found that the defendant has an earning capacity of $200,000 per year. The court further found that the defendant was expected to sell his dental practice later in 2016, for the estimated amount of $600,000, at which

[2] In another part of its decision, the court found that the plaintiff's earning capacity was $20,000. In its articulation, however, it restated her gross earning capacity as $20,800.

time the plaintiff would receive $120,000 as a result of that sale.

The court also stated that the plaintiff's financial affidavit provides that her expenses have been reduced to $106,000 per year,[3] but the court found that the plaintiff's expenses were inflated and that she "could continue to enjoy her present lifestyle without the necessity of working with $78,156 per year." Further, the court found that the plaintiff is "woefully ignorant as to her financial circumstances, opportunities, and investments . . . [as well] as to her Social Security rights . . . ."

On the basis of these findings, the court, stating that it had considered the statutory criteria set forth in § 46b-82, granted the defendant's motion for modification and modified his alimony, life insurance, and disability insurance obligations. Specifically, the court ordered, effective June 9, 2016,[4] the plaintiff's sixty-sixth birthday, the defendant's alimony obligation reduced to $60,000 per year and his life and disability insurance obligations reduced by 50 percent.[5] This appeal followed.[6]

We begin by setting forth the standard of review. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused

[3] At the time of the dissolution in 2008, the plaintiff's financial affidavit provided that her living expenses were $187,497.96 per year.

[4] Although the defendant had requested that the modification be made retroactive to the date of the filing of the motion, the court denied that request, explaining that the defendant had enjoyed his higher income during that period and that the plaintiff presumably had spent that money.

[5] The court explained that "[t]he life insurance and disability insurance obligation agreed to by the parties at the time of the dissolution can and should be reduced at this time as the term to be protected is shorter and the amount is lower than at the time of the divorce."

[6] In an articulation, the court explained that the plaintiff's net earning capacity is approximately $350 per week, and the defendant's net earning capacity is approximately $2700 per week.

its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling on a modification may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citation omitted; internal quotation marks omitted.) *Williams* v. *Williams*, 276 Conn. 491, 496–97, 886 A.2d 817 (2005). "Furthermore, [t]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Norberg-Hurlburt* v. *Hurlburt*, 162 Conn. App. 661, 672–73, 133 A.3d 482 (2016).

"In a marriage dissolution action, an agreement of the parties executed at the time of the dissolution and incorporated into the judgment is a contract of the parties. . . . The construction of a contract to ascertain the intent of the parties presents a question of law when the contract or agreement is unambiguous within the four corners of the instrument. . . . The scope of review in such cases is plenary . . . [rather than] the clearly erroneous standard used to review questions of fact found by a trial court." (Citation omitted; internal quotation marks omitted.) *Williams* v. *Williams*, supra, 276 Conn. 497. Because the language of the agreement in the present case, as incorporated into the dissolution

judgment, is clear and unambiguous, our review is plenary.

"[Our Supreme Court] and [this court] have often described financial orders appurtenant to dissolution proceedings as entirely interwoven and as a carefully crafted mosaic, each element of which may be dependent on the other. . . . In general, the same factors used by the court to establish an initial award of alimony are relevant in deciding whether the decree may be modified. . . . More specifically, these criteria, outlined in . . . § 46b-82, require the court to consider the needs and financial resources of each of the parties . . . as well as such factors as the causes for the dissolution of the marriage and the age, health, station, occupation, employability and amount and sources of income of the parties." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Gay* v. *Gay*, 70 Conn. App. 772, 776, 800 A.2d 1231 (2002), aff'd in part, 266 Conn. 641, 835 A.2d 1 (2003). We now consider each of the plaintiff's claims.

I

The plaintiff first claims that the court "improperly determined that the defendant's earning capacity was lower than his actual current income, and then based its orders on his earning capacity rather than actual income." She argues: "A voluntary retirement does not result in a loss of earning capacity, just as a proposed reduction in hours is not the same as a loss of earning *capacity*. . . . [A]scribing a loss of earning capacity to the defendant when he is still working and completely employable at his current occupation is speculative and a misapplication of the law. He may or may not reduce his hours; he may retire or he may not." (Emphasis in original.)

The defendant argues that the court properly construed the term "earning capacity." He argues that the

court "had before it evidence that the defendant was reducing his work hours and that the reduction in work hours would lead to a reduction in earnings." Further, the defendant argues that, because he reached the age of sixty-five and is entitled to a second look at alimony on the basis of the dissolution judgment, without a showing of a substantial change, and because he is experiencing health issues such as a stiff neck, arthritis, and increased stress, the court properly found that his earning capacity was reduced by his age and circumstances. We agree with the defendant.

Section 46b-82 (a) provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties . . . ."

"It is well established that the trial court may under appropriate circumstances in a marital dissolution proceeding base financial awards on the earning capacity of the parties rather than on actual earned income. . . . Earning capacity, in this context, is not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a person can realistically be expected to earn considering such things as his vocational skills, employability, age and health. . . . [I]t also is especially appropriate for the court to consider whether the defendant has wilfully restricted his earning capacity to avoid support obligations . . . . Moreover, [l]ifestyle and personal expenses may serve as the basis for imputing income where conventional methods for determining income are inadequate." (Citations omitted; internal quotation

marks omitted.) *Milazzo-Panico* v. *Panico*, 103 Conn. App. 464, 468, 929 A.2d 351 (2007).

"Although it is true that the court generally increases the actual earned income of a party when it considers that party's earning capacity, there is no statutory provision or case law that precludes a court from decreasing that income under appropriate circumstances. . . . [Our] case law is clear that earning capacity is the amount that a person can *realistically* be expected to earn . . . ." (Emphasis in original; internal quotation marks omitted.) *Elia* v. *Elia*, 99 Conn. App. 829, 833, 916 A.2d 845 (2007).

The plaintiff claims that the court misinterpreted the term "earning capacity" as that term is used in § 46b-82. She argues that this misinterpretation is demonstrated by the fact that the defendant's actual earnings at the time of the hearing on the defendant's motion for modification were greater than the earning capacity found by the court. We are not persuaded.

In this case, the defendant, at the January 29, 2016 hearing on his motion, testified that, *as of January 1*, he was "taking an additional afternoon off and . . . scheduling ten weeks [of] vacation per year." He also testified: "After practicing dentistry for [forty] years . . . I'm starting to . . . have a few bodily issues. My neck has been stiff for six months. . . . I have a little bit of arthritis in my hand. And the stress of running any small business now is extremely difficult . . . ." This testimony provided a sufficient basis for the court to find that the defendant's earning capacity is less than his current income. We find no error in this conclusion.[7]

[7] Our conclusion that the court reasonably could conclude, based on the evidence presented, including the agreement that anticipated a reduction in the defendant's work schedule, that the defendant had an earning capacity less than his current income does not change what must be shown to determine the defendant's specific earning capacity. The court's conclusion as to earning capacity must be based on evidence of what reasonably can be expected. The court cannot rely on speculation as to a defendant's hopes

As we explained in *Elia*, our case law is clear that a party's earning capacity is the amount that he or she *realistically can be expected* to earn. *Elia* v. *Elia*, supra, 99 Conn. App. 833. It is not the amount the party previously has earned or currently may be earning. See id.; *Milazzo-Panico* v. *Panico*, supra, 103 Conn. App. 468.

After reviewing the court's memorandum of decision and our relevant case law, we conclude that the plaintiff has failed to demonstrate that the court misconstrued or misapplied the term "earning capacity" or that it improperly determined that the defendant's earning capacity was less than his purported current earnings. In fact, the court's conclusion is entirely consistent with the parties' agreement, which explicitly contemplates a change in the defendant's work hours when he reached age sixty-five. Article 4.3 of the agreement confirms the defendant's right to retire at the age of sixty-five and provides for a "second look" at alimony, without the need to show a substantial change in circumstances, even if he did not retire. Under these circumstances, a finding of an earning capacity less than the defendant's current income is amply justified.

II

The plaintiff next claims that the court made clearly erroneous findings, which were unsupported by the evidence, regarding the defendant's gross and net earning capacity, the plaintiff's earning capacity, and the amount the plaintiff would receive from the purported sale of the defendant's dental practice later in the year. We consider each of these in turn.

or desires as to a reduced work schedule. In order to conclude that the defendant's earning capacity is less than his actual income, the court must have evidence that the defendant actually has taken steps or has demonstrated that he will be taking steps to reduce his income, and there must be evidence as to the effect such steps will have on the defendant's earning capacity.

As set forth previously in this opinion: "[T]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Norberg-Hurlburt* v. *Hurlburt*, supra, 162 Conn. App. 672–73.

A

The plaintiff claims that the court's "finding that the defendant has a gross annual earning capacity of $200,000 was not supported by the evidence." The plaintiff argues that "it is indisputable that the evidence of current actual gross income far exceeded the trial court's $200,000 per year finding." To support her argument, the plaintiff points to the defendant's financial affidavit, which discloses a gross weekly income from employment of $5006, his 2015 paystub, which showed wages of $260,319 in 2015, and his testimony revealing that, in addition to these wages in 2015, he made a voluntary contribution to his 401 (K) in the amount of $24,000, his business paid his family health insurance premiums in the amount of $25,012, his limited liability company received rental income in the amount of $58,200, he received income in the form of car payments made by his business for one of his cars, and he had subchapter S flow through income that was not disclosed on the affidavit. She argues that "[n]o historical or expert evidence supports the trial court's finding that the defendant's earning capacity is $200,000" and that "[a]n earning capacity finding that is based on incompetent, equivocal, or speculative evidence cannot stand."

The defendant responds that the court properly concluded that his gross earning capacity was $200,000. He argues that "there was ample evidence, based on [his] testimony and paystubs regarding his 2015 income and his reduction in work hours to support the court's finding . . . ." We agree with the plaintiff.

The court's conclusion as to the defendant's earning capacity was based on a brief exchange between the court and the defendant. Initially, the court asked the defendant if he had "an estimate as to how much income [he would] be able to earn in [2016], based on [his new] schedule." The defendant responded that he "really [had not] thought about it too much. Whatever it is, it is." In response to further questions from the court, the defendant eventually testified that his *income* for 2016 would be "around $200,000." The defendant explained that he had reduced his work schedule to thirty-three hours per week by taking an additional afternoon off, so that he was no longer working on Wednesday or Friday afternoons, and that he also increased his vacation time from four to six weeks per year to ten or more weeks per year. The defendant testified that he expected to earn approximately *50 percent of his previous income*. The court asked the defendant if he meant that he was going to earn 50 percent less than the $250,000 in wages from last year, and the defendant responded: "[M]aybe not half of that, but I'm thinking of years past, too." The court then asked the defendant to explain how that was possible. The defendant explained that when he hired his associate, he also had to hire an additional dental assistant, and that the addition of these two people initially increased his expenses by approximately $200,000. As his associate and his new assistant developed their abilities and increased the number of patients they saw, the defendant saw an increase in his income as a result of these employees. The defendant stated, however, that, with

the recent decline in the economy and his beginning to take more time off, business leveled off and then declined, such that his income went from $469,000 in 2014 to $260,000 in 2015. With his further reduction in hours and the need to eliminate one of his two dental hygienists, the defendant stated that he expects to earn only $200,000 going forward.

The problem with the defendant's back of the envelope estimate is that it was inconsistent with and contrary to other undisputed evidence, including the defendant's 2014 tax return, his 2015 statement of wages, and his October 8, 2015 and January 29, 2016 financial affidavits. A review of those records demonstrates that the defendant's income did not decline from $469,459 in 2014 to $260,000 in 2015. The defendant's 2014 tax return provides some detail as to the components of the defendant's income that year. Only $250,816 of his income that year was from wages. The defendant reported additional income of $185,436 from "[r]ental real estate, royalties, partnerships, S corporations, trusts, etc." This amount included rent his limited liability company received from his dental practice, as well as subchapter S flow through income from the dental practice.[8] The defendant's 2014 income also included $29,173 in other income.

