STATE OF CONNECTICUT *v.* JASMINE LAMANTIA (AC 40157)

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

Syllabus

Convicted, following a jury trial, of the crimes of interfering with an officer and tampering with a witness, the defendant appealed to this court, claiming that the evidence was insufficient to support her conviction of those crimes. Following an altercation at a residence involving her boyfriend, R, and M, the defendant sent certain text messages to R in which she asked R to lie to the police regarding the altercation and to make sure their stories matched. *Held*:

1. The evidence was insufficient to support the defendant's conviction of interfering with an officer; a conviction of that offense required evidence that the defendant obstructed, resisted, hindered, or endangered a peace officer while the officer was in the performance of his duties, and here, the communications that formed the basis for the defendant's conviction were nonviolent and nonthreatening text messages directed to R that were sent in order to induce R to report to a police officer a version of events concerning the altercation that matched her own prior statements to the police, which messages did not constitute physical conduct or amount to fighting words that inflicted injury or tended to incite an

immediate breach of peace for purposes of the crime of interfering with an officer.

2. The defendant's claim that the state failed to prove that she had the specific intent to influence a witness at an official proceeding by sending the text messages to R was unavailing, the evidence having been sufficient to support her conviction of tampering with a witness in violation of statute (§ 53a-151), which applies to any conduct intended to induce a witness to testify falsely or to refrain from testifying in an official proceeding, and to conduct intentionally undertaken to undermine the veracity of the testimony given by a witness; although the defendant claimed that it was not probable that a criminal court proceeding would occur arising out of the altercation in which R would testify, the term official proceeding as used in the statute was not limited to a prosecution of R, and the jury reasonably could have found that the defendant tampered with R by sending him the text messages shortly after his altercation with M, as the defendant's text messages encouraged R to lie to an officer and evinced that the defendant was aware of the officer's investigation of the altercation, and the jury could have concluded that the defendant believed than an official proceeding against her or the other participants in the altercation probably would result therefrom.

Argued January 9—officially released May 8, 2018

Procedural History

Substitute information charging the defendant with the crimes of interfering with a police officer and tampering with a witness, brought to the Superior Court in the judicial district of New London, geographical area twenty-one, and tried to a jury before the court, *A. Hadden, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed in part; judgment directed; further proceedings.*

Conrad O. Seifert, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Michael Regan*, state's attorney, and *Christa L. Baker*, assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Jasmine Lamantia, appeals from the judgment of conviction, rendered after

a jury trial, of interfering with an officer in violation of General Statutes § 53a-167a and tampering with a witness in violation of General Statutes § 53a-151. On appeal, the defendant claims that the evidence was insufficient to support her conviction for these offenses. We agree with the defendant with respect to the interfering with an officer count, but disagree as to the tampering with a witness count. Accordingly, we reverse in part and affirm in part the judgment of the trial court.

The jury reasonably could have found the following facts in support of the verdict.[1] On the evening of July 24, 2015, Earl F. Babcock and Jason Rajewski spent three or four hours socializing at a bar in Norwich. At that time, Rajewski was involved romantically with the defendant. At some point that evening, the defendant arrived at the bar. After midnight, Babcock and Rajewski followed the defendant to a house located at 18 Bunny Drive in Preston. At this location, some teenagers, including the defendant's son, Joshua Bivens, were having a party. Upon her arrival, the defendant parked her car and immediately ran into house. Babcock parked his car and remained outside with Rajewski.

David Moulson, the defendant's former boyfriend,[2] drove his vehicle into the driveway, and directed the

[1] We note that this case is replete with conflicting testimony regarding the timing and nature of the relationships between the various parties, as well as the events of the night of July 24, 2015, and the early morning of July 25, 2015. It was for the jury, and not this court, to resolve discrepancies in the testimony. We emphasize that "we must defer to the finder of fact's evaluation of the credibility of the witnesses that is based on its invaluable firsthand observation of their conduct, demeanor and attitude. . . . [The fact finder] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [fact finder's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [fact finder] can . . . decide what—all, none or some—of a witness' testimony to accept or reject." (Citation omitted; internal quotation marks omitted.) *State* v. *Colon*, 117 Conn. App. 150, 154, 978 A.2d 99 (2009).

[2] In July, 2015, the defendant and Moulson lived together, but no longer were involved romantically.

headlights at Babcock and Rajewski. Moulson, exited his car and ran toward them while swinging his arms. Babcock fell over backwards, as he was "disoriented" by the headlights shining in his eyes. Moulson and Rajewski engaged in a verbal and physical altercation that ended with Rajewski striking Moulson with his right hand and Moulson bleeding from his face. Moulson ran into the house and called the police. Babcock and Rajewski left after hearing from the defendant about Moulson's phone call. Five minutes later, Babcock dropped Rajewski off at his house, and then proceeded home.

Jonathan Baker, a Connecticut state trooper, received a dispatch to 18 Bunny Drive for an active disturbance at approximately 2:30 a.m. Baker spoke with Moulson in the presence of the defendant. Moulson claimed that two males, one of whom he identified as Rajewski, had assaulted him as he exited his vehicle. Baker obtained an address for Rajewski, and proceeded to that address to continue the investigation.

At Rajewski's residence, Baker knocked on the door. Rajewski indicated that he knew why Baker was there and then presented his cell phone to Baker. Rajewski asked Baker to read the text messages that he had received from the defendant. Baker read the text conversation and concluded that the defendant had requested that Rajewski lie to him. Rajewski then received a call from Babcock and permitted Baker to answer his phone. Baker took Rajewski into custody, drove him to the state police barracks for processing, and then went to Babcock's house. Following a conversation, Baker arrested Babcock and transported him to the barracks for processing.

Later that morning, the defendant arrived at the barracks to pick up Moulson, who also had been arrested.

Baker confronted the defendant about the text messages that she had sent to Rajewski, and then placed her under arrest. The defendant subsequently was charged, tried, and convicted of interfering with a police officer in violation of § 53a-167a (a) and tampering with a witness in violation of § 53-151 (a). The court imposed a concurrent sentence for each count of one year incarceration, execution suspended, and two years of probation. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant claims that the evidence was insufficient to sustain her conviction. We begin by setting forth our well established standard of review. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"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. *Crespo*, 317 Conn. 1, 16–17, 115 A.3d 447 (2015); see also *State* v. *Rodriguez*, 146 Conn. App. 99, 110, 75 A.3d 798 (defendant who asserts insufficiency claim bears arduous burden), cert. denied, 310 Conn. 948, 80 A.3d 906 (2013). When a claim of insufficient evidence turns on the appropriate interpretation of a statute, however, our review is plenary. See *State* v. *Webster*, 308 Conn. 43, 51, 60 A.3d 259 (2013).

I

We first address the defendant's claim that the evidence was insufficient to support her conviction of interfering with a police officer. The defendant argues that our decision in *State* v. *Sabato*, 152 Conn. App. 590, 98 A.3d 910 (2014), aff'd, 321 Conn. 729, 138 A.3d

895 (2016), controls the present appeal. Specifically, she contends that her text messages to Rajewski, a verbal communication that did not constitute fighting words, cannot form the basis for a violation of § 53a-167a. We agree with the defendant.

Section 53a-167a (a) provides in relevant part: "A person is guilty of interfering with an officer when such person obstructs, resists, hinders or endangers any peace officer . . . in the performance of such peace officer's . . . duties." Accordingly, "[t]he elements of this crime . . . are (1) a person obstructs, resists, hinders, or endangers, (2) a peace officer, (3) while the officer is in the performance of his or her duties." *State* v. *Wearing*, 98 Conn. App. 350, 355, 908 A.2d 1134 (2006), cert. denied, 281 Conn. 905, 916 A.2d 47 (2007).

In *State* v. *Briggs*, 94 Conn. App. 722, 728, 894 A.2d 1008, cert. denied, 278 Conn. 912, 899 A.2d 39 (2006), we noted that this statute, which is broad in scope, proscribes behavior that hampers the actions of the police in the performance of their duties. "[A]ny act intended to thwart this purpose violates the statute." (Internal quotation marks omitted.) Id. Additionally, "[t]his statutory provision has been interpreted to require the intention to interfere with the performance of an officer's duties as a necessary element of the offense." *State* v. *Flynn*, 14 Conn. App. 10, 18, 539 A.2d 1005, cert. denied, 488 U.S. 891, 109 S. Ct. 226, 102 L. Ed. 2d 217 (1988); see also *State* v. *Briggs*, supra, 728 (intent is necessary element of § 53a-167a).

On appeal, the defendant contends that the communication that formed the basis for her conviction of interfering with a police officer was nonviolent and nonthreatening text messages directed to Rajewski, not Baker.[3] The following additional facts are necessary for

[3] To the extent that the defendant claims the evidence was insufficient to sustain her conviction of § 53a-167 (a) because she sent the text message to a third party, Rajewski, and not the state trooper, Baker, we conclude that she abandoned such a contention as a result of an inadequate brief.

our discussion. In the course of his investigation, Baker left Bunny Drive and proceeded to Rajewski's residence. Baker knocked on the door and asked if Rajewski knew why he was there. Rajewski responded affirmatively, and then handed Baker his cell phone. Rajewski requested that Baker read the text messages that he recently had received from the defendant.

Baker testified that the text messages were "a conversation between [Rajewski] and [the defendant] about how their stories have to match and have to be on the same pages and the cops were coming and a couple of other things." Baker then explained that he had recorded the text message conversation into his police report.[4] The defendant first texted Rajewski telling him that the "cops are coming," that he should "make sure [he was] bloody" and that she had stated to Baker that Moulson was abusive to her. Rajewski simply replied, "ok." The defendant then texted that Rajewski should wait outside because the police were coming to his residence and that he should delete this text conversation. Next, the defendant asked Rajewski to tell the police that Moulson had "stalked" her, that Rajewski should claim to have been involved in an altercation at a bar, had been bleeding when he arrived at Bunny Drive, and had followed her to Bunny Drive only

"We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *State* v. *Fowler*, 178 Conn. App. 332, 345, 175 A.3d 76 (2017), cert. denied, 327 Conn. 999, 176 A.3d 556 (2018). Other than a passing reference to the fact that her communication was directed at Rajewski, the defendant failed to provide any argument or analysis. Accordingly, we decline to consider this argument. See *State* v. *Navarro*, 172 Conn. App. 496, 500–501 n.1, 160 A.3d 444, cert. denied, 326 Conn. 910, 164 A.3d 681 (2017).

[4] Neither Rajewski's cell phone nor the police report was admitted into evidence. Instead, the prosecutor used the police report to refresh Baker's recollection as to the text message conversation between the defendant and Rajewski.

because he loved the defendant. Finally, the defendant texted Rajewski that they needed "to stick with the same story" and that their statements needed "to match."

Rajewski replied that he was going to tell the truth, specifically, that Moulson had "tried to kick [his] ass, so [Rajewski] beat him up." Rajewski's text messages conveyed that he was upset, and that "enough is enough." The defendant responded with a question mark, and then that his story needed to match hers. After additional conversation via text message, Rajewski again stated that "he was not going to tell a story, he's just going to tell what happened."

Our analysis begins with *State* v. *Williams*, 205 Conn. 456, 459, 534 A.2d 230 (1987), where our Supreme Court considered claims that § 53a-167a was unconstitutionally vague and fatally overbroad. In that case, two police officers detained the defendant during the early morning hours because he matched the description of a burglar. Id., 457–59. One of the officers asked the defendant to wait inside a police vehicle. Id., 458. "The defendant refused to comply with [the] request. Increasingly 'out of control,' he started to swear at the police officers and, in a crescendo, to protest his detention. Observing that the noise had attracted onlookers, the [officers] decided that the defendant was causing a disturbance and arrested him for breach of the peace. Following standard police procedures, they attempted to handcuff the defendant but he had become 'totally out of control' and had to be forcibly 'subdued.' " Id. As a result of his resisting arrest, the defendant was convicted for violating § 53a-167a (a). Id., 459.

Our Supreme Court rejected the defendant's claim of insufficient evidence as to his conviction for violating § 53a-167a. Id., 468–69. Next, it considered his claim

that § 53a-167a was unconstitutionally vague and violated due process of law. Id., 469. In rejecting this claim, the court explained that this statute was confined "to conduct that amounts to meddling in or hampering the activities of the police in the performance of their duties. . . . Furthermore, the conduct that the statute proscribes is limited to action intended to obstruct the police in the performance of their duties." (Citations omitted.) Id., 471. The court also recognized that certain acts of "verbal resistance" fell within the ambit of § 53a-167a. Id. "The statute's requirement of intent limits its application to verbal conduct intended to interfere with a police officer and excludes situations in which a defendant merely questions a police officer's authority or protests his or her action." Id., 472.

The court then turned to the defendant's claim that § 53a-167a was fatally overbroad. Id., 472–74. First, it distinguished § 53a-167a from a Texas ordinance that the United States Supreme Court had determined to be overbroad. Id., 472–73. It then stated: "Moreover, unlike the United States Supreme Court, this court has the power to construe state statutes narrowly to comport with the constitutional right of free speech. . . . *To avoid the risk of constitutional infirmity, we construe § 53a-167a to proscribe only physical conduct and fighting words that by their very utterance inflict injury or tend to incite an immediate breach of the peace.* . . . By its terms, § 53a-167a is directed only at conduct that interferes with police and firemen in the performance of their duties. As we have said earlier, it encompasses only interference that is intentional. . . . This limiting construction, which we deem to be fully consistent with the intent of the legislature, preserves the statute's purpose to proscribe core criminal conduct that is not constitutionally protected." (Citations omitted; emphasis added; footnotes omitted; internal quotation marks omitted.) Id., 473–74.

Approximately twenty-seven years later, in *State* v. *Sabato*, supra, 152 Conn. App. 590, 595 n.3, this court, sua sponte, raised the issue of whether § 53a-167a was limited to physical conduct and fighting words. In that case, the victim's cell phone was stolen from a nightclub. Id., 592. The next day, the defendant sold this cell phone to a third party, who sought assistance in unlocking it. Id. The victim used a tracking application on her computer to locate her phone and then notified the police. Id. The third party, later relinquishing the phone, provided the police with a sworn statement, and notified the defendant that he was at the police station. Id., 592–93. The defendant sent the third party a text message "telling him not to write a statement and to keep his mouth shut." (Internal quotation marks omitted.) Id., 593. The state subsequently charged the defendant with attempt to interfere with a police officer. Id., 594. Following his conviction, the defendant filed an appeal. Id.

The defendant in *Sabato* claimed that the evidence was insufficient to sustain his conviction for attempt to interfere with a police officer. "First, he argues that § 53a-167a does not proscribe physical or verbal conduct directed against a third party . . . . Second, he contends that applying § 53a-167a to his conduct, which was outside the presence of a police officer, would render the statute void for vagueness." Id., 595. After oral argument, we ordered the parties to submit supplemental briefs on the applicability of *State* v. *Williams*, supra, 205 Conn. 456. *State* v. *Sabato*, supra, 152 Conn. App. 595 n.3.

We concluded that *State* v. *Williams*, supra, 205 Conn. 456, controlled the appeal. *State* v. *Sabato*, supra, 152 Conn. App. 595. "Applying *Williams* to the present case, we conclude that there was insufficient evidence to convict the defendant of attempt to interfere with an officer." Id., 596. "By long form information, the

defendant was charged under § 53a-167a exclusively for a text message he sent to [the third party] . . . telling him not to write a statement and to 'keep [his] mouth shut.' These words cannot be construed to be 'fighting words that by their very utterance inflict injury or tend to incite an immediate breach of the peace.' *State* v. *Williams*, supra, [473]. They were therefore not proscribed by § 53a-167a. As a result, we conclude that there was insufficient evidence presented to sustain the defendant's conviction for attempt to interfere with an officer." *State* v. *Sabato*, supra, 152 Conn. App. 596.

Our Supreme Court granted the petitions for certification filed by the state and the defendant. *State* v. *Sabato*, 321 Conn. 729, 732–33, 138 A.3d 895 (2016). The state argued that this court erred in concluding that § 53a-167a excluded true threats or, alternatively, that the judicial gloss applied to that statute should include true threats.[5] Id., 740. The defendant countered that the state was attempting to save the conviction on the basis of a theory of guilt that had not been alleged or presented to the jury, and, therefore, constituted a violation of due process. Id., 740–41.

The court reviewed its prior interpretation of § 53a-167a in *State* v. *Williams*, supra, 205 Conn. 456, noting first that the statute encompassed both verbal and physical conduct, subject to the intent requirement. *State* v. *Sabato*, supra, 321 Conn. 741. It iterated the limiting construction that had been placed on the statute; namely, that § 53a-167a proscribed "*only physical conduct and fighting words* that by their very utterance inflict injury or tend to incite an immediate breach of the peace." (Emphasis added; internal quotation marks omitted.) Id., 741.

The court in *Sabato* rejected the state's true threats argument on the basis that it violated the theory of the

[5] Ultimately, our Supreme Court declined to reach these issues. *State* v. *Sabato*, supra, 321 Conn. 734 n.7.

case, and thus, due process. Id., 742–45. In its analysis, the court expressly noted that the prosecutor had contended that the defendant's statement to the third party to refrain from providing a statement to the police comprised the actus reus of the offense. Id., 745. "*As we have explained, however, and as the state concedes, § 53a-167a does not proscribe such verbal conduct, and, therefore, the defendant's conviction under that statute cannot stand.*" (Emphasis added.) Id., 746.

The state attempts to distinguish the present case from the *Sabato* opinions and *State* v. *Williams*, supra, 205 Conn. 456. With respect to the latter, the state contends that the court in *Williams* "was careful not to preclude application of § 53a-167a to 'verbal conduct intended to interfere with a police officer' because such 'core criminal conduct' is not constitutionally protected speech, and, thus, falls within the ambit of § 53a-167a." In support, the state directs us to the following footnote from *Williams*: "This narrow construction [that § 53a-167a applies only to physical conduct and fighting words] is required by the constitutional right of free speech even though a broader construction of verbal conduct intended to interfere with a police officer to which we referred in our earlier discussion of vagueness would constitutionally suffice for the latter purpose." (Internal quotation marks omitted.) *State* v. *Williams*, supra, 205 Conn. 473 n.6. As to the former, the state maintains that, contrary to the present case, it had failed to present evidence of specific intent to interfere in the *Sabato* prosecution.

We are not persuaded by the state's interpretation of *State* v. *Williams*, supra, 205 Conn. 456. In that case, our Supreme Court determined that, for purposes of the defendant's claim that § 53a-167a was unconstitutionally vague, verbal conduct, coupled with the intent requirement, sufficiently defined the statute and provided notice as to what was proscribed, and thus did

not violate due process. Id., 469–72. In order to ensure that the state did not run afoul of the constitutional right to free speech, however, our Supreme Court expressly limited its application to intentional interference consisting of either physical conduct or fighting words that inflicted injury or tended to incite an immediate breach of peace. Id., 473. "This limiting construction, which we deem to be fully consistent with the intent of the legislature, preserves the statute's purpose to proscribe core criminal conduct that is not constitutionally protected." (Internal quotation marks omitted.) Id., 474. Additionally, our Supreme Court recently endorsed this limitation. In *State* v. *Sabato*, supra, 321 Conn. 746, it explicitly emphasized that "§ 53a-167a does not proscribe such verbal conduct [that does not constitute fighting words] . . . ."

Additionally, we are not persuaded by the state's attempt to distinguish the present case from the *Sabato* decisions. Neither this court nor our Supreme Court based its decision on whether there was evidence that the defendant specifically intended to interfere with a police officer when he sent his text message to the third party. Rather, the focus of both courts was on the fact that the verbal conduct did not amount to fighting words and could not constitute a violation of § 53a-167a.

The state also directs us to *State* v. *Williams*, 110 Conn. App. 778, 956 A.2d 1176, cert. denied, 289 Conn. 957, 961 A.2d 424 (2008). In that case, a Norwalk police sergeant effectuated a motor vehicle stop after observing a vehicle in a commercial parking lot at 2 a.m. Id., 780. All three men in the vehicle, including the defendant who was sitting in the back seat, appeared nervous and fidgety. Id., 781. The sergeant arrested the three men for trespassing, and the police found cocaine and marijuana in the vehicle. Id., 781–82. At the scene of the arrest, and later at the police station, the defendant

identified himself to the police officers as "Zeke Williams." Id., 782. At the station, he provided the police with his correct social security number, address and birthplace. Id. Using an electronic database, the police determined the defendant's "actual identity to be Corey Williams, not Zeke Williams." Id. He subsequently was convicted of possession of narcotics with intent to sell and interfering with an officer. Id., 783.

On appeal, the defendant claimed, inter alia, that the evidence was insufficient to support his conviction for violating § 53a-167a (a). Id., 793. Relying on our Supreme Court's decision in *State* v. *Aloi*, 280 Conn. 824, 911 A.2d 1086 (2007),[6] we affirmed the defendant's conviction. Id., 793–98. We specifically reasoned that "[t]he defendant's providing a false name to police is verbal conduct that is equivalent to the defendant's refusal to give identification to the police in *Aloi*, in that it hampered, or hindered, the ability of the police to perform their duties properly, quickly and efficiently." Id., 797. Accordingly, we concluded that the defendant's sufficiency claim failed. Id., 798.

At first blush, *State* v. *Williams*, supra, 110 Conn. App. 778, appears to support the state's claim that verbal

[6] In *State* v. *Aloi*, supra, 280 Conn. 833–35, our Supreme Court concluded that the refusal to comply with a police command to provide identification during a *Terry* stop was not categorically excluded from the broad language of § 53a-167a. Such a refusal, though done peacefully, was likely to impede or delay the police investigation. Id., 834. It also noted that it would have been impractical, if not impossible, to draft a statute that detailed with precision "exactly what *obstructive conduct* is proscribed." (Emphasis added.) Id., 837. Finally, it determined, under the facts and circumstances of that case, that the evidence was sufficient to support the defendant's conviction for violating § 53a-167a. Id., 841–44; see also *State* v. *Silva*, 285 Conn. 447, 456–61, 939 A.2d 581 (2008) (evidence sufficient to support conviction for violating § 53a-167a where defendant, about to receive infraction ticket, refused to provide police with driver's license, registration and insurance information and for fleeing the scene to avoid infraction ticket). Contrary to the present case, which involved verbal communications to Rajewski, the defendants in *Aloi* and *Silva* engaged in obstructive conduct by refusing to provide information sought by the police.

conduct specifically intended to interfere with a police officer constitutes a violation of § 53a-167a. Our opinion, however, did not specifically address the question of whether the verbal conduct of the defendant constituted a violation of § 53a-167a. Id., 793–98. Furthermore, a review of the briefs filed in that case reveals that the defendant argued that the testimony of one officer should have been discounted, the defendant provided his proper social security number and address to the police, the defendant followed the commands of the arresting sergeant and never resisted or became uncooperative. *State* v. *Williams*, Conn. Appellate Court Record & Briefs, May-June Term, 2008, Defendant's Brief pp.13–15. In other words, the defendant in *State* v. *Williams*, supra, 110 Conn. App. 778, did not challenge his conviction under § 53a-167a on the basis that it was premised on verbal conduct. The issue addressed in *State* v. *Williams*, supra, 205 Conn. 456, and subsequently endorsed in *State* v. *Sabato*, supra, 321 Conn. 729, was not before this court and not part of the opinion in *State* v. *Williams*, supra, 110 Conn. App. 778. We conclude, therefore, that our decision in *State* v. *Williams*, supra,110 Conn. App. 778, is inapplicable to the present case.

The sole basis for the defendant's conviction for violating § 53a-167a was the text messages sent to Rajewski. These words, which cannot be construed as fighting words, were not proscribed by that statute. As a result, we conclude that there was insufficient evidence to sustain her conviction for interfering with a police officer.

II

The defendant next claims that the evidence was insufficient to support her conviction of tampering with a witness. Specifically, she argues that the state failed

to prove that she sent the text messages to Rajewski[7] with the specific intent required for a conviction of § 53a-151 (a), that is, the intent to influence a witness at an official proceeding. See *State* v. *Ortiz*, 312 Conn. 551, 554, 93 A.3d 1128 (2014). We are not persuaded.

Section 53a-151 (a) provides: "A person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding."[8] See also *State* v. *Bennett-Gibson*, 84 Conn. App. 48, 52–53, 851 A.2d 1214, cert. denied, 271 Conn.

[7] We note that the court instructed the jury that the tampering of a witness count applied either to Rajewski or Babcock. The defendant did not object to the court's charge. On appeal, the defendant claims that her right to due process was violated because the state's information did not charge her with tampering with Babcock. She further claims that the evidence was insufficient to sustain her conviction for violating § 53a-151 (a) with respect to Babcock. In its brief, the state expressly conceded that it had not pursued a charge of tampering with a witness as to Babcock. With respect to the defendant's due process claim, the state argued that it failed under the third prong of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 813 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Specifically, the state claims that it "never proceeded on any theory of the case alleging that the defendant had tampered with Babcock, and presented no evidence from which the jury could have found the defendant guilty under that theory of culpability. Consequently, the defendant's due process claim lacks a factual predicate, and must fail." We agree that, despite the court's instructions, the state presented its case of tampering with a witness solely as to Rajewski, and that the defendant cannot demonstrate a violation of her right to due process under these facts and circumstances.

[8] "The term witness is broadly defined as any person summoned, *or who may be summoned*, to give testimony in an official proceeding . . . . General Statutes § 53a-146 (6). The statutory scheme also includes a broad definition of official proceeding, that is, any proceeding held *or which may be held* before any legislative, judicial, administrative, or other agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, or notary or other person taking evidence in connection with any proceeding. . . . General Statutes § 53a-146 (1)." (Emphasis in original; internal quotation marks omitted.) *State* v. *Ortiz*, supra, 312 Conn. 562 n.6.

916, 859 A.2d 570 (2004). Its purpose is to punish those who interfere with our system of justice. *State* v. *Pommer*, 110 Conn. App. 608, 617, 955 A.2d 637, cert. denied, 289 Conn. 951, 961 A.2d 418 (2008).

Our Supreme Court has stated that this statutory language "plainly warns potential perpetrators that the statute applies to any conduct that is intended to prompt a witness to testify falsely or to refrain from testifying in an official proceeding that the perpetrator believes to be pending or imminent." *State* v. *Cavallo*, 200 Conn. 664, 668, 513 A.2d 646 (1986). It further explained that § 53a-151 (a) "applies only to conduct intentionally undertaken to undermine the veracity of the testimony given by a witness." Id., 672; see also *State* v. *Coleman*, 83 Conn. App. 672, 678–79, 851 A.2d 329, cert. denied, 271 Conn. 910, 859 A.2d 571 (2004), cert. denied, 544 U.S. 1050, 125 S. Ct. 2290, 161 L. Ed. 2d 1091 (2005). We are mindful that "[i]ntent may be, and usually is, inferred from the defendant's verbal or physical conduct. . . . Intent may also be inferred from the surrounding circumstances. . . . The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Bennett-Gibson*, supra, 84 Conn. App. 53.

Before addressing the specific arguments in this case, it is helpful to review our Supreme Court's decision in *State* v. *Ortiz*, supra, 312 Conn. 551, which both parties have discussed in their respective briefs. In that case, the defendant admitted to Louis Labbadia that he had committed a burglary in the town of Haddam. Id., 554–55. That same day, Labbadia provided this information to the police. Id., 555. Approximately fifteen months

later, the defendant went to the home of Robin Bonita, Labbadia's fiancée. Id. Bonita, who lived in Middletown, informed the defendant that Labbadia had gone to the police. Id. Shortly thereafter, Labbadia went missing, and his remains subsequently were discovered approximately eight months later in Middletown. Id.

The police considered the defendant as a suspect in the death of Labbadia, and went to speak with the defendant's girlfriend, Kristen Quinn. Id., 554–55. At this time, Quinn did not provide the police with any useful information for the investigation. Id., 555. She did, however, inform the defendant that she had been in contact with the police, and did not want to be involved with him because she suspected his involvement in Labbadia's death. Id.

One week later, the defendant, intoxicated and suicidal, told Middletown police officers that he "was tired of being accused of . . . something that he [did not] do." (Internal quotation marks omitted.) Id., 555. Thereafter, the defendant went to Quinn's home and confessed to killing Labbadia with a hunting knife following his conversation with Bonita. Id., 557. Quinn then provided this information to the police. Id.

Approximately seven weeks later, the defendant returned to Quinn's home, this time in possession of a small handgun. Id. "The defendant told Quinn that he had the gun for 'insurance' if she told 'the cops about what he said about [Labbadia].' The defendant said that if Quinn spoke to the police '[her] house was going to go up in smoke . . . .' The defendant stated that he knew where Quinn's grandparents lived. The defendant told Quinn that he was going to 'put [her down] on [her] knees, put the gun to [her] head and scare [her] straight.' " Id.

The defendant in *Ortiz* subsequently was found guilty, inter alia, of tampering with a witness. Id., 558. We affirmed his conviction, and our Supreme Court

granted his petition for certification. Id. It interpreted § 53a-151 (a) and concluded that "a jury may consider a defendant's attempt to induce a potential witness to lie to police investigators as evidence of his intent to affect that witness' conduct at a future official proceeding." Id., 563. It stated expressly that "§ 53a-151 (a) applies whenever the *defendant* believes that an official proceeding will probably occur, even if the police are only at the investigation stage." (Emphasis in the original.) Id., 568–69. It also explained that the statutory phrase "about to be instituted" signified probability and not temporal proximity. Id., 569. It also provided the following example: "[W]hen an individual knows that there is significant evidence connecting him to the crime, or, even further, when the individual knows that a witness with relevant information already has spoken with the police, a jury reasonably could infer that the individual believed that the investigation probably would progress into an official proceeding." Id., 570–71.

Next, the court in *Ortiz* considered the defendant's sufficiency claim. Id., 572–74. It noted that the defendant had confessed to two people that he had killed someone, one of those individuals had been in contact with the police, and the defendant himself, after exhibiting suicidal behavior, spoke with police officers, including the investigator working on the Labbadia homicide. Id., 572. As a result, the jury had sufficient evidence to find that an official proceeding would be instituted. Id., 572–73. Additionally, based on defendant's threats to Quinn, the jury was free to find that he had intended to induce her to testify falsely or withhold testimony at an official proceeding. Id., 573–74. Accordingly, our Supreme Court concluded that the jury reasonably could have concluded that the evidence established the defendant's guilt as to the charge of tampering with a witness beyond a reasonable doubt. Id.

In the present case, the defendant challenges only the requirement that the state prove that she sent text messages to Rajewski with the intent to induce him to testify falsely. Specifically, she contends that it was too speculative for the jury to infer that she possessed the required intent to induce Rajewski to lie or withhold testimony at a future official proceeding at the time she texted him. She also argues that it would have been speculation for the jury to find that Rajewski would in fact testify when a future official proceeding could be resolved via a nolle prosequi, diversionary program or guilty plea. In other words, it simply was not probable that a "criminal court proceeding" would occur in which Rajewski would testify. Finally, she maintains that, at most, the jury could infer that she had attempted to prevent his arrest.

The defendant's argument suffers from two flaws. First, she incorrectly assumes that the future official proceeding was limited to Rajewski's criminal trial. She offers no support for this interpretation of § 53a-151 (a). In *State* v. *Pommer*, supra, 110 Conn. App. 614, we stated: "An official proceeding includes *any proceeding held or that may be held before any judicial official authorized to take evidence under oath*." (Emphasis added.) Thus, the official proceeding was not limited to a prosecution of Rajewski, but included a prosecution of Babcock, Moulson, or the defendant. Accordingly, we disagree with the defendant's interpretation of the "official proceeding" language contained in § 53a-151 (a).

Second, and more importantly, we disagree that the evidence in the present case was insufficient to support a finding that "an official proceeding was pending, or about to be instituted . . . ." Our precedent contradicts the defendant's argument. In *State* v. *Foreshaw*, 214 Conn. 540, 541, 572 A.2d 1006 (1990), the defendant was charged with murder, carrying a pistol without a permit and tampering with physical evidence. In that

case, the defendant exchanged words with a third party near a convenience store. Id., 542. The victim admonished the defendant for her "vile language." Id. After disappearing briefly behind a nearby building, the defendant returned, shot and killed the victim. Id., 543. The defendant immediately fled in her vehicle, throwing the gun out of the window prior to her apprehension. Id.

The state charged the defendant, inter alia, with a violation of General Statutes (Rev. to 1989) § 53a-155 (a), which provides in relevant part: "A person is guilty of tampering with . . . physical evidence if, believing that an official *proceeding is pending, or about to be instituted*, he: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding." (Emphasis in original.) *State* v. *Foreshaw*, supra, 214 Conn. 547.[9]

On appeal in *Foreshaw*, the defendant claimed that the state had failed to present sufficient evidence to support her conviction. Id., 549–51. "In particular, the defendant argues that because she discarded the gun prior to any contact with law enforcement officers or the judicial system, she could not have believed an official proceeding was 'about to be instituted.' " Id., 550. Our Supreme Court disagreed, stating: "It is true that at the time the defendant discarded the gun, no official proceeding had in fact been instituted. The statute, however, speaks to that which is readily apt to come into existence or be contemplated and thus plainly apples to the official proceeding arising out such incident. The crucial role police involvement would play in that process cannot be disputed." Id., 551.

