CHRISTOPHER GASKIN *v.* COMMISSIONER OF CORRECTION (AC 39462)

Sheldon, Bright and Flynn, Js.

Syllabus

The petitioner, who had been convicted of murder, conspiracy to commit murder and tampering with a witness in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming that his rights to due process were violated when the prosecutor at his criminal trial elicited testimony from a cooperating witness, E, which the prosecutor knew to be false, failed to correct that testimony before the jury and then relied on it during closing argument to the jury. E, who also had been charged with the victim's murder, was the only witness who placed the petitioner at the crime scene with the likely murder weapon in his hand. During colloquy with the court and the petitioner's trial counsel prior to the start of trial, the prosecutor denied having promised anything to E in exchange for his testimony and stated that E had been told that his cooperation and truthfulness in testifying against the petitioner would be brought to the attention of the sentencing court in E's case. E thereafter testified that he had never been told that if he testified truthfully, the state would bring his cooperation to the attention of the court in his own case, and he denied that any promises had been made to him in exchange for his testimony. The petitioner filed a direct appeal from his conviction, but the trial court granted his appointed appellate counsel permission, under *Anders* v. *California* (386 U.S. 738), to withdraw from representation after she reviewed the trial record and determined that there were no nonfrivolous issues to be raised on appeal. The petitioner thereafter withdrew his direct appeal. After E testified at the petitioner's trial and pleaded guilty in his own case, the prosecutor in E's case, who was the same prosecutor as in the petitioner's criminal trial, made the sentencing judge in E's case aware of E's involvement in the petitioner's criminal trial. E's sentence was thereafter reduced twice. It was not until the prosecutor testified in the petitioner's habeas trial that it became clear to the petitioner that E had testified falsely about whether the prosecutor had promised him anything in exchange for his testimony. The habeas court concluded that the petitioner had procedurally defaulted his due process claim because he failed to raise it in his direct appeal, and failed to establish cause and prejudice for his default. The habeas court further determined that although E testified falsely, there had been no need for the prosecutor to correct E's testimony because the prosecutor previously had disclosed to the petitioner's trial counsel the promise to E. The habeas court rendered judgment denying the petition for a writ of habeas corpus and, thereafter, denied

the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court abused its discretion in denying the petition for certification to appeal from the judgment denying the habeas petition; the issues of whether the petitioner had procedurally defaulted his due process claim and whether his due process rights were violated were debatable among jurists of reason, they could be resolved in a different manner and they were adequate to deserve encouragement to proceed further, as the appellate courts of this state have not yet addressed the issues of whether a petitioner procedurally defaults a claim when his appellate counsel withdraws from representation, with permission of the court, after having reviewed only the record and without having investigated new information outside the record that could develop a due process claim, or what constitutes cause and prejudice should such a default exist.

2. The petitioner did not procedurally default his due process claim:

a. The criminal trial record was inadequate for the petitioner to have raised his due process claim on direct appeal: the prosecutor's statements regarding any promise to E were ambiguous and contradictory, the petitioner's trial counsel cross-examined E, to no avail, regarding the prosecutor's promise to him, information regarding E's sentencing became available only after the petitioner's criminal trial, and the petitioner's appellate counsel, who had been granted permission to withdraw after she determined that there were no nonfrivolous claims to raise on appeal, had no duty to investigate or to augment the record; moreover, the requirements of the cause and prejudice doctrine parallel certain of the requirements to establish that material evidence has been suppressed under *Brady* v. *Maryland* (373 U.S. 73), and although this court was not at liberty to overrule precedent from our Supreme Court and this court applying the procedural default doctrine to due process claims under *Brady* and its analogues, prudential considerations underlying the procedural default doctrine warranted looking past procedural default to address the merits of the petitioner's due process claim.

