PATRICIA R. KAPLAN *v.* DAVID SCHEER ET AL.
(AC 39515)

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

Syllabus

The plaintiff property owner sought, inter alia, the reformation of a deed in connection with a settlement agreement with the defendants resolving her adverse possession action against them. In that action, the plaintiff had claimed adverse possession of a portion of the defendants' property that comprised part of her driveway. The settlement agreement provided that the parties agreed to resolve all issues and disputes between them. Pursuant to the agreement, the plaintiff withdrew the action, the parties

exchanged quitclaim deeds and the defendants granted the plaintiff an easement for pedestrian and vehicular access to the portion of her driveway that was on their property. The defendants' deed conveyed "any and all" of their rights in the plaintiff's property. The plaintiff's deed conveyed "any and all" of her rights in the defendants' property except her rights in the driveway easement. Among the rights conveyed was an easement permitting the plaintiff to cross the defendants' property to access Long Island Sound. The defendants' attorney recorded the three instruments on the town land records. The settlement agreement contained no specific language dictating the order in which they were to be recorded. Thereafter, the defendants informed the plaintiff that she no longer would be permitted to cross their property to access the water. In response, the plaintiff commenced the present action seeking to reform the deed she exchanged with the defendants by reserving the water access easement. She asserted, inter alia, that because of the parties' mutual mistake, the deeds were recorded in the wrong order, resulting in the inadvertent conveyance of the water access easement. After a trial, the court rendered judgment in favor of the defendants, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on her claim that the trial court misinterpreted the settlement agreement by concluding that the alphanumeric prefixes were included only for convenience and did not bear on the parties' intent: the plain language of the settlement agreement belied the plaintiff's contention that the alphanumeric prefixes determined the sequence in which the subject instruments were to be recorded, as the settlement agreement was silent as to the sequence of recording, and it expressly provided that the parties agreed to resolve all of the issues and disputes between them by the execution and exchange of the subject instruments, and it was clear from the express language in the settlement agreement and the legal instruments, that the only rights the plaintiff sought to preserve were those in the driveway easement, which she did, and, therefore, the express intent of the settlement agreement was satisfied, regardless of whether the sequence of recording or the language of the instruments, or both in combination, had an effect on the conveyance of the water access easement; moreover, the plaintiff's interpretation would have rendered superfluous the "any and all" language in the settlement agreement, and in the absence of explicit language to the contrary, this court declined to presume that a list invariably demands sequential performance, especially where such a presumption would render superfluous other contractual language.
2. The plaintiff's claim that the trial court erred in rejecting her claim of mutual mistake was without merit, as that court's finding that the plaintiff failed to prove mutual mistake by clear and convincing evidence was not clearly erroneous; there was sufficient evidence in the record to support the court's conclusion that reformation of the subject deed on the ground of mutual mistake was not warranted, as the record clearly indicated that the trial court carefully considered and weighed

all the evidence and testimony and determined that the defendants were more credible than the plaintiff and that there was insufficient credible evidence to find, by clear and convincing evidence, that there was mutual mistake, and it was not the role of this court to second-guess on appeal the trial court's credibility determinations.

Argued December 5, 2017—officially released June 12, 2018

Procedural History

Action for, inter alia, the reformation of a deed, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the defendants filed a counterclaim; thereafter, the court, *Nazzaro, J.*, granted the defendants' motion to cite in Ian Scott as a counterclaim defendant; subsequently, the matter was tried to the court, *Hon. Richard E. Burke*, judge trial referee; judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

Matthew G. Berger, for the appellant (plaintiff).

Richard T. Meehan, for the appellees (defendants).

Opinion

DiPENTIMA, C. J. This case concerns a settlement agreement pursuant to which (1) the defendants, David Scheer and his wife, Tracy Scheer, granted the plaintiff, Patricia R. Kaplan, an easement for pedestrian and vehicular access to a portion of the plaintiff's driveway that lay on the defendants' property (driveway easement), and (2) the parties exchanged quitclaim deeds. The plaintiff now contends that these deeds were recorded in the wrong order and, as a result, her deed inadvertently conveyed to the defendants a different easement, one that previously had allowed her to cross the defendants' property to access Long Island Sound (water easement).[1] The plaintiff contends that this conveyance was not something the parties bargained for when they reached their agreement. She brought the

[1] In particular, the plaintiff used a walkway and staircase on the defendants' property that leads to the beach below.

underlying action seeking to restore the water easement through various equitable remedies; she now appeals[2] from the judgment of the trial court, following a trial to that court, in favor of the defendants.[3] On appeal, the plaintiff claims that the trial court (1) misinterpreted the settlement agreement by finding that the alphanumeric prefixes in it were included only for convenience and did not bear upon the parties' intent and (2) improperly rejected her claim of mutual mistake.[4] We affirm the judgment of the trial court.

The record contains the following relevant facts and procedural history. The plaintiff has lived at 6 Spring Rock Road in Branford since 1969 and has owned that property since 1970. In 1999, the defendants purchased 2 Spring Rock Road, the waterfront parcel immediately to the south of the plaintiff's property. From the start, the relationship between the parties was characterized by mutual antipathy and soon devolved into a series of disputes.

One of these disputes concerned the location of a boundary line. After a survey, the defendants discovered that a portion of the plaintiff's driveway crossed

[2] The plaintiff's husband, Ian Scott, was a counterclaim defendant in the underlying action. He later withdrew a separate appeal and is not a participant in this appeal.

[3] Specifically, the court rendered judgment in favor of the defendants and ordered that "[t]he claimed right by [the plaintiff] and/or [her husband] to pass or repass, or enter upon the area referred to as the 'Shore and Grove,' or 'Grove' or 'Water and Grove,' to the extent that any such area continues to exist upon [the defendants' property] is hereby extinguished and forever barred. A copy of this order shall be recorded upon the Branford land records by the [defendants]."

[4] The plaintiff also claims that the court erred by determining that the equitable doctrine of laches precluded reformation of the plaintiff's deed. In light of our conclusion that the court properly found that (1) the alphanumeric prefixes in the agreement were included only for convenience and (2) the plaintiff had not proved mutual mistake by the clear and convincing evidence required to sustain an action for reformation, we do not address whether there was an unreasonable and prejudicial delay in bringing the underlying action.

over their property. Thereafter, the defendants erected a stockade fence on or near the boundary line. Following further antagonism from both parties about that fence as well as various plantings along the same boundary, the plaintiff brought an action against the defendants claiming, inter alia, adverse possession of the portion of the defendants' property that comprised part of her driveway.

In 2003, the parties resolved that case by entering into a written settlement agreement. Pursuant to the settlement agreement, the plaintiff withdrew the action, the parties exchanged quitclaim deeds and the defendants granted the plaintiff the driveway easement.[5] The settlement agreement, however, contained no specific language dictating the order in which the defendants' attorney was to record these instruments in the Branford land records.

On April 23, 2003, the defendants' attorney submitted the instruments in the following sequence. First, the driveway easement was recorded at 9:40 a.m. in volume 813 at page 734.[6] Next, the quitclaim deed from the

[5] Specifically, the settlement agreement provided as follows: "For and in consideration of the mutual promises, covenants, and agreements herein set forth, the Plaintiff . . . and the Defendants . . . agree to resolve all of the issues and disputes between them on the following terms and conditions:

A. The [p]laintiff . . . has executed and delivered a Quit Claim Deed of any and all interest that she may have in or to the [defendants'] property, with the specific intention of relinquishing any and all claims she may have to said property. A copy of said Deed is appended hereto as 'Exhibit A.'

B. The [d]efendants . . . have executed and delivered a Quit Claim Deed of any and all interest that they may have in or to the [plaintiff's] property, with the specific intention of relinquishing any and all claims they may have to said property. A copy of said Deed is appended hereto as 'Exhibit B.'

C. [The defendants] have granted [the plaintiff] a perpetual Easement for the purpose of pedestrian and vehicular access to a portion of the [d]efendants' property . . . . A copy of said grant of Easement is appended hereto as 'Exhibit C.' "

[6] The driveway easement reads, in relevant part, as follows: "[The defendants] do hereby give, grant, bargain, sell and convey unto [the plaintiff], an easement over that certain piece or parcel of land . . . particularly shown . . . on a map . . . which map is on file or to be filed herewith in the Branford Land Records.

defendants to the plaintiff (defendants' deed) was recorded at 9:42 a.m. in volume 813 at page 736.[7] Finally, the quitclaim deed from the plaintiff to the defendants (plaintiff's deed) was recorded at 9:44 a.m. in volume 813 at page 738.[8]

The plaintiff's deed conveyed all of her extant rights in the defendants' property "excepting only those rights conveyed" in the driveway easement. See footnotes 6, 7 and 8 of this opinion. Among the rights thus conveyed was the privilege to cross the defendants' property to access the water, which the plaintiff argued she possessed by virtue of both the defendants' deed, which made reference to it in the description of the defendants' property, and an 1882 warranty deed.[9] The defendants eventually informed the plaintiff that, because all her rights in their property had been conveyed to them

"Said easement is granted to [the plaintiff] for the purpose of pedestrian and vehicular access to her property at 6 Spring Rock Road . . . and shall be binding upon [the plaintiff] and [her] successors and assigns. Said easement shall run with the land . . . .

"Except as otherwise expressly limited herein, [the defendants] . . . [reserve] the right to use the easement area for any purposes as permitted by law which does not prevent or in any way interfere with the use by [the plaintiff] of the easement premises for the purposes herein set forth."

The map referenced in the easement shows that the grant of access covers only that portion of the plaintiff's driveway that crosses onto the defendants' property.

[7] The defendants' deed reads, in relevant part, as follows: "[The defendants] . . . do by these presents . . . justly and absolutely remise, release, and forever QUIT-CLAIM unto [the plaintiff] . . . all the right, title, interest, claim and demand whatsoever as we [the defendants] have or ought to have in or to the property known as 6 Spring Rock Road . . . ."

[8] The plaintiff's deed reads, in relevant part, as follows: "[The plaintiff] . . . do[es] by these presents . . . justly and absolutely remise, release, and forever QUIT-CLAIM unto [the defendants] . . . all the right, title, interest, claim and demand whatsoever as we [the plaintiff] have or ought to have in or to [2 Spring Rock Road]. Excepting only those rights conveyed in a Grant of Pedestrian and Vehicular Access Easement recorded herewith."

[9] This warranty deed, granted to James Smith and William Munson by Elizur Clinton, was recorded in the Branford land records in volume 37 at page 472. It grants access across the defendants' property to "the grove and shore."

and because the plaintiff and her husband had continued to engage in activities the defendants found injurious to the quiet enjoyment of their property,[10] the defendants would no longer permit the plaintiff and her guests to cross the defendants' property to access the water.

In 2012, the plaintiff brought the underlying action, seeking, inter alia, to reform the plaintiff's deed "by reserving the [water easement]."[11] In support of her claim for reformation, the plaintiff alleged mutual and unilateral mistake, the latter of which by actual and constructive fraud or inequitable conduct. After a five day trial to the court in August and December, 2015, the court rendered judgment in favor of the defendants.

[10] The plaintiff admitted to crossing the defendants' stairs after Hurricanes Irene and Sandy despite signs prohibiting access and warning about damage and trimming the defendants' plants without permission. The plaintiff's husband admitted to poisoning a large cedar tree on the defendants' property that blocked his and the plaintiff's view to the water.

The defendants also testified that the plaintiff and her husband engaged in other intimidating behavior. The plaintiff likewise testified that the defendants engaged in obstinate and unreasonable behavior.

[11] All told, the plaintiff sought reformation of her deed or, in the alternative, a prescriptive easement to the defendants' property. In support of her claim for reformation, the plaintiff pleaded both mutual and unilateral mistake, the latter of which supported by alleged actual fraud, constructive fraud or inequitable conduct. She prayed for injunctive relief to reform the deed, an injunction prohibiting the defendants from interfering with her right to use the easements and/or an injunction as to the prescriptive easement.

The defendants brought a counterclaim against the plaintiff and her husband seeking injunctive relief and to quiet title. See footnote 2 of this opinion. In response, the plaintiff's husband asserted a right to traverse the defendants' property by prescription because he had used the walkway and stairs on the defendants' property to access the beach for some thirty-five years.

The court rejected both the plaintiff's and her husband's claims to prescriptive easements, concluded that the plaintiff could not prove either the unilateral or mutual mistake necessary to support her claim for reformation and determined that the plaintiff's claim for reformation was time barred. Although the court rendered judgment in favor of the defendants; see footnote 3 of this opinion; it did not separately address the defendants' counterclaim.

See footnote 3 of this opinion. The plaintiff appealed. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the trial court erred by concluding that the alphanumeric prefixes in the settlement agreement; see footnote 5 of this opinion; were included only for convenience. She contends that the prefixes indicated the order in which the property instruments were to be recorded. We disagree.

We begin with the applicable legal principles. The plaintiff argues that "[w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law" over which our review is plenary. (Internal quotation marks omitted.) See *Reid* v. *Landsberger*, 123 Conn. App. 260, 271, 1 A.3d 1149, cert. denied, 298 Conn. 933, 10 A.3d 517 (2010). The defendants counter that, because the court made a finding of fact, the clearly erroneous standard applies. These arguments are incomplete because, as explained herein, the scope and depth of our review depend on whether the contractual language is ambiguous on its face.

"The law governing the construction of contracts is well settled. When a party asserts a claim that challenges the trial court's construction of a contract, we must first ascertain whether the relevant language in the agreement is ambiguous. . . . If a contract is unambiguous within its four corners, intent of the parties is a question of law requiring plenary review. . . . [If] the language of a contract is ambiguous, the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous. . . . A contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . Accordingly, any ambiguity in a contract must emanate from

the language used in the contract rather than from one party's subjective perception of the terms. . . .

"[W]e accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract. . . . [If] the language is unambiguous, we must give the contract effect according to its terms. . . . [If] the language is ambiguous, however, we must construe those ambiguities against the drafter. . . . Moreover, in construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous." (Citations omitted; internal quotation marks omitted.) *EH Investment Co., LLC* v. *Chappo, LLC*, 174 Conn. App. 344, 357–58, 166 A.3d 800 (2017); see also *Reid* v. *Landsberger*, supra, 123 Conn. App. 271–72.

We conclude that the section of the settlement agreement at issue; see footnote 5 of this opinion; is unambiguous on its face. The settlement agreement is straightforward in its mandate that the parties draft and exchange the referenced legal instruments. The parties' conflicting understandings of the *application* of the prefixes notwithstanding, there is nothing intrinsically ambiguous about the alphanumeric labeling.[12] See *EH*

[12] The plaintiff relies in part on federal cases that speak to the interpretation of headings and captions. See, e.g., *International Multifoods Corp.* v. *Commercial Union Ins. Co.*, 309 F.3d 76, 85 (2d Cir. 2002) (heading must be considered and given effect in contractual constructions); *Mazzaferro* v. *RLI Ins. Co.*, 50 F.3d 137, 140 (2d Cir. 1995) ("[c]aptions are relevant to contract interpretation"). These cases are neither apposite nor persuasive; captions and headings convey detailed information that alphanumeric prefixes cannot. That is, we are unable to conclude, without more, that listing the letters of the alphabet from "A" to "Z" is equivalent to listing ordinal numbers from "first" to "twenty-sixth." Our analysis might be considerably different if the settlement agreement contained a *heading* or *caption* that read "Sequence of Recording" or "Order of Performance."

Investment Co., LLC v. *Chappo, LLC*, supra, 174 Conn. App. 358 ("any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms" [internal quotation marks omitted]). Accordingly, our review is plenary.

The plain language of the settlement agreement, specifically the substantive language of the challenged section, belies the plaintiff's contention that the alphanumeric prefixes determine the sequence of recording. First, the settlement agreement is silent as to the sequence of recording. Second, it expressly indicates that the parties "agree to resolve *all of the issues and disputes between them* . . . ." (Emphasis added.)

The resolution of "all of the issues and disputes between them" is conditioned on the execution and exchange of the instruments, each of which is given an express purpose: "A. The [p]laintiff . . . has executed and delivered a Quit Claim Deed of any and all interest that she may have in or to the [defendants'] property, *with the specific intention of relinquishing any and all claims she may have to said property*. . . . B. The [d]efendants . . . have executed and delivered a Quit Claim Deed of any and all interest that they may have in or to the [plaintiff's] property, *with the specific intention of relinquishing any and all claims they may have to said property*. . . . C. [The defendants] have granted [the plaintiff] a perpetual easement *for the purpose of pedestrian and vehicular access to a portion of the* [*d*]*efendants' property* . . . ." (Emphasis added.)

Relevant also is the language of the plaintiff's deed to the defendants, which was incorporated by reference into the settlement agreement. See footnotes 6, 7 and 8 of this opinion. The plaintiff quitclaimed "*all* the right, title, interest, claim and demand whatsoever . . . . Excepting *only* those rights conveyed in a Grant of

Pedestrian and Vehicular Access Easement recorded herewith." (Emphasis added.) That easement, the driveway easement, is granted "for the purpose of pedestrian and vehicular access *to her property at 6 Spring Rock Road* . . . ." (Emphasis added.) Together, these instruments indicate an express purpose on the part of the plaintiff to disclaim all rights in and interests to the defendants' property except for pedestrian and vehicular access, via the driveway easement, to her own property. Because the plaintiff retained that right, the express intentions of the settlement agreement were satisfied regardless of whether the sequence of recording or the language of the instruments, or both in combination, effected the conveyance of the water easement.[13] Put another way, the settlement agreement does precisely what it says it is meant to do.

Moreover, the plaintiff's interpretation would render superfluous the "any and all" language in the settlement agreement. "[I]n construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous." (Internal quotation marks omitted.) *EH Investment Co., LLC* v. *Chappo, LLC*, supra, 174 Conn. App. 358. To the extent that the plaintiff argues that losing her access to the water and grove was an "unintended consequence" of the contract between them, it is entirely irrelevant to the interpretation of the unambiguous language *in the settlement agreement.* "The circumstances

[13] Indeed, the defendants argue that the plaintiff would not prevail even if the deeds were recorded in the opposite order. The plaintiff's deed "*forever* QUIT-CLAIM[s] unto [the defendants] . . . all the right, title, interest, claim and demand whatsoever as we [the plaintiff] have or ought to have . . . . Excepting only those rights conveyed in a Grant of Pedestrian and Vehicular Access Easement . . . ." (Emphasis added.) The defendants' experts, Attorneys John P. Tesei and Robert Piscitelli, opined that such language suggests that the plaintiff's right would not have been resurrected by the defendants' deed even if it had been filed subsequently.

surrounding the making of the contract, the purposes which the parties sought to accomplish and their motive cannot prove an intent contrary to the plain meaning of the language used. . . . It is axiomatic that a party is entitled to rely upon its written contract as the final integration of its rights and duties." (Internal quotation marks omitted.) *Yellow Book Sales & Distribution Co.* v. *Valle*, 311 Conn. 112, 119, 84 A.3d 1196 (2014). Again, it is clear from the express language in both the settlement agreement and in the legal instruments that the *only* rights the plaintiff sought to preserve were those in the driveway easement.

In the absence of explicit language to the contrary, we decline to presume that a list invariably demands sequential performance. We especially are disinclined to do so where, as here, such a presumption would render superfluous other contractual language. For those reasons, we conclude that the trial court did not misinterpret the settlement agreement by concluding that its alphanumeric prefixes were included only for convenience.

II

The plaintiff next claims that the trial court erred in rejecting her claim of mutual mistake.[14] This claim is without merit.

A

We note at the outset that the plaintiff's reformation claim is somewhat nebulous. Although it is true that reformation of a deed is an appropriate remedy where *the deed itself* embodies the parties' contract; see *Lopinto* v. *Haines*, 185 Conn. 527, 531–32, 441 A.2d 151

[14] As discussed previously in this opinion, the plaintiff argued at trial that there was also unilateral mistake supported either by actual fraud, constructive fraud or inequitable conduct. On appeal, the plaintiff only challenges the court's ruling as to mutual mistake.

(1981); the waters are muddied in this case by the separate existence of the written settlement agreement. Although reformation of the plaintiff's deed would bring about the plaintiff's desired result, reformation of the deed does not actually repair the mistake *in the written agreement* alleged by the plaintiff. Put another way, reformation of the plaintiff's deed would be an equitable end run around the settlement agreement itself.

This is significant because the equitable remedy of reformation "is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorialized that agreement is at variance with the intent of both parties . . . ." (Internal quotation marks omitted.) Id., 532. In this case, the writing that memorialized the parties' contract is the settlement agreement, and the mistake alleged here is the failure of the agreement to specify the order of recording. Thus, to reform the deed itself would be to change the substance of the bargained for consideration exchanged pursuant to the settlement agreement, not to restate the actual contract between the parties.[15] "[T]o prevail in [a case for reformation], it must appear that *the writing*, as reformed, will express what was understood and agreed to by both parties." (Emphasis added; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Perez*, 146 Conn. App. 833, 840, 80 A.3d 910 (2013), appeal dismissed, 315 Conn. 542, 109 A.3d 452 (2016) (certification improvidently granted); *Greenwich Contracting Co.* v. *Bonwit Construction Co.*, 156 Conn. 123, 127, 239 A.2d 519 (1968); see also 7 J. Perillo, Corbin on Contracts (Rev. Ed. 2002) § 28.45, pp. 281–82

[15] We acknowledge, however, both that the function of the deed is "merely to pass title to land, pursuant to the agreement of the parties"; (internal quotation marks omitted) *Lopinto* v. *Haines*, supra, 185 Conn. 532; and that all the instruments in this case were incorporated by reference into the settlement agreement. Those facts do not change our analysis.

("Note the limited scope for reformation. Contracts are not reformed for mistake; writings are. The distinction is crucial." [Footnote omitted.]).

B

That caveat notwithstanding, and even if we were to conclude that reformation of the plaintiff's deed is the appropriate remedy in this case, the trial court did not err in concluding that the plaintiff failed to prove the underlying claim of mutual mistake.

"The party seeking the reformation of a deed must establish the asserted ground for reformation by clear and convincing proof. . . . Clear and convincing proof is a demanding standard denot[ing] a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist. . . . The determinations reached by the trial court that the evidence is clear and convincing will be disturbed only if [any challenged] finding is not supported by the evidence and [is], in light of the evidence in the whole record, clearly erroneous. . . . On appeal, our function is to determine whether the trial court's conclusion was legally correct and factually supported. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached . . . nor do we retry the case or pass upon the credibility of the witnesses. . . . Rather, on review by this court every reasonable presumption is made in favor of the trial court's ruling. . . .

"A cause of action for reformation of a deed rests on the equitable theory that the instrument sought to be reformed does not conform to the real contract agreed upon and does not express the intention of the parties and that it was executed as the result of mutual mistake, or mistake of one party coupled with actual or constructive fraud, or inequitable conduct on the part of the other. . . . Reformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties. . . . The remedy of reformation is appropriate in cases of mutual mistake—that is where, in reducing to writing an agreement made or transaction entered into as intended by the parties thereto, through mistake, common to both parties, the written instrument fails to express the real agreement or transaction. . . . In short, the mistake, being common to both parties, effects a result which neither intended." (Citations omitted; internal quotation marks omitted.) *Czeczotka* v. *Roode*, 130 Conn. App. 90, 98–99, 21 A.3d 958 (2011); see also *Lopinto* v. *Haines*, supra, 185 Conn. 533–35; *Blackwell* v. *Mahmood*, 120 Conn. App. 690, 700–701, 992 A.2d 1219 (2010); *Blow* v. *Konetchy*, 107 Conn. App. 777, 792, 946 A.2d 943 (2008).

The court's conclusion that the facts in the present case do not demand reformation of the deed was not clearly erroneous. Essentially, the plaintiff contended at trial that the conveyance of the water easement was an unintended consequence of the settlement agreement, whereas the defendants contended that those rights were wrapped up in the bargained for consideration exchanged pursuant to the settlement agreement. This case, therefore, boiled down to a contest of credibility, and there is sufficient evidence in the record to indicate that reformation was not warranted.

For instance, the defendants repeatedly testified that their reasoning for agreeing to exchange deeds was that they "wanted peace" and "did not want to have any repeat performances of lawsuits that were really going to be based on trying to secure any additional parts of [their] properties or rights on any additional portions of [their] property." They testified that they knew that they owned the stairs and wanted to maintain the right to control access to them. Furthermore, both the plaintiff's prior attorney and the plaintiff herself testified that she had understood the language of the settlement agreement, reviewed it with her attorney, asked no questions about it and raised no objections to it.

Additionally, as discussed previously in this opinion, the sequence of recording had no effect on *the boundary line or the creation of the driveway easement.* Although the parties dispute the effect of the sequence of recording on the *water* easement, the purpose of the settlement agreement was to create the driveway easement and to settle the boundary dispute only, not to preserve the water easement.[16] Thus, we cannot say that the court clearly erred in concluding that there was not clear and convincing evidence of a mistake common to both parties that effected a result neither party intended; they intended to, and did, create the driveway easement.

Indeed, the record clearly indicates that the court carefully considered and weighed all the evidence and all the testimony and determined that the defendants were more credible than the plaintiff. The court noted

[16] The plaintiff relies on *Mulla* v. *Maguire*, 65 Conn. App. 525, 783 A.2d 93, cert. denied, 258 Conn. 934, 785 A.2d 229 (2001), for the proposition that the granting of a quitclaim deed for the purpose of settling a boundary dispute cannot extinguish a separate right-of-way. The existence of a separate written agreement outlining the parties' intent distinguishes the present case from *Mulla*. In *Mulla*, intent had to be determined, upon cross motions for summary judgment, solely on the basis of the deed itself. Id., 536.

that it "believes that there was a mutual mistake, but only by a fair preponderance of the evidence. . . . There was insufficient credible evidence, however, to find, by clear and convincing evidence, that there was mutual mistake. Therefore, the court does not find there to have been a mutual mistake." "[I]t is well established that [i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence." (Internal quotation marks omitted.) *Customers Bank* v. *Boxer*, 148 Conn. App. 479, 487, 84 A.3d 1256 (2014).

Although the court acknowledged that the plaintiff would have prevailed under a lower burden of proof, it nonetheless remains the plaintiff's responsibility to sustain the "heavy burden" of clear and convincing proof where "extremely significant questions of fact," such as whether a written instrument contradicts the actual agreement between the parties, are involved. *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 796, 700 A.2d 1108 (1997); *Lopinto* v. *Haines*, supra, 185 Conn. 531–32. "[The clear and convincing standard's] emphasis on the *high probability* and the *substantial greatness of the probability* of the truth of the facts asserted indicates that it is a very demanding standard and should be understood as such . . . . We have stated that the clear and convincing evidence standard 'should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory.' " (Emphasis in original.) *Miller* v. *Commissioner of Correction*, supra, 795, quoting *Lopinto* v. *Haines*, supra, 539. To the extent that the plaintiff is challenging the trial court's conclusion as to the parties' relative credibility, we iterate that "our function is to determine whether the trial court's conclusion was legally correct and factually supported. . . . We do not examine the record to determine

whether the trier of fact could have reached a conclusion other than the one reached . . . nor do we retry the case or pass upon the credibility of the witnesses." (Internal quotation marks omitted.) *Czeczotka* v. *Roode*, supra, 130 Conn. App. 98. The trial court specifically stated that "[t]here was insufficient *credible* evidence . . . to find, by clear and convincing evidence, that there was mutual mistake." (Emphasis added.)

Insofar as the plaintiff maintains that "[i]t is unclear from the [memorandum of decision] what testimony, if any, the court relied upon in its passing reference to [the defendants'] testimony," we note that it is the responsibility of the appellant to move for an articulation of the trial court's reasoning. See Practice Book §§ 60-5 and 61-10. In the absence of a further articulation, we are left only with the court's assessment of the parties' testimonies in their entirety, the credibility of which is not for us to second-guess.

We, therefore, cannot say that the trial court's finding that the plaintiff had not proven mutual mistake by clear and convincing evidence was clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

SYLVIA N. KUEHL *v.* ROSALIND J. KOSKOFF ET AL.
(AC 38128)

Lavine, Sheldon and Elgo, Js.

Syllabus

The plaintiff sought to recover damages from the defendant attorney and the defendant law firm for alleged legal malpractice in connection with their representation of the plaintiff in certain proceedings related to an underlying personal injury action that concerned an automobile accident involving the plaintiff's husband, G. In the underlying action, G and the plaintiff signed retainer agreements with the defendants, which stated,

inter alia, that the law firm was retained to pursue claims against any party arising out of the collision. In December, 1991, G, on his own behalf, filed a notice of claim for workers' compensation benefits related to the collision, which had occurred while he was driving from his home office to a business appointment, and his employer and the employer's insurance company contested his claim. The defendants thereafter commenced a personal injury action against the operator and owner of the other motor vehicle involved in the collision in November, 1992, and G died shortly thereafter. The personal injury action was eventually settled. At the time of G's death, the defendant attorney did not advise the plaintiff to contact a workers' compensation attorney, and the plaintiff never filed a formal notice of a claim for workers' compensation survivor's benefits within one year of G's death pursuant to statute (§ 31-294c [a]). The plaintiff, however, requested a hearing for survivor's benefits, and following a hearing, the Workers' Compensation Commissioner issued a decision determining that the plaintiff's failure to file a formal notice precluded her from pursuing a claim for survivor's benefits, which was affirmed by the Workers' Compensation Review Board and by our Supreme Court. Thereafter, the plaintiff commenced the present action, claiming that the defendants committed legal malpractice by failing to tell her that she was required to file a notice of claim for survivor's benefits within the one year statute of limitations. After a trial, the jury found in favor of the plaintiff, and the defendants filed certain posttrial motions, including a motion to set aside the verdict, claiming, inter alia, that the plaintiff was required to present expert testimony in a legal malpractice action showing that the defendants' breach of the standard of care proximately caused the plaintiff's alleged damages, which the plaintiff did not do. The trial court denied the defendants' posttrial motions, and the defendants appealed to this court. *Held* that the trial court improperly denied the defendants' motion to set aside the verdict; although the plaintiff presented the testimony of an attorney expert who practiced personal injury litigation and workers' compensation law, the plaintiff failed to provide expert testimony as to causation, as her expert did not testify that the failure of the defendant attorney to file a workers' compensation claim on behalf of the plaintiff was a proximate cause of the plaintiff's damages or that the plaintiff would have prevailed on the issues related to the workers' compensation claim, namely, whether the collision occurred during the course of G's employment and whether the collision was a proximate cause of his death, and the trial court improperly concluded that the jury could discern whether the collision occurred during the course of G's employment and that his death was the result of the collision, as the court did not address the statutory and regulatory rules related to workers' compensation claims, which were complex and not within the ken of the jury, and for which expert testimony was required to enable the jury to determine the causal relationship between any legal malpractice and the plaintiff's alleged damages.

Argued January 5—officially released June 12, 2018

Procedural History

Action to recover damages for, inter alia, legal malpractice, and for other relief, brought to the Superior Court in the judicial district of Stamford; thereafter, the court, *Povodator*, *J.*, granted the motion to substitute Clifford A. Mollo, executor of the estate of the plaintiff, as the party plaintiff; subsequently, the case was tried to the jury; verdict for the substitute plaintiff; thereafter, the court denied the defendants' motion for a directed verdict, motion for judgment notwithstanding the verdict, and motion to set aside the verdict, and rendered judgment in accordance with the verdict, from which the defendants appealed and the substitute plaintiff cross-appealed to this court. *Reversed*; *judgment directed.*

James J. Healy, with whom, on the brief, was *Matthew W. Naparty*, for the appellants/cross-appellees (defendants).