In the present case, the jury reasonably could have found that the defendant tampered with Rajewski by

[9] In *State* v. *Pommer*, supra, 110 Conn. App. 617, we adopted and applied our Supreme Court's construction of the "official proceeding is pending, or about to be instituted" language in § 53a-155 (a) from *State* v. *Foreshaw*, supra, 214 Conn. 540, to the identical language in § 53a-151 (a).

sending him text messages shortly after his altercation with Moulson. The timing of this tampering is similar to the facts of *State* v. *Foreshaw*, supra, 214 Conn. 543, where the defendant tampered with the evidence by throwing the gun out of the car window while fleeing from the crime scene. Additionally, the text messages from the defendant encouraged Rajewski to lie to Baker. See *State* v. *Ortiz*, supra, 312 Conn. 563; id., 571–72 (jury may consider defendant's attempt to induce potential witness to lie to police investigators as intent to affect that witness' conduct at future official proceeding); see also, e.g., *State* v. *Higgins*, 74 Conn. App. 473, 484, 811 A.2d 765 (state may establish second prong of tampering statute by proving defendant urged another to testify falsely), cert. denied, 262 Conn. 950, 817 A.2d 110 (2003). The evidence established that the defendant was aware of Baker's investigation of the physical altercation involving Rajewski, Babcock and Moulson. The jury could also find that the defendant, knowing that Baker investigated the physical altercation that had occurred at Bunny Road and had learned the identity of the participants, including Rajewski, believed than an official proceeding probably would result therefrom. See *State* v. *Ortiz*, supra, 572–73; *State* v. *Pommer*, supra, 110 Conn. App. 619–20. Furthermore, these cases do not support the defendant's argument that we must consider the possibility that a future official proceeding ultimately may be resolved by means of a nolle prosequi, diversionary program or a guilty plea, obviating the need for Rajewski's testimony. Instead, our focus remains on whether a future official proceeding, i.e. a criminal trial, is probable. For these reasons, we conclude that the defendant's insufficiency claim with respect to her conviction of tampering with a witness must fail.[10]

[10] On remand, the court must resentence the defendant as to this conviction. See *State* v. *Wade*, 297 Conn. 262, 268, 998 A.2d 1114 (2010); *State* v. *Crenshaw*, 172 Conn. App. 526, 530, 161 A.3d 638, cert. denied, 326 Conn. 911, 165 A.3d 1252 (2017).

The judgment is reversed only with respect to the defendant's conviction of interfering with an officer and the case is remanded with direction to render a judgment of acquittal on that charge and to resentence the defendant on the conviction of tampering with a witness. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ROBIN MICALIZZI *v.* KENNETH STEWART
(AC 38683)

DiPentima, C. J., and Sheldon and Norcott, Js.

Syllabus

The plaintiff sought to recover damages for personal injuries she sustained in an automobile accident allegedly caused by the defendant's negligence. The jury returned a verdict in favor of the plaintiff, awarding her economic damages but no noneconomic damages. Thereafter, the trial court denied the plaintiff's motion for additur or to set aside the verdict and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Held:*

1. The trial court did not abuse its discretion in denying the plaintiff's motion for additur or to set aside the verdict:

   a. The plaintiff's claim that the court should have set aside the verdict because the award of zero noneconomic damages conflicted with the jury's answers to certain interrogatories she had requested and was thus, fatally inconsistent, was unavailing: when a certain interrogatory was read in conjunction with the court's instructions to the jury to consider each claim for damages separately and to decide damages last, it was clear that the interrogatory concerned the nature of the defendant's liability, not the existence or extent of the plaintiff's damages, the court made it clear that the mere fact that the plaintiff suffered an injury or loss did not automatically entitle her to damages, the plaintiff's interpretation of the interrogatory would have required the jury to proceed contrary to the court's instructions and to consider the questions of causation and damages simultaneously, and it was entirely plausible and reasonable for the jury to have found that the defendant violated certain statutes pleaded in the complaint with reckless disregard and that the plaintiffs injuries were caused thereby, but that the plaintiff did not prove her noneconomic damages by a fair preponderance of the evidence; accordingly, the plaintiff failed to show that the jury's verdict was inconsistent with its answers to the interrogatories.

b. The plaintiff could not prevail on her claim that the award of zero noneconomic damages was inadequate as a matter of law: an award of all claimed economic damages, including compensation for medical expenses for the treatment of pain, does not require an award of noneconomic damages, and, thus, the fact that the jury awarded economic damages for medical treatment, including treatment for pain, did not necessarily mean that it had to award damages for pain itself, as it may be reasonable for a jury to conclude that although a plaintiff suffered an injury caused by a defendant and incurred reasonable and necessary medical expenses in treating that injury, the plaintiff nevertheless did not suffer compensable pain and suffering; moreover, the jury here reasonably could have determined that all of the plaintiff's medical expenses were reasonable and necessary treatment for her relatively minor injuries but that the plaintiff did not experience any compensable pain related to the accident, that the plaintiff failed to prove by a preponderance of the evidence that the accident caused her headaches and neck pain, and therefore, that although her diagnostic consultation and radiological imaging were reasonable and necessary in light of the collision, she did not experience compensable pain caused by it, and the jury was free to credit all, none or some of the testimony of the plaintiff, who failed to show that there was either a mistake in law or another valid basis for upsetting the will of the jury.

2. The trial court did not abuse its discretion in refusing to set aside the verdict due to certain alleged procedural irregularities: although the plaintiff claimed that the court improperly failed to accept a technically correct verdict and to consult with counsel before reinstructing the jury, there was nothing in the record, or in any legal authority provided by the plaintiff, to indicate that she was harmed or prejudiced by the court's action in adjourning for the day after the jury had indicated that it was pretty sure that it had done everything necessary to render a technically correct verdict, to give the jury more time the following day, after it was reinstructed, to properly complete the verdict forms, and the record showed that the court explained to counsel what it planned to do, listened to counsel and then reinstructed the jury as to filling out the verdict forms, and there was no merit to the plaintiff's claim that the court failed to ensure that only full exhibits were submitted to the jury; moreover, although the plaintiff claimed that the court improperly discharged the jury before the parties had an opportunity to request a polling of the jury under the applicable rule of practice (§ 16-32), that rule does not require the court to inquire, sua sponte, whether the parties want to have the jury polled, and there was no request prior to the discharge of the jury for it to be polled.

Argued October 16, 2017—officially released May 8, 2018

Procedural History

Action to recover damages for personal injuries sustained by the plaintiff in a motor vehicle accident allegedly caused by the defendant's negligence, and for other relief, brought to the Superior Court in the judicial district of Bridgeport and tried to a jury before *Radcliffe*, *J.*; verdict for the plaintiff; thereafter, the court denied the plaintiff's motion for additur or to set aside the verdict, and the plaintiff appealed to this court. *Affirmed.*

Tracey Lane Russso, with whom, on the brief, was *Gerard McEnery*, for the appellant (plaintiff).

Michael T. Vitali, for the appellee (defendant).

Opinion

DiPENTIMA, C. J. In this personal injury action arising from an automobile collision, the jury found in favor of the plaintiff, Robin Micalizzi, and awarded her all of her claimed economic damages but zero noneconomic damages. She filed a motion to set aside the verdict and, in the alternative, for an additur on the ground that she also was entitled to noneconomic damages. The trial court denied that motion, and the plaintiff appealed from that denial. She claims that the court abused its discretion by (1) refusing to set aside the verdict or to order an additur because the jury's verdict was inconsistent and inadequate, and (2) refusing to set aside the verdict because of procedural irregularities. We do not agree. Accordingly, 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 May 10, 2013, at the intersection of North Bishop and Grandfield Avenues in Bridgeport, a vehicle operated by the defendant, Kenneth Stewart, struck the vehicle the plaintiff was operating. The plaintiff claimed that the collision caused a strain/sprain of her cervical

spine, permanent damage to her left hand and recurring, severe headaches. She consulted medical professionals and received some treatment for her alleged injuries, incurring a total of $7,325 in medical expenses.

On September 11, 2013, the plaintiff brought an action against the defendant, alleging that his negligence, statutory recklessness, and common-law recklessness had caused her aforementioned injuries.[1] On November 3 and 4, 2015, the matter was tried to a jury. On November 6, 2015, the jury returned a plaintiff's verdict, finding the defendant 65 percent responsible for the plaintiff's injuries and awarding the plaintiff that proportion of her total claimed economic damages. The jury did not award the plaintiff any noneconomic damages. The plaintiff filed a motion to set aside the verdict and, in the alternative, for an additur. After a hearing, the court orally denied the plaintiff's motion, and the plaintiff appealed from that denial.[2] Additional facts will be set forth as necessary.

I

The plaintiff first claims that the trial court abused its discretion by refusing to set aside the verdict or to

[1] We note that the plaintiff failed to include the operative complaint in part I of her appendix. See Practice Book § 67-8.

[2] Specifically, the court stated: "The court does not sit as the seventh juror and must find [in] order to set aside a verdict that the verdict was the result of prejudice, partiality, corruption or mistake, none of which were present here. The jury deliberated, discharged its duties and responsibilities conscientiously and was discharged—was discharged before defense counsel made the request for a poll of the jury, and having been discharged, did not feel that resummoning them to the courtroom would be appropriate at that time for a—a poll of the—the jury. And that was particularly true given the claims that were being advanced regarding the alleged improprieties and the taking of the—the verdict, and that was appropriately minimized, I think.

"So the—the motion for—to set aside the verdict is denied. The motion for additur is denied. The question is not whether the court would or would not have awarded noneconomic damages, but whether construing all facts most favorably to affirming a verdict the jury could award, no damages of a noneconomic nature, which they did in this case. So the motion is denied in its entirety."

order an additur. Specifically, the plaintiff argues that (1) the court should have set aside the verdict because the award of zero noneconomic damages conflicts with the jury's answers to the interrogatories and (2) the court should have set aside the verdict or ordered an additur because the award was inadequate as a matter of law. We disagree.

We begin with the standard that governs our review. "The trial court's refusal to set aside the verdict or to order an additur is entitled to great weight and every reasonable presumption should be given in favor of its correctness. In reviewing the action of the trial court in denying the motions for additur and to set aside the verdict, our primary concern is to determine whether the court abused its discretion and we decide only whether, on the evidence presented, the jury could fairly reach the verdict [it] did. The trial court's decision is significant because the trial judge has had the same opportunity as the jury to view the witnesses, to assess their credibility and to determine the weight that should be given to their evidence. Moreover, the trial judge can gauge the tenor of the trial, as we, on the written record, cannot, and can detect those factors, if any, that could improperly have influenced the jury. . . . The only practical test to apply to a verdict is whether the award of damages falls somewhere within the necessarily uncertain limits of fair and reasonable compensation in the particular case, or whether the verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, mistake or corruption. . . .

"[A]lthough the trial court has a broad legal discretion in this area, it is not without its limits. Because in setting aside a verdict the court has deprived a litigant in whose favor the verdict has been rendered of his constitutional right to have disputed issues of fact determined by a jury . . . the court's action cannot be reviewed in a

vacuum. The evidential underpinnings of the verdict itself must be examined. . . . [I]f there is a reasonable basis in the evidence for the jury's verdict, unless there is a mistake in law or some other valid basis for upsetting the result other than a difference of opinion regarding the conclusions to be drawn from the evidence, the trial court should let the jury work [its] will." (Internal quotation marks omitted.) *DeEsso* v. *Litzie*, 172 Conn. App. 787, 795–96, 163 A.3d 55, cert. denied, 326 Conn. 913, 173 A.3d 389 (2017).

A

We first address the plaintiff's contention that the court should have set aside the verdict because the award of zero noneconomic damages conflicted with the jury's answers to the interrogatories she requested and, thus, was fatally inconsistent. We conclude that the verdict and the responses to the interrogatories were not necessarily inconsistent.

A party may request that the court submit interrogatories to the jury pursuant to Practice Book § 16-18.[3] Interrogatories provide a breakdown of the components of the jury's award and of the factors underlying the jury's ultimate view of the evidence. *DeEsso* v. *Litzie*, supra, 172 Conn. App. 797; *Caruso* v. *Quickie Cab Co.*, 48 Conn. App. 459, 462, 709 A.2d 1154 (1998); *Marchetti* v. *Ramirez*, 40 Conn. App. 740, 746, 673 A.2d 567 (1996), aff'd, 240 Conn. 49, 688 A.2d 1325 (1997). In considering the plaintiff's claim, we note that "[i]t is not the function

[3] Practice Book §16-18 provides: "The judicial authority may submit to the jury written interrogatories for the purpose of explaining or limiting a general verdict, which shall be answered and delivered to the clerk as a part of the verdict. The clerk will take the verdict and then the answers to the several interrogatories, and thereafter the clerk will take the judicial authority's acceptance of the verdict returned and the questions as answered, and proceed according to the usual practice. The judicial authority will not accept a verdict until the interrogatories which are essential to the verdict have been answered."

of a court to search the record for conflicting answers in order to take the case away from the jury on a theory that gives equal support to inconsistent and uncertain inferences. When a claim is made that the jury's answers to interrogatories in returning a verdict are inconsistent, the court has the duty to attempt to harmonize the answers." (Internal quotation marks omitted.) *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 270, 698 A.2d 838 (1997); *Froom Development Corp.* v. *Developers Realty, Inc.*, 114 Conn. App. 618, 626–27, 972 A.2d 239, cert. denied, 293 Conn. 922, 980 A.2d 909 (2009).

Only if a court cannot harmonize the verdict and the interrogatories may it refuse to accept such verdict. *Rendahl* v. *Peluso*, 173 Conn. App. 66, 95–96, 162 A.3d 1 (2017). "A verdict is not defective as a matter of law as long as it contains an intelligible finding so that its meaning is clear. . . . A verdict will be deemed intelligible if it clearly manifests the intent of the jury." *Sigular* v. *Gilson*, 141 Conn. App. 581, 587, 62 A.3d 564, cert. granted, 308 Conn. 948, 67 A.3d 291 (2013) (appeal withdrawn Aug. 1, 2013).

"The role of an appellate court where an appellant seeks a judgment contrary to a general verdict on the basis of the jury's allegedly inconsistent answers to . . . interrogatories is extremely limited. . . . To justify the entry of a judgment contrary to a general verdict upon the basis of answers to interrogatories, those answers must be such in themselves as conclusively to show that as [a] matter of law judgment could only be rendered for the party against whom the general verdict was found; they must [negate] every reasonable hypothesis as to the situation provable under the issues made by the pleadings; and in determining that, the court may consider only the issues framed by the pleadings, the general verdict and the interrogatories, with the answers made to them, without resort to the evidence offered at the trial." (Citation omitted; internal quotation marks omitted.) *Suarez* v. *Dickmont Plastics*

Corp., supra, 242 Conn. 269–70; *Snell* v. *Norwalk Yellow Cab, Inc.*, 172 Conn. App. 38, 72, 158 A.3d 787, cert. granted, 325 Conn. 927, 169 A.3d 232 (2017); *Froom Development Corp.* v. *Developers Realty, Inc.*, supra, 114 Conn. App. 626–27.

In this case, in its answers to the interrogatories, the jury specifically found that (1) the defendant violated both General Statutes §§ 14-218a[4] and 14-222,[5] (2) the defendant violated both statutes "with reckless disregard"[6] and (3) the defendant's violation of such statutes with reckless disregard proximately caused the plaintiff's injuries, but that (4) the plaintiff was not entitled to double or treble damages. In addition, the jury found that the plaintiff was comparatively negligent. Ultimately, the jury determined that the plaintiff was entitled to recover 65 percent of $7,325, the latter sum

[4] General Statutes § 14-218a provides in relevant part: "(a) No person shall operate a motor vehicle upon any public highway . . . or road . . . or on any parking area . . . or upon a private road on which a speed limit has been established . . . at a rate of speed greater than is reasonable, having regard to the width, traffic and use of highway, road or parking area, the intersection of streets and weather conditions. . . . Any speed in excess of such limits, other than speeding . . . shall be prima facie evidence that such speed is not reasonable . . . ."

[5] General Statutes § 14-222 provides in relevant part: "(a) No person shall operate any motor vehicle upon any public highway . . . or any road . . . or in any parking area for ten cars or more or upon any private road on which a speed limit has been established in accordance . . . or upon any school property recklessly, having regard to the width, traffic and use of such highway, road, school property or parking area, the intersection of streets and the weather conditions. The operation of a motor vehicle upon any such highway, road or parking area . . . at such a rate of speed as to endanger the life of any person other than the operator of such motor vehicle . . . shall constitute a violation of the provisions of this section."

[6] General Statutes § 14-295 provides in relevant part: "In any civil action to recover damages resulting from personal injury, wrongful death or damage to property, the trier of fact may award double or treble damages if the injured party has specifically pleaded that another party has . . . with reckless disregard operated a motor vehicle in violation of section 14-218a, . . . 14-222 . . . and that such violation was a substantial factor in causing such injury . . . ."

representing her claimed and proven economic damages, but no noneconomic damages. Thus, the jury's total award was $4,761.25.

It is the plaintiff's contention that, notwithstanding its award of noneconomic damages, the jury found that she had necessarily endured pain and suffering, therefore entitling her to noneconomic damages. Specifically, the plaintiff directs our attention to the third interrogatory, which reads: "Do you find that the violation of either or both statutes 'with reckless disregard,' was the proximate cause (substantial factor) of the injuries sustained by [the plaintiff]?"[7] The jury answered this interrogatory in the affirmative. The plaintiff contends that the phrase "injuries sustained by [the plaintiff]" implies a subordinate finding that there were, in fact, noneconomic damages.[8] Specifically, the plaintiff

[7] The other interrogatories read: "1. Do you find that [the defendant] violated either or both of the following statutes? . . . [General Statutes §] 14-218a . . . [General Statutes §] 14-222 . . . 2. Do you find that [the defendant] violated either or both statutes 'with reckless disregard.'? . . . 4. Do you find that the Plaintiff should receive Double Damages, Treble Damages, or Neither?" The jury also completed verdict forms that inquired as to (1) the plaintiff's comparative negligence and (2) specific economic damages.

[8] Both the verdict form and the court's instructions define noneconomic damages as "physical pain and suffering, mental and emotional pain and suffering, permanent injury, disability or impairment, and the inability to enjoy and to fully participate in the daily activities of life." The plaintiff argues that "injuries" means one or more of these things.

We note that, in some similar cases, this issue has been presented to the jury in an additional interrogatory. See, e.g., *Sigular* v. *Gilson*, supra, 141 Conn. App. 585–86 ("The first question asked whether the negligence of the decedent proximately caused the plaintiff's injuries . . . . Question two then asked *whether the plaintiff suffered damages as a result of the decedent's negligence* . . . . Question three asked the jury to determine the amount of damages suffered by the plaintiff, by specifically listing the relevant economic and noneconomic damages." [Emphasis added.]).

Additionally, the plaintiff's interpretation of the interrogatory at issue begs the question of which of the underlying injuries, if any, the jury found proven. In *Esaw* v. *Friedman*, 217 Conn. 553, 567, 586 A.2d 1164 (1991), the plaintiff challenged as inadequate a verdict in her favor and relied on an interrogatory remarkably similar to the interrogatory here for support: "Did the plaintiff prove that one or more of the proven specifications of

asserts that were we to "[break] down the plain meaning of the terms used by the [j]ury in [its] findings," we would have to conclude "that medical care would not be rendered for injuries if there was no 'physical pain and suffering [or] permanent injury disability or impairment.' "

This argument is unavailing. Even if we assume that the interrogatory and its answer were open to interpretation, our standard of review requires us to resolve any ambiguity in the verdict in favor of the verdict's propriety. See *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 435 n.14, 820 A.2d 258 (2003) (harmonizing verdict where compound question in jury interrogatory resulted in ambiguous answer); *Suarez* v. *Dickmont Plastics Corp.*, supra, 242 Conn. 270 ("the court has a duty to attempt to harmonize the answers" [internal quotation marks omitted]).

When read in conjunction with the court's instructions to the jury; see *Suarez* v. *Dickmont Plastics Corp.*, supra, 242 Conn. 271 ("we do not read the interrogatories in isolation, but, rather, in conjunction with the jury instructions"); it is clear that the third question concerned the nature of the defendant's liability, not the existence or extent of the plaintiff's damages. The court instructed the jury that it ought to decide damages last, that it should consider each claim for damages separately from all others, that it was free to credit or discredit any witness' testimony, and that the plaintiff

negligence was a proximate cause of (that is, a substantial factor in causing) her injuries?" The jury in that case also answered in the affirmative, but did not compensate the plaintiff to her satisfaction. The court in that case noted that "the jury did not specifically find what claimed injuries were proven to have been caused by the defendant's negligence. This response of the jury is not inconsistent with a finding that only some of the injuries that the plaintiff claimed were in fact caused by the . . . accident. In short, we cannot conclude on this record that the verdict was so inadequate that it shocks the sense of justice and compels the conclusion that it was the product of partiality, prejudice, mistake or corruption." Id.

had the burden of proving her damages by a fair preponderance of the evidence.[9]

Indeed, the court made it clear that "the mere fact that the plaintiff suffered an injury or loss *does not automatically entitle her to damages*. She must prove by the preponderance of the evidence standard that her injuries and damages were proximately caused by some act or acts of negligence on the part of the defendant. In other words, the plaintiff must prove three elements to you. First, at least one act of negligence on the part of the defendant as specified or outlined in her complaint. *Second, that that act or those acts proximately caused her injuries. And third, she must prove the resulting injuries and damages.*" (Emphasis added.) These instructions clarify that each component of the jury's verdict requires a separate consideration, and that the jury would necessarily have had to address the question of proximate causation before it turned to the question of damages. The plaintiff's interpretation of the challenged interrogatory would require the jury to proceed contrary to the court's instructions and consider the questions of causation and damages simultaneously. "[I]t is well established that, [i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them." *Monti* v. *Wenkert*, 287 Conn. 101, 116, 947 A.2d 261 (2008).

Accordingly, it is entirely plausible and reasonable for the jury here to have found that the defendant violated the two pleaded statutes with reckless disregard and that the plaintiff's injuries were caused by the same, but that the plaintiff did not prove her noneconomic damages by a fair preponderance of the evidence. See also part I B of this opinion. As a result, the plaintiff

[9] We also note that, despite the plaintiff's reliance on the diction of the interrogatory form, the court repeatedly spoke of noneconomic damages more broadly, referring to "injuries and damages," "injuries and losses," and "nonmoney losses".

cannot demonstrate that the jury's verdict is inconsistent with its answers to the interrogatories. The court, therefore, did not abuse its discretion in refusing to set aside the verdict on that ground.

B

Having determined that the jury's verdict is not inconsistent with its answers to the interrogatories, we turn now to the plaintiff's contention that the award is inadequate and, thus, that the court abused its discretion in refusing to set it aside or to order an additur. This contention has two parts. First, the plaintiff argues that an award of zero noneconomic damages is inadequate as a matter of law where the jury has awarded one hundred percent of the claimed economic damages, which include medical expenses for the treatment of pain. Second, the plaintiff argues that the facts and circumstances of this case demand an award of noneconomic damages. We do not agree.

1

As to the first part of the plaintiff's argument, we disagree that an award of all claimed economic damages, including compensation for medical expenses for the treatment of pain, *requires* an award of noneconomic damages.

"It is well established that in Connecticut a jury's decision to award economic damages does not trigger, as a matter of law, an automatic award of noneconomic damages. Our Supreme Court has articulated a special standard for the review of verdicts like the one at issue here to determine whether inconsistency renders them legally inadequate. . . . In *Wichers* v. *Hatch*, 252 Conn. 174, 188, 745 A.2d 789 (2000), [our Supreme Court] held that trial courts, when confronted with jury verdicts awarding economic damages and zero noneconomic

damages, must determine on a case-by-case basis whether a verdict is adequate as a matter of law. . . .

"Under *Wichers*, [r]ather than decide that an award of only economic damages is inadequate as a matter of law, the jury's decision to award economic damages and zero noneconomic damages is best tested in light of the circumstances of the particular case before it. Accordingly, the trial court should examine the evidence to decide whether the jury reasonably could have found that the plaintiff had failed in his proof of the issue. That decision should be made, not on the assumption that the jury made a mistake, but, rather, on the supposition that the jury did exactly what it intended to do. . . .

"Thus, pursuant to *Wichers* and its progeny, [a] plaintiff [is] not entitled to an award of noneconomic damages simply because the jury awarded her economic damages. On the contrary, [a] plaintiff, as the party claiming noneconomic damages, had the burden of proving them with reasonable certainty. . . . Simply stated, [where] the plaintiff claim[s] noneconomic damages . . . she ha[s] the burden of proof to show that she experienced pain as the result of the accident." (Citations omitted; internal quotation marks omitted.) *DeEsso* v. *Litzie*, supra, 172 Conn. App. 804–805.

The plaintiff cites to *Wichers* v. *Hatch*, supra, 252 Conn. 174, and *Schroeder* v. *Triangulum Associates*, 259 Conn. 325, 789 A.2d 459 (2002), in support of her argument that the award is inadequate per se. She contends that these cases hold that where the jury awards *all* of the plaintiff's claimed economic damages, the jury has unambiguously determined that the claimed medical expenses were reasonable and necessary to treat pain caused by the claimed injury, and, thus, that an award of zero noneconomic damages invariably is inadequate.

This is not an accurate reading of these cases. Although our courts sometimes have been reluctant to do so,[10] our Supreme Court expressly has allowed for an award of 100 percent of the claimed economic damages and zero noneconomic damages under the right circumstances. See *Wichers* v. *Hatch*, supra, 252 Conn. 188–89 ("[T]he jury's decision to award economic damages and zero noneconomic damages is best tested in light of the circumstances of the particular case before it. Accordingly, the trial court should examine the evidence to decide whether the jury reasonably could have found that the plaintiff had failed in his proof of the issue."); *Schroeder* v. *Triangulum Assocs.*, supra, 259 Conn. 334 n.5 ("[o]ur conclusion on the facts of this case does not foreclose the possibility . . . that a jury in a case with different facts reasonably could award the full amount of a plaintiff's claimed economic damages but no noneconomic damages"); see also *Melendez* v. *Deleo*, 159 Conn. App. 414, 418–19, 123 A.3d 80 (2015) (affirming judgment awarding 100 percent of past claimed medical bills including for treatment of pain, wages, and property damage but zero noneconomic damages); *Lidman* v. *Nugent*, 59 Conn. App. 43, 46, 755 A.2d 378 (2000) (reversing and remanding with direction to reinstate jury verdict awarding all economic damages and zero noneconomic damages and render judgment thereon). Thus, contrary to the plaintiff's reading of our cases, they clearly stand for the proposition that *there is no per se rule* in cases where a jury awards substantial economic damages but no noneconomic damages.

Additionally, the fact that the jury awarded economic damages for medical treatment, including treatment for pain, does not *necessarily* mean that it must award

[10] See, e.g., *DeEsso* v. *Litzie*, supra, 172 Conn. App. 808–809 (distinguishing facts from cases where jury awarded all or "virtually all" claimed economic damages).

damages for pain itself. Under the fact intensive, case-by-case inquiry demanded by *Wichers* v. *Hatch*, supra, 252 Conn. 188–90, it may be reasonable for a jury to conclude that although a plaintiff suffered an injury caused by a defendant and incurred reasonable and necessary medical expenses in treating that injury, that plaintiff nevertheless did not suffer compensable pain and suffering. See *Cusano* v. *Lajoie*, 178 Conn. App. 605, 611, 176 A.3d 1228 (2017) ("[T]he court seems to assume that because the plaintiff sought medical treatment for pain . . . *and was awarded the full amount of the cost of that treatment*, the plaintiff inevitably experienced compensable pain and suffering. Our Supreme Court expressly rejected that reasoning in *Wichers* v. *Hatch*, [supra, 188–90]." [Emphasis added.]); *Smith* v. *Lefebre*, 92 Conn. App. 417, 422, 885 A.2d 1232 (2005) ("there is no obligation for the jury to find that every injury causes pain").[11] Indeed, this court previously has upheld verdicts that awarded economic

[11] But see *Benedetto* v. *Zaku*, 112 Conn. App. 467, 472, 963 A.2d 94 (2009) ("[i]t is not reasonable for a jury to find a defendant liable for the expense of a spinal fusion surgery, but not liable for the pain and permanent disability necessarily attendant to such intrusive surgery"); *Lombardi* v. *Cobb*, 99 Conn. App. 705, 709, 915 A2d 911 (2007) ("[b]ecause the plaintiff's medical expenses and lost wages related to her treatment [and medication] for back and shoulder pain, the jury necessarily found that she had experienced pain, and it therefore should have awarded her noneconomic damages"); *Fileccia* v. *Nationwide Property & Casualty Ins. Co.*, 92 Conn. App. 481, 489, 886 A.2d 461 (2005) ("We conclude that under the circumstances, the jury's award of economic damages and no noneconomic damages is internally inconsistent and ought to have been set aside. In finding that the plaintiff, by virtue of the accident, had suffered . . . [a pinched nerve, a herniated disc, and other trauma] requiring [physical therapy] treatments and medication, the purpose of which was to alleviate pain and to improve functioning, the jury necessarily found that he had experienced pain and decreased functioning."), cert. denied, 277 Conn. 907, 894 A.2d 987 (2006); *Elliot* v. *Larson*, 81 Conn. App. 468, 477, 840 A.2d 59 (2004) (court did not abuse its discretion in concluding that plaintiff "must have suffered pain accompanying his injury" where jury awarded all economic damages including lost wages [internal quotation marks omitted]); see also *Schroeder* v. *Triangulum Assocs.*, supra, 259 Conn. 333 ("[t]he jury reasonably could not have initially found the defendant liable for the expense of the surgery but not

damages for procedures specifically targeting pain and suffering, but zero noneconomic damages. *Cusano* v. *Lajoie*, supra, 605 (chiropractic); *Melendez* v. *Deleo*, supra, 159 Conn. App. 414 (manipulation, stimulation, cold packs, chiropractic); *Silva* v. *Walgreen Co.*, 120 Conn. App. 544, 992 A.2d 1190 (2010) (emergency room observation and medication for anxiety, depression, and sleep disorders caused by alleged post-traumatic stress disorder); *Smith* v. *Lefebre*, supra, 92 Conn. App. 417 (physical therapy, ultrasound, traction, chiropractic); see also *Lidman* v. *Nugent*, supra, 59 Conn. App. 46 (upholding jury verdict awarding no noneconomic damages where trial court, in its decision, noted use of hot/cold packs, ultrasound, electrical stimulation, assisted therapeutic exercise, massage with deep friction, myofascial release and manual traction).

These cases indicate that it is possible for a jury to conclude that medical treatment was reasonable and necessary as a diagnostic or prophylactic measure, but that the plaintiff experienced either no pain or pain caused by an underlying illness, preexisting condition or other cause. See, e.g., *Wichers* v. *Hatch*, supra, 252 Conn. 189–90 ("the jury could have accepted the evidence that it was advisable for the plaintiff to see his chiropractor more frequently than usual following the accident, but that the accident did not cause him actually to suffer greater pain *than he already had experienced as a result of his preexisting condition*" [emphasis added]); *Silva* v. *Walgreen Co.*, supra, 120 Conn. App. 559 ("[T]he jury, in its commonsense assessment of the case and evaluation of the plaintiff's credibility, might well have believed that she either sought

responsible for any pain or disability attendant to such surgery"). The facts of these cases, i.e., involving surgery, lost wages, an objective diagnosis, etc. make them arguably distinguishable from the present case, where the injuries claimed are based on subjective complaints and there is no claim for lost wages, and other cases where this court has upheld the jury award of no noneconomic damages.

medical treatment as an appropriate precautionary measure or in anticipation of possible litigation but that she failed to prove that she had actually suffered compensable pain. The jury was not required to find that, because the plaintiff sought treatment for pain and suffering, she necessarily experienced pain and suffering." [Internal quotation marks omitted.]).

2

Accordingly, we must examine with care the specific facts and circumstances of this case to determine whether the jury reasonably could have concluded that although the plaintiff's economic damages were compensable, her noneconomic damages were not. In light of this record, we cannot conclude that the jury's award was inadequate.

At trial, the plaintiff testified that, after the Friday collision, she experienced several symptoms: "Really bad headache. My neck felt really stiff. I had—couldn't bend my hand at all and I was all black and blued . . . ." For these, the plaintiff eventually sought treatment from various sources. First, over the weekend following the collision, she called her brother, a neurologist, who, over the telephone, ordered an MRI scan and prescribed Soma compound for the headaches. Then, on the Monday after the collision, the plaintiff consulted her primary care physician, who advised her to receive physical therapy for her neck. The plaintiff later sought advice regarding her hand from an orthopedist, who ordered X-ray imaging but did not prescribe any treatment.