b. Even if the petitioner procedurally defaulted his claim, he established cause for any procedural default: because the factual basis underlying the petitioner's due process claim was not fully available until after his appellate counsel, who had no duty to investigate it under *Anders*, moved to withdraw, such information was not reasonably available and it would be contrary to *Anders* to impose on appellate counsel the additional duty of investigating whether there are possible claims outside the record, as *Anders* requires only that appellate counsel look to the record to decide if there are appealable issues, it would defy reason to expect incarcerated individuals, such as the petitioner, to be able to develop new claims from the confines of prison after appellate counsel has been permitted to withdraw from representation, and the harm to the petitioner here stemmed from E's truculence and the petitioner's

inability to respond effectively in light of the prosecutor's silence in that it was not until the prosecutor testified at the habeas trial that there was a complete factual record to prove the petitioner's claim; moreover, it was error for the habeas court to suggest as support for a lack of cause that the petitioner could have petitioned for a new trial, as a motion or petition for a new trial is not part of a direct appeal, augmentation of the record is not necessary for a direct appeal, and the return of the respondent Commissioner of Correction asserted only that the petitioner had procedurally defaulted because he did not raise his due process claim on direct appeal.

c. The petitioner established the requisite prejudice to overcome any procedural default; E's testimony was material to the petitioner's conviction of murder and conspiracy to commit murder, the petitioner's trial counsel was unable to get E, who repeatedly stonewalled counsel when questioned about his motives for testifying, to admit to the jury that E had some promise from the state regarding his cooperation, the trial court's jury instructions regarding witnesses' cooperation could not obviate the prejudice emanating from E's false testimony, the prosecutor sharpened that prejudice by suggesting in closing argument to the jury that E had everything to lose and nothing to gain by testifying, and that E had no interest in the outcome of the petitioner's case, and the impeachment of E through knowledge of his prior criminal convictions would not have mitigated the prejudice that resulted from his false testimony.

3. The petitioner's due process rights were violated as a result of the prosecutor's use of E's false testimony and suggestion to the jury that E had no interest in the outcome of the petitioner's trial:

a. E's false testimony was material to the petitioner's conviction of murder and conspiracy to commit murder, as there was a reasonable likelihood that E's testimony or the prosecutor's reliance on it in closing argument could have affected the verdict of the jury: E was the only witness to tie the petitioner to the murder scene or place a revolver in the petitioner's hands at the time and place of the killing, there was no physical evidence to tie the petitioner to the crime scene, there could be no claim that the prosecutor, who was also the prosecutor in E's guilty pleas, was unaware of the promises made to E because the prosecutor promised to bring E's testimony to the attention of E's sentencing judge, the prosecutor's argument to the jury enhanced E's credibility by stating that E had everything to lose and nothing to gain, and although the prosecutor claimed that he did not know if E expected anything in exchange for his testimony, the prosecutor had told E that the state would bring his testimony to the attention of the sentencing judge in E's case; furthermore, the state's case against the petitioner was weak, as E was not an eyewitness to the shooting, and the testimony of the only other witness to implicate the petitioner was based on an alleged

admission by the petitioner to that witness, who was unhappy with him for personal reasons.

b. Although there is a split in this court's precedent as to whether disclosure of an agreement between the state and a cooperating witness needs to be made only to a criminal defendant or whether it also must be made to the jury, the jury here was entitled to know about the state's promise to E; E's credibility was important, as the state's case was also almost entirely dependent on his testimony, evidence of the state's promise to him bore on whether E had anything to gain by testifying, the jury was not made aware of the agreement between E and the state, and even if the prosecutor satisfied his disclosure requirement by informing the petitioner's trial counsel of the state's promise to E, the petitioner still was harmed, as the prosecutor's disclosure was negated by his harmful bolstering of E's testimony during closing argument to the jury.

4. The petitioner's conviction of tampering with a witness was not improper; the jury reasonably could have found from evidence of the petitioner's letters to his girlfriend that he had attempted to induce her to withhold testimony, and although the petitioner claimed that his conviction of the tampering charge was buoyed by his conviction of murder and conspiracy to commit murder and E's false testimony concerning those charges, tampering with a witness can be established even in the absence of the conviction of other crimes, and E's false testimony was not material to the charge of tampering with a witness.