Ridgely Whitmore Brown, with whom were *David M. S. Shaiken* and *Benjamin E. Gershberg*, and, on the brief, *Mark S. Shipman* and *Austin Sherwood Brown*, legal intern, for the appellee/cross-appellant (substitute plaintiff).

Opinion

LAVINE, J. Except in obvious situations, expert testimony generally is required to establish the element of causation in a legal malpractice case. See *Bozelko* v. *Papastavros*, 323 Conn. 275, 284–85, 147 A.3d 1023 (2016). "Because a determination of what result should have occurred if the attorney had not been negligent usually is beyond the field of ordinary knowledge and experience possessed by a juror, expert testimony generally will be necessary to provide the essential nexus between the attorney's [alleged] error and the plaintiff's damages." Id., 285.

In this legal malpractice action, the defendants, Rosalind J. Koskoff and the law firm of Koskoff, Koskoff & Bieder, P.C.,[1] appeal from the judgment of the trial court rendered, after a jury trial, in favor of the plaintiff, Sylvia N. Kuehl.[2] To summarize, this protracted litigation concerns the plaintiff's contention that the defendants breached the duty of care they owed her during their representation of her in an underlying personal injury action involving her late husband, Guenther Kuehl (decedent), when the defendants failed to file a claim for survivor's benefits under our Workers' Compensation Act (act), General Statutes § 31-275 et seq., within a year of his death.[3] At trial, the defendants claimed that the plaintiff failed to prove the proximate cause element of a negligence cause of action because she failed to present expert testimony that, more likely than not, she would have been awarded survivor's benefits under the act if the defendants had submitted her claim. On appeal, the defendants claim that the trial court improperly denied their motion for a directed verdict, motion for judgment notwithstanding the verdict, and motion to set aside the verdict.[4] We reverse the judgment of the trial court.[5]

[1] In this opinion we refer to Rosalind J. Koskoff as Koskoff and to Koskoff, Koskoff & Bieder, P.C., as the firm, and to them jointly as the defendants. Richard Bieder and Travelers Companies were defendants at trial, but they are not parties to this appeal.

[2] The plaintiff died during the pendency of this case, and Clifford A. Mollo, the executor of her estate, was substituted as the plaintiff. In this opinion, we refer to Sylvia N. Kuehl as the plaintiff.

[3] See General Statutes §§ 31-294c, 31-306.

[4] The defendants raised three claims on appeal: (1) the trial court erred in refusing to enter judgment in their favor because the plaintiff failed to offer expert testimony to prove causation; (2) even if the plaintiff had produced expert testimony to show the outcome of the workers' compensation proceeding, she failed to establish a necessary element of her claim for her survivor's benefits claim, i.e., that the decedent's death was work related; and (3) she failed to prove the standard of care and breach of the standard. We resolve the appeal on the basis of the defendants' first claim and, therefore, need not address the others.

[5] The substitute plaintiff filed a cross appeal claiming that the court erred by (1) denying the plaintiff's motion to set aside the verdict and motion for

The following facts and procedural history are relevant to the issue on appeal. The events giving rise to this case began on the morning of June 26, 1991, when a squirrel darted across a street in Greenwich causing a motorist to swerve and collide with the motor vehicle operated by the decedent.[6] Later in the day, the decedent went to an emergency room and was diagnosed with a cervical strain. At the time, the decedent was the president and owner of Z-Loda Systems Engineering, Inc. (Z-Loda). *Kuehl* v. *Z-Loda Systems Engineering, Inc.*, 265 Conn. 525, 527, 829 A.2d 818 (2003). The decedent believed that he had been injured in the course of his employment because, at the time of the collision, he was driving from his Greenwich home, where he had an office in addition to his office at Z-Loda, to a business appointment in Tarrytown, New York. On August 3, 1991, the decedent suffered an aortic dissection that was surgically repaired. The plaintiff and the decedent believed that his aortic dissection was a result of the injuries the decedent suffered in the collision.

On September 24, 1991, the decedent and the plaintiff each signed a retainer agreement with the firm for their

judgment notwithstanding the verdict with respect to the jury's finding her 15 percent comparatively negligent, (2) setting aside the $165,000 verdict on the breach of contract count, (3) striking the failure to notify count of the complaint, and (4) denying the plaintiff prejudgment interest pursuant to General Statutes § 37-3a. Because we reverse the judgment on the ground that the plaintiff failed to present expert testimony that the defendants' alleged omission was a proximate cause of the plaintiff's injuries, we need not address the cross appeal.

[6] The collision indirectly gave rise to two appeals in our Supreme Court. See *St. Paul Travelers Cos.* v. *Kuehl*, 299 Conn. 800, 802, 12 A.3d 852 (2011) (workers' compensation respondent had standing in declaratory judgment action to challenge constitutionality of public act permitting claimant to file claim for survivor's benefits outside statute of limitations); *Kuehl* v. *Z-Loda Systems Engineering, Inc.*, 265 Conn. 525, 527, 829 A.2d 818 (2003) (plaintiff precluded from obtaining survivor's benefits under General Statutes § 31-306 [a] because she failed to file notice of claim for compensation with decedent's employer or workers' compensation commissioner).

respective claims arising out of the collision. The plaintiff's retainer agreement stated that the firm was retained "to pursue and if warranted to prosecute a claim or claims against any party or parties arising out of the following: Accident to my husband on 6/26/91 in Greenwich, CT."[7] Koskoff was the firm's attorney who assumed responsibility for the case.

On December 16, 1991, the decedent, on his own behalf, filed a notice of claim for workers' compensation benefits (compensation claim). *Kuehl* v. *Z-Loda Systems Engineering, Inc.*, supra, 265 Conn. 528. On January 21, 1992, Z-Loda and Travelers Insurance Company (Travelers), the workers' compensation insurance carrier for Z-Loda, filed a notice contesting the decedent's claim on two grounds: that the collision was not work related and that even if it were, the decedent's injuries were unrelated to the collision.[8] Id., 528–29. On November 1, 1992, Koskoff, on behalf of the plaintiff and the decedent, commenced a personal injury action against the operator and owner of the motor vehicle (tortfeasors) involved in the collision. Id., 529. The decedent alleged claims to recover damages for his personal injuries and losses; the plaintiff alleged a claim to recover damages for loss of consortium.

On November 14, 1992, the decedent died, and the plaintiff, as executrix of his estate, was substituted for him as the plaintiff in the personal injury action. Id. The plaintiff amended the complaint to allege that the decedent's death was a result of his aortic aneurysm, which in turn was a consequence of the injuries he

[7] In the present action, the plaintiff claims that the retainer obligated the defendants to preserve any workers' compensation rights she and the decedent had. The defendants deny that claim and argue that they were only obligated to pursue a personal injury action.

[8] The trial court quoted from *Kuehl* v. *Z-Loda Systems Engineering, Inc.*, supra, 265 Conn. 529, for the fact that the decedent's compensation claim had not yet been resolved and no benefits had been paid in connection with it.

sustained in the collision. Id. The plaintiff sent a copy of the amended complaint to Z-Loda in May, 1993, and Z-Loda moved to intervene in the personal injury action on the ground that it might become obligated to pay large sums to the decedent's estate "and/or to the plaintiff." (Internal quotation marks omitted.) Id. The plaintiff eventually settled the personal injury action and signed a release as to Travelers.[9] At the time of the decedent's death, Koskoff did not advise the plaintiff to contact a workers' compensation attorney because she knew that the decedent had met with an attorney specializing in workers' compensation law,[10] as previously recommended by Richard Bieder of the firm. "Although the decedent previously had filed a notice of claim for compensation in connection with his claim for workers' compensation benefits, the plaintiff did not file a separate notice of claim in connection with her claim for survivor's benefits." Id., 530 n.8.

On July 22, 1998, however, the plaintiff requested a hearing for survivor's benefits pursuant to § 31-306. Id., 530. On August 31, 1998, the Workers' Compensation Commissioner (commissioner) held a hearing on the plaintiff's claim to determine whether she should be precluded from pursuing a claim for survivor's benefits due to the fact that she had not filed a formal notice of her claim within the statute of limitations pursuant to § 31-294c (a); id.; i.e., one year from the date of the decedent's death. Although the plaintiff presented several arguments as to why her failure to file notice should not be fatal to her claim, the commissioner concluded that her failure to file a formal notice precluded

[9] The trial court in the present case found that Travelers had limited involvement in the personal injury action given the possibility that it could recover compensation benefits paid or payable to the decedent pursuant to General Statutes § 31-293.

[10] The workers' compensation firm of Abate and Fox met with the decedent to discuss his compensation claim but did not prosecute it on behalf of the decedent.

her from pursuing a claim for survivor's benefits. Id., 531–32. The plaintiff took two appeals, but the commissioner's decision was affirmed by the Workers' Compensation Review Board; id., 532; and by our Supreme Court. Id., 539. Our Supreme Court concluded that the plaintiff's failure to file a formal notice of claim pursuant to § 31-294c (a) deprived the commissioner of subject matter jurisdiction. See id., 534–35.

Thereafter, on March 16, 1999, the plaintiff commenced the present action against the defendants, alleging that they had failed to tell her that she was required to file a notice of claim for survivor's benefits within one year of the decedent's death to confer jurisdiction on the commissioner. See *St. Paul Travelers Cos.* v. *Kuehl*, 299 Conn. 800, 806, 12 A.3d 852 (2011). The plaintiff alleged two counts: negligence or legal malpractice and breach of contract. Following the plaintiff's death, Clifford A. Mollo was appointed executor of her estate and substituted as the party plaintiff in the present action.[11]

The operative complaint was filed on May 1, 2014, during trial. It alleged in relevant part that the defendant was an attorney admitted to practice law in Connecticut and was employed by the firm. The plaintiff alleged that the decedent sustained personal injuries in the collision and that the tortfeasors had more than $3 million of insurance coverage. In addition, prior to the collision, Z-Loda had purchased workers' compensation coverage from Travelers that was available to compensate the decedent and the plaintiff for their losses. The plaintiff further alleged that she had retained Koskoff to prosecute "a claim or claims against any party or parties arising out of [the decedent's]" collision of June 26,

[11] In March, 2000, the plaintiff amended her complaint to add a third count alleging that the defendants were aware of their negligence in failing to advise her to file a timely claim for survivor's benefits but failed to disclose their knowledge to the plaintiff. That count was not submitted to the jury.

1991, and that the defendants accepted the employment and provided "legal representation to the plaintiff," which was continuous from October 19, 1991, until October 1, 1998.

The operative complaint also alleged that the defendants commenced a personal injury action against the tortfeasors on behalf of the decedent and the plaintiff on November 1, 1992. The plaintiff as executrix of the decedent's estate was substituted as the plaintiff after the decedent died. The plaintiff alleged that "Koskoff, in the exercise of the skills ordinarily expected of attorneys in the community practicing law under the same or similar circumstances, knew or reasonably should have known" that under the act, the plaintiff was entitled to file a claim for survivor's benefits; that the time for filing a written notice of claim for survivor's benefits was one year from the date of the decedent's death; and that the failure to file a written claim for survivor's benefits on or before November 14, 1993, would bar the plaintiff from receiving survivor's benefits under the act. The plaintiff also alleged that the value of her claim for survivor's benefits was in excess of $1 million.

The plaintiff alleged that Koskoff was negligent in multiple ways but principally in that she failed to file a written notice of claim for survivor's benefits within one year of the decedent's death, failed to pursue benefits for the plaintiff when she knew or reasonably should have known that the plaintiff was entitled to them, and failed to advise the plaintiff that she had to file a notice of claim. In addition, she alleged that the defendants' negligent acts constituted legal malpractice that was a substantial factor in proximately causing her damages. On May 5, 2014, the defendants filed an answer and special defense to the amended complaint, in which they denied its material allegations and pleaded the special defense of comparative negligence on the basis of the plaintiff's alleged negligence in failing to consult

with other counsel for the purposes of filing for benefits under the act as she had been advised to do, and failure to retain counsel for that purpose.

The parties tried the case to a jury in April and May, 2014. The evidence relevant to the determinative issue in this appeal concerns the expert testimony the plaintiff presented as to the prevailing standard in the legal community, whether Koskoff had breached that standard of care when representing the plaintiff, and whether the alleged breach proximately caused the plaintiff's alleged losses and damages.[12] The plaintiff's expert witness was Thomas Willcutts, an attorney who practices in the areas of personal injury and workers' compensation law. The defendants contend that he did not offer expert testimony as to the prevailing standard of professional care, but instead testified only about his personal preferences, and that he did not offer expert testimony that the defendants' negligence proximately caused the plaintiff's alleged losses and damages.

Willcutts testified in part that Koskoff "does not know workers' comp. She knows some of it, but she would not consider herself someone who would handle a workers' compensation matter, which is okay. You can handle the personal injury side of the case and not the workers'

[12] During the plaintiff's case in chief, Koskoff testified, in relevant part, that she knew nothing about worker's compensation law. A letter written by Koskoff that was placed in evidence stated that "[o]ur office . . . does not do workers' compensation law."

We note that there is no statute comparable to General Statutes § 52-184c, which is applicable in actions alleging the negligence of a health-care provider, for actions alleging negligence of an attorney. Section 52-184c (a) states in relevant part: "The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers . . . ." There is no issue on appeal concerning the qualifications or legal specialization required to testify as to the standard of care applicable to the type of law practiced by a defendant attorney. We note, however, that the practice of law has become highly specialized.

compensation case. So that in itself I don't see as a problem. So I am judging her not as a workers' compensation lawyer and what a workers' compensation [lawyer] should know and should do, but my opinion is based on her being a personal injury lawyer who takes the position that she doesn't know workers' comp., but is handling a case that involves workers' comp. . . . Well, lawyers can make mistakes and they don't necessarily cause any harm. Part of my opinion is based upon the information in terms of what I expect would occur in this case had it been handled the way I believe it should have been handled." Although Willcutts testified at length about Koskoff's alleged mistakes in handling the plaintiff's claim, he did not testify that her alleged breach of the standard of care proximately caused the plaintiff's alleged losses and damages, that is that the plaintiff would have received survivor's benefits if Koskoff had submitted a claim for such benefits or if she had referred the matter to a lawyer who specializes in workers' compensation claims.

At the conclusion of the plaintiff's case-in-chief, the defendants moved for a directed verdict on the ground that the plaintiff had failed to produce expert testimony to establish that she likely would have prevailed on her claim for survivor's benefits because the complexities of workers' compensation law are not common knowledge to the jurors.[13] The defendants argued that because

[13] The defendants specifically argued that "the plaintiff claims the defendants were negligent such that the decedent's ability to pursue a claim for workers' compensation benefits was lost. The original decision maker would have been a workers' compensation commissioner, an individual whose experience and base of knowledge regarding workers' compensation proceedings and law far exceed that of the jury." Moreover, they argued "[i]t is an axiom of [workers'] compensation law that awards are determined by a two-part test. The [claimant] has the burden of proving that the injury claimed [1] arose out of the employment and [2] occurred in the course of the employment." (Internal quotation marks omitted.) *Perun* v. *Danbury*, 143 Conn. App. 313, 316, 67 A.3d 1018 (2013).

the plaintiff claimed that her damages flowed from the loss of her right to pursue survivor's benefits under the act, she needed to present a legal expert to testify that she more than likely would have been awarded survivor's benefits if she had submitted a claim. Such an action is proved by presenting what is known as a case-within-a-case. See, e.g., *Grimm* v. *Fox*, 303 Conn. 322, 352, 33 A.3d 205 (2012) (*Palmer*, *J.*, concurring). The plaintiff faced a difficult challenge in proving causation, in that Z-Loda and Travelers had contested the claim that the self-represented decedent filed on the grounds that the injuries he sustained in the collision did not arise in the course of his employment and that his aortic dissection and ensuing death were not proximately caused by the collision. The court denied the defendants' motion for a directed verdict.

The case and certain interrogatories were submitted to the jury on May 13, 2014. The jury found, pursuant to its answers to interrogatories, that the defendants departed from the standard of care that they owed the plaintiff and the departure proximately caused the financial harm that the plaintiff sustained. The jury also found that the defendants had proved that the plaintiff's negligence in failing to follow their advice to consult with an experienced workers' compensation attorney was a proximate cause of the financial harm that she sustained. The jury apportioned 85 percent of the negligence to the defendants and 15 percent of it to the plaintiff. The jury found that the plaintiff's damages were $1.1 million, but reduced that sum by 15 percent to $935,000, due to the plaintiff's comparative negligence, in awarding the plaintiff damages on her legal malpractice claim.[14]

Thereafter the defendants moved for a judgment notwithstanding the verdict and to set aside the verdict.

[14] The jury's answers with respect to the plaintiff's breach of contract claim and associated verdict are not relevant to the issue in this appeal.

On July 21, 2014, they filed a memorandum of law in support of their postjudgment motions. In their memorandum of law, the defendants cited numerous cases for the proposition that a plaintiff must present expert testimony in a legal malpractice action that the defendant's breach of the standard of care proximately caused the plaintiff's alleged losses and damages. See *Byrne* v. *Grasso*, 118 Conn. App. 444, 451–52, 985 A.2d 1064 (2009) (to prove damages for alleged malpractice in challenging claim for attorney's fees, plaintiff had to present expert testimony that, without malpractice, fee challenge could have been successful), cert. denied, 294 Conn. 934, 987 A.2d 1028 (2010); *Dixon* v. *Bromson & Reiner*, 95 Conn. App. 294, 299–300, 898 A.2d 193 (2006) (in legal malpractice case expert witness is necessary to opine that defendant's alleged breach of standard of care proximately caused plaintiff's alleged loss or damages; judge not expert in every area of law); *DiStefano* v. *Milardo*, 82 Conn. App. 838, 843, 847 A.2d 1034 (2004) (directed verdict proper if plaintiff fails to present expert testimony on issue of proximate causation in legal malpractice actions), aff'd, 276 Conn. 416, 886 A.2d 415 (2005); *Vona* v. *Lerner*, 72 Conn. App. 179, 188–92, 804 A.2d 1018 (2002) (expert testimony serves to assist lay members of jury and presiding judge and to prevail on negligence claim, plaintiff must establish that defendant's conduct proximately caused injuries), cert. denied, 262 Conn. 938, 815 A.2d 138 (2003).[15]

On June 18, 2015, the court issued a lengthy memorandum of decision on the defendants' postverdict motions, as well as the postverdict motions filed by the plaintiff.[16]

[15] See also *Davis* v. *Margolis*, 215 Conn. 408, 416, 576 A.2d 489 (1990) (expert testimony must be evaluated in terms of helpfulness to trier of fact on specific issues of standard of care and alleged breach of that standard).

[16] Because we determine that the plaintiff could not prevail on her malpractice claim due to her failure to present expert testimony with respect to causation, we need not address her postverdict motions.

We need address only that portion of the court's decision with respect to the defendants' claim that the plaintiff was required to provide expert testimony to prove that the defendants' alleged breach of the standard of care proximately caused her alleged damages.

The court outlined the legal complexities of the plaintiff's case. "[I]nstead of the usual trial within a trial format, this case had a trial within a trial within a trial quality. Long before most of the issues in this case had developed, [the decedent] had died. The real workers' compensation issue became not so much the claim that he might have been able to pursue, but rather the [survivor's] benefits which [the plaintiff] might have received, had workers' compensation issues been pursued properly/diligently. That however entails its own trial within a trial element—in order for [the plaintiff] to have had a right to survivor's benefits, [there] first would have to be proof that the injury to [the decedent] was a compensable claim under workers' compensation. In other words, the viability of the survivor's benefit claim was contingent upon the viability of the underlying claim of [the decedent]."

The court summarized the issue presented by the defendants' postverdict motions as follows: "[The] defendants claim that there was a need for expert testimony as to the likely outcome, had the initial claim by [the decedent], and the later [survivor's] claim of [the plaintiff], been properly and timely submitted to the administrative process of workers' compensation—what would a commissioner have done? The court does not believe that [the] defendants have submitted adequate authority for such a requirement; they have not adequately refuted the suggestion . . . of [the] plaintiff that that would be asking for an opinion as to an ultimate issue for the jury to decide." The court concluded that the jury reasonably could have found that the defendants had breached a duty to take care of all legal

matters arising from the collision. It also concluded that there was adequate, if not overwhelming, evidence that the requirements to establish a valid workers' compensation claim by the decedent existed and that it would have been successful if timely filed, which in turn would have led to the awarding of survivor's benefits to the plaintiff if her claim had been submitted.

In other words, the court was of the opinion that the plaintiff had presented sufficient evidence to permit the jury to infer that there was a causal link between the collision and the decedent's injuries. It found that the medical evidence, if considered as presenting a chain of interrelated elements, established a causal connection between the collision and the condition that eventually led to the decedent's death. It found that when they prosecuted the personal injury action, the defendants argued that there was evidence of "medical linkage" between the collision and the decedent's aortic dissection. The court therefore concluded that there was sufficient evidence for the jury to find that the decedent's injury was compensable under the act. In summary, the court believed that "there was adequate evidence presented that would allow a jury to infer that there was a causative link between the injury-causing [collision] and the eventual death of [the decedent]. The appropriate standards were presented through an expert [Willcutts]. There was evidence and discussion of the evidence relating to the employment nexus, including records created by [the] defendants. Again, the court must return to the refrain that even weak evidence, and evidence that must be stitched together, can be sufficient to support a jury verdict." For these and other reasons, the court denied the defendants' postverdict motions and rendered judgment for the plaintiff. The defendants appealed.

The essence of the defendants' claims on appeal concerns legal malpractice. "Malpractice is commonly

defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services . . . ." (Internal quotation marks omitted.) *Updike, Kelly & Spellacy, P.C.* v. *Beckett*, 269 Conn. 613, 649, 850 A.2d 145 (2004). Generally, a plaintiff who alleges legal malpractice must prove all of the following elements: "(1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) *causation*; and (4) damages." (Emphasis added; internal quotation marks omitted.) *Grimm* v. *Fox*, 303 Conn. 322, 329, 33 A.3d 205 (2012). There is no dispute that an attorney-client relationship existed between the parties. The case turns on the causation element of legal malpractice.

"The essential element of causation has two components. The first component, causation in fact, requires us to determine whether the injury would have occurred but for the defendant's conduct. . . . The second component, proximate causation, requires us to determine whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . That is, there must be an unbroken sequence of events that tied [the plaintiff's] injuries to the [defendants' conduct]. . . . The causal connection must be based [on] more than conjecture and surmise. . . . [N]o matter how negligent a party may have been, if his negligent act bears no [demonstrable] relation to the injury, it is not actionable . . . .

"The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection. . . . In legal malpractice actions arising from prior litigation, the plaintiff typically proves that the . . . attorney's professional negligence caused injury to the

plaintiff by presenting evidence of what would have happened in the underlying action had the [attorney] not been negligent. This traditional method of presenting the merits of the underlying action is often called the case-within-a-case. . . . More specifically, the plaintiff must prove that, in the absence of the alleged breach of duty by her attorney, the plaintiff would have prevailed [in] the underlying cause of action and would have been entitled to judgment. . . . To meet this burden, the plaintiff must produce evidence explaining the legal significance of the attorney's failure and the impact this had on the underlying action." (Citations omitted; internal quotation marks omitted.) *Bozelko* v. *Papstavros*, supra, 323 Conn. 283–84.

"Generally, expert testimony is admissible if (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues." (Internal quotation marks omitted.) *Card* v. *State*, 57 Conn. App. 134, 138, 747 A.2d 32 (2000). Expert testimony is permitted in many instances, but it is required "only [if] the question involved goes beyond the field of the ordinary knowledge and experience of a [trier of fact]." *Franchey* v. *Hannes*, 155 Conn. 663, 666, 237 A.2d 364 (1967).

"[Our Supreme Court] has explained that, as a general matter, expert testimony is necessary in legal malpractice cases in order to establish the standard of care, against which the attorney's conduct should be evaluated by the jury." *Bozelko* v. *Papastavros*, supra, 323 Conn. 282–84. Expert testimony is required because to know the outcome if an attorney had not been negligent is beyond the ken of the ordinary trier of fact. Id., 285. Expert testimony provides the required nexus between the attorney's negligence and the plaintiff's damages.

Id. "In complex legal malpractice matters, expert testimony is necessary to keep the jury from speculating on how the client's loss or injury is directly linked to that which he claims was the breach of duty by the attorney." (Emphasis omitted.) Id., 289.

In the present case, the plaintiff presented the testimony of Willcutts, an attorney who practices personal injury litigation and workers' compensation law. We carefully have reviewed his testimony as to how he handles workers' compensation cases. He testified that litigating a personal injury case is different from litigating a workers' compensation case. He also testified that Koskoff was a personal injury lawyer, not a workers' compensation lawyer. He identified the decedent's report of the collision that should have put Koskoff on notice of a compensation claim and opined that she should have filed a claim. Nowhere in his testimony, however, did he testify that her failure to do so was a proximate cause of the plaintiff's injuries and loss. At no time did he testify that the plaintiff would have prevailed on the issues related to the case-within-a-case, namely whether the collision occurred during the course of the decedent's employment and the collision was a proximate cause of his death, in the face of Z-Loda and Travelers filing notice that they intended to contest the decedent's claim for benefits. Z-Loda and Travelers contested the decedent's claim on the grounds that the collision did not occur in the course of his employment and that his injuries and death were not proximately caused by the collision.[17] As to whether the collision occurred during the course of the decedent's employment, Willcutts mentioned the coming and going rule that applies to an employee's commute

[17] Willcutts testified that there was only one informal hearing on the decedent's compensation claim. There was never a formal denial of the claim. Nonetheless, he did not testify that it was more likely than not that the plaintiff would have prevailed if the claim had been pursued.

to his place of employment or start of the work day, but he did not opine that had Koskoff filed a compensation claim the plaintiff more likely than not would have received survivor's benefits. This omission was especially critical in light of the fact that Z-Loda and Travelers were contesting the decedent's claim for workers' compensation benefits.

In denying the defendants' motion for judgment notwithstanding the verdict, the court found that "[the] plaintiff produced at least the minimum evidence needed to present the case to the jury, which in turn was at least the minimum evidence needed to support a possible verdict in favor of [the] plaintiff." The court also found that "the evidence was not overwhelming and may have had to be pieced or stitched together, but that is not an issue to be addressed by way of motion for judgment notwithstanding the verdict or motion to set aside the verdict." It concluded that the jury could discern whether the collision occurred during the course of the decedent's employment and that his death was the result of the collision. In coming to that conclusion, the court found applicable the law related to proximate cause in a personal injury action. It did not, however, address the statutory and regulatory rules related to workers' compensation claims, in particular the coming and going rule that controls whether an injury that was sustained during an employee's commute arose in the course of employment.[18] It can hardly be said that the statutes and regulations regarding workers' compensation are within the ken of the jury. It is for that reason that expert testimony is needed to prove causation in a legal malpractice action.

"It is well settled that, because the purpose of the act is to compensate employees for injuries without

[18] See *Labadie* v. *Norwalk Rehabilitation Services, Inc.*, 84 Conn. App. 220, 228–29, 853 A.2d 597 (2004), aff'd, 274 Conn. 219, 875 A.2d 485 (2005) (explaining coming and going rule).

fault by imposing a form of strict liability on employers, to recover for an injury under the act a plaintiff must prove that the injury is causally connected to the employment. To establish a causal connection, a plaintiff must demonstrate that the claimed injury (1) arose out of the employment, and (2) in the course of the employment. . . .

"The determination of whether an injury arose out of and in the course of employment is a question of fact for the commissioner." (Citation omitted; internal quotation marks omitted.) *Labadie* v. *Norwalk Rehabilitation Services, Inc.*, 84 Conn. App. 220, 225–26, 853 A.2d 597 (2004), aff'd, 274 Conn. 219, 875 A.2d 485 (2005).

"The purpose of the [workers'] compensation statute is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer. . . . A commissioner may exercise jurisdiction to hear a claim only under the precise circumstances and in the manner particularly prescribed by the enabling legislation. . . . The [act] is not triggered by a claimant until he brings himself within its statutory ambit. . . . Although the [act] should be broadly construed to accomplish its humanitarian purpose . . . its remedial purpose cannot transcend its statutorily defined jurisdictional boundaries. . . .

"In order to establish that [the] injury occurred in the course of employment, the claimant has the burden of proving that the accident giving rise to the injury took place (a) within the period of the employment; (b) at a place [the employee] may reasonably [have been]; and (c) while [the employee was] reasonably fulfilling the duties of the employment or doing something incidental to it. . . . An injury is said to arise out of the employment when (a) it occurs in the course of

the employment and (b) is the result of a risk involved in the employment or incident to it or to the conditions under which it is required to be performed. . . .

"Ordinarily, an injury sustained by an employee on a public highway while the employee is going to or coming home from work is not compensable. . . . A principal reason for this rule is that employment ordinarily does not commence until the claimant has reached the employer's premises, and consequently an injury sustained prior to that time would ordinarily not occur in the course of the employment so as to be compensable. Furthermore, in cases falling within the ordinary rule, the employee's means of transportation, as well as his route are entirely within his discretion, unfettered by any control or power of control on the part of the employer. . . .

"A number of exceptions, however, exist to the coming and going rule. Those exceptions are: (1) [i]f the work requires the employee to travel on the highways; (2) where the employer contracts to furnish or does furnish transportation to and from work; (3) where, by the terms of his employment, the employee is subject to emergency calls and (4) where the employee is injured while using the highway in doing something incidental to his regular employment, for the joint benefit of himself and his employer, with the knowledge and approval of the employer." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) Id., 227–29.

The standards and legal principles related to our workers' compensation scheme are complex and no amount of factual background presented to a jury would enable them to determine the causal relationship between legal malpractice, if any, and the plaintiff's alleged losses and damages without the assistance of expert testimony, especially when the cause of action

involves the presentation of a case-within-a-case. In the present matter, the plaintiff failed to provide expert testimony as to causation, and for that reason the court erred in denying the defendants' motion to set aside the verdict.[19]

The judgment is reversed and the case is remanded with direction to render judgment for the defendants.

In this opinion the other judges concurred.

JOSEPH GARTRELL ET AL. *v.* CITY OF HARTFORD ET AL.
(AC 39687)

Alvord, Keller and Bright, Js.

Syllabus

The plaintiffs sought to recover damages from the defendant city of Hartford for alleged violations of the state building code in connection with a residential building owned by the plaintiffs that had sustained substantial damage following a fire. After the fire, it was determined, under the state building code, that imminent danger to the public existed that required immediate action, and the city, after providing notice to the plaintiffs, retained a company to demolish the building. The trial court

[19] The defendants also argue that the plaintiff failed to establish the standard of care because Willcutts testified as to his preferences and not the baseline standard of care. The case of *Vona* v. *Lerner*, supra, 72 Conn. App 179, is particularly instructive in the present case. In *Vona*, this court reviewed the testimony of the plaintiffs' expert and concluded that "the court properly granted the defendants' motion for a directed verdict. All of [the expert's] responses to the hypothetical questions asked of him with respect to the proximate cause of the plaintiffs' alleged damages were based on his personal belief, as opposed to the standard of care, and were conditional or speculative. As we noted in discussing the standard of review applicable to challenges to directed verdicts, a trial court should direct a verdict in the defendants' favor where there is insufficient evidence to support a verdict favorable to the plaintiffs." (Footnote omitted.) Id., 190–91. Our review of Willcutts' testimony reveals that he opined that the defendants violated the standard of care and deprived the plaintiff of the opportunity to submit a claim for survivor's benefits. He, however, did not opine that, if the plaintiff had submitted a claim, she more likely than not would have prevailed.

granted the city's motion for a directed verdict, in which the city claimed that the plaintiffs had not carried their burden of proof with respect to showing that the city did not act under an emergency when it ordered the plaintiffs' building to be demolished. The court initially had reserved decision on the motion and, subsequently, after discussion with counsel, provided the jury with a single interrogatory asking whether it found that the city and its officials could believe that an imminent danger or emergency existed that allowed it to demolish the plaintiffs' building. After the jury answered the interrogatory in the affirmative, the trial court granted the city's motion for a directed verdict and rendered judgment in favor of the city, from which the plaintiffs appealed to this court. On appeal, they claimed that in order to permit the trial court to properly render a directed verdict on the basis of the jury interrogatory, the interrogatory would have been required to ask the jury to find whether the city had proved that it actually did believe that an imminent danger or emergency existed, and not whether it was a belief that could have been held by the city. *Held* that the plaintiffs' unpreserved claim that the trial court erred in directing the verdict in favor of the city on the basis of the jury's answer to a single interrogatory was not reviewable, the plaintiffs having failed to raise the issue to the court on the record, either before or after the jury was charged, or as a basis for denying the city's motion for a directed verdict; the trial court had met with counsel in chambers, prior to its instructions to the jury, and explained the procedure it planned to follow, the court did, in fact, follow the procedure discussed when the trial resumed, and although the plaintiffs' counsel had ample opportunity to object to the court's procedure, the plaintiffs' counsel acquiesced in that procedure by, inter alia, failing to object even though the court read the interrogatory to the jury during its charge and subsequently invited exceptions from the parties.