[8] We are mindful that our Supreme Court in *Tuckman* v. *Tuckman*, 308 Conn. 194, 209–10, 61 A.3d 449 (2013), a case involving a child support obligation, explained that although a tax return may demonstrate that "a substantial portion of [a party's] taxable income . . . was income from [that party's] share of the S corporation . . . [because an S corporation's] capital gains and losses, for federal income tax purposes, pass through [it] to the individual shareholders . . . any federal income tax liability on capital gains is the responsibility of the individual shareholder. . . . All of the earnings of such a company must be reported as individual income by its [shareholders]." (Citation omitted; internal quotation marks omitted.) That does not signify, however, what portion of the money "was actually available to the [party] and what portion was merely [pass] through earnings of the S corporation." (Internal quotation marks omitted.) Id., 210. Here, the court and the defendant attributed the entire S corporation income to him for a total gross income of $469,459.

At the time of the January 29, 2016 hearing on the defendant's motion, the defendant had not yet prepared his 2015 tax return, so it was not available for a fair comparison of the defendant's year to year income with 2014. The October 8, 2015 affidavit reflected year to date wages of $224,016, but it did not contain any of the additional income shown on the defendant's 2014 tax return. The defendant did provide the plaintiff with an updated financial affidavit dated January 29, 2016, in connection with his motion, but that affidavit also only set forth his income from wages. The defendant testified, however, that he did not include any other sources of income on the affidavit because he believed that the plaintiff had that information from his 2014 tax return. Also in evidence was the defendant's statement of wages for 2015, which reflected that the defendant's 2015 wages were $260,319. His January 29, 2016 financial affidavit reflected weekly wages of $5006, which is consistent with his statement of wages. Thus, despite the defendant's testimony that the economy took a toll on his business and "he took a lot more time off" in 2015, his wages in 2015 actually increased by almost $10,000 from 2014.

Furthermore, the defendant's 2015 "earnings" of $260,319 do not include other income received by the defendant, including additional income specifically related to his dental practice. For example, the defendant's limited liability company received rental income from the practice during 2015. The practice also paid certain personal expenses for the defendant, such as property tax on one of his personal vehicles and home cleaning expenses. The defendant's wage earnings also do not include any subchapter S flow through income that the defendant received in 2015. See generally footnote 8 of this opinion. According to the defendant's tax return, such income from his dental practice alone amounted to $151,306 in 2014.

Thus, although the defendant's 2015 tax return was not available and his updated financial affidavit did not itemize all of his sources of income, it is clear that his income in 2015 was greater than his wage earnings of $260,319. In fact, the only evidence before the court as to the amount of this other income was the defendant's testimony that he did not think he needed to provide such information on his updated financial affidavit because the plaintiff had the relevant information from his 2014 tax return, suggesting that such income in 2015 was not materially different. Consequently, the court's factual findings that the defendant earned approximately $469,000 in 2014 but only $260,000 in 2015 is the result of an unfair comparison of income because the $260,000 included only income from wages. It reflects an apples to oranges comparison of *total income* in 2014 to *wage income* in 2015. The court should have considered all of the defendant's income in 2015, not just his wages, which in 2014, made up only a little more than one half of his total income. Because the court's ultimate conclusion that the defendant's earning capacity is $200,000 was based, at least in part, on its clearly erroneous finding that the defendant earned only $260,000 in 2015, it, too, is clearly erroneous.

Furthermore, the evidence does not support the court's conclusion that a reduction in the defendant's hours from forty to thirty-three per week, and an increase in his vacation time from six to ten weeks per year, would cause his earning capacity to decrease from $469,000 in 2014 to $200,000 in 2016. When asked by the court how much income he would be able to earn based on that reduced schedule, the defendant responded that he really had not thought about it too much and "[w]hatever it is, it is." He then estimated that the impact would be "at least 50 percent of my income." He then identified two factors on which he based his estimate. First, the defendant testified that

reducing his hours would require the practice to have one less dental hygienist. He produced no evidence, however, regarding the income generated by the hygienist. Second, the defendant testified that his business suffered due to problems in the economy in 2015, but, again, he produced no records or other evidence quantifying such an impact, and, in fact, the only evidence provided showed that his wages actually increased in 2015.

Overall, the court's conclusion that the defendant's gross earning capacity is $200,000 is not supported by the evidence; instead, it is based on unsupported assumptions and the defendant's speculation. We are left with the definite and firm conviction that a mistake has been committed. See *Norberg-Hurlburt* v. *Hurlburt*, supra, 162 Conn. App. 673. Consequently, the court's finding as to the amount of the defendant's gross earning capacity is clearly erroneous. Because § 46b-82 (a) requires the court, when determining alimony, to consider each party's "amount and sources of income [and] earning capacity," the court's clearly erroneous finding as to the defendant's earning capacity and its failure to consider all of the defendant's sources of income requires that the court's judgment modifying the defendant's alimony obligation be reversed and the case remanded for a new hearing on the defendant's motion for modification.

B

The plaintiff next claims that the court's articulated finding that the defendant's net weekly earning capacity is $2700 is clearly erroneous and unsupported by the evidence. We agree. Because the court based its net earnings finding on its clearly erroneous finding that the defendant has a gross earning capacity of $200,000, the court's net earning capacity finding is also clearly erroneous.

C

The plaintiff also claims that the court's "findings that the plaintiff has a gross annual earning capacity of $20,800 and a net weekly earning capacity of approximately $350 per week were not supported by the evidence." (Internal quotation marks omitted.) She argues that "[t]here was no evidence that anyone would hire the plaintiff to work for forty hours each week, that anyone would pay her $10 per hour, or that she should work fifty-two weeks per year as a babysitter for a stranger while the defendant enjoys his 'golden years.' " The plaintiff further argues that the court had no evidence to compute a net earning capacity for her. Given our conclusion that the court's finding regarding the defendant's earning capacity requires us to reverse the judgment of the trial court and to remand the case for a new hearing on the defendant's motion, we need not address the plaintiff's argument and decline to do so.

D

The plaintiff claims that the court's "finding that [she] would receive $120,000 upon sale of the dental practice in 2016 was unsupported and speculative." The plaintiff argues that the "court considered all of the . . . § 46b-82 criteria, and those criteria include 'estate' and 'amount and sources of income.' . . . The trial court [therefore erred] by finding that the plaintiff would receive $120,000 from the defendant in 2016, and by considering that amount when it entered a modified alimony order." (Citation omitted.) Although the defendant concedes that the court's finding that a sale *was expected in 2016* was clearly erroneous, he argues that the finding was not relevant to the court's decision, and, therefore, it was harmless error.

We have reviewed the record in this case and agree with the plaintiff that there is no evidence to support the court's finding that "it is expected that a sale [of

the defendant's dental practice] will occur this year" and that the plaintiff will get $120,000 from that sale.[9] We agree, therefore, that this finding is clearly erroneous. Because we are reversing the judgment of the trial court and remanding the case for a new hearing on the defendant's motion for modification, and this error is not likely to recur on remand, it is not necessary for us to determine if the court's error was harmful.

III

The plaintiff next claims that "[t]he trial court misapplied *Borkowski* and *Dan* when it considered the . . . § 46b-82 criteria." See *Borkowski* v. *Borkowski*, 228 Conn. 729, 638 A.2d 1060 (1994), and *Dan* v. *Dan*, 315 Conn. 1, 105 A.3d 118 (2014). She argues that *Dan* requires the court to compare "conditions at the time of its modified order to conditions at the time of the last court order . . . ." Furthermore, she argues, although paragraph 4.3 of the agreement "allowed for a 'second look' at alimony without a substantial change in circumstances . . . [p]aragraph 4.1 . . . provided for $100,000 per year in alimony for an indefinite duration of time . . . [and] [t]here was no indication in the agreement that the plaintiff had an earning capacity, must obtain paid employment, or must become self-sufficient by a certain date. . . . There was no demonstration that circumstances had changed since the last court order such that it would be unjust or inequitable for the plaintiff to maintain her lifestyle after she attained age sixty-six. . . . The trial court abused its discretion by basing its alimony order on a reduced standard of living and an imputed earning capacity." (Citations omitted.)

[9] Schedule A of the agreement provides in relevant part that the plaintiff will receive 20 percent of the net consideration received for the sale of the practice.

The defendant argues that, by agreement of the parties, the defendant did not need to establish a substantial change in circumstances when obtaining review of his alimony order upon reaching the age of sixty-five. Accordingly, he argues, the court properly considered the statutory criteria used to determine the initial award and "properly considered the needs of the plaintiff and the earning capacities of both parties when entering the modified alimony award, and, these being the criteria that had changed since the date of dissolution of the parties' marriage, the trial court properly conformed its [new alimony order] to those changed criteria." We conclude that the court properly conducted a "second look" de novo review of alimony in accordance with the parties' agreement.

In *Hardisty* v. *Hardisty*, 183 Conn. 253, 258–59, 439 A.2d 307 (1981), our Supreme Court articulated a two part test to be conducted when addressing a motion to modify alimony. First, the court must find a substantial change in the financial circumstances of one of the parties. Id. Second, the court must determine whether modification is warranted. Id., 259.

In *Borkowski* v. *Borkowski*, supra, 228 Conn. 737, our Supreme Court further articulated that the bifurcated inquiry of the trial court is not two completely separate inquiries but that modification can be entertained on a showing of a "substantial change in the circumstances of either party to the original dissolution decree. . . . Thus, once the trial court finds a substantial change in circumstances, it can properly consider a motion for modification of alimony." (Citation omitted.) See also *Dan* v. *Dan*, supra, 315 Conn. 9.

"When a modification of alimony is requested on the basis of the [parties'] separation agreement, [however] the court must look to the agreement. Separation agreements incorporated by reference into dissolution

judgments are to be interpreted consistently with accepted principles governing contracts." (Internal quotation marks omitted.) *Cushman* v. *Cushman*, 93 Conn. App. 186, 191, 888 A.2d 156 (2006). "The construction of a contract to ascertain the intent of the parties presents a question of law when the contract or agreement is unambiguous within the four corners of the instrument. . . . The scope of review in such cases is plenary." (Internal quotation marks omitted.) Id.

In the present case, the parties agreed that once the defendant reached his sixty-fifth birthday, that circumstance in and of itself would permit him to obtain a "second look" at the alimony order "without the need of showing a substantial change in circumstances." Although the plaintiff appears to argue that the court could not conduct a de novo review of alimony, and that it needed to find a substantial change of circumstances; see *Borkowski* v. *Borkowski*, supra, 228 Conn. 737; we conclude that the plain language of the agreement permitted the court to take a fresh look at the parties' financial circumstances after the defendant reached his sixty-fifth birthday. As we explained in *Taylor* v. *Taylor*, 117 Conn. App. 229, 233, 978 A.2d 538, cert. denied, 294 Conn. 915, 983 A.2d 852 (2009): "If that was not the intent of the parties, the second look language would have been superfluous because the agreement provided that alimony could be modified at any time if a substantial change of circumstances occurred. The [parties'] agreement, however, specifically provides that on the happening of . . . [the defendant's sixty-fifth birthday], alimony may be given a second look. We conclude, therefore, that this language permits a de novo review of the plaintiff's alimony obligation." See also A. Rutkin et al., 8 Connecticut Practice Series: Family Law and Practice with Forms (3d Ed. 2010) § 33:31, pp. 89–90 ("[w]hen the judgment . . . calls for a second look at a specified time or upon the

occurrence of a specified event, there is no need for separate proof of a substantial change in circumstances and there is a de novo review at the time of the second look").