Argued February 1—officially released July 24, 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. *Reversed in part; judgment directed; further proceedings.*

Jennifer L. Bourn, assistant public defender, with whom, on the brief, was *Denis J. O'Malley*, certified legal intern, for the appellant (petitioner).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

FLYNN, J. It has been usual for trial judges, when instructing jurors on how to weigh the credibility of witnesses, to tell them to consider whether the witness has an interest of whatever sort in the outcome of the trial that might influence or color the witness' testimony. In the petitioner's criminal trial, however, the jury never received important evidence of a cooperating witness' interest in the outcome. This appeal requires us to examine a situation where a necessary cooperating witness, the only one who put the defendant at the crime scene with the likely murder weapon in his hand, falsely denied before the jury any promise from the state in exchange for his testimony and such falsity was not disclosed to the jury, but the prosecutor argued in summation to the jury that the witness had "everything to lose, nothing to gain," by giving statements to the police and testifying. We hold this scenario to be antithetical to due process under the fourteenth amendment to the United States constitution.

The petitioner, Christopher Gaskin, filed this appeal 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 court: (1) abused its discretion in denying his petition for certification to appeal; (2) erred in finding that the petitioner's due process claim[1]

[1] See *Giglio* v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Napue* v. *Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

The petitioner's claim has been styled by the parties and the habeas court as a "*Brady*" claim, a "*Giglio*" claim, a "*Napue*" claim and a "due process" claim. Noting that there are some subtle differences among these cases, they are nonetheless often conflated. See footnote 22 of this opinion. Recognizing these subtleties, we use the term "due process" claim wherever possible in this opinion, although our discussion of the parties' briefs, the habeas court's memorandum of decision and the various precedents often dictates the use of one of the other terms.

was procedurally defaulted; and (3) in addressing the merits, erred in finding that the state did not deprive the petitioner of his due process rights when it did not correct a witness' known false testimony at the underlying criminal trial. We agree with all of the petitioner's claims as they pertain to his underlying convictions of murder and conspiracy to commit murder under General Statutes §§ 53a-54 and 53a-48, respectively. Accordingly, we reverse in part the judgment of the habeas court and remand the case to the habeas court with instruction to render judgment granting the petition for a writ of habeas corpus, vacating the petitioner's underlying convictions of murder and conspiracy to commit murder, and ordering a new trial on those charges. We affirm the judgment as to the petitioner's underlying conviction of tampering with a witness under General Statutes § 53a-151.

The record reveals the following facts and procedural history. The underlying criminal proceedings stem from the shooting death of Kendall Williams-Bey in Hartford on July 6, 1998. The petitioner eventually was charged with Williams-Bey's murder and with tampering with a witness.[2]

At trial, only two witnesses implicated the petitioner in Williams-Bey's murder: Benjamin Ellis and Evelyn Douglas.[3] Ellis, a cooperating witness, testified that he drove the petitioner and another man, later identified as

[2] Specifically, the petitioner was charged with murder in violation of § 53a-54, conspiracy to commit murder in violation of §§ 53a-48 and 53a-54, and tampering with a witness in violation of § 53a-151.

[3] Dennis Paris, who was shot at the same time as Williams-Bey, testified that while he and the petitioner were being held in nearby parts of the courthouse, he told the petitioner that "[y]ou all supposed to know who you all shooting," to which the petitioner replied, "I didn't even know you was there . . . ." We do not believe that this cryptic and ambiguous statement places the petitioner at the crime scene, as did the testimony of Ellis and Douglas, especially because, according to Paris, the petitioner also told Paris that he did not shoot him.

Trevor Bennett,[4] past the crime scene and then parked nearby. While Ellis waited in the car, the petitioner and Bennett got out of the vehicle carrying guns, the petitioner carrying a revolver and Bennett carrying an "automatic." Shortly thereafter, Ellis testified that he heard gunshots and then the petitioner and Bennett returned. Ellis then drove his passengers away from the area and dropped them off at various points in Hartford. James Stephenson, the state's firearms identification and testing expert, testified that the bullet that killed Williams-Bey was fired from a revolver.