Argued January 25—officially released June 12, 2018

Procedural History

Action to recover damages for, inter alia, violations of the state building code with respect to certain real property, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the action was withdrawn as to the defendant Environmental Services, Inc.; thereafter, the matter was tried to the jury before *Berger, J.*; subsequently, the court granted the named defendant's motion for a directed verdict and rendered judgment for the named defendant, from which the plaintiffs appealed to this court. *Affirmed.*

John R. Williams, for the appellants (plaintiffs).

Demar G. Osbourne, assistant corporation counsel, for the appellee (named defendant).

Opinion

ALVORD, J. The plaintiffs, Joseph Gartrell, 481 Albany Avenue, and Wonder Package, LLC, appeal from the judgment of the trial court granting the motion for a directed verdict in favor of the defendant city of Hartford (city).[1] The plaintiffs claim that the trial court erred in directing a verdict for the city on the basis of the jury's answer to a single interrogatory. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The plaintiffs owned a mixed-use commercial and residential building located at 481 Albany Avenue in Hartford (building). The first floor of the building was occupied by a liquor store, which was owned by Gartrell, and a delicatessen, and the second and third floors consisted of two units each of residential apartments.

On Saturday, February 12, 2011, at 6:15 a.m., a nonresident who was present in the building started a fire on the third floor, using gasoline as an accelerant. The Hartford Fire Department (department) responded, and Gregory Simon, an officer with the department, authorized firefighters to enter the building. Firefighters had been alerted that a person was unaccounted for and that he was suspected to be in the third floor "left-hand apartment."[2] Firefighters attempted to reach the third floor but were forced back by "heavy fire" they encountered in the stairwell leading to the third floor. The fire

[1] The plaintiffs also named Environmental Services, Inc., as a defendant in this action, but the complaint was withdrawn as to it prior to trial. Therefore, only the city is involved in this appeal.

[2] One resident died in the building.

engulfed structural members supporting the roof, which caused Simon concern that the roof was compromised. Simon also was aware that the building had heavy snow on the roof, which, combined with "the deteriorating roof members," caused "concern for imminent collapse." The third floor of the building became "fully involved," and the fire also started to envelop the second floor. One side of the building began to bow outward. As a result of the heavy fire, the department's safety officer, after consulting with the chief, ordered Simon's team to withdraw from the building, and a second team extinguished the fire from another location. Michael Fuschi, the Hartford building official, inspected the building on the day of the fire and determined that the roof rafters could "no longer support the original load by design." Temporary shoring was installed in order to permit officials to conduct their investigation.

Gartrell's commercial tenant called him on the morning of the fire and told him that the building was burning. Gartrell lived in Bloomfield and was ill at the time. He was not able to drive and did not go to the building until two days after he learned of the fire.

Also on the day of the fire, the city issued to Gartrell a notice of violation stating that the building had been deemed unsafe due to fire. The notice stated that the city's inspector would hire a contractor to board up the building, and a bill would follow. It directed Gartrell to "make building safe or demolish building." Gartrell received and counter-signed the notice on February 14, 2011, the same day that Gartrell first went to the building after the fire. Gartrell had gone to the building to meet with a representative from his insurance company. The police initially did not permit Gartrell to enter the building but he later entered the building and looked up the stairs. While Gartrell was at the building, a representative of the city told him that they would board up the

building. At some point after the fire and before the demolition, Gartrell spoke with a carpenter named Benjamin Brown about fixing the building, but Gartrell needed time for his insurance company to estimate the job, and neither Brown nor Gartrell had made any preparations or requested any permits to repair the building.

On the basis of his investigation, Fuschi had concluded by February 18, 2011, that under § 116.4 of the State Building Code,[3] imminent danger requiring immediate action existed, and he ordered the building to be demolished. On February 18, 2011, the city issued a second notice, signed by Fuschi, which stated: "[B]uilding to be demolished. Building poses imminent danger to public." Gartrell did not receive or counter-sign the second notice. The city retained Environmental Services, Inc., to demolish the building. Demolition began on February 19, 2011, and was completed on March 3, 2011.

The plaintiffs commenced the present action in February, 2013. In their operative complaint, the plaintiffs alleged in two counts against the city that, inter alia, the city violated §§ 115.3 and 116 of the State Building Code and General Statutes §§ 49-73b and 49-34, in that it failed to provide the plaintiffs with notice describing the conditions deemed unsafe, failed to specify the required repairs, and failed to provide adequate notice that the building would be demolished within a stipulated time. The plaintiffs further alleged that the city

[3] Section 116.4 of the State Building Code provides: "Emergency work. When imminent danger or an unsafe condition requiring immediate action exists and the owner of the building or structure cannot be located, or refuses or is unable to expeditiously render the premises safe, the building official shall order the employment of the necessary labor and materials to perform the required work as expeditiously as possible. Such work shall include that required, in the building official's sole opinion, to make the premises temporarily safe, up to and including demolition."

deprived them of due process of law by preventing them from accessing the building and retrieving its contents.[4]

At trial, the plaintiffs presented the testimony of Gartrell and Debra Nails, a tenant of the building. After the plaintiffs rested, the city moved for a directed verdict, arguing that the plaintiffs had not "carried the burden of proof with respect to showing that the city did not act under an emergency," and that the plaintiffs "offered no evidence whatsoever as to whether the plaintiff[s] [were] going to expeditiously render the premises safe." The plaintiffs' counsel objected, arguing that there were "substantial issues of negligence" and that the city officials needed to testify as to the issue of whether the city was justified in making the decision to demolish the building so quickly.[5] The court reserved decision

[4] In their second count, the plaintiffs alleged, inter alia, that the city demolished the building before conducting an investigation in accordance with General Statutes § 29-311. During oral argument before this court, the plaintiffs' counsel clarified that the plaintiffs appeal solely from the directed verdict as to the first count of their complaint.

[5] The following colloquy occurred:

"[The Plaintiffs' Counsel]: I would ask that that decision for directed verdict would be reserved, if anything, until the end of the trial.

"The Court: So you're saying that I should reserve my decision on this motion until after—

"[The Plaintiffs' Counsel]: Well, I'm asking for you to deny—

"The Court: You would like me to deny right now, I get that. But you've also suggested that I—if I'm thinking about it, I should reserve until after I have heard the witnesses of the city to determine whether or not the situation in which Mr. Osbourne [the city's counsel] is claiming actually existed.

"[The Plaintiffs' Counsel]: Yes, Your Honor.

"The Court: Okay. So how about if the testimony, in fact, shows that? Are you suggesting that if I were to find that the testimony of the city's witness shows that emergen[cy] situation, then I am able to rule on your motion? Are you agreeing that I can do that?

"[The Plaintiffs' Counsel]: Well, not exactly agreeing, Your Honor.

"The Court: You don't want me to do that, I get that.

"[The Plaintiffs' Counsel]: Well, Your Honor—

"The Court: Better to deny it right now. But you also suggested that I should wait to hear before I rule on it.

"[The Plaintiffs' Counsel]: I believe the jury should wait—should hear—

"The Court: I know that, too.

"[The Plaintiffs' Counsel]: —the evidence. Yes.

on the motion. The city then presented the testimony of Simon and Fuschi, and the plaintiffs recalled Gartrell in rebuttal. After the close of evidence, the city renewed its motion for a directed verdict, arguing that the plaintiffs had presented no evidence to challenge the city's evidence of an emergency. The plaintiffs' counsel objected, arguing that there was sufficient evidence, in the form of Gartrell's testimony that the building was not badly damaged, to present the issue to the jury. The court again reserved decision, and then stated: "All right. I'm going to follow the procedure that I discussed with you folks. Which means we will ask—provide the jury with this one interrogatory. And so we will have closing arguments and then charges on this issue." The city's counsel inquired of the court whether the jury would see the interrogatory before or after closing arguments, and the following exchange occurred:

"The Court: They will go in with an instruction from me.

"[The City 's Counsel]: Before or—

"The Court: But that's not what I'm asking you. You saying that instead of ruling right now, one of the things I could do is to defer until after I hear Mr. Osbourne's witnesses?

"[The Plaintiffs' Counsel]: Yes, Your Honor, I think that would be fair.

"The Court: So one possibility would be I deny it right now. Another possibility would be I wait and hear his witnesses and then I deny it. But another possibility would be I hear his witnesses and then I grant it.

"[The Plaintiffs' Counsel]: And what?

"The Court: I grant it.

"[The Plaintiffs' Counsel]: Okay.

"The Court: So I have those three options and you're saying I should wait before I do that, and that's okay with you?

"[The Plaintiffs' Counsel]: I prefer that—

"The Court: I know what you prefer.

"[The Plaintiffs' Counsel]: —at the end of—after the jury's verdict, because—I think would be a more appropriate time for counsel to revisit the motion for a directed verdict.

"The Court: Well, one thing for sure, is I'm not going to grant that motion now. I think there are some pieces to this puzzle that are missing. I'm going to reserve my options. Okay?

"[The Plaintiffs' Counsel]: Thank you, Your Honor.

"[The City's Counsel]: Thank you, Your Honor."

"The Court: You're allowed to say to them—you're allowed to argue that to them. . . . And I will help you out—both out by telling the jury that I am going to ask this question of them first. And then you'll be able to start your very short, abbreviated closing argument on this issue. And then back to [the city's counsel], and then back to [the plaintiffs' counsel], just as if we were doing a regular closing argument. I will give them a short charge on this. And give them that instruction. Okay?

"[The City's Counsel]: And the defendant first? And plaintiff last? I believe that's the order, unless I'm mistaken.

"The Court: It's plaintiff, defendant, plaintiff. Okay?

"[The City's Counsel]: Yes, sir.

"The Court: And one issue.

"[The City's Counsel]: Yes, sir.

"The Court: And we all understand. It's what we discussed earlier. Okay?

"[The City's Counsel]: Yes, sir."

The court then directed the clerk to bring the jury into the courtroom and addressed the jury as follows: "All right. So sometimes cases don't go exactly the way they do on television. This case has sort of been like that. There's been some delays. We're also going to do something different on this case. Normally at this point in time we would have closing arguments, I would charge you, you would make a decision. We're not going to do that. We're going to do something different. And that is, we are going to have abbreviated closing arguments and an abbreviated charge. And I'm going to send in an interrogatory that will ask you to answer one question. So you will, like any other jury, you will pick your foreperson. And you will look at the exhibits. You will have deliberations. And you will sign and answer the interrogatory, which will require you to answer a

question, yes or no. Okay? And because of certain laws in the state of Connecticut, I will then make some decisions. It is possible that there will be more work for you. It is possible that there will not be more work for you. I can't tell you that at the moment. But I need for you to answer questions for me as the fact finders. Okay. So that's what we're going to do. A little bit different than other cases. But that's okay. You are performing the role as the fact finder. Okay. I'm going to tell you what the question is. They're going to argue to you evidence based upon that and how they believe you should rule. But I'm going to tell you right now, so there's going to be no mystery here. Here's the question: Do you find that the evidence in this case—I'm sorry, let me restart. Do you find pursuant to the evidence in this case that the city and its agents and officials could believe that an imminent danger or emergency existed, allowing it to demolish the plaintiffs' building? That's the question. And you're going to have this in there with you. So, knowing the question, we're going to have closing arguments, and then I'm going to give you some instructions that I would give to any jury. Unfortunately, you may say, Judge Berger, I don't need all of your instructions to answer this question, but I feel like I should at least give you most of those instructions. So that will take a little bit of time. But we're going to start with plaintiffs' counsel on argument of evidence as to this question." The plaintiffs' counsel then replied: "Thank you, Your Honor." The court responded: "You bet."

The plaintiffs' counsel then began the plaintiffs' closing argument. She addressed the jury by stating: "As the judge instructs you, we are going to argue in the closing arguments about a limited issue of whether you feel that the city acted under emergency circumstances and whether those, that emergency imminent danger, justified the decision to demolish the building." After closing arguments, the court instructed the jury, in part:

"My task is only to apply the rules of evidence and to instruct you on the law. It is for you to decide the question that we will be giving you. Again, it's your duty to follow those instructions and to conscientiously apply the law as I give it to you, so that you can decide that question."[6] At the end of its charge, the court stated: "Okay. So what will happen now? I will go over this interrogatory again. We call it a question to the jury, an interrogatory to the jury, and as I've indicated, I need you to answer this question for me: Do you find pursuant to the evidence in this case that the city and its agents and officials could believe that an imminent danger or emergency existed, allowing it to demolish the plaintiffs' building? Either yes or no, and the foreperson would sign it."

The court inquired of counsel whether they had any exceptions to its charge, and both counsel responded that they did not. The jury then retired for deliberations. After further deliberations the next morning, the jury answered the interrogatory in the affirmative. After accepting and recording the jury's answer, the court addressed counsel and stated that it would return to the city's motion for a directed verdict. The court asked counsel whether there was "anything you would like to say in furtherance of that," to which both the plaintiffs' counsel and the city's counsel responded: "No, Your Honor." The court then issued the following oral ruling: "All right. In light of both the decision in *Brown* v. *Hartford*, 160 Conn. App. 677, [127 A.3d 278, cert. denied, 320 Conn. 911, 128 A.3d 954 (2015)], and in

[6] Later in its charge, the court again referenced the interrogatory: "Let me say that I've asked you to answer a certain question. You have heard references by counsel to other matters, issues of ten days' of notice and things like that. Those issues, we are not addressing at this time. So you are to address only the issue. And the issue that is raised in terms of this interrogatory question, of whether or not an imminent danger or emergency exists, is actually something that was raised by the defendant and appropriately so. But, in fact, they have the burden of proof to prove that; that is their burden."

light of our governmental immunity [statute], [General Statutes §] 52-557n, the verdict is directed in this case, which means that the city defendant has won this case. There is nothing more to deliberate in this case because of that finding, because, as I say, the Appellate Court's recent decision in 2015 and, of course, in light of § 52-557n, which was the hurdle I had spoken to you all about before. So with that, I'm going to bring the jury out, discharge them, and this case is over. Okay? Thank you."[7] This appeal followed.

The plaintiffs' sole claim on appeal is that the trial court erred in directing a verdict in favor of the city "after the jury answered the single interrogatory submitted to it." Specifically, the plaintiffs claim that "[t]he court's direction of a verdict in this case was plainly erroneous because the jury interrogatory did not permit such a ruling. Had the jury concluded that the defendant had proved that the city of Hartford, through its agents, actually *did* believe that an imminent danger or emergency existed, the court would have been correct in directing a verdict." (Emphasis in original.) In other words, the plaintiffs' only contention on appeal is that in order to permit the court to render a directed verdict in this action on the basis of a jury interrogatory, the interrogatory would have been required to ask the jury to find "whether the defendant had proved that it actually did believe that an imminent danger or emergency existed," not "whether it was a belief that *could* have

[7] On September 26, 2016, the court issued the following written order: "In light of the jury's answer to the interrogatory that the actions taken by the city were in response to an emergency, the defendant's oral motion for a directed verdict, taken under advisement, is hereby granted for two reasons. First, [the] plaintiffs' due process arguments found in the first count must fail pursuant to that emergency finding under *Brown* v. *Hartford*, [supra, 160 Conn. App. 692]; [they were] afforded postdeprivation due process in this trial. Second, as to the second count, the plaintiff[s] submitted no evidence that the city was not protected by governmental immunity under [§] 52-557n (a) (2) (B) and/or [§] 52-557n (b) (7) and (8)."

been held."[8] (Emphasis in original.) We conclude that the plaintiffs' claim was not properly preserved for appellate review, and, accordingly, we decline to address it.

"Our appellate courts, as a general practice, will not review claims made for the first time on appeal. . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court." (Internal quotation marks omitted.) *Guzman* v. *Yeroz*, 167 Conn. App. 420, 426, 143 A.3d 661, cert. denied, 323 Conn. 923, 150 A.3d 1152 (2016). "The purpose of our preservation requirements is to ensure fair notice of a party's claims to both the trial court and opposing parties." *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 620, 99 A.3d 1079 (2014). "These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act." (Internal quotation marks omitted.) *Great Country Bank* v. *Ogalin*, 168 Conn. App. 783, 802, 148 A.3d 218 (2016). "The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *McMahon* v. *Middletown*, 181 Conn. App. 68, 76, A.3d (2018).

Having thoroughly reviewed the transcripts,[9] we conclude that the plaintiffs failed to preserve their argument that the jury interrogatory, as written, did not permit the court to render a directed verdict because

[8] The plaintiffs do not claim in their brief on appeal that a properly drafted interrogatory would have required language inquiring whether the city's belief was *reasonable* in order to permit the court to render a directed verdict on the basis of the interrogatory.

[9] We note that the motion for a directed verdict was made orally.

they failed to raise the issue to the trial court on the record, either before or after the jury was charged, or as a basis for denying the city's motion for a directed verdict. See *Mokonnen* v. *Pro Park, Inc.*, 113 Conn. App. 765, 770–71, 968 A.2d 916 (2009) ("[w]e may presume from the plaintiff's repeated failure to object to the interrogatories that he agreed to their content and their submission to the jury"). The plaintiffs conceded at oral argument before this court that the record reveals that the trial court had met with counsel in chambers and explained the procedure it planned to follow, and that the trial court, in fact, did follow the procedure discussed. The court referenced that conversation on the record but outside the presence of the jury on September 22, 2016, when it stated: "I'm going to follow the procedure that I discussed with you folks. Which means we will ask—provide the jury with this one interrogatory." Neither the parties nor the court described with any detail the conversation that occurred off the record. Thus, the record is silent, and this court is left to speculate, as to who might have proposed and drafted the interrogatory and whether any party had expressed during that conversation any disagreement either with the interrogatory or the court's procedure.

Over the course of two days, the plaintiffs' counsel had ample opportunity to object to the court's procedure, and, rather than object, the plaintiffs' counsel acquiesced in that procedure. First, after the jury returned to the courtroom on September 22, the court began its instruction by informing the jury that they were "going to do something different on this case" and that the jury would be asked to answer one question. It then explained that "because of certain laws in the state of Connecticut, I will then make some decisions. It is possible that there will be more work for you. It is possible that there will not be more work for you." After reading the interrogatory to the jury, the court told the jury that closing arguments "as to this question"

would begin with the plaintiffs' counsel, who responded by thanking the court rather than objecting.

Second, the plaintiffs' counsel not only referenced the interrogatory in her closing argument, but also failed to articulate the question properly herself, stating that counsel would be arguing the "limited issue of whether *you feel* that the city acted under emergency circumstances and whether those, that emergency imminent danger, justified the decision to demolish the building." (Emphasis added.) Later in her argument, she used similar language to that now challenged on appeal, arguing: "We did not hear enough information that justified that there was an emergency that would cause them to bypass all of the due process, all of the statutes, all of the different—safeguards that are there to protect someone's property. *There's no evidence showing that they could—could have exercised that discretion* without the abuse of power. And I would like you to consider that when you answer that question as to whether it was imminent, whether the city had authority to justify the degradation of property." (Emphasis added.)

Third, after closing arguments, the court further instructed the jury, referencing the interrogatory throughout. Upon completion of its instruction, the court specifically asked whether counsel had any exceptions to its charge, and the plaintiffs' counsel replied: "No, Your Honor." See *West Haven Sound Development Corp.* v. *West Haven*, 207 Conn. 308, 317, 541 A.2d 858 (1988) (declining to review unpreserved claim of allegedly erroneous jury interrogatories where interrogatories were read to jury during court's charge, trial court invited exceptions, and "[a]gain, the plaintiff allowed an opportunity for preserving this alleged claim of error to pass"); *Mokonnen* v. *Pro Park, Inc.*, supra, 113 Conn. App. 770 (holding that claim that jury interrogatories were erroneous was not preserved for appeal, in part, where despite trial court reading interrogatories to jury during its charge and inviting excep-

tions from parties, neither party took exception).[10] Finally, the next morning, after the jury had answered the interrogatory in the affirmative and the court had indicated its intention to return to the city's motion for a directed verdict, the court asked counsel whether there was "anything you would like to say in furtherance of that," to which both the plaintiffs' counsel and the city's counsel responded: "No, Your Honor."

Because the plaintiffs concededly were aware of the procedure the court planned to, and did, follow, and the record reveals that the plaintiffs made no claim before the trial court that the jury's answer to the interrogatory, as written, did not permit the court to render a directed verdict, we conclude that the plaintiffs failed to preserve their claim for our review.[11]

For these reasons, we decline to review the plaintiffs' claim.

The judgment is affirmed.

In this opinion the other judges concurred.

[10] Although the plaintiffs frame the issue presented in this appeal as a claim of error in the court's direction of a verdict rather than a claim of instructional error or a claim directly challenging the interrogatory as erroneous, we nevertheless find persuasive the cases declining to review unpreserved claims of allegedly erroneous jury interrogatories. See *West Haven Sound Development Corp.* v. *West Haven*, supra, 207 Conn. 317, and *Mokonnen* v. *Pro Park, Inc.*, supra, 113 Conn. App. 770. In the present case, the record is clear that the parties were well aware before the interrogatory was read to the jury of the procedure the court planned to follow, and the plaintiffs failed to raise, at that time or any other time, the distinct claim that the court could not properly direct a verdict on the basis of the jury's response to the interrogatory.

[11] In their brief on appeal, the plaintiffs failed to note that they had not preserved at trial the claim raised before this court, and they did not request that the claim be reviewed pursuant to any doctrine in exception to the preservation rule. The plaintiffs' brief on appeal does not meet the predicate for *Golding* review, as it neither has "present[ed] a record that is [adequate] for review" nor "affirmatively [demonstrated] that [the] claim is indeed a violation of a fundamental constitutional right." (Internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 755, 91 A.3d 862 (2014). In their brief, the plaintiffs argued only that the court erred in directing a verdict because the interrogatory "did not permit such a ruling." The plaintiffs did not suggest, let alone demonstrate, that their claim involved a violation of

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Lavine, Elgo and Beach, Js.

Syllabus

The petitioner, who had been convicted of the crimes of aiding and abetting murder, felony murder, home invasion and burglary in the first degree, sought a writ of habeas corpus, claiming that his trial counsel had rendered ineffective assistance by, inter alia, failing to adequately challenge the eyewitness testimony of B and C. At the habeas trial, the petitioner claimed, inter alia, that his trial counsel should have offered expert testimony on the issue of the reliability of eyewitness identification, and the petitioner presented the testimony of a legal expert, S, in support of that claim. The petitioner also offered into evidence as a full

a constitutional right. We further note that the plaintiffs did not affirmatively request in their brief relief under the plain error doctrine. "[I]t is well established that this court [is not obligated to] apply the plain error doctrine when it has not been requested affirmatively by a party . . . ." (Citations omitted; internal quotation marks omitted.) *Guzman* v. *Yeroz*, supra, 167 Conn. App. 426, quoting *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 125 n.26, 956 A.2d 1145 (2008).

During oral argument, the plaintiffs made one passing reference to "plain" or "fundamental" error. We conclude that relief under the plain error doctrine would not be appropriate in this case. "[T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . [T]he plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *Guzman* v. *Yeroz*, supra, 167 Conn. App. 427. After a thorough review of the record and the plaintiffs' challenges to the court's direction of a verdict, we see nothing that would meet "this extraordinarily high standard." Id.

Also for the first time during oral argument before this court, the plaintiffs suggested that their claim implicated the constitutional right to a jury trial, and argued that they could only have waived their claim through an affirmative, on-the-record waiver before the trial court. Both this court and our Supreme Court have recognized that "it is well settled that arguments cannot be raised for the first time at oral argument." *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 328 n.20, 71 A.3d 492 (2013); *Vaccaro* v. *Shell Beach Condominium, Inc.*, 169 Conn. App. 21, 46 n.28, 148 A.3d 1123 (2016), cert. denied, 324 Conn. 917, 154 A.3d 1008 (2017).

exhibit a copy of the transcript of certain expert testimony at a hearing, pursuant to *State* v. *Porter* (241 Conn. 57), in the trial of his codefendant, M, and the habeas court declined to admit the transcript into evidence as a full exhibit. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to the petitioner's claims that the court improperly declined to admit as a full exhibit the transcript of the expert testimony presented at M's criminal trial and that his trial counsel performed deficiently by inadequately challenging eyewitness testimony, the petitioner having failed to demonstrate that the issues he raised were debatable among jurists of reason, or that a court could have resolved them in a different manner.
2. The habeas court did not abuse its discretion in declining to admit the transcript of the expert testimony from M's criminal trial into evidence as a full exhibit, which the petitioner claimed was admissible for the purpose of showing the basis for S's expert opinions: although, in certain circumstances, the information that an expert witness relied on may be admissible for the purpose of showing the basis for the opinions of that expert, there was no requirement that such documents be admitted as a full exhibit, as the facts contained therein were hearsay, and the record showed that S testified at length about the developments in the law regarding eyewitness identification, about the opinions expressed by the expert in M's criminal trial, and about studies underlying the changes in the law; moreover, the habeas court did not err by not taking judicial notice of the transcript, as the opinions expressed by the expert witness in M's criminal trial were not the sort of uncontested facts contemplated by the concept of judicial notice, and the court acted within its discretion under the applicable provision (§ 2-1) of the Connecticut Code of Evidence, and the petitioner's unpreserved claim that the habeas court should have admitted the transcript as a full exhibit pursuant to the residual exception to the hearsay rule was not reviewable, the petitioner having failed to raise the claim before the habeas court.
3. The petitioner could not prevail on his claim that the habeas court erred in concluding on the merits that his right to the effective assistance of counsel was not violated: that court did not err in its conclusion that the petitioner's trial counsel did not perform deficiently by not moving to suppress B's in-court identification of the petitioner, as trial counsel's performance had to be considered in light of the legal standards in effect at the time of the petitioner's criminal trial, which allowed for the exclusion of an in-court identification only when it was tainted by an unnecessarily suggestive and unreliable out-of-court identification, and provided that, in all other circumstances, as here, a defendant's protection against the obvious suggestiveness in any courtroom confrontation was his right to cross-examination, which trial counsel here performed effectively; moreover, there was no merit to the petitioner's

claim that his trial counsel performed deficiently by not presenting an expert on the issue of eyewitness identification, as the controlling law at the time of the petitioner's criminal trial discouraged the use of expert testimony on that issue and it was, thus, reasonable for trial counsel to use cross-examination to attack the weight of the testimony of B and C, and the petitioner's claim that his trial counsel performed deficiently by not emphasizing, in the course of cross-examination, certain factors identified as important by our Supreme Court in evaluating the reliability of an eyewitness identification was unavailing, as trial counsel's performance could not be evaluated according to standards enunciated by our Supreme Court three years after the criminal trial.

Argued December 11, 2017—officially released June 12, 2018

Procedural History

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

Michael W. Brown, assigned counsel, for the appellant (petitioner).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

BEACH, J. The petitioner, Calvin Bennett, 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, (2) abused its discretion in declining to admit into evidence a transcript from the criminal trial of another defendant, and (3) erred in finding that his right to the effective assistance of counsel at his criminal trial

had not been violated. We disagree and, accordingly, dismiss the appeal.

Our Supreme Court, in the petitioner's direct appeal, recited the following facts, as found by the three judge trial court. "[The victim] James Caffrey lived in the second floor apartment of 323 Hill Street in Waterbury with his girlfriend Samantha Bright and one other roommate. [The victim's] mother, Emilia Caffrey, lived in the first floor apartment. In the late afternoon of Saturday, October 26, 2008, [the victim] and Bright had five visitors, including [the codefendant] Tamarius Maner, in their living room. Maner had a clear view of the bedroom from where he was seated in the living room. Maner purchased a small amount of marijuana from [the victim] and paid him some money, which [the victim] put in the bedroom. [The victim] kept the marijuana in the bedroom. [The victim] remarked that he had saved $500 for a child that he was expecting with Bright.

"At about that time, Maner and the [petitioner] lived next door to each other in Bridgeport and had done drug business together. Maner contacted the [petitioner] by cell phone during the evening of Saturday, October 26. Shortly after midnight on Sunday, October 27, Maner and the [petitioner] drove from Bridgeport to Waterbury to go to [the victim's] apartment. They were carrying loaded handguns.

"Just after 1 a.m., the doorbell to the second floor apartment at 323 Hill Street rang and [the victim] answered the door. A conversation of a few seconds with . . . [the victim] ensued. Maner then shot [the victim] in the face from a distance of one to three feet with a .45 caliber handgun. [The victim] fell in the hallway in a pool of blood and died from the gunshot wound to the head.

"Maner and the [petitioner] walked past [the victim] and into a bedroom. There the [petitioner] put a gun

to Bright's head and asked: Where is everything? Bright understood the question to inquire about money and drugs. Bright referred them to the top dresser drawer. Maner opened it and threw its contents on the bedroom floor.

"At about that time, they heard the screams of Emilia Caffrey, who had heard the shot and discovered her son lying in the second floor hallway. The [petitioner] told Bright to keep her head down and face toward the wall. Maner and the [petitioner] then ran into the kitchen, which Emilia Caffrey had also entered in order to call 911. Maner, who was standing at the stove, fired one shot at [Emilia] Caffrey and missed. The [petitioner] was standing at the window.

"Maner and the [petitioner] then ran out of the kitchen, pushing [Emilia] Caffrey to the floor as they left. They returned to their car and arrived back in Bridgeport around 2 a.m.

"Police interviews of some of the Waterbury visitors to [the victim's] apartment on the afternoon of October 26 led to the identity of Maner . . . . Further police investigation, including analysis of Maner's cell phone calls, brought police to an apartment in Bridgeport where they found the [petitioner]. The [petitioner] voluntarily returned to Waterbury with the police and told them that he had not left Bridgeport on the night in question. When confronted with the fact that his cell phone records showed him in Waterbury during the time of the crimes, the [petitioner] put his head down for a minute and then indicated that he had nothing more to say. A search, pursuant to a warrant, of his apartment in Bridgeport revealed a suitcase containing the [petitioner's] clothes, a loaded .45 caliber pistol, and a sock containing sixty-one rounds of ammunition." (Internal quotation marks omitted.) *State* v. *Bennett*, 307 Conn. 758, 761–63, 59 A.3d 221 (2013).