The plaintiff testified that her neck injury was temporary and that she eventually stopped getting treatment therefor: "I went to physical therapy for a few months, but it was just sort of making it worse just massage or exercise. It didn't really do anything so it I discontinued

that." Despite the lack of continued treatment, the plaintiff testified at trial that, at that time, her neck injury "isn't that bad. It's pretty much, much better. . . . Once in a while it'll, like, stiffen up but it's—it's not that bad." Conversely, the plaintiff testified that her headaches were persistent. She described them as "viselike," causing a "squeezing pressure pain type of feeling" in the "frontal" region of her head "[j]ust about on a daily basis." She testified that she believed the headaches might be related to "abnormal findings" in her MRI, but agreed on cross-examination that such findings "could be" representative of "a normal variance" in someone her age. Although the MRI report the plaintiff received recommended that she undergo follow-up scans every four to six months, she admitted that she had never gotten a second scan; she testified that she intended to do so in the near future.

In addition to her recurring headaches, the plaintiff testified that the partial loss of mobility in her left hand was a permanent impairment, affecting her ability to type, crochet, garden, and bowl—activities she claimed she had enjoyed before the collision. She also testified, however, that during her initial consultation with the orthopedist, she was told that "there's really nothing that can be done" for her left pinky finger, and that her "finger should clear up." Despite a recommendation from the orthopedist to consult a hand specialist if her condition did not improve, the plaintiff conceded that she never did so.

Although the defendant's primary challenge to the plaintiff's claims was over the question of liability,[12] he also made an issue of the nature and severity of the plaintiff's injuries, and challenged the plaintiff to

[12] The defendant's counsel did not disagree with the propriety of the plaintiff's initial diagnostic consultations, even going so far as to credit the assessment of the parties' expert that the plaintiff's treatment was "appropriate."

explain her failure to follow up on her doctors' recommendations and pursue further treatment. He also disputed her claims of inability to enjoy life's activities, and contested her assertion that the collision caused her claimed injuries. In response, the plaintiff conceded that she had repeatedly declined further diagnostic tests and other medical treatment, even when she had been advised to do so. She testified that some treatment, such as physical therapy, caused her more discomfort than nontreatment. She agreed that any abnormalities in her MRI scan could be related to individual physiology or age.

As discussed earlier in this opinion, claims of inadequate verdicts are treated on a case-by-case, fact specific basis. See *Wichers* v. *Hatch*, supra, 252 Conn. 188–90. Viewing the record in the light most favorable to sustaining the jury's verdict; see *DeEsso* v. *Litzie*, supra, 172 Conn. App. 805; we conclude that the facts of this case more closely align with those cases in which an award of substantially all the claimed economic damages and zero noneconomic damages was upheld. Here, the jury determined that all of the plaintiff's medical expenses were reasonable and necessary treatment for her relatively minor injuries.[13] Nevertheless, the jury reasonably could have concluded that the plaintiff did not experience any compensable pain related to the accident. First, a significant portion of the plaintiff's claimed medical expenses related to diagnostic consultations. In the jury's estimation, it may very well have been reasonable and necessary for the plaintiff to consult her physicians after a motor vehicle collision to ensure that she had not suffered any injuries that may

[13] With respect to awarding economic damages, the court instructed the jury as follows: "To the extent that these charges are *reasonable, and were necessary and were proximately caused by the accident* . . . you may compensate her for these charges. There is a presumption that the medical bills are reasonable if no contrary evidence has been offered to rebut the reasonableness of the bills and costs." (Emphasis added.)

or may not present immediate or notable symptoms. This is especially true in light of the plaintiff's testimony that she had once before suffered a "really bad injury to [her] lower back" in a previous, unrelated motor vehicle collision involving a semitrailer truck. Similarly, the jury reasonably could have concluded that the radiological imaging the plaintiff received was an appropriate way to ensure that latent internal damage did not result from the collision.

Notwithstanding those expenses, the plaintiff received two additional treatments that ostensibly could be reasonable and necessary to treat pain caused by the accident: Soma, a muscle relaxant/analgesic compound, for her headaches and physical therapy for her neck. On this record, however, it was reasonable for the jury to conclude that the plaintiff failed to prove that the accident caused her compensable pain. With respect to the medication, the plaintiff testified that she believed that her headaches might be related to abnormalities found in her MRI, which she then conceded could have been caused not by the accident but rather by the idiosyncrasies of her physiology. Part of the reason that it is difficult to trace their source is that the plaintiff failed to follow up on her physicians' recommendation that she receive another MRI. The jury may reasonably have concluded that the plaintiff's failure to do so suggested that she was not concerned about the onset of new symptoms or possible damage to her brain. Accordingly, the jury reasonably could have determined that the plaintiff failed to prove by a preponderance of the evidence that the accident caused her headaches, and therefore, that although her diagnostic consultation and radiological imaging were reasonable and necessary in light of the collision, she did not experience compensable pain caused by it.

With respect to the physical therapy, the plaintiff testified that she stopped attending after a few months

because "it was just sort of making it worse just massage or exercise. It didn't really do anything so . . . I discontinued that." The plaintiff also testified that despite the lack of treatment, the condition of her neck had improved. Together, this testimony could have led the jury reasonably to conclude that her physical therapy was a prophylactic treatment designed to prevent further damage to her cervical spine or the deterioration of her overall musculoskeletal condition. This is especially true in light of the fact that the plaintiff had previously injured her lower back, an injury for which Vicodin had been prescribed. Therefore, the jury reasonably could have determined that the plaintiff failed to prove by a preponderance of the evidence that the accident caused her neck pain.

To the extent that the plaintiff and the plaintiff's witnesses, including her physicians, testified that the link between the collision and her pain was absolute, "[i]t is the jury's right to accept some, none or all of the evidence presented. . . . It is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [jury] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Cusano* v. *Lajoie*, supra, 178 Conn. App. 609.

Moreover, the trial court accepted the jury's verdict over the plaintiff's motion to set it aside or to order an additur. A court's acceptance of the verdict, despite objections, counsels in favor of its propriety. "Where . . . a trial court and a jury have concurred in their determination that a particular damages award is appropriate, that circumstance provides a persuasive argument for sustaining the action of the court on the motion. . . . The reason for such a deferential standard is clear. Litigants have a constitutional right to have factual issues resolved by the jury. . . . This right

embraces the determination of damages when there is room for a reasonable difference of opinion among fair-minded persons as to the amount that should be awarded. . . . " (Citations omitted; internal quotation marks omitted.) *Munn* v. *Hotchkiss School*, 326 Conn. 540, 574-75, 165 A.3d 1167 (2017). "The trial court's refusal to set aside the verdict or to order an additur is entitled to great weight and every reasonable presumption should be given in favor of its correctness. In reviewing the action of the trial court in denying the motions for additur and to set aside the verdict, our primary concern is to determine whether the court abused its discretion and we decide only whether, on the evidence presented, the jury could fairly reach the verdict [it] did. . . . If, on the evidence, the jury could reasonably have decided as [it] did, [the reviewing court] will not find error in the trial court's acceptance of the verdict." (Citations omitted; internal quotation marks omitted.) *Childs* v. *Bainer*, 235 Conn. 107, 112–13, 663 A.2d 398 (1995).

We especially are reluctant to overturn an award premised mainly on subjective descriptions of pain and suffering.[14] In such cases, the credibility of the plaintiff and the plaintiff's witnesses is crucial, and we, as a reviewing court, are far less able to make such a determination upon a cold record. Instead, we defer to the jury, which was free to credit all, none, or some of the plaintiff's testimony and return a verdict accordingly. See *Froom Development Corp.* v. *Developers Realty, Inc.*, supra, 114 Conn. App. 635. The record is clear that the nature and extent of the plaintiff's injuries, and the claimed damages flowing therefrom, were contested. We can presume that the jury returned a verdict reflective of its assessment of the results of that contest. In that respect, this case is similar to *Melendez* v. *Deleo*, supra, 159 Conn. App. 414, in which this court affirmed

[14] The parties' expert characterized her complaints as "subjective."

the denial of an additur where the jury awarded all of the plaintiff's claimed economic damages and none of her claimed noneconomic damages.[15] The trial court in that case had the same opportunity as the jury to observe the witnesses, assess their credibility and determine the weight to be given their evidence.

Thus, the trial court's refusal to set aside the verdict or to order an additur must be given great weight and

[15] The facts of *Melendez* are somewhat analogous and bear reciting here. In that case, at the scene of the automobile accident, the plaintiff complained of "left side lower back pain 8 out of 10" and was transported by ambulance to Saint Mary's Hospital in Waterbury. There, the emergency department physician found nothing remarkable and the plaintiff refused pain medication. She testified, however, that shortly after she was discharged, she vomited twice and developed headaches and wrist pains. *Melendez* v. *Deleo*, 159 Conn. App. 419–20.

Accordingly, she visited the emergency room at Waterbury Hospital. (She testified that she did not return to Saint Mary's Hospital because "she did not feel like [the personnel at Saint Mary's Hospital] even bothered to really check me when I was there the first time.") At Waterbury Hospital, the plaintiff complained of left hip pain, left wrist pain, left shoulder pain, left leg pain and a headache. She received X-rays and CT scans, all of which returned normal. She was prescribed medication for nausea and was discharged. Id., 420.

Five days later, she went to her primary care provider complaining of, inter alia, pain in her hip, back, neck and shoulder. Her physician noted no signs of problems but advised the plaintiff to return if her pain did not improve. Id.

Six days after that, the plaintiff instead began chiropractic treatment for the pain in her back, hip, and leg. Her chiropractor concluded that she suffered a 6 percent permanent impairment of her lumbar spine and recommended treatment to include cervical manipulation, electrical muscle stimulation and cold packs. At trial, the plaintiff testified that, although her conditions had not improved, she had not sought further help from any medical professional after she concluded her chiropractic treatment. Id., 421–22.

The jury awarded the plaintiff all of her claimed medical bills, lost wages and automobile property damages, but no noneconomic damages. This court affirmed the trial court's denial of the plaintiff's motion to set aside the verdict and for additur, concluding that the jury was not required to believe the plaintiff or her expert. Id., 416–17.

In the present case, the plaintiff did not complain of pain at the scene of the accident, was not transported to the hospital in an ambulance, did not visit an emergency department, failed to follow up on her treatment, had

presumed correct unless unreasonable. Id. Here, as in *Melendez*, the plaintiff has failed to show that there was either a mistake in law or another valid basis for upsetting the will of the jury. Accordingly, we find no reason not to conclude that "the award of damages falls somewhere within the necessarily uncertain limits of fair and reasonable compensation . . . or [that] the verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, mistake or corruption." (Internal quotation marks omitted.) *DeEsso* v. *Litzie*, supra, 172 Conn. App. 796. Therefore, it was not an abuse of discretion for the court to accept the verdict.

II

The plaintiff next claims that a series of procedural irregularities required the court to set aside the verdict and order a new trial. Specifically, the plaintiff argues that the court (1) failed to accept a technically correct verdict in violation of Practice Book § 16-31,[16] (2) neither consulted with counsel before communicating with the jury nor tailored such communications to the scope of the jury's question in violation of Practice Book § 16-

normal or otherwise explainable test results and testified that her condition had improved.

[16] Practice Book § 16-31 provides: "Subject to the provisions of Section 16-17, the judicial authority shall, if the verdict is in order and is technically correct, accept it without comment."

Practice Book § 16-17 provides: "The judicial authority may, if it determines that the jury has mistaken the evidence in the cause and has brought in a verdict contrary to it, or has brought in a verdict contrary to the direction of the judicial authority in a matter of law, return the jury to a second consideration, and for like reason may return it to a third consideration, and no more. (See General Statutes § 52-223 and annotations.)"

General Statutes § 52-223 provides: "The court may, if it judges the jury has mistaken the evidence in the action and has brought in a verdict contrary to the evidence, or has brought in a verdict contrary to the direction of the court in a matter of law, return them to a second consideration, and for the same reason may return them to a third consideration. The jury shall not be returned for further consideration after a third consideration."

28,[17] (3) deprived the plaintiff of the opportunity to ensure that only full exhibits were submitted to the jury, and (4) discharged the jury without affording the parties the opportunity to have the jury polled in violation of Practice Book § 16-32.[18] Because we are not persuaded that the court abused its discretion in any of the ways alleged, we disagree that the court should have set aside the verdict and ordered a new trial.

The following additional facts underlie the plaintiff's claims of procedural impropriety. Evidence concluded on November 4, 2015. On the following day, in the morning, the parties made their closing arguments and the court delivered its final instructions to the jury. At the conclusion of those instructions, the court indicated that, due to a personal commitment, deliberations would have to pause on that day at 4 p.m. rather than at 5 p.m. That prompted counsel for the plaintiff to ask whether any other judge might be available to hear a potential verdict after 4 p.m.; the court indicated that every judge in that courthouse was on trial.

The court then released the jury for the lunch recess and gave both counsel an opportunity to sort through the exhibits that would be submitted to the jury.[19] After

[17] Practice Book § 16-28 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 necessary to respond properly to the request or to direct the jury's attention to a portion of the original instructions."

[18] Practice Book § 16-32 provides: "Subject to the provisions of Section 16-17, after a verdict has been returned and before the jury has been discharged, the jury shall be polled at the request of any party or upon the judicial authority's own motion. The poll shall be conducted by the clerk of the court by asking each juror individually whether the verdict announced is such juror's verdict. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or it may be discharged."

[19] "The Court: . . . [W]e'll stay on the record. We'll get all the exhibits ready and counsel can look at them to see if they're in the form to be given to them.

* * *

the lunch recess, the jury began deliberations. At approximately 3:45 p.m., it sent out a note with a question for the court. The court informed counsel that it would take the question at that time and release the jury until the following morning.[20] The court then received the jury's note and read it into the record. The note read: "We have come to a verdict and are pretty sure we haven't filled form Plaintiff's Verdict & Interrogatories as to count two correctly."

In response to the jury's note, the court stated: "That's not really a question but I'm going to have it marked as a court exhibit. And because, as I said, I have to recess early today, I'm going to mark that as a court's exhibit, and I'm going to release you for today, ask that you report back at 9:30 tomorrow morning, and at 9:30 tomorrow morning you can resume your deliberations. If any further follow up questions are necessary, we'll do so at that time, but I don't want anything to be stampeded this afternoon."

Counsel for the plaintiff then asked if the jury could be held while he addressed a question to the court. The court complied, and the jury left the courtroom. At that point, counsel for the plaintiff made a record of his request to have another judge take the verdict.[21] The

"Here are the original interrogatories. And let's separate the ID and the regular exhibits and just take a look at them for a second. . . . Just take a look at them, make sure they're all in proper form, don't need redaction. Send them in as soon as the jury comes back at two o'clock."

[20] "The Court: Let's ask them to come in with the question, I'll answer the question and then we'll recess until tomorrow morning because we're going to have to suspend at this point."

[21] "[The Plaintiff's Counsel]: May I—may I put it on the record, Your Honor?

"The Court: Yes, you may put on the record. I—I told everyone today that I had because of a personal matter, I had to recess at four o'clock today. That's what I am doing. We had—the jury has done that. I don't want to rush through anything, and I'll have them come back tomorrow. We have the verdict form, the question to—from the jury marked, it's a written communication. The clerk will take the materials into custody and they'll get them again at 9:30 tomorrow morning when they resume.

"[The Plaintiff's Counsel]: And if, Your Honor, if I may just make a record. My request was gonna be if the court could in its consideration find another Judge—

court declined so to order and released the jury for the day.

The next morning, the court informed counsel that it intended to (1) reinstruct the jury on the proper way to complete the verdict forms and (2) send fresh copies of each such form to the jury when it reconvened for deliberations. Counsel for the plaintiff then sought to clarify whether the jury would have the original copy of each form and whether the court would mark the original copies as exhibits. The court indicated that the jury would have both copies of the verdict forms, and that it eventually would mark whatever forms the jury had partially or incorrectly completed as court's exhibits.

Thereafter, the following exchange occurred:

"[The Plaintiff's Counsel]: And will the court determine prior to the documents going back into the jury room whether or not the verdict forms have been signed?

"The Court: No.

"[The Plaintiff's Counsel]: Then I would ask the court to do that.

"The Court: I won't.

"[The Plaintiff's Counsel]: And, Your Honor, the reason I would ask the court to do that is because this jury went home last night, and if that verdict form was signed, then sending them back in gives them a chance to have outside influences or different deliberations. If I had a verdict yesterday, I need to protect that verdict, and I'm asking—

"The Court: No.
"[The Plaintiff's Counsel]: —you may—
"The Court: Summon the jury. Told you that this morning."

"The Court: I am assuming . . . that the jury followed the court's instructions, which were not to discuss the matter with anyone or to allow anyone to discuss the matter with them. They were told that, they were specifically told when they left yesterday at approximately four o'clock that they would only deliberate in the—when all of them were together and they had with them the full exhibits and the verdict forms which were given to them by the clerk. I presume that they followed that instruction. So I am not going to ask them if they talked with anybody or if they signed a verdict form. I don't know what's on those verdict forms, if anything.

"[The Plaintiff's Counsel]: Your Honor, again, I would ask that you determine whether or not the verdict form has been signed. I understand—

"The Court: I'm not going to do that.

"[The Plaintiff's Counsel]: I understand the court's direction."

After a brief recess, counsel for the plaintiff raised the issue again, but the court did not change its mind.[22]

[22] "[The Plaintiff's Counsel]: Your Honor, before we summon the jury—

"The Court: Certainly just a moment.

"[The Plaintiff's Counsel]: May—may I go on the record?

"The Court: Certainly.

"[The Plaintiff's Counsel]: Your Honor, the document the court exhibit states that this jury has a verdict.

"The Court: Right.

"[The Plaintiff's Counsel]: And under Practice Book § 16-31 it is the duty of this court to accept that verdict and examine that verdict, and if that verdict is in error under [Practice Book §] 16-17, then you can send the jury back. You cannot under [§] 16-31 proceed as you—

"The Court: We have—

"[The Plaintiff's Counsel]: —are indicating—

"The Court: We have a note from the jury that says, we have come to a verdict and are pretty sure we haven't filled a form plaintiff and verdict and interrogatories as to count two correctly. Well, I'm—I am going to reinstruct them. I don't know that it says they have completed the form but I am going to reconstruct them—reinstruct them, rather, on the completion of the forms. After they have completed the forms, I am going to, as I indicated

Thereafter, the court reinstructed the jury on the methods for completing the verdict forms. When the jury returned to deliberate, counsel for the plaintiff took an exception on the record to the court's actions with respect to the jury's note.

Shortly thereafter, the jury indicated that it had reached a verdict. When the jury returned to the courtroom, the court marked all of the verdict forms as court's exhibits. The clerk then read the verdict into the record, and the jury confirmed it. The court then ordered that the verdict be "accepted and recorded," and thanked the jury before asking the jurors to return to the jury room. The court then addressed the verdict forms it had marked as court's exhibits.

At that point, the court asked counsel whether they wanted to be heard. *Counsel for the plaintiff stated that she did not.* Counsel for the *defendant*, however, requested that the court poll the jury. The court declined, stating that it had discharged the jury. Counsel for the plaintiff took no position with respect to that request.[23]

The plaintiff's four claims of procedural irregularity merit little discussion. It has long been the rule that

earlier, give them additional verdict forms and indicate that if they have completed any portion of the form, they can either complete the entire form or they can use another form if that is appropriate, and they will bring back all of the forms. Following the receipt of the verdict, and again I don't know if they've completed anything. I don't know if they've done anything. Following the completion of the verdict, those forms which are not used will be marked as court's exhibits and any motions can be direct to those forms. Summon the jury.

[23] "The Court: Counsel wish to be heard?

"[The Plaintiff's Counsel]: Nothing, Your Honor.

"[The Defendant's Counsel]: Your Honor, I would just request, given everything that we've gone through, that we poll the jury.

"The Court: Well, I think that should have been done before I released them to the – to the jury room. The verdict was accepted and recorded. I can't poll them subsequent to accepting a particular jury, I don't believe.

"[The Defendant's Counsel]: Pursuant to [Practice Book] § 16-32, poll after the jury verdict subject to the provisions of [Practice Book] § 16-17 after

"control of the order of the courtroom is necessarily within the discretion of the trial court . . . ." *Antel* v. *Poli*, 100 Conn. 64, 69, 123 A. 272 (1923). "The trial court is vested with a large discretion over matters occurring in the conduct of the trial. While this is a judicial discretion and therefore subject to some degree of review and control, its exercise will not be interfered with unless it has been clearly abused to the manifest injury of a litigant." *Pisel* v. *Stamford Hospital*, 180 Conn. 314, 322, 430 A.2d 1 (1980). This inherent power to control proceedings exists independent of any set forth by rule or statute. See *State* v. *Abushaqra*, 164 Conn. App. 256, 264–66, 137 A.3d 861 (2016). "The trial court has a 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. . . . In addition, matters involving judicial economy, docket management [and control of] courtroom proceedings . . . are particularly within the province of a trial court." (Internal quotation marks omitted.) *Bobbin* v. *Sail the Sounds, LLC*, 153 Conn. App. 716, 724–25, 107 A.3d 414 (2014), cert denied, 315 Conn. 918, 107 A.3d 961 (2015). "In determining whether a trial court abused its discretion, the unquestioned rule is that great weight is due to the

verdict has been returned and before the jury has been discharged, the jury—the jury shall be—

"The Court: I—

"[The Defendant's Counsel]: —polled—

"The Court: —think I just—

"[The Defendant's Counsel]: Shall be polled.

"The Court: I just told them I wanted to talk to them and that they were being discharged with the thanks of the court, so I don't think I can poll them at this particular point. I think that—that's premature. That issue should have been raised while the jury was still in the courtroom. They have since retired to the jury room having been excused and certainly they could have been talking about this as I told them they could. So I think a poll at this point would be inappropriate. [The plaintiff's counsel]?

"[The Plaintiff's Counsel]: Your Honor, I take no position.

"The Court: All right, all right. Then we will—we will stand in—in recess."

action of the trial court and every reasonable presumption should be given in favor of its correctness." Id., 727.

As for the plaintiff's claim that the court failed to comply with Practice Book § 16-31, we disagree. The note that the jury sent out to the court at 3:45 p.m. indicated that the jury was "pretty sure we haven't filled form Plaintiff's Verdict & Interrogatories as to count two correctly." In response, the court marked the note as a court exhibit and reminded counsel and the jury that it needed to recess at 4 p.m. that day before instructing the jury to report back the next morning. The next morning, the court reinstructed the jury on the proper way to complete verdict forms and sent it fresh copies of the verdict forms along with the original forms. By following this procedure, the court provided the jury with reinstruction and time to complete the forms properly. Because the note indicated that the jurors were "pretty sure" they had not done everything necessary to render a technically correct verdict, the court properly adjourned for the day to give them more time, after they were reinstructed, to properly complete the verdict forms. Further, there is nothing in the record, or in any legal authority provided by the plaintiff, to indicate that she was harmed or prejudiced by the court's action.[24]

As for the plaintiff's claim that the court failed to consult with counsel before reinstructing the jury, the record indicates otherwise. The court explained to counsel what it planned to do, listened to counsel and then reinstructed the jury as to filling out the verdict forms.

The next claim of procedural irregularity, that the court failed to ensure that only full exhibits were submitted to the jury, is particularly meritless. The record

[24] Indeed, the original verdict forms indicate a *less* favorable verdict for the plaintiff, in that they assign her a higher proportion of liability than the final verdict.

reveals that prior to the beginning of deliberations, the court gave counsel the opportunity to review the materials the jury would have with it during deliberations. Although the plaintiff claims that the court improperly deprived counsel of the opportunity to review the materials prior to deliberations on the second day, she offers no legal authority for that proposition. See *Matthiessen* v. *Vanech*, 266 Conn. 822, 844–47, 836 A.2d 394 (2003) (no harm where court improperly permitted jury to begin deliberations before counsel reviewed exhibits). Finally, unlike the plaintiff in *Kortner* v. *Martise*, 312 Conn. 1, 91 A.3d 412 (2014), on which she relies, the plaintiff here has provided no showing of harm as a result of the alleged impropriety. See id., 45–46 (release to jury of exhibit not in evidence was harmful where it directly related to central issue in case).

Finally, the plaintiff claims that the court improperly discharged the jury before the parties had an opportunity to request a polling of the jury under Practice Book § 16-32. That rule, however, does not require the court to inquire, sua sponte, whether the parties want to have the jury polled. The plaintiff reads *Wiseman* v. *Armstrong*, 295 Conn. 94, 989 A.2d 1027 (2010), to hold that the court must do so. Our reading of *Wiseman* differs markedly. See id., 104 ("the plain language of § 16-32 imposes a mandatory obligation on the trial court to poll the jury *when requested*" [emphasis added]). Here, there was no request, prior to the discharge of the jury, that the jury be polled.[25]

Accordingly, we conclude that the trial court did not abuse its discretion in refusing to set aside the verdict due to procedural irregularities.

The judgment is affirmed.

In this opinion the other judges concurred.

[25] The *Wiseman* court also held that the error in refusing to poll the jury when requested prior to discharge must be harmful to warrant reversal. *Wiseman* v. *Armstrong*, supra, 295 Conn. 115–21.

STATE OF CONNECTICUT *v.* JOSEPH ABRAHAM (AC 38863)

Sheldon, Bright and Beach, Js.

Syllabus

Convicted of the crimes of sexual assault in the second degree and risk of injury to a child in connection with the alleged sexual abuse of his minor stepdaughter, the defendant appealed to this court. During trial, the trial court held a hearing on the admissibility of a video recording of a second forensic interview of the victim by a clinical social worker, and ruled that certain statements made during the second interview were admissible pursuant to the medical diagnosis and treatment exception to the hearsay rule because the primary purpose of that interview was medical. On appeal, the defendant claimed, inter alia, that the trial court applied an incorrect standard to determine whether that video recording was admissible under the medical treatment exception to the hearsay rule and that, even if the court applied the correct standard, the video recording was not admissible pursuant to that exception because the second interview was not reasonably pertinent to medical treatment. *Held* that the trial court did not abuse its discretion in admitting the video recording of the victim's second forensic interview under the medical treatment exception to the hearsay rule: although that court applied an incorrect standard in ruling that the statements in the second interview were admissible because the primary purpose of the interview was medical, as the correct test is whether the interview had a medical purpose from the victim's perspective, its ruling was nevertheless sustainable under the medical treatment exception, as the correct standard is broader and more inclusive than the standard applied by the trial court, and if the primary purpose of the interview was medical, then it necessarily had a medical purpose; moreover, an objective observer could have concluded that the second interview was reasonably pertinent to medical treatment under the circumstances here, where there was testimony that the second interview was conducted because the victim had disclosed additional information, it was recommended after the interview that the victim continue therapy and undergo a medical examination, the victim was asked whether she had any worries or any problems with any part of her body and disclosed actual sexual intercourse, and the interview was conducted at a hospital and resulted in a report that was added to the victim's medical file; furthermore, the defendant's claim that successive interviews should categorically fall outside the medical treatment exception was unavailing, as a trial court must determine whether the successive interviews are reasonably pertinent to obtaining medical treatment and this court could not conclude as a matter of law that successive interviews are never reasonably

pertinent to medical treatment, and even if the trial court's admission of the second interview was improper, it did not substantially affect the verdict given that the state's case was supported by physical evidence, including DNA analysis, and that the victim testified at trial as to all of the abuse that she had disclosed in the second forensic interview.

Argued December 4, 2017—officially released May 8, 2018

Procedural History

Substitute information charging the defendant with the crime of sexual assault in the second degree and with three counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Hartford and tried to a jury before *Mullarkey, J.*; verdict and judgment of guilty of sexual assault in the second degree and of two counts of risk of injury to a child, from which the defendant appealed to this court. *Affirmed.*

Glenn W. Falk, assigned counsel, with whom, on the brief, was *Robert M. Black*, legal fellow, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Chris A. Pelosi*, senior assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. The defendant, Joseph Abraham, was convicted, after a jury trial, of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1), risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and risk of injury to a child in violation of § 53-21 (a) (1).[1] On appeal, the defendant claims that the trial court improperly admitted a DVD recording of the victim's forensic interview. We disagree and affirm the judgment of the trial court.

[1] The defendant was acquitted as to an additional count of risk of injury to a child in violation of § 53-21 (a) (2).

The following facts, found by the court or undisputed, are relevant to this appeal. On February 27, 2013, the minor victim[2] reported to a social worker at her school that she had been sexually abused by the defendant, her stepfather.[3] The social worker relayed these allegations to the police and the Department of Children and Families (department) and an investigation ensued. The victim's mother arranged for the victim to stay at the house of a family friend for a few days and obtained a temporary restraining order against the defendant. The defendant then left the family home to stay elsewhere, so that the victim could return. Meanwhile, the department also directed the defendant not to stay in the same house as the victim. The department then referred the victim for a forensic interview.

On March 4, 2013, the victim was interviewed by Lisa Murphy-Cipolla, the clinical services coordinator at the Children's Advocacy Center at Saint Francis Hospital and Medical Center. During the interview, the victim revealed that the defendant had "raped her," but she did not provide further detail. After the first interview, Murphy-Cipolla recommended that the victim undergo therapy and a medical examination. Later that month, the department learned that the victim's mother had sought to modify the restraining order and that on one occasion the defendant had picked the victim up from school. Upon a visit to the family home, a department worker found the defendant in a room across the hall from the victim's bedroom; the defendant left the house upon the worker's request. Following this incident, the

[2] In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

[3] The record reveals that the defendant first sexually abused the victim when she was eleven years old and continued to do so until she was fourteen years old. The final act of sexual abuse was committed on February 25, 2013.

defendant and the victim's mother went to the ombudsman's office to file a complaint against the department worker. While at the office, they revealed that the victim had accompanied them there and was waiting in the car. Upon learning this, the ombudsman's office contacted the department because of concern that the victim and the defendant had been together.

On April 17, 2013, the department obtained temporary custody of the victim and subsequently placed her with her maternal aunt, who later formally adopted the victim. While staying with her aunt, the victim began to reveal additional information about the sexual abuse she had suffered. The victim's aunt reported this to the department and the victim was referred for another forensic interview. On June 11, 2013, the victim was interviewed a second time by Murphy-Cipolla at the Children's Advocacy Center at Saint Francis Hospital and Medical Center. During this interview, the victim disclosed more extensive sexual abuse, including one instance of sexual intercourse. Murphy-Cipolla recommended continued therapy and a medical examination. Both forensic interviews were video recorded on DVDs and, after each interview, Murphy-Cipolla prepared a report and added it to the victim's medical file at Saint Francis Hospital.

The defendant subsequently was arrested and charged with sexual assault in the second degree, and three counts of risk of injury to a child. At trial, the state sought to introduce into evidence the DVD recording of the second interview, and the defendant objected. The court held a hearing on the admissibility of the DVD, at which the state argued that the interview was admissible pursuant to § 8-3 (5) of the Connecticut Code of Evidence—the medical treatment exception to the

hearsay rule.[4] The state presented the testimony of Murphy-Cipolla and other witnesses. Murphy-Cipolla testified that the "primary purpose" of forensic interviews was to "elicit clear and accurate information . . . to minimize any additional trauma to the child and to make the appropriate recommendations for mental health and/or a medical exam." She testified further that forensic interviews were conducted upon referrals "primarily from the department . . . [but also] from the emergency department, pediatricians, police and, occasionally, a therapist." Finally, Murphy-Cipolla testified that forensic interviews were typically observed from behind a one-way mirror by police and/or department officials. She explained that toward the end of an interview, she typically conferred with the observers to ensure "that everybody has heard the same thing and see if [there are] any additional questions or anything that needs to be clarified." The defendant objected to the admission of the second interview, arguing that it "was geared [toward the] investigation of a criminal case and wasn't for the primary purpose of obtaining medical treatment."

In its oral ruling, the trial court noted that "there is evidence that the [victim's] counseling, [which] she was getting from the social worker at her middle school, was stopped. [The victim's] [m]other tried to put the defendant back on the [list of persons authorized to pick the victim up from school], [the] defendant was in the house on the date of the home visit by the [department] worker, which was subsequent to the issuance of the temporary restraining order. As far as we can

[4] Section 8-3 of the Connecticut Code of Evidence provides in relevant part that "[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (5) . . . [a] statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment."

tell . . . the temporary restraining order that was protecting the [victim] in the case was vacated or dismissed at the mother's insistence. The mother, along with the defendant, subsequent to the April 12, 2013 finding of the defendant hiding in the bedroom upstairs, brought the victim, along with the both of them, to the ombudsman to make a complaint against the social worker. There had been additional disclosures that were made to [the victim's] aunt, now her adopted mother, and while there had been arrangements made for the beginning of counseling at the Klingberg Clinic, it had not begun yet. Under those circumstances, the department . . . requested that there be a second forensic interview.

"It is [the] court's opinion and finding that that was primarily for medical purposes, particularly additional counseling, particularly to find out if there had been any additional assaults against [the victim] during the period of time that had elapsed between the initial complaint and the number of contacts that the defendant had with her. Having watched the second DVD, although neither . . . Murphy-Cipolla nor Detective [Craig] Browning remembers exactly who asked what questions when there was a break taken, the break that was taken in the forensic interview [on] June 11, 2013, was clearly marked when . . . Murphy-Cipolla came back. She had additional questions for the [victim], particularly using the standard anatomical form and asking her about what parts of her body were touched by what parts of [the defendant's] body, asking about positions and asking about addresses and occurrences. That may be medical, but it's also investigatory, and I think in a cautious ruling that part of the DVD will be excluded and not shown to the jury. The first part . . . is medical, particularly in the circumstance [where] the defendant had additional contact with the [victim] and where her mental health counseling, as much as she got at

[school], had been cancelled by her mother." The court then admitted the DVD of the second interview into evidence but excluded the portion of the interview subsequent to Murphy-Cipolla's discussion with the observers. The defendant thereafter introduced into evidence a section of the DVD of the first interview without objection from the state.