When conducting a de novo "second look," the court considers "the parties' financial circumstances de novo, as if it were an initial determination of alimony, requiring the application of § 46b–82 criteria." *Cushman* v. *Cushman*, supra, 93 Conn. App. 191. "Section 46b–82 set[s] forth the criteria that a trial court must consider when resolving property and alimony disputes in a dissolution of marriage action. The court must consider all of these criteria. . . . It need not, however, make explicit reference to the statutory criteria that it considered in making its decision or make express finding[s] as to each statutory factor. A ritualistic rendition of each and every statutory element would serve no useful purpose. . . . [T]he trial court is free to weigh the relevant statutory criteria without having to detail what importance it has assigned to the various statutory factors." (Internal quotation marks omitted.) Id.

In the present case, the trial court's memorandum of decision reveals that, in conducting the "second look" at alimony, the court took note of the award of alimony to the plaintiff at the time of the judgment of dissolution, as well as the fact that she was "awarded substantial assets through the separation agreement." The court specifically stated that it had "considered the statutory criteria pursuant to . . . [§] 46b-82 including the length of the marriage, the causes for the dissolution of the marriage, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties," and its decision reflects that consideration. Indeed, the court's focus, as evinced by its memorandum of decision, was on the parties' present

circumstances, including their current ages, employability, earning capacities, amount and sources of income, and their respective needs. We conclude, therefore, that although it made erroneous findings of fact that require reversal and a new hearing, the court properly conducted a "second look" at alimony under the agreement and that it properly considered the criteria of § 46b-82 in accordance with relevant case law.

IV

The plaintiff's final claim is that the court abused its discretion by lowering the defendant's insurance obligations without finding a substantial change in circumstances. The plaintiff also argues, however, that insurance orders, like property divisions, are nonmodifiable, and the court had no authority to rewrite the parties' agreement. The defendant argues that the plaintiff is attempting to "confuse the issues" because the parties' agreement provides that "the defendant's obligations to maintain disability insurance and life insurance were fully modifiable once the four year period of nonmodifiable alimony had passed." We agree with the defendant.

As explained previously in this opinion: "In a marriage dissolution action, an agreement of the parties executed at the time of the dissolution and incorporated into the judgment is a contract of the parties. . . . The construction of a contract to ascertain the intent of the parties presents a question of law when the contract or agreement is unambiguous within the four corners of the instrument. . . . The scope of review in such cases is plenary . . . [rather than] the clearly erroneous standard used to review questions of fact found by a trial court." (Citation omitted; internal quotation marks omitted.) *Williams* v. *Williams*, supra, 276 Conn. 497. Because the language of the agreement in the present case, as incorporated into the dissolution judgment, is clear and unambiguous, our review is plenary.

Paragraph 5.1 of the agreement provides in relevant part that the defendant "shall maintain insurance upon his life . . . in an amount not less [than] SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000) and shall name the [plaintiff] as beneficiary of said policy *in order to secure the* [*plaintiff's*] *alimony*. The amount of life insurance coverage . . . may . . . be reduced by ONE HUNDRED THOUSAND DOLLARS ($100,000) per year commencing on the fifth (5th) anniversary of the final decree for dissolution of marriage. Provided, however, no less than FOUR HUNDRED FIFTY THOUSAND DOLLARS ($450,000) *shall be maintained for the benefit of the* [*plaintiff*] *until the termination of alimony or pursuant to further Court order*." (Emphasis added.)

Paragraph 5.6 of the agreement provides in relevant part: "The [defendant] shall maintain his present disability insurance policies at no cost to the [plaintiff], pursuant to the provisions of Article IV[10] . . . . The [defendant] shall, at all times, keep said disability insurance in full force and effect . . . *until*, *when*, *and if the* [*defendant's*] *alimony obligation is terminated* pursuant to the provisions of Article IV . . . . Provided, however, commencing on the fourth (4th) anniversary of the final decree for dissolution of marriage, the [defendant's] *obligation to maintain his current level of disability insurance shall be modifiable in the same manner as alimony under Connecticut law*." (Emphasis added; footnote added.)

In its memorandum of decision, the court ordered that the defendant could reduce both his life insurance and his disability insurance by 50 percent. The plaintiff argues that the court abused its discretion because

[10] Article IV of the agreement provides in relevant part that disability insurance was to be maintained to "secure the alimony payment" to the plaintiff.

insurance orders are not modifiable and because the defendant did not prove a substantial change in circumstances. We disagree.

As to the plaintiff's argument that insurance is not modifiable, on the basis of the clear language of the agreement, we reject this contention outright. See also General Statutes § 46b-86 (expressly authorizing modification of life insurance orders in marital dissolution decrees). Clearly, both insurance provisions in the agreement specifically provide that the amount of insurance is modifiable. Indeed, both provisions also anticipate the prospect that insurance could be terminated upon the termination of alimony. Accordingly, we need not address this argument further.

The plaintiff also argues that the court abused its discretion by modifying the amount of insurance the defendant was required to maintain without finding a substantial change in circumstances. She argues that despite the fact that paragraph 4.3 of the agreement provided that the defendant did not need to show a substantial change in circumstances upon reaching the age of sixty-five for a modification of alimony, the same was not provided in the paragraphs dealing with his insurance obligations. She argues, therefore, that the court needed to find a substantial change in circumstances. We are not persuaded.

As our law clearly provides: "[A] contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so." (Internal quotation marks omitted.) *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 192, 112 A.3d 144 (2015). Both insurance provisions in the agreement provide that they are meant to secure the plaintiff's entitlement to alimony. They also provide that they are modifiable by the court and terminable upon the termination of alimony. Thus, on remand, the

court may consider whether the defendant's insurance obligations should be modified in connection with its resolution of the defendant's motion for modification of his alimony obligation. To hold otherwise would require that we overlook and disregard the stated purpose of the life and disability insurance provisions of the agreement.

The judgment is reversed and the case is remanded for a new hearing on the defendant's motion for modification.

In this opinion the other judges concurred.

WELLS FARGO BANK, N.A., TRUSTEE *v.* MICHAEL JOHN MELAHN ET AL.
(AC 39426)

Sheldon, Bright and Bear, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property of the defendant M, who filed a second amended answer with special defenses and an eight count counterclaim. The counterclaim included claims for, inter alia, intentional and negligent misrepresentation, which were based in part on the plaintiff's past failure to comply with the notice provisions of the uniform foreclosure standing orders and on certain alleged misrepresentations by the plaintiff that induced M to enter into the mortgage and loan agreement. Thereafter, the plaintiff filed a motion to strike M's special defenses and all eight counts of the counterclaim, which the trial court granted on the grounds of legal insufficiency and that seven of the counterclaims did not relate to the making, validity, or enforcement of the note and mortgage, and, therefore, failed the transaction test. Subsequently, the trial court rendered judgment on the counterclaim in favor of the plaintiff, from which M appealed to this court. *Held* that the trial court did not abuse its discretion when it struck M's eight count second amended counterclaim on the grounds of legal insufficiency and a failure to meet the transaction test, and it properly rendered judgment in favor of the plaintiff after having stricken each count of the second amended counterclaim despite M's attempt to replead four of the eight stricken counts by adding a conclusory sentence to each of those counts; moreover, this court

dismissed M's appeal from the striking of the special defenses because that portion of the appeal was not from an appealable final judgment.

Argued February 5—officially released May 1, 2018

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the named defendant was defaulted for failure to appear; thereafter, the court, *Pavia*, *J.*, granted the plaintiff's motion for judgment of strict foreclosure and rendered judgment thereon; subsequently, the court, *Pavia*, *J.*, opened the judgment and granted the motion to dismiss filed by the named defendant; thereafter, the court, *Pavia*, *J.*, granted the plaintiff's motion to reargue and vacated its order of dismissal, and the named defendant appealed to this court, which reversed the trial court's judgment and remanded the matter for further proceedings; subsequently, the named defendant filed amended special defenses and a counterclaim; thereafter, the court, *Russo*, *J.*, granted the plaintiff's motion to strike the amended special defenses and counterclaim; subsequently, the named defendant filed a motion to amend the counterclaim; thereafter, the court, *Russo*, *J.*, rendered judgment on the counterclaim for the plaintiff, from which the named defendant appealed to this court. *Appeal dismissed in part; affirmed in part.*

Ridgely Whitmore Brown, with whom, on the brief, was *Benjamin Gershberg*, for the appellant (named defendant).

Marissa I. Delinks, with whom, on the brief, was *Valerie N. Doble*, for the appellee (plaintiff).

Opinion

PER CURIAM. The defendant, Michael John Melahn,[1] appeals, specifically pursuant to Practice Book § 61-2,[2] from the judgment of the trial court rendered in favor of the plaintiff, Wells Fargo Bank, N.A., as trustee, on the defendant's second amended counterclaim. In his appellate brief, the defendant also claims to be appealing from the court's order striking his amended special defenses. We dismiss the appeal as to the striking of the special defenses, and we affirm the judgment in all other respects.

This foreclosure case returns to us following our remand in *Wells Fargo Bank, N.A.* v. *Melahn*, 148 Conn. App. 1, 12–13, 85 A.3d 1 (2014). In that appeal, this court, despite the running of the law day, reversed the judgment of strict foreclosure and remanded the case to the trial court because the plaintiff had failed to comply with the foreclosure standing orders by giving timely notice to the defendant of certain important

[1] The plaintiff also named Danbury Radiological Associates, P.C., and Danbury Hospital as defendants in the foreclosure action. The only defendant who is a party to this appeal, however, is Melahn. Accordingly, all references to the defendant in this opinion are to Melahn.

[2] Practice Book § 61-2 provides: "When judgment has been rendered on an entire complaint, counterclaim or cross complaint, whether by judgment on the granting of a motion to strike pursuant to Section 10-44, by dismissal pursuant to Section 10-30, by summary judgment pursuant to Section 17-44, or otherwise, such judgment shall constitute a final judgment.

"If at the time a judgment referred to in this section is rendered, an undisposed complaint, counterclaim or cross complaint remains in the case, appeal from such a judgment may be deferred (unless the appellee objects as set forth in Section 61-5) until the entire case is concluded by the rendering of judgment on the last such outstanding complaint, counterclaim or cross complaint.

"If the judgment disposing of the complaint, counterclaim or cross complaint resolves all causes of action brought by or against a party who is not a party in any remaining complaint, counterclaim, or cross complaint, a notice of intent to appeal in accordance with the provisions of Section 61-5 must be filed in order to preserve the right to appeal such a judgment at the conclusion of the case."

terms of the foreclosure judgment and the adverse consequences of his continued failure to take action. Id., 4, 12–13. Moreover, the plaintiff incorrectly had certified to the court that the required notice had been provided to the defendant when, in fact, it had not been provided. Id., 6, 12–13.

After the case was remanded to the trial court, the defendant, on June 4, 2015, filed an answer with special defenses and a four count counterclaim, which included a count alleging no specific cause of action, a count alleging a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., a count alleging breach of contract/breach of the implied covenant of good faith and fair dealing, and a count alleging fraudulent or negligent misrepresentation. The plaintiff moved to strike the special defenses and the counterclaim, alleging, in relevant part, that all counts of the counterclaim were legally insufficient. The defendant, thereafter, consented to the granting of that motion.

On August 28, 2015, the defendant filed an amended answer with special defenses and a four count counterclaim, which included counts for (1) tortious predatory lending and foreclosure practices, (2) a CUTPA violation, (3) breach of contract/breach of the implied covenant of good faith and fair dealing, and (4) fraudulent and negligent misrepresentation. The plaintiff again moved, in relevant part, to strike all counts of the counterclaim on the ground of legal insufficiency. On September 10, 2015, the court granted the motion to strike.

On October 26, 2015, the defendant filed a second amended answer with special defenses and an eight count counterclaim. The alleged factual basis for the defendant's counterclaim was, in relevant part, as follows: The defendant, his wife, and his mother-in-law reside in the subject property. The defendant was nonappearing in the initial foreclosure. The plaintiff had

failed to comply with the uniform foreclosure standing orders by sending a letter, via regular and certified mail, to the defendant regarding the rendering of judgment. See *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 148 Conn. App. 4. The plaintiff negligently misrepresented facts that induced the defendant to enter into the mortgage and loan agreement, despite the defendant's inability to pay the loan on a long-term basis, and the plaintiff benefited from these misrepresentations. The plaintiff made several misrepresentations that it knew, or should have known, to be false, and, as a result of these misrepresentations, the defendant was harmed.