Our Supreme Court noted that the petitioner "was charged with aiding and abetting murder in violation of General Statutes §§ 53a-8 and 53a-54a, felony murder in violation of General Statutes § 53a-54c, home invasion in violation of General Statutes § 53a-100aa (a) (1), and burglary in the first degree in violation of General Statutes § 53a-101 (a) (3). The [petitioner] elected a trial to a three judge court . . . . The panel, consisting of *Cremins*, *Crawford* and *Schuman*, *Js.*, rendered a unanimous verdict of guilty on all of the charges except aiding and abetting murder, on which a majority of the panel found the [petitioner] guilty, and thereafter rendered judgment in accordance with the verdict and imposed a total effective sentence of sixty years imprisonment. . . . [T]he [petitioner] directly appealed from the judgment of conviction to [our Supreme Court]. On appeal, the [petitioner] contend[ed]: (1) that there was insufficient evidence to convict him of aiding and abetting murder; and (2) that he did not knowingly waive his right to a jury trial." (Citation omitted.) Id., 760–61. Our Supreme Court reversed the judgment as to the petitioner's first claim but affirmed it in all other respects. Id., 777.

In his amended petition for a writ of habeas corpus, filed February 4, 2014, the petitioner claimed that his trial counsel, Lawrence Hopkins, rendered ineffective assistance by, among other things, failing adequately to challenge the eyewitness testimony of Bright and Emilia Caffrey. The habeas court denied the petition for a writ of habeas corpus and a subsequent petition for certification to appeal from the court's judgment. This appeal followed. Additional facts will be discussed as necessary.

I

The petitioner claims that the habeas court erred in denying his petition for certification to appeal from the

denial of his habeas petition. Specifically, he argues that because the issues are debatable among jurists of reason and a court could have resolved the issues differently, the habeas court abused its discretion in denying his petition for certification to appeal.

"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 we discuss more fully in parts II and III of this opinion, we disagree with the petitioner's claims that the habeas court abused its discretion in declining to admit as a full exhibit a transcript of expert testimony presented at Maner's criminal trial and that Hopkins performed deficiently in inadequately challenging eyewitness testimony. Because the resolution of the petitioner's claims does not involve an issue that is debatable among jurists of reason and a court could not reasonably have resolved the issues differently, we conclude that the habeas court did not abuse its discretion in denying certification to appeal from the denial of the petition for a writ of habeas corpus.

II

We turn to the question of whether the habeas court abused its discretion in refusing to admit as a full exhibit a transcript of expert testimony from Maner's criminal trial. The petitioner argues that the transcript was relevant evidence in support of his claim that Hopkins rendered ineffective assistance by failing to present at the criminal trial an expert witness on the issue of the reliability of eyewitness identification. We conclude that the habeas court did not abuse its discretion in its evidentiary ruling.

We first set forth our standard of review. "To the extent [that] a trial court's admission of evidence is based on an interpretation of [our law 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 [or exclude] evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. . . . Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling[s] [on these bases] . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did." (Internal quotation marks omitted.) *Weaver* v. *McKnight*, 313 Conn. 393, 426, 97 A.3d 920 (2014).

"[A]n out-of-court statement offered to establish the truth of the matter asserted is hearsay. . . . As a general rule, such hearsay statements are inadmissible unless they fall within a recognized exception to the hearsay rule. . . . A hearsay statement that does not fall within one of the traditional exceptions to the hearsay rule nevertheless may be admissible under the residual exception to the hearsay rule provided that the proponent's use of the statement is reasonably necessary and the statement itself is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule. . . .

"Reasonable necessity may be established by showing that unless the hearsay statement is admitted, the facts it contains may be lost, either because the declarant is dead or otherwise unavailable, or because the assertion is of such a nature that evidence of the same value cannot be obtained from the same or other sources." (Citations omitted; internal quotation marks omitted.) *Corbett* v. *Commissioner of Correction*, 133 Conn. App. 310, 319–20, 34 A.3d 1046 (2012).

The following additional facts, which appear in the record, are relevant. At his habeas trial, the petitioner

claimed that Hopkins should have offered expert testimony on the issue of the reliability of eyewitness identification. The petitioner presented a legal expert, Lisa Steele, who testified comprehensively. Although she was qualified as a legal expert, the habeas court did not find Steele to be qualified as an expert in the science of eyewitness identification. Steele then testified that she had reviewed all of the transcripts and briefs in the cases of both the petitioner and Maner;[1] she had also reviewed the witness statements by Bright and Emilia Caffrey. Steele opined that Hopkins could have applied *State* v. *Ledbetter*, 275 Conn. 534, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006), and *State* v. *Marquez*, 291 Conn. 122, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009), to highlight weaknesses in the identification procedures used in the present case to identify the petitioner as a perpetrator. Specifically, the police had used nonblind simultaneous photographic arrays, and the officer conducting the process knew the identities of the suspects. Steele opined that Hopkins should have forcefully highlighted the effects of stress, lighting, and the threatened use of weapons on the reliability of eyewitness identification through cross-examination and by using an expert in the field of eyewitness identification.

Steele contrasted the petitioner's criminal case to that of Maner, in which the expert testimony of Steven Penrod, a psychologist, was presented. She noted that Penrod had testified about the subconscious influences that officers exert in the presentation of photographic arrays to witnesses when the officers are aware of a suspect's identity. She said that an expert such as Penrod would have been effective in educating the three

[1] Maner, a coparticipant in the petitioner's criminal activity, was tried separately from, and after, the petitioner. The transcripts of Maner's trial were available to the petitioner at his habeas trial.

judge court about factors such as the effect of stress on eyewitness identification. On cross-examination, the respondent, the Commissioner of Correction, elicited from Steele the information that Maner was convicted despite the use of Penrod at his trial.

During Steele's testimony, the petitioner offered into evidence as a full exhibit his exhibit 19 for identification, which was a copy of the transcript of the *Porter*[2] hearing in Maner's trial on the issue of Penrod's qualifications as an expert. Steele had reviewed the transcript prior to her testimony, and from it she gleaned information regarding the science of eyewitness identification as it related to Maner's trial. The respondent objected to its introduction as a full exhibit, apparently on relevancy grounds, because the testimony took place in the trial of a different defendant and the trial took place approximately one year after the petitioner's criminal trial. The habeas court and the petitioner's counsel then engaged in the following colloquy:

"The Court: [W]hat's the purpose you're seeking to introduce this for?

"[The Petitioner's Counsel]: Your Honor, I seek to submit it as a full exhibit for the purpose of the information that . . . Steele reviewed and the basis of formulating her opinions or the opinions that she will be formulating in this particular trial.

"The Court: Not for the truth contained within?

"[The Petitioner's Counsel]: Not as far as what happened to . . . Maner's trial or anything like that. Basically, just the information regarding the science of witness identification.

"The Court: Well, there, I assume, is testimony by . . . Penrod?

"[The Petitioner's Counsel]: Correct.

[2] See *State* v. *Porter*, 241 Conn. 57, 80–90, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998).

"The Court: And are you seeking to have me accept that as for the truth contained in that testimony?

"[The Petitioner's Counsel]: For that limited purpose, yes, Your Honor.

"The Court: How's that not hearsay?

"[The Petitioner's Counsel]: Well, I believe Your Honor can take judicial notice [of] the particular transcript. If nothing else, it was a part of . . . Maner's appeal and that part of his appellate record.

"The Court: What do I care about . . . Maner's [appeal]? I mean . . . this case involves [the petitioner].

"[The Petitioner's Counsel]: I understand that, but . . . Maner was [the petitioner's] codefendant . . . . I submit to the court that the information contained therein is relevant to [the petitioner] as far as the eyewitness identification is concerned, and the . . . availability of the information that . . . Hopkins had and failed to utilize at the time of [the petitioner's] trial.

"The Court: Objection's sustained."

The record reveals, then, that the rationale advanced for admission as a full exhibit was somewhat scattered. The petitioner first suggested that the exhibit was admissible for the purpose of showing a basis for Steele's opinions. Although, in some circumstances, such information may be admissible for that limited purpose,[3] there is no requirement that such documents

[3] Section 7-4 (b) of the Connecticut Code of Evidence provides: "The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. *The facts relied on pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence.*" (Emphasis added.)

be admitted as full exhibits, because the "facts" contained therein are hearsay nonetheless. See, e.g., *Tadros* v. *Tripodi*, 87 Conn. App. 321, 329, 866 A.2d 610 (2005) ("[t]he court was well within its discretion to allow [the witness] to *testify* as to the bases of his expert opinion, regardless of whether the documentation on which he relied was itself admissible" [emphasis added]). The record reveals that Steele testified at considerable length about the developments in the law regarding eyewitness identification, including *Ledbetter* and *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012),[4] she testified about the opinions which Penrod had expressed during the *Porter* hearing in Maner's criminal trial; and the petitioner agreed in his brief that Steele testified about the studies underlying the changes in the law. The court did not abuse its discretion in declining to admit the transcript as a full exhibit on the basis of it having been used in the formulation of Steele's expert opinions.

The petitioner also argues that the court erred by not taking judicial notice of the transcript, because it was a document created in the course of another judicial proceeding. Section 2-1 of the Connecticut Code of Evidence states in relevant part that "[a] court may, but is not required to, take notice of matters of fact, in accordance with subsection (c)," which provides that a "judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) within the knowledge of people generally in the ordinary course of human experience, or (2) generally accepted as true and capable of ready and unquestionable demonstration." The opinions expressed by Penrod were simply not the sort of uncontested facts contemplated by the concept of judicial notice. See, e.g., *State* v. *Guilbert*, supra, 306 Conn. 230 (admissibility of expert testimony

[4] Steele was appellate counsel for the defendant in both *Ledbetter* and *Guilbert*.

dependent on whether witness offered as expert has any peculiar knowledge or experience, not common to world, which aids fact finder); see also *State* v. *Porter*, 241 Conn. 57, 84–85, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998). In any event, the rule on its face grants discretion to the court, and the court did not abuse its discretion, especially in light of Steele's testimony on the same topic.

The petitioner argues on appeal that the court should have admitted the transcript as a full exhibit pursuant to the residual exception to the hearsay rule. This reasoning was not advanced to the habeas court and, thus, was not preserved for review. "An appellant who challenges on appeal a trial court's exclusion of evidence is limited to the theory of admissibility that was raised before and ruled upon by the trial court. A court cannot be said to have refused improperly to admit evidence during a trial if the specific grounds for admission on which the proponent relies never were presented to the court when the evidence was offered. . . . Error does not lie in the exclusion of evidence claimed on an inadmissible ground even though it might have been admissible had it been claimed on another and different ground [at trial]. . . . A contrary policy would allow trial court proceedings to become a Kafkaesque academic test which [the trial judge] may be determined to have failed because of questions never asked of him or issues never clearly presented to him." (Citations omitted; internal quotation marks omitted.) *State* v. *Polynice*, 164 Conn. App. 390, 401, 133 A.3d 952, cert. denied, 321 Conn. 914, 136 A.3d 1274 (2016). We, therefore, decline to review the claim that the transcript should have been admitted on the basis of the residual exception to the hearsay rule.[5]

[5] We note that, although a court may take judicial notice of a file in another case; see, e.g., *State* v. *Bunkley*, 202 Conn. 629, 648, 522 A.2d 795 (1987); the specific evidence sought to be admitted is subject to ordinary evidential

Finally, Steele testified about the many resources available to Hopkins at the time of the petitioner's criminal trial, including the science that was beginning to be accepted in the law. We do not see what value the transcript would have added to the habeas court's analysis. The habeas court did not abuse its discretion in declining to admit exhibit 19 into evidence as a full exhibit.

III

The petitioner also claims that the habeas court erred in concluding on the merits that the petitioner's right to the effective assistance of counsel was not violated. The petitioner argues that Hopkins performed deficiently by inadequately challenging the eyewitness testimony of Bright and Emilia Caffrey. Specifically, he argues that Hopkins should have moved to suppress the identification made by Bright and should have more effectively challenged the testimony of Bright and Emilia Caffrey. We disagree.

We begin with the standard of review applicable to this claim. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the

standards, such as relevance and hearsay. *State* v. *Speers*, 17 Conn. App. 587, 601–602, 554 A.2d 769, cert. denied, 211 Conn. 808, 559 A.2d 1142, cert. denied, 493 U.S. 851, 110 S. Ct. 150, 107 L. Ed. 2d 108, cert. denied sub nom. *George* v. *Connecticut*, 493 U.S. 893, 110 S. Ct. 241, 107 L. Ed. 2d 192 (1989). Such evidence may well be admissible to show that information or documentation exists, as opposed to the truth of the information or documentation. See, e.g., *Heritage Village Master Assn., Inc.* v. *Heritage Village Water Co.*, 30 Conn. App. 693, 701, 622 A.2d 578 (1993); see also C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 2.16.5, p. 125. In the present case, there was no dispute that the information existed.

weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

"A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 686, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], [our Supreme Court] has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. . . . The claim will succeed only if both prongs are satisfied. . . .

"To prove his or her entitlement to relief pursuant to *Strickland*, a petitioner must first satisfy what the courts refer to as the performance prong; this requires that the petitioner demonstrate that his or her counsel's assistance was, in fact, ineffective in that counsel's performance was deficient. To establish that there was deficient performance by the petitioner's counsel, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. . . . A reviewing court must view counsel's conduct with a strong presumption that it falls within the wide range of reasonable professional assistance. . . . The range of competence demanded is reasonably competent, or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . .

"[J]udicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney

performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . In reconstructing the circumstances, a reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Citations omitted; internal quotation marks omitted.) *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 537–39, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016).

The following additional facts are relevant. At the habeas trial, Hopkins testified that he hired an investigator to interview witnesses but did not use the results of that investigation in the petitioner's defense. Hopkins testified to knowing that Bright and Emilia Caffrey were shown photographic arrays, which included a photograph of the petitioner two days after the shooting, and that Bright had not been able to identify the petitioner at that time. Bright later identified the petitioner at a probable cause hearing and at trial. Hopkins also testified that he had reviewed Bright's statement to police, in which she said that she did not get a good look at either of the two intruders. Hopkins said he "never pursued a motion to suppress [Bright's in-court identifications] . . . because, really, we used all of that background . . . for purposes of cross-examination, both in the probable cause hearing and at trial, and made a big issue out of it in front of . . . the three judge panel."

The habeas court then engaged in the following discussion with the petitioner's counsel.

"The Court: [Counsel], may I ask you a question?

"[The Petitioner's Counsel]: Yes, Your Honor.

"The Court: [Bright] did not identify [the petitioner]. Correct?

"[The Petitioner's Counsel]: Correct.

"The Court: What . . . is there to suppress?

"[The Petitioner's Counsel]: The in-court identification, Your Honor.

"The Court: That's her testimony.

"[The Petitioner's Counsel]: Well, it was. It wasn't. But it was also an identification that was made in court—

"The Court: Well, I understand.

"[The Petitioner's Counsel]: —when asked.

"The Court: But she's there. She's under oath.

"[The Petitioner's Counsel]: Correct.

"The Court: She's subject to cross-examination. . . . [W]here is anything to be suppressed?

"[The Petitioner's Counsel]: I claim that a motion still could have been done, argued. I'll move off this subject and I'll—

"The Court: I'm not telling you to move off. I'm just asking you: where is the evidence that was subject to a potential motion for suppression?

"[The Petitioner's Counsel]: Well, it would have been the in-court identification. You could have moved to suppress that. You could have also addressed it through cross-examination.

"The Court: Didn't [Hopkins] just say he did that?

"[The Petitioner's Counsel]: Correct. I'm just clarifying things, Your Honor.

"The Court: So, what motion was [Hopkins] to have filed pretrial before [Bright] made an identification in court?

"[The Petitioner's Counsel]: It would have been a motion to suppress, but he did not do that.

"The Court: There was nothing to suppress.

"[The Petitioner's Counsel]: And I—

"The Court: Was there?

"[The Petitioner's Counsel]: —understand that, Your Honor. That is correct, Your Honor. . . . Your Honor's correct. I'll withdraw that line of questioning. I won't proceed further on that."

The petitioner's counsel then asked Hopkins if he sought to suppress Emilia Caffrey's identification of the petitioner. Hopkins responded that he did not, stating: "I just didn't feel that there were any reasonable grounds upon which to base such a motion."

In its memorandum of decision, the habeas court stated the following: "The petition . . . attempts to take . . . Hopkins to task for failing to adequately address a suppression motion as to the pretrial eyewitness identification of the petitioner by . . . Bright. What emerged loud and clear from the testimony that was received in this case is that there really were not any grounds upon which the evidence could be suppressed at trial. The petitioner's own legal expert also made it abundantly clear in her testimony that it was her opinion that there was no basis upon which the evidence could be prevented from being presented to the three judge panel. So, there is nothing in . . . Hopkins' trial representation on this point that merits habeas relief. . . .

"At the outset of this discussion, it is clear that . . . Hopkins did an outstanding job of cross-examining both

of the eyewitnesses on their identifications. The transcripts reveal it to be a vigorous and thorough job. All of the facts that were necessary to undermine the credibility and reliability of those identifications of the petitioner were elucidated on [cross-examination]. In fact, the petitioner's own legal expert conceded as much in her testimony."

The petitioner claims that pursuant to the principles stated in *State* v. *Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017), decided approximately two years after the decision of the habeas court in the present case, Hopkins should have moved to suppress Bright's identification of the petitioner because she had been unable to identify the petitioner from a photographic array several days after the shooting, but later made in-court identifications. At the probable cause hearing, Bright testified that she first recognized the petitioner when he had appeared in court after his arrest.

In *Dickson*, our Supreme Court concluded "that first time in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court." Id., 426. The court specifically described the state of the law prior to its decision in *Dickson*: an in-court identification was subject to exclusion only when tainted by an unnecessarily suggestive and unreliable out-of-court identification; otherwise, an in-court identification was subject only to cross-examination. Id., 422–23. The court further stated that its holding regarding prescreening was to apply only to future cases and pending related cases, and was not to be applied retroactively in habeas actions. Id., 450–51 and 451 n.34.

At the time of the petitioner's criminal trial, the controlling law was *State* v. *Smith*, 200 Conn. 465, 512 A.2d 189 (1986), overruled in part by *State* v. *Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, U.S.

, 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017). In *Smith*, our Supreme Court stated that it knew "of no authority which would prohibit, as unduly suggestive, an exclusively in-court identification. . . . The defendant's protection against the obvious suggestiveness in any courtroom confrontation is his right to cross-examination. . . . The innate weakness in any in-court testimonial identification is grounds for assailing its weight rather than its admissibility." (Citations omitted; internal quotation marks omitted.) Id., 470.

We of course consider Hopkins' performance in light of standards in effect at the time of the petitioner's criminal trial. "Counsel . . . performs effectively when he elects to maneuver within the existing law . . . ." (Internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 462, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006). At the time of the petitioner's criminal trial, there was no legal ground for suppression, and Hopkins cross-examined effectively. The habeas court did not err in its conclusion that Hopkins did not perform deficiently by not moving to suppress Bright's identification.

The petitioner also argues that Hopkins did not adequately attack the identifications made by Bright and Emilia Caffrey. The petitioner specifically points to factors such as lighting, the short duration of the incident, and stress experienced by the witnesses at the time they saw the perpetrators, which, he now claims, should have been more forcefully developed. He also posits that the identifications were cross-racial and, as such, would have affected the reliability of the identifications. The petitioner argues that Hopkins should have used an expert and should have stressed more applicable case law.

There is no merit to the claim that Hopkins performed deficiently by not presenting an expert on the issue of

eyewitness identification. At the time of the petitioner's criminal trial, the controlling law on the issue was *State* v. *Kemp*, 199 Conn. 473, 507 A.2d 1387 (1986), overruled in part by *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), in which our Supreme Court observed "that the reliability of eyewitness identification is within the knowledge of jurors and expert testimony generally would not assist them in determining the question. . . . Such testimony is also disfavored because . . . it invades the province of the jury to determine what weight or effect it wishes to give to eyewitness testimony." (Citation omitted; internal quotation marks omitted.) Id., 477.

Three years after the petitioner's criminal trial, our Supreme Court decided *Guilbert*, which overruled *Kemp*. The court concluded that *Kemp* was "out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror." *State* v. *Guilbert*, supra, 306 Conn. 234. The court also observed that cross-examination "often is not as effective as expert testimony at identifying the weaknesses of eyewitness identification testimony because cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs." Id., 243. The court noted that "some circumstances undoubtedly call for more than mere cross-examination of the eyewitness." (Internal quotation marks omitted.) Id., 244.

Again, because the law in effect at the time of the criminal trial discouraged the use of expert testimony on the issue of eyewitness identification, Hopkins did not perform deficiently by not presenting expert testimony. It was reasonable for Hopkins to use cross-examination to attack the weight of the testimony of Bright and Emilia Caffrey. Therefore, the habeas court did not err in failing to find deficient performance pertaining to this claim.

Finally, the petitioner claims that Hopkins performed deficiently by not stressing in the course of cross-examination, even if an expert were not called to testify, several factors identified as important in *Guilbert*. Performance of counsel is not to be evaluated according to standards enunciated three years after the criminal trial. For example, in *State* v. *Marquez*, supra, 291 Conn. 164–65, our Supreme Court had held that a nonblind photographic array was not unnecessarily suggestive. We have reviewed the record of the cross-examinations[6] and we conclude that the habeas court did not err in finding the performance adequate.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* HAJI JHMALAH BISCHOFF
(AC 39336)

Sheldon, Elgo and Bright, Js.

Syllabus

Convicted of the crimes of possession of narcotics ([Rev. to 2013] § 21a-279) and possession of less than four ounces of a cannabis-type substance, the defendant appealed to this court, claiming, inter alia, that the evidence was insufficient to support his conviction of possession of narcotics and that the trial court improperly failed to instruct the jury on third-party culpability in accordance with his request to charge. The police

[6] During Hopkins' cross-examination of Bright, he stressed, among other things, her inability to give to the police an accurate description of the intruders due to lighting issues, inconsistencies between her initial statement to the police and testimony at trial, her not looking at the intruders because she was told to look away, the short duration of the incident, and her inability to pick the petitioner from a photographic array shortly after the shooting.

During Hopkins' cross-examination of Emilia Caffrey, he asked her, among other things, about her statement to the police in which she stated that she did not get a good look at one of the two intruders, presumably the petitioner, her being startled because she was fired upon, the short duration of the incident, and her hesitancy in selecting the petitioner from a photographic array.

had conducted surveillance of a motel for several months during which they saw the defendant go into the motel and into a certain room in the motel. Pursuant to a search warrant, the police entered the room, where they found the defendant and L, and recovered, inter alia, currency and $10 packets of narcotics that were on a television stand. The police also found men's clothing in the room that could have fit the defendant but not L. L also was arrested and subsequently entered a plea to certain charges against him in connection with the incident. *Held*:

1. The defendant could not prevail on his claim that the evidence was insufficient to support his conviction of possession of narcotics, which was based on his assertion that the state failed to prove that he had actual or constructive possession of the narcotics: the jury reasonably could have determined from the evidence presented and the inferences reasonably drawn therefrom that the defendant knew of the presence and narcotic character of the narcotics in the motel room, and that the defendant, as the person who frequented the room and kept clothing there, was the person who exercised control over the room and its contents, including the recovered narcotics, and such evidence was sufficient to sustain the jury's finding beyond a reasonable doubt that the defendant constructively possessed the narcotics; moreover, the jury could have inferred a consciousness of guilt on the defendant's part from his conduct in seeking to distance himself from the $10 packets of narcotics by running from them when the police entered the room and by throwing into the bathtub several bills in denominations that generally are used to purchase narcotics.
2. The trial court properly denied the defendant's request to instruct the jury on third-party culpability, there having been no evidence presented that connected L to the motel room or to the narcotics found there; there was no evidence presented showing that L possessed the narcotics, as neither the transcript of L's plea proceeding nor the certified disposition of his case was admitted into evidence, there was no heroin or cocaine in a bag of marijuana that L was sitting on when the police entered the motel room, L had not been seen by the police officers who surveilled the area of the motel or elsewhere prior to the incident at issue, and the clothing found in the motel room would not have fit L, and because there was no evidence presented to the jury that L possessed the narcotics in the motel room, to the exclusion of the defendant, an instruction on third-party culpability was not required.
3. The defendant could not prevail on his claim that he was entitled to resentencing on his conviction of possession of narcotics, which was based on his claim that the legislature, in 2015, retroactively reclassified a violation of § 21a-279 and reduced the penalty for a first offense to a class A misdemeanor that carries a maximum sentence of one year of incarceration; this court previously has determined that the 2015 amendment to § 21a-279 (a) does not apply retroactively, and that determination was dispositive of the defendant's claim.

Argued March 6—officially released June 12, 2018

Procedural History

Substitute information charging the defendant with two counts each of the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent, possession of narcotics with intent to sell and possession of narcotics, and with the crime of possession of less than four ounces of a cannabis-type substance, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Dennis, J.*; verdict and judgment of guilty of possession of less than four ounces of a cannabis-type substance and two counts of possession of narcotics, from which the defendant appealed to this court. *Affirmed.*

James B. Streeto, senior assistant public defender, with whom were *Conor J. McLaughlin*, certified legal intern, and, on the brief, *Emily H. Wagner*, assistant public defender, for the appellant (defendant).

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *Craig P. Nowak*, senior state's attorney, and *Merav Knafo*, certified legal intern, for the appellee (state).

Opinion

SHELDON, J. The defendant, Haji Jhmalah Bischoff, appeals from the judgment of conviction, rendered against him after a jury trial in the judicial district of Fairfield, on charges of possession of narcotics in violation of General Statutes (Rev. to 2013) § 21a-279 (a) and possession of less than four ounces of a cannabis-type substance (marijuana) in violation of General Statutes (Rev. to 2013) § 21a-279 (c). The defendant claims that (1) the evidence presented at trial was insufficient to support his conviction of possession of narcotics; (2) the trial court erred in failing to instruct the jury, as he requested, on third-party culpability as a defense

to possession of narcotics; and (3) if his conviction of possession of narcotics is upheld, this case must be remanded for resentencing because his seven year sentence on that offense exceeds the one year statutory maximum for that offense, as it was retroactively reclassified after his arrest but before his conviction and sentencing in this case.[1] We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In July, 2014, the narcotics unit of the Stratford Police Department began to investigate the defendant. Over the next three months, officers surveilling the

[1] Although the defendant states in the heading of this claim in his brief that he is entitled to resentencing on his conviction under both § 21a-279 (a) and (c), he has focused his argument solely on his seven year sentence for having violated § 21a-279 (a). He thus has not properly challenged his concurrent one year sentence for having violated § 21a-279 (c).

On October 21, 2014, the date the defendant committed the offense for which he was convicted, General Statutes (Rev. to 2013) § 21a-279 (a) provided: "Any person who possesses or has under his control any quantity of any narcotic substance, except as authorized in this chapter, for a first offense, may be imprisoned not more than seven years or be fined not more than fifty thousand dollars, or be both fined and imprisoned; and for a second offense, may be imprisoned not more than fifteen years or be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for any subsequent offense, may be imprisoned not more than twenty-five years or be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned."

At the time of the defendant's conviction and sentencing, General Statutes (Supp. 2016) § 21a-279 (a) provided: "(1) Any person who possesses or has under such person's control any quantity of any controlled substance, except less than one-half ounce of a cannabis-type substance and except as authorized in this chapter, shall be guilty of a class A misdemeanor.

"(2) For a second offense of subdivision (1) of this subsection, the court shall evaluate such person and, if the court determines such person is a drug-dependent person, the court may suspend prosecution of such person and order such person to undergo a substance abuse treatment program.

"(3) For any subsequent offense of subdivision (1) of this subsection, the court may find such person to be a persistent offender for possession of a controlled substance in accordance with section 53a-40."

Hereinafter, unless otherwise indicated, all references to § 21a-279 (a) in this opinion are to the 2013 revision of the statute.

defendant observed him enter and exit the Honeyspot Motor Lodge in Stratford (motel) several times, and saw him enter room 208 of the motel on at least five or six of those occasions.[2]

On the morning of October 21, 2014, Sergeant Shaun Martinez went to the motel with a search warrant for room 208 and an arrest warrant for the defendant. At some point between noon and 1 p.m. on that day, while Martinez was waiting outside of the motel for the defendant to arrive, he saw the defendant exit a vehicle, together with one male and three or four female companions, and enter the motel. Thereafter, Martinez and several detectives from the Milford Police Department used a ram to break open the door of room 208. Upon entering the room—which the officers described as a small room, where "[e]verything is within a hop"—Martinez saw the defendant, who was initially standing in front of the two open cabinet doors of a television stand (TV stand), run into the bathroom. Martinez followed the defendant into the bathroom, and "tackled [him] onto the floor and took him into custody" after seeing him throw four $10 bills into the bathtub. When Martinez later searched the defendant's person, he found a small quantity of marijuana and a $10 or a $20 bill in his pocket.

When Martinez and his fellow officers first entered the room, they saw the other male who had entered the motel with the defendant, whom they later identified as Nevin Lowe, sitting in a chair approximately four to six feet from the TV stand near which the defendant was standing. Lowe did not move from the chair until he was directed to do so by the officers conducting the search of the motel room. None of the officers who

[2] To get to room 208, one enters the front door of the Honeyspot, which faces the roadway, walks up the staircase inside that door and walks down the hall to room 208.

had been surveilling the defendant since July had ever seen Lowe, at the motel or elsewhere, prior to October 21, 2014.

After the defendant, Lowe and four women were removed from the room, Detectives Jonathan Policano and Jason Creatore, of the Stratford Police Department, who had been surveilling the motel from a school parking lot across the street, were called into the room to photograph it and take custody of the evidence that had been found there during the search. On top of the TV stand, they recovered an Altoids tin containing several yellow folds of heroin and thirteen small, clear Ziploc baggies and one blue baggie containing crack cocaine, in addition to $36 in United States currency and "several prescription pills, narcotic pills." Each of the folds and baggies was packed with $10 or $20 worth of heroin or crack cocaine. The officers also seized four cell phones from the dresser located "just beneath the TV . . . ."

From the chair on which Lowe had been sitting, the officers seized what Martinez described during his testimony as a "plastic baggie with several smaller plastic baggies that are used for packaging street level narcotics. Crack cocaine, specifically. There's also a baggie of marijuana, suspected marijuana. And there is what you call apple baggies. It's one big bag but it contains several, it can be fifty, a hundred, I'm not sure the exact amount, but this one baggie here with the apple on it contains several smaller baggies, and that's used for breaking down narcotics and packaging them." "There [were] several small Ziploc baggies [of] various colors, pink, yellow, clear and purple, and these baggies here are used to package crack cocaine." The search of the room did not reveal any paraphernalia necessary for using any of the recovered drugs. Also found in the room were several items of men's clothing, which, according to the officers conducting the search, could

have fit the defendant, but not Lowe, because Lowe was approximately eighty pounds heavier than the defendant.

The defendant was charged in connection with these seizures, by a long form information filed February 2, 2016, with possession of heroin with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b), possession of heroin with intent to sell in violation of General Statutes § 21a-277 (a), possession of cocaine with intent to sell by a person who is not drug-dependent in violation of § 21a-278 (b), possession of cocaine with intent to sell in violation of § 21a-277 (a), possession of heroin in violation of § 21a-279 (a), possession of cocaine in violation of § 21a-279 (a), and possession of less than four ounces of a cannabis-type substance (marijuana) in violation of § 21a-279 (c).[3] Following a jury trial, the defendant was convicted of possession of heroin in violation of § 21a-279 (a), possession of cocaine in violation of § 21a-279 (a) and possession of less than four ounces of marijuana in violation of § 21a-279 (c). He was found not guilty of all remaining charges. The court merged the defendant's conviction of possession of heroin and possession of cocaine into a single conviction of possession of narcotics, on which it sentenced the defendant to seven years incarceration, suspended after five years, and three years of probation. The court sentenced the defendant on his conviction of possession of less than four ounces of marijuana to a concurrent term of one year of incarceration. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the evidence presented at trial was insufficient to sustain his conviction

[3] Lowe also was arrested. His arrest and subsequent guilty plea will be discussed in further detail in part II of this opinion.

of possession of narcotics because the state failed to prove that he had actual or constructive possession of the narcotics at issue in this case. We disagree.