Douglas, the petitioner's girlfriend with whom he lived at the time, testified that the petitioner admitted to her that he shot Williams-Bey. She testified that, prior to the shooting, the petitioner arrived home with a busted lip and told Douglas he had gotten into a fight with London Johnson at a nightclub in Springfield, Massachusetts. She stated that the petitioner said he was going to "get" Johnson. She said that when the petitioner came back to her apartment later, he said, "I just f----d up. . . . I didn't mean to shoot Kendall." She testified that he meant to shoot Johnson, who was near the crime scene when Williams-Bey was shot. Douglas' testimony did not tie the petitioner to the murder scene or possession of a revolver of the kind that killed the victim. Only Ellis' testimony established that.

Many times prior to Ellis' trial testimony, the petitioner's trial counsel asked for any information on agreements or promises the state may have made with any witnesses, particularly Ellis. Because Ellis also was being charged with Williams-Bey's murder, the petitioner's trial counsel wanted to know if the state had promised anything to him in exchange for his testimony. The prosecutor denied that any deal had been made. Just

[4] Bennett, who was tried separately, apparently was acquitted of all charges.

prior to trial, the following colloquy between the trial court and the prosecutor took place:

"The Court: . . . Now, was anything offered to [Ellis]?

"[The Prosecutor]: No, Your Honor. It's standard routine, no offers are made. When I have a case, they are told that I will not make any agreement with them. They have to testify, and if they expect something that's within their—it's not—not something—I—I do not or neither does my inspector, anybody involved with me, make any offers.

"The Court: Right. Well, in the old days what used to be done was, the phrase, as I recall it, was, make your truthful cooperation—truthful and full cooperation known to the sentencing judge.

"[The Prosecutor]: Yes.

"The Court: Was that done in this case?

"[The Prosecutor]: Yes. The sentencing judge would be told that he gave a statement, but the thing he was told is he has to tell the truth, and it's not within my province, it's within the sentencing judge's province, which is the standard procedure . . . ."

During the trial, the prosecutor asked Ellis whether he was made any promises in exchange for his testimony, which Ellis denied. The prosecutor asked Ellis why he gave his statements to the police, to which Ellis replied that he "felt bad about the incident." Ellis also stated that he was happy he was "doing the right thing." On cross-examination, the petitioner's trial counsel engaged in the following questioning of Ellis:

"Q. . . . Have you met with [the prosecutor] at any time in this case?

"A. With [the prosecutor] and my lawyer.

"Q. Okay. . . . The answer to that, I take it, is yes?

"A. Yes.

"Q. Okay. And was it your understanding as a result of the meeting that the state wanted you to testify truthfully?

"A. Yes.

"Q. Okay. And was it your understanding that if you testified truthfully, the state would take that into consideration in deciding what would happen in the case in which you're charged?

"A. No. I wasn't made any promises.

"Q. I didn't ask you, sir . . . if you were made any promises. What I asked you was—was it your understanding that if you testified truthfully, the state would take that into consideration in deciding the outcome of your case?

"A. I'm not sure.

"Q. You're not sure?

"A. No.

"Q. Was it discussed?

"A. No."

Later, the petitioner's trial counsel questioned Ellis as follows:

"Q. Is it your understanding that after you testify, by truthful testimony, that the state will bring your cooperation and truthfulness to the attention of the court?

"A. I was never told that.

"Q. And you don't have that expectation?

"A. No.

"Q. And you are aware, because of your experience in the system, that the state can change any of the charges it wants against you . . . ? Do you want me to rephrase that?

"A. No. I understand.

"Q. You are aware of that?

"A. I wasn't sure of that, but now I know."

During closing argument, after Ellis had given testimony inculpating the petitioner in the killing, the prosecutor stated that Ellis "wanted to get [his testimony] off his chest. He knew and knows that his statements put him in the mix." On rebuttal, the prosecutor then argued that Ellis "had everything to lose, nothing to gain, by giving these statements" and that Ellis "has been charged with this crime, too. And his position is he's only the driver, he had nothing to gain by giving both statements. He clearly said he wasn't made any promises. Does he expect something? That's in his mind. I don't know. But the reality is: he is in the mix."