On the basis of these alleged facts, the defendant set forth the following numbered counts in his counterclaim: (1) negligent misrepresentation, (2) intentional misrepresentation and fraud, (3) breach of contract/breach of the implied covenant of good faith and fair dealing, (4) a violation of CUTPA, (5) wanton and reckless violation of CUTPA, (6) a violation of CUTPA, (7) a violation of CUTPA with an ascertainable loss, and (8) a violation of CUTPA with punitive damages. The plaintiff objected to the second amended answer with special defenses and counterclaim on the ground that the defendant had failed to comply with Practice Book (2015) § 10-60 (a).[3] The court sustained the objection and ordered the second amended answer with special defenses and counterclaim stricken.

[3] Practice Book (2015) § 10-60 (a) provides: "Except as provided in Section 10-66, a party may amend his or her pleadings or other parts of the record or proceedings at any time subsequent to that stated in the preceding section in the following manner:

"(1) By order of judicial authority; or

"(2) By written consent of the adverse party; or

"(3) By filing a request for leave to file such amendment, with the amendment appended, after service upon each party as provided by Sections 10-12 through 10-17, and with proof of service endorsed thereon. If no objection thereto has been filed by any party within fifteen days from the date of the filing of said request, the amendment shall be deemed to have been filed by consent of the adverse party. If an opposing party shall have objection to any part of such request or the amendment appended thereto, such

On November 12, 2015, the defendant refiled his second amended answer with special defenses and an eight count counterclaim. In response, on November 25, 2015, the plaintiff filed a motion to strike with prejudice the defendant's refiled pleading on the ground that the special defenses and each count of the counterclaim were legally insufficient. The plaintiff alleged, in relevant part, that counts one, two, four, five, six, seven, and eight of the counterclaim failed to allege required elements, and did not relate to the making, validity, or enforcement of the note and mortgage, and that they, therefore, failed the transaction test. See *CitiMortgage, Inc.* v. *Rey*, 150 Conn. App. 595, 605, 92 A.3d 278 ("counterclaim must . . . have a sufficient relationship to the making, validity or enforcement of the subject note or mortgage in order to meet the transaction test," although it need not "directly attack the making, validity or enforcement of the subject mortgage or note"), cert. denied, 314 Conn. 905, 99 A.3d 635 (2014). As to count three of the counterclaim, the plaintiff alleged that it failed to identify a breach by the plaintiff. The court, in a thorough memorandum of decision, issued on May 20, 2016, granted the plaintiff's motion on the grounds advanced by the plaintiff.

On June 6, 2016, the defendant filed an "amendment of counterclaim after motion to strike," which sought to add a single paragraph to counts one through four, providing: "The above facts implicate the making, validity, and enforcement of the original note and arise out of the same transactional facts that are the subject of [the] plaintiff's complaint." In that pleading, the defendant also stated that he would be filing a motion to

objection in writing specifying the particular paragraph or paragraphs to which there is objection and the reasons therefor, shall, after service upon each party as provided by Sections 10-12 through 10-17 and with proof of service endorsed thereon, be filed with the clerk within the time specified above and placed upon the next short calendar list."

reargue the other stricken counts of his counterclaim within twenty days.[4]

On June 21, 2016, the plaintiff filed a motion for judgment on the defendant's counterclaims on the basis of the court's May 20, 2016 decision striking each count. In that motion, the plaintiff also objected to the June 6, 2016 purported amendment on the ground that it was improper and did not constitute a new pleading that required a response. The defendant did not file an objection to the motion for judgment. The court, apparently in agreement with the plaintiff, rendered judgment on the counterclaim in favor of the plaintiff.[5] The defendant, thereafter, filed the present appeal in which he claims that the court improperly struck his eight count counterclaim and his special defenses.

As to the defendant's appeal from the striking of his special defenses, we conclude that this portion of the appeal must be dismissed for lack of a final judgment. See *Glastonbury* v. *Sakon*, 172 Conn. App. 646, 651, 161 A.3d 657 (2017) (' "The granting of a motion to strike a special defense is not a final judgment and is therefore not appealable. . . . The striking of special defenses neither terminates a separate proceeding nor so concludes the rights of the parties that further proceedings cannot affect them.' ").

[4] But see Practice Book § 10-44, which provides: "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, counterclaim or cross complaint, or any count in a complaint, counterclaim or cross 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 stricken complaint, counterclaim or cross complaint, or count thereof. Nothing in this section shall dispense with the requirements of Sections 61-3 or 61-4 of the appellate rules."

[5] The defendant, in his appellate brief, refers to his June 6, 2016 amendment as "inconsequential," and he has briefed the propriety of the court's striking of his November 12, 2015 second amended counterclaim. After reviewing the record, we conclude that the June 6, 2016 attempted amendment was disregarded as improper by the trial court. The defendant has not raised a claim of error regarding that action.

We next consider the propriety of the court's judgment in favor of the plaintiff on the defendant's second amended counterclaim. After reviewing the record, in conjunction with the parties' appellate briefs and arguments, we conclude that the court did not abuse its discretion when, on May 20, 2016, it struck the defendant's eight count second amended counterclaim on the grounds of legal insufficiency and a failure to meet the transaction test. See *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 370, 143 A.3d 638 (2016); *CitiMortgage, Inc.* v. *Rey*, supra, 150 Conn. App. 605–607. We further conclude that the court, on July 5, 2016, properly rendered judgment in favor of the plaintiff after having stricken each count of the second amended counterclaim on May 20, 2016, despite the defendant's June 6, 2016 attempt to replead four of the eight stricken counts by merely adding a conclusory sentence to each of them. See *Glastonbury* v. *Sakon*, supra, 172 Conn. App. 657–59 (court properly rendered judgment after striking counts in substitute counterclaim when defendant presented same legal issues as alleged in counts of original counterclaim, which was stricken for legal insufficiency).

The appeal is dismissed with respect to the striking of the defendant's special defenses; the judgment is affirmed in all other respects.

STATE OF CONNECTICUT *v.* LARRY LAMAR STEPHENSON
(AC 38674)

Sheldon, Bright and Bear, Js.

Syllabus

Convicted of the crimes of failure to appear in the first degree, possession of narcotics, engaging police in a motor vehicle pursuit, falsely reporting an incident in the second degree and interfering with an officer, the defendant appealed to this court. The defendant had led the police on a high speed motor vehicle chase after which he abandoned his vehicle in a parking lot and fled on foot. The police recovered narcotics from

the vehicle, and found the defendant's driver's license and mail that was addressed to him in the vehicle. *Held*:

1. The trial court did not abuse its discretion or violate the defendant's constitutional right to counsel when it denied the defendant's request for a ten minute recess to discuss with his attorney a plea deal that had been offered by the court, as the court properly considered the legitimacy and timing of the request, and its impact on the litigants and the jury, which was waiting to resume hearing evidence, and had afforded the defendant ample time to consider multiple plea offers throughout the pendency of his case and while trial was underway, and its denial of the defendant's request was neither unreasonable nor arbitrary; moreover, the defendant expressed to the court on the morning of the commencement of evidence that he did not want to accept any plea, and the court's view that further time was unnecessary was understandable, as the court's plea offer was similar to one that the court told the defendant it would accept before evidence started, which the defendant had rejected, and nothing in the record suggested that the defendant was precluded from speaking to his attorney when the court recessed so that the trial judge could take the bench and resume the jury trial.
2. The evidence was sufficient to sustain the defendant's conviction of possession of narcotics, as the state presented circumstantial evidence from which the jury reasonably could have inferred that the defendant had exclusive control of the vehicle in which the narcotics were found just minutes before he was apprehended and that he constructively possessed the narcotics that were recovered from that vehicle; the defendant was apprehended a few blocks from the parking lot where the vehicle was found and where the police first encountered the vehicle, the defendant was identified by a police officer as the man the officer had seen driving the vehicle just minutes earlier, the defendant, in a phone call to the police in which he falsely reported that the vehicle had been stolen, admitted that he had been driving it on the evening of the events at issue, his mother testified that he used the vehicle while managing property for her, and the jury reasonably could have inferred that he attempted to avoid being caught with narcotics in his possession on the basis of his conduct, which included leading the police on a high speed chase, engaging in extensive efforts to evade them, driving away when the officer ordered him to exit the vehicle and then fleeing on foot.

Argued February 5—officially released May 1, 2018

Procedural History

Substitute information, in the first case, charging the defendant with the crime of failure to appear in the first degree, and substitute information in the second and third cases, charging the defendant with the crimes of possession of narcotics, engaging police in a motor vehicle pursuit, falsely reporting an incident in the second degree and interfering with an officer, brought to

the Superior Court in the judicial district of Stamford-Norwalk, where the cases were consolidated and tried to the jury before *Colin*, *J.*; thereafter, the court, *White*, *J.*, denied the defendant's motion for a continuance; verdicts of guilty, subsequently, the court, *Colin*, *J.*, rendered judgments in accordance with the verdicts, from which the defendant appealed to this court. *Affirmed.*

James P. Sexton, assigned counsel, with whom were *Emily Graner Sexton*, assigned counsel, and, on the brief, *Marina L. Green*, assigned counsel, and *Megan L. Wade*, assigned counsel, for the appellant (defendant).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Paul J. Ferencek*, supervisory assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Larry Lamar Stephenson, appeals from the judgments of conviction, rendered after a jury trial, on charges of failure to appear in the first degree in violation of General Statutes § 53a-172 (a) (1); possession of narcotics in violation of General Statutes § 21a-279 (a); engaging police in a motor vehicle pursuit in violation of General Statutes § 14-223 (b); falsely reporting an incident in the second degree in violation of General Statutes § 53a-180c (a) (1); and interfering with an officer in violation of General Statutes § 53a-167a (a). On appeal, the defendant claims that (1) the trial court abused its discretion and deprived him of his sixth amendment right to counsel by denying his request for a recess to discuss with his attorney the terms of a plea deal offered by the court; and (2) the evidence adduced at trial was insufficient to sustain his conviction of possession of narcotics. We affirm the judgments of the trial court.