On appeal, the defendant argues that the trial court applied an incorrect standard to determine whether the second DVD was admissible under the medical treatment exception. He claims, however, that even had the court applied the correct standard, the second interview was not admissible pursuant to the medical treatment exception to the hearsay rule. Specifically, the defendant argues that the interview was not reasonably pertinent to medical treatment because it was the victim's second forensic interview and, thus, its purpose was more investigatory and less medical than that of the first interview. Consequently, the defendant claims, any relationship the second interview bore to medical treatment was "merely incidental." In making this argument, the defendant urges this court to consider the rationale behind the medical treatment exception: that the declarant is motivated to tell the truth when seeking medical treatment. If, however, the declarant is simply reporting to an investigator, that motivation evaporates.

The defendant also contends that for reasons of policy, the medical treatment exception should apply only to forensic interviews that "truly are pertinent to medical diagnosis and treatment" and never, barring special circumstances, to successive interviews. He argues that admitting subsequent interviews under the exception would "risk making the very concept of the hearsay rules obsolete" because the state could "repeatedly refer a complaining witness for interviews" until "[it] get[s] a suitably compelling version of the story." Finally, the defendant argues that the trial court's

improper admission of the second interview was harmful because it bolstered the victim's credibility.

The state agrees that the trial court applied an incorrect standard for the medical treatment exception but argues that the second DVD, nevertheless, was admissible under the correct standard.[5] The court ruled that the statements made during the second interview were admissible because the *primary* purpose of the interview was medical. As we conclude in this opinion, the correct test is whether the interview had *a* medical purpose from the victim's perspective. Concluding as we do, that it did have such a purpose, we hold that the victim's statements made during that interview were admissible under the medical treatment exception.

"We begin our analysis of the defendant's claim by setting forth the standard of review and relevant legal principles. To the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it

[5] The state also argues that the defendant did not claim at trial that the medical treatment exception should not apply to subsequent interviews as a matter of law. We review the defendant's argument, however, because it is tied to and falls within the scope of his principal claim that the second interview in this case was not admissible under the medical treatment exception. See *State* v. *Telford*, 108 Conn. App. 435, 441 n.5, 948 A.2d 350 (defendant allowed to make more specific argument on appeal because it fell within scope of objection at trial), cert. denied, 289 Conn. 905, 957 A.2d 875 (2008).

vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought." (Internal quotation marks omitted.) *State* v. *Griswold*, 160 Conn. App. 528, 536, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015).

"The legal principles relating to the medical treatment exception are well settled. Admissibility of out-of-court statements made by a patient to a medical care provider depends on whether the statements were made for the purposes of obtaining medical diagnosis or treatment . . . and on whether the declarant's statements reasonably were related to achieving those ends. . . . The term 'medical' encompasses psychological as well as somatic illnesses and conditions. . . . Furthermore, statements made by a sexual assault complainant to a social worker may fall within the exception if the social worker is found to have been acting within the chain of medical care." (Citations omitted.) *State* v. *Telford*, 108 Conn. App. 435, 440, 948 A.2d 350, cert. denied, 289 Conn. 905, 957 A.2d 875 (2008).

"[S]tatements may be reasonably pertinent . . . to obtaining medical diagnosis or treatment even when that was not the *primary purpose* of the inquiry that prompted them, or the principal motivation behind their expression." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Griswold*, supra, 160 Conn. App. 552–53. "Although [t]he medical treatment exception to the hearsay rule requires that the statements be both pertinent to treatment and motivated by a desire for treatment . . . in cases involving juveniles, [we] have permitted this requirement to be satisfied inferentially." (Internal quotation marks omitted.) Id., 556; see also *State* v. *Telford*, supra, 108 Conn. App. 441–42.[6]

[6] There is, then, no requirement of direct evidence of the declarant's state of mind at the time of the statement. See *State* v. *Telford*, supra, 108 Conn.

In *Telford*, this court concluded that the victim's testimony that she had felt "upset," "mad," and "scared" as a result of sexual abuse, and that she had discussed the abuse with someone at a hospital, was sufficient to permit an inference that the purpose of her statements at her forensic interview had been to obtain medical treatment. *State* v. *Telford*, supra, 108 Conn. App. 443. Similarly, in *State* v. *Donald M.*, 113 Conn. App. 63, 71, 966 A.2d 266, cert. denied, 291 Conn. 910, 969 A.2d 174 (2009), this court held that a medical purpose could reasonably be inferred where the victim did not recall the purpose of the interview but the interviewer testified to informing the victim that she would meet with someone at the hospital to determine whether she needed therapy or other medical treatment.

In *Griswold*, this court concluded that the forensic interviews in that case were reasonably pertinent to medical treatment because the interviewers testified that "the purpose of their questions was to assist them in recommending medical examinations or mental health treatment" and that they normally inquired whether the victims had "any concerns about their bodies." *State* v. *Griswold*, supra, 160 Conn. App. 557. Although we observed in *Griswold* that "the primary purpose of many of [the] questions appear[ed] to be directed toward assisting law enforcement," the interviews were, nonetheless, reasonably pertinent to medical diagnosis because the information obtained was "available and provided to medical providers and mental health practitioners." Id.; see also *State* v. *Giovanni P.*, 155 Conn. App. 322, 331–32, 110 A.3d 442 (affirming trial court's conclusion that interview had medical purpose

App. 441, in which this court agreed with the state's contention that "the objective circumstances of the interview [may] support an inference that a juvenile declarant knew of its medical purpose." This is not to say that direct evidence would not be useful in the inquiry.

based on testimony of interviewer), cert. denied, 316 Conn. 909, 111 A.3d 883 (2015). Recently, in *State* v. *Estrella J.C.*, 169 Conn. App. 56, 77–80, 148 A.3d 594 (2016), this court relied, in part, on the timing and context of the forensic interview to conclude that an objective observer could determine that the interview had a medical purpose. Because the victim in that case was undergoing treatment at the time that he was interviewed, this court held that the interview was reasonably pertinent to obtaining medical treatment. Id., 77. We observed further that "the involvement of a police officer in the interview does not automatically preclude a statement from falling within the medical diagnosis and treatment exception." Id.

Our case law, then, holds that the statements of a declarant may be admissible under the medical treatment exception if made in circumstances from which it reasonably may be inferred that the declarant understands that the interview has *a* medical purpose. Statements of others, including the interviewers, may be relevant to show the circumstances.

Applying these principles to the present case, we conclude that the trial court properly admitted the DVD of the second interview under the medical treatment exception. The interviewer, Murphy-Cipolla, was the clinical services coordinator at the Children's Advocacy Center at Saint Francis Hospital and Medical Center. She testified that the "primary purpose" of forensic interviews is to "elicit clear and accurate information . . . to minimize any additional trauma to the child and to make the appropriate recommendations for mental health and/or a medical exam." Murphy-Cipolla specifically testified that the second interview was conducted because the victim disclosed additional information and that, after the interview, she recommended continued therapy and a medical exam for the victim. As in *Griswold*, the victim in the present case was asked whether

she had "any worries or any problems with any part of [her] body." The victim also was asked to identify, on an anatomical diagram, the body parts with which the defendant had had contact. The interview was conducted at Saint Francis Hospital and Medical Center and a report prepared after the interview was added to the victim's medical file. As in *Estrella J.C.*, this evidence provided a context which suggested a medical purpose for the victim's second interview. Finally, Murphy-Cipolla testified, in response to a direct question from the trial court, that in light of the victim's disclosure of actual sexual intercourse, the second interview could be pertinent to additional medical or mental health treatment because of the extent to which the sexual abuse affected the victim. We conclude that under these circumstances an objective observer could conclude that the second interview was reasonably pertinent to medical treatment. See *State* v. *Estrella J.C.*, supra, 169 Conn. App. 76 ("[w]e reach this conclusion because . . . an objective observer could determine that the victim's statements . . . were reasonably pertinent to obtaining medical treatment").

The defendant correctly urges that the rationale underlying the medical treatment exception is that the declarant, in seeking medical treatment, has a motivation to tell the truth. That rationale, however, does not require that the statements be made or elicited for the sole purpose of medical treatment. See id., 74–75 ("[u]ndoubtedly, statements may be reasonably pertinent . . . to obtaining medical diagnosis or treatment even when that was not the *primary purpose* of the inquiry that prompted them, or the principal motivation behind their expression" [emphasis in original; internal quotation marks omitted]); see also *State* v. *Griswold*, supra, 160 Conn. App. 552–53 (same).[7] Because our

[7] We note that the rationale underlying the medical treatment exception was satisfied in the circumstances of this case. An objective observer could conclude that the victim understood, from the circumstances of the second

law permits the rationale behind this exception to be satisfied even if there is an additional purpose, the defendant's argument is not persuasive. For this reason the trial court's ruling, albeit based on an erroneous standard, is sustainable under the medical treatment exception. If the *primary* purpose of the interview was medical, then it necessarily had *a* medical purpose. Because the correct standard is broader and more inclusive than the standard applied by the trial court, we find no error in the court's ruling. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the DVD recording of the second interview.

As for the defendant's policy argument, we are not persuaded that successive interviews should categorically fall outside the medical treatment exception. Admissibility under the medical treatment exception "turns principally on whether the declarant was seeking medical diagnosis or treatment, and the statements are reasonably pertinent to achieving those ends." (Internal quotation marks omitted.) *State* v. *Griswold*, supra, 160 Conn. App. 552. Although successive interviews may in some cases, as the defendant suggests, have minimal medical purposes, it is for the trial court to determine whether they were *reasonably pertinent* to obtaining medical treatment. We decline to hold as a matter of law that successive forensic interviews are never reasonably pertinent to medical treatment.

In light of our conclusion, we need not address at length the defendant's argument that the admission of the second DVD was harmful. We note, however, that the defendant acknowledges that the interview "did not contain significant factual claims or allegations independent of [the victim's] live testimony." He argues,

interview, that it was being conducted, at least in part, for medical treatment purposes. The interview took place at a hospital and the victim knew from the first interview that treatment and counseling would likely follow the second interview. That the interview may have had a dual purpose is of no moment.

nonetheless, that the interview bolstered the victim's credibility, "which was a key issue at trial." The state's case, however, was supported by physical evidence, including DNA analysis.[8] Moreover, the victim testified personally at trial as to all of the abuse that she had disclosed in the second interview.[9] Our review of the record, therefore, leaves us with a fair assurance that the trial court's admission of the second interview, even if it had been improper, did not substantially affect the verdict. See *State* v. *Eddie N. C.*, 178 Conn. App. 147, 173, 174 A.3d 803 (2017) ("[a] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict" [internal quotation marks omitted]), cert. denied, 327 Conn. 1000, 176 A.3d 558 (2018).

The judgment is affirmed.

In this opinion the other judges concurred.

ROBERT R. MURPHY *v.* JAMIE D. MURPHY
(AC 39025)

Lavine, Prescott and Bear, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court denying his motion to modify the dissolution judgment by terminating his alimony obligation because of the defendant's alleged cohabitation with her boyfriend. Pursuant to the parties' separation agreement, which

[8] The last sexual assault occurred on February 25, 2013, two days before the victim reported the abuse on February 27, 2013. The physical evidence presented at trial included swabs taken from the victim's external genital area, containing semenogelin for which the defendant could not be ruled out as a source. In addition, the defendant was identified as a contributor for secretions on underwear the victim wore after the last sexual assault, and as the source of secretions on another pair of underwear retrieved from the victim's home.

[9] In fact, at trial, the victim revealed two instances of sexual intercourse with the defendant that she previously had not disclosed in either interview.

had been incorporated into the dissolution judgment, the plaintiff was required to pay the defendant periodic alimony. The alimony was nonmodifiable but subject to the condition that it would terminate on, inter alia, the cohabitation by the defendant as defined by the applicable statute (§ 46b-86 [b]), which permits the trial court to terminate periodic alimony upon a showing that the alimony recipient was living with another person and that the living arrangements caused a change of circumstances so as to alter the financial needs of the recipient. Following the dissolution, the defendant and the parties' minor children rented a condominium in South Windsor for approximately $1640 per month for rent and utilities. Thereafter, she and the children moved into her boyfriend's residence in Bloomfield, paying $800 per month toward the rent and other housing expenses. In the plaintiff's motion to modify, he alleged that the defendant's new living arrangements with her boyfriend resulted in a change of circumstances that altered her financial needs and, therefore, pursuant the separation agreement and § 46b-86 (b), his alimony obligation should be terminated. After a hearing, the trial court denied the plaintiff's motion, concluding that the evidence did not support a finding of cohabitation pursuant to § 46b-86 (b). In reaching its decision, the court found that the plaintiff had failed to prove that the defendant's boyfriend had contributed to her financial support. On appeal, the plaintiff claimed that the trial court applied an improper legal standard as a prerequisite for the termination of alimony under § 46b-86 (b). *Held* that the trial court improperly interpreted § 46b-86 (b) to require proof by a preponderance of the evidence that the defendant's boyfriend made financial contributions to the defendant while she lived with him in the Bloomfield residence: the trial court interpreted § 46b-86 (b) too narrowly by focusing solely on the lack of proof of the boyfriend's financial contributions to the defendant to the exclusion of the monthly savings to the defendant that resulted from her moving in with her boyfriend at the Bloomfield residence, as the operative language of § 46b-86 (b) permitted the court to consider the defendant's savings associated with her new living arrangements in its determination under the statute as to whether her financial needs had been altered, and pursuant to *Spencer* v. *Spencer* (177 Conn. App. 504), the defendant's alleged reduction in living expenses of approximately $840 per month was sufficient for a court to conclude, in its discretion and if warranted by the evidence, that a change in the defendant's financial circumstances occurred because of her voluntary move into the Bloomfield residence with her boyfriend and payment of less rent each month; accordingly, the case was remanded for a new hearing on the defendant's motion to modify to determine whether that change in circumstances altered the defendant's financial needs within the meaning of § 46b-86 (b) so as to cause the termination of alimony pursuant to the separation agreement.

(*One judge dissenting*)

Argued October 10, 2017—officially released May 8, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Hon. Herbert Barall*, judge trial referee; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Bozzuto*, *J.*, denied the plaintiff's motion to modify the judgment, and the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Keith Yagaloff, for the appellant (plaintiff).

Opinion

BEAR, J. The plaintiff, Robert R. Murphy, appeals from the judgment of the trial court denying his post-judgment motion, as amended, to modify the judgment rendered in the parties' dissolution action. In that motion he sought, pursuant to paragraph 12 (d) of the parties' separation agreement, which was incorporated into the judgment, to terminate his alimony obligation to the defendant, Jamie R. Murphy, because of her alleged cohabitation with her boyfriend. On appeal, the plaintiff claims that the court applied an improper legal standard as a prerequisite for the termination of alimony under General Statutes § 46b-86 (b). We agree and, accordingly, reverse the judgment of the court and remand the case for further proceedings.

The following facts and procedural history are relevant to this appeal. The marriage of the parties was dissolved on March 12, 2012. The court accepted and incorporated the terms of the parties' separation agreement into the judgment. Paragraph 12 (d) of the separation agreement provided that the plaintiff pay periodic alimony to the defendant in the amount of $400

per month until July, 2016,[1] nonmodifiable as to amount and duration, subject, however, to the condition that alimony would terminate on the earlier of the (a) death of the plaintiff, (b) death of the defendant, (c) remarriage of the defendant, or (d) cohabitation by the defendant as defined by § 46b-86 (b).[2]

Following the dissolution, the defendant rented a condominium on Sunfield Drive in South Windsor. She paid approximately $1640 per month for rent and utilities. In December, 2014, the defendant and her children left the condominium and moved into her boyfriend's residence in Bloomfield (Bloomfield residence). The defendant paid her boyfriend $800 per month toward his rent and other housing expenses. She continued to pay her personal expenses and the expenses she incurred for the parties' minor children.[3]

After learning that the defendant had moved into the Bloomfield residence, the plaintiff filed several motions, including the postjudgment motion, as amended, to modify the judgment by terminating his alimony obligation pursuant to paragraph 12 (d) of the separation agreement.[4] In that motion, the plaintiff alleged that the

[1] Although pursuant to the judgment alimony was to end in July, 2016, as is evident from the plaintiff's claims on appeal, this appeal is not moot.

[2] On August 27, 2013, the parties agreed that the plaintiff's alimony obligation should be reduced to $320 per month. The court, *Olear*, *J.*, later approved that reduction.

[3] The defendant testified, however, that when she was living with her boyfriend in the Bloomfield residence, she did not "do major grocery shopping and . . . if [she] stopped at Stop and Shop, [she] grab[bed] $15 worth of food, [made] dinner that night and that's it." She also explained that when she was living with her boyfriend, she was not "stocking the house with groceries." She continued, however, by stating that "[n]ow that I am back in my own home again, I am stocking my house with groceries," and that she spent about $125 per week on groceries after moving back to South Windsor. There was no evidence presented regarding the amount, if any, of the boyfriend's financial contribution to the defendant's food expenses while she and the children lived with him in the Bloomfield residence.

[4] The only remedy the plaintiff sought was termination of his alimony obligation.

defendant had relocated to Bloomfield where she was living with her boyfriend and that the new living arrangements resulted in a change in circumstances so as to alter the financial needs of the defendant, i.e., a change in circumstances that was sufficient to satisfy the financial requirement of § 46b-86 (b) for termination of alimony.

On April 21, 2015, the motion appeared on the court's docket, and the parties entered into a written stipulation that the court accepted. The stipulation provided, in relevant part, that "[i]f [the defendant did] not return to South Windsor on or before August 15, 2015, then the issue of cohabitation and [the plaintiff's] claim to modify/terminate alimony [would] be addressed in mid-September, 2015. Further, if [the defendant] cohabitate[d] in South Windsor the issue of cohabitation [would] also be addressed in mid-September, 2015."

At the hearing, the plaintiff's counsel further explained that "[i]f [the defendant] resumes living in South Windsor and leaves the residence where we're claiming that she's residing with her [boyfriend], then the issue of cohabitation . . . [is] not a major issue and will likely be done with. If [the defendant] returns with her [boyfriend] to South Windsor, or if she does not return to South Windsor and stays in Bloomfield with her [boyfriend], we're going to come back in mid-September and deal with cohabitation."

On August 14, 2015, as a result of the parties' stipulation, the defendant executed a lease for another residence in South Windsor (South Windsor residence). Although the defendant's boyfriend cosigned the lease, it provided that only the defendant and the parties' two children would occupy that residence. The defendant moved into that residence on October 1, 2015.

At the plaintiff's request, the court subsequently scheduled a hearing on the plaintiff's amended post-judgment motion seeking termination of his alimony

obligation. The hearing took place over two days in January and February, 2016, during which the court, *Bozzuto*, *J.*, heard testimony and admitted into evidence various exhibits.

Following the hearing, the court denied the plaintiff's motion. The court found that, although it was clear that the defendant was living with her boyfriend for a period of time at the Bloomfield residence, it was not clear whether her boyfriend "contributed to her support at all, much less to such an extent that the living arrangements caused such a change of circumstances as to alter the financial needs of the defendant." (Internal quotation marks omitted.)

With respect to the period of time after the defendant moved from the Bloomfield residence to the South Windsor residence, the court found that "the record [was] devoid of reliable or probative evidence that the boyfriend contribute[d] financial support to the defendant."[5] The court therefore concluded that the evidence did not support a finding of cohabitation either at the Bloomfield residence or the South Windsor residence, and declined to terminate the plaintiff's alimony obligation to the defendant. This appeal followed.[6]

On appeal, the plaintiff claims that the court improperly concluded that he had to establish a change in the defendant's financial needs pursuant to § 46b-86 (b) on the basis of her boyfriend's financial contributions to her support during the period of alleged cohabitation at the Bloomfield residence, rather than due to the defendant's altered financial needs as a result of a reduction in her expenses during that period of time. We agree.

[5] The plaintiff did not raise any claims on appeal challenging the court's determination that the defendant and her boyfriend were not cohabiting at the South Windsor residence.

[6] The defendant did not file a brief in this court. We therefore decide the appeal on the basis of the plaintiff's brief and the record.

Section 46b-86 (b) provides, in relevant part, that "the Superior Court may, in its discretion and upon notice and hearing . . . terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the . . . termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party. . . ."[7]

"[U]nder § 46b-86 (b), a finding of cohabitation requires that (1) the alimony recipient was living with another person and (2) the living arrangement caused a change of circumstances so as to alter the financial needs of the alimony recipient." (Internal quotation marks omitted.) *Spencer* v. *Spencer*, 177 Conn. App. 504, 515, 173 A.3d 1 (2017), cert. granted, 328 Conn. 903, 177 A.3d 565 (2018). "Pursuant to § 46b-86 (b), the nonmarital union must be one with attendant financial consequences before the trial court may alter an award of alimony." (Internal quotation marks omitted.) Id. The change in the need of the alimony recipient "need not be substantial . . . [but] the difference must be measureable in some way . . . . [T]he court must have the ability to compare the plaintiff's financial needs at different points in time to determine whether those needs either have increased or decreased over time. Because the court, in setting the alimony award pursuant to [§ 46b-86 (b)], quantified the [receiving party's] financial needs in terms of dollar amounts at the time of dissolution, we conclude that the proper way for the court to determine whether the [receiving party's] needs

[7] General Statutes § 46b-86 (b) additionally provides that "[i]n the event that a final judgment incorporates a provision of an agreement in which the parties agree to circumstances, other than as provided in this subsection, under which alimony will be modified, including suspension, reduction, or termination of alimony, the court shall enforce the provision of such agreement and enter orders in accordance therewith."

have changed as a result of her cohabitation is to quantify her financial needs in terms of dollar amounts during the period of cohabitation." (Citations omitted.) *Blum* v. *Blum*, 109 Conn. App. 316, 324–25, 951 A.2d 587, cert. denied, 289 Conn. 929, 958 A.2d 157 (2008).

In the hearing on the motion, the defendant did not dispute that the first requirement under § 46b-86 (b) had been satisfied, i.e., that she was living with her boyfriend in the Bloomfield residence. Therefore, the remaining question is whether the court properly interpreted § 46b-86 (b) to require proof by a preponderance of the evidence that the defendant's boyfriend made financial contributions to her during the period of time she lived in that residence. "It is well established that statutory interpretation involves a question of law over which we exercise plenary review." *Friezo* v. *Friezo*, 281 Conn. 166, 180, 914 A.2d 533 (2007).

This court's recent decision in *Spencer* v. *Spencer*, supra, 177 Conn. App. 504, provides precedent for and supports our analysis in this case.[8] In *Spencer*, the judgment provided that the defendant's alimony obligation would terminate if, inter alia, the plaintiff began cohabiting.[9] Id., 507. The plaintiff began residing with her boyfriend during the period in which she was entitled to

[8] *Spencer* was decided after we heard oral argument in this case. We sua sponte permitted the parties "to file simultaneous supplemental briefs . . . analyzing [*Spencer*] and its application, if any, to the present case." Only the plaintiff filed a supplemental brief.

[9] In *Spencer* the dissolution judgment did not specify that the issue of cohabitation would be decided in accordance with § 46b-86 (b), but the trial court and this court still applied § 46b-86 (b) in determining whether the plaintiff had begun cohabiting with her boyfriend. See *Spencer* v. *Spencer*, supra, 177 Conn. App. 507. Additionally, although *Spencer* and earlier decisions use the word cohabitation, that word does not appear in § 46b-86 (b): "The legislature instead chose the broader language of living with another person rather than cohabitation . . . . Because, however, living with another person without financial benefit did not establish sufficient reason to refashion an award of alimony under General Statutes § 46b-8[2], the legislature imposed the additional requirement that the party making alimony payments prove that the living arrangement has resulted in a change in

alimony payments. Id., 511. As a result of her living arrangements, the plaintiff's monthly housing expense decreased from $950 per month to $375 per month. Id. This court held that a reduction of the former spouse's living expenses was a proper basis on which to find that alimony should be terminated, assuming that both requirements of § 46b-86 (b) were satisfied. Id., 515. This court concluded that "[o]n the basis of the record before us, we have no difficulty concluding that [the trial court's finding of cohabitation pursuant to § 46b-86 (b)] is not clearly erroneous because there is ample evidence to support it, and we are without the definite and firm conviction that a mistake has been committed. *Specifically, the plaintiff's own testimony established that she began living with her boyfriend and that, as a result of that living arrangement, her monthly rent obligations were reduced from $950 to $375. Thus, there was clear evidence of the two requirements imposed by the definition of cohabitation in § 46b-86 (b).* Accordingly, we conclude that the trial court's termination of alimony was not an abuse of discretion." (Emphasis added.) Id., 521.

In the present case, paragraph 12 (d) of the separation agreement provided that alimony would terminate if the plaintiff cohabited as defined in § 46b-86 (b). The defendant, after the judgment was rendered, began residing with her boyfriend during the period in which she was entitled to alimony payments. As a result of the defendant's living situation, her housing expenses allegedly decreased from approximately $1640 per month to $800 per month, a monthly savings of approximately $840.

circumstances that alters the financial needs of the alimony recipient. . . . Pursuant to § 46b-86 (b), the nonmarital union must be one with attendant financial consequences before the trial court may alter an award of alimony." (Citation omitted; internal quotation marks omitted.) *DeMaria* v. *DeMaria*, 247 Conn. 715, 720, 724 A.2d 1088 (1999).

In its memorandum of decision, the court iterated that although it was clear that the defendant and her boyfriend were living together in the Bloomfield residence, "[w]hat [was] not clear [was] whether the defendant's boyfriend contributed to her support at all, much less to such an extent that the living arrangements caused a change of circumstances as to alter the financial needs of the defendant." (Internal quotation marks omitted.) The court concluded, "[t]he evidence does not support a finding of cohabitation pursuant to § 46b-86 (b)."[10]

The court's focus on the contributions of the boyfriend derives from appellate decisions such as *Blum* v. *Blum*, supra, 109 Conn. App. 316. In *Blum*, the parties' dissolution judgment provided for termination of the defendant's alimony obligation if the plaintiff cohabited with an unrelated person. Id., 318. The plaintiff purchased a home and her boyfriend moved into her home with his children. Id., 321. The trial court found that the plaintiff's boyfriend "purchases groceries for the residence once a week, occasionally cuts the lawn and helps with minor household chores." Id. The boyfriend, however, "pays nothing toward the mortgage, taxes, insurance, utilities, the plaintiff's clothing, fuel and maintenance for the plaintiff's car, the plaintiff's haircuts or expenses for the [plaintiff's] three children." Id. The trial court denied the defendant's motion to modify his alimony obligation. Id., 320. In affirming the judgment, this court stated: "The party moving for a change in the court's alimony order . . . must adduce some evidence from which the court reasonably could infer the value of the cohabitant's contributions." Id., 325. The court in *Blum*, however, did not have before it the specific facts of the present case, or of *Spencer*.

[10] Because it was undisputed that the defendant and her boyfriend were living together in the Bloomfield residence, the court's statement must refer to the plaintiff's failure to prove that the defendant's boyfriend contributed to her support in such a manner as to alter her financial needs.

This court's decision in *Blum* is correct (and unexceptionable based on its facts)[11] in the circumstance of when a boyfriend (or other person), postjudgment, moves in with an alimony recipient, and then provides some financial support, whether directly or indirectly, to that alimony recipient. In fact, most of this court's decisions applying § 46b-86 (b) do so in the context of the boyfriend (or other person) providing financial support to the alimony recipient, whether the boyfriend moves in with the alimony recipient, or the alimony recipient moves in with the boyfriend, as those are the usual fact patterns. Section 46b-86 (b), however, provides that "the Superior Court may, in its discretion and upon notice and hearing . . . terminate the payment of periodic alimony upon a showing that *the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the . . . termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party*." (Emphasis added.) In the present case, the plaintiff claims that the defendant's financial needs have

[11] It would be most unusual for a panel of this court to intend, either explicitly or implicitly, to reverse an earlier ruling of this court because, "[a]s we often have stated, this court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.) *First Connecticut Capital, LLC* v. *Homes of Westport, LLC*, 112 Conn. App. 750, 759, 966 A.2d 239 (2009); see also *Consiglio* v. *Transamerica Ins. Group*, 55 Conn. App. 134, 138 n.2, 737 A.2d 969 (1999) ("[T]his court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc. Before a case is assigned for oral argument, the chief judge may order, on the motion of a party or suo moto, that a case be heard en banc. Practice Book § 70-7 (a).")

As previously stated, *Blum* and many similar precedents have considered and been decided on the basis of the contributions of the cohabitant. Looking at the cohabitant's financial contributions is but one permissible approach permitted by § 46b-86 (b) to determine if the receiving party's financial needs have been altered. This case presents another permissible approach.

been altered as a result of her choice to move into the Bloomfield residence with her boyfriend, which caused an approximate savings to her of $840 monthly, separate from and independent of any specific financial contribution by her boyfriend. In light of the language of § 46b-86 (b) and the facts of this case, the plaintiff was and is entitled, even in the absence of any proof that the boyfriend was contributing to the financial support of the defendant, to the opportunity to prove to the court that the defendant's living arrangements with her boyfriend caused a change of circumstances so as to alter her financial needs to the point where the provisions of paragraph 12 (d) of the separation agreement concerning termination of alimony became applicable and should be enforced.

In the present case, the court interpreted § 46b-86 (b) too narrowly by focusing on the lack of proof of the *boyfriend's* financial contributions, to the exclusion of the *defendant's savings* as a result of her move. Although the boyfriend's contributions may have been factually relevant in *Blum*, proof of them is not a prerequisite in all cases involving the application of § 46b-86 (b), and that is not the only basis pursuant to § 46b-86 (b) to determine if a party's living arrangements cause such a change of circumstances as to alter that party's financial needs. As *Spencer* demonstrates, evidence of a $575 reduction in the receiving party's monthly rent obligation is "clear evidence" of a change in circumstances as to alter the financial needs of that party. See *Spencer* v. *Spencer*, supra, 177 Conn. App. 521.[12]

[12] The court's interpretation of § 46b-86 (b), requiring evidence of the boyfriend's contributions to the defendant in this case, is contrary to the clear and unambiguous language of § 46b-86 (b) that "the living arrangements cause such a change of circumstances as to alter the financial needs of [the defendant]." In other words, the focus of the statutory language as applied to this case is on whether there was a change in the defendant's financial needs because of her move to the Bloomfield residence, and not on whether there was no change to the defendant's financial needs because her boyfriend did not make a specific financial contribution to her support.

In summary, in analyzing the plaintiff's claim that the defendant's living arrangements in the Bloomfield residence with her boyfriend caused such a change of circumstances as to alter her financial needs, the court focused solely on whether the defendant's boyfriend contributed to the support of her and her children. The plaintiff's claim, however, was that by moving in with her boyfriend, the defendant saved at least $840 per month in expenses, which resulted in a change in cir-

Both our Supreme Court and this court have applied the clear and unambiguous language of § 46b-86 (b) focusing on a change in the receiving party's financial needs, regardless of the source thereof. In *DeMaria* v. *DeMaria*, supra, 247 Conn. 720, our Supreme Court stated that "[b]ecause . . . 'living with another' person without financial benefit did not establish sufficient reason to refashion an award of alimony under General Statutes § 46b-8[2], the legislature imposed the additional requirement that the party making alimony payments prove that the living arrangement has resulted in a change in circumstances *that alters the financial needs of the alimony recipient.* Therefore, this additional requirement, in effect, serves as a limitation. Pursuant to § 46b-86 (b), the nonmarital union must be one with attendant financial consequences before the trial court may alter an award of alimony." (Emphasis added.) Similarly, in *Lehan* v. *Lehan*, 118 Conn. App. 685, 696–97, 985 A.2d 378 (2010), this court focused on whether there was a change in the alimony recipient's financial needs: "The second requirement is that the plaintiff establish that the defendant's financial needs have been altered as a result of the cohabitation. . . . For purposes of § 46b-86 (b), the plaintiff must demonstrate that the defendant's financial needs, as quantified by the court in setting the alimony award pursuant to . . . § 46b-82, have been altered by her living arrangements." (Citation omitted; internal quotation marks omitted.); see also *Cushman* v. *Cushman*, 93 Conn. App. 186, 199, 888 A.2d 156 (2006) ("the party seeking to alter the terms of the alimony payments must . . . establish that the recipient's financial needs have been altered as a result of the cohabitation" [internal quotation marks omitted]); *Gervais* v. *Gervais*, 91 Conn. App. 840, 853, 882 A.2d 731 ("subsection (b) of § 46b-86, following a finding that a party is living with another individual, allows the court to . . . terminate the payment of alimony if there is a *corresponding change in financial circumstances*" [emphasis added]), cert. denied, 276 Conn. 919, 888 A.2d 88 (2005); *Duhl* v. *Duhl*, 7 Conn. App. 92, 94, 507 A.2d 523 (court concluded that there is no requirement of "financial interdependence such as is found in a common law marriage" before court can order termination of alimony under § 46b-86 (b), and "[n]o such requirement is found in the statute nor [is] . . . such a requirement . . . necessary to fulfill [the statute's] purpose"), cert. denied, 200 Conn. 803, 509 A.2d 517 (1986).

cumstances that altered, i.e., reduced, her financial needs. Prior to the defendant's move to the Bloomfield residence, she allegedly paid $1640 per month for housing expenses, but after the move, she was paying $800 per month, an alleged savings to her of approximately $840 monthly, or approximately $10,080 annually.