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

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but that] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the 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).

"[T]o prove illegal possession of a narcotic substance, it is necessary to establish that the defendant knew the character of the substance, knew of its presence and exercised dominion and control over it. . . . Where . . . the [narcotics were] not found on the defendant's person, the state must proceed on the theory of constructive possession, that is, possession without direct physical contact. . . . One factor that may be considered in determining whether a defendant is in constructive possession of narcotics is whether he is in possession of the premises where the narcotics are found. . . . Where the defendant is not in exclusive possession of the premises where the narcotics are found, it may not be inferred that [the defendant] knew of the presence of the narcotics and had control of them, unless there are other incriminating statements or circumstances tending to buttress such an inference. . . . While mere presence is not enough to support an inference of dominion or control, where there are other pieces of evidence tying the defendant to dominion and control, the [finder of fact is] entitled to consider the fact of [the defendant's] presence and to draw inferences from that presence and the other circumstances linking [the defendant] to the crime. . . . [T]he test for

illegal possession of drugs is that the accused must know that the substance in question is a drug, must know of its presence and exercise dominion and control over it. . . .

"Importantly, [k]nowledge of the presence of narcotics and control may be proved circumstantially. . . . Knowledge that drugs are present and under a defendant's control when found in a defendant's home or car is more easily shown, of course, if the defendant has exclusive possession of the area in which the drugs are found. The difficult cases, such as the present one, arise when possession of an area, such as a car or home or an apartment, is shared with another person or persons. In situations in which the putative offender is not in exclusive possession of the premises where the narcotics are found, we may not infer that he or she knew of the presence of the narcotics or that he or she had control over them, without incriminating statements or circumstances to support that inference." (Citation omitted; internal quotation marks omitted.) *State* v. *Slaughter*, 151 Conn. App. 340, 345–47, 95 A.3d 1160, cert. denied, 314 Conn. 916, 100 A.3d 405 (2014).

Here, because the narcotics at issue were not found on the defendant's person, the state was required to prove that he possessed them constructively. The defendant argues that the state failed to introduce any evidence establishing either "that the defendant was the renter of room 208" or that there was any "connection between the defendant and the narcotics." We disagree.

Although it is true that the state did not introduce evidence that room 208 was registered to the defendant,[4] it did introduce evidence from which the jury

[4] As an explanation for why the officers did not try to ascertain whether room 208 was registered to the defendant, Policano testified: "This hotel . . . when you walk into the front desk there's no computer. There's no— you can rent a room by the hour. Very often, and we've done it in the past, is to put people working for us up into the room, you just pay the guy cash. You don't have to show I.D. many times. And the paperwork, from my

reasonably could have inferred that the defendant knew of the presence of the narcotics and had control over them. When the police officers first rammed through the door of room 208, they found the defendant standing in front of the TV stand on which the narcotics at issue were resting in plain sight. The defendant had been seen entering the motel, and, more particularly, room 208, several times between July and October, 2014. The officers had never seen Lowe during that three month period of surveillance. In fact, one of the officers testified, without contradiction, that he believed that Lowe had been incarcerated during that period of time. Furthermore, the men's clothing that was found in the room, which, by inference, had been brought there by the room's occupant, could only have fit the defendant, not Lowe, who was much heavier than the defendant. The presence of the clothing supported a reasonable inference that the defendant was the regular occupant of the room, and thus that he was in possession and control of its contents.

When the officers entered the room, the defendant ran away from the TV stand and, thus, away from the narcotics in the Altoids tin. The defendant's act of running away upon the officers' entry reasonably could have been found to support an inference of consciousness of guilt, suggesting that the defendant knew of the presence and character of the narcotics on the nearby TV stand and sought to distance himself from them. Thereafter, moreover, he threw $40, all in $10 bills, into the bathtub. The police officers testified that bills in these denominations are generally used in the purchase of narcotics, particularly where, as here, they are packaged in $10 folds of heroin and $10 bags of crack cocaine. The jury reasonably could have inferred from

experience, has been unreliable. People that we're looking for [are] fugitives and so forth that we know are in a particular room; you go to the front desk and they—they give their hands up like this; they don't know."

this conduct that the defendant was trying to rid himself of evidence tying him to the $10 packets of narcotics that he knew to be on the TV stand. Finally, the surveilling officers testified that they previously had made "some controlled purchases" of narcotics from the defendant, including at least one purchase of "crack cocaine . . . ."

Although alternative views of the evidence might conceivably have supported inferences of the defendant's innocence, our task in adjudicating a challenge to the sufficiency of the evidence is to view the evidence in the light most favorable to sustaining the jury's verdict. We conclude, on that basis, that a reasonable jury could have determined, from the evidence presented and the inferences reasonably drawn therefrom, that the defendant knew of the presence and narcotic character of the heroin and cocaine in the room, and, as the person who frequented the room and kept clothing there, it was he who exercised control over the room and its contents, including the recovered narcotics. Such evidence was sufficient to sustain the jury's finding that he constructively possessed such narcotics beyond a reasonable doubt.

II

The defendant also claims that the trial court erred in denying his request for a jury instruction on third-party culpability. We disagree.

The defendant submitted a written request to charge the jury on third-party culpability, which read as follows: "There has been evidence that a third party, not the defendant, committed the crimes with which the defendant is charged. This evidence is not intended to prove the guilt of the third party, but is part of the total evidence for you to consider. The burden remains on the state to prove each and every element of the offense beyond a reasonable doubt.

"It is up to you, and to you alone, to determine whether any of this evidence, if believed, tends to directly connect a third party to the crimes with which the defendant is charged. If after a full and fair consideration and comparison of all the evidence, you have left in your minds a reasonable doubt indicating that the alleged third party, Nevin Lowe, Jr., may be responsible for the crimes the defendant is charged with committing, then it would be your duty to render a verdict of not guilty as to the accused, [the defendant].

"This request is based upon the evidence adduced that Nevin Lowe, Jr., was arrested for the same crime and the evidence admitted of the transcript of Nevin Lowe, Jr.'s plea and the certified disposition of his case." (Emphasis omitted.)

The court denied the defendant's request to charge the jury on third-party culpability, explaining its ruling as follows: "A charge on third-party culpability deals with instructing the jury that there actually has been evidence that someone other than the defendant committed the crime or crimes with which the defendant is charged. Under the evidence in this case . . . the law requires that I give to the jurors [an instruction] regarding actual possession [and] constructive possession . . . . In view of the fact that I also am required to instruct the jurors that more than one person may possess the same item and explain to them that this is known as joint possession, I find that it's not appropriate to give the third-party culpability instruction. Also, in view of the rulings that I made on defense exhibit A for identification and defense exhibit B for identification. [See footnote 5 of this opinion.] Certainly, [the defense is] free to argue that theory . . . because what the jury is instructed to consider in terms of constructive possession includes that the mere presence of the defendant is not sufficient to support a finding of constructive possession. It also—they will

be instructed that if the defendant is not in exclusive possession of the premises, it can't be inferred that he knew of the presence of the illegal item and had control of it unless there are other incriminating statements or circumstance tending to support the inference. They're also going to be instructed that if the evidence shows that more than one person had access to the premises, then the defendant's knowledge and intent to possess the substance must be established by evidence other than the mere fact that the defendant, along with others, occupied or had access to the premises where the substance was found. So, certainly, they're going to be thoroughly instructed on that, and you're allowed to argue your theory of the case, but I don't think that the evidence in this case is sufficient for me to give them the instruction that there has been evidence that *a third party, not the defendant, committed the crime or crimes to which he is charged*. So, I decline to give that instruction." (Emphasis added.)

The defendant claims that the court erred by failing to instruct the jury in accordance with his request to charge on third-party culpability. "In determining whether the trial court improperly refused a request to charge, [w]e . . . review the evidence presented at trial in the light most favorable to supporting the . . . proposed charge. . . . A request to charge which is relevant to the issues of [a] case and which is an accurate statement of the law must be given. . . . If, however, the evidence would not reasonably support a finding of the particular issue, the trial court has a duty not to submit it to the jury. . . . Thus, a trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence. . . . [T]he very standards governing the admissibility of third party culpability evidence also should serve as the standards

governing a trial court's decision of whether to submit a requested third party culpability charge to the jury. . . .

"The admissibility of evidence of third party culpability is governed by the rules relating to relevancy. . . . Relevant evidence is evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . Accordingly, in explaining the requirement that the proffered evidence establish a direct connection to a third party, rather than raise merely a bare suspicion regarding a third party, we have stated [that] [s]uch evidence is relevant, exculpatory evidence, rather than merely tenuous evidence of third party culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt. . . . In other words, evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense. Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination. A trial court's decision, therefore, that third party culpability evidence proffered by the defendant is admissible, necessarily entails a determination that the proffered evidence is relevant to the jury's determination of whether a reasonable doubt exists as to the defendant's guilt. . . . Finally, [t]he trial court's ruling on the relevancy of third party inculpatory evidence will be reversed on appeal only if the court has abused its discretion or an injustice appears to have been done." (Citations omitted; internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 810–11, 91 A.3d 384 (2014).

In his request to charge, as set forth previously, the defendant explained that his request for an instruction

on third-party culpability was "based upon the evidence adduced that Nevin Lowe, Jr., was arrested for the same crime and the evidence admitted of the transcript of Nevin Lowe, Jr.'s plea and the certified disposition of his case." (Emphasis omitted.) Although Lowe was arrested on October 21, 2014, the record does not reveal that Lowe and the defendant were charged with the same crimes. Moreover, neither the transcript of Lowe's plea proceeding nor the certified disposition of his case was admitted into evidence.[5] See footnote 3 of this opinion. The trial court denied the defendant's offer to enter them into evidence, and the defendant has not challenged that ruling on appeal. Because the evidence on which the defendant sought to base his request to charge on third-party culpability was not before the jury, the defendant cannot prevail on a claim of error for failure to grant that request to charge.

Turning to the evidence that was presented to the jury, moreover, we agree with the trial court that no evidence was presented that Lowe, as opposed to the defendant, possessed the narcotics at issue. It is undisputed that Lowe, in addition to the defendant and the four unidentified females, was present in room 208 when the police officers executed the search warrant for the room on October 21, 2014. When the police entered the room, Lowe was sitting in a chair near the TV stand on which the heroin and cocaine were found. Although Lowe was sitting on a bag of marijuana and other items commonly used to package crack cocaine for sale, there was no heroin or cocaine in that bag. There were no folds used to package heroin in the bag found in the chair where Lowe was sitting. Although the small Ziploc baggies found in that bag were of the same generic type and size as those containing cocaine in the Altoids tin, there was nothing so distinctive about

[5] The referenced documents are marked, respectively, as defendant's exhibits A and B for identification.

them as to suggest that they had come from, and thus were possessed and controlled by, one and the same person. Lowe, like the defendant, was arrested. Unlike the defendant, however, Lowe had not been seen by the surveilling officers in the area of the motel or elsewhere prior to October 21, 2014. In fact, one officer testified that Lowe was incarcerated during that period of time. Those officers also testified that the clothing found in the motel room, which presumably belonged to the person renting and controlling the room, would have fit the defendant, but would not have fit Lowe. Thus, no evidence was presented, apart from Lowe's presence in the room on October 21, 2014, that connected Lowe either to room 208 or to the heroin or cocaine found inside the room on that date. Any evidence of Lowe's connection to the narcotics recovered from room 208 raised, at most, a bare suspicion that he, rather than the defendant, controlled and possessed them. Because there was no evidence presented to the jury that Lowe possessed the narcotics in the room, to the exclusion of the defendant, an instruction on third-party culpability was not required in this case. We thus conclude that the trial court did not err in denying the defendant's request for a jury instruction on third-party culpability in the present case.

III

The defendant finally claims that he is entitled to resentencing on his conviction of possession of narcotics because the legislature has retroactively reclassified the violation of § 21a-279, for a first offense, as a class A misdemeanor, which carries a maximum sentence of one year of incarceration. See Public Acts, Spec. Sess., June, 2015, No. 15-2, § 1. The defendant concedes, as he must, that this court's holding in *State* v. *Moore*, 180 Conn. App. 116, 124, A.3d (2018), in which this court held that the 2015 amendment to § 21a-279 (a),

which took effect October 1, 2015, does not apply retroactively and is dispositive of his claim. The defendant's claim that he is entitled to be resentenced must therefore fail.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MONDAY J. ORTIZ (AC 39391)

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

Syllabus

Convicted, on conditional a plea of nolo contendere, of the crimes of possession of a sawed-off shotgun and possession of a weapon in a motor vehicle, the defendant appealed to this court, claiming that the trial court improperly denied his motion to suppress certain evidence seized during a warrantless search of his van. The police had been dispatched to an apartment complex to investigate a report of an assault and had been told that the suspect was in his apartment with a shotgun. After they arrived, officers were approached by an unidentified man, who told them that the person they were looking for was sitting with a shotgun in a gray van in the parking lot. Upon locating the van, the officers did not see the defendant or the shotgun in the van and learned that the plate did not belong to the van and that there was no information on record for the vehicle identification number. Certain of the officers returned inside the building, where they encountered the defendant and placed him under arrest. Officers again looked into the tinted windows of the van and saw the barrel of a shotgun, as well a box with bullets spilling out of it. Upon seeing the shotgun, the police used a key fob seized from the defendant to unlock the van and seized the gun. *Held* that the trial court properly denied the defendant's motion to suppress the evidence seized from the van, that court having properly determined that the warrantless search of the van and seizure of the shotgun were justified under the plain view doctrine: the warrantless seizure of contraband that is in plain view is reasonable under the constitution if the initial intrusion that enabled the police to view the item seized was lawful and the police had probable cause to believe that the item was contraband, and here, because the officers' second look into the defendant's vehicle was merely a continuation of their ongoing investigation into witness reports of a suspect who had committed an assault, was armed with a shotgun, and had been seen sitting with a shotgun in a

van in the parking lot, the officers were lawfully in the private parking lot, and although the defendant claimed that once he was placed in handcuffs in the police cruiser, the police were no longer permitted to search his van, the defendant did not dispute that the officers were lawfully present in the residential parking lot near his apartment when they first looked into his van because they were responding to an emergency call reporting an assault on the premises, the officers had not yet located the shotgun described by the witnesses, and it was reasonable for them to believe that the shotgun was located in the defendant's van and to return to the parking lot in order to retrieve the weapon; moreover, the incriminating character of the object viewed was immediately apparent, as the trial court credited the officers' testimony that they could see the barrel of a shotgun and bullets protruding from a box on the floor of the van, and the totality of the facts were sufficient to warrant a person of reasonable caution to believe that the weapon described by witnesses might be found in the van and for the officers to infer that there was a fair probability the defendant had stored the shotgun in his van prior to his apprehension.

Argued February 22—officially released June 12, 2018

Procedural History

Information charging the defendant with the crimes of assault in the third degree, possession of a sawed-off shotgun, and possession of the weapon in a motor vehicle, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, where the court, *Holden*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court, *E. Richards*, *J.*, on a conditional plea of nolo contendere to possession of a sawed-off shotgun and possession of the weapon in a motor vehicle; judgment of guilty in accordance with the plea; subsequently, the state entered a nolle prosequi as to assault in the third degree, and the defendant appealed to this court. *Affirmed.*

Alice Osedach, assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Richard L. Palombo*, *Jr.*, senior assistant state's attorney, for the appellant (state).

Opinion

PELLEGRINO, J. The defendant, Monday J. Ortiz, appeals from the judgment of conviction rendered by the trial court following a plea of nolo contendere to the charges of possession of a sawed-off shotgun in violation of General Statutes § 53a-211 and possession of a weapon in a motor vehicle in violation of General Statutes § 29-38 (a). On appeal, the defendant claims that the trial court improperly denied his motion to suppress evidence seized during a warrantless search of his vehicle. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. At approximately 2 p.m. on November 22, 2013, Bridgeport Police Officer Kenneth Ruge was dispatched to the YMCA building on State Street in Bridgeport to investigate a report of an assault. The alleged assault took place at the Harrison Apartments, which are located in the same building as the YMCA. The dispatcher relayed to Ruge that the suspect was in his apartment with a shotgun. Ruge arrived at the building approximately four minutes later and was met shortly thereafter by Sergeant Joseph Szor and Officer Tyrone Teele. The three officers parked their patrol cars in front of the building on State Street and walked into the lobby area of the YMCA through the main entrance. While they were speaking with the receptionist, Samuel Sanchez approached the officers and identified himself as the victim of the assault.

Sanchez, who worked at the YMCA in the maintenance department, told the officers that the defendant, a resident of the apartment building, came up from behind him and punched him in the back of the head. The officers observed injuries to the back of Sanchez's head and called for medical assistance for him. Sanchez described the defendant as a "shorter, medium build,

bald Hispanic male'' and reported that he lived in apartment 417 and owned a shotgun.

As they were speaking to Sanchez, an unidentified man approached the officers and told them that the person they were looking for was sitting with a shotgun in a gray van in the parking lot. Ruge transmitted this information over his radio while the unidentified man showed them to a side door leading to the residential parking lot; the man waited for them at the door. Around the same time, Officers David Neary and Garrett Waddel arrived and, having heard Ruge's update over the radio, proceeded to the parking lot to meet the other three officers. The parking lot was fenced in, located on private property and required a key card to access it. Posted signs indicated that the lot was for permitted residents of the Harrison Apartments only. When the officers arrived, there was only one gray van parked in the residential lot.

The five officers went to the van and looked into it to see if anyone was inside. Although the windows of the van were tinted, the officers' ability to see inside the vehicle was not impeded. None of the officers saw the defendant or a shotgun in the van. The officers ran a license plate check on the van and learned that the plate did not belong to the van and that there was no information on record for the vehicle identification number.

Ruge, Szor and Teele returned to the apartment building to continue their investigation, while Neary and Waddel stayed behind in the parking lot by the van. The unidentified man held the door open so that the three officers could reenter the building from the parking lot. The officers took the elevator to the fourth floor and approached apartment number 417. They knocked on the door for several minutes and received no answer. The officers then returned to the elevator and, as the

elevator doors opened, a Hispanic male matching the description given by Sanchez exited the elevator and walked directly to the door of apartment 417.

The officers stopped the man before he could open the door and asked his name; he identified himself as the defendant. He was then placed under arrest, handcuffed, and searched incident to the arrest. The officers seized a key fob, a 12 gauge shotgun shell, a screwdriver and a box cutter from the defendant's person. When asked if they could search his apartment, the defendant refused and told the officers to get a warrant.

The officers took the defendant in the elevator back to the first floor and outside to be placed in the back of Ruge's patrol car. Ruge and Teele remained with the defendant. Meanwhile, Szor took the key fob and returned to the parking lot. Along with Neary and Waddel, Szor approached the van again to look for a shotgun. Neary cupped his hands and peered through the tinted windows again and saw the barrel of a shotgun as well as a box with bullets spilling out of it. He stated aloud that he thought he saw the barrel of a gun. Waddel then looked and saw the gun also. Szor approached, pressed his face to the window, and saw the barrel of the weapon sticking out of a box on the backseat floor of the van. All three officers recalled cupping their hands to shield the sun while looking into the tinted windows of the van. Upon seeing the shotgun, Szor used the defendant's key fob to unlock the van and seized the shotgun.

The defendant subsequently was charged by information with one count of possession of a sawed-off shotgun, one count of possession of a weapon in a motor vehicle, and one count of assault in the third degree in violation of General Statutes § 53a-61 (a) (1). On March 2, 2016, the defendant filed a motion to suppress evidence obtained by the police as a result of the search

of his vehicle.[1] On March 9, 2016, the trial court, *Holden, J.*, conducted a motion to suppress hearing and heard arguments from both parties. On March 10, 2016, Judge Holden denied the motion to suppress in an oral decision, finding that there was "probable cause [for the officers] to believe that the car contained contraband or evidence pertaining to a crime." On the same date, following the court's denial of the motion to suppress, the defendant entered conditional pleas of nolo contendere on the gun-related charges, reserving his right to appeal the denial of his motion to suppress.[2] The court, *E. Richards, J.*, also made a finding that the motion to suppress would have been dispositive of the gun-related charges. On May 12, 2016, Judge Richards sentenced the defendant to a total effective term of five years incarceration, execution suspended after fifteen months, followed by three years of probation. This appeal followed.[3]

The sole issue in this appeal is whether the seizure of the sawed-off shotgun from the defendant's vehicle was the product of an illegal, warrantless search in violation of the defendant's rights under the state and federal constitutions to be free from an unreasonable search and seizure. Specifically, the defendant argues that the warrantless search of his vehicle and the seizure of the sawed-off shotgun found within the vehicle was not justified under any of the following exceptions to the warrant requirement: (1) the search was incident

[1] We note that the defendant did not challenge in the trial court, or on appeal, the legality of his arrest or the fruits of the search of his person incident to that arrest.

[2] At the defendant's plea hearing, the state entered a nolle prosequi on the assault in the third degree charge.

[3] On January 20, 2017, Judge Holden issued a written memorandum of decision outlining his rationale for denying the motion to suppress, namely, that there was probable cause to believe that the vehicle contained contraband and that the shotgun was seized pursuant to the plain view of the officers.

to a lawful arrest of a recent occupant of a motor vehicle; (2) there was probable cause to believe that the vehicle contained contraband; and (3) the contraband was in plain view to the officers. In response, the state claims that the court correctly determined that the seizure of the shotgun was justified under the plain view doctrine. Because we agree with the state that the officers' plain view of the shotgun justified their seizure of it, we need not address the defendant's alternative arguments.[4]

We begin our analysis by setting forth the appropriate standard of review. "Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in

[4] The defendant also raises a state constitutional claim that the plain view doctrine did not justify the warrantless search of his van under article first, § 7, of the Connecticut constitution. The defendant has not provided any independent analysis of the plain view doctrine under the Connecticut constitution, nor does he apply the facts of this case to pertinent Connecticut case law. "[F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . [A]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.) *State* v. *Hodkoski*, 146 Conn. App. 701, 712 n.10, 78 A.3d 255 (2013). Accordingly, we decline to review the defendant's state constitutional claim.

Additionally, because we determine that the officers' seizure of the shotgun was justified under the plain view doctrine, we do not reach the defendant's claim that, under article first, § 7, of the Connecticut constitution, a residential parking lot is part of the constitutionally protected curtilage of an individual's home.

the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Winfrey*, 302 Conn. 195, 200–201, 24 A.3d 1218 (2011).

"Whether the trial court properly found that the facts submitted were enough to support a finding of probable cause is a question of law. . . . The trial court's determination on the issue, therefore, is subject to plenary review on appeal. . . . Because a trial court's determination of the validity of a . . . search [or seizure] implicates a defendant's constitutional rights . . . we engage in a careful examination of the record to ensure that the court's decision was supported by substantial evidence. . . . However, [w]e [will] give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses." (Internal quotation marks omitted.) *State* v. *Brown*, 279 Conn. 493, 514, 903 A.2d 169 (2006).

We next set forth the applicable constitutional principles. "The fourth amendment to the United States constitution protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures . . . . U.S. Const., amend. IV; see also Conn. Const., art. I, § 7. Ordinarily, police may not conduct a search unless they first obtain a search warrant from a neutral magistrate after establishing probable cause. . . . Under both the federal and state constitutions, a warrantless search and seizure is per se unreasonable, subject to a few well defined exceptions. . . . These exceptions have been jealously and carefully drawn . . . and the burden is on the state to establish the exception." (Citations omitted; internal quotation marks omitted.) *State* v. *Wilson*, 111 Conn. App. 614, 622, 960 A.2d 1056 (2008), cert. denied, 290 Conn. 917, 966 A.2d 234 (2009).

"In *Coolidge* v. *New Hampshire*, 403 U.S. 443, 464–73, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), the United States

Supreme Court articulated what has become known as the plain view exception to the warrant requirement. The warrantless seizure of contraband that is in plain view is reasonable under the fourth amendment if two requirements are met: (1) the initial intrusion that enabled the police to view the items seized must have been lawful; and (2) the police must have had probable cause to believe that these items were contraband or stolen goods." (Internal quotation marks omitted.) *State* v. *Eady*, 249 Conn. 431, 436–37, 733 A.2d 112, cert. denied, 528 U.S. 1030, 120 S. Ct. 551, 145 L. Ed. 2d 428 (1999).

It is well settled that "objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." (Internal quotation marks omitted.) *Texas* v. *Brown*, 460 U.S. 730, 738, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983). "A different situation is presented, however, when the property in open view is situated on private premises to which access is not otherwise available for the seizing officer. . . . [P]lain view provides grounds for seizure of an item when an officer's access to an object has some prior justification under the [f]ourth [a]mendment. Plain view is perhaps better understood, therefore, not as an independent exception to the [w]arrant [c]lause, but simply as an extension of whatever the prior justification for an officer's access to an object may be." (Citation omitted; internal quotation marks omitted.) Id., 738–39.

"[T]he plain view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost; the owner may retain the incidents of title and possession but not privacy. . . . [I]f contraband is

left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no search within the meaning of the [f]ourth [a]mendment—or at least no search independent of the initial intrusion that gave the officers their vantage point." (Citation omitted; internal quotation marks omitted.) *State* v. *Brown*, supra, 279 Conn. 520–21; see also *State* v. *Kuskowski*, 200 Conn. 82, 85, 510 A.2d 172 (1986) (where defendant's car was parked in public boat launch area, officer had right to stand beside car, peer in, and subsequently seize contraband in plain view). Additionally, the police need not have discovered the evidence inadvertently in order to seize contraband in plain view. See *State* v. *Eady*, supra, 249 Conn. 437 n.7 ("inadvertence is not required if the items seized fall under the category of contraband, stolen property or objects dangerous in themselves" [internal quotation marks omitted]).

The defendant does not dispute that the officers were lawfully present in the residential parking lot when they first looked into the defendant's vehicle because they were responding to the emergency call reporting an assault on the premises. The defendant asserts, however, that once he was arrested and placed into the back of the police cruiser, the officers were no longer lawfully present because they were trespassing on private property and, therefore, they needed a warrant to look into his vehicle a second time.

We conclude that the officer's subsequent look into the defendant's vehicle was a mere continuation of their ongoing investigation. See *State* v. *Langley*, 128 Conn. App. 213, 225, 16 A.3d 799 ("[a] search warrant is not required where evidence discovered in plain view is seized as part of a continuing police investigation" [internal quotation marks omitted]), cert. denied, 302 Conn. 911, 27 A.3d 371 (2011); accord *State* v. *Magnano*, 204 Conn. 259, 269, 528 A.2d 760 (1987).

In the present case, when the officers arrived at the Harrison Apartments, they were actively investigating reports of a suspect who had committed an assault and was armed with a shotgun. Two witnesses indicated to the police that the defendant had a shotgun: The victim told police that they could find the defendant in his apartment with a shotgun, and the unidentified man indicated that the suspect was sitting with a shotgun in his van in the parking lot. The officers did not see anyone with a shotgun in the van. Neary and Waddel remained with the van while the other officers apprehended the defendant as he was returning to his apartment. They did not find a weapon on his person, but they did find a 12 gauge shotgun shell in his pocket. Although the defendant had been arrested and placed in the back of the police cruiser, the police still had not located the shotgun described by the two witnesses. It was reasonable for the officers to believe, therefore, that the shotgun was located in the van and to return to the parking lot to retrieve the weapon. At the time the officers looked into the van for a second time, they were continuing their investigation into the assault; specifically, they were looking for the shotgun described by the two witnesses.

We find no meaningful distinction between the first and second time the police looked into the defendant's van. The second look into the defendant's van constituted no greater intrusion upon the defendant's privacy or possessory interest than did their initial view. See *State* v. *Eady*, supra, 249 Conn. 444–45 ("the initial lawful entry by a government agent, who was entitled to seize contraband observed in plain view . . . eliminated the defendant's reasonable expectation of privacy in the contraband and thereby permitted the subsequent entry by a second government agent to do that which the first could have done" [citations omitted]); see also *United States* v. *Jacobsen*, 466 U.S. 109, 117, 104 S. Ct.

1652, 80 L. Ed. 2d 85 (1984) ("[o]nce frustration of the original expectation of privacy occurs, the [f]ourth [a]mendment does not prohibit governmental use of the now nonprivate information"). Because the plain view doctrine focuses on whether the *initial* intrusion was lawful, we reject the defendant's argument that the officers' intrusion somehow became unlawful during the ongoing investigation. We conclude, therefore, that the officers' second look into the defendant's vehicle was merely a continuation of their ongoing investigation into the assault, and therefore, the officers were lawfully present in the private parking lot.

The second element of the plain view doctrine requires that the incriminating character of the object viewed was immediately apparent. "The immediately apparent requirement of the plain view exception is satisfied if, at the time of discovery of the contraband or evidence, there is probable cause to associate the property in plain view with criminal activity without further investigation." (Internal quotation marks omitted.) *State* v. *Eady*, supra, 249 Conn. 439. "[Our Connecticut courts] consistently have held that [t]he quantum of evidence necessary to establish probable cause exceeds mere suspicion, but is substantially less than that required for conviction. . . . While probable cause requires more than mere suspicion . . . the line between mere suspicion and probable cause necessarily must be drawn by an act of judgment formed in light of the particular situation and with account taken of all the circumstances." (Internal quotation marks omitted.) *State* v. *Brown*, supra, 279 Conn. 521.

"Probable cause, broadly defined, [comprises] such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred. . . . In other words, because [t]he probable cause determination is, simply, an analysis of probabilities . . . [p]robable cause requires only a probability or substan-

tial chance of criminal activity, not an actual showing of such activity." (Internal quotation marks omitted.) *State* v. *Jones*, supra, 320 Conn. 70–71. "It is axiomatic that [t]he probable cause test then is an objective one. . . . The United States Supreme Court has endorsed an objective standard, noting that evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend on the subjective state of mind of the officer." (Citation omitted; internal quotation marks omitted.) *State* v. *Eady*, supra, 249 Conn. 440–41, citing *Horton* v. *California*, 496 U.S. 128, 138, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). "The determination of whether probable cause exists under the fourth amendment to the federal constitution, and under article first, § 7, of our state constitution, is made pursuant to a totality of circumstances test." *State* v. *Orellana*, 89 Conn. App. 71, 80, 872 A.2d 506, cert. denied, 274 Conn. 910, 876 A.2d 1202 (2005). "Under the [*Illinois* v. *Gates*, 462 U.S. 213, 231–32, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)] test, a court must examine all of the evidence relating to the issue of probable cause and, on the basis of that evidence, make a commonsense, practical determination of whether probable cause existed." *State* v. *Orellana*, supra, 80–81.

In light of this objective standard, we need only look to the evidence presented relating to the officers' knowledge to determine whether, on the basis of that knowledge, a reasonable person would have had probable cause to believe that the shotgun viewed by the officers from outside of the defendant's vehicle was the weapon described by the two witnesses. The trial court credited the testimony of the five officers and relied on that testimony in denying the defendant's motion to suppress. The court found that: (1) the police were dispatched to the YMCA and adjoining apartment complex to investigate a reported assault; (2) the dispatcher indicated that the suspect was in his apartment with a

shotgun; (3) upon arrival, the police spoke with the victim, who identified the defendant as his assailant and told them that the defendant owned a shotgun; (4) an unidentified man told police that the defendant was in the residential parking lot sitting in his van with a shotgun; (5) the officers looked in the windows of the van but did not see the defendant or a shotgun inside; (6) the officers apprehended the defendant and during the search of his person, the key to the vehicle in question was found in his pocket, along with a 12 gauge shotgun shell; (7) the officers again looked inside the van and could see the barrel of a shotgun and bullets protruding from a box on the floor of the van; and (8) the officers used the key to access the defendant's van; and (9) they seized the sawed-off shotgun from the backseat of the van. See, e.g., *State* v. *Wilson*, supra, 111 Conn. App. 624–25.