The jury reasonably could have found the following facts. At approximately 10:15 p.m. on the night of October 9, 2013, Sergeant Richard Gasparino, a member of

the narcotics and organized crime unit of the Stamford Police Department, was patrolling the east side of Stamford with three fellow officers in an unmarked Chevrolet Malibu. Gasparino pulled into the parking lot of 1 Lawn Avenue, a multiunit public housing complex, which is known as a high crime area due to narcotics activity and thus is regularly patrolled. Upon entering the parking lot, Gasparino observed a silver Jeep Liberty bearing license plate number 388 ZTO,[1] idling with its lights off parked next to a dumpster, with a black male sitting in the driver's seat. As Gasparino drove past the Jeep Liberty, it sped out of the lot "at a fairly high rate of speed." Finding that suspicious, Gasparino turned his vehicle around and followed the Jeep Liberty. After the Jeep Liberty exited the parking lot onto Lawn Avenue, it accelerated. One of the other officers in the Malibu then put a flashing emergency light on the top of the vehicle and activated it as Gasparino pursued and attempted to stop the Jeep Liberty. Gasparino notified his dispatcher that he was attempting to stop a fleeing vehicle, as he followed it onto Hamilton Avenue. Gasparino followed the Jeep Liberty onto Glenbrook Road, at which time Officer Wilgins Altera, driving a marked cruiser, took over the lead in the pursuit. Altera, in addition to other officers who had joined in the pursuit, followed the Jeep Liberty in their marked vehicles with their lights and sirens on. The Jeep Liberty proceeded erratically through residential areas and into downtown Stamford, trying to elude the pursuing vehicles by weaving in and out between other moving vehicles, crossing over the yellow line, and disregarding traffic signals and stop signs. The Jeep Liberty was then pursued onto Interstate 95, northbound, on which it travelled to the next exit, exit nine, where it exited onto Seaside Avenue. There it turned left onto East Main Street and travelled approximately fifty yards before

[1] At some point during the pursuit, Gasparino learned that the Jeep Liberty was registered to the defendant's mother, Chiquita Stephenson.

turning back onto Interstate 95, in the southbound lanes, where it encountered "gridlock" traffic and was forced to come to a "[d]ead stop." When this occurred, Altera and Gasparino also stopped their vehicles, then Altera exited his vehicle, "drew [his] sidearm and ran up around the front of [his] vehicle and to the front passenger side of the suspect's vehicle." While standing at the passenger's side window of the Jeep Liberty, Altera ordered the operator to turn off the engine and exit the vehicle. Although Altera repeated that order several times, the operator did not acknowledge Altera and instead continued looking forward for about thirty seconds to one minute. The operator finally turned his head to look directly at Altera, "then proceed[ed] forward, kind of jolted the car a little bit forward making contact with a vehicle." The Jeep Liberty finally "inch[ed] its way around traffic, and then started heading . . . southbound [once again] on [Interstate] 95." Altera was unable to get back to his car in time to follow the Jeep Liberty, which had made its way into the breakdown lane, so he crossed through the traffic on foot to get a view of where it was heading. Altera lost sight of the vehicle as it appeared to be "heading off of exit eight." Because of the heavily congested traffic, neither Altera nor Gasparino was able to pursue the Jeep Liberty, so Gasparino "put out over [the police] dispatch . . . for surrounding units to start looking for the vehicle . . . ." Surmising that the Jeep Liberty likely exited the interstate at exit eight, Gasparino, too, started looking for the vehicle in that vicinity, "[b]asically . . . the downtown area."

Shortly thereafter, Gasparino learned that the Jeep Liberty had been found abandoned by Officer Jerry Junes at the Marriott Hotel in downtown Stamford, approximately two hundred yards from exit eight. Junes spoke to a patron at the hotel bar, who stated that he had seen a man exit the Jeep Liberty and run away. He described that man as a heavyset black male, five foot,

nine inches, to six feet tall, wearing a green or dark baseball cap, a gray sweatshirt and jeans. Junes reported that description to his dispatcher.

Because the vehicle was found unattended, it had to be inventoried and towed. Gasparino and Officer Louis Vidal seized several items from the vehicle. On the driver's seat of the Jeep Liberty, Gasparino found a driver's license belonging to the defendant. In the driver's door compartment, Vidal discovered "a clear plastic wrap which contained a white rock-like substance," that appeared, and was later confirmed, to be crack cocaine. The officers also found three items of mail in the center console—two letters and one bank statement—which were addressed to the defendant. Also in the center console of the vehicle, the officers found a bottle of oxycodone, prescribed to Nicole Cyboski, who was a known drug user with a criminal record.

While the officers were searching the vehicle, they received a notification from their dispatcher that "there was a party on the line that was reporting that vehicle stolen, the one that we were chasing." The caller identified himself, by name, as the defendant, and stated that he had parked his Jeep Liberty near Lawn Avenue in Stamford, with the keys in it, and crossed the street to use the bathroom at Dunkin Donuts. When he returned to the vehicle, he reported, it was gone. He indicated that he was reporting the theft "to cover my footsteps so that [it] could be shown that I wasn't the one driving the car." The defendant claimed to be calling from Norwalk, but the call was traced to a location in Stamford within a two block radius of the intersection of Orange and Lockwood, just one block away from 1 Lawn Avenue.

With that information, Gasparino and his three fellow officers drove to the intersection of Lockwood and Orange to look for the caller, who they considered a possible suspect. When they entered the parking lot,

they observed two or three people standing in the back staircase of a housing complex, an area where people often hung out, that was illuminated with "flood lighting." The officers saw someone in that location who matched the description of their suspect—a black male wearing a gray sweatshirt and jeans. They believed that that man, who was using a cell phone, looked like and met the physical description of the defendant, as shown on the driver's license found in the Jeep Liberty. Gasparino also testified that he knew the defendant from dealing with him in the past. On that basis, they pulled up to the staircase and stopped their car. "The minute [their] car doors open[ed], that individual took off running northbound through the complex." He was wearing a baggy gray sweatshirt and was running "at a high rate of speed." The four officers chased the suspect on foot, until he jumped down a retaining wall and ran down the street, where they lost him.

The officers then set up a perimeter around the area, as additional officers responded and joined in the search. Approximately three minutes later, Sergeant Sean McGowan saw an individual running across East Main Street. McGowan and other officers pursued and apprehended the defendant in the parking lot of Sergio's Pizza, near the intersection of Lawn Avenue and East Main Street. Sergio's Pizza is next to Dunkin Donuts, across the street from 1 Lawn Avenue.

The defendant was arrested on charges of failure to appear in the first degree in violation of § 53a-172 (a) (1);[2] possession of narcotics in violation of § 21a-279 (a); engaging police in a motor vehicle pursuit in violation of § 14-223 (b); falsely reporting an incident in the second degree in violation of § 53a-180c (a) (1); and interfering with an officer in violation of § 53a-167a (a). After he

[2] This charge arose out of the defendant's failure to appear in court to answer to a charge that he violated his probation in an unrelated case. See footnote 3 of this opinion.

was found guilty by a jury on those charges, the court imposed a total effective sentence of five years incarceration, consecutive to a sentence that he was then serving,[3] followed by five years of special parole. This appeal followed.

I

The defendant first claims that the trial court abused its discretion and violated his constitutional right to counsel by denying his request for a recess to discuss with his attorney the terms of a plea deal offered by the court. We are not persuaded.

The following procedural history is relevant to our discussion of this claim. On the morning of July 21, 2014, just before the start of evidence at trial, the court, *White*, *J.*, had a discussion with counsel on the record regarding various plea agreements that had been offered to, but rejected by, the defendant.[4] Following a lengthy recitation by counsel as to the various pleas

[3] The defendant was serving a four year sentence resulting from his violation of the conditions of his probation that was imposed on him after he was convicted of robbery and assault in 2007.

[4] The following discussion took place before Judge White before the first day of the trial:

"[The Prosecutor]: Judge, as Your Honor is aware, we're going to be beginning a jury trial in this case this morning. And prior to bringing the jury out before Judge Colin, who will be the presiding judge for the trial, I thought it was prudent if I could just put on the record efforts that I have made with defense counsel to try to resolve the case—

"The Court: All right.

"[The Prosecutor]: —if the court pleases. . . . So, I would just—I—I know that earlier on, when the case was pretried, I believe by Judge Comerford, this would have been in the late winter, early spring. I was not involved in those discussions at that point because this is a part B matter, and the part B prosecutors were handling it. But my understanding that—and there's a record of this—whatever the—whatever the court's offer was, that was rejected.

"And then in the summer time when I began preparing the case, I made efforts—[defense counsel] and I have had numerous discussions in trying to settle the case. And on July 3rd, I believe this is, actually, after—this was after jury selection had taken place, I offered the following disposition: possession of narcotics, engaging police in pursuit, issuing a false statement

that the defendant had considered, the court stated, inter alia: "The only plea I'd accept would be an open

and failure to appear in the first degree would be a total effective jail sentence of five years on those counts, which would run concurrently with the sentence he's currently serving, which is four years.

"I had earlier—if I could just backtrack a little bit. When this case was set down for trial, this—earlier this summer in June, my offer was five, jail, followed by three years of special parole.

"After we picked a jury and counsel and I—and I had further discussions, I lowered the offered to what I had just indicated, a flat five year jail sentence with no special parole. . . . However, [the defendant] would have to lose credit for the time that he's in, been—been in jail because all of that credit, pursuant to [Department of Correction] regulations is being applied to his [violation of probation] sentence. That would be about nine months of—of lost time that he would have done.

"I indicated to [defense counsel] that the defendant would have until July 10th to consider that offer; I believe that's a Thursday. And I indicated that I needed to know by one o'clock. That offer, apparently, the weekend came, I didn't hear anything and then I believe, thereafter, we had further discussions. And then at that point, I raised the offer to a total effective sentence of six years concurrent with the jail sentence—four year jail sentence he's currently serving. And, again, there would be no credit for time served. My understanding, as of last week, that that offer—that last offer was rejected, and so here we are today to begin the trial.

"The Court: All right. Do you want to say anything, [defense counsel]?

"[Defense Counsel]: Yes. One—two things. One, I did speak to the prosecutor and showed him a form that I filled out and had [the defendant] sign. And the form indicated that, please be advised that the state of Connecticut has accepted my counteroffer as follows, a guilty plea to engaging the police in a chase, possession of narcotics, false report of a crime and a failure to appear. The state agrees to give you one more year added to the four years you are serving on the [violation of probation] sentence. If you want this offer, please indicate by signing below. If you are refusing this offer, please indicate by signing below, as well.

"And just for the record, I met with [the defendant] at the [Bridgeport Correctional Center], presented him with this contract, and this was on July 12th, which is a Saturday, and I did share that with [the prosecutor].

"And I shared with him the fact that he at first rejected it after spending some time going over this with him, and prior to walking out of the jail, he called me back, the marshals opened up the cells, and he signed it, saying that he accepts that.

"So—so, I think that's important to put on the record. And I'd ask the court to canvass [the defendant] as to whether, in fact, he had—he had rejected this offer. And also, there was a second offer after we started trial of six years flat, with no special parole—

plea, with no recommendation at all. And the court will review a [presentence investigation report], hear the

"[The Prosecutor]: Right. That's the current offer.

"[Defense Counsel]: The current offer—and I asked the court to canvass him on this July 12th offer that he rejected first and then signed after, and also whether he, in fact, rejects the current offer of six years flat.

"And I would just add, just to the benefit of [the defendant] and if there's any fault on my own, the state did say that he has to have this done by the twelfth, which is in the middle of the week, and I wasn't able to get there till Saturday. And as soon as he—I got a signed page, I e-mailed [the prosecutor] that same night, saying that it's twelve o'clock, this is what's going on, and he said we'll talk about it on Monday. So, if, in fact, he—the—he missed his ship because of me giving it Saturday, not Thursday, I just want to put that out there so it won't be charged against him.

"[The Prosecutor]: Well, I mean—I can—

"The Court: Hold—hold on for a second. I've got to admit, [defense counsel], I really don't understand what you said to me. You made a number of statements and it—it sounds to me like the bottom line is, the—[the defendant] has rejected every offer that's been made to him. You said something about him accepting an offer or—and apparently, he decided he wanted to accept an offer after he rejected it.

"[The Prosecutor]: It was accepted after it was no longer open.

"[Defense Counsel]: May—may—

"The Court: Then that's not—

"[Defense Counsel]: —may I approach?

"The Court: —that's not accepting an offer, then. Well, I don't really need to—to see that, I'm not really sure what you're handing me.

"[Defense Counsel]: I want—I'm just trying to clarify it, with your confusion. What I said was that I presented him with a contract and it had two lines, one is accept or reject, and the offer is what I read out to you on the record. I said prior to—to me leaving, he had signed that he rejected. But before I walked out of the prison, he called for the marshals to open up the cells. They opened up the cells; he said, bring that paper back. He scribbled out the rejection and signed that he accepted it. That's what I put on the record.

"[The Prosecutor]: And that was on the—

"The Court: Okay.

"[The Prosecutor]: And that was on the twelfth; the offer was open until one o'clock on July 10th. And so it wasn't open any more. I then upped the offer one year—and all of this was subject to Your Honor's approval.

"The Court: All right. Well, the bottom line is, the state made various offers, when the offers were open, [the defendant] didn't accept them. And if an offer's been rejected, that's it, you can't accept—reject an offer and then accept it. So, I take it, well, the last best offer was six years to serve.