The operative language in § 46b-86 (b), "because the living arrangements cause such a change of circumstances as to alter the financial needs of that party," allows the court to consider the defendant's savings as a result of her change in residences in the calculation of whether there has been an alteration in her financial needs. The court has the discretion to conclude, if warranted by the evidence, that the alleged $840 in monthly savings satisfied the requirements of § 46b-86 (b), resulting in a termination of the defendant's alimony pursuant to paragraph 12 (d) of the separation agreement. See *Spencer* v. *Spencer*, supra, 177 Conn. App. 521 (reduction in rent from $950 to $375 sufficient to satisfy statute). The court in the present case did not consider the defendant's monthly savings in living expenses, however, because her boyfriend did not financially contribute the $840 monthly to her.

Pursuant to this court's recent decision in *Spencer*, the defendant's alleged reduction in living expenses of approximately $840 per month is sufficient for a court to conclude, in its discretion and if warranted by the evidence, that a change in the defendant's financial circumstances occurred because of her voluntary move into the Bloomfield residence with her boyfriend and payment of less rent each month. See id., 521. Therefore, the plaintiff is entitled to a hearing on the issue of whether the defendant's alleged $840 monthly living expense reduction as a result of her move to the Bloomfield residence altered her financial needs within the meaning of § 46b-86 (b) so as to cause the termination of alimony pursuant to paragraph 12 (d) of the separation

agreement that the court incorporated into the judgment.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion LAVINE, J., concurred.

PRESCOTT, J., dissenting. For at least two reasons, I disagree with the majority's conclusion that the judgment of the trial court in this case must be reversed due to the court's application of the wrong legal standard in deciding whether to terminate the alimony obligation of the plaintiff, Robert R. Murphy. First, the majority's decision conflicts with, and implicitly overturns, prior decisions of this court. Second, the legal standard that the majority opinion announces is contrary to the legislative intent expressed in General Statutes § 46b-86 (b). In my view, the majority opinion fashions a new and significantly lower standard of proof in cases in which a party seeks to modify or terminate an alimony obligation because the recipient of the alimony is now living with another person.

This simply is not a case in which the trial court applied the wrong legal standard but, instead, is a case, like many others, in which the moving party did not meet his burden of persuasion with respect to the critical facts he needed to demonstrate in order to be entitled to relief. Accordingly, I respectfully dissent.

The following facts and procedural history are relevant to this appeal. The parties were divorced on March 12, 2012. The parties have one minor child that is an issue of the marriage, and the defendant, Jamie D. Murphy, also has a child who was born prior to the marriage and who subsequently was adopted by the plaintiff.

The court rendered a judgment of marital dissolution in accordance with the parties' separation agreement.

Paragraph 12 of the separation agreement provides that the plaintiff would pay periodic alimony to the defendant in the amount of $400 per month until July, 2016, nonmodifiable as to amount and duration. It further provides that the obligation to pay alimony terminates on the earlier of the (a) death of the plaintiff, (b) death of the defendant, (c) remarriage of the defendant, or (d) cohabitation by the defendant as defined by § 46b-86 (b). On August 27, 2013, the parties agreed that the plaintiff's alimony obligation should be reduced to $320 per month. This modification later was approved by the court, *Olear*, *J.*

After the divorce, the defendant began renting a condominium on Sunfield Drive in South Windsor. In December, 2014, the defendant moved into her boyfriend's residence in Bloomfield. The defendant paid her boyfriend approximately $800 per month for rent and other housing expenses. She continued to pay all of her personal expenses and the expenses she incurred for the parties' children.

Upon learning that the defendant had moved into her boyfriend's residence in Bloomfield, the plaintiff filed a number of motions, including the amended postjudgment motion seeking termination of his obligation to pay alimony. In that motion, the plaintiff alleged that the defendant had moved to Bloomfield where she was living with her boyfriend and that the new living arrangement caused such a change in circumstances as to alter her financial needs. The plaintiff therefore asked the court to terminate his alimony obligation pursuant to paragraph 12 (d) of the parties' separation agreement.

On April 21, 2015, the parties entered into a stipulation that was accepted by the court. The stipulation provided, in relevant part, that "[i]f [the defendant] [did] not return to South Windsor on or before August 15,

2015, then the issue of cohabitation and [the plaintiff's] claim to modify/terminate alimony [would] be addressed in mid-September, 2015. Further, if [the defendant] cohabitate[d] in South Windsor the issue of cohabitation [would] also be addressed in mid-September, 2015."

The plaintiff's counsel further represented to the court that "[i]f [the defendant] resumes living in South Windsor and leaves the residence where we're claiming that she's residing with her significant other, then the issue of cohabitation . . . [is] not a major issue and will likely be done with. If [the defendant] returns with her significant other to South Windsor, or if she does not return to South Windsor and stays in Bloomfield with her significant other, we're going to come back in mid-September and deal with cohabitation."

On August 14, 2015, as a result of the parties' stipulation, the defendant executed a lease to rent a residence in South Windsor. Although the defendant's boyfriend cosigned the lease, it provided that only the defendant and the parties' two children would occupy the rental residence. The defendant moved into that residence on October 1, 2015.

At the plaintiff's request, the court subsequently scheduled a hearing on the plaintiff's amended postjudgment motion seeking termination of his alimony obligation. The hearing took place over two days in January and February, 2016, during which the court, *Bozzuto*, *J.*, Chief Administrative Judge for Family Matters, heard testimony and admitted into evidence various exhibits.

Following the hearing, the court, in a written memorandum of decision, denied the plaintiff's motion. In its decision, the court recognized that the cost of the defendant's rent and utilities decreased when she was living with her boyfriend but reasoned that such a

decrease "does not in and of itself lead to the conclusion that the boyfriend [was] contributing to the defendant's expenses."

Indeed, the court found that "[t]here was no reliable or persuasive evidence that the defendant's boyfriend paid any of her other personal or housing expenses." The court concluded that there was insufficient evidence to draw the inference that, in light of the new living arrangements, the boyfriend contributes financial support to the defendant so as to alter her financial needs. The plaintiff did not offer any credible evidence regarding whether the defendant's boyfriend gave her money for clothing, food, household items, or anything else while she lived at the boyfriend's residence. Nor did the plaintiff offer any credible evidence "as to the monthly cost of the [Bloomfield] home or an indication of what percentage of the overall cost of the housing the defendant's $800 contribution covered." The court reasoned that, standing alone, the fact that the cost of the defendant's rent and utilities decreased while she lived in Bloomfield with her boyfriend did not suffice to show that her boyfriend contributed to her expenses such that the living arrangements altered her financial needs. In sum, the court concluded that the plaintiff failed to meet his burden to persuade it that living with her boyfriend in Bloomfield caused such a change of circumstances as to alter the financial needs of the defendant. "There is insufficient evidence before the court to draw such a conclusion."[1] This appeal followed.[2]

[1] With respect to the period of time after the defendant moved from Bloomfield back to South Windsor, the court also found that "the record [was] devoid of reliable or probative evidence that the boyfriend contributes financial support to the defendant . . . ." The court therefore concluded that the evidence did not support a finding of cohabitation and declined to terminate the plaintiff's alimony obligation to the defendant. The plaintiff does not challenge on appeal this determination.

[2] The defendant did not file a brief in this court.

On appeal, the plaintiff primarily argues that the court applied the wrong legal standard in deciding his motion and should have found, on the basis of the evidence presented, that the defendant's financial needs were altered when she was living with her boyfriend simply because she paid less for rent and utilities in Bloomfield than what she had paid at the Sunfield Drive residence in South Windsor.

At the outset, I note the points on which the majority opinion and I appear to agree. Paragraph 12 of the separation agreement provided that the plaintiff would pay periodic alimony to the defendant in the amount of $400 per month until July, 2016, nonmodifiable as to amount and duration, and that the alimony would terminate on the earlier of the (a) death of the plaintiff, (b) death of the defendant, (c) remarriage of the defendant, or (d) cohabitation by the defendant *as defined by* § 46b-86 (b). Pursuant to the parties' agreement, permanent termination of the plaintiff's obligation to pay alimony is the sole remedy following a finding of cohabitation and the definition of cohabitation set forth in § 46b-86 (b) sets the standard for assessing whether cohabitation has occurred. See *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 193, 112 A.3d 144 (2015) (parties' agreement reflects intent not to import remedial aspect of § 46b-86 [b]).[3]

Section 46b-86 (b) defines cohabitation as "living with another person under circumstances which the court

[3] In other words, the plaintiff does not seek to terminate alimony on the basis of § 46b-86 (b). Instead, the plaintiff seeks to terminate alimony on the basis of the parties' agreement, in which they simply rely on the statute as a means of defining "cohabitation." See General Statutes § 46b-86 (b) ("[i]n the event that a final judgment incorporates a provision of an agreement in which the parties agree to circumstances, other than as provided in this subsection, under which alimony will be modified, including suspension, reduction, or termination of alimony, the court shall enforce the provision of such agreement and enter orders in accordance therewith"); see also *Nation-Bailey* v. *Bailey*, supra, 316 Conn. 198.

finds should result in the . . . termination of alimony because the living arrangements cause such a change in circumstances as to alter the financial needs of that party." Thus, in accordance with § 46b-86 (b), "a finding of cohabitation requires that (1) the alimony recipient was living with another person and (2) the living arrangement *caused* a change of circumstances so as to alter the financial needs of the alimony recipient." (Emphasis added.) *Fazio* v. *Fazio*, 162 Conn. App. 236, 240 n.1, 131 A.3d 1162, cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016). As this court stated in *DiStefano* v. *DiStefano*, 67 Conn. App. 628, 633, 787 A.2d 675 (2002), "[b]ecause . . . living with another person *without financial benefit* did not establish sufficient reason to refashion an award of alimony . . . the legislature imposed the additional requirement that the party making the alimony payments prove that the living arrangement has resulted in a change in circumstances that alters the financial needs of alimony recipient." (Citation omitted; emphasis added; internal quotation marks omitted.)

The majority opinion and I also agree that, pursuant to § 46b-86 (b), the alteration of the financial needs of the alimony recipient caused by the new living arrangements "need not be substantial . . . [but] the difference must be measurable in some way. . . . [T]he court must have the ability to compare the plaintiff's financial needs at different points in time to determine whether those needs either have increased or have decreased over time." (Citations omitted.) *Blum* v. *Blum*, 109 Conn. App. 316, 324–25, 951 A.2d 587, cert. denied, 289 Conn. 929, 958 A.2d 157 (2008).

It is at this point in the analysis, however, that the majority and I diverge. The majority appears to conclude that, so long as the alimony obligor demonstrates that the alimony recipient's expenses such as rent were reduced in a measurable way after moving in with

another person, then the alimony obligor has established cohabitation as defined by § 46b-86 (b). The majority reasons that because the rental obligations of the defendant in this case may have been reduced by $840 per month when she moved into the new residence in Bloomfield and began living with her boyfriend, the plaintiff was not required to demonstrate that the person with whom the defendant was living (the cohabitator) made any financial contributions to paying the rent or to the new household in general.[4] I respectfully disagree with this conclusion.

First, it directly conflicts with established precedent. In *Blum* v. *Blum*, supra, 109 Conn. App. 319, the defendant sought to terminate or modify his alimony obligation because the plaintiff, his former wife, had begun living with Damian Donovan, the father of the plaintiff's fourth child, at a new residence that she had purchased out of the proceeds from the sale of the marital residence. In his motion to modify, the defendant alleged that the plaintiff's new living arrangements "resulted in a change to her financial circumstances sufficient to justify a reduction or termination of the defendant's alimony obligations." Id. The trial court denied the motion, concluding that the defendant "failed to meet his burden *because he adduced no evidence as to the values of the contributions that Donovan made to the plaintiff's household* or the burdens that Donovan placed on the plaintiff's financial resources." (Emphasis added.) Id., 323.

[4] Footnote 3 of the majority opinion implies that the defendant's boyfriend also contributed to expenses related to the defendant's minor children while she was living at the Bloomfield residence by referring to testimony of the defendant that she did not do "major grocery shopping" during that time. The trial court, however, made no such finding in its memorandum of decision and, in fact, found that "[t]here was no reliable or persuasive evidence that the defendant's boyfriend paid any of her other personal or housing expenses."

This court subsequently affirmed the judgment of the trial court. In so doing, this court emphasized that "the defendant adduced no evidence as to the goods, services and resources provided . . . by Donovan." Id., 321. This court plainly stated: "Parties are not required to account for every penny that leaves the cohabitant's purse or elicit expert testimony as to the value conferred on the alimony recipient by every activity of the cohabitant. The party moving for a change in the court's alimony order, however, *must adduce some evidence from which the court could infer the value of the cohabitant's contributions*. . . . In this case, there was no evidence from which the court could have inferred the value of Donovan's contributions to, or demands on, the plaintiff's financial resources. *Accordingly, we conclude that the court properly construed § 46b-86 (b)* in denying the defendant's May 30, 2006 motion." (Emphasis added.) Id., 325–26. The trial court in the present case directly relied on this language from *Blum* in denying the motion to terminate alimony.

The majority, however, implicitly overrules *Blum* because it frees a party seeking to terminate or modify alimony from the obligation of demonstrating that the cohabitator contributed to the alteration in the financial needs of the alimony recipient. Thus, the decision by the majority contravenes the long-standing policy of this court "that one panel should not, on its own, [overrule] the ruling of a previous panel. The [overruling] may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.) *State* v. *White*, 127 Conn. App. 846, 858 n.11, 17 A.3d 72, cert. denied, 302 Conn. 911, 27 A.3d 371 (2011). Indeed, neither the majority opinion nor the plaintiff cite a single appellate case in which this court or our Supreme Court affirmed a trial court's termination or modification of alimony in the absence of evidence that the cohabitator made any contributions to the household of the alimony

recipient that thereby resulted in the alteration of his or her financial needs.

Other appellate decisions, in analyzing the question of cohabitation, have relied on findings that the cohabitator made financial contributions after moving in with the alimony recipient. For example, in *Lehan* v. *Lehan*, 118 Conn. App. 685, 697–98, 985 A.2d 378 (2010), this court reversed the trial court's judgment modifying alimony despite evidence that the recipient's overall expenses had been reduced during the period of cohabitation. In doing so, we emphasized the requirement that "[t]he party moving for a change in the court's alimony order . . . must adduce some evidence from which the court reasonably could infer the value of the *cohabitant's contributions*." (Emphasis in original; internal quotation marks omitted.) Id., 697; see also *Knapp* v. *Knapp*, 270 Conn. 815, 821–22, 856 A.2d 358 (2004) (noting that trial court found that even though alimony recipient and cohabitator already had been living together, cohabitation did not begin until cohabitator began to contribute financial support); *Lupien* v. *Lupien*, 192 Conn. 443, 444–45, 472 A.2d 18 (1984) (extensive discussion of facts showing cohabitator's financial contributions to alimony recipient's household); *Nation-Bailey* v. *Bailey*, 144 Conn. App. 319, 322, 74 A.3d 433 (2013) ("the plaintiff and her then fiancé . . . had cohabitated from December, 2007, through late March 2008, *with* [*her fiancé*] *sharing some of the plaintiff's living expenses during that period, thus altering her financial needs*"), aff'd, 316 Conn. 182, 112 A.3d 144 (2015); *Gervais* v. *Gervais*, 91 Conn. App. 840, 842, 882 A.2d 731 (court found that alimony recipient and cohabitator shared expenses and engaged in accountings to ensure that they were each paying their share of expenses), cert. denied, 276 Conn. 919, 888 A.2d 88 (2005); *Duhl* v. *Duhl*, 7 Conn. App. 92, 94–95, 507 A.2d 523 (finding of cohabitation supported

by evidence that alimony recipient received rent from cohabitator), cert. denied, 200 Conn. 803, 509 A.2d 517 (1986).

Furthermore, I disagree with the majority that this court's recent decision in *Spencer* v. *Spencer*, 177 Conn. App. 504, 173 A.3d 1 (2017), cert. granted, 328 Conn. 903, 177 A.3d 565 (2018), supports its conclusion that a reduction in living expenses of the alimony recipient alone is sufficient to establish that the living arrangements have resulted in a change in circumstances that alters the financial needs of the alimony recipient. Indeed, if anything, *Spencer* reaffirms the importance of adducing evidence that the cohabitator is making financial contributions to the new household or the alimony recipient.

In *Spencer*, contrary to the suggestion of the majority, the defendant, the alimony obligor, demonstrated that the cohabitator was contributing financially to the new living arrangements with the plaintiff, the alimony recipient. Prior to moving in with her boyfriend in a rented single-family home, the plaintiff lived alone on the second floor of a two-family house where she paid $950 per month in rent. Id. 511. As this court specifically noted, "[r]egarding her living arrangement with her boyfriend, the plaintiff testified that *they share equally the cost of rent and utilities. Pursuant to that cost sharing arrangement*, the plaintiff pays only $375 per month in rent." (Emphasis added.) Id. Indeed, the trial court in *Spencer* specifically predicated its conclusion that the defendant had established cohabitation on the basis of "two findings: (1) [t]he plaintiff has admitted that she began cohabitating with her boyfriend on or about October 1, 2013, and (2) as result of that cohabitation *and the contribution*[*s*] *of* [*her boyfriend*] *to the plaintiff's household expenses*, the plaintiff's financial needs have been altered." (Emphasis added; internal quotation marks omitted.) Id., 512.

Thus, *Spencer* is entirely consistent with *Blum* and other appellate cases in which cohabitation was established after the alimony obligor had met his or her burden to demonstrate that the cohabitator's financial contributions to the alimony recipient have altered the financial needs of the alimony recipient. In light of the previously quoted language from *Spencer*, I simply cannot read the decision, as the majority seems to do, as standing for the proposition that a reduction in rent is sufficient evidence, by itself, to establish that the alimony recipient's financial needs have altered because the alimony recipient is living with her boyfriend.

My second point of contention with the majority opinion is that the conclusion it reaches is contrary to the definition of cohabitation set forth in § 46b-86 (b) because it effectively eliminates the requirement contained in the plain language of the statute that a party seeking to avoid his or her alimony obligation must establish a causal nexus between the living arrangement and the change of circumstances that alters the alimony recipient's needs. The statute plainly states that alimony may be terminated when the party seeking termination establishes that the living arrangements, that is, living with another person, "*cause* such a change of circumstances as to alter the financial needs of that party." (Emphasis added.) General Statutes § 46b-86 (b).

A simple hypothetical will help to explain why I think that the majority's decision eliminates the causal nexus required by the statute. Consider a scenario in which an alimony recipient is living in a residence for which the rent is $2000 per month. In order to reduce her expenses, however, she chooses to move into a new, smaller residence where the rent is only $1200 per month. Several months later, another person moves into the new residence of the alimony recipient, but

the cohabitator does not pay any of the rent or otherwise make any financial contributions to the alimony recipient.

Under these circumstances, the decision to cohabitate is not the cause of the alteration of the alimony recipient's financial needs. Instead, the financial needs of the alimony recipient have been altered because of his or her choice to live in a less expensive dwelling and not because he or she has chosen to cohabitate. In the present case, like in the hypothetical, the court made no findings that the defendant's boyfriend contributed in any way to the household's costs for rent, utilities or other personal expenses.

As I understand the majority decision, the combination of the fact that the alimony recipient's expenses have been reduced with the fact that he or she is now living with a third party is sufficient to establish cohabitation pursuant to § 46b-86 (b) even though there is no evidence that the cohabitator has anything to do with the reduction of those expenses. Such a rule eliminates the causal nexus required by the plain language of the statute.

I do not mean to argue that the financial needs of the alimony recipient in my hypothetical are unaltered or unchanged, or that the alimony obligor is necessarily without a remedy. Because it is not the cohabitation itself, however, that has caused that change, the remedy for the alimony obligor in my hypothetical must be sought pursuant to § 46b-86 (a), which permits the trial court, unless otherwise precluded by the divorce decree itself, to terminate or modify alimony upon a showing of a "substantial change in the circumstances of either party . . . ." The lower standard of proof fashioned by the majority in this case has the effect of confounding the first two subsections of § 46b-86. See *Berry* v. *Berry*, 88 Conn. App. 674, 682–83, 870 A.2d 1161 (2005)

(whether alimony should be modified pursuant to § 46b-86 [a] requires different legal analysis than modification pursuant to § 46b-86 [b]).

I also should note that the majority concludes that this case should be remanded to the trial court for a new hearing on the motion to terminate alimony. A new hearing, however, seemingly would be unnecessary under the majority's lower standard of proof because, on the basis of the factual findings by the trial court that the defendant's living expenses have been reduced during a period in which she was living with her boyfriend, no other facts would be necessary to entitle the plaintiff to a termination of alimony.

I do not mean to suggest that the trial court in this case was prohibited from inferring that the defendant was receiving financial support from her boyfriend based on the fact the defendant was paying less rent in Bloomfield after moving in with him than she had been paying in South Windsor. The trial court, however, chose not to draw this inference based on the lack of reliable evidence of financial support by the cohabitator or of what the total amount of rent was for the Bloomfield residence. Thus, in my view, this is simply an unremarkable case in which an experienced trial judge heard the evidence, applied the standard set out in *Blum* and other appellate decisions, and ultimately concluded that the plaintiff had not met his burden of persuasion to prove the nexus between the alteration in the defendant's financial needs and the fact that she was living with her boyfriend. Instead, the majority's decision to reverse the judgment and implicitly overrule our precedent undoubtedly will surprise members of the bench and bar who have relied on those cases. If the majority believes those cases were incorrectly decided, then we should adhere to the rules regarding when they may be overruled.

I respectfully dissent.

KURTIS TURNER *v.* COMMISSIONER OF CORRECTION (AC 39131)

Sheldon, Keller and Eveleigh, Js.

Syllabus

The petitioner, who had been convicted of murder in connection with a dispute that led to the shooting death of the victim, sought a writ of habeas corpus, claiming that the habeas court abused its discretion in denying his petition for certification to appeal because his due process right to a fair trial was violated when the prosecutor failed to disclose material exculpatory evidence that was favorable to the defense in violation of *Brady* v. *Maryland* (373 U.S. 83). The state had purchased plane fare for P to travel to Connecticut to testify at the petitioner's trial. The prosecutor had told P that if he believed she testified truthfully, he would notify the prosecutor handling certain charges pending against P of her cooperation. Prior to trial, P had told the police that an individual other than the petitioner had stated during the dispute that somebody was going to die within forty-eight hours. P changed her story at trial and testified that it was the petitioner who had made that statement. When P denied during her testimony that she was hoping for consideration, aside from the plane fare, in exchange for her testimony, the prosecutor did not correct her statement. The habeas court concluded that no *Brady* violation had occurred because there was no evidence of a formal plea agreement between P and the state, and rendered judgment denying the habeas petition. Thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court abused its discretion in denying the petition for certification to appeal with regard to the petitioner's claim that he was denied his due process right to a fair trial in violation of *Brady*, as the issues involved were debatable among jurists of reason and could have been resolved by a court in a different manner: the prosecutor's failure to correct the false testimony of P that she did not expect to receive any consideration in exchange for her testimony was material for purposes of *Brady* and violated the petitioner's due process right to a fair trial, and when the probable effect of P's testimony was weighed against the petitioner's ability to impeach her and the weaknesses of the state's case, there was a reasonable likelihood that the false testimony could have affected the verdict such that the petitioner was entitled to a new trial, as the strength of the state's case was not overwhelming, P was a crucial witness for the state in that her testimony provided evidence of motive, intent and means on the part of the petitioner, and negated any effect that his self-defense argument may have had on the jury, the state relied heavily on P's testimony in its closing

argument, and, therefore, any evidence that could have affected her credibility would have been vital to the defense; moreover, the habeas court applied an incorrect legal standard when it determined that the petitioner had not proven a *Brady* violation resulting from the state's failure to disclose P's informal agreement with the state to receive consideration in exchange for her testimony at the petitioner's criminal trial, as the habeas court's conclusion that no exculpatory evidence was withheld from the petitioner was premised on its factual finding that there was no evidence of a plea agreement between the state and P, and it was not necessary for the petitioner to establish the existence of a formal plea agreement in order to prove a *Brady* violation, as evidence that merely suggests an informal understanding between the state and a witness may constitute impeachment evidence for purposes of *Brady* and such evidence is not limited to the existence of a plea agreement.

Argued December 7, 2017—officially released May 8, 2018

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the petition was withdrawn in part; thereafter, the matter was tried to the court, *Sferrazza*, *J.*; judgment denying the petition; subsequently, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Reversed; judgment directed.*

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

Stephen M. Carney, senior assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (respondent).

Opinion

EVELEIGH, J. The petitioner, Kurtis Turner, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to

appeal, and (2) improperly concluded that there were no violations of *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), at his underlying criminal trial.[1] For the reasons set forth herein, we agree with the petitioner and conclude that the habeas court abused its discretion in denying the petition for certification to appeal and in denying the petition for a writ of habeas corpus. Accordingly, we reverse the judgment of the habeas court and remand the matter for a new trial.

The following facts and procedural history are relevant to our resolution of this appeal. After a jury trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a (a) and sentenced to sixty years incarceration. Our prior decision on the petitioner's direct appeal in *State* v. *Turner*, 133 Conn. App. 812, 37 A.3d 183, cert. denied, 304 Conn. 929, 42 A.3d 390 (2012), set forth the following facts: "In June, 2007, the [petitioner] was living in an apartment in New London with Curtis McGill. McGill had, on several occasions, sold the drug PCP to Lakisha Alexander, the sister of Vernall Marshall, the victim. At some point during or near in time to April, 2007, Alexander stole some PCP from McGill's apartment. McGill later discovered that she had done so and told her that she owed him a favor.

"On June 19, 2007, Alexander, the victim, and two of the victim's friends encountered McGill, who was alone, on Bank Street in New London. The victim approached McGill, and the two of them conversed apart from the others. During the conversation, the victim told McGill that he would not let McGill disrespect his sister. After

[1] Additionally, the petitioner claims that the habeas court improperly concluded that he failed to establish the ineffectiveness of his trial counsel. In light of our decision to grant the petitioner relief from his challenged conviction on the basis of his *Brady* claim, we do not reach the merits of this alternate substantive claim.

talking with McGill for two to five minutes, the victim walked back to Alexander and the others. McGill appeared to be upset, remarking several times that he felt threatened.

"Subsequent to this encounter with the victim, McGill made a telephone call, and, three to five minutes later, a car came down Bank Street and parked next to McGill. Three individuals got out of the car, one of whom was the [petitioner], who was holding a gun. The [petitioner] waved the gun in the air and pointed it at the victim, proclaiming, 'I'll do anybody out here,' 'You want to die?' and, 'somebody is going to die.' After approximately one minute, McGill told the [petitioner] to stop, and the [petitioner] lowered the gun and returned to the car with the other two individuals. The three of them left in the car, and McGill walked away from the victim, Alexander and the others. On the way back to the apartment, the [petitioner] repeatedly remarked that '[w]ithin forty-eight hours somebody is going to die.'

"On the night of June 20, 2007, the victim was in New London having drinks with friends. He had gone into New London with his friend, Shannon Johnson, and later that evening he met up with Alexander. In the early morning hours of June 21, 2007, the victim again met up with Johnson on the sidewalk just outside the front entrance to Ernie's Café on Bank Street. At this time, the [state claims, the petitioner] approached the victim and shot him in the head. Emergency personnel took the victim by ambulance to a nearby hospital, where, after approximately twelve minutes of medical care, he was pronounced dead.

"On January 8, 2008, the state filed an information charging the [petitioner] with murder in violation of § 53a-54a (a). On May 28, 2008, attorney Raul [Davila-Carlos] was appointed as a special public defender to

represent the [petitioner], which he did for approximately one year without complaint. Beginning on the first day of jury selection on May 28, 2009, the [petitioner] made several requests that the court remove [Davila-Carlos] as his counsel and either appoint new counsel or allow him to represent himself. The court denied the [petitioner's] requests to have new counsel appointed, noting that the requests were made on the eve of trial. The trial then proceeded with [Davila-Carlos] representing the [petitioner]. . . .

"On July 16, 2009, at the conclusion of the state's case-in-chief, the [petitioner] made an oral motion for a judgment of acquittal, asserting that the evidence was insufficient to establish guilt beyond a reasonable doubt, which the court denied. The jury returned a verdict of guilty, and the [petitioner] was sentenced to sixty years incarceration." Id., 814–16. This court affirmed the petitioner's conviction on direct appeal. See id., 814.

On March 1, 2013, the petitioner, in a self-represented capacity, filed a petition for writ of habeas corpus. On May 8, 2015, the petitioner, represented by appointed counsel, filed the amended petition operative in this appeal. In the amended petition, the petitioner alleged that (1) his constitutional right to the effective assistance of trial counsel was violated, (2) his right to due process was violated by the prosecuting authority's knowing presentation of false testimony, and (3) his right to due process was violated by the prosecuting authority's failure to disclose material exculpatory evidence.[2] The habeas trial was held over three days from September 28, 2015 to September 30, 2015. The petitioner presented the testimony of, inter alia, Raul Davila-Carlos, the petitioner's trial counsel, and John P.

[2] See footnote 1 of this opinion. In the amended petition, the petitioner also alleged the ineffective assistance of his appellate counsel. The petitioner, however, withdrew that count on September 28, 2015.

Gravelec-Pannone, the prosecuting attorney in the petitioner's case. Following the trial, the habeas court, *Sferrazza*, *J.*, denied the petition in a written decision in which it concluded that the petitioner had not met his burden to prove ineffective assistance of counsel or a violation of his due process rights. Thereafter, the habeas court denied the petition for certification to appeal, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal from the denial of his petition for a writ of habeas corpus with respect to his claim of due process violations. We agree.

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

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

As discussed in part II of this opinion, because the resolution of the petitioner's underlying claim involves issues that are debatable among jurists of reason and could have been resolved by a court in a different manner, we conclude that the habeas court abused its discretion in denying certification to appeal from the denial of the petition for a writ of habeas corpus.

II

The petitioner claims that his due process rights were violated by the prosecuting attorney's knowing presentation of false or misleading testimony and failure to disclose material impeachment evidence as required by *Brady* v. *Maryland*, supra, 373 U.S. 83. Specifically, the petitioner argues that (1) Gravelec-Pannone failed to correct the false testimony of Alice Philips, a cooperating witness for the prosecution, that she had not received consideration in exchange for her testimony; and (2) the prosecution failed to disclose the material exculpatory evidence that the state had provided consideration in exchange for the testimony of Philips, who was a friend of the victim and testified on behalf of the

state about the dispute among the petitioner, McGill and the victim.

The following additional facts are relevant to this issue. In her initial statement to the police, Philips told them that McGill was the individual who said that somebody was going to be dead within forty-eight hours. Prior to testifying at the petitioner's trial, Gravelec-Pannone told Philips that if he believed she testified truthfully, he would notify the prosecutor handling her own pending charges of her cooperation. The State's Attorney's Office also purchased plane fare for Philips, who traveled from Michigan to Connecticut to testify at the petitioner's trial.

At the petitioner's trial, Philips admitted that she was flown in by the state to answer to her outstanding warrants and had just been arraigned on those charges. Her defense counsel was present throughout her testimony. Notably, Philips changed her story when she testified at trial that the petitioner, rather than McGill, uttered the statement that somebody was going to die within forty-eight hours. Furthermore, when asked if she was hoping for any consideration, aside from the plane fare, in exchange for her testimony, Philips answered, "no." Gravelec-Pannone did not correct that statement.

After testifying at the petitioner's trial, Philips was transported to the geographical area number ten courthouse in New London to plead guilty on her outstanding charges. Peter A. McShane, a prosecutor in that courthouse at the time Philips was put to plea, informed the court, *McMahon*, *J.*, that she had cooperated and testified on behalf of the state at the petitioner's trial. Thereafter, Philips received a one year sentence, fully suspended, with a one year conditional discharge where the sole condition was not to return to Connecticut. At the petitioner's habeas trial, McShane testified that Philips' case "just showed up on the docket," and that

he did not remember who advised him of the fact that Philips had testified in a case in the part A court. Additionally, McShane testified that it did not appear that he or anyone else working in his office at the geographical area number ten courthouse ever made a sentencing recommendation to Judge McMahon; it appeared that the judge sua sponte came up with a court-indicated sentence for Philips.