The state claims that those facts established probable cause to seize the defendant's shotgun once the police viewed it from outside the van. We agree. "[A] police officer is certainly entitled to utilize his training and experience in ascertaining probable cause"; (internal quotation marks omitted) id., 625; and in this case, we conclude that the totality of the facts are sufficient to "warrant a [person] of reasonable caution in the belief" that the weapon described by two witnesses might be found in the van. (Internal quotation marks omitted.) *State* v. *Badgett*, 200 Conn. 412, 430, 512 A.2d 160, cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986). It was reasonable for the officers to infer that there was a fair probability the defendant had stored the shotgun in his vehicle prior to his apprehension. We conclude, therefore, that the shotgun inside the defendant's van was immediately apparent to the officers.[5]

[5] Even if we were to hold that the officers' search of the vehicle was unreasonable, which we do not, the shotgun inevitably would have been discovered through the inventory procedures of the police department. "Under the inevitable discovery rule, evidence illegally secured in violation

Accordingly, we conclude that the warrantless search of the defendant's vehicle and the seizure of the items found within were constitutionally valid pursuant to the plain view doctrine, and, thus, the court properly denied the defendant's motion to suppress.

The judgment is affirmed.

In this opinion the other judges concurred.

RANDY MURALLO *v.* UNITED BUILDERS SUPPLY CO., INC.
(AC 40442)

Lavine, Bright and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for, inter alia, breach of contract. The plaintiff had purchased materials for the construction by the defendant of two decks on the plaintiff's property. After the completion of the two decks, the plaintiff alleged that the decking

of the defendant's constitutional rights need not be suppressed if the state demonstrates by a preponderance of the evidence that the evidence would have been ultimately discovered by lawful means. . . . To qualify for admissibility the state must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the constitutional violation. . . . The inevitable discovery rule applies in a situation in which . . . the police would have legally discovered the evidence eventually." (Citations omitted; internal quotation marks omitted.) *State* v. *Vallejo*, 102 Conn. App. 628, 640, 926 A.2d 681, cert. denied, 284 Conn. 912, 931 A.2d 934 (2007).

In the present case, the van was towed from the parking lot and impounded for the misuse of license plates and because no information could be found on the VIN number. Ruge testified that it was the Bridgeport police department policy to conduct an inventory search of vehicles that had been towed. See id. ("[A]n inventory search is a well-defined exception to the warrant requirement. . . . In the performance of their community caretaking functions, the police are frequently obliged to take automobiles into their custody. . . . A standardized procedure for making a list or inventory as soon as reasonable after reaching the stationhouse not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person." [Internal quotation marks omitted.]). The police would have found the shotgun when they inventoried the vehicle after they towed the van. Therefore, the inevitable discovery doctrine provides an alternative ground for affirmance.

material was defective and complained to the defendant several times. He thereafter received a charge-back from his credit card company for the cost of the decking materials. Following discussions with B, the defendant's principal, B sent the plaintiff an e-mail in 2009 indicating that the defendant would not provide any material for a deck replacement because the plaintiff had received the charge-back for the materials, but that the defendant would provide the labor for replacement of the decks if the plaintiff chose to replace them. Although the plaintiff subsequently informed the defendant that he wanted to replace his decks, the defendant never provided the labor to replace the decks, and this action followed. During the trial, B testified on two separate occasions that the 2009 e-mail set forth the parties' agreement. The trial court rendered judgment in favor of the defendant, from which the plaintiff appealed to this court, claiming, inter alia, that the trial court erred in finding that the parties had not formed a contract. *Held* that the trial court's finding that the 2009 e-mail was an offer that the plaintiff never accepted was clearly erroneous and not supported by any evidence in the record: the defendant did not dispute the plaintiff's claim that he and B had reached an agreement before B sent the 2009 e-mail, and it was undisputed that the e-mail memorialized the parties' agreement regarding the replacement of the plaintiff's decks with labor provided by the defendant, and because the court did not make findings regarding whether the plaintiff performed his obligations under the agreement and, if so, whether the defendant breached any contractual duties it owed the plaintiff, nor did it address what damages, if any, the plaintiff would be entitled to recover if the defendant did breach the agreement, a new trial on the plaintiff's breach of contract claim was necessary; moreover, in light of that determination, it was not necessary to address the plaintiff's challenge to the trial court's finding that the decking materials he had purchased from the defendant were not defective.

Argued February 15—officially released June 12, 2018

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New London, small claims session, where the matter was transferred to the regular civil docket; thereafter, the plaintiff filed an amended complaint; subsequently, the matter was tried to the court, *Hon. Joseph Q. Koletsky*, judge trial referee; judgment in favor of the defendant, from which the plaintiff appealed to this court. *Reversed in part; further proceedings.*

Eugene C. Cushman, for the appellant (plaintiff).

Garon Camassar, for the appellee (defendant).

Opinion

BRIGHT, J. The plaintiff, Randy Murallo, appeals from the judgment of the trial court rendered after a trial to the court in favor of the defendant, United Builders Supply Co., Inc. The plaintiff claims that the court erred in finding that (1) the parties had not formed a contract and (2) the decking materials sold by the defendant were not defective. We conclude that the court's finding that no contract existed between the parties was clearly erroneous. Accordingly, we reverse in part the judgment of the trial court.

The following facts and procedural history, as found by the trial court or as undisputed in the record, are relevant to our review. In August and September, 2007, the plaintiff purchased sufficient quantities of GeoDeck materials for the construction of three outdoor decks on his property in Waterford, where he was building two houses. The plaintiff intended to occupy one of the houses (residence), which would include two decks. The plaintiff paid the defendant $4749.81 for the decking materials by way of two charges to his American Express account. All construction on the property, including the residence and the decks attached thereto, was completed in or about November, 2007, and the Waterford building official issued the plaintiff a certificate of occupancy for his residence at that time. Shortly thereafter, the plaintiff noticed spacing between the boards of the decks at his residence, and he contacted the defendant in order to have someone inspect the decks. Jared Beaulieu, the defendant's vice president, went to the plaintiff's property to inspect the decks, and he found that they appeared to be in good condition. The plaintiff also was told that the gaps between the

boards would close as the weather became warmer during the summer.

The plaintiff moved into the residence in April, 2008, and by the fall of 2008, the plaintiff believed that the condition of the decks at his residence had gotten worse. He made several phone calls to the defendant regarding his complaint about the decks, and there were several e-mail exchanges between the plaintiff and the defendant's representatives. The plaintiff, believing that the defendant was not going to resolve his complaint, contacted American Express to dispute the charges to his account. Eventually American Express issued a charge-back on the defendant's account in January, 2009, so that the plaintiff was credited for the cost of the decking materials.[1]

Following further discussions with the plaintiff, on September 2, 2009, Beaulieu sent an e-mail to the plaintiff stating: "[A]s discussed with you previously: 1. [W]e will not provide any material for the deck replacement at your home . . . as the original material was credited back through you[r] merchant card. 2. [W]e will provide the labor with our own crew for the replacement of the deck when and if it is replaced by you . . . that labor would preferably be during a 'down' time of our business year." On that same date Beaulieu sent another e-mail with a quote for certain decking materials, with the notation "will refine if and when ready." There were no further communications between the plaintiff and the defendant until April, 2011, when the defendant sent an account statement to the plaintiff that reflected a balance on the plaintiff's account.[2] The plaintiff returned the account statement to the defendant with

[1] All parties agreed that, as of the second day of trial, the plaintiff had been reimbursed for the cost of the decking materials and that the defendant had not been paid for the plaintiff's decking materials.

[2] The statement was for materials provided to the plaintiff that are unrelated to the decks at issue in this case.

a handwritten notation indicating that the plaintiff wanted to replace his decks, and he needed to "schedule workers" to perform the labor at no charge. The defendant never provided the labor to replace the plaintiff's decks.

In May, 2013, the plaintiff commenced this action against the defendant in small claims court as a self-represented party. In June, 2013, the defendant had the matter transferred to the regular docket of the Superior Court pursuant to Practice Book § 24-21. On July 23, 2013, after obtaining counsel, the plaintiff filed the seven count operative complaint, alleging, inter alia, breach of contract arising from the defendant's failure to provide the labor to replace the decks at the plaintiff's residence.[3] In addition, the plaintiff sought attorney's fees pursuant to General Statutes § 52-251a[4] in the seventh count of the operative complaint. The case was tried to the court over the course of two days on April 26 and April 27, 2017.

At trial, the plaintiff testified that he and Beaulieu had reached an agreement to resolve the plaintiff's complaint whereby the plaintiff would pay for new decking

[3] The plaintiff's breach of contract claim is set forth in the first count of the operative complaint. In particular, paragraph 9 of the first count alleges that "[t]he plaintiff gave timely notice of the defects and breach of warranty to the defendant, and the defendant made promises to the plaintiff to rectify the problem, but it has neglected and refused to do so." Although the first count includes allegations suggesting that the defendant breached an implied warranty and made misrepresentations as to the quality of the decking materials, given the allegation in paragraph nine and the claims made by the plaintiff on appeal, we understand the first count to state solely a claim for a breach of the parties' contract entered into by the plaintiff and Beaulieu on or about September 2, 2009. The remaining counts of the operative complaint alleged breach of warranty, fraud, civil theft, and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. On appeal, the plaintiff raises claims related to only the breach of contract count.

[4] General Statutes § 52-251a provides: "Whenever the plaintiff prevails in a small claims matter which was transferred to the regular docket in the Superior Court on the motion of the defendant, the court may allow to the plaintiff his costs, together with reasonable attorney's fees to be taxed by the court."

materials and the defendant would provide the labor to install the decks. After reaching that agreement, the plaintiff asked Beaulieu to put the agreement in writing, and Beaulieu sent the e-mail to the plaintiff memorializing their agreement on September 2, 2009. Beaulieu acknowledged, on two separate occasions during his testimony at trial, that the September 2, 2009 e-mail set forth the parties' agreement. On the first day of the trial, the following examination occurred between plaintiff's counsel and Beaulieu:

"Q: Okay. And you set forth what your agreement is in this e-mail, did you not?

"A: Yes, but, once again, you're leaving out timeliness.

"Q: I'm not asking [about] timeliness. I'm asking if you agree in that document that you [would] provide the labor to replace [the plaintiff's] deck[s].

"A: That's correct."

Then, on the second day of the trial, the following examination occurred between plaintiff's counsel and Beaulieu regarding the September 2, 2009 e-mail:

"Q: The document says, as we discussed previously, correct?

"A: Yes. Okay.

"Q: Okay. What does that mean?

"A: Obviously we had a telephone conversation.

"Q: All right. And did you come to an agreement?

"A: I believe that this was—we will not provide any material for the deck replacement at your home as the original material was credited back to your merchant card. We will provide the labor with our own crew for the replacement of the deck when and if [replaced] by you, that labor would preferably be at our down time.

"Q: Now, does that reflect the discussion you had previously?

"A: Judging on this I'd say yes. . . .

"Q: You reached a verbal agreement and then you put it in writing.

"A: It looks that way to me, sir."

After trial, the court rendered judgment in favor of the defendant on all counts of the plaintiff's complaint. Despite the testimony of both the plaintiff and Beaulieu regarding their agreement, the court found, inter alia, that the September 2, 2009 e-mail was an offer that the plaintiff never accepted, and, therefore, the court held that there was no contract between the parties. This appeal followed.

I

The plaintiff first claims that the court's finding that the e-mail dated September 2, 2009, was an offer that the plaintiff never accepted is clearly erroneous. We agree.

"The existence of a contract is a question of fact to be determined by the trier on the basis of all of the evidence. . . . To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were 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. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling. . . .

"In order for an enforceable contract to exist, the court must find that the parties' minds had truly met. . . . If there has been a misunderstanding between the

parties, or a misapprehension by one or both so that their minds have never met, no contract has been entered into by them and the court will not make for them a contract which they themselves did not make. . . . [A]n agreement must be definite and certain as to its terms and requirements." (Citations omitted; internal quotation marks omitted.) *Electric Wholesalers, Inc.* v. *M.J.B. Corp.*, 99 Conn. App. 294, 301–302, 912 A.2d 1117 (2007).

The court held that there was no contract between the parties on the basis of its finding that the September 2, 2009 e-mail was an offer from the defendant that the plaintiff never accepted. Our review of the record does not reveal any evidence that supports the court's finding that the e-mail constituted an offer. Both the plaintiff and Beaulieu[5] acknowledged that they had reached an agreement following their discussions regarding the plaintiff's complaint. They further agreed that the September 2, 2009 e-mail set forth their agreement that the defendant would provide the labor necessary to replace the plaintiff's decks when the plaintiff purchased new materials. Furthermore, the trial court acknowledged that the parties had reached an agreement during the plaintiff's closing arguments. Plaintiff's counsel asserted that Beaulieu agreed that the e-mail reflected the agreement he had reached with the plaintiff and the court responded: "More or less, yes."

On the basis of our review of the record, we conclude that the court's finding that the e-mail constituted an offer is clearly erroneous. The defendant did not dispute the plaintiff's claim that he and Beaulieu reached an agreement before Beaulieu sent the e-mail on September 2, 2009, memorializing the parties' agreement. Moreover, there is no evidence in the record to support the

[5] Alexander Slosberg, the defendant's president, acknowledged that Beaulieu, as the defendant's vice president, had the authority to make agreements for the defendant.

court's finding that the e-mail constituted an offer that the plaintiff never accepted. Instead, the evidence reveals that it was undisputed that the e-mail memorialized the agreement that the plaintiff and Beaulieu had reached regarding the replacement of the plaintiff's decks. Because the court improperly found that the e-mail constituted only an offer, rather than the parties' agreement, the court did not make any findings regarding whether the plaintiff performed his obligations under the agreement, and, if so, whether the defendant breached any contractual duties it owed the plaintiff; nor did the court address what damages, if any, the plaintiff would be entitled to recover if the defendant did breach the agreement. Accordingly, a new trial is required on the plaintiff's breach of contract claim.[6]

II

The plaintiff also claims that the trial court's finding that the decking materials purchased from the defendant were not defective is clearly erroneous. The plaintiff argues that if the decking materials were defective,

[6] A request for costs and attorney's fees pursuant to § 52-251a requires that the plaintiff prevail in the small claims matter; therefore, such a request is derivative of the underlying cause of action. See, e.g., *Doyle Group* v. *Alaskans for Cuddy*, 164 Conn. App. 209, 231, 137 A.3d 809 ("court's decision of entitlement to fees . . . require[s] an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has prevailed" [internal quotation marks omitted]), cert. denied, 321 Conn. 924, 138 A.3d 284 (2016). In the present case, because the court rendered judgment in favor of the defendant on all counts of the operative complaint, the plaintiff was not entitled to an award of costs or attorney's fees pursuant to § 52-251a, as alleged in the seventh count of his operative complaint. On remand, if the plaintiff prevails on his breach of contract claim, then, as the prevailing party, the court may award him costs and attorney's fees pursuant § 52-251a. See footnote 4 of this opinion. Accordingly, a separate cause of action requesting such relief is not necessary; such a request more properly should be raised in a prayer for relief. Nevertheless, because the plaintiff specifically raised this requested relief in his operative complaint, we construe count seven as part of his prayer for relief, as should the trial court on remand.

then his forbearance of any legal action based on the defective materials against the defendant was "clearly adequate consideration for the mutual promises which were made in the fall of 2009." We need not address this claim in light of our conclusion in part I of this opinion.

"[I]t is a general rule of law that forebearance to prosecute a cause of action, where the right is honestly asserted under the belief that it is substantial, although it may in fact be wholly unfounded, is a valuable consideration which will support a promise. . . . Forbearance, however, is not a sufficient consideration unless the claimant had some reasonable ground for belief in the justice of the claim . . . or if the claim is not made in good faith." (Citations omitted; internal quotation marks omitted.) *Iseli Co.* v. *Connecticut Light & Power Co.*, 211 Conn. 133, 136, 558 A.2d 966 (1989).

Because we concluded in part I of this opinion that the parties had an agreement resolving the plaintiff's legal claims against the defendant regarding the decking materials, it simply is not relevant to the plaintiff's breach of contract claim whether the materials in fact were defective. Furthermore, the defendant did not argue before the trial court that the plaintiff did not make his claim in good faith. In fact, the defendant never claimed that the parties' agreement was not supported by any consideration. Accordingly, we decline to address the plaintiff's claim.

The judgment is reversed only with respect to the first count of the plaintiff's complaint and the case is remanded for a new trial on that count, including any claim for attorney's fees and costs pursuant to § 52-251a; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ABIMAEL RAMOS (AC 40606)

Lavine, Bright and Eveleigh, Js.

Syllabus

Convicted of the crime of manslaughter in the first degree with a firearm in connection with the shooting death of the victim, the defendant appealed. The defendant, who was in a romantic relationship with the victim, had stated to the police that two unidentified Jamaican or Haitian men, who were about five feet, eight inches in height, broke into the home he shared with the victim, attacked him, and shot the victim. During trial, defense counsel sought to question three witnesses, including two investigating police officers, about the possible connection between the victim's death and a prior burglary that had occurred at a former residence of the defendant and the victim. Defense counsel made an offer of proof outside the presence of the jury, and the only eyewitness to the burglary testified that she noticed an African-American male, who was six feet, two inches in height, coming out of the defendant's former residence on the same day as the burglary. The trial court ruled that it would not permit defense counsel to question the investigating police officers about their alleged failure to investigate a potential connection between the victim's death and the burglary because, inter alia, the proffered testimony was irrelevant and the defendant had not made the required showing for a third-party culpability defense. *Held*:

1. The defendant's claim that he was deprived of his rights to present a defense and to cross-examine witnesses, pursuant to the sixth amendment to the United States constitution, when the trial court prevented him from questioning police officers about alleged inadequacies in their investigation into the possible connection between the prior burglary and the victim's death was unavailing, the trial court having properly excluded the proffered testimony as irrelevant; the defendant's multiple offers of proof failed to indicate how a further, specific investigation into the possible connection between the burglary and the victim's death reasonably could have led to additional evidence bearing on his guilt or innocence, as the two incidents were separated by approximately eight months and allegedly involved individuals with distinct characteristics, and their only alleged connection was that they both took place at the shared residences of the defendant and the victim, and to the extent that the proffered testimony had any probative value, admitting it could have diverted the jury's attention to a collateral matter, namely, speculation about a theorized connection between the unsolved burglary and the victim's death that allegedly involved unknown assailants.
2. The defendant's claim that the trial court abused its discretion in admitting into evidence testimony regarding the victim's relationship with the

defendant prior to her death was not reviewable, the defendant having failed to address the harmfulness of the allegedly improper evidentiary rulings in his principal brief.

Argued January 9—officially released June 12, 2018

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kahn, J.*; verdict and judgment of guilty of the lesser included offense of manslaughter in the first degree with a firearm, from which the defendant appealed. *Affirmed.*

Sean P. Barrett, assigned counsel, with whom, on the brief, was *Peter G. Billings*, assigned counsel, for the appellant (defendant).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Michael A. DeJoseph*, senior assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Abimael Ramos, appeals from the judgment of conviction, rendered following a jury trial, of intentional manslaughter in the first degree with a firearm in violation of General Statutes §§ 53a-55 (a) (1) and 53a-55a. On appeal, he claims that (1) he was deprived of his rights to present a defense and to cross-examine witnesses, pursuant to the sixth amendment to the federal constitution, when the trial court prevented him from questioning police officers about alleged inadequacies in their investigation of the victim's death, and (2) the trial court abused its discretion in admitting into evidence, under the state of mind exception to the hearsay rule, testimony regarding the victim's relationship with the defendant prior to her death. We affirm the judgment of the trial court.

By way of a single count information, the state charged the defendant with murder with a firearm in violation of General Statutes §§ 53a-54a (a) and 53-202k. The charge stemmed from the death of Luz Morales, the victim, who died from a single gunshot wound to her abdomen. A jury found the defendant not guilty of murder, but guilty of the lesser included offense of manslaughter in the first degree with a firearm. The court accepted the verdict, rendered a judgment of conviction, and sentenced the defendant to a term of imprisonment of forty years, five of which are a mandatory minimum, to run concurrently with a sentence he then was already serving. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's claim that the trial court deprived him of his sixth amendment rights. According to the defendant, the court improperly prevented him from questioning the investigating police officers about their alleged failure to investigate a potential connection between the victim's death and a burglary at a former residence that he shared with the victim. He claims that the court deprived him of both his right to present a defense and to cross-examine witnesses.

The state argues that the defendant's proposed line of questioning addressed a "purely speculative possibility [regarding third-party culpability that] was not relevant to the jury's determination . . . and, furthermore, that . . . carried with it a substantial risk of unfair prejudice to the state [by] diverting the jury's attention to collateral matters." (Citation omitted.) According to the state, the court properly exercised its discretion in limiting the inquiry into alleged deficiencies in the police investigation "[absent] anything other than a bare suspicion

that the victim's death . . . was in any way related to the [previous] burglary . . . ."[1] We agree with the state.

The following additional facts, which the jury reasonably could have found, and procedural history are relevant to our decision. For approximately five years, the defendant and the victim were in a romantic relationship. They lived together at 761 Wood Avenue in Bridgeport at the time of the victim's death, and previously had lived together at 222 Lenox Avenue in Bridgeport.

At approximately 11:30 p.m., on May 23, 2011, Christina Catlin heard the defendant, her neighbor, banging on her front door, stating "help her, help her." After Catlin opened the door, the defendant ran back to his house, and she followed. When Catlin entered the defendant's residence, she saw the victim lying on her back, naked, and "very, very pale," at the top of a staircase. The victim had a large cut near her left eyebrow, "a tiny hole" near her belly button, and blood underneath her. Catlin asked the defendant to call 911, but when he did not respond, she grabbed the cell phone from his hand and did so. Medical personnel subsequently took the victim to a hospital, where she later died from a gunshot wound to her abdomen.

In the course of their investigation into the victim's death, police officers questioned the defendant about the night of May 23, 2011. In various statements he made to the police, the defendant claimed that two unidentified Jamaican or Haitian men broke into his home, attacked him, and shot the victim before fleeing down his driveway. He provided partial descriptions of the men, noting that one had a missing tooth, the other

[1] Alternatively, the state argues that the trial court afforded the defendant wide latitude to elicit evidence relating to the alleged inadequacies in the police investigation. Therefore, the state maintains that the defendant's constitutional claims fail and that any error was harmless. Because we conclude that the trial court properly exercised its discretion in excluding the proffered testimony, we need not address the state's alternative arguments.

had a scruffy beard, and they "[were not] big dudes," standing at about five feet, eight inches or five feet, seven inches in height.

Within hours of the victim's death, William Simpson, a K-9 handler with the Bridgeport Police Department, and his K-9 dog, Balu, were dispatched to 761 Wood Avenue. According to Simpson, he responded to "a claim of home invasion" where "two men had been involved." He also testified that Balu identified a trail of human scent that started in the rear of 761 Wood Avenue and continued "[d]own Wood Avenue [for] two or three blocks" until reaching another street, where Balu lost the scent.

During a video-recorded interview on May 24, 2011, which was admitted into evidence, investigating officers questioned the defendant about a burglary that occurred at 222 Lenox Avenue in September, 2010, while the defendant and the victim lived there.[2] In fact, Detective Todd Toth, one of the investigating officers who testified at trial, told the defendant, "[T]he reason we asked about the break-in at Lenox Avenue is [that] we were wondering if it's the same people [whom you claimed were involved in shooting the victim]." The defendant later informed police officers that the reason he and the victim moved to 761 Wood Avenue was because of the September, 2010 burglary at 222 Lenox Avenue and their fear that it might happen again.

Norman Pattis, counsel for the defendant, sought to cross-examine Toth about his knowledge of the Lenox Avenue burglary. Pattis asked Toth whether he had spoken to Carmen Rivera-Torres, the victim's aunt and the only eyewitness to the burglary, and specifically inquired whether he had "asked her about the identifying characteristics of the persons who broke in

[2] Investigating officers also questioned the defendant about the burglary at 222 Lenox Avenue in subsequent interviews.

. . . .'' Toth testified, ''I believe we did.'' Pattis then asked, ''Did you ask her if they had Caribbean accents, Jamaican, Haitian, let's say?'' Toth did not answer that question, however, as the state's attorney immediately objected and stated that this particular matter was the subject of pretrial motions. The court held a sidebar discussion and stated that it would hear argument outside the presence of the jury.

In the absence of the jury, the court noted that the Lenox Avenue burglary was the subject of a motion in limine filed by the state[3] and stated that it had sustained the state's objection ''because, based on what has transpired thus far, I don't believe that the defense has made the required showing for a third-party culpability [defense], and to get into that line of questioning would be to do so.'' Pattis nonetheless argued that he did not intend to argue third-party culpability; rather, ''[his] questions are going to the thoroughness of the investigation and whether [the investigating officers] prejudged things. And so, during the course of the interviews with [the defendant], the accents came up. [Toth] acknowledged going to see [Rivera-Torres] and acknowledged discussing this. If he didn't ask about the accents, and I don't know candidly what his answer will be, that will be probative . . . in terms of the thoroughness of the investigation and leaving potentially exculpatory evidence on the table . . . . So I didn't—if he said yes, you know, I think I would have been stuck. But I don't think he did based on—I just don't think he did.'' Pattis also argued: ''Had he said no, I could have argued,

[3] Prior to trial, the state filed a motion in limine seeking to prevent the defense ''from offering, or attempting to elicit, any evidence concerning [the] burglary at the defendant's prior residence on Lenox Avenue . . . in or around September of 2010.'' In its motion, the state argued that such evidence failed to meet the threshold for admissibility as third-party culpability evidence and, therefore, was not relevant to the victim's death. The state also filed a motion to redact portions of the defendant's recorded interviews discussing the Lenox Avenue burglary. The court denied the state's motions.

perhaps, hey, you know, these [police officers] had made up their mind[s] and decided early to prejudge the case . . . ." The court reiterated its prior ruling, and added that it also sustained the state's objection on the ground that there was no foundation establishing that Rivera-Torres "either saw or even spoke to the individuals or individual that conducted the Lenox Avenue break-in."[4]

Pattis also sought to cross-examine Detective Walberto Cotto, another investigating officer who testified at trial, about the police investigation into the possible connection between the Lenox Avenue burglary and the victim's death. During an offer of proof held outside the presence of the jury, Cotto testified that he was aware of the prior Lenox Avenue burglary, which possibly involved two black males, but that the defendant had informed him that the Lenox Avenue burglars did not have anything to do with the victim's death. According to Cotto, his understanding of the Lenox Avenue burglary was based solely on the defendant's statements. Pattis once again argued: "The thoroughness of the investigation and the steps that officers took in investigating [the defendant] I think are fair game within the sixth amendment. We may well have had third-party culpability evidence had the officers done something with this information and investigated it. They didn't."[5] The court again ruled that it would not permit this line of questioning without a showing that the two incidents were somehow connected.

Pattis attempted to revisit the Lenox Avenue burglary for a third time during the defendant's case-in-chief. During an offer of proof held outside the presence of the jury, Pattis first questioned Rivera-Torres. She testified

[4] The court, nonetheless, permitted Pattis to recall Toth and pursue this line of questioning if he first established an adequate foundation.

[5] Pattis stated on multiple occasions that he was not offering this evidence to support a third-party culpability defense.

that she lived above the defendant and the victim at the 222 Lenox Avenue address when the burglary happened. According to her, on September 9, 2010, she noticed a familiar looking "[six]-foot-[two], 220, 240 pound African-American male coming out of [the defendant's and the victim's] apartment." She later learned that their apartment had been burglarized, and spoke with police officers about her observations before and after the victim's death. She testified: "I had spoken to [Cotto] back in 2010 when [the burglary] occurred. And then I did speak to him [after the victim's death] because I wanted to believe that that's what happened." Pattis indicated that he would not seek to elicit any further testimony from Rivera-Torres.

Later during the offer of proof, the following examination took place between Pattis and Toth regarding the police investigation into a possible connection between the Lenox Avenue burglary and the victim's death:

"[Pattis]: And did—was the topic of the identity or information about the burglary, did that come up in the interview with [Rivera-Torres]?

"[Toth]: I don't—I don't recall that. I don't think it did.

"[Pattis]: Did you take any steps to—you questioned [the defendant] about [the Lenox Avenue burglary], correct?

"[Toth]: Correct.

"[Pattis]: In part to see whether the same people might have returned to Wood Avenue, correct?

"[Toth]: Yeah, to see if, you know, they were related in any way.

"[Pattis]: Did—beyond talking to [the defendant], did you do anything to see whether there was any relationship between the two?

"[Toth]: Beyond speaking with him?

"[Pattis]: Yes.

"[Toth]: No.

"[Pattis]: Nothing further, Judge."[6]

On redirect, Pattis also asked Toth: "So, did you make any effort to determine whether the people who came to Wood Avenue were related to the people who went into Lenox Avenue in any way?" Toth testified: "I don't believe so."

Through his questioning during the latter offer of proof, Pattis sought to establish that the alleged home invasion on May 23, 2011, might have been drug related because the defendant was a known drug dealer with a substantial amount of cash, firearms, and drugs at the Wood Avenue residence. Pattis further sought to establish that the defendant may have denied knowing who was involved in either the Lenox Avenue burglary or the alleged May 23, 2011 home invasion because individuals involved in illegal narcotics activities generally try to resolve their disputes without the help of police.

Following his final offer of proof, Pattis argued that the evidence pertaining to the alleged inadequacy of the police investigation into a possible connection between the Lenox Avenue burglary and the victim's death was admissible, principally relying on this court's decision in *State* v. *Wright*, 152 Conn. App. 260, 96 A.3d 638 (2014), rev'd, 322 Conn. 270, 140 A.3d 939 (2016). He argued: "[T]he failure to investigate this potential linkage may well have deprived us of third-party culpability [evidence] if the police had established the link. But

[6] When questioned by the state's attorney during the offer of proof, Toth testified that the defendant informed him that the people involved in the Lenox Avenue burglary were not the same people involved in the alleged Wood Avenue home invasion.

their failure to even consider it is a . . . deficiency in the investigation that we think . . . we should be permitted to explore . . . ."[7] Throughout the trial, Pattis argued that preventing him from pursuing this line of questioning abridged both the defendant's right to present a defense and his right to confrontation under the sixth amendment to the federal constitution.

The court again sustained the state's objections to this line of questioning. According to the court, "there's no other purpose to elicit this testimony other than to back door in a third-party culpability [defense]. The defendant's ability to present a defense that somebody else did this, that the police failed to pursue leads, that they had made up their mind[s] that he was the murderer, all of that he is permitted to argue, [and] has argued by way of cross-examination." The defendant took his exception and maintains on appeal that the court's rulings deprived him of his constitutional rights.

We now set forth the relevant legal principles governing our review of the defendant's claims. "It is fundamental that the defendant's rights to confront the witnesses against him and to present a defense are guaranteed by the sixth amendment to the United States constitution. . . .