The record reveals that the prosecutor never corrected Ellis' testimony before the jury in which Ellis told the jury that he had never been told that, after he testified truthfully, the state would bring his cooperation and truthfulness to the attention of the sentencing court.

On July 7, 2003, the jury found the petitioner guilty of all the charges. He was sentenced to a total effective sentence of sixty years imprisonment. On December 30, 2003, the petitioner filed a direct appeal. His appointed counsel later moved to withdraw as appellate counsel, filing an *Anders*[5] brief on December 29, 2004, in which she stated that there were no nonfrivolous issues for

[5] See *Anders* v. *California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

appeal, and was permitted to withdraw by a judge of the Superior Court on September 11, 2006. The petitioner then represented himself pro se until withdrawing his direct appeal seven years later on April 10, 2013.

After testifying at the petitioner's and Bennett's criminal trials, Ellis, on November 4, 2004, pleaded guilty to violating General Statutes § 53a-59 (a) (3), accessory to assault in the first degree.[6] The prosecutor, the same as in the petitioner's case, recommended a sentence of twenty years, suspended after five years, with five years probation, to run concurrently with a sentence Ellis then was serving for the commission of an unrelated crime. As promised, the prosecutor made the sentencing judge aware of Ellis' involvement in the petitioner's criminal trial. On September 7, 2005, Ellis' sentence was reduced to twenty years, execution suspended after three years, with five years probation. Ellis' prior sentence, which he was serving at the time of the petitioner's criminal trial, also later was reduced in 2005 by three years on the prosecutor's recommendation for "[s]ubstantial aid and cooperation in several serious felony cases." That sentence could only be modified by reduction pursuant to General Statutes § 53a-39 (b),[7] which requires the assent of the prosecuting authority prior to its reduction.

On September 10, 2012, the petitioner filed a pro se petition for a writ of habeas corpus. Then, after counsel

[6] Although Ellis originally was charged with conspiracy to commit murder, assault in the first degree, conspiracy to commit assault in the first degree and tampering with a witness, all of the charges, except assault in the first degree, were dropped.

[7] General Statutes § 53a-39 (b) provides: "At any time during the period of a definite sentence of more than three years, upon agreement of the defendant and the state's attorney to seek review of the sentence, the sentencing court or judge may, after hearing and for good cause shown, reduce the sentence, order the defendant discharged, or order the defendant discharged on probation or conditional discharge for a period not to exceed that to which the defendant could have been originally sentenced."

was appointed, the petitioner filed his operative petition on December 9, 2014. The petitioner alleged that the prosecutor violated his constitutional rights in failing to correct Ellis' false testimony and in failing to disclose exculpatory materials. Specifically, the petitioner alleged that Ellis lied at the petitioner's criminal trial when he testified that he did not receive or expect to receive any consideration for his testimony against the petitioner. The respondent, the Commissioner of Correction, filed his amended return on February 11, 2015, denying the allegations and claiming that the petitioner procedurally defaulted on his claim because he did not directly appeal his underlying criminal conviction on the grounds raised in his petition and that he established neither cause nor prejudice for his procedural default. In his reply, filed February 26, 2015, the petitioner denied procedurally defaulting his claim, but also stated that, if he did procedurally default his claim, there was cause and prejudice for doing so. Specifically, the petitioner stated that cause existed because "at the time his appeal was pending, there was no additional evidence available to the petitioner or his appellate attorney which could have shown that Benjamin Ellis received consideration for his testimony. It was not until later that evidence became available to prove this claim." The petitioner stated that he also was "prejudiced because the jury hearing his criminal trial did not know of Benjamin Ellis' self-serving motivations for testifying against the petitioner, and the [prosecutor] allowed him to testify in an untruthful manner without correcting his testimony."

The matter proceeded to a habeas trial, which included the testimony of Ellis; John L. Stawicki, Ellis' attorney at the time of his testimony and in his subsequent pleas; and Victor Carlucci, Jr., the prosecutor in the petitioner's criminal trial and Ellis' later pleas. Ellis testified that he was made no promises for a reduction

in his charges or anything else in exchange for his testimony, although he said that he hoped his testimony would help him. Stawicki and the prosecutor both testified that the prosecutor made no specific promises, other than to convey Ellis' cooperation to his sentencing judge.