"[The Prosecutor]: That's correct.

arguments and make a decision." When asked if he understood what that meant, the defendant said that he did, but that he did not want to accept that offer, that he did not want to take any offer, and that he had

"The Court: [Defendant], could you stand up, please. And I take it that's not open anymore? Or the state's not extending that anymore?

"[The Prosecutor]: I'll—that—that would be subject to Your Honor's approval.

"The Court: Well, I'm—you picked a jury, your witnesses are here, you're ready to go. The only plea I'd accept would be an open plea, with no recommendation at all. And the court will review a [presentence investigation report], hear the arguments and make a decision. So [defendant], did you understand what I just said?

"[The Defendant]: Yes, sir.

"The Court: Do you want to do that?

"[The Defendant]: No, I don't want to take that.

"The Court: Okay. And you understand the various offers you were made, correct?

"[The Defendant]: I was offered five years with three years special parole.

"The Court: Okay. And you rejected that, correct?

"[The Defendant]: I rejected that. Then—

"The Court: And then you were offered—what was it, five years—

"[The Prosecutor]: Flat—flat five.

"The Court: Flat five years to serve.

"[The Defendant]: No. To my knowledge, I was—I was offered a year concurrent to my four years—

"The Court: Okay.

"[The Defendant]: —which would have come up to five. And the last time I got here, they said it was two years concurrent to the four, which I already had, which would make it six—well, five for the first one, and then six in total for the—where we stand here and we're talking about now.

"The Court: Okay. But the bottom line is, you don't want to enter a guilty plea, which is your right, you have a right to a trial. So, you don't want any offer then, correct?

"[The Defendant]: No, sir.

"The Court: All right.

"[The Prosecutor]: Okay.

"The Court: And you've talked to your attorney about this?

"[The Defendant]: Yes, sir.

"The Court: Okay. And you're ready to go forward?

"[The Defendant]: Yes.

"The Court: Okay. Thank you.

"[The Prosecutor]: Thank you, Your Honor.

"The Court: We'll have Judge Colin come out, and you can start your trial. Thank you."

spoken with his attorney and was ready to proceed to trial. The trial thus proceeded.

The state began the presentation of its evidence against the defendant on July 21, 2014, before Judge Colin. On July 23, 2014, at some point prior to the luncheon recess, the court adjourned for the day, planning to reconvene the next morning. Just before the court adjourned, counsel for the defendant asked the court's permission to remain in the courtroom so that the defendant's mother could "just have two seconds to communicate with him" and "have a quick colloquy about a potential settlement." The court left that decision to the discretion of the judicial marshals, then adjourned for the day. The record does not reveal whether the requested colloquy took place, or, if it did, how long it lasted.

The next morning, Judge White took the bench to discuss plea negotiations once again. The court then indicated that it had met with the prosecutor and defense counsel the preceding afternoon, at which time the prosecutor had offered to drop the narcotics charge and the interfering with an officer charge, and to recommend a sentence of five years incarceration on the remaining three charges, to be served concurrently with the sentence the defendant was then serving. The court told counsel that it would consider the state's offer overnight. The next morning, July 24, 2014, the court met with counsel in chambers and informed them that it would accept the state's recommendation of five years, but only as a floor, and that Judge Colin would do the actual sentencing and could impose a sentence of up to seven years consecutive to the sentence that the defendant was then serving. The state made it clear that it was looking for a sentence of no more than five years incarceration, to be served concurrently with the sentence that the defendant was already serving. The defendant and his attorney asked for more time for him

to consider the court's offer, his attorney indicating that they had only had about seven uninterrupted minutes between the in-chambers conference with Judge White and the calling of the defendant's case, to discuss the court's offer. The defendant asked to come back the next day or the following week to "make a decision . . . ." His attorney told him to ask for a ten minute recess, but the defendant indicated to his attorney that the court had already told him no. The court responded that it had already passed the defendant's case to give him time to consider the offer. The court explained that it was not going to entertain further discussions because they were in the midst of trial and the jury was waiting. The court then recessed to await Judge Colin for trial to resume.[5]

[5] The following colloquy occurred before Judge White about a plea settlement before trial resumed before Judge Colin:

"The Court: . . . The trial in this case is ongoing. Yesterday afternoon, I believe it was, [the prosecutor and] defense [counsel] came to me, [and] proposed a resolution to the case. And the bottom line of the resolution was a sentence of five years to serve concurrent with the sentence the defendant is now serving. And the lawyers jointly asked me to accept the recommendation. I indicated to the lawyers that I was going to think about it overnight.

"This morning, I met with counsel. I told counsel I would accept their proposal as a floor including no time—no credit for time served. And that was a part of the original offer, by the way. And correct me, gentlemen, if I'm misstating something.

"And we passed the case, [defense counsel], so you could discuss it with your client. And I'm told your client doesn't want it, which is fine. That's his right.

"But the parties approached the court with a resolution, and now the defendant doesn't want it. I'm not going to entertain—I'll give you a chance to speak, but I'm not going to entertain any more discussions. If the defendant is acquitted, he's going to walk and that will be the end of it. And if he's convicted, I think that he's facing a maximum of seven years consecutive to the amount of time he's doing now.

"[The Prosecutor]: Right. The only thing I would add is, I also agreed at counsel's request to—for this agreement, I would drop the possession of narcotics charge and also the interfering charge. So, he would be only pleading to three charges. That would be failure to appear, which is a [class] D felony; engaging police in pursuit, which is an A misdemeanor; and issuing a false statement, which is an A misdemeanor.

"The Court: Let me back up for a minute; what are the charges he's being tried on right now?

"[The Prosecutor]: Right now, he's being charged with one count of failure to appear in the first degree.

"The Court: That's five years.

"[The Prosecutor]: Right. Second count is possession of narcotics.

"The Court: That's another seven years, so we're up to twelve years.

"[The Prosecutor]: Count two is engaging police, that's—

"The Court: That's another year, thirteen.

"[The Prosecutor]: Falsely reporting an incident, which is an additional year.

"The Court: Fourteen.

"[The Prosecutor]: And then finally, interfering, that's fifteen years.

"The Court: That's another year. It's fifteen years of exposure consecutive to the time he's now doing. I just want to restate this, if I have it correctly, the state and the defense came to me and they—both wanted to resolve the case for five years concurrent to the sentence he's now serving with no credit for time served. I said I would accept that as a floor with a maximum of, I believe it was seven years because you had indicated, [prosecutor], you were only going to put him to plea on failure to appear—

"[The Prosecutor]: And two misdemeanors.

"The Court: And two misdemeanors.

"[The Prosecutor]: So, his exposure would be at less than half at the—rather than proceeding to trial now.

"The Court: All right. So, you want to say something, [defense counsel]?

"[Defense Counsel]: Yes, Your Honor, just in defense of the defendant, what I presented to him this morning was a little different than what the state proposed. The state, as Your Honor sort of just indicated, proposed five years to run concurrent with the four, closed, end of deal. I presented to him that the court said that that five would be a floor and, essentially, this would be an open sentence where the judge, Judge Colin, Your Honor, said you'd send it back to Judge Colin.

"The Court: Yes, I didn't add that, but I was not going to be the sentencing Judge. Judge Colin has sat through the evidence—

"[Defense Counsel]: Correct. Okay.

"The Court: —and he's going to do the sentencing. And, by the way, I haven't discussed this with Judge Colin.

"[Defense Counsel]: Thank you, Judge. And so what I presented to [the defendant] was that Judge Colin would do the sentence and, essentially, it would be an open sentence with Judge Colin to give him up to seven years, and it could be consecutive to the five, so it can be twelve years, it could be a twelve year sentence. I can't make any promise. And I explained to him, that's not—I understand that's not the agreement that I presented to you yesterday, but having taken it to Your Honor, Judge White, that is, for the record, Your Honor did not accept the deal that we proposed and essentially made an open sentence with a floor of five?

"[The Prosecutor]: Exactly.

"The Court: Floor of five with no credit for time served.

"[Defense Counsel]: And so that was a little different than what we went over yesterday.

"The Court: That's true.

"[Defense Counsel]: I had about maybe ten to twelve minutes to kind of explain that to him. His mother did step in. And so, lots gone on today, and so he was not able to grasp all this in seven minutes and understand what all this means. And he says, well, I don't understand it, so I can't accept it.

"The Court: Okay. Well, you had a chance to talk to him yesterday about what the state had offered, and I modified that offer somewhat.

"[Defense Counsel]: Yes.

"The Court: I wasn't going to accept what the state and defense had proposed, so my offer was a little different. And you had time to talk to your client about it; the jury is waiting. So, what, if anything, do you want to say, [defendant]?

"[The Defendant]: I mean, I'm gettin' all different type of offers, and like you said, I'm really not able to commit and make any type of plea bargain because the way it's all coming to me at once, it's this, then it's this, then it's that. So, if you would like, you know, to come back maybe Friday or next week.

"The Court: No. We're going forward today.

"[The Defendant]: Well, other than that, I can't really comprehend everything that's coming at me at this time in a twelve minute span, so I'm not able to make a decision about my life in twelve minutes.

"The Court: Okay. All right. Well, I will just indicate that the last best offer that the court would accept was the five—it was the five years to serve, concurrent, with no credit for time served, and I'd order a [presentence investigation report], Judge Colin would do the sentencing, I would not. And Judge Colin—I heard the [prosecutor] say it, I believe I heard the [prosecutor] say that the state's not looking for any more than five years—

"[The Prosecutor]: No. I would only—I know [the defendant] from past cases. I'm familiar with his background. I know the court wanted a [presentence investigation report]. I would not be asking more than the sentence of five years to run concurrently. In essence it would amount to an additional time of about a year and ten months more than what he is serving now.

"The Court: Okay. So, the state's not looking for any more than five years to serve concurrent without any credit for time served, and the state has said that.

"[The Prosecutor]: Correct.

"The Court: And if Judge Colin goes along with that, fine. But if Judge Colin wants to impose a greater sentence, it would be up to him. So, you understand what I just told you?

"[The Defendant]: Yes, sir.

"The Court: And do you want to accept that or do you want to have—continue with your trial?

The defendant claims that the trial court abused its discretion and violated his constitutional right to counsel by not granting his request for a ten minute recess to further discuss with counsel the plea offered by the court. The sixth amendment provides that in all criminal prosecutions, the accused shall enjoy the right to the effective assistance of counsel. U.S. Const., amend. VI. This right is incorporated against the states through the due process clause of the fourteenth amendment. See U.S. Const., amend. XIV, § 1; *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). "Although the defendant couches his claim on appeal in terms of a denial of his constitutional right [to counsel], we will review the trial court's refusal to grant a continuance for an abuse of discretion. Even if the denial of a motion for a continuance . . . can be directly linked to a claim of a denial of a specific constitutional right, if the reasons given for the continuance do not support any interference with the specific constitutional right, the court's analysis will revolve around whether the trial court abused its discretion. . . . In other words, the constitutional right alleged to have been violated must be shown, not merely alleged." (Citation omitted; internal quotation marks omitted.) *State*

"[The Defendant]: I'm not sure.

"The Court: Well, it's one or the other, sir.

"[Defense Counsel]: Do you need time to talk to me about it?

"[The Defendant]: Of course.

"[Defense Counsel]: Request that.

"The Court: What's that?

"[The Defendant]: I did. He told me no.

"The Court: I've already given you time. You've had time to talk. We've got a jury waiting. So, if you don't want it, that's fine. It's your right. You're in the midst of a trial.

"[The Defendant]: I never said I don't want it. I said I can't say yes or no.

"The Court: Okay.

"[Defense Counsel]: Can we have ten minutes, please?

"The Court: I'll let Judge Colin know. You can bring out the jury, and you can resume your trial. Thank you. You can see Judge Colin. Thank you.