"In plain terms, the defendant's right to present a defense is the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . It guarantees the right to offer the testimony of witnesses, and

[7] Pattis also argued: "The state that failed to investigate is now saying there's no linkage; well, it's because of the failure to investigate that there's no potential—there is absolutely no chance of a linkage. Had [the police] investigated, there might have been one. And our claim is that this evidence is relevant because it shows that at some level [the police] prejudged the case. Rather than investigating all leads, they focused their efforts on [the defendant]. If they had followed that, we may be in a different posture and I might have at my disposal third-party culpability [evidence]."

to compel their attendance, if necessary . . . . Therefore, exclusion of evidence offered by the defense may result in the denial of the defendant's right to present a defense. . . .

"Although it is within the trial court's discretion to determine the extent of cross-examination and the admissibility of evidence, the preclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements [of the confrontation clause] of the sixth amendment. . . .

"These sixth amendment rights, although substantial, do not suspend the rules of evidence . . . . A court is not required to admit all evidence presented by a defendant; nor is a court required to allow a defendant to engage in unrestricted cross-examination. . . . Instead, [a] defendant is . . . bound by the rules of evidence in presenting a defense . . . . Nevertheless, exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights . . . . Thus, [i]f the proffered evidence is not relevant . . . the defendant's right[s] to confrontation [and to present a defense are] not affected, and the evidence was properly excluded." (Citation omitted; internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 593–94, 175 A.3d 514 (2018).

"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, including issues of relevance and the scope of cross-examination. . . . 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. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be

made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *Calabrese*, 279 Conn. 393, 406–407, 902 A.2d 1044 (2006).

Additionally, "[our Supreme Court] has recognized that defendants may use evidence regarding the inadequacy of the investigation into the crime with which they are charged as a legitimate defense strategy." *State* v. *Wright*, 322 Conn. 270, 282, 140 A.3d 939 (2016), citing *State* v. *Collins*, 299 Conn. 567, 599–600, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).[8] "Conducting a thorough, professional investigation is not an element of the government's case. . . . A defendant may, however, rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt, and the trial court violates his right to a fair trial by precluding the jury from considering evidence to that effect." (Internal quotation marks omitted.) *State* v. *Wright*, supra, 282.

"A defendant, however, does not have an unfettered right to elicit evidence regarding the adequacy of the police investigation. The reference in *Collins* to *relevant* deficiencies or lapses in the police investigation suggests that the defendant must do more than simply seek to establish that the police could have done more. . . . Even when such evidence has some probative value, the court must consider whether the probative

[8] "*Collins* involved a challenge to a jury instruction stating that the ultimate issue to be decided was not the thoroughness of the investigation, but whether the state had proven the defendant's guilt beyond a reasonable doubt. . . . In concluding that the instruction was not improper, [our Supreme Court] explained: In the abstract, whether the government conducted a thorough, professional investigation is not relevant to what the jury must decide: Did the defendant commit the alleged offense? Juries are not instructed to acquit the defendant if the government's investigation was superficial." (Citation omitted; internal quotation marks omitted.) *State* v. *Wright*, supra, 322 Conn. 282.

weight of the . . . evidence exceed[s] the risk of unfair prejudice to the [state] from diverting the jury's attention to collateral matters. . . .

"All of these factors must be evaluated by the trial court in determining whether the particular inadequate investigation evidence should be admitted. That evaluation necessarily is framed by the theory of the proffering party. It is well settled that [t]he proffering party bears the burden of establishing the relevance of the offered testimony. Unless a proper foundation is established, the evidence is irrelevant. . . . Relevance may be established in one of three ways. First, the proffering party can make an offer of proof. . . . Second, the record can itself be adequate to establish the relevance of the proffered testimony. . . . Third, the proffering party can establish a proper foundation for the testimony by stating a good faith belief that there is an adequate factual basis for his or her inquiry." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 284–85; see also *State* v. *Johnson*, 171 Conn. App. 328, 349–50, 157 A.3d 120, cert. denied, 325 Conn. 911, 158 A.3d 322 (2017).

The defendant claims that he was precluded from presenting relevant evidence of an inadequate police investigation into the possible connection between the 222 Lenox Avenue burglary and the victim's death. According to him: "It is clear the investigating police officers were aware that [he] believed that the *same two individuals who robbed him earlier* [had] committed the instant offense. This is not only a claim that the police could have done more, but rather . . . [he] was precluded from making the claim that the police had actionable, definable information of other individuals involved and simply did not bother to follow up on those leads or develop the information further." (Emphasis added.)

We conclude that the trial court properly excluded the proffered testimony as irrelevant and, therefore, the defendant's constitutional claims fail.[9] Under *Wright*, a defendant must demonstrate that further investigation reasonably may have led to additional evidence bearing on the defendant's guilt or innocence. See *State* v. *Wright*, supra, 322 Conn. 284 (citing cases); see also id., 287–88 (offer of proof deemed inadequate based on, inter alia, failure to elicit evidence demonstrating "the possibility that adherence to such practices or procedures could have led to material evidence of the defendant's guilt or innocence"); *Commonwealth* v. *Alcantara*, 471 Mass. 550, 562, 31 N.E.3d 561 (2015) (proposed inadequate police investigation into sperm and drug evidence lacked probative value because there was no indication that murder victim engaged in sexual intercourse around time of attack, "nor was there any evidence . . . suggesting that the killing arose from a sexual relationship," and no evidence existed that "the drugs or supplier of the drugs played any role in causing

[9] The trial court was aware of this court's decision in *State* v. *Wright*, supra, 152 Conn. App. 260, but it did not have the benefit of our Supreme Court's decision discussing the admissibility of inadequate police investigation evidence; see *State* v. *Wright*, supra, 322 Conn. 284–85; which reversed this court's decision and was decided after the trial court had sentenced the defendant. Nonetheless, we are guided by our Supreme Court's decision in *Wright* for two reasons. First, both parties cite and discuss our Supreme Court's decision in *Wright*, and neither disputes its applicability. Second, "[a]s a general rule, judicial decisions apply retroactively." (Internal quotation marks omitted.) *State* v. *Marsala*, 42 Conn. App. 1, 4, 679 A.2d 367, cert. denied, 239 Conn. 912, 682 A.2d 1010 (1996). "A decision will not be applied retroactively only if (1) it establishes a new principle of law, either by overruling past precedent on which litigants have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . (2) given its prior history, purpose and effect, retrospective application of the rule would retard its operation; and (3) retroactive application would produce substantial inequitable results, injustice or hardship." (Internal quotation marks omitted.) *State* v. *Fabricatore*, 89 Conn. App. 729, 744, 875 A.2d 48 (2005), aff'd, 281 Conn. 469, 915 A.2d 872 (2007). The effect of *Wright* does not satisfy any of these prongs.

[the victim's] death").[10] The defendant, here, therefore bore the burden of demonstrating how a further, specific investigation into the possible connection between the Lenox Avenue burglary and the victim's death reasonably may have led to additional evidence bearing on his guilt or innocence. He failed to meet his burden.

Toth testified during the defendant's offer of proof that, beyond speaking with the defendant, he did not attempt to establish a connection between the victim's death and the Lenox Avenue burglary. Toth also testified, however, that the defendant told him the people involved in the Lenox Avenue burglary were not the same individuals allegedly involved in the Wood Avenue home invasion.[11] See footnote 6 of this opinion. Additionally, although the court precluded the defendant, during cross-examination, from asking Toth whether he asked Rivera-Torres if the Lenox Avenue burglars had Caribbean accents, Pattis represented that he was uncertain what Toth's answer would be. The defendant did not revisit this question during his subsequent offer of proof.

Cotto similarly testified that the defendant informed him that he did not believe the Lenox Avenue burglars were involved with the victim's death. In fact, defense counsel conceded that he could not connect the two incidents. And the only eyewitness to the September 9, 2010 Lenox Avenue burglary, Rivera-Torres, testified during the offer of proof that she noticed a single, familiar looking "[six]-foot-[two], 220, 240 pound African-American male coming out of [the Lenox Avenue] apartment." The defendant, on the other hand, claimed that

[10] In *State* v. *Wright*, supra, 322 Conn. 283–84, our Supreme Court favorably cited to decisions from the Massachusetts Supreme Judicial Court, including *Alcantara*.

[11] Our independent review of the record reveals that the defendant informed police officers that neither he nor the victim were home when the Lenox Avenue burglary occurred. In fact, he told investigating officers that he was either uncertain whether the incidents were connected or acknowledged that the incidents were not related.

two unidentified Jamaican or Haitian males, standing at either five feet, eight inches or five feet, seven inches in height, shot the victim on May 23, 2011.

We realize that courts have noted that evidence of an inadequate police investigation need not meet the strict standard of establishing a direct connection to potential third-party culprits. See, e.g., *Commonwealth* v. *Silva-Santiago*, 453 Mass. 782, 800–803, 906 N.E.2d 299 (2009). A defendant who attempts to elicit evidence regarding the adequacy of a police investigation, however, "must do more than simply seek to establish that the police could have done more." *State* v. *Wright*, supra, 322 Conn. 284.

Here, the defendant's multiple offers of proof and the record fail to indicate how a further, specific investigation into the possible connection between the burglary and the victim's death may have led to additional evidence bearing on his guilt or innocence. See id., 284, 288; see also *Commonwealth* v. *Alcantara*, supra, 471 Mass. 562. The two incidents were separated by approximately eight months and allegedly involving individuals with distinct characteristics, and their only alleged connection was that they both took place at the shared residences of the defendant and the victim.[12] Simply put, the defendant's proffer asked the court to engage in substantial speculation as to both the possible connection between the two incidents and how a further police investigation into that connection might have produced additional evidence bearing on the defendant's guilt or innocence.[13] Under these circumstances,

[12] During his offers of proof, Pattis indicated that he was not offering the proffered evidence for a third-party culpability defense. He also argued, however, that "the failure to investigate this potential linkage may well have deprived us of third-party culpability [evidence] if the police had established the link." Consequently, under the particular circumstances of this case, we agree with the trial court's assessment that this evidence was an attempt to "back door in a third-party culpability [defense]."

[13] Although the trial court prevented the defendant from introducing evidence of an alleged failure to investigate further into a potential connection

we agree that the defendant failed to establish the relevance of the proffered evidence. Furthermore, to the extent that this evidence had any probative value at all, we conclude that admitting it also could have diverted the jury's attention to a collateral matter, namely, speculation about a theorized connection between the unsolved Lenox Avenue burglary and the victim's death that allegedly involved unknown assailants. See *State* v. *Wright*, supra, 284 (court must consider whether probative weight of evidence outweighed by unfair prejudice to state). Accordingly, the trial court properly excluded the evidence as irrelevant and, therefore, the defendant's claims fail.[14]

II

The defendant's final claim is that the trial court abused its discretion in admitting into evidence testimony regarding the victim's relationship with the defendant prior to her death. More specifically, he argues that the trial court improperly admitted hearsay testimony from Ariana Paneto and Kaila Oquendo under the state

between the victim's death and the Lenox Avenue burglary, we note that the defendant was permitted to introduce evidence pertaining to the adequacy of the police investigation as a whole. The defendant, for example, cross-examined Toth on a failure to order a gun residue test on the defendant, a failure to dust for fingerprints on the stairs where the defendant claimed he struggled with the alleged intruders, a failure to look at photographs from the police database with the defendant to potentially identify suspects, and the inability of the police to locate certain items initially seized from the Wood Avenue residence following the victim's death. In fact, Pattis argued to the jury that the police investigation was inadequate and narrowly focused on the defendant. See, e.g., *Commonwealth* v. *Alcantara*, supra, 471 Mass. 563 ("where the issue of an inadequate investigation was fairly before the jury, the defendant suffered no prejudice from the exclusion of the proffered evidence" [internal quotation marks omitted]).

[14] Our conclusion that the defendant failed to demonstrate the relevancy of the proffered evidence disposes of both of his sixth amendment claims. See, e.g., *State* v. *Wright*, supra, 322 Conn. 284–85 (evidence of inadequate investigation defense must be relevant); *State* v. *Davis*, 298 Conn. 1, 10, 1 A.3d 76 (2010) ("[i]f the proffered evidence is not relevant . . . the defendant's right to confrontation is not affected" [internal quotation marks omitted]).

of mind exception to the hearsay rule. We decline to review this claim.

"It is well settled that, absent structural error, the mere fact that a trial court rendered an improper ruling does not entitle the party challenging that ruling to obtain a new trial. An improper ruling must also be harmful to justify such relief. . . . The harmfulness of an improper ruling is material irrespective of whether the ruling is subject to review under an abuse of discretion standard or a plenary review standard. . . . When the ruling at issue is not of constitutional dimensions, the party challenging the ruling bears the burden of proving harm." (Internal quotation marks omitted.) *State* v. *Myers*, 178 Conn. App. 102, 105–106, 174 A.3d 197 (2017).

"We do not reach the merits of [a] claim [where] the defendant has not briefed how he was harmed by the allegedly improper evidentiary ruling." (Internal quotation marks omitted.) *State* v. *Toro*, 172 Conn. App. 810, 817, 162 A.3d 63, cert. denied, 327 Conn. 905, 170 A.3d 2 (2017); see also *State* v. *Myers*, supra, 178 Conn. App. 108 ("there must be some analysis of how the defendant was harmed from the claimed error given the other evidence before the jury"). "It is also a well established principle that arguments cannot be raised for the first time in a reply brief." (Internal quotation marks omitted.) *State* v. *Myers*, supra, 106.

The defendant, in his principal brief, does not address the harmfulness of the allegedly improper evidentiary rulings regarding the testimonies of Paneto and Oquendo. He argues that their testimonies did not relate to the victim's fear of the defendant and that "there is *no* corroborating evidence of the victim's statements . . . [and, therefore], the statements admitted in this case are far more prejudicial than probative, and should not have been before the jury." (Emphasis in original.) He maintains that he was "irreparably prejudiced" by

the court's rulings and that the uncorroborated statements "require[d] an impermissible inference concerning [his] motive."

Even if we assume, without deciding, that the defendant is correct—the statements were improperly admitted and this also permitted the jury to make an impermissible inference concerning his motive—he does not analyze "how [he] was harmed from the claimed error given the other evidence before the jury." *State* v. *Myers*, supra, 178 Conn. App. 108. Nor does he address any of the relevant factors that courts consider when assessing harmlessness. See, e.g., *State* v. *Toro*, supra, 172 Conn. App. 817; *State* v. *Johnson*, supra, 171 Conn. App. 338. Simply put, he fails to argue how the testimonies of Paneto and Oquendo, along with any impermissible inference potentially drawn from them, substantially affected the verdict. See *State* v. *Toro*, supra, 817 ("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]). Accordingly, we decline to review his evidentiary claim.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOHN CORVER
(AC 40239)

Prescott, Elgo and Bear, Js.

Syllabus

Convicted of the crimes of attempt to commit murder, assault in the first degree and kidnapping in the first degree, and of being a persistent dangerous felony offender, the defendant appealed. He claimed that the trial court improperly denied his request to discharge his counsel on the day before jury selection was to begin, and that he did not knowingly, intelligently and voluntarily waive his right to a jury trial. *Held*:

1. The trial court did not abuse its discretion in denying the defendant's request to discharge his counsel, that court having reasonably determined that the defendant did not demonstrate any substantial reason or exceptional circumstances that warranted the discharge of his counsel on the eve of jury selection; no issue or complaint had been raised with respect to counsel's representation of or relationship with the defendant prior to a hearing held the day before the commencement of jury selection, as they had appeared before the court on several previous occasions over many months, including the week preceding the request to discharge, the transcripts of those court proceedings reflected cooperation and ample communication between the defendant and his counsel, and the trial court, having been in a superior position to observe the interactions between them, reasonably could have concluded that the request to discharge filed on the eve of trial was an attempt by the defendant to forestall his decision on whether to elect a court trial, and, notwithstanding the defendant's claim of tension with his counsel because of the defendant's limited resources, a complete breakdown in communication between them had not transpired, as the defendant did not request the appointment of a public defender but continued with his privately retained counsel throughout the court trial.
2. The defendant could not prevail on his unpreserved claim that he did not knowingly, intelligently and voluntarily waive his right to a jury trial due to a breakdown in communication with his counsel and the trial court's refusal to grant him a continuance to consider whether to elect a court trial: the totality of the circumstances demonstrated that a complete breakdown in communication did not occur, and that the defendant's waiver of his right to a jury trial was knowing, intelligent and voluntary, as he and his counsel communicated in an effective manner throughout the proceeding in which the defendant elected a court trial, and there was little merit to the defendant's contention that his waiver was not the product of a free and meaningful choice due to the denial of the continuance, as the court went to great lengths to communicate to him that even if he began selecting a jury, he still could elect to waive a jury trial and proceed with a court trial; moreover, the defendant was represented by counsel when the court canvassed him twice on whether he wanted to waive a jury trial, the court having terminated the first canvass when he equivocated and informed him that it would not accept a waiver unless it was knowing, intelligent, and voluntary, and the defendant's statements during the second canvass having indicated that he understood the court's questions and not having revealed hesitation or involuntariness.

Argued January 30—officially released June 12, 2018

Procedural History

Two part substitute information charging the defendant, in the first part, with four counts of the crime of

attempt to commit murder, two counts of the crime of assault in the first degree and the crime of kidnapping in the first degree, and, in the second part, with being a persistent dangerous felony offender, brought to the Superior Court in the judicial district of Tolland, where the, court, *Oliver*, *J*., denied the defendant's motion to discharge counsel; thereafter, the first part of the information was tried to the court, *Graham*, *J*.; finding of guilty of three counts of attempt to commit murder, two counts of assault in the first degree and kidnapping in the first degree; subsequently, the defendant was presented to the court, *Oliver*, *J*., on a conditional plea of nolo contendere to the charge of being a persistent dangerous felony offender; thereafter, the court, *Graham*, *J*., rendered judgment of guilty in accordance with the finding and plea, from which the defendant appealed. *Affirmed*.

Joseph G. Bruckmann, public defender, for the appellant (defendant).

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Merav Knafo*, certified legal intern, for the appellee (state).

Opinion

ELGO, J The defendant, John Corver, appeals from the judgment of conviction, rendered after a court trial, of three counts of attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a, two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and one count of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A). On appeal, the defendant claims that (1) the trial court abused its discretion in denying a request to discharge his legal counsel and (2) his

conviction must be reversed because he did not knowingly, intelligently, and voluntarily waive his right to a jury trial. We affirm the judgment of the trial court.

On the basis of the evidence adduced at trial, the court reasonably could have found the following facts.[1] In April, 2014, the defendant's wife, K,[2] traveled to California to visit her mother and attend a dog show. While in California, K informed the defendant that she wanted to end their marriage. When the defendant picked her up at Bradley International Airport in Windsor Locks on the evening of April 23, 2014, he was very aggravated. Once inside her vehicle, the defendant begged her not to leave him. When K indicated that their marriage was over, the defendant, who was operating the vehicle, grew even more agitated. Concerned that the "situation was getting out of control," K attempted to call a friend. In response, the defendant grabbed her cell phone and tossed it out the window. The defendant then retrieved a knife from the driver's side door and began stabbing K on the left side of her body. While doing so, the defendant repeatedly told K that he loved her and did not want to hurt her, but that he was going to kill her for ruining his life.

[1] In rendering its oral decision, the court made specific findings of fact as to the elements of each charged offense. Our recitation of the relevant facts includes those express findings, as well as subordinate findings that the court, as trier of fact, reasonably could have found on the evidence before it. In this regard, we note that the defendant and the victim, K, testified at trial and provided conflicting accounts of the events in question. In rendering its decision, the court, as sole arbiter of credibility; see *State* v. *Santiago*, 245 Conn. 301, 343, 715 A.2d 1 (1998); found K's testimony "highly credible" and substantiated by the exhibits and testimony of other witnesses. The court also indicated that it did not find the defendant's testimony to be credible, noting that "[h]is testimony . . . [was] consistently contradicted by the exhibits, by the testimony of witnesses in addition to [K], and, on occasion, by common sense."

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

K, who was bleeding from her injuries, asked the defendant to take her to a hospital or to let her out of the vehicle. The defendant refused to do so. Instead, he took her to a secluded area of the Nathan Hale Homestead (homestead) in Coventry, where he parked and exited the vehicle. He then opened K's passenger side door and again stabbed her multiple times. As he did so, the defendant continuously told K that her loved her, but was going to kill her.

The defendant then returned to the driver's side of the vehicle and left the homestead. As he drove around Coventry, K "was not doing well" and felt "[v]ery weak." The defendant ultimately returned to the same secluded area of the homestead and parked the vehicle. The defendant then stuffed a rag inside the gas tank of the vehicle and attempted to set it on fire. When those efforts proved unsuccessful, the defendant stabbed himself in the stomach and then tried to strangle himself, but to no avail. He then called a friend, Mike Theirer, and told him that he had stabbed K and that "[t]his is the end."[3] Theirer then contacted the police and informed them that the defendant had just told him that he had stabbed his wife. During that phone call, a recording of which was admitted into evidence and played at trial, Theirer stated that he heard K "screaming in the background" during his conversation with the defendant.[4]

The defendant once again drove away from the homestead. He handed the knife to K and asked her to stab him, telling her that they "both were going to die . . . ." K took the knife and dropped it out of the vehicle. At that point, the defendant accelerated and said, "Here

[3] The defendant made similar remarks in a subsequent phone call to Erin Diette, a friend of K.

[4] In that phone call, Theirer stated in relevant part that "[t]hey were both were screaming. She was screaming, help me. He [was] screaming, I just stabbed her . . . ."

we go, baby. We're both going to die now . . . ." The defendant then drove the vehicle into a large tree.

When a passerby spotted the vehicle against the tree, she stopped her vehicle and immediately called 911. Melinda Hegener, an emergency medical technician and the assistant chief of the Andover Volunteer Fire Department, first responded to the scene. Hegener testified at trial that K was "very pale" and "covered in blood . . . ." Hegener at that time believed that if K "didn't get medical attention soon . . . she would probably [pass] out and die." K was transported by helicopter to Hartford Hospital, where she remained for approximately two weeks while undergoing multiple surgeries.

The defendant thereafter was arrested and charged, by substitute information, with four counts of attempt to commit murder, two counts of assault in the first degree, and one count of kidnapping in the first degree. A court trial was held in November, 2015, at the conclusion of which the court, *Graham, J.*, acquitted the defendant on one count of attempt to commit murder and found him guilty on all other counts.[5] The court sentenced the defendant to a total effective term of thirty-eight years incarceration, and this appeal followed.

I

The defendant first claims that the court abused its discretion in denying a request to discharge his legal counsel, Attorney Ryan E. Bausch, due to a breakdown

[5] The defendant also was charged, in a part B information, with being a persistent dangerous felony offender in violation of General Statutes § 53a-40 (a) (1) (A) on the ground that he previously had been convicted of assault in the first degree, a felony, and served a sentence of more than one year. On November 25, 2015, the defendant entered a conditional plea of nolo contendere to that charge.

in communication that was made on the eve of jury selection. We disagree.

The following additional facts are relevant to the defendant's claim. Although a public defender initially was appointed to represent the defendant due to his failure to post bond, Bausch filed an appearance as his privately retained attorney on July 18, 2014. The case was continued multiple times while the defendant reviewed discovery and discussed a possible plea deal with the state. On May 8, 2015, the state advised the court, *Oliver*, *J.*, that although it had been discussing a plea offer with the defendant for "a number of months," it did not believe that those discussions were "going to be fruitful." Accordingly, the state suggested that the case should be moved to the jury trial list. In response, Bausch requested a judicial pretrial conference and indicated that the defendant "wants to speak with me before [it] actually occurs." The court granted that request, and a pretrial was held on June 5, 2015.

When the parties appeared before the court, *Bright*, *J.*, on July 31, 2015, Bausch began his remarks by stating that he had "talked to [the defendant] numerous times since the [pretrial conference] regarding the [plea] offer . . . ." After acknowledging that "today is the accept-or-reject date," Bausch requested a further continuance to permit him to review with the defendant additional discovery regarding certain telephone records. In response, the state's attorney reminded the court that almost two months had passed since the pretrial conference and opined that the telephonic evidence was "an inconsequential matter" and "an excuse to get another continuance." The court nevertheless granted a continuance until August 14, 2015, at which time the court cautioned the defendant that he was "either going to take the offer, or it's going to go to trial."

At the August 14, 2015 hearing, Bausch informed the court, *Bright*, *J.*, that he had discussed the plea offer

with the defendant, stating that "we went over everything," and communicated the defendant's desire to reject that offer and proceed to trial. The court canvassed the defendant on that decision. During that canvass, the defendant confirmed that he had discussed the matter with Bausch, and was aware of both the potential maximum sentence in the case and the state's intent to add additional charges that would increase the maximum possible sentence. When asked if he had had sufficient time to talk with Bausch about "all of your options," the defendant replied, "About the existing charges. I don't know about the future charges." When Bausch responded, "I went over," the transcript then indicates that a discussion was held off the record. The court thereafter placed the matter on the firm trial list and informed the parties that a trial would commence in either October or November, 2015. As a final matter, Bausch asked the state to provide another copy of the list of potential additional charges, stating that he "had some trouble reading" the copy that the state previously provided.

The defendant next appeared in court on Friday, October 23, 2015, at which time the state filed a substitute information that contained eight counts, including a charge of kidnapping in the first degree. At the outset of that proceeding, the state's attorney indicated that the parties had met with *Hon. James T. Graham*, who was scheduled to preside over the defendant's upcoming trial, earlier that day, and that Judge Graham had "indicated to counsel that . . . the defendant has until Monday to decide whether to elect a court trial or a jury trial."[6] In response, Bausch submitted certain documents, including a psychological evaluation of the defendant, to the court. Bausch asked the court, *Oliver*, *J.*, to review those documents and decide whether an additional pretrial conference was warranted. In

[6] Jury selection was scheduled to commence on Tuesday, October 27, 2015.

response, the state indicated that it was ready to proceed, and reminded the court that a pretrial conference was held months earlier and that this new report was provided "at, literally, the eleventh hour here, right before a trial . . . ." The court nonetheless agreed to review the report and determine whether a further pretrial conference was appropriate.

At the state's request, the court then canvassed the defendant on the part B information that recently was filed, which charged him with being a persistent dangerous felony offender. See footnote 5 of this opinion. During that canvass, the defendant confirmed that he understood that he was charged, under the substitute information, with four counts of attempt to commit murder, as well as with assault and kidnapping charges. The court also asked the defendant if he had any questions for Bausch about "the new charges" contained in the substitute information; the defendant replied, "[n]o." The court then continued the matter until Monday, October 26, 2015, "for a canvass on [the defendant's] decision to have his trial before either a jury or [a] court trial."

When the parties appeared on October 26, 2015, Bausch immediately informed Judge Oliver that the defendant wanted to discharge him as legal counsel. The defendant then told the court that he had fired Bausch. Before addressing that issue, the court stated that it had reviewed the materials furnished by Bausch on Friday and had concluded that an additional pretrial conference was not warranted.

The court then asked the state's attorney if he had anything to say. The state's attorney responded that "it seems awfully suspicious . . . that on the eve of trial [the defendant is] attempting to do this" and suggested that the request to discharge was a dilatory tactic. For that reason, the state's attorney opined that the court

"should not let [Bausch] out of this case." In response, the court noted that, barring the defendant's waiver of his right to a jury trial, jury selection was scheduled to begin the next day.

Bausch then made an oral motion to withdraw from the case due to a breakdown in communication with the defendant, stating that the defendant had "no interest in assisting me or communicating with me" and opining that their communications were "in complete disarray." The court then asked the defendant to provide the basis for his request that Bausch be discharged. The defendant stated that "we've been having issues with how to approach this case," as monetary issues had arisen due to the defendant's limited resources, which created "tension" between the two. As the defendant stated, he did not have "any more money to give him and we are down to the last minute. . . . [T]here's no money for investigators, there's no money for—the mental health exam you got was done last minute . . . ." At no time did the defendant express either a desire to represent himself or to have new counsel appointed. Bausch then clarified, with respect to those monetary issues, that "[i]t wasn't about me being paid money. What [the defendant is] referring to is about money for investigators, mental health [examinations] . . . ."

The court then observed that the principal basis for the request to discharge concerned "money and the things that [it] buys in relation to a criminal defense," and noted that a defendant is not guaranteed, "whether [represented by private counsel] or a public defender, a bottomless pit of money with which to launch an investigation and put on a defense." With respect to the defendant's purported disinterest in cooperating with Bausch, the court stated, "That is his option. I haven't heard anything that says he is unable to. Whether [the defendant] chooses to do that is up to him in the face of a criminal prosecution . . . ." The

court then addressed the defendant, stating: "I have let everyone say everything they wanted to say in terms of a basis for granting the oral motion to dismiss, and I've asked anything else, anything else, anything else, and *what I have not heard is an actual basis to remove counsel and either have you represent yourself, which you certainly could, or appoint new counsel, or give you time to retain separate counsel*." (Emphasis added.) The court informed the defendant that "[i]t's always your option if you want to hire another attorney and have that attorney file an appearance in lieu of [Bausch], and then ask for a continuance . . . and have that request granted or not; but as to a basis for removing [Bausch in light of the state's] suspicions about the basis being to delay, there's no basis to remove counsel, so that request is denied." The court further remarked that "if anyone . . . listens to a recording of [the] Friday [October 23, 2015 hearing] or reads a transcript, no one's going to see any clue that there was any discord between the two of you . . . ."

The court then reminded the defendant that, unless he elected to proceed with a court trial, jury selection would begin the next day, October 27, 2015. At that point, the defendant stated that Bausch had told him he would not be calling any witnesses for him due to a lack of funds. In response, the court stated: "I'm not hearing anything further in support of your request to remove your attorney, and the trial strategy between the two of you is the trial strategy between the two of you. I can tell you, though . . . in cases of this nature, it is not unusual not to call defense witnesses [and] to [leave] the state to their proof . . . ." Whether to put on witnesses as part of a criminal defense, the court explained, was "a trial strategy decision . . . ." The defendant then complained that, in various discussions with Bausch that occurred on "several different times," Bausch had not provided "the same consistent answer"

as to whether he was planning to call witnesses on the defendant's behalf. In response, the court explained that "an attorney who cannot adapt cannot effectively represent their client, so things do change." Discussion then followed on the question of whether the defendant wanted to waive his right to a jury trial, and the defendant ultimately decided to proceed with a court trial.

On appeal, the defendant claims that the court improperly denied the motion to discharge Bausch as counsel. The parties submit, and we agree, that appellate review of that determination is governed by the abuse of discretion standard. See *State* v. *Gonzalez*, 205 Conn. 673, 683, 535 A.2d 345 (1987) ("we conclude that the trial court did not abuse its discretion in not permitting the defendant to discharge his attorney").[7] Pursuant to that standard, we make every reasonable presumption in favor of the correctness of the trial court's ruling. See *State* v. *Williams*, 317 Conn. 691, 710 n.17, 119 A.3d 1194 (2015). In the present case, both the defendant and Bausch requested, at the outset of the October 26, 2015 hearing, that Bausch be relieved of his representation in the present case. As this court has observed, "[t]he standard of reviewing both a motion by a defendant to discharge counsel and a motion by counsel to withdraw is the same. . . . It is within the trial court's discretion to determine whether a factual basis exists for appointing new counsel and, absent a factual record revealing an abuse of that discretion, the court's refusal to appoint new counsel is not improper. . . . Moreover, appellate tribunals look with a jaundiced eye at complaints regarding adequacy of counsel made on the eve of trial . . . . Such a request must be supported by a substantial reason and, [i]n order to work a delay

[7] At trial, the defendant in *Gonzalez* made no indication that he wanted to represent himself or to have new counsel appointed. Rather, like the defendant in the present case, he simply expressed his desire to have his counsel discharged. *State* v. *Gonzalez*, supra, 205 Conn. 679–81, 682 n.6.

by a last minute discharge of counsel there must exist exceptional circumstances." (Citations omitted; internal quotation marks omitted.) *State* v. *Fisher*, 57 Conn. App. 371, 382, 748 A.2d 377, cert. denied, 253 Conn. 914, 754 A.2d 163 (2000).