Gravelec-Pannone testified that after Philips was done testifying in the petitioner's case, he instructed his inspector to let the prosecutor in Philips' case know that she had testified to his satisfaction. Gravelec-Pannone acknowledged that notifying the prosecutor in Philips' case that she had testified helpfully was a form of consideration in exchange for her testimony, "but no specific consideration that you're going to get this deal up front if you do that." He indicated, however, that he did not correct Philips' statement that she was not expecting consideration because he did not want to impeach his own witness. He indicated that his office would not have told the prosecutors in the geographical area number ten courthouse what to do with Philips' cases, but would make them aware that she was going to be a witness in their case and would keep them posted as to what happened in the part A court. He also testified that Philips' father was a marshal in the New London part A court, and that he had "used his efforts" to persuade Philips to come back from Michigan to "testify and face the music" regarding her pending charges in Connecticut. After Philips' outstanding cases were resolved, Gravelec-Pannone "communicated [to Davila-Carlos] [the] fact that [Philips'] cases were resolved, and she would be heading back to Michigan shortly thereafter, but [Davila-Carlos] was aware that [Philips] was still in New London and capable of being served with a subpoena if [Davila-Carlos] needed to do that." The State's Attorney's Office paid for an

airline ticket for Philips to return to Michigan the day after she pleaded guilty.

Davila-Carlos testified that he did not have a recollection of the state informing him of the agreement with Philips, but that he could have argued the issue of Philips' credibility to the jury if he had known of a prior agreement. He also testified that he had not wanted to discredit Philips' testimony too much because he believed her recollection of the dispute between the petitioner and the victim aided in his self-defense argument.

On the basis of this testimony, the habeas court concluded that the petitioner had failed to establish a *Brady* violation because "no exculpatory evidence was withheld from the petitioner, nor did [Philips] testify falsely at his criminal trial."

We next set forth our standard of review and the applicable legal principles governing *Brady* claims. As set forth by the United States Supreme Court in *Brady* v. *Maryland*, supra, 373 U.S. 87, "[t]o establish a *Brady* violation, the [petitioner] must show that (1) the government suppressed evidence, (2) the suppressed evidence was favorable to the [petitioner], and (3) it was material [either to guilt or to punishment]." (Internal quotation marks omitted.) *Morant* v. *Commissioner of Correction*, 117 Conn. App. 279, 295, 979 A.2d 507, cert. denied, 294 Conn. 906, 982 A.2d 1080 (2009). "Whether the petitioner was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review." (Internal quotation marks omitted.) *Peeler* v. *Commissioner of Correction*, 170 Conn. App. 654, 689, 155 A.3d 772, cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017).

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process [when] the evidence is material either to guilt or

to punishment, irrespective of the good faith or bad faith of the [prosecutor]. . . . The United States Supreme Court also has recognized that [t]he jury's estimate of the truthfulness and reliability of a . . . witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. *Napue* v. *Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). Accordingly, the *Brady* rule applies not just to exculpatory evidence, but also to impeachment evidence . . . which, broadly defined, is evidence having the potential to alter the jury's assessment of the credibility of a significant prosecution witness. . . . Because a plea agreement is likely to bear on the motivation of a witness who has agreed to testify for the state, such agreements are potential impeachment evidence that the state must disclose. . . .

"[A] prosecutor's failure to disclose favorable evidence will constitute a violation of *Brady* only if the evidence is found to be material. . . . In a classic *Brady* case . . . the evidence will be deemed material only if there would be a reasonable probability of a different result if the evidence had been disclosed." (Internal quotation marks omitted.) *State* v. *Jordan*, 314 Conn. 354, 370, 102 A.3d 1 (2014).

A

We first address the petitioner's claim that the prosecutor's failure to correct Philips' false testimony that she did not expect any consideration for her testimony deprived him of his due process right to a fair trial under *Brady*. In response, the respondent, the Commissioner of Correction, argues that even if the witness did testify falsely and the prosecutor failed to correct that testimony, there was no reasonable likelihood that

the misleading testimony could have affected the judgment of the jury. We agree with the petitioner.

We set forth the legal principles applicable to this issue. The state has a duty to correct the record if it knows that a witness has testified falsely. See *Diaz* v. *Commissioner of Correction*, 174 Conn. App. 776, 796, 166 A.3d 815 ("[D]ue process is . . . offended if the state, although not soliciting false evidence, allows it to go uncorrected when it appears. . . . If a government witness falsely denies having struck a bargain with the state, or substantially mischaracterizes the nature of the inducement, the state is obliged to correct the misconception." [Internal quotation marks omitted.]), cert. denied, 327 Conn. 957, 172 A.3d 204 (2017); see also *Gomez* v. *Commissioner of Correction*, 178 Conn. App. 519, 539, 176 A.3d 559 (2017) ("[r]egardless of the lack of intent to lie on the part of the witness, *Giglio* [v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)] and *Napue* [v. *Illinois*, supra, 360 U.S. 264] require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading" [internal quotation marks omitted]), cert. granted on other grounds, 328 Conn. 916, A.3d (2018).[3]

"When . . . a prosecutor obtains a conviction with evidence that he or she knows or should know to be

[3] We emphasize that all attorneys have a duty of candor to the court. Rule 3.3 (a) of the Rules of Professional Conduct provides in relevant part: "A lawyer shall not knowingly . . . (3) [o]ffer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

Prosecutors also have special responsibilities to the court, proscribed by rule 3.8 of the Rules of Professional Conduct, which provides in relevant part: "The prosecutor in a criminal case shall . . . (4) [m]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . ."

false, the materiality standard [of *Brady*] is significantly more favorable to the defendant. [A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. . . . This standard . . . applies whether the state solicited the false testimony or allowed it to go uncorrected . . . and is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless beyond a reasonable doubt. . . . This strict standard of materiality is appropriate in such cases not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process. . . . In light of this corrupting effect, and because the state's use of false testimony is fundamentally unfair, prejudice sufficient to satisfy the materiality standard is readily shown . . . such that reversal is virtually automatic . . . *unless the state's case is so overwhelming that there is no reasonable likelihood that the false testimony could have affected the judgment of the jury*. . . .

"In accordance with these principles, our determination of whether [the witness'] false testimony was material under *Brady* and its progeny requires a careful review of that testimony and its probable effect on the jury, weighed against the strength of the state's case and the extent to which [the petitioner was] otherwise able to impeach [the witness]." (Emphasis in original; internal quotation marks omitted.) *State* v. *Jordan*, supra, 314 Conn. 370–71.

Applying the foregoing principles to the petitioner's claim, we conclude that the prosecutor's failure to correct the false testimony of Philips that she was not

hoping for any consideration in exchange for her testimony violated the petitioner's due process right to a fair trial. Weighing the probable effect of Philips' testimony against the petitioner's ability to impeach her and the weaknesses of the state's case, we conclude that there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. The state's theory of the case, namely, that the petitioner shot the victim as part of the dispute between McGill, the petitioner and the victim, was largely dependent on Philips' testimony. Philips testified that on the day before the shooting, she witnessed the petitioner pull a gun out of his hoodie with his right hand, wave the gun around, and point it at the victim. She testified that the petitioner said, "you want to die, you want to die," followed by, "before [forty-eight] hours they was gonna die." The petitioner put the gun back into his hoodie when McGill told him to stop. The petitioner and Philips then left the scene in the car of a friend, Shauntay. On the ride back to Shauntay's house, the petitioner again stated, "within [forty-eight] hours somebody is going to die."

Alexander was the only other witness who testified about the dispute between the petitioner and the victim on the night before the shooting, but her testimony was far less detailed than Philips' description of the event. Alexander testified that the petitioner had a gun and "kind of waved it in the air," and stated, "I'll do anybody out here." Alexander, however, had substantial credibility issues; she was the sister of the victim, had a significant PCP addiction during 2007, and admitted that she was the individual who stole PCP from McGill in the months before the shooting. Although Alexander claimed not to know the substance of the argument between the victim, the petitioner and McGill, Philips testified that the three were clearly arguing about Alexander owing McGill money for the PCP she stole. Additionally, Philips testified that Alexander appeared to be high on PCP at the time of the dispute.

The state also offered a surveillance video into evidence to support its theory that the petitioner had killed the victim. On the night of June 20, 2007, Ernie's Café had surveillance cameras pointed in the direction of the entrance to the bar. At approximately 12:19 a.m. on June 21, 2007, the video recording showed the petitioner get up from a table where he was sitting with friends and walk toward the entrance to the bar. The petitioner was dressed in a dark shirt, light colored jeans, and a black baseball cap. The petitioner reached into the waistband of his jeans with his right hand as he walked to the front door. As the petitioner reached the entrance, the video recording showed the victim fall to the ground just outside the front door. The petitioner then ran out the front door and to his right toward Golden Street.

The state acknowledged, however, that the video does not clearly show the petitioner as the shooter of the victim.[4] The state was also unable to offer any physical evidence that identified the petitioner as the shooter of the victim, such as fingerprints, DNA, or bullet fragments. Because the state relied heavily on Philips' testimony in its closing argument, labelling her a "very important" witness in the case who "straddle[d] or reflect[ed] both sides in this matter," her credibility was important to the jury's verdict. The petitioner's trial counsel was unable to cross-examine or impeach Philips regarding her false testimony about the consideration she anticipated receiving for her favorable testimony because he was not informed that Philips received any consideration for such testimony until after she was done testifying at the petitioner's trial.

Against this background, we conclude that the prosecutor's failure to correct Philips' false testimony was

[4] During closing arguments, Gravelec-Pannone argued: "The state wishes we could give you a clearer or more enhanced video than we've shown you. . . . [T]he quality of this is not television or the movies. We can't give you a clear, pristine picture of the events."

material for the purposes of *Brady*. Philips was a crucial witness for the state. Her testimony provided evidence of motive, intent, and means on the part of the petitioner. Further, her testimony negated any possible effect that the self-defense argument by the petitioner's trial counsel may have had on the jury because it painted the petitioner as an aggressor. Therefore, any evidence that would affect her credibility would be vital to the defense. The petitioner is entitled to a new trial because the strength of the state's case was not so overwhelming that there is no reasonable likelihood that the witness' false testimony affected the judgment of the jury. Cf. *State* v. *Jordan*, supra, 314 Conn. 372.

B

The petitioner also claims that he suffered a violation of his due process rights under *Brady* because the prosecution did not disclose Philips' informal agreement with the state to receive consideration in exchange for her testimony at the petitioner's trial. In response, the respondent argues that no material evidence was withheld from the petitioner because Philips' pending charges were disclosed. Because we determine that the habeas court applied an incorrect legal standard to this issue, the petitioner is entitled to a new trial.

The habeas court's conclusion that "no exculpatory evidence was withheld from the petitioner" was premised on its factual finding that there was no evidence of a plea agreement between the state and Philips. Our case law is clear, however, that the petitioner need not establish the existence of a formal plea agreement in order to prove a *Brady* violation. "[E]vidence that merely *suggests* an informal understanding between the state and a state's witness may constitute impeachment evidence for the purposes of *Brady*. . . . Such evidence is by no means limited to the existence of plea agreements." (Citation omitted; emphasis in original.)

Diaz v. *Commissioner of Correction*, supra, 174 Conn. App. 798. "An agreement by a prosecutor with a cooperating witness to bring the witness' cooperation to the attention of the judge who later sentences the witness on his own pending criminal charges is a deal that must be disclosed to the defendant against whom [she] testifies, even if the deal does not involve a specific recommendation by the prosecutor for the imposition of a particular sentence." *Hines* v. *Commissioner of Correction*, 164 Conn. App. 712, 725, 138 A.3d 430 (2016); see also *Walker* v. *Commissioner of Correction*, 103 Conn. App. 485, 493, 930 A.2d 65 ("[a]ny such understanding or agreement between any state's witness and the state police or the state's attorney clearly falls within the ambit of the *Brady* principles"), cert. denied, 284 Conn. 940, 937 A.2d 698 (2007).

It is generally undisputed that there was an informal agreement between Philips and the prosecutor for her cooperation at the petitioner's trial, and that she received consideration for her favorable testimony. Gravelec-Pannone acknowledged that notifying the prosecutor in Philips' case that she had cooperated at the petitioner's trial was a form of consideration. The court, therefore, applied the incorrect legal standard when it determined that the petitioner had not proven a *Brady* violation because there was no evidence of a formal plea agreement between Philips and the state.

"[W]hether the court applied the correct legal standard is a question of law subject to plenary review. . . . When an incorrect legal standard is applied, the appropriate remedy is to reverse the judgment of the trial court and to remand the matter for further proceedings." (Internal quotation marks omitted.) *Carraway* v. *Commissioner of Correction*, 144 Conn. App. 461, 471, 72 A.3d 426 (2013), appeal dismissed, 317 Conn. 594, 119 A.3d 1153 (2015). Accordingly, the petitioner is entitled to a new trial on this basis.

In sum, we conclude that the petitioner has established that he suffered a *Brady* violation at his criminal trial when the prosecutor failed to correct Philips' false testimony that she did not expect to receive any consideration, aside from plane fare, in exchange for her testimony. Additionally, we conclude that the habeas court applied an incorrect legal standard in determining whether the petitioner suffered a *Brady* violation in that Philips' informal agreement with the state was not disclosed to the defense. On those bases, we further conclude that the habeas court abused its discretion in denying the petition for certification to appeal from the denial of the petition for a writ of habeas corpus.

The judgment is reversed and the case is remanded with direction to render judgment granting the petition for a writ of habeas corpus, to vacate the petitioner's conviction under § 53a-54a (a) and to order a new trial on that offense.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DONALD RAYNOR (AC 41018)

Keller, Elgo and Eveleigh, Js.

Syllabus

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed. On appeal, he claimed, inter alia, that the trial court improperly denied his motion in limine in which he sought to exclude or to limit the scope of the testimony of S, the state's expert witness on firearm and toolmark identification. Specifically, he claimed that because recent studies and reports had established that the methodology underlying firearm and toolmark identification was not sufficiently reliable, the court improperly denied his request for a hearing, pursuant to *State* v. *Porter* (241 Conn. 57), to determine the reliability of firearm and toolmark identification. *Held*:

1. The trial court did not abuse its discretion by denying the defendant's motion in limine to exclude or limit S's testimony and request for a *Porter* hearing: a *Porter* hearing to determine the validity of firearm and

toolmark identification was not required, as this court previously has determined that the science of firearm and toolmark identification is well established, and although this court's prior decision predated certain reports and studies, and other certain sources that questioned the validity of firearm and toolmark identification, those sources did not overrule or otherwise abrogate the controlling case law in this state; moreover, although the testimony of S included the flaws and criticisms of firearm and toolmark identification, to which the jury was free to give as much or as little weight as it saw fit, the defendant did not proffer his own expert witness to testify that the science of firearm and toolmark identification was not reliable.

2. The defendant could not prevail on his claim that the trial court improperly granted the state's motion for the admission of uncharged misconduct evidence related to a shooting that occurred eight months after the shooting of the victim, the trial court not having abused its discretion in determining that the probative value of the uncharged misconduct evidence outweighed its prejudicial effect; the admission of the uncharged misconduct evidence did not unduly arouse the jury's emotions because the uncharged misconduct, which involved an attempted shooting that did not result in any deaths or injuries, was much less severe than the charged conduct, which involved the shooting death of the victim, the admission of the uncharged misconduct evidence did not create a distracting side issue, as the evidence admitted linked an assault rifle and the perpetrator of the uncharged shooting to the murder at issue in the present case, the presentation of evidence related to the attempted shooting did not take up an inordinate amount of time, the defendant was not unfairly surprised by the admission of the uncharged misconduct evidence, as it was admitted in the defendant's prior trial, which had resulted in a mistrial, and the state had filed a pretrial motion for admission of uncharged misconduct evidence, and any possible prejudice was further mitigated by the trial court's limiting instructions that the uncharged misconduct evidence was being admitted solely to establish the identity of the person who committed the crimes alleged and the availability of the means to commit those crimes.

Argued January 31—officially released May 8, 2018

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before the court, *Kwak, J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Andrew O'Shea, with whom was *Damon Kirschbaum*, for the appellant (defendant).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Patrick Griffin*, state's attorney, for the appellee (state).

Opinion

EVELEIGH, J. The defendant, Donald Raynor, appeals from the judgment of conviction, rendered following a jury trial, of murder in violation of General Statutes § 53a-54a (a). On appeal, the defendant claims that the trial court (1) improperly denied the defendant's motion in limine to exclude or limit the scope of the testimony of the state's expert witness on firearm and toolmark identification, and (2) abused its discretion by granting the state's motion for uncharged misconduct related to a shooting that occurred approximately eight months after the events of this case. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, which a jury reasonably could have found, and procedural history are relevant to this appeal. The defendant and Jose Rivera[1] were members of the Money Green Bedrock (Bedrock) street gang in Hartford. The victim was a member of The Avenue, another Hartford street gang. Bedrock and The Avenue are rival gangs, and the defendant and Rivera viewed members of The Avenue as "the enemy." Prior to the events giving rise to this case, there were two incidents between the rival gangs involving the defendant and the victim. The first incident involved the victim firing shots at the defendant and another Bedrock member. The second incident, which occurred approximately one week prior to the events of this case, involved

[1] Rivera pleaded guilty to one count of conspiracy to commit murder in violation of General Statutes §§ 53a-54a (a) and 53a-48 in connection with the murder of the victim in this case. See *State* v. *Rivera*, Superior Court, judicial district of Hartford, Docket No. CR-13-0670080-T (August 4, 2015).

the victim spotting the defendant and Rivera on The Avenue's territory and subsequently taking a picture of the defendant's vehicle leaving the area. Following the second incident, the defendant stated to Rivera that the victim "had to go," which Rivera understood to mean that the victim "had to get killed for what he did."

During the early morning hours of June 18, 2007, the defendant called Rivera and stated that he wanted to find members of The Avenue and test out a .223 caliber assault rifle. Rivera understood this to mean that, "[b]asically, he wanted to go look [for] and kill somebody." The defendant picked up Rivera and drove to a parking lot located behind Bedford Street where there was an abandoned vehicle in which the defendant and Rivera stored guns and drugs. The defendant then put on latex gloves, removed a .223 caliber assault rifle from the trunk of the abandoned vehicle, and loaded the rifle. The defendant and Rivera then got back into the vehicle that they were driving; Rivera drove the vehicle and the defendant sat in the backseat.

Rivera drove the vehicle around areas that he and the defendant knew were frequented by members of The Avenue. While Rivera was driving on Enfield Street, he informed the defendant that he saw the victim standing on the sidewalk having a conversation with a woman. The defendant instructed Rivera to go around the block, and Rivera complied. As Rivera turned back onto Enfield Street, he lowered the back window and began to slow down. As the vehicle approached the victim and the woman, the defendant hung out the back window and began shooting at the victim. The victim attempted to run away but made it only three steps before he fell to the ground. The defendant continued to fire at the victim while he was on the ground. He fired at least ten to fifteen shots at the victim, who died as a result of gunshot wounds to the chest and neck.

In 2008, the police recovered a .223 Kel-Tec assault rifle in an unrelated investigation. In 2011, Rivera gave a statement to the police in which he confessed to his involvement in the victim's murder and implicated the defendant. Rivera also identified the .223 Kel-Tec assault rifle that the police had recovered in 2008 as the weapon that the defendant used to shoot the victim. In 2014, the defendant was charged, in a long form information, with murder in violation of § 53a-54a (a), conspiracy to commit murder in violation of § 53a-54a (a) and General Statutes § 53a-48 (a), and criminal use of a firearm in violation of General Statutes § 53a-216 (a). A trial on these charges commenced in September, 2014, and ended in a mistrial because the jury was unable to reach a verdict. A second trial commenced in March, 2015, in which the defendant was charged only with one count of murder in violation of § 53a-54a (a). The jury found the defendant guilty, and the court sentenced him to a total effective sentence of sixty years of imprisonment. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim on appeal is that the court abused its discretion by denying his motion in limine in which he sought to exclude or limit the scope of the testimony of James Stephenson, the state's expert firearm and toolmark examiner. The defendant raises the following arguments in support of this claim: (1) recent studies have established that the methodology underlying firearm and toolmark identification is not sufficiently reliable; (2) the court improperly denied his request for a hearing pursuant to *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), to determine the reliability of firearm and toolmark identification; (3) the court improperly allowed Stephenson to

opine that various cartridge casings recovered from the crime scene were fired from a particular firearm; and (4) the court improperly denied his motion to limit the scope of Stephenson's testimony. We disagree.

"It is axiomatic that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference. In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence. . . . Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Because a trial court's ruling under *Porter* involves the admissibility of evidence, we review that ruling on appeal for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Legnani*, 109 Conn. App. 399, 418, 951 A.2d 674, cert. denied, 289 Conn. 940, 959 A.2d 1007 (2008).

"In [*Porter*], our Supreme Court held that scientific evidence should be subjected to a flexible test, with differing factors that are applied on a case-by-case basis, to determine the reliability of the scientific evidence. . . . The court, however, did not define what constituted scientific evidence, thereby allowing the courts to maintain some flexibility in applying the test. As a result, a court's initial inquiry should be whether the [evidence] at issue . . . is the type of evidence contemplated by *Porter*. . . . In *Porter*, our Supreme Court noted that some scientific principles have become so well established that an explicit . . . analysis [under *Daubert* v. *Merrell Dow Pharmaceuticals*, *Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)] is not necessary for admission of evidence thereunder. . . . Evidence derived from such principles would clearly withstand a *Daubert* analysis, and thus may be admitted simply on a showing of relevance." (Citations omitted; internal quotation marks omitted.) *State* v. *Legnani*, supra, 109 Conn. App. 419.

The following additional facts and procedural history are relevant to the resolution of this claim. Prior to Stephenson's testimony, the defendant filed a motion in limine in which he requested a *Porter* hearing to determine whether the methodology underlying firearm and toolmark identification was reliable. In the alternative, the defendant sought to limit Stephenson's testimony so that he could not state his conclusions to a particular degree of certainty but, instead, would have been required to state that his conclusions were "merely more likely than not . . . correct." In support of his request for a *Porter* hearing, the defendant relied on multiple studies that called into question the scientific validity of firearm and toolmark identification.[2] The defendant also relied upon *United States* v. *Glynn*, 578 F. Supp. 2d 567 (S.D.N.Y. 2008), to support his alternative argument that the scope of Stephenson's testimony should be limited to opining that his conclusions were "more likely than not" correct.[3]

[2] One such study was the Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, "Strengthening Forensic Science in the United States: A Path Forward," (2009), available at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf (last visited April 30, 2018) (NAS Report). The NAS Report explained that "[b]ecause not enough is known about the variabilities among individual tools and guns, we are not able to specify how many points of similarity are necessary for a given level of confidence in the result. Sufficient studies have not been done to understand the reliability and repeatability of the methods." Id., 154. The study added that "[a]lthough some studies have been performed on the degree of similarity that can be found between marks made by different tools and the variability in marks made by an individual tool, the scientific knowledge base for toolmark and firearms analysis is fairly limited." Id., 155.

Another such study was the Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database, "Ballistic Imaging," (2008), available at http://www.nap.edu/catalog/12162.html (last visited April 30, 2018) (Ballistic Imaging). The Ballistic Imaging study found that "[t]he validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated." (Emphasis omitted.) Id., 3.

[3] The court in *United States* v. *Glynn*, supra, 578 F. Supp. 2d 567, stated that "ballistics examination not only lacks the rigor of science but suffers from greater uncertainty than many other kinds of forensic evidence. Yet

Following argument on the motion, the court denied the defendant's motion in limine and request for a *Porter* hearing, relying on *State* v. *Legnani*, supra, 109 Conn. App. 399. The court reasoned that firearm and toolmark evidence is "forensic science [that] has been well established, and we have a case, [*Legnani*] . . . which stands for the proposition that this is not a new science. Therefore, a *Porter* hearing is not necessary." The court also denied the defendant's request to limit Stephenson's testimony to state that his conclusions were "more likely than not . . . correct."

Stephenson subsequently testified before the jury that it was possible to determine whether the bullets or cartridge casings recovered from a crime scene could be identified as having been fired from a particular firearm. In fact, twelve of the fifteen cartridge casings recovered from the Enfield Street shooting were "positively matched" to the .223 Kel-Tec assault rifle that Rivera had identified as the firearm that the defendant used to shoot the victim. Although the three remaining cartridge casings were the same size and weight as a .223 caliber shell casing and contained similar toolmarks, there was not sufficient detail for a positive identification to the particular firearm in evidence. The

its methodology has garnered sufficient empirical support as to warrant its admissibility. . . . The problem is how to admit it into evidence without giving the jury the impression . . . that it has greater reliability than its imperfect methodology permits. The problem is compounded by the tendency of ballistics experts . . . to make assertions that their matches are certain beyond all doubt, that the error rate of their methodology is zero, and other such pretensions. Although effective cross-examination may mitigate some of these dangers, the explicit premise of *Daubert* and *Kumho Tire* [*Co.*, *Ltd.* v. *Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)] is that, when it comes to expert testimony, cross-examination is inherently handicapped by the jury's own lack of background knowledge, so that the [c]ourt must play a greater role, not only in excluding unreliable testimony, but also in alerting the jury to the limitations of what is presented." (Citation omitted; internal quotation marks omitted.) *United States* v. *Glynn*, supra, 574. The court ordered that any testimony from the ballistics expert would be limited to "only that a firearms match was more likely than not . . . ." (Internal quotation marks omitted.) Id., 574–75.

examiner determined that the three remaining cartridge casings produced inconclusive results.

Stephenson also testified regarding the Association of Firearm and Tool Mark Examiners (association) and its theory of identification. The association's theory of identification is generally accepted in the science of firearm and toolmark identification, and the Connecticut Forensic Science Laboratory follows the guidelines from this theory. Stephenson conceded, however, that recent studies and reports have critiqued the science of firearm and toolmark identification. Stephenson testified regarding the NAS Report and the Ballistic Imaging studies; see footnote 2 of this opinion; and explained that he viewed some, but not all, of the critiques in those studies as valid. Defense counsel also highlighted the ways in which firearm and toolmark identification does not follow precisely the scientific method—i.e., by not protecting against confirmation bias—and that the association's theory of identification is not a completely objective theory.

On appeal, the defendant claims that the court abused its discretion by denying his motion in limine and request for a *Porter* hearing. The defendant argues that the NAS Report and the Ballistic Imaging studies establish that the methodology underlying firearm and toolmark identification is not reliable, and as a result, the court should have precluded Stephenson from opining that particular cartridge casings positively matched the firearm in evidence. In the alternative, the defendant argues that the court should have limited Stephenson's testimony so that he could opine only that his conclusions were "more likely than not . . . correct." The state argues that the court properly relied upon *State* v. *Legnani*, supra, 109 Conn. App. 399, in concluding that the admissibility of firearm and toolmark identification evidence is well established and, therefore, properly denied the defendant's motion. We agree with the state.

This court's decision in *Legnani* controls our resolution of this claim. In *Legnani*, the defendant requested that the trial court hold a *Porter* hearing to determine whether the comparison between a firearm's magazine that was recovered from the defendant's home and fired cartridge casings that were recovered from the crime scene was relevant and supported by a valid methodology. Id., 415–16. The state argued that a *Porter* hearing was not necessary, as the evidence fell within the general category of firearm and toolmark identification, which courts routinely have held admissible. Id., 416. The trial court held an evidentiary hearing—not a *Porter* hearing—during which the state called an expert witness in the field of firearm and toolmark identification. Id. The defendant did not call any witnesses during the evidentiary hearing, and the court subsequently denied the defendant's request for a *Porter* hearing. Id., 417. In so doing, the court stated that it "need not conduct a *Porter* type hearing in this case because the scientific principles of ballistics and firearms analysis are very well established and can be admitted on a mere showing [of] relevance." (Internal quotation marks omitted.) Id.

On appeal, the defendant in *Legnani* argued that the trial court improperly denied his request for a *Porter* hearing. Id., 415. This court noted that "[s]everal times during the cross-examination of [the expert], defense counsel attempted to inquire into the specific methodology used by [the firearm and toolmark examiner]. The court precluded defense counsel from delving too deeply into the specific methodology used, sustaining the state's objection that the specific methodology used pertains to the weight of the evidence and not to the request for a *Porter* hearing." Id., 417. This court concluded that "identifying marks made on the magazine by the cartridge casings is merely a subset of the science of firearm and tool mark identification, *which has been well established and admissible evidence under prior*

case law. . . . Because identifying the magazine markings is a subset of the *well established and admissible science and practice of firearm and tool mark identification*, the court did not have to subject evidence related thereto to a *Porter* hearing. As a result, we conclude that the court did not abuse its discretion in refusing to hold a *Porter* hearing." (Citations omitted; emphasis added.) Id., 420–21.

Legnani is controlling precedent on the issue of whether the science of firearm and toolmark identification is well established, and thus binds our resolution of this claim.[4] The defendant argues that *Legnani* is

[4] The defendant urges this court to overrule *Legnani*. "[T]his court's policy dictates that one panel should not . . . reverse the ruling of a previous panel. The reversal may be accomplished *only* if the appeal is heard en banc." (Emphasis added; internal quotation marks omitted.) *Boccanfuso* v. *Conner*, 89 Conn. App. 260, 285 n.20, 873 A.2d 208, cert. denied, 275 Conn. 905, 882 A.2d 668 (2005). On November 27, 2017, the defendant filed a motion for consideration en banc, which this court denied on January 10, 2018. Additionally, the entire court has not ordered that this case be considered en banc pursuant to Practice Book § 70-7 (b), nor are we persuaded that en banc review is warranted. Therefore, we will not overrule *Legnani*.

We do acknowledge, however, that there has been some evolvement in the field of firearm and toolmark identification since this court decided *Legnani*. As the defendant pointed out before the trial court and in his briefs to this court, recent studies and cases have questioned the scientific validity of firearm and toolmark identification. We are familiar with the findings and conclusions of the NAS Report and the Ballistic Imaging studies, which explain the limitations that exist in the science of firearm and toolmark identification; see footnote 2 of this opinion; as well as the holding of *United States* v. *Glynn*, supra, 578 F. Supp. 2d 567, which limited the scope of the testimony regarding firearm and toolmark identification in that case. See footnote 3 of this opinion; see also *State* v. *Burton*, Superior Court, judicial district of New Haven, Docket No. CR-14-0150831-S (February 1, 2017) (court applied *Legnani* in ruling that firearm and toolmark identification evidence is reliable and not subject to *Porter*, but limited testimony of state's firearm and toolmark identification expert to be that recovered cartridge casing was *consistent* with being fired from particular firearm, and expert could not opine that recovered casing was *match* to particular firearm). Defense counsel also extensively cross-examined Stephenson regarding the recent criticisms of firearm and toolmark identification, during which Stephenson acknowledged the validity of at least some of those criticisms. Even if we were inclined to review the scientific validity of firearm and toolmark

inapplicable because it predates the NAS Report, the Ballistic Imaging study, and other sources that question the validity of firearm and toolmark identification. Although *Legnani* was decided prior to these reports being published, these reports do not overrule or otherwise abrogate the existing case law in this state; nor do the district court cases or the cases from other states that the defendant has cited in support of this claim. More importantly, the defendant did not proffer his own expert witness to testify that the science of firearm and toolmark identification is not reliable.

The evidence admitted during the cross-examination of Stephenson included the flaws and criticisms of firearm and toolmark identification. The jury was free to give this evidence as much or as little weight as it saw fit. 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). A *Porter* hearing to determine the validity of firearm and toolmark identification was not required. The state had to establish only that the firearm and toolmark evidence was relevant, which it did. Therefore, we conclude that the court properly relied upon *Legnani*, and did not abuse its discretion by denying the defendant's motion in limine to exclude or limit Stephenson's testimony.

II

The defendant's second claim on appeal is that the court abused its discretion by granting the state's

identification—and therefore inclined to review the holding of *Legnani*—the circumstances of the present case do not warrant a departure from our precedent. The defendant has not proffered his own expert to rebut the notion that firearm and toolmark evidence is sufficiently reliable as to be admitted without first requiring a *Porter* hearing. Therefore, we adhere to our precedent that holds that the admissibility of firearm and toolmark identification is well established.

motion for the admission of uncharged misconduct evidence. The defendant argues that the probative value of the uncharged misconduct evidence was outweighed by the risk of unfair prejudice. The state argues that the court properly admitted the evidence to establish identity and means. We agree with the state.

The following additional facts and procedural history are relevant to the resolution of this claim. Prior to the start of the second trial, the state filed a motion in which it sought to introduce uncharged misconduct evidence related to a shooting on Baltimore Street that had occurred eight months after the shooting of the victim. The state argued that the uncharged misconduct evidence was admissible to establish identity and means. The defendant opposed this motion, arguing that the evidence was more prejudicial than probative because the evidence showed only "that this gun was used on a separate occasion potentially by [the defendant] to shoot at another person that he's not charged with [shooting] in this case. . . . It's the very sort of thing that yields the prejudice/probative . . . calculus . . . in the prohibition against propensity evidence. . . . [W]e think the state has everything it needs to prove the manner and means of the homicide as charged, [and] that to introduce another shooting, the gun charged in this case, is prejudicial, and in mar of the propensity of evidence rule." The court granted the state's motion for uncharged misconduct on the basis of its interpretation of the rules of evidence,[5] and concluded that evidence of the Baltimore Street shooting fell within the identity and means exceptions of § 4-5 (c) of the Connecticut Code of Evidence.[6]

[5] The court also noted that its decision was based, in part, on the law of the case doctrine, as the evidence had been admitted in the defendant's first trial.

[6] On three occasions, the court gave the jury a limiting instruction regarding the use of the uncharged misconduct evidence.