"(Recess)."

v. *Godbolt*, 161 Conn. App. 367, 374 n.4, 127 A.3d 1139 (2015), cert. denied, 320 Conn. 931, 134 A.3d 621 (2016). Furthermore, "broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiablerequest for delay violates the right to the assistance of counsel." (Internal quotation marks omitted.) *Morris* v. *Slappy*, 461 U.S. 1, 11–12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983).

"The determination of whether to grant a request for a continuance is within the discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. . . .

"A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . To prove an abuse of discretion, an appellant must show that the trial court's denial of a request for a continuance was arbitrary. . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. . . . In the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis. . . .

"Among the factors that may enter into the court's exercise of discretion in considering a request for a continuance are the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; the defendant's personal responsibility for the timing

of the request; [and] the likelihood that the denial would substantially impair the defendant's ability to defend himself . . . . We are especially hesitant to find an abuse of discretion where the court has denied a motion for continuance made on the day of the trial. . . .

"Lastly, we emphasize that an appellate court should limit its assessment of the reasonableness of the trial court's exercise of its discretion to a consideration of those factors, on the record, that were presented to the trial court, or of which that court was aware, at the time of its ruling on the motion for a continuance." (Internal quotation marks omitted.) *State* v. *Godbolt*, supra, 161 Conn. App. 374–75. "The trial court has the responsibility to avoid unnecessary interruptions, to maintain the orderly procedure of the court docket, and to prevent any interference with the fair administration of justice. . . . Once a trial has begun . . . a defendant's right to due process . . . [does not entitle] him to a continuance upon demand." (Internal quotation marks omitted.) Id., 376.

Our review of the record reveals that the defendant was afforded ample time to consider various plea offers extended to him throughout the pendency of his case, and, in fact, while his jury trial was underway. The record reflects that the defendant had considered multiple offers extended by the state, and had expressed that he did not want to accept any plea at all, as of the morning of the commencement of the presentation of evidence. The court, at the request of the state, canvassed the defendant thoroughly that morning. The record further reflects that the court clearly stated to the defendant before the start of evidence that the only offer the court would entertain was an open plea with no recommendation. The record also reflects that the defendant was offered ample time to consider the offers extended on July 23 and July 24, 2014. Although the record does not reflect at what time counsel met with

Judge White in his chambers on the morning of July 24, 2014, or at what time Judge White addressed the parties from the bench, it does reveal that the defendant's case was "passed" to afford him time to discuss the court's offer with his attorney. The court noted that it was not going to entertain further discussions, referring to the extensive discussions that already had taken place, a clear indication that the court did not regard the defendant's request for additional time as legitimate. The court's view that further time was unnecessary is particularly understandable in that the court's offer basically left the defendant at risk to receive the maximum sentence permissible for the charges to which he would plead guilty. It was thus substantially similar to the open plea offer the court told the defendant it would accept before evidence started—an offer the defendant rejected. Although defense counsel suggested a ten minute recess, the defendant himself sought a longer period of time, either a full day or until the next week, to consider the court's offer. Moreover, Judge White did, in fact, recess, so that Judge Colin could take the bench and resume the jury trial. There is nothing in the record to suggest that the defendant was precluded from speaking to his attorney during that recess, the duration of which is also missing from the record.[6]

On the basis of the foregoing, we conclude that the trial court properly considered the legitimacy of the defendant's request for a recess to further consider its plea offer, the timing of that request for a continuance, and the impact on the litigants and, in particular, the jury, which was waiting to resume hearing evidence

[6] The defendant also could have achieved the same result as accepting Judge White's offer at any time after the hearing before Judge White by simply entering an open plea to the three charges as to which the state was seeking guilty pleas. His maximum exposure would have been seven years consecutive to his current sentence, precisely the offer made by Judge White.

when the defendant made his request. Because the court's denial of the defendant's request was neither unreasonable nor arbitrary, we cannot conclude that the court abused its discretion in so ruling.[7]

II

The defendant also claims that the evidence presented at trial was insufficient to sustain his conviction of possession of narcotics because the state failed to prove that he had actual or constructive possession of the narcotics at issue. We disagree.

"In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but that] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the

[7] The defendant also claims that the court constructively violated his sixth amendment right to counsel by denying his request for additional time to consider the court's plea offer, and that because that denial arose at a critical stage in the proceedings, prejudice arising from that denial is presumed pursuant to *United States* v. *Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Although the defendant is correct in his assertion that the decision of whether to accept a plea offer is a critical stage of a criminal proceeding at which a criminal defendant is constitutionally entitled to the effective assistance of counsel, we cannot conclude that the court's denial of a ten minute recess resulted in a "complete failure" of representation by his attorney, as required to trigger the automatic presumption of prejudice under *Cronic*. Id., 662–66.

jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Crespo*, 317 Conn. 1, 16–17, 115 A.3d 447 (2015).

"In order to prove that a defendant is guilty of possession of narcotics . . . the state must prove beyond a reasonable doubt that the defendant had either actual or constructive possession of a narcotic substance. . . . Actual possession requires the defendant to have had direct physical contact with the narcotics. . . .

Constructive possession, on the other hand, is possession without direct physical contact. . . . To prove either actual or constructive possession of a narcotic substance, the state must establish beyond a reasonable doubt that the accused knew of the character of the drug and its presence, and exercised dominion and control over it. . . .

"Where . . . the [narcotic substance] was not found on the defendant's person, the state must proceed on the theory of constructive possession . . . . One factor that may be considered in determining whether a defendant is in constructive possession of narcotics is whether he is in possession of the premises where the narcotics are found. . . . Where the defendant is not in exclusive possession of the premises where the narcotics are found, it may not be inferred that [the defendant] knew of the presence of the narcotics and hadcontrol of them, unless there are other incriminating statements or circumstances tending to buttress such an inference. . . . In determining whether the attendant incriminating circumstances support an inference of constructive possession, the proper focus is on the relationship between the defendant and the contraband found in the [vehicle] rather than on the relationship between the defendant and the [vehicle] itself." (Citation omitted; internal quotation marks omitted.) *State* v. *Nova*, 161 Conn. App. 708, 718–19, 129 A.3d 146 (2015).

Here, because the narcotics were not found on the defendant's person, the state was required to prove that he possessed them constructively. Although the defendant was not in the Jeep Liberty when it was recovered by the officers, the state presented circumstantial evidence from which the jury reasonably could have inferred that he had exclusive control of the Jeep just minutes before he was apprehended. The defendant was apprehended only a few blocks from the Marriott Hotel at which the vehicle was found, which is also

within a few blocks of 1 Lawn Avenue, where Gasparino and his fellow officers first encountered the vehicle. Altera testified that he saw the operator of the Jeep Liberty when he drew his gun and approached the vehicle, ordering the operator to exit the vehicle several times, until the operator turned toward him and then drove away. Even though the defendant was not wearing a gray sweatshirt when he was apprehended, Altera identified him as the man he had seen driving the Jeep Liberty minutes earlier. Altera testified that the entire chase—from the time that he got involved in the pursuit of the Jeep Liberty to the time that the defendant was apprehended—took approximately fifteen to twenty minutes. Additionally, the defendant's mother, Chiquita Stephenson, testified that she owns a rental property in Stamford that the defendant manages for her and that he uses her Jeep Liberty when doing so. Not only was the defendant's driver's license found on the driver's seat in the vehicle, but several pieces of mail addressed to him were found in the center console, and the defendant himself admitted that he had been driving the Jeep that evening, just minutes before he called 911 and reported that it had been stolen. The jury thus reasonably could have found that the defendant was in possession and control of the Jeep Liberty and of the narcotics recovered therefrom.

The jury also could have inferred from the defendant's conduct—speeding away upon seeing the police at 1 Lawn Avenue, leading them on a high speed chase and engaging in extensive efforts to evade them, not surrendering to Altera when so ordered, and then fleeing on foot—that he was attempting to avoid being caught with the narcotics in his possession. In other words, the jury could have concluded that the defendant would not have fled unless he knew of the presence and nature of the narcotics in the vehicle.

On the basis of the foregoing, we conclude that the jury reasonably could have found, on the basis of the circumstantial evidence presented at trial, that the defendant constructively possessed the narcotics recovered from the Jeep Liberty he had been driving on the night of October 9, 2013. Accordingly, we conclude that the evidence presented at trial was sufficient to sustain the defendant's conviction of possession of narcotics.

The judgments are affirmed.

In this opinion the other judges concurred.

ANTHONY C. CARTER *v.* JAMES WATSON ET AL. (AC 39655)

Sheldon, Elgo and Bear, Js.

Syllabus

The self-represented, incarcerated plaintiff brought this action against the defendant employees of the Department of Correction, claiming that his rights to due process under a department administrative directive pertaining to drug testing were violated due to a delay in his release from restrictive housing after the defendants were informed that his urine sample had tested negative for illicit drugs. The plaintiff also claimed that his status prior to the defendants' action was not fully restored because he lost his job in the prison library. The trial court granted in part the defendants' motion to dismiss, concluding that sovereign immunity barred the plaintiff's claims for monetary damages against the defendants in their official capacities and that all claims against the defendants in their individual capacities had to be dismissed because of defective service of process. Thereafter, the court granted the defendants' motion for reargument and dismissed the plaintiff's complaint entirely, ruling that his claim for declaratory relief was moot because he had been transferred out of the correctional institution at which the defendants were employed. *Held*:

1. The trial court properly dismissed the plaintiff's claim for monetary damages against the defendants in their official capacities for lack of subject matter jurisdiction, as that claim was barred by the doctrine of sovereign immunity; the plaintiff's allegations did not fall under the exception to the sovereign immunity doctrine for individuals alleged to have acted in excess of their statutory authority, which applied only to actions for

injunctive or declaratory relief, and the plaintiff did not allege, nor was there any evidence, that he had obtained authorization from the Claims Commissioner to bring an action for monetary damages.

2. The trial court properly dismissed the plaintiff's claim for declaratory relief on the ground of mootness, as it is well established that an inmate's transfer from a prison facility generally moots claims for declaratory and injunctive relief against officials at that facility, and the plaintiff's allegations did not satisfy the capable of repetition, yet evading review exception to the mootness doctrine; there was no evidence that the defendants' action had an inherently limited duration such that it would be strongly likely to become moot in the majority of cases in which it arose, there was no allegation that the events at issue were part of a systemic, systematic, ongoing, frequent or occasional pattern or practice, the plaintiff not having alleged that he had been the subject of the same or a similar erroneous occurrence in the approximately four years since the occurrence at issue, and the plaintiff did not allege that his claims were a matter of public importance.

Argued December 6, 2017—officially released May 1, 2018

Procedural History

Action to recover damages for the alleged deprivation of the plaintiff's due process rights, and for other relief, brought to the Superior Court in the judicial district New Haven, where the court, *Ecker*, *J.*, granted in part the defendants' motion to dismiss; thereafter, the court granted the defendants' motion for reargument and rendered judgment dismissing the action, from which the plaintiff appealed to this court. *Affirmed.*

Anthony C. Carter, self-represented, the appellant (plaintiff).

Steven R. Strom, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellees (defendants).

Opinion

BEAR, J. The self-represented plaintiff, Anthony C. Carter, appeals from the judgment of the trial court dismissing his action against the defendants, the attorney general for the state of Connecticut and four state

employees,[1] in their official and individual capacities, on the grounds of sovereign immunity, lack of personal jurisdiction due to insufficient service of process, and mootness. On appeal, the plaintiff asserts that the court erred in dismissing his action against the defendants in their official capacities because his allegations fall within (1) an exception to the doctrine of sovereign immunity and (2) the capable of repetition, yet evading review exception to mootness.[2] We affirm the judgment of the court.