Applying that standard to the record before us persuades us that the court did not abuse its discretion. We are particularly mindful of the context in which the motion to discharge counsel arose. In the previous year, numerous continuances had been granted and multiple pretrial conferences were conducted at the defendant's request. When the defendant appeared before Judge Oliver on Friday, October 23, 2015, he knew that jury selection was scheduled to begin the following week, and at that time requested a further pretrial conference, which was denied. The defendant appeared before Judge Oliver again on Monday, October 26, 2015, the day before the commencement of jury selection, at which time he requested Bausch's discharge. Prior to that hearing, neither the defendant nor Bausch had raised any issue or complaint with respect to Bausch's legal representation or their relationship.

Significantly, the defendant and Bausch had appeared before Judge Oliver on several occasions over the course of many months, and as recently as the preceding Friday, October 23, 2015. The judge, therefore, was in a superior position to evaluate whether a complete breakdown in communication between the two had transpired, as Bausch suggested. During those proceedings, Judge Oliver had the opportunity to observe the interactions of the defendant and Bausch. In light of that perspective, it is telling that Judge Oliver, in denying the request to discharge, emphasized that "if anyone . . . listens to a recording of [the] Friday [October 23, 2015 hearing] or reads a transcript, no one's going to see any clue that there was any discord between the two of you . . . ."

The transcripts before us also reflect a good deal of cooperation between the defendant and Bausch prior to the request to discharge. When Bausch requested a pretrial conference when he appeared before Judge Oliver on May 8, 2015, he made clear that the defendant "wants to speak with me before [it] actually occurs." At the July 31, 2015 hearing, Bausch indicated that he had "talked to [the defendant] numerous times since the [June 5, 2015] pretrial" conference and then requested an additional continuance "to go over [a] last piece of evidence with [the defendant]." At the August 14, 2015 hearing, Bausch informed the court that he had discussed the plea offer with the defendant, stating that "we went over everything . . . ." When the defendant then rejected the state's plea offer, he confirmed during the court's canvass of him that he had discussed the matter with Bausch. The defendant further indicated that, on the basis of those discussions, he understood both his current exposure as well as the possibility that the state would file additional charges against him. The defendant at that time also acknowledged that he had been provided sufficient time to discuss with Bausch "all of [his] options" regarding the existing charges. Likewise, when Judge Oliver canvassed the defendant on the part B information on October 23, 2015, the defendant indicated that he understood the charges filed against him in the substitute information, as well as in the part B information. The defendant at that time also confirmed to the court that he had no remaining questions for Bausch about "the new charges" or the part B information.

Given that context, as well as Judge Oliver's firsthand observations of the defendant and Bausch, the court reasonably could conclude that a complete breakdown in communication between the two had not transpired, and that the request to discharge filed on the eve of jury selection was an attempt to forestall the defendant's

decision on whether to elect a court trial. To paraphrase *State* v. *Gethers*, 193 Conn. 526, 545, 480 A.2d 435 (1984), the record indicates that there was ample communication between the defendant and Bausch until the day the defendant requested his discharge. The court, in ruling on the request to discharge, properly could rely on its observations of the defendant and Bausch prior to that request. See *State* v. *Drakeford*, 202 Conn. 75, 84, 519 A.2d 1194 (1987) (expressly considering "the history of their relationship, the prior activity of the defendant's attorney on his behalf and the timing of the request" in concluding that trial court did not abuse its discretion in denying request to discharge); *State* v. *Rosado*, 52 Conn. App. 408, 430, 726 A.2d 1177 (1999) (noting that trial court "properly determined that there was not a complete breakdown of communication between the defendant and his counsel" in light of its firsthand observation of their interactions).

Although the defendant informed the court that the breakdown in communication with his counsel was attributable to "great tension" due to the defendant's limited resources, the court properly advised the defendant that the right to counsel does not entail the right to unlimited resources, even when represented by a public defender. See, e.g., *Smith* v. *Collins*, 977 F.2d 951, 960 (5th Cir. 1992) ("[t]he defense of a criminal case [does not] contemplate the employment of wholly unlimited time and resources"), cert. denied, 510 U.S. 829, 114 S. Ct. 97, 126 L. Ed. 2d 64 (1993); *United States* v. *Williams*, Docket No. 12-CR-0463 (JCM-VCF), 2013 WL 5954490, *4 (D. Nev. November 6, 2013) ("no criminal defendant has unlimited resources"). Furthermore, the record reveals that at no time during the October 26, 2015 hearing or thereafter did the defendant request the appointment of a public defender. Rather, he continued with his privately retained legal counsel throughout the six day court trial, during which Bausch called four

witnesses, in addition to the defendant, as part of his defense.

The defendant also argues that a colloquy that occurred subsequent to the court's ruling on his request to discharge demonstrates a breakdown in communication with his legal counsel. When the defendant later that day expressed his desire for a court trial, the court canvassed him on that decision. During that canvass, the court reviewed, inter alia, the pending charges alleged in the substitute information. When the court referenced the four attempt to commit murder counts, the defendant interjected, "How is it four attempted murders?" After the state's attorney provided an overview of the discrete acts that formed the basis for those charges, the defendant replied, that he would "like to talk to my attorney" because he still did not understand why those acts gave rise to four distinct charges of attempt to commit murder. The court then provided the defendant the opportunity to discuss the matter with Bausch. When that discussion concluded, Bausch informed the court that "I explained what I had to explain, Your Honor." The defendant thereafter expressed no further misapprehension of the four attempt to commit murder charges.

We disagree with the defendant's assertion that this colloquy demonstrates that communications between him and Bausch had completely broken down. To the contrary, a fair reading of that transcript indicates that Bausch and the defendant at that time continued to communicate in an effective manner. Moreover, we note that, when the defendant appeared before Judge Oliver the following day, he apologized to the court, stating, "I'm sorry about the confusion yesterday."

In light of the foregoing, we conclude that the trial court reasonably determined that the defendant had not demonstrated that any substantial reason or truly

exceptional circumstances warranted the discharge of his legal counsel on the eve of jury selection. The court, therefore, did not abuse its discretion in denying the request to discharge made by the defendant, and the related motion to withdraw made by Bausch, on October 26, 2015.

II

The defendant next contends that his conviction must be reversed because he did not knowingly, intelligently, and voluntarily waive his right to a jury trial under the sixth amendment[8] to the United States constitution.[9] The defendant did not preserve this claim at trial and

[8] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." That right to a trial by an impartial jury is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See *Turner* v. *Murray*, 476 U.S. 28, 36 n.9, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986).

[9] In his appellate brief, the defendant also alleges a violation of his right to a jury trial under article first, § 19, of the Connecticut constitution. In so doing, he acknowledges that our Supreme Court, in *State* v. *Marino*, 190 Conn. 639, 645–46, 462 A.2d 1021 (1983), overruled in part on other grounds by *State* v. *Chapman*, 229 Conn. 529, 541, 643 A.2d 1213 (1994), rejected the claim that, because article first, § 19 provides rights above and beyond those afforded under the federal constitution, a waiver thereof must reflect that the accused knowingly and voluntarily waived those additional rights. Furthermore, two decades later in *State* v. *Ouellette*, 271 Conn. 740, 757, 859 A.2d 907 (2004), our Supreme Court expressly was asked "to reconsider [its] state constitutional holding in *Marino*" and declined to do so.

The defendant in the present case nonetheless argues that *Marino* and *Ouellette* "should be overturned and the court should hold that because the trial court failed to advise the defendant of his state constitutional right to be tried by six jurors . . . he did not intelligently, knowingly and voluntarily waive that right." (Citation omitted.) It is well established that this court cannot overrule or reconsider the decisions of our Supreme Court. See *State* v. *Brown*, 73 Conn. App. 751, 756, 809 A.2d 546 (2002) ("Our Supreme Court is the ultimate arbiter of the law in this state. We, as an intermediate appellate court, cannot reconsider the decisions of our highest court."); *State* v. *Fuller*, 56 Conn. App. 592, 609, 744 A.2d 931 ("[i]t is not within our function as an intermediate appellate court to overrule Supreme Court authority"), cert. denied, 252 Conn. 949, 748 A.2d 298, cert. denied, 531 U.S. 911, 121 S. Ct. 262, 148 L. Ed. 2d 190 (2000). Bound by *Marino* and *Ouellette*, we decline to further consider the defendant's unpreserved state constitutional claim.

now seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[10] We review the defendant's claim because the record is adequate for review and the claim is of constitutional magnitude. See *State* v. *Reynolds*, 126 Conn. App. 291, 298, 11 A.3d 198 (2011).

"The right to a jury trial in a criminal case is among those constitutional rights which are related to the procedure for the determination of guilt or innocence. The standard for an effective waiver of such a right is that it must be knowing and intelligent, as well as voluntary. . . . [Our Supreme Court has] adopted the definition of a valid waiver of a constitutional right as the intentional relinquishment or abandonment of a known right. . . . This strict standard precludes a court from presuming a waiver of the right to a trial by jury from a silent record. . . . In determining whether this strict standard has been met, a court must inquire into the totality of the circumstances of each case. . . . Our task . . . is to determine whether the totality of the record furnishes sufficient assurance of a constitutionally valid waiver of the right to a jury trial. . . . Our inquiry is dependent upon the particular facts and circumstances surrounding [each] case, including the background, experience, and conduct of the accused." (Citation omitted; internal quotation marks omitted.) *State* v. *Woods*, 297 Conn. 569, 583, 4 A.3d 236 (2010). "[W]hether a defendant has effectively waived his federal constitutional

[10] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

[right to a jury trial] is ultimately [a] legal question subject to de novo review, although we defer to the trial court's subsidiary factual findings unless they are clearly erroneous." (Internal quotation marks omitted.) *State* v. *Rizzo*, 303 Conn. 71, 91–92, 31 A.3d 1094 (2011), cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012).

When the defendant appeared before the court, *Oliver*, *J.*, on the eve of jury selection, he sought to discharge his legal counsel. Following the denial of that request by the court, discussion turned to the defendant's election of a trial by jury or a court trial. The court advised the defendant as follows: "[Y]ou don't have to make your [decision right now]—you don't have to make an election to a court trial. You will have your trial by jury. You always can, if you choose to, elect to waive your right by jury. That's fine, but as it stands now you've elected . . . to have your trial before a jury of your peers, and that will start tomorrow, here. That's where it stands now. If you want time to talk to Attorney Bausch I'll give it to you, but [if] you can't make that decision now, [then] [t]hat is fine. You'll start picking your jury [tomorrow] morning. That's the default setting, as well it should be, to have a number of individuals from the community decide guilt or not guilty beyond a reasonable doubt. You have to make the decision whether you're going to have one judge do it. That's fine, too. So, if you want me to begin the canvass, I will. Otherwise, tomorrow for jury selection. . . . [A]s it stands now, before Judge Graham you'll start picking your jury."

At that point, Bausch requested an opportunity to talk with the defendant "one last time," which the court granted. Following a recess, Bausch informed the court that he had spoken with the defendant and at that time was prepared to "let him make his decision" before the court. The defendant then stated, "[w]e're doing a bench

trial . . . ." After confirming that Bausch had discussed that decision with the defendant, the court observed that this decision "was the purpose of being in court" on the preceding Friday, October 23, 2015. The court then began its canvass of the defendant by asking him various questions about his age, occupation, education, and prior experience before the criminal courts of this state. When the court asked the defendant if he understood the charges against him, which included four counts of attempt to commit murder, the defendant expressed confusion, stating, "How is it four attempted murders?" The state's attorney then provided an overview of the discrete acts that formed the basis for those charges, after which the court permitted the defendant to discuss the matter with his attorney. When Bausch then informed the court that "I explained what I had to explain, Your Honor," the court proceeded to detail the distinct allegations of the substitute information.

After completing its overview of those charges, the court asked the defendant whether he was electing a trial by jury or a court trial. The defendant stated in relevant part: "I would like some time to decide this. . . . Everybody wants to do everything in five minutes. You wait a year and a half, and nobody wants to do anything, even with discovery or anything else, and now in five minutes . . . you want to do all this." The court then advised the defendant that it had no preference as to how the defendant elected to proceed, as it would not be presiding over the defendant's trial. Rather, the court continued, "I'm here to . . . make sure you have a fair and accurate understanding of what's going to happen to you and [ensure that you] make that informed and knowing and voluntary decision whether to have a jury or court trial." After the court reminded him of his right to proceed with a jury trial or to elect to waive that right and proceed with a court trial, the defendant

stated, "I don't know," and then indicated that he "would like to talk to my attorney and have a little bit of time." The defendant then asked the court, "[c]an we at least do the end of the week?" In response, the court stated: "That's not happening. . . . Your default setting . . . is to have a trial by jury. That's where you are right now. That jury trial starts tomorrow morning. If between now and then, or frankly, at any point during jury selection, you change your mind and elect to have a trial by court, you can do so, but then that waiver is gone. You cannot go back and forth. So, it is an important decision you're making, to have a trial by a jury or a court. You start with a jury, and once you elect a court trial—that's why I'm asking you all these questions about your education, your age, whether you ran your own business, because once you elect to have a court trial, you have waived your right to go back to a jury trial. . . . So, there's nothing wrong with taking the time to do that, but . . . it is final . . . . [M]ake no mistake, I'm going to ask you all the questions necessary to make the determination of whether your decision and waiver of a jury trial is knowing, intelligent and voluntary. That will happen, and you'll either have a jury trial, which is completely fine, or you'll have a court trial before Judge Graham." The court then stated: "I assume you don't want to make that decision today. Is that correct, sir?" The defendant answered, "[c]orrect," and the proceeding adjourned.

The defendant again appeared before the court, *Oliver, J.*, the next morning. At that time, the defendant indicated that he was electing a court trial. Noting that some of the questions that followed might be "duplicative of yesterday," the court began its canvass of the defendant. The court asked the defendant several questions about his age, education, occupation and prior experience with the criminal justice system. The court then confirmed that the defendant had "discussed [his]

right to a jury trial" with Bausch and understood that a jury "is composed of a number of members from the community"; to each query, the defendant answered, "[y]es." The defendant also confirmed that he understood that although a jury's verdict must be unanimous, the verdict in a court trial is rendered by one person.

The following colloquy then transpired:

"The Court: Now, you're making this decision after discussing the benefits or detriments of a jury trial . . . after discussing those things with Attorney Bausch?

"The Defendant: Correct.

"The Court: And you're making this decision knowingly, voluntarily, and of your own free will?

"The Defendant: Yes.

"The Court: Is anyone forcing, threatening, or promising you anything to make you elect to waive your right to a jury trial—

"The Defendant: No.

"The Court: —and to elect a court trial?

"The Defendant: No.

"The Court: Okay. And do you have any questions for me about this decision?

"The Defendant: I would just like to apologize to Your Honor and to the jury for being here. I'm sorry about the confusion yesterday.

"The Court: Mr. Corver, as I said yesterday, this is America. The constitution guarantees you that right. You have some serious charges. It's not an easy decision to make, and there's nothing wrong with taking the time necessary to make the decision voluntarily and be informed and speak with your attorney about it, all right?

"The Defendant: Thank you.

"The Court: So, do you have any questions for me about this decision?

"The Defendant: No.

"The Court: Do you have any questions for Attorney Bausch about this decision?

"The Defendant: No."

The court confirmed that the defendant understood that "[o]nce I accept your waiver of your right to [a] jury trial, you cannot change your mind," to which the defendant replied, "[y]es." The court then entered a finding that the defendant "has been fully and adequately apprised of the consequences of his election to waive his right to [a] jury trial and elect a court trial" and "has done so, and the court accepts the waiver."

On appeal, the defendant concedes that he made an affirmative indication of his waiver of his right to a jury trial during that canvass. See *State* v. *Gore*, 288 Conn. 770, 783, 955 A.2d 1 (2008) ("because the right to a jury trial is uniquely personal to the defendant, an affirmative indication of the defendant's personal waiver of this right must appear on the record"). He nonetheless claims that his waiver was not made in a knowing, intelligent, and voluntary manner due to (1) the alleged breakdown in communication with his legal counsel and (2) the court's refusal to grant a continuance in response to his request for more time to consider his decision. We disagree.

As detailed in part I of this opinion, the record substantiates the court's determination that a complete breakdown in communication between the defendant and Bausch did not occur. To the contrary, the evidence demonstrates that Bausch and the defendant continued to communicate in an effective manner throughout the

October 27, 2015 proceeding. Indeed, when the defendant on October 26, 2015, asked the court for a continuance until "the end of the week," he expressly indicated that he "would like to talk to my attorney and have a little bit of time" before making his election of a court trial.

Furthermore, there is little merit to the defendant's contention that the waiver of his right to a jury trial was not the product of free and meaningful choice due to the court's denial of that request for a continuance. As the aforementioned colloquies between the court and the defendant reflect, the court went to great lengths to communicate to the defendant the fact that, even if he began selecting a jury, the defendant still could elect to waive a jury trial at a later date and proceed with a court trial. The defendant was represented by counsel when he twice was canvassed on that decision by the court at the October 26 and October 27, 2015 proceedings. When the defendant equivocated on his waiver during the October 26 proceeding, the court terminated its canvass and informed the defendant that it would not accept a waiver of the defendant's right to a jury trial unless it was knowing, intelligent, and voluntary. During the second canvass conducted the following day, the defendant confirmed that he previously had discussed his decision with Bausch and had no remaining questions for Bausch at that time. As our Supreme Court has noted, "[t]he fact that the defendant was represented by counsel and that he conferred with counsel concerning waiver of his right to a jury trial supports a conclusion that his waiver was constitutionally sound." *State* v. *Woods*, supra, 297 Conn. 586.

In addition, the defendant's statements during the October 27, 2015 canvass indicate that he understood the court's various questions, including whether his election was the product of undue influence or coercion, and do not reveal any hesitation or involuntariness

on the defendant's part. See *State* v. *Scott*, 158 Conn. App. 809, 818, 121 A.3d 742 (emphasizing that "[t]he record contains no indication of any hesitancy or indecision on the part of the defendant" in waiving right to jury trial), cert. denied, 319 Conn. 946, 125 A.3d 527 (2015). Notably, at the conclusion of that canvass, the defendant stated that he "would just like to apologize to Your Honor and to the jury for being here. I'm sorry about the confusion yesterday." The defendant also testified during the October 27, 2015 canvass as to his familiarity with the criminal justice system, having pleaded guilty to assault in the first degree years earlier.[11] See *State* v. *Moye*, 119 Conn. App. 143, 164, 986 A.2d 1134 ("[t]he constitutional stricture that a plea of guilty must be made knowingly and voluntarily . . . requires . . . that there be a voluntary waiver during a plea canvass of the right to a jury trial" [internal quotation marks omitted]), cert. denied, 297 Conn. 907, 995 A.2d 638 (2010); *State* v. *Smith*, 100 Conn. App. 313, 324, 917 A.2d 1017 (noting, in considering propriety of waiver of right to jury trial, defendant's "familiarity with the court system" due to criminal history), cert. denied, 282 Conn. 920, 925 A.2d 1102 (2007).

We therefore conclude that the totality of the circumstances demonstrates that the defendant's waiver of his right to a jury trial was knowing, intelligent, and voluntary. Accordingly, he cannot prevail under *Golding*'s third prong. See footnote 10 of this opinion.

The judgment is affirmed.

In this opinion the other judges concurred.

[11] We reiterate that the defendant in the present case also was charged, in a part B information, with being a persistent dangerous felony offender due to his prior conviction for assault in the first degree. See footnote 5 of this opinion.

KERMIT FRANCIS *v.* COMMISSIONER OF CORRECTION (AC 39445)

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

Syllabus

The petitioner, who had been convicted of, inter alia, murder in connection with a shooting that occurred following a drug transaction, filed a third petition for a writ of habeas corpus, claiming that the habeas counsel who had represented him with respect to his second habeas matter had rendered ineffective assistance by failing to question a potentially exculpatory witness, K, properly and to present evidence that K had been available to testify at his criminal trial. K, who testified at both the petitioner's second and third habeas proceedings, recalled that she had seen the victim standing on a porch when she saw a spark of light without audible accompaniment. She later observed the victim on the ground. K testified that she never saw the actual shooting and did not hear a gunshot, and she was inconsistent in her recollection of the sequence of events. At the criminal trial, evidence had been adduced that an individual on the porch had used a cigarette lighter to light the petitioner's marijuana cigar shortly before the shooting occurred in a nearby driveway and that other witnesses had heard the gunshot. The habeas court determined that, had K's testimony been introduced at the criminal trial, it would not have undermined the court's confidence in the petitioner's conviction, and rendered judgment denying the third habeas petition. Thereafter, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court properly denied the petitioner's third petition for a writ of habeas corpus; that court's findings were supported by the evidence and were not clearly erroneous, as the witnesses at the criminal trial were consistent with one another and were bolstered by statements that had been given in the immediate aftermath of the crime, and other evidence, including the petitioner's flight to New York under an alias, suggested his guilt, the habeas court carefully weighed K's testimony against that evidence and found it to be not credible, as K's testimony at the habeas trial was inconsistent with her prior statements and with other witnesses' recollections, and the habeas court having properly determined that, in light of all the other evidence, K's testimony would not have led a reasonable jury to find the petitioner not guilty, the petitioner could not prove that he was prejudiced by his prior habeas counsel's purportedly deficient performance at the second habeas trial in questioning K improperly or in failing to present evidence of her availability to testify at the original criminal trial, or both.

Submitted on briefs February 22—officially released June 12, 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, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Donald F. Meehan and *Walter C. Bansley IV* filed a brief for the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, *Gail P. Hardy*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, filed a brief for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The petitioner, Kermit Francis, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The habeas court granted his petition for certification to appeal to this court; he claims on appeal that he was prejudiced as a result of the ineffective assistance of his erstwhile habeas counsel, Michael Day. Specifically, the petitioner argues that, at his habeas trial, Day failed (1) to question a witness properly and (2) to present evidence of that witness' availability to testify at the original criminal trial. We affirm the judgment of the habeas court.

The following facts, as summarized by our Supreme Court on the petitioner's direct appeal, are relevant. "On December 20, 1993, the [petitioner], along with Casey Wilcox, Andre Shirley and Corey Rosemond, were selling crack cocaine in the area of [Wilcox'] residence at 88 Atwood Street in Hartford. The victim, Moses Barber, Jr., a regular customer, purchased drugs from the [petitioner]. After making his purchase, he walked away. The victim later returned to [Wilcox']

porch and engaged in an argument with the [petitioner] concerning the drug sale. The victim and the [petitioner] left the porch and the [petitioner] proceeded up a dark driveway between two buildings directly across the street from [Wilcox'] residence. The victim remained near the street. As they continued to argue, the [petitioner] approached the victim and shot him. The victim died later that night as a result of a gunshot wound to his abdomen.

"On December 21, 1993, Wilcox asked the [petitioner] for his guns for the purpose of threatening an individual who had accused Wilcox of shooting the victim. The [petitioner] went into the basement of a house on Atwood Street, and emerged with a handgun and rifle, which he gave to Wilcox. Wilcox, in turn, gave the weapons to Rosemond and instructed Rosemond to put the weapons in the trunk of a vehicle parked behind [Wilcox'] residence. The next morning, Hartford police officers, armed with a search warrant, seized the weapons from the trunk of the vehicle and, thereafter, learned that the [petitioner] did not have a permit to carry a pistol or revolver. Moreover, the police officers found that the serial number on the pistol had been ground off.

"Thereafter, Wilcox, Shirley and Rosemond gave statements implicating the [petitioner] in the murder, and a warrant was issued on December 23, 1993, for the [petitioner's] arrest. The [petitioner] was arrested in New York in June, 1995." (Footnotes omitted.) *State* v. *Francis*, 246 Conn. 339, 342–43, 717 A.2d 696 (1998).

Following a trial, a jury found the petitioner guilty of murder in violation of General Statutes (Rev. to 1993) § 53a-54a (a), carrying a pistol without a permit in violation of General Statutes (Rev. to 1993) § 29-35 and altering or removing an identification mark on a pistol in violation of General Statutes (Rev. to 1993) § 29-36. See

State v. *Francis*, supra, 246 Conn. 341–42. The trial court, *Barry*, *J.*, sentenced the petitioner to a total effective sentence of sixty years imprisonment.[1]

The petitioner, representing himself, filed a petition for a writ of habeas corpus dated January 1, 2001, alleging that his criminal trial counsel, William B. Collins, had rendered ineffective assistance. Eventually, the petitioner was assigned counsel, Frank Cannatelli, who withdrew that first petition with prejudice. That withdrawal prompted a second habeas action, this time alleging, among other things, that Cannatelli was ineffective for withdrawing the original petition. After a trial (first habeas trial), the habeas court, *Schuman*, *J.*, partially granted the second petition and restored the original petition under a new docket number.

In his restored petition, the petitioner, represented by Day, alleged that Collins had rendered ineffective assistance. Specifically, the petitioner alleged that Collins failed to call Fredrica Knight, a potentially exculpatory witness, to testify in the original criminal trial. After a trial (second habeas trial), the habeas court, *Bright*, *J.*, denied the petition in a memorandum of decision, which this court summarily affirmed. See *Francis* v. *Commissioner of Correction*, 150 Conn. App. 906, 98 A.3d 121 (2014).

Thereafter, in a new petition, which was amended on January 4, 2016, the petitioner set forth another claim of ineffective assistance of counsel. Specifically, he alleged that Day had rendered ineffective assistance at the second habeas trial by failing (1) to question Knight properly and (2) to present evidence of Knight's availability to testify at the original criminal trial. That

[1] On the petitioner's direct appeal, our Supreme Court reversed his conviction of altering or removing an identification mark on a pistol, but affirmed his conviction of the remaining offenses. *State* v. *Francis*, supra, 246 Conn. 352–56, 359.

amended petition is the operative petition in this matter. On June 30, 2016, after a trial (third habeas trial), the habeas court, *Sferrazza, J.*, issued a memorandum of decision denying the operative petition. The habeas court then granted the petitioner's petition for certification to appeal to this court. This appeal ensued. Additional facts will be set forth as necessary.

"Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . . Therefore, our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"It is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings . . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: [A] performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the second prong of *Strickland*,

that his counsel's deficient performance prejudiced his defense, the petitioner must establish that, as a result of his trial counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal. . . . The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied. . . . The court, however, may decide against a petitioner on either prong, whichever is easier." (Citations omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 822–23, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

"The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition. . . . In *Lozada*, the court explained that [t]o succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . . As to each of those inquiries, the petitioner is required to satisfy the familiar two-pronged test set forth in [*Strickland*]. . . . In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy *Strickland* twice . . . ." (Citations omitted; internal quotation marks

omitted.) *Gerald W.* v. *Commissioner of Correction*, 169 Conn. App. 456, 463–64, 150 A.3d 729 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

The petitioner's sole claim on appeal is that the habeas court improperly determined that he failed to prove that Day had provided ineffective assistance. We conclude that the habeas court properly denied the amended petition for a writ of habeas corpus.

The petitioner failed to, and cannot, prove that he was prejudiced by Day's alleged ineffectiveness. Knight testified at the second and third habeas trials. Following a review of the evidence presented at the third habeas trial as well as the transcripts of both the second habeas trial and the criminal trial, the third habeas court noted: "Knight was very sketchy as to the sequence of events she purportedly perceived. She first testified that, after school on December 20, 1993, she and two friends walked to a corner store located about one block from her residence. The victim . . . was her mother's boyfriend. She saw him on or at a porch attached to a house . . . . She saw a 'spark' of light between the victim and a person other than the petitioner. She heard *no* gunshot accompanying the glint of light. Sometime later, she observed the victim lying on the ground, went near his body, and spoke to a young man whom she believes was the petitioner. The man told her to leave the area. Subsequently, Knight modified her recollection so that she stated that she noticed the activity recounted above on her way *back* from the corner store. Knight reiterated that she never saw the actual shooting, but she knew the petitioner was not the shooter.

"The other evidence adduced at the criminal trial both refutes and explains some of Knight's inconsistent observations. . . . [Wilcox, Rosemond, Shirley] and the petitioner regularly sold crack cocaine [at Wilcox' residence]. . . . During the early evening of December

20, 1993, the petitioner approached the porch . . . upon which Wilcox, Rosemond, and Shirley loitered. The petitioner asked for a light in order to smoke a marijuana cigar. Rosemond obliged.

"A little later, the victim also approached the group and complained to the petitioner about whether a drug transaction between them was satisfactorily fulfilled. Following some argument, the petitioner crossed the street to enter a driveway or alleyway . . . . The victim followed the petitioner but stopped on the sidewalk at the beginning of the driveway. The petitioner proceeded down the driveway toward the rear of the buildings.

"The petitioner emerged from the alley carrying a pistol. The victim tussled with the petitioner, followed by an audible gunshot. The victim staggered backward a few steps and then collapsed. Wilcox, Rosemond, and Shirley ran across the street to where the victim lay. The petitioner ran away, and no one encountered him again that night. A girl also came over to the victim, and *Wilcox* told her to call an ambulance.

"After full review of the evidence, the court finds it highly unlikely that a jury would find Knight's putative testimony very persuasive. This witness repeatedly stated that she never *saw* or *heard* anyone shoot the victim. Instead, she recalled a spark of light without audible accompaniment. Knight may very well have seen the assisted lighting of the petitioner's marijuana cigar. It should be noted that evidence of the use of the cigarette lighter shortly before the argument between the petitioner and the victim was introduced at the criminal trial at which Knight never testified. Thus, that testimony was *not* an attempt to explain away Knight's perception of a flash of light among the group of young men.

"Also, other witnesses in the neighborhood heard the gunshot, which must have been quite audible. Yet,

Knight observes only a quick 'spark' of light uncoupled from the sound of gunfire.

"At the criminal trial, *Wilcox* described a young female approach the victim while he stood nearby the body. Wilcox mentioned that *he* engaged the girl in a brief conversation. His testimony came sixteen years before Knight testified at the [second habeas trial]. It appears likely that a fact finder would find Knight's identification of the person to whom she spoke sincere but mistaken. In sum, the addition of her testimony fails to undermine the court's confidence in the petitioner's convictions." (Emphasis in original.)

It is clear that the habeas court in the third habeas trial carefully weighed Knight's putative testimony against the rest of the evidence adduced at the original criminal trial and found it not to be credible. "[A] pure credibility determination . . . is unassailable." *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 694, 159 A.3d 1112 (2017); see also *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 604, 103 A.3d 954 (2014) ("we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude" [internal quotation marks omitted]); *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 448, 936 A.2d 611 (2007) ("[t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony" [internal quotation marks omitted]).

The habeas court's findings are supported by the evidence. Not only are the other witnesses' testimonies consistent with one another, but they are bolstered by statements given in the immediate aftermath of the crime. Knight's testimony, on the other hand, is consistent neither with her early statements nor with any of the other witnesses' recollections. Additionally, other

evidence was presented at the criminal trial to suggest the petitioner's guilt, most salient of which was his flight to New York under an alias, which is strong circumstantial evidence of consciousness of guilt. Thus, the court's findings were not clearly erroneous.

On this record, therefore, the habeas court properly determined that, in light of all the other evidence, Knight's testimony would not have led a reasonable jury to find the petitioner not guilty. As a result, the petitioner cannot prove that he was prejudiced by Day's purportedly deficient performance at the second habeas trial in questioning Knight improperly or in failing to present evidence of her availability to testify at the original criminal trial, or both.

The judgment is affirmed.

In this opinion the other judges concurred.