At trial, Deborah Parker, the target of the Baltimore Street shooting, testified that at approximately 2:30 a.m., on February 16, 2008, she and Daryl Spence returned to their residence on Baltimore Street in Hartford, where they resided with their two sons. As Parker and Spence prepared to exit their vehicle, Parker noticed two men walking in the street. As the men approached, one man fired a handgun in Parker's direction. The other man then raised a rifle and began firing it in Parker's direction. Parker took cover underneath a vehicle and Spence ran away to hide elsewhere. Parker saw the faces of both shooters, which were made visible due to the streetlight. She also noticed that the man with the rifle was wearing white or light colored gloves. Neither Parker nor Spence was injured.

Later that morning, Parker's sons were looking online through pictures of a concert that they had attended the night before. While Parker was passing by, she saw on the computer screen a photograph of two men, whom she recognized as the men who had shot at her just hours before. She identified the defendant as the man who had shot the rifle in her direction. Parker testified that she called the detective who was assigned to investigate the shooting to report the identity of the shooters. Because the detective never got back to her, however, she "left the whole situation alone."

In August, 2011, Parker met with a cold case detective in Hartford to review photographs related to the Baltimore Street shooting. During this meeting, Parker identified the defendant's picture in a photographic array and circled it to indicate that he was involved in the shooting. In a separate photographic array, Parker identified the second shooter as an individual named Ezekiel.

Stephenson testified regarding the cartridge casings that were recovered from the Baltimore Street shooting.

There were twenty-two cartridge casings recovered, seventeen of which were positively matched to the .223 Kel-Tec assault rifle that Rivera identified as the firearm the defendant had used in the Enfield Street shooting. See part I of this opinion.

On appeal, the defendant does not challenge the court's conclusion that the uncharged misconduct evidence was relevant to establish identity and means. Accordingly, the only question we must resolve with respect to this claim is whether the court abused its discretion in concluding that the probative value of the uncharged misconduct evidence outweighed its prejudicial effect. The defendant argues that the evidence is more prejudicial than probative because "Parker's identification of the defendant was exceedingly unreliable," that the similarities between the charged and uncharged conduct render admission of the uncharged misconduct overly prejudicial, and that the uncharged misconduct evidence painted the defendant as a "deranged gunman." We disagree.

"[A]s a general rule, evidence of prior misconduct is inadmissible to prove that a criminal defendant is guilty of the crime of which the defendant is accused. . . . Such evidence cannot be used to suggest that the defendant has a bad character or a propensity for criminal behavior. . . . On the other hand, evidence of crimes so connected with the principal crime by circumstance, motive, design, or innate peculiarity, that the commission of the collateral crime tends directly to prove the commission of the principal crime, is admissible. The rules of policy have no application whatever to evidence of any crime which directly tends to prove that the accused is guilty of the specific offense for which he is on trial. . . . We have developed a two part test to determine the admissibility of such evidence. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions

[set forth in § 4-5 (b) of the Connecticut Code of Evidence].[7] . . . Second, the probative value of the evidence must outweigh its prejudicial effect. . . . Because of the difficulties inherent in this balancing process, the trial court's decision will be reversed only whe[n] abuse of discretion is manifest or whe[n] an injustice appears to have been done. . . . On review by this court, therefore, every reasonable presumption should be given in favor of the trial court's ruling. . . .

"The well established exceptions to the general prohibition against the admission of uncharged misconduct [evidence] are set forth in § 4-5 (b) of the Connecticut Code of Evidence, which provides in relevant part that [e]vidence of other crimes, wrongs or acts of a person is admissible . . . to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony." (Citation omitted; footnote added; internal quotation marks omitted.) *State* v. *Collins*, 299 Conn. 567, 582–83, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

"In determining whether the prejudicial effect of otherwise relevant evidence outweighs its probative value, we consider whether: (1) . . . the facts offered may unduly arouse the jury's emotions, hostility or sympathy, (2) . . . the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) . . . the evidence offered and the counterproof will consume an undue

[7] When *State* v. *Collins*, 299 Conn. 567, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011), was decided, the 2009 edition of the Connecticut Code of Evidence was applied in that case. In the 2009 edition, the exceptions to the propensity of the evidence rule were found in § 4-5 (b). By the time of the trial in the present case, however, a new edition of the Code of Evidence had been released, and § 4-5 (b) has been transferred to § 4-5 (c).

amount of time, and (4) . . . the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) Id., 586–87.

Our Supreme Court's decision in *State* v. *Collins*, supra, 299 Conn. 567, guides our resolution of this claim. In *Collins*, the trial court admitted evidence of uncharged misconduct related to another shooting in which the defendant allegedly was involved. Id., 569–70, 580. The state's firearm and toolmark examiner testified that cartridge casings recovered from the scene of the murder at issue were fired from the same weapon that had been used in the uncharged crime. Id., 572. The state argued that such evidence was admissible because "it linked a gun owned and used by the defendant [in the uncharged shooting] to the shooting of [the victim] in this case." Id., 577. The defendant argued that the admission of such evidence was "highly prejudicial and of little probative value," and that the evidence "would inflame the jury" due to the similarities between the charged and uncharged shootings. (Internal quotation marks omitted.) Id., 574–75.

On appeal, this court agreed that the trial court abused its discretion in admitting the uncharged misconduct evidence and reversed and remanded the case for a new trial. Id., 576. The state appealed to our Supreme Court, which reversed this court's judgment. Id., 586. In so doing, the court noted, inter alia, that "[u]ncharged misconduct evidence has been held not unduly prejudicial when the evidentiary substantiation of the vicious conduct, with which the defendant was charged, far outweighed, in severity, the character of his prior misconduct." (Internal quotation marks omitted.) Id., 588. The court also stated that it found "significant in mitigating any possible prejudice the limiting instructions . . . given by the trial court both during the testimony of relevant witnesses and during the final jury

charge, which we presume the jury to have followed in the absence of any indication to the contrary." Id., 590. In addition, the court cited "numerous other [decisions from] federal and state courts that have rejected challenges, founded on undue prejudice, to the use of uncharged misconduct evidence in cases wherein the charged offenses were committed using the same gun that the defendant had utilized in [the uncharged] prior shootings." Id.

Here, the severity of the charged conduct outweighed the severity of the uncharged conduct. The charged conduct derived from the drive-by shooting of the victim, which resulted in the death of the victim. The uncharged conduct derived from the attempted shooting of Parker and Spence, and did not result in any deaths or even any injuries. Cf. id., 588 (uncharged conduct related to prior, less severe shooting found admissible, where defendant charged with murder, felony murder, and robbery in first degree in connection with shooting death).

Additionally, the court in the present case gave the jury limiting instructions on three occasions: (1) prior to the state first presenting evidence of the Baltimore Street shooting; (2) following Parker's testimony; and (3) during its final charge to the jury. These limiting instructions provided, inter alia, that the uncharged misconduct evidence was being admitted "solely to show or establish [the] identity of the person who committed the crimes alleged in this information, and the availability of the means to commit those crimes."[8]

On the basis of our review of the record, we conclude that the court did not abuse its discretion in determining that the probative value of the uncharged misconduct

[8] "In the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them." (Internal quotation marks omitted.) *State* v. *Santiago*, 269 Conn. 726, 762, 850 A.2d 199 (2004).

evidence outweighed its prejudicial effect. Although the facts of the uncharged misconduct involved the defendant attempting to shoot Parker and Spence, they were much less severe than those of the charged conduct and, therefore, admission of the uncharged misconduct evidence cannot be said to have unduly aroused the jury's emotions. Nor can we say that admission of the uncharged misconduct evidence created a distracting side issue, as the evidence admitted linked the rifle and the perpetrator of the uncharged shooting to the murder at issue in this case. Additionally, the presentation of evidence related to the Baltimore Street shooting did not take up an inordinate amount of time, as the presentation of the uncharged misconduct evidence comprised at most one and one-half days of a six day trial.[9] Finally, the defendant was not unfairly surprised by the admission of this evidence, as it was admitted in the defendant's first trial and the state filed a pretrial motion for the admission of uncharged misconduct evidence. Accordingly, we conclude that the court did not abuse its discretion by admitting the uncharged misconduct evidence related to the Baltimore Street shooting.

The judgment is affirmed.

In this opinion the other judges concurred.

MARK HENDERSON *v.* COMMISSIONER OF CORRECTION
(AC 39493)

Keller, Elgo and Beach, Js.

Syllabus

The petitioner, who had been convicted, on a guilty plea, of robbery in the first degree as a persistent dangerous felony offender, sought a writ of

[9] In addition, as the state notes, three of the witnesses who testified about the uncharged Baltimore Street shooting testified primarily about the charged conduct.

habeas corpus, claiming that the trial court deprived him of his right to due process in his criminal case by, inter alia, refusing to let him represent himself or to allow his appointed trial counsel, D, to withdraw, and that D provided ineffective assistance. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. He claimed, inter alia, that the habeas court, in denying his petition for certification to appeal, erroneously determined that, by virtue of his unconditional guilty plea, he had waived his pretrial claims of ineffective assistance of counsel and structural error related to his right of self-representation. *Held:*

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to the petitioner's claims that the habeas court improperly refused to permit him to represent himself, to permit D to withdraw as counsel, to provide him with an investigator and to recuse itself: because an unconditional guilty plea deprives a petitioner of the ability to collaterally challenge his conviction when the claims are based on nonjurisdictional defects that are unrelated to the voluntariness of the plea, the petitioner was unable to demonstrate that he did not implicitly waive the claims at issue by virtue of his unconditional guilty plea, and the petitioner's reliance on *Hill* v. *Lockhart* (474 U.S. 52) for the proposition that it prohibits the application of the waiver rule to claims of ineffective assistance of counsel following an unconditional guilty plea was unavailing, as *Hill* was not inconsistent with the application of the waiver rule, nor did it undermine the rule's application in the present case in which the specific claims of ineffectiveness were unrelated to the validity of the unconditional guilty plea; moreover, there was no relevant authority that directly supported the petitioner's argument that his claims related to self-representation and the court's refusal to remove D as trial counsel were not subject to the waiver rule, as the petitioner could not demonstrate that any of the rulings at issue affected his decision to plead guilty, and the habeas court found that despite D's contested representation of the petitioner, the decision to accept the state's plea offer and to plead guilty was made solely by the petitioner.

2. The petitioner could not prevail on his claim that his guilty plea was not knowing, intelligent and voluntary because D failed to remove himself as counsel and that had D rendered effective representation or the court permitted the petitioner to represent himself, he would have not pleaded guilty and would have insisted on exercising his right to a trial; although the petitioner purported to challenge the validity of his plea, his claim on appeal was an attempt to litigate pretrial claims of ineffective representation and rulings with respect to self-representation, and because, if any ineffective assistance occurred, it was antecedent to the plea hearing and known by the petitioner, it was effectively waived by the plea of the petitioner, who failed to show that any of the alleged deficiencies

in D's representation rendered his subsequent guilty plea invalid and to undermine the habeas court's determination that he had not been compelled to plead guilty and that his decision to plead guilty was made knowingly and voluntarily.

Argued January 18—officially released May 8, 2018

Procedural History

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

Heather Clark, assigned counsel, for the appellant (petitioner).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Kevin D. Lawlor*, state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

KELLER, J. The petitioner, Mark Henderson, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims that the court abused its discretion by denying his petition for certification to appeal on the ground that it was untimely[1] and, in the alternative, on its merits. With respect to the petitioner's claim that the habeas court abused its discretion in its consideration of the merits of the petition, he claims that the court erroneously determined that, by virtue of his unconditional guilty plea, he waived his pretrial claims

[1] In light of our determination that the court properly denied certification in its consideration of the merits of the petitioner's claims, we do not reach the merits of his claim that the court improperly denied certification because his petition for certification was untimely.

of ineffective assistance of counsel and claims of structural error related to his right of self-representation. The petitioner also claims that, absent counsel's ineffectiveness and the court's denial of his right to self-representation, he would not have pleaded guilty and would have insisted on exercising his right to a trial. We conclude that the court properly exercised its discretion in denying the petition for certification to appeal and, accordingly, we dismiss the appeal.

The following procedural history underlies the present appeal. In 2011, following the court's acceptance of the petitioner's guilty plea, the petitioner was convicted of robbery in the first degree as a persistent dangerous felony offender in violation of General Statutes §§ 53a-134 (a) (2) and 53a-40 (a) (1) (A) (B) (iv). The court sentenced the petitioner to serve a twenty-year term of incarceration. The petitioner did not file a direct appeal.

In 2013, the petitioner, acting in a self-represented capacity, brought a petition for a writ of habeas corpus. On September 4, 2015, the petitioner, still acting in a self-represented capacity, brought the seven count amended petition that the habeas court denied. The habeas court reasonably interpreted the fifty-eight page amended petition to allege that two of the trial judges who made rulings in his criminal case (*Keegan*, *J.* and *Iannotti*, *J.*) deprived the petitioner of his right to due process by (1) refusing to permit him to represent himself; (2) refusing to permit appointed defense counsel, John Drapp, to withdraw his appearance in the case; (3) refusing the petitioner's request to be provided with the services of an investigator at the state's expense; and (4) refusing to recuse themselves from the case. Additionally, the court interpreted the amended petition to allege that Drapp had rendered ineffective assistance by virtue of his (1) declining to prepare and present a defense based on the doctrine of necessity, (2) failing

to interview certain witnesses, (3) failing to remove himself as defense counsel, (4) failing to advise him of the sentencing consequences of being convicted as a persistent dangerous felony offender, and (5) failing to advise him with respect to his right to appeal.

In his return, the respondent, the Commissioner of Correction, contested the allegations of ineffective assistance of counsel. With respect to the petitioner's claims of structural error in counts one and two of the amended petition (alleging errors by the court during the pretrial period), the respondent alleged in the alternative that the petitioner had failed to state a claim on which relief could be granted and that the claims were procedurally defaulted because the claims were not raised by the petitioner prior to the habeas proceeding and the petitioner could not demonstrate cause and prejudice to excuse such default. In his reply, the petitioner contested the allegation of procedural default, but did not deny that he had failed to raise the claims at issue by way of a direct appeal or set forth any cause for such failure.

The habeas court conducted a trial, during which the petitioner represented himself. On June 30, 2016, the habeas court rendered judgment denying the petition. The habeas court's memorandum of decision provides in relevant part as follows: "The petitioner was arrested for the armed robbery of a bank. He readily admits robbing the bank. He also acknowledges a lengthy criminal history, including previous bank robberies, which qualified him for treatment as a persistent dangerous felony offender. Attorney David Egan . . . was appointed to represent the petitioner [at his criminal trial]. On June 14, 2011, the petitioner requested that Attorney Egan be removed as counsel and that he be permitted to handle his own defense. At Attorney Egan's request, the court appointed Paul Carty to represent the petitioner on September 7, 2011.

"The petitioner continued his quest to represent himself and moved for Judge Arnold to recuse himself. Attorney Carty urged the court to order a competency examination and, pursuant to General Statutes § 54-56d, Judge Arnold granted that request.

"On November 29, 2011, the requisite competency proceeding was held, and Judge Arnold determined that the petitioner was able to understand the nature of the charges against him, the proceedings in which he was involved, and to assist counsel in his own defense. Also, on that date, the petitioner demanded that Attorney Carty withdraw as his attorney. Judge Arnold denied that request and denied a recusal motion.

"On January 12, 2012, the court granted the petitioner's request to appear for himself and, eventually, Attorney Drapp became standby counsel. The petitioner asked for the assistance of an investigator, and Attorney Drapp engaged his customary investigator to help the petitioner. However, the petitioner refused to work with that investigator.

"The petitioner, on April 30, 2012, requested new standby counsel based on a perceived conflict of interest with Attorney Drapp. Judge Keegan discerned no genuine conflict of interest, and denied the motion. Jury selection was scheduled to begin on June 19, 2012. The Office of the Chief Public Defender allowed special public defender Drapp to retain a different investigator.

"On June 7, 2012, Judge Keegan ruled that the petitioner [had] forfeited his right to represent himself based on his persistent misbehavior in the courtroom. Attorney Drapp was then tasked with representing the petitioner in full. Judge Keegan filed a written memorandum [of decision] on June 21, 2012, articulating her decision to revoke the petitioner's opportunity to represent himself.

"In response, the petitioner moved for [for Attorney Drapp to be removed as counsel] and [for] Judge Keegan's recusal. Attorney Drapp also moved to withdraw as counsel. These motions were denied, but the imminent jury trial was postponed.

"Frustrated by these decisions, the petitioner engaged in a hunger strike. In the interim, Attorney Drapp thoroughly familiarized himself with the evidence in the case. Attorney Drapp suggested an emotional distress type of defense, but the petitioner strongly disagreed with that strategy. Instead, he insisted that Attorney Drapp pursue the common-law defense of necessity based on the petitioner's claim that he had to rob a bank to obtain sufficient funds to relocate [the residence of] his mother. He perceived that his past activities as a government informant placed his and her life in danger should the targets of his assistance seek vengeance.

"Attorney Drapp tried, in vain, to convince the petitioner that this doctrine was not a legitimate defense to the armed robbery [that] he conceded he [had] perpetrated. The petitioner obstinately refused to recognize this reality."

After the court set forth legal principles related to the common-law defense of necessity and duress, it concluded that such defenses were not available to the petitioner. The court stated: "[N]o one demanded that the petitioner rob a bank under threat of an imminent use of force against him or his mother. The lack of financial wherewithal to extricate oneself from a vague and generalized fear of possible harm in the unspecified future simply provides no excuse to commit bank robbery under our system of criminal justice. As ardently as the petitioner may wish it were otherwise, Attorney Drapp's refusal to pursue such a fanciful defense was ethically and professionally mandated.

"The petitioner's criminal trial was rescheduled to begin on April 30, 2013. A second competency examination was ordered, and the hearing resulting from that examination took place on April 12, 2013. Judge Iannotti found [that] the petitioner [was] competent to stand trial.

"On April 29, 2013, the petitioner agreed to plead guilty to robbery in the first degree as a persistent dangerous felony offender in exchange for the prosecutor's nolle of other charges and a recommended ceiling of twenty-five years to serve and a floor of the mandatory minimum ten year sentence. On July 16, 2013, Judge Iannotti imposed the twenty year term noted above."

The court proceeded in its analysis to conclude that "[t]he petitioner's claims that pertain to alleged improprieties by the judicial officers or Attorney Drapp that are unrelated to the validity of his guilty plea on April 29, 2013, were forfeited by virtue of that plea of guilty." The court engaged in a significant legal analysis of the waiver issue, observing that "[t]he general rule is that a guilty plea waives all nonjurisdictional defects antecedent to the entering of the plea, including defects asserting constitutional deprivations . . . . Only defects which implicate the subject matter jurisdiction of the court survive a later valid guilty plea, and defects asserting a lack of personal jurisdiction over an accused are waived by a subsequent guilty plea. . . . This waiver rule applies equally to matters raised by way of direct appeal or by collateral attack, such as through a petition for habeas corpus relief . . . . A claim of ineffectiveness of counsel at an antecedent proceeding is the kind of defect ordinarily waived by a later guilty plea." (Citations omitted.) The court observed as a general rule that, subject to the limited exception codified in General Statutes § 54-94a, "a later guilty plea washes away nonjurisdictional, pre-plea errors . . . ."

The court went on to conclude: "Consequently, any alleged judicial errors regarding self-representation, recusal, access to investigators, and removal of appointed counsel were waived by the entry of the petitioner's guilty plea on April 29, 2013. Similarly, any claims of ineffective assistance of Attorney Drapp concerning lack of preparation, refusal to interview certain witnesses or to obtain certain documents, conflicts of interest, and the refusal to pursue a necessity defense were also forfeited by that plea.

"Therefore, the only remaining ineffectiveness claims upon which habeas corpus relief can be based center on Attorney Drapp's advice and representation surrounding the petitioner's guilty plea. The petitioner has never alleged that Attorney Drapp failed to apprise him of the elements of robbery in the first degree and being a persistent dangerous felony offender. Nor has he averred that Attorney Drapp misinformed him as to the trial rights he gave up by pleading guilty nor as to the terms of the plea agreement. Also, a factual basis for the crime and status was conceded and obvious.

"The petitioner also makes no claim that Judge Iannotti's plea canvass [was legally deficient] . . . . Nor does he contend that he was misinformed as to the maximum and mandatory minimum imposable sentence by the judge or Attorney Drapp. Except for adverse immigration consequences, a trial court need not inform a criminal defendant of all possible ramifications which may flow from a plea of guilty . . . .

"The particular deficiencies that the petitioner does assert are that his hunger strikes so affected his thought processes that he was unable to intelligently, knowingly, and voluntarily decide to plead guilty and forgo a jury trial. He further avers that this debilitation caused him to succumb to the coercion exercised by Attorney Drapp. The court finds this allegation unproven.

"As mentioned earlier, the court ordered a second competency evaluation of the petitioner shortly before he entered his guilty plea. On April 12, 2013, Dr. Joseph Chien, a fellow in psychiatry at Yale University, testified that the petitioner understood the nature and attendant sentence for each crime of which he was accused; [that he] accurately recounted the roles of the various courtroom participants; and that he had a comprehensive knowledge of the legal proceedings in which he was enmeshed. Dr. Chien further opined that the petitioner was able to discuss possible plea dispositions rationally and even expressed a willingness to plead guilty in exchange for a ten year prison sentence. Dr. Chien also felt, however, that the petitioner's deep distrust of attorneys, including Attorney Drapp, disabled him from meaningfully assisting counsel. The doctor acknowledged that the question of the petitioner's capacity to work with an attorney was a 'close call.' After the hearing, Judge Iannotti ruled that the petitioner was legally competent to stand trial.

"Dr. Chien had reviewed the petitioner's medical records kept by the Department of Correction which review encompassed the periods of hunger strike. The doctor related that, during these events, the petitioner continued to drink water and protein drinks and had only lost twenty pounds over his four month abstinence.

"Attorney Drapp testified at the habeas hearing. He recalled that the petitioner, if convicted after trial, faced a maximum, effective sentence equivalent to life imprisonment. The petitioner concurred that he was aware of this exposure. Attorney Drapp stated that he strongly recommended that the petitioner accept the state's offer, however, he never coerced or badgered the petitioner into changing his plea. The court finds Attorney Drapp's testimony credible on this point.

"Dr. James Elderkin, a specialist in internal medicine at a facility that treats inmates at the University of

Connecticut Health Center, monitored the petitioner's medical condition during the two hunger strikes and for some time after his guilty plea proceeding. In his assessment, the petitioner's hunger strike created no medical condition that had impinged on his ability to participate in that proceeding. He observed that the petitioner exhibited no altered mental state impairing his comprehension skills. Had he seen evidence of such impairment, Dr. Elderkin would have intervened by prohibiting the petitioner's trip to court.

"Neither party introduced a transcript of the guilty plea hearing of April 29, 2013. However, Judge Iannotti rendered findings that were recorded as docket entries by the clerk. Judge Iannotti decided that the petitioner's guilty pleas 'were . . . given freely and knowingly with [the] advice of counsel.' In the absence of credible evidence to the contrary, this court determines that the petitioner's restrictive diet did not diminish his ability to comprehend the terms of the plea agreement; the trial rights that he was yielding by pleading guilty; the elements and maximum and minimum mandatory sentences of robbery [in the] first degree as a persistent dangerous felony offender; and the advice [that] Attorney Drapp gave him. The petitioner has failed to meet his burden of proving, by a preponderance of the evidence, that his guilty plea was unknowing, involuntary, or the subject of coercion by Attorney Drapp.

"[The petitioner's] assertion that he was 'forced' to plead guilty appears to be a metaphorical use of that word rather than a literal or legal one. Unquestionably, the petitioner faced unenviable circumstances and limited options. The evidence against him overwhelmingly and undisputedly demonstrated that he robbed bank employees in excess of $3000 while armed with an operable firearm. His terrible and lengthy history of criminal convictions and prison sentences made the prospect of spending the remainder of his life behind

bars quite likely if convicted, once again, for bank robbery. The pressure to accept the state's very reasonable proposal created by the weight of the above realities did not invalidate the guilty plea or render Attorney Drapp's advice to do so deficient.

"The petitioner also argues that his hearing impairment ought to justify [the] overturning of his conviction. The court also rejects this contention. A review of the transcripts of the petitioner's many court appearances belies this claim. He exhibited little difficulty understanding the dialogue as it occurred. The doctors that interacted with him never found his diminished hearing to be so manifest as to require extended comment. Attorney Drapp observed no impediments in the petitioner's ability to understand and respond to oral communications. Although the petitioner complained that his hearing aid malfunctioned occasionally at the habeas hearing, the court discerned no instances in which the petitioner's hearing deficit significantly impeded his ability to comprehend what was being discussed in court. The court is very confident that the petitioner's hearing problem played no role in his voluntary and knowing decision to plead guilty.

"The final issue the court must address concerns the petitioner's claim that Attorney Drapp never disclosed to him that he could appeal from the conviction that resulted from his guilty plea. However, unless the petitioner expressly inquired about taking an appeal or unless Attorney Drapp had reason to believe that a rational defendant in the petitioner's situation would want to appeal, Attorney Drapp had no 'constitutionally-imposed duty to consult with the [petitioner] about an appeal' . . . . Neither predicate circumstance existed in the present case. Therefore, the petitioner cannot prevail as to this specification of ineffective assistance." (Citation omitted.)

On July 12, 2016, twelve days following the court's decision denying the petition for a writ of habeas corpus, the petitioner filed a petition for certification to appeal; see General Statutes § 52-470 (g); and an application for waiver of fees, costs, and expenses and appointment of counsel on appeal (fee waiver application). See General Statutes § 52-259b. In his petition for certification to appeal, the petitioner stated that the grounds for his request for certification were set forth in his fee waiver application. In the fee waiver application, the petitioner stated the following ground for his appeal: "[W]hether the habeas court abused its discretion by failing to address ten questions of law which [the] petitioner distinctly raised and supported by evidence within [the] petitioner's pretrial brief filed on May 23, 2016. And again raised during and before [the] petitioner's closing argument at his June 6-8 habeas trial."

On July 19, 2016, the court denied the petition for certification to appeal. On the court's order, it noted: "Not filed within time period and denied even if it was." With respect to the fee waiver application, on July 19, 2016, the court found the petitioner to be indigent and granted the application to the extent that it waived all appellate fees and costs and ordered the state to pay all necessary expenses. The court, noting the petitioner's self-represented status, denied the petitioner's request for appellate counsel.

On August 4, 2016, the petitioner filed a motion for reconsideration of the denial of his petition for certification to appeal. In that motion, the petitioner challenged only the court's determination that the petition had been untimely filed. On August 8, 2016, the court denied the motion for reconsideration.

On August 4, 2016, the petitioner filed a motion for appointment of appellate counsel. In that motion, the

petitioner referred to the fact that he intended to appeal from the court's denial of certification to appeal and that, in its ruling of July 19, 2016, on his original fee waiver application, the court found him to be indigent. In addition to his motion for appellate counsel, the petitioner included an affidavit in which he set forth numerous grounds that he intended to raise on appeal. These grounds included (1) whether the habeas court abused its discretion in denying the petition for certification to appeal "to address ten questions of law distinctly raised and supported by evidence within [the] petitioner's pretrial brief . . . and raised during [and] before [the] petitioner's closing argument at his . . . habeas trial"; (2) whether Judge Keegan committed "pretrial structural errors"; (3) whether Judge Iannotti committed "cumulative pretrial structural errors"; (4) whether Drapp rendered ineffective assistance; (5) whether he could "establish cause of any procedural default and prejudice, sufficient to excuse the default and permit review of the claim for the first time in this habeas proceeding"; (6) whether "the trial court . . . [stripped him] of his right of self-representation"; (7) whether Judge Iannotti erroneously failed to inquire into his mental state during the pretrial proceedings; (8) whether the habeas court violated his rights to due process and access to the court by its "refusal to issue a subpoena application"; (9) whether the habeas court erroneously failed to admit forty-two exhibits; and (10) whether the habeas court erroneously evaluated the issues before it by "solely focusing on [the] petitioner's choice of defense theory." On August 8, 2016, the court granted the motion for appellate counsel. This appeal followed.

Before discussing the merits of the claims raised on appeal, we must consider whether the petitioner raised the claims in his petition for certification to appeal and, thus, properly preserved them for appellate review.

"[A]n appeal following the denial of a petition for certification to appeal from the judgment denying a petition for a writ of habeas corpus is not the appellate equivalent of a direct appeal from a criminal conviction. Our limited task as a reviewing court is to determine whether the habeas court abused its discretion in concluding that the petitioner's appeal is frivolous. Thus, we review whether the issues for which certification to appeal was sought are debatable among jurists of reason, a court could resolve the issues differently or the issues are adequate to deserve encouragement to proceed further. . . . *Because it is impossible to review an exercise of discretion that did not occur, we are confined to reviewing only those issues which were brought to the habeas court's attention in the petition for certification to appeal.* . . .

"This court has determined that a petitioner cannot demonstrate that the habeas court abused its discretion in denying a petition for certification to appeal if the issues that the petitioner later raises on appeal were never presented to, or decided by, the habeas court. . . . Under such circumstances, a review of the petitioner's claims would amount to an ambuscade of the [habeas] judge." (Citations omitted; emphasis added; internal quotation marks omitted.) *Tutson* v. *Commissioner of Correction*, 144 Conn. App. 203, 216–17, 72 A.3d 1162, cert. denied, 310 Conn. 928, 78 A.3d 145 (2013).

The petitioner's petition for certification refers to the grounds for appeal set forth in the fee waiver application. As was previously set forth in this opinion, the fee waiver application refers to the habeas court's "fail[-ure] to address ten questions of law which [the] petitioner distinctly raised and supported by evidence within [the] petitioner's pretrial brief filed on May 23, 2016. And again raised during and before [the] petitioner's closing argument at his June 6-8 habeas trial."

The fee waiver application is not a model of clarity. The petitioner filed the petition for certification and the fee waiver application in a self-represented capacity. "[I]t is the established policy of the Connecticut courts to be solicitous of pro se litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the pro se party. . . . The modern trend . . . is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . The courts adhere to this rule to ensure that pro se litigants receive a full and fair opportunity to be heard, regardless of their lack of legal education and experience. . . . This rule of construction has limits, however. Although we allow pro se litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law. . . . A habeas court does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised. . . . In addition, while courts should not construe pleadings narrowly and technically, courts also cannot contort pleadings in such a way so as to strain the bounds of rational comprehension." (Citations omitted; internal quotation marks omitted.) *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 569–70, 877 A.2d 761 (2005); see also *Gaynor* v. *Hi–Tech Homes*, 149 Conn. App. 267, 278–79 n.11, 89 A.3d 373 (2014); *Mourning* v. *Commissioner of Correction*, 120 Conn. App. 612, 624–25, 992 A.2d 1169, cert. denied, 297 Conn. 919, 996 A.2d 1192 (2010).

The respondent does not claim that the petitioner failed to preserve any aspect of the present appeal from the court's judgment denying his petition for certification to appeal. Although the fee waiver application does not set forth grounds for appeal that are as clear, exhaustive, or precise as those which may have been set forth by a member of the bar or a person with legal

training and expertise, it sufficiently alerted the court to the fact that the petition was based on the court's failure to address several grounds that were raised and argued before the habeas court. Read broadly and realistically, this pleading sufficiently conveyed that certification was sought with respect to the claims that the habeas court deemed to have been waived by the petitioner by virtue of his guilty plea. Additionally, we observe that, although it technically was not incorporated by reference as a part of the petition for certification, the petitioner's motion for appointment of appellate counsel, which was filed on the same day that the petitioner filed his motion for reconsideration of the denial of his petition for certification, sufficiently set forth the claims raised in this appeal. Thus, we may presume that, by the time the court considered and denied the motion for reconsideration, it was aware that the petitioner intended to raise the claims presently before us. Accordingly, although the issue of reviewability certainly is debatable, we conclude that the claims before us were preserved for appellate review.

We now turn to our familiar standard of review. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . .

"To prove 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 evaluating the merits of the underlying claims on which the petitioner relies in the present appeal, we observe that [when] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 174 Conn. App. 776, 785–86, 166 A.3d 815, cert. denied, 327 Conn. 957, 172 A.3d 204 (2017).

I

First, we address the petitioner's claim that the court abused its discretion in denying certification with respect to whether he had waived several claims that it had determined to be unrelated to his guilty plea. Specifically, the petitioner alleged that, prior to the time of the plea, the trial court improperly refused to permit him to represent himself, refused to permit Drapp to withdraw as counsel, refused to provide him with an

investigator, and refused to recuse itself. Additionally, the petitioner alleged that Drapp rendered ineffective assistance by virtue of his failure to pursue a necessity defense and in otherwise preparing his defense. As set forth previously in this opinion, the court determined that the petitioner waived these claims by virtue of his guilty plea of April 29, 2013. We conclude that the court's analysis of the waiver issue was legally sound and that it did not abuse its discretion by denying certification with respect to these issues.