The following facts alleged in the complaint and procedural history are relevant to this appeal. In a complaint dated June 9, 2015, the plaintiff, then an inmate at Cheshire Correctional Institution in Cheshire, alleged that on July 17, 2014, he was subject to a random urinalysis test pursuant to Department of Correction Administrative Directive 6.8. The plaintiff was informed that his urine sample tested positive for amphetamines. According to protocol, a positive test result requires the sample to be sent to an outside laboratory for confirmatory testing. The plaintiff was placed in restrictive housing while awaiting the results of the confirmatory test. On July 22, 2014, correctional institution officials were informed that the plaintiff's urine sample tested negative for amphetamines and methamphetamines. More than twenty-four hours later, the plaintiff was still in restrictive housing. According to the administrative

[1] The complaint named four Department of Correction employees, Captain James Watson, Lieutenant Brett Mollins, Officer Christopher Kelly, and Officer Jason Hogan. Although the fifth defendant, the attorney general for the state of Connecticut, was served with process, the complaint made no allegations against him.

[2] On appeal, the plaintiff does not challenge the court's dismissal of the action against the defendants in their individual capacities for lack of personal jurisdiction due to insufficient service of process. See *Harnage* v. *Lightner*, 328 Conn. 248, 255, A.3d (2018) (court properly dismissed action against defendants in their individual capacities for lack of personal jurisdiction due to insufficiency of service of process).

directive, when the "outside laboratory urinalysis results are negative . . . the inmate's status prior to any administrative action taken shall be restored." The plaintiff alleged that, following the negative test results, "he was not restored to his prior status as a ticket or trouble free inmate, nor his employment in the library area . . . ."

The plaintiff averred that the defendants either were involved in a conspiracy to deprive or "reckless[ly] disregard[ed] . . . the plaintiff's due process rights afforded [to] him by administrative directive 6.8." For relief, the defendant sought monetary damages from the defendants in their official and individual capacities, a jury trial and "[a] declaratory judgment declaring what [his] due process rights [were] or are." On August 7, 2014, approximately three weeks after the random urinalysis test was administered, the plaintiff was transferred to MacDougall-Walker Correctional Institution in Suffield. The plaintiff subsequently was transferred to Corrigan-Radgowski Correctional Institution in Uncasville.

The defendants were served with process on July 20, 2015, by a state marshal who left the writ of summons and complaint at the Office of the Attorney General. On August 12, 2015, the defendants filed a motion to dismiss the plaintiff's complaint on the grounds of lack of personal jurisdiction, sovereign immunity, and mootness. On February 18, 2016, the court granted the motion to dismiss in part, stating that (1) sovereign immunity barred any claims for monetary damages against the defendants in their official capacities, and (2) claims against the defendants in their individual capacities were dismissed for defective service of process. The court denied the motion to dismiss as to the plaintiff's claim for declaratory relief. Subsequently, on August 16, 2016, the court granted the defendants'

motion to reargue and dismissed the plaintiff's complaint entirely, stating that the plaintiff's claim for declaratory relief was moot because he had been transferred out of the correctional institution at which the defendants were employed. This appeal followed.

Our standard of review on a motion to dismiss is well established. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200–201, 994 A.2d 106 (2010).

I

We first address the plaintiff's claim that the court erred by dismissing his action against the defendants in their official capacities on the ground of sovereign immunity. The plaintiff argues that his complaint contained sufficient allegations to fall within an exception to the doctrine of sovereign immunity; specifically, that the defendants' conduct was in excess of their statutory authority derived from Department of Correction Administrative Directive 6.8.

"Sovereign immunity relates to a court's subject matter jurisdiction over a case, and therefore presents a question of law over which we exercise de novo review. . . . In so doing, we must decide whether [the trial

court's] conclusions are legally and logically correct and find support in the facts that appear in the record. . . . The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . . . It has deep roots in this state and our legal system in general, finding its origin in ancient common law. . . . Not only have we recognized the state's immunity as an entity, but [w]e have also recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state. . . . Exceptions to this doctrine are few and narrowly construed under our jurisprudence. . . .

"[T]he sovereign immunity enjoyed by the state is not absolute. There are [three] exceptions: (1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity . . . (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights . . . and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority. . . . For a claim under the third exception, the plaintiffs must do more than allege that the defendants' conduct was in excess of their statutory authority; they also must allege or otherwise establish facts that reasonably support those allegations. . . . In the absence of a proper factual basis in the complaint to support the applicability of these exceptions, the granting of a motion to dismiss on sovereign immunity grounds is proper." (Citations omitted; internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 349–50, 977 A.2d 636 (2009).

Our Supreme Court has held that the exception to sovereign immunity for individuals alleged to have acted in excess of their statutory authority applies only to actions for injunctive or declaratory relief. *Miller* v. *Egan*, 265 Conn. 301, 321, 828 A.2d 549 (2003). "The reason for this qualification was to protect the state from significant interference with its functions and to limit the rule to declaratory or injunctive suits, in which the trial court carefully can tailor the relief." (Internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 351. Furthermore, "a plaintiff who seeks to bring an action for monetary damages against the state must first obtain authorization from the claims commissioner." *Miller* v. *Egan*, supra, 317; see also General Statutes § 4-141 et seq.; *DaimlerChrysler Corp.* v. *Law*, 284 Conn. 701, 723, 937 A.2d 675 (2007).

In the present case, the court determined that "eleventh amendment sovereign immunity bars any due process claim for monetary damages brought against [the] defendants in their official capacities." We agree. Although the plaintiff argues that his allegations fall under the third exception, the third exception relates only to claims for declaratory or injunctive relief.[3] Additionally, the plaintiff has neither alleged, nor is there any evidence in the record to establish, that he has obtained authorization from the Claims Commissioner to bring this action for monetary damages. Accordingly, the doctrine of sovereign immunity bars the plaintiff's claims for monetary relief. This is our well established jurisprudence. See, e.g., *Klemonski* v. *University of Connecticut Health Center*, 141 Conn. App. 106, 60 A.3d

[3] To the extent that the plaintiff also argues that his allegations fall under the second exception to sovereign immunity, that argument is inadequately briefed; accordingly, we need not address it. See *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016). Nevertheless, the same analysis would apply to the second exception, as it applies only to claims for declaratory or injunctive relief.

1002, cert. denied, 308 Conn. 930, 64 A.3d 121 (2013); *Kenney* v. *Weaving*, 123 Conn. App. 211, 1 A.3d 1083 (2010); *Bloom* v. *Dept. of Labor*, 93 Conn. App. 37, 888 A.2d 115, cert. denied, 277 Conn. 912, 894 A.2d 992 (2006). Because the doctrine of sovereign immunity applies, the court properly dismissed the plaintiff's claim for monetary damages against the defendants in their official capacities for lack of subject matter jurisdiction.

II

Next, we address the plaintiff's argument that the court erred in dismissing his claim for declaratory relief on the ground of mootness, which was based on his assertion that his allegations fall within the capable of repetition, yet evading review exception. The plaintiff, in his brief, admits that "[i]t is well established that an inmate['s] transfer from a prison facility generally moots claims for declaratory and injunctive relief against officials of that facility." Nevertheless, he contends that his claim is not moot because he could be subject to random urinalysis tests at any state correctional institution. Our only inquiry is whether the capable of repetition, yet evading review exception applies to the plaintiff's claim. We conclude that it does not.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates this court's subject matter jurisdiction. . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When,

during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citations omitted; internal quotation marks omitted.) *Renaissance Management Co.* v. *Barnes*, 175 Conn. App. 681, 685–86, 168 A.3d 530 (2017).

An otherwise moot question may qualify for review under the capable of repetition, yet evading review exception to the mootness doctrine. *In re Priscilla A.*, 122 Conn. App. 832, 836, 2 A.3d 24 (2010). "To qualify under the capable of repetition, yet evading review exception, three requirements must be met. First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot." (Internal quotation marks omitted.) *Renaissance Management Co.* v. *Barnes*, supra, 175 Conn. App. 686–87; accord *Loisel* v. *Rowe*, 233 Conn. 370, 383–88, 660 A.2d 323 (1995) (requirements known as the *Loisel* factors).

"The first element in the analysis pertains to the length of the challenged action. . . . The basis for this element derives from the nature of the exception. If an action or its effects is not of inherently limited duration, the action can be reviewed the next time it arises, when it will present an ongoing live controversy. Moreover, if the question presented is not strongly likely to become

moot in the substantial majority of cases in which it arises, the urgency of deciding the pending case is significantly reduced. Thus, there is no reason to reach out to decide the issue as between parties who, by hypothesis, no longer have any present interest in the outcome. . . . [A] party typically satisfies this prong if there exists a functionally insurmountable time [constraint] . . . or the challenged action had an intrinsically limited lifespan." (Internal quotation marks omitted.) *Renaissance Management Co.* v. *Barnes*, supra, 175 Conn. App. 687.

Analysis under the second requirement "entails two separate inquiries: (1) whether the question presented will recur at all; and (2) whether the interests of the people likely to be affected by the question presented are adequately represented in the current litigation. . . . Commonly referred to as the surrogacy concept, that second inquiry requires some nexus between the litigating party and those people who may be affected by the court's ruling in the future." (Citation omitted; internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 96 Conn. App. 496, 500–501, 900 A.2d 572, cert. denied, 280 Conn. 938, 910 A.2d 217 (2006).

In the present case, the plaintiff argues that his allegations satisfy the requirements of the exception. Under the first requirement, the length of the challenged action, he asserts that he was placed in restrictive housing from July 17 through August 7, 2014, when he was transferred to another facility, and that this "duration was too short to be fully litigated prior to cessation or expiration . . . ." Under the second requirement, the reasonable likelihood that the question will arise again, the plaintiff argues that "there is a reasonable expectation that he will be subject to the same [random urinalysis testing] again" at any correctional institution in the

state. The plaintiff did not allege that the third requirement is also satisfied, i.e., that his claims are a matter of public importance.

A reasonable interpretation of the plaintiff's allegations is that he was aggrieved due to the delay in his release from restrictive housing after the correctional institution officials were informed that his urine sample tested negative for amphetamines and methamphetamines, and that his prior status was not fully restored because he lost his job in the library due to his transfer to a different correctional institution. Although the plaintiff alleged that he was placed in restrictive housing for a limited duration in this specific instance, there is no evidence of the challenged action having an *inherently limited duration* or *intrinsically limited lifespan*. Moreover, there is no evidence in the record that such actions will be "strongly likely to become moot in the substantial majority of cases in which [they arise] . . . ." (Internal quotation marks omitted.) *Renaissance Management Co.* v. *Barnes*, supra, 175 Conn. App. 687. The court noted that there was no allegation in the plaintiff's complaint that the events giving rise to his claims were "part of a systemic, systematic, ongoing, frequent or even occasional pattern or practice at [any correctional institution]." We note that the plaintiff has not alleged in any way that he has been the subject of the same or a similar erroneous occurrence in the approximately four years that have passed since the occurrence of which he complains. The plaintiff's claim of possible repetition thus is, at best, speculative. Without a more detailed record, we cannot conclude, in the absence of any allegation by the plaintiff, that he has satisfied the public importance requirement. "Unless all three requirements are met, the appeal must be dismissed as moot." (Internal quotation marks omitted.) *Burbank* v. *Board of Education*, 299 Conn. 833, 840, 11 A.3d 658 (2011). Not only has the plaintiff failed to

meet all three requirements to qualify under the capable of repetition, yet evading review exception to an otherwise moot claim, he has failed to establish any of the three requirements for such an exception.[4] Accordingly, the court properly dismissed the plaintiff's claim for declaratory relief for lack of subject matter jurisdiction.

The judgment is affirmed.

In this opinion the other judges concurred.

---

[4] To the extent that the plaintiff directly or indirectly hoped or intended to represent or rely on the interests of other inmates, as obliquely stated in his oral argument, because he is self-represented he cannot do so. "The authorization to appear pro se is limited to representing one's own cause, and does not permit individuals to appear pro se in a representative capacity." *Expressway Associates II* v. *Friendly Ice Cream Corp. of Connecticut*, 34 Conn. App. 543, 546, 642 A.2d 62, cert. denied, 230 Conn. 915, 645 A.2d 1018 (1994).