The United States Supreme Court recently discussed some of the consequences of a valid guilty plea, as follows: "[A] valid guilty plea foregoes not only a fair trial, but also other accompanying constitutional guarantees. . . . While those simultaneously relinquished rights include the privilege against compulsory self-incrimination, the jury trial right, and the right to confront accusers . . . they do not include a waiver of the privileges which exist beyond the confines of the trial. . . .

"A valid guilty plea also renders irrelevant—and thereby prevents the defendant from appealing—the constitutionality of case-related government conduct that takes place before the plea is entered. . . .

"Finally, a valid guilty plea relinquishes any claim that would contradict the admissions necessarily made upon entry of a valid plea of guilty." (Citations omitted; internal quotation marks omitted.) *Class* v. *United States*, U.S. , 138 S. Ct. 798, 805, 200 L. Ed. 2d 37 (2018).

Our Supreme Court has discussed the effect of an unconditional guilty plea as follows: "It is well established that an unconditional plea of guilty, made intelligently and voluntarily, operates as a waiver of all nonjurisdictional defects and bars the later assertion of constitutional challenges to pretrial proceedings. . . . In general, the only allowable challenges after a

plea are those relating either to the voluntary and intelligent nature of the plea or the exercise of the trial court's jurisdiction." (Citation omitted.) *State* v. *Johnson*, 253 Conn. 1, 80, 751 A.2d 298 (2000); see also *State* v. *Hanson*, 117 Conn. App. 436, 456, 979 A.2d 576 (2009), cert. denied, 295 Conn. 907, 989 A.2d 604, cert. denied, 562 U.S. 986, 131 S. Ct. 425, 178 L. Ed. 2d 331 (2010). "A plea, whether conditional or unconditional, does not preclude review of 'jurisdictional defects.' Those defects have been characterized as those which would prevent a trial from occurring in the first place. . . . Thus, after an unqualified plea of guilty or nolo contendere, a defendant may challenge his conviction if the conviction is in violation of the double jeopardy clause . . . if the court lacks subject matter jurisdiction over the case . . . or if the statute under which the defendant is charged is unconstitutional." (Citations omitted.) *State* v. *Madera*, 198 Conn. 92, 98 n.6, 503 A.2d 136 (1985).

"Where . . . a guilty plea is entered on the advice of counsel, the plea constitutes an admission of guilt and a waiver of nonjurisdictional defects and claims, including federal constitutional claims, which might otherwise be raised by way of defense, appeal or collateral attack. . . . This waiver rule means that a claim of the ineffective assistance of counsel due to an alleged conflict of interest, standing alone, is not sufficient to call the validity of a guilty plea and the judgment of conviction based thereon into question. . . . Of course, a guilty plea does not constitute a waiver of a claim that the plea itself was rendered involuntary and unintelligent as a result of a violation of an accused's fundamental constitutional rights. . . . Thus, an allegation of the ineffective assistance of counsel is a factor to be taken into consideration in determining whether a guilty plea was voluntary and intelligent, but for the plea and the judgment of conviction based thereon to

be overturned on this ground, it must be demonstrated that there was such an interrelationship between the ineffective assistance of counsel and the plea that it can be said the plea was not voluntary and intelligent because of the ineffective assistance." (Citations omitted.) *Dukes* v. *Warden*, 161 Conn. 337, 343–44, 288 A.2d 58 (1971) aff'd, 406 U.S. 250, 92 S. Ct. 1551, 32 L. Ed. 2d 45 (1972); see also *Tollett* v. *Henderson*, 411 U.S. 258, 266–67, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973) (focus of federal habeas inquiry is on nature of advice of counsel and voluntariness of guilty plea, not existence as such of antecedent constitutional infirmity).

In light of the foregoing authority, the petitioner is unable to demonstrate that he did not implicitly waive the claims at issue by virtue of his unconditional guilty plea.[2] The petitioner suggests that we should interpret *Hill* v. *Lockhart*, 474 U.S. 52, 58–59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), such that it prohibits the application of the waiver rule to claims of ineffective assistance of counsel following an unconditional guilty plea. *Hill* defines a petitioner's burden of proof with respect to ineffective assistance claims in the guilty plea context, thereby requiring a petitioner to demonstrate that but for counsel's errors, he would not have entered the

[2] As is reflected in our discussion of relevant authority, courts generally conclude that, following an unconditional guilty plea, a defendant has "waived" claims that are unrelated to the validity of the plea. "Waiver is an intentional relinquishment or abandonment of a known right or privilege. . . . It involves the idea of assent, and assent is an act of understanding." (Internal quotation marks omitted.) *State* v. *Torres*, 175 Conn. App. 138, 146, 167 A.3d 365, cert. denied, 327 Conn. 958, 172 A.3d 204 (2017), cert. denied, U.S. , 138 S. Ct. 1303, L. Ed. 2d (2018). In light of the fact that the waiver rule applies by operation of law rather than by any conduct or representation of the defendant beyond his solemn admission of guilt, it may, however, be more precise to refer to the issue as involving implicit waiver or a forfeiture of a defendant's right to raise certain claims as a consequence of a guilty plea. "Implicit waiver arises from an inference that the defendant knowingly and voluntarily relinquished the right in question."(Internal quotation marks omitted.) Id.

plea. Id., 59. *Hill* is not inconsistent with the application of the waiver rule, nor do we interpret it to have undermined the rule's application in a case such as the present in which the specific claims of ineffectiveness are unrelated to the validity of the unconditional guilty plea.

Likewise, we are not persuaded by the petitioner's argument that his claims related to self-representation and the court's refusal to remove Drapp as his counsel, which he considers "structural errors" requiring automatic reversal, were not subject to the waiver rule. The petitioner urges us to "make clear that a petitioner cannot waive such a claim by pleading guilty" and that such a claim properly may be raised in a habeas proceeding following an unconditional guilty plea. The petitioner, however, acknowledges that there is no relevant authority that directly supports this argument. As stated previously in this opinion, our waiver jurisprudence reflects that an unconditional guilty plea deprives a petitioner of the ability to collaterally challenge his conviction when the claims are based on nonjurisdictional defects that are unrelated to the voluntariness of his plea. We see no reason why this broad class of claims does not encompass the petitioner's claims related to self-representation. The touchstone of the waiver inquiry is whether the claim implicates the validity of the plea. In light of the court's unchallenged factual findings, the petitioner cannot argue, let alone demonstrate, that any of the rulings at issue affected his decision to plead guilty. The court found that despite Drapp's contested representation of the petitioner, the decision to accept the state's plea offer and to plead guilty was made solely by the petitioner.[3]

[3] Because we conclude that the waiver rule applies to the petitioner's claims, we do not address any of his arguments with respect to procedural default or the cause and prejudice standard.

II

Next, the petitioner claims that, if trial counsel had rendered effective representation or the court had permitted him to represent himself, he would not have pleaded guilty and would have insisted on exercising his right to a trial. Essentially, the petitioner argues that his guilty plea was not knowing, intelligent, and voluntary because Drapp failed to remove himself as counsel, failed to interview certain witnesses, and failed to prepare and present a necessity defense. We disagree.

As the court observed, the petitioner essentially raised two claims with respect to the representation afforded him surrounding his guilty plea. The first claim was that his plea was not intelligently, knowingly, and voluntarily made because Drapp coerced him to plead guilty. The second claim is that Drapp failed to advise him that he had the ability to appeal from the judgment of conviction that resulted from his guilty plea. The petitioner does not challenge the court's decision as it relates to the court's resolution of these claims. Rather, he argues before us, in a conclusory manner, that defense counsel's ineffectiveness related to pretrial matters effectively undermined the validity of his plea.

"The sixth amendment to the United States constitution, made applicable to the states through the due process clause of the fourteenth amendment, affords criminal defendants the right to effective assistance of counsel. . . . Although a challenge to the facts found by the habeas court is reviewed under the clearly erroneous standard, whether those facts constituted a violation of the petitioner's rights under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case . . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . .

"It is well established that the failure to adequately advise a client regarding a plea offer from the state can form the basis for a sixth amendment claim of ineffective assistance of counsel. The United States Supreme Court, long before its recent decisions in *Missouri* v. *Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), and *Lafler* v. *Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), recognized that the two part test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), applies to ineffective assistance of counsel claims arising out of the plea negotiation stage. . . .

"Finally, we recite the familiar test that governs whether a petitioner's constitutional right to the effective assistance of counsel has been violated. To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [id, 687] . . . . The petitioner has the burden to establish that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . It is not enough for the petitioner to simply prove the underlying facts that his attorney failed to take a certain action. Rather, the petitioner must prove, by a preponderance of the evidence, that his counsel's acts or omissions were so serious that counsel was not functioning as the counsel guaranteed by the sixth amendment, and as a result, he was deprived of a fair trial. . . .

"For claims of ineffective assistance of counsel arising out of the plea process, the United States Supreme

Court has modified the second prong of the *Strickland* test to require that the petitioner produce evidence that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied. . . . It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Duncan* v. *Commissioner of Correction*, 171 Conn. App. 635, 646–48, 157 A.3d 1169, cert. denied, 325 Conn. 923, 159 A.3d 1172 (2017).

Essentially, the petitioner argues that, absent the alleged flaws in Drapp's pretrial representation (related to his failure to remove himself as counsel, failure to interview certain witnesses, and failure to prepare and present a necessity defense) he would not have pleaded guilty. With respect to proving prejudice, the petitioner argues that he "consistently and unequivocally asserted his right to self-representation so that he could present evidence on a necessity defense to the jury. . . . Prejudice must be presumed related to the right of self-representation. . . . Further, absent the revocation of that right, it cannot be disputed that the petitioner would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.)

Although the petitioner purports to challenge the validity of his plea, his claim on appeal is an attempt to litigate pretrial claims of ineffective representation and rulings with respect to self-representation. "Under [*Dukes* v. *Warden*, supra, 161 Conn. 344], the entry of a guilty plea waives future ineffective assistance of counsel claims unless the ineffective assistance is so intertwined with the guilty plea that the plea cannot be considered knowing, voluntary and intelligent." *Mincewicz* v. *Commissioner of Correction*, 162 Conn.

App. 109, 116, 129 A.3d 791 (2015). The petitioner failed to show that any of the alleged deficiencies in Drapp's representation rendered his subsequent guilty plea invalid. If any ineffective assistance occurred, it was antecedent to the plea hearing and known by the petitioner and, as such, was effectively waived by the plea. The court made several findings of fact related to the plea. It is noteworthy that the court unambiguously rejected any claim that the petitioner had been compelled to plead guilty and found that the decision was made by him knowingly and voluntarily. The petitioner has failed to undermine that determination.

For all of the foregoing reasons, we conclude that the petitioner has failed to demonstrate that the court abused its discretion by denying his petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

IN RE ATHENA C.*
(AC 40809)

Keller, Bright and Norcott, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights with respect to his minor daughter, A. *Held*:

1. The respondent father could not prevail on his claim that the trial court improperly determined that the termination of his parental rights was in the best interest of A based on its comparison of the relationship that A's foster parents had with A and the stability of their home with that of A's biological parents: the trial court, which first found by clear

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

and convincing evidence that the adjudicative ground for termination was met before making its dispositional finding, was statutorily required in the dispositional phase to consider A's bond with her foster parents because of the extended time she had spent in their care, and it made no reference to the relative comfort of A's putative home, nor did it compare the parenting abilities or level of care received by A from the father and the foster parents; moreover, the trial court did not improperly make a determination as to a permanent placement for A but, instead, left the issue as to the appropriate custodian or adoptive parent to be resolved at a later date, the court's decision terminating the father's parental rights was based on a consideration of the statutory (§ 17a-112 [k]) factors, and the court did nothing more than what it was statutorily required to do by noting the bond between A and her foster parents.

2. The trial court did not abuse its discretion in declining to transfer guardianship of A to her maternal grandmother as an alternative to terminating the respondent father's parental rights; even though a review of the record revealed that A had a close bond with her grandmother, the trial court also had evidence before it that A was emotionally attached to her foster parents such that she regarded them as her psychological parents and that removing A from their care might have posed a serious health risk to her, and the court did not ignore A's close relationship with her grandmother or certain past deficiencies of the foster parents but, rather, considered all the evidence, and it properly relied on the relationship between A and her foster parents to decide whether immediately transferring guardianship to A's grandmother would be in A's best interest.

Argued January 29—officially released April 30, 2018**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, and tried to the court, *Hon. Henry S. Cohn*, judge trial referee; judgment terminating the respondents' parental rights, from which the respondent father appealed to this court; thereafter, the court issued an articulation of its decision. *Affirmed.*

** April 30, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

David J. Reich, for the appellant (respondent father).

John E. Tucker, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

NORCOTT, J. The respondent father appeals from the judgment of the trial court terminating his parental rights with respect to his minor child, Athena C. The respondent claims that the trial court improperly (1) determined that the termination of his parental rights was in the child's best interest; and (2) denied his motion to transfer guardianship of the child to the child's maternal grandmother (grandmother).[1] We affirm the judgment of the trial court.

The following relevant facts were found by the court or are otherwise undisputed. On October 30, 2015, the petitioner, the Commissioner of Children and Families (petitioner), filed coterminous petitions of neglect and termination of the respondent's and the mother's parental rights to their child.[2] Subsequently, the petitioner

[1] At trial, the father did not file his own motion for transfer of guardianship to the grandmother but adopted the mother's motion. The father is the sole appellant in this case. We will therefore refer to the father as the respondent throughout this opinion.

[2] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) (A) the child has been abandoned by the parent in the sense that the parent has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child; (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a

also filed a motion to review and approve the permanency plan of termination of parental rights and adoption. By way of background, the Department of Children and Families (department) became involved with the family due to incidents of domestic violence and the mother's serious recurrent substance abuse. The department had twice obtained temporary custody of the child and placed her with her current foster parents. On both occasions, the grandmother declined to take care of the child due to age and health issues. At the time of the second placement, the child already was staying with the foster parents under an informal arrangement and the grandmother suggested to the department that the child remain in their care. At the time of disposition, the child was four years old and had been living with the foster parents for more than two years.

On July 19, 2016, the mother filed a motion for transfer of guardianship of the child to the grandmother, which was adopted by the respondent. The mother then sought to consolidate this motion with the coterminous petitions. Thereafter, the trial court consolidated the above matters and heard argument over the course of a five day trial. The court heard testimony from various witnesses, including the grandmother, the foster

prior proceeding, or (ii) is found to be neglected, abused or uncared for and has been in the custody of the commissioner for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

The petition alleged, as adjudicative grounds for termination, (1) abandonment, (2) failure to rehabilitate, and (3) the absence of an ongoing parent-child or youth relationship with the respondent. The court adjudicated the child neglected on the ground that she was denied proper care and attention and that she was being permitted to live under conditions injurious to her well-being. Thereafter, the court terminated the parental rights of the mother and the respondent on the ground that they had failed to rehabilitate within the meaning of § 17a-112 (j) (3) (B) (ii).

mother, the court-appointed psychologist, Derek Franklin, and an independent psychologist, Bruce Freedman, who had been retained by the mother. On July 25, 2017, the court, *Hon. Henry S. Cohn*, judge trial referee, in an oral decision, adjudicated the child neglected on the ground that she had been denied proper care and attention and permitted to live under conditions injurious to her well-being. In the same decision, the court terminated the parental rights of the respondent and the mother on the ground that they had failed to rehabilitate within a reasonable time, and denied the mother's motion to transfer guardianship. This appeal followed.

After hearing argument, this court, sua sponte, issued an order for articulation and supplemental briefing. Specifically, we ordered the court to "please articulate what other facts [it] found, besides the existence of the bond between the child and her foster parents, to support its determination that termination of parental rights was in the child's best interest and its denial of the motion to transfer guardianship to the maternal grandmother." The trial court thereafter filed an articulation with this court, which states in relevant part: "In determining that terminating the respondent parents' parental rights is in [the child's] best interest, the court has considered various factors, including her interest in sustained growth, development, well-being, and in the continuity and stability of her environment . . . her age and needs; the length and nature of her stay in foster care; the contact and lack thereof that she has had with her father and mother; the potential benefit or detriment of her retaining a connection with her biological parents; [and] her genetic bond to each birth parent . . . and the seven statutory factors and the court's finding thereon. The court has also balanced [the] child's intrinsic need for stability and permanency against the potential benefit of maintaining a connection with her biological parents. . . . In consideration

of all these factors and after weighing all of the evidence, the court found that clear and convincing evidence established that it was in the best interests of [the] child to terminate the parental rights of both respondent parents." (Citations omitted; internal quotation marks omitted.) In light of the trial court's articulation, the parties provided supplemental briefing. Additional facts will be set forth as necessary.

I

The respondent first claims that the trial court improperly determined that the termination of his parental rights was in the best interest of the child. Specifically, the respondent argues that the court, in basing its dispositional finding on the child's bond with the foster parents and the extended duration for which she had lived with them, essentially engaged in an improper comparison of the "foster parents' relationship with the child and the stability of their home with that of the biological parents." In making this argument, the respondent relies on *In re Paul M.*, 154 Conn. App. 488, 107 A.3d 552 (2014), where this court observed that it is "improper for a termination of parental rights to be grounded on a finding that a child's prospective foster or adoptive home will be 'better' than life with one or more biological parent." Id., 505. The respondent acknowledges that our observation in *In re Paul M.* addresses a comparison of material advantages between the homes of foster and biological parents. He argues, however, that the trial court's reasoning amounted to a comparison of "relative abilities to care for the child" and that "[s]uch a comparison is just as damaging as comparing material advantage because it would also tend to prejudice the court to look at the advantages of the adoptive placement rather than the statutory grounds."

In his supplemental brief, the respondent also argues that the "statutory finding regarding the positive bond

that the child has with the foster parents should . . . not be used to support a termination." Rather, it "should only be used as a factor in finding that it would not be in the child's best interest to terminate . . . parental rights." (Emphasis omitted.) Finally, the respondent argues that the court's reliance on the child's bond with the foster parents constituted an improper consideration, at the dispositional phase of the termination proceeding, of where the child should reside posttermination.[3]

We disagree that the trial court's consideration of the child's bond with the foster parents was improper, or that it led to an improper determination of where the child would reside. We also disagree with the respondent's theory of how the best interest standard should be applied.

"We begin with the applicable standard of review and general governing principles. Although the trial court's subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. . . . That conclusion is drawn from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. . . . On review, we must determine whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment

[3] The respondent also argues that even though the trial court listed additional factors in its articulation that had guided its decision to terminate the respondent's parental rights, these factors do not cure the prejudice resulting from the court's original decision. Because we conclude that the trial court's original decision was proper, we need not reach this argument.

of the trial court." (Citations omitted; internal quotation marks omitted.) *In re Egypt E.*, 327 Conn. 506, 525–26, 175 A.3d 21 (2018).

"[A] hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights . . . exists by clear and convincing evidence. If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the [parent's] parental rights is not in the best interests of the child. In arriving at that decision, the court is mandated to consider and make written findings regarding seven factors delineated in . . . § [17a-112 (k)]."[4]

[4] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been

(Internal quotation marks omitted.) *In re Joseph M.*, 158 Conn. App. 849, 858–59, 120 A.3d 1271 (2015).

"In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in [§ 17a-112 (k)]. . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Footnote omitted; internal quotation marks omitted.) Id., 868–69.

The respondent argues that the trial court's reasoning amounted to the type of comparison that was proscribed by *In re Paul M.* In that case, the respondent challenged the trial court's termination of parental rights on the basis of the following language from its decision: "[T]he testimony of the social workers regarding their observations of the adjustment of [the child] to the foster home, the level of care he receives and the devotion of the foster parents to him *satisfy the*

prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

court that remaining in his present placement is the best possible outcome and accordingly in the best interest of the child"; and "[t]he child has adjusted very well in his foster home and to the extended foster family. This family is providing the day-to-day physical, emotional, moral and educational support the child needs. *The foster parents are committed to the child and would like to adopt him.*" (Emphasis in original; internal quotation marks omitted.) *In re Paul M.*, supra, 154 Conn. App. 503. On appeal, this court concluded that the trial court had "improperly overstated the importance of the perceived relative advantage of the putative adoptive home, and those findings were made erroneously." Id., 505–506. We held, however, that the court's remaining findings were entirely appropriate and supported its ultimate conclusion. Id., 506. The respondent asserts that the trial court's decision in the present case, unlike *In re Paul M.*, is primarily based on the child's bond with the foster parents and, therefore, is deficient.[5] We are not persuaded.

As a factual matter, we disagree with the respondent that the trial court, in terminating his parental rights, relied principally on the child's bond with the foster parents. The court first found that the petitioner had proven the adjudicative ground by clear and convincing evidence; a finding not challenged by the respondent.[6]

[5] In particular, the respondent points to the following language from the court's oral decision to suggest that the court primarily relied on the child's bond with the foster parents: "So as regards to the termination of parental rights, I have to look at the . . . best interest finding and I'm going to find by clear and convincing evidence based on the fact that the foster parents have a bond and the child has been living there off and on for close to two and a half years."

[6] Before considering whether termination of the respondent's parental rights was in the child's best interest, the court first found, as it must, that the petitioner had proven the adjudicative ground by clear and convincing evidence. At oral argument before this court, the respondent's counsel acknowledged that he is not challenging the trial court's adjudicative finding and that his claim that the court principally relied on the child's bond with the foster parents goes to the dispositional phase only.

In the dispositional phase, the court, while issuing an oral decision, not only noted the child's strong emotional bond with the foster parents, but also considered her emotional ties to the respondent. The court then considered the unlikelihood of the respondent's rehabilitation within a reasonable time and the urgent need for permanence and stability for the child. After briefly considering the issue of the transfer of guardianship, the court then concluded its finding as to the termination of parental rights as follows: "*I'm considering the child's sense of time . . . or her need for a secure and permanent environment.* The relationship . . . the child has with the foster parents, *the totality of the circumstances*, that the termination of parental rights is in the child's best interest." (Emphasis added.)

In its subsequent articulation, the court stated that it had considered the seven statutory factors of § 17a-112 (k), as well as the child's "interest in sustained growth, development, well-being" and "continuity and stability of her environment . . . her age and needs; the length and nature of her stay in foster care; the contact and lack thereof that she has had with her father and mother; the potential benefit or detriment of her retaining a connection with her biological parents; [and] her genetic bond to each birth parent." (Citation omitted; internal quotation marks omitted.) The court also stated that it had "balanced [the] child's intrinsic need for stability and permanency against the potential benefit of maintaining a connection with her biological parents."

In light of the trial court's reasoning, we are not persuaded by the respondent's argument that this case is deficient in a manner that *In re Paul M.* was not. In fact, this case is similar to *In re Paul M.*, in that here, as there, the trial court first found by clear and convincing evidence that the adjudicative ground for termination was met before making its dispositional finding. *In re*

Paul M., supra, 154 Conn. App. 506. In both cases the trial court was statutorily required, in the dispositional phase, to consider the children's bond with their foster parents because of the extended time the children had spent in their care. See id. Unlike *In re Paul M.*, however, the trial court in the present case made no reference to the relative comfort of the child's putative home, nor did it compare the level of care received by the child from the respondent and the foster parents. See id., 503 ("[t]he testimony of the social workers regarding their observations of the adjustment of [the child] *to the foster home, the level of care he receives and the devotion of the foster parents to him* satisfy the court that remaining in his present placement is the best possible outcome and accordingly in the best interest of the child" [emphasis altered; internal quotation marks omitted]).[7]

The respondent contends, however, that a comparison of the child's emotional ties with the respondent and her bond with the foster parents essentially amounts to a comparison of their parenting abilities. In *In re Joseph M.*, supra, 158 Conn. App. 871, this court rejected a similar argument. The respondent in that case claimed that the trial court impermissibly had compared the parenting abilities of the foster and biological parents by basing its decision to terminate his parental rights on the child's emotional ties with the foster parents. Id., 867–69. Specifically, the respondent in that case took issue with the following excerpt from the trial court's memorandum of decision: "Based on all the foregoing, the court by clear and convincing evidence finds termination of the parental rights of the mother

[7] By comparison, the trial court in the present case referenced the care provided to the child by the foster parents as follows: "The child has strong emotional ties with the foster family that provide the physical, emotional, [and] education support of this child. The child [has] little or no positive emotional ties with [the] mother, [she] does to the father. There's no question that [there are] emotional ties to the father."

and [the respondent] as to [the child] is in the best interest of such child. The court concludes that subjecting [the child] to a removal from the foster family *with whom he has bonded and with whom he can attain permanency through adoption* would not be in his best interest given the circumstances of this case." (Emphasis in original; internal quotation marks omitted.) Id., 868 n.19.

In rejecting the respondent's claim, in that case, that the trial court had engaged in an improper comparison, we observed that the court was required, under § 17a-112 (k), to consider the three year old child's bond with the foster family because he had spent all but one month of his life with them. Id., 871. We concluded that in considering this bond, the court did not determine that the foster home was "better," rather, the court had found that the foster home "in general, provided for the child's needs, including emotional needs for love and stability." Id.

Similarly in the present case, the child was four years old at the time the trial court issued its decision and had spent more than two years in the care of the foster parents. As in *In re Joseph M.*, therefore, the court, in the present case, was statutorily required to consider the child's emotional ties with the foster parents. In light of the court's reasoning for terminating the respondent's parental rights, and after carefully reviewing the record, we are persuaded that here, as in *In re Joseph M.*, there was no comparison of the parties' parenting abilities.

We also are unpersuaded by the respondent's argument that the court improperly considered the child's placement in the dispositional phase of the termination proceeding. Specifically, the respondent's reliance on *In re Denzel A.*, 53 Conn. App. 827, 733 A.2d 298 (1999), and *In re Sheena I.*, 63 Conn. App. 713, 778 A.2d 997

(2001), in support of this argument is misplaced. The respondent correctly asserts that this court reiterated in *In re Denzel A.* and *In re Sheena I.*, that "[i]n the dispositional phase of a termination proceeding, the court properly considers only whether the parent's parental rights should be terminated, not where or with whom a child should reside following termination." *In re Sheena I.*, supra, 726; see also *In re Denzel A.*, supra, 834. In both those cases, however, this court declined to consider the transfer of guardianship to the proponent of such transfer *in lieu* of termination of parental rights. Instead, we held that such a determination should, in certain circumstances, wait until after the parents' rights were terminated. See *In re Denzel A.*, supra, 835.

Consistent with these holdings, the trial court here did not make a determination as to a permanent placement for the child during the dispositional phase. Instead, it left the issue as to the appropriate custodian or adoptive parent to be resolved at a later date through the department's interactions with the interested parties: "[T]he better way to go would be a termination of parental rights and let . . . the [department], which is going to become the statutory parent, take on a role of [mediator] in bringing these people together." Furthermore, the court's articulation makes clear that the court's decision terminating the respondent's parental rights was based on a consideration of the statutorily required factors. The court explained that although it noted the child's bond with the foster parents, it considered the seven best interest factors in § 17a-112 (k). The court further noted that its decision was based on the fact that "the [respondent] had severe and long-standing substance abuse, domestic violence, [and] mental health issues and a long history of engaging in criminal conduct, including attempting to strangle the mother on two separate occasions. The court-appointed

psychologist concluded that the best interest of the child required granting the [petition to terminate parental rights], as the parents had virtually no possibility of playing a constructive role in the child's life."[8] Thus, the court did not improperly consider placement of the child with the foster parents when it determined that it was in the child's best interest to terminate the respondent's parental rights.

Finally, the respondent's argument that the emotional bond between the child and the foster parents should be used only to determine whether it would *not* be in the best interest of the child to terminate parental rights is a misstatement of the law. There is simply nothing in the language of § 17a-112 (k) that supports such an interpretation. Subsection (4) identifies several people for and with whom the child might have "feelings and emotional ties." The statute requires the court to consider and make findings as to all such persons. In doing so, it does not distinguish or limit what use the court is to make of such information in determining whether termination is in the best interest of the child. The respondent's argument would require us to limit the court's consideration of the child's feelings and emotional ties to any person who has exercised physical care, custody or control of a child for at least one year to the lack of such feelings and emotional ties. Not only is this illogical, it is flatly inconsistent with the plain language of subsection (4), which describes such persons as those "with whom the child has developed significant emotional ties . . . ." General Statutes § 17a-112 (k) (4). By noting the bond between the child and foster parents in this case, the court did no more than what it was statutorily required to do.

[8] A trial court should consider that a transfer of guardianship absent a termination of parental rights, as opposed to a permanent guardianship, can lead to continued efforts on the part of a parent to seek to regain custody. See Practice Book § 35a-20 (motion for reinstatement of guardianship). This may have a disruptive effect on the child's need for stability.

II

The respondent next argues that the trial court erred in declining to transfer guardianship of the child as an alternative to terminating the respondent's parental rights. Specifically, the respondent argues that the grandmother had an "extremely close bond" with the child, and the foster parents could not provide a stable home for the child. In light of these facts, the respondent contends that the trial court should, in the best interest of the child, have transferred guardianship to the grandmother. We disagree.

"To determine whether a custodial placement is in the best interest of the child, the court uses its broad discretion to choose a place that will foster the child's interest in sustained growth, development, well-being, and in the continuity and stability of its environment. . . . We have stated that when making the determination of what is in the best interest of the child, [t]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . . [G]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . [Appellate courts] are not in a position to second-guess the opinions of witnesses, professional or otherwise, nor the observations and conclusions of the [trial

court] when they are based on reliable evidence." (Internal quotation marks omitted.) *In re Anthony A.*, 112 Conn. App. 643, 653–54, 963 A.2d 1057 (2009).

Our review of the record reveals that the child, indeed, has a close bond with the grandmother. In fact, the trial court, in issuing its ruling from the bench, noted that "[t]here's no question that the child is bonded with the grandmother." The trial court also, however, had evidence before it that the child was emotionally attached to the foster parents such that she regards them as her parents and refers to them as "Mommy" and "Daddy." The court-appointed psychologist, Derek Franklin, testified that the foster parents essentially are the child's "psychological parents." He testified further that removing the child from the care of the foster parents might pose a serious health risk for her.

On the other hand, the psychologist retained by the mother, Bruce Freedman, based on his observation of the interaction between the child and the grandmother, testified that they had a close bond. Not having had the chance to observe a similar interaction between the child and the foster parents, Freedman assumed a healthy relationship between them. He concluded, however, that ideally the child should maintain a relationship with the foster parents as well as the grandmother. He opined further that an arrangement where the child was permanently placed with the foster parents would work just as well, as long as the child maintained a relationship with the grandmother.

In its articulation, the trial court summarized the evidence before it as follows: "The child had lived the majority of her life with the preadoptive foster parents. The foster father had some financial difficulties and minor criminal charges that had been resolved several years previous. . . . The mother had recruited the foster mother from time to time for placement. . . . The

grandmother had declined twice to take custody of the child, due to her age and health. . . . The court-appointed psychologist deemed the foster parents 'psychological parents' . . . [and] [r]emoval of the child would put the child at risk for behavioral or emotional problems." Finally, the trial court noted in relation to the mother's expert that the "best solution for [him] would be a shared care arrangement."

In light of this evidence, the trial court essentially had to decide whether an immediate removal of the child from the foster parents' care to the grandmother's care was in the best interest of the child. After observing, in its oral decision, the child's bond with the grandmother, the court stated: "[T]he better way to go would be a termination of parental rights and let . . . the [department], which is going to become the statutory parent, take on a role of mediation in bringing these people together. And I think in this family, which—very close family where people are always having parties and working things out, that the transfer of guardianship is going to be denied and let's see if we can't get [the] grandmother and [the foster parents] together. I think [the foster parents]—I should comment on the fact that [the foster parents] had some financial difficulties. There were four instances of some kind of money problems. There was a—or a fight, disorderly conduct, but these were about ten years ago and they don't seem to have occurred again."

It is clear from the court's reasoning that it neither ignored the child's close relationship with the grandmother, nor certain past deficiencies of the foster parents. Rather, the court considered all the evidence before it to decide whether immediately transferring guardianship to the grandmother would be in the best interest of the child. We will not, on appeal, second-guess the court's determination that it was not. See *In re Averiella P.*, 146 Conn. App. 800, 803, 81 A.3d 272

(2013) ("[appellate courts] are not in a position to second-guess the opinions of witnesses, professional or otherwise, nor the observations and conclusions of the [trial court] when they are based on reliable evidence" [internal quotation marks omitted]); see also *In re Anthony A.*, supra, 112 Conn. App. 654 (same).

In addition, this court previously has held that a trial court may rely on the relationship between a child and the child's foster parents to determine whether a different placement would be in the child's best interest. In *In re Anthony A.*, supra, 112 Conn. App. 653, the intervenor grandmother claimed that the trial court improperly had concluded that it was not in the child's best interest to transfer guardianship to her when the child had been placed with the foster parents for some time. In rejecting the grandmother's claim, we concluded that the trial court properly considered the child's close relationship with the foster parents, with whom he had bonded and referred to as "Mommy" and "Daddy," their status as the child's psychological parents, and a clinical psychologist's testimony that it would not be in the best interest of the child to be removed from their care. (Internal quotation marks omitted.) Id., 654–55. We held that the trial court reasonably concluded that it was in the child's best interest to remain with the foster family. Id., 655. Likewise, in the present case, we conclude that the trial court did not abuse its discretion in declining to transfer guardianship of the child to the grandmother.

The judgment is affirmed.

In this opinion the other judges concurred.