In its memorandum of decision dated June 23, 2016, the habeas court denied the petition on the ground that the petitioner procedurally defaulted his claim and failed to establish cause and prejudice for his default. Nonetheless, the court also addressed the merits of the petitioner's claim, finding that, although Ellis testified falsely, the prosecutor had disclosed his promise to Ellis to the petitioner's trial counsel, which obviated any need to correct the false testimony. The petitioner requested certification to appeal, which was denied by the habeas court on July 6, 2016. This appeal followed.

On appeal, the petitioner claims that the court abused its discretion in denying his petition for certification to appeal; erred in finding that the petitioner's due process claim was procedurally defaulted; and in addressing the merits, erred in finding that the state did not deprive the petitioner of his due process rights when it did not correct a witness' false testimony at the petitioner's criminal trial and then subsequently relied on that testimony in closing arguments.

"Before we turn to the petitioner's claims we set forth our standard of review for habeas corpus appeals. The underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Questions of law and mixed questions of law and fact receive plenary review." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 174, 982 A.2d 620 (2009). The petitioner

generally does not challenge the habeas court's factual findings. Thus, each of his claims raises either questions of law or mixed questions of law and fact, over which we exercise plenary review.

I

The petitioner first claims that the habeas court abused its discretion in denying his petition for certification to appeal from the denial of his habeas petition. Specifically, he argues that both the issue of procedural default and the issue of whether his due process rights were violated are debatable among jurists of reason, could be resolved in a different manner and are adequate to deserve encouragement to proceed further. We agree.

"Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . Id., 616, quoting *Lozada* v. *Deeds*, 498 U.S. 430, 432, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991). The required determination may be made on the basis of the record before the habeas court and the applicable legal principles. See *Simms* v. *Warden*, supra, 617. If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits. Id., 612." (Emphasis omitted; footnote omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 564, 941 A.2d 248 (2008).

Turning to the petitioner's substantive claims, we have been unable to find any case in which this court or our Supreme Court has addressed whether a petitioner procedurally defaults a claim when appellate counsel withdraws, with permission of the court, after filing an *Anders* brief, having reviewed only the record, and does not investigate new information outside the record that could develop further a due process claim, or what constitutes cause and prejudice should such a default exist. Because these questions have not yet been addressed by the appellate courts of this state, we conclude that the petitioner's claim regarding procedural default is adequate to deserve encouragement to proceed further. See *Rodriguez* v. *Commissioner of Correction*, 131 Conn. App. 336, 347, 27 A.3d 404 (2011) (concluding that claim deserved encouragement to proceed further when no appellate case had decided precise issue), aff'd on other grounds, 312 Conn. 345, 92 A.3d 944 (2014); *Small* v. *Commissioner of Correction*, 98 Conn. App. 389, 391–92, 909 A.2d 533 (2006), aff'd, 286 Conn. 707, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

Additionally, as discussed more fully in parts II and III of this opinion, we agree with the petitioner's claims that he did not procedurally default his claim, that he alternatively established cause and prejudice, and that he was denied his due process rights when the prosecutor did not correct Ellis' false testimony and then argued to the jury after testimony favorable to the prosecution that Ellis had "everything to lose, nothing to gain . . . ." We, therefore, address the merits of the petitioner's claims.

II

The petitioner next claims that he did not procedurally default his due process claim. Specifically, he

argues that the trial record was inadequate to raise the claim on direct appeal and that he did not fail to follow a firmly established and regularly followed state procedural requirement because appellate counsel was not required to investigate or augment the record. Alternatively, if procedural default is found, the petitioner claims that he established cause and prejudice for his default.

A

"A party in a habeas appeal procedurally defaults on a claim when he raises issues on appeal that were not properly raised at the criminal trial or the appeal thereafter. . . . Habeas, as a collateral form of relief, is generally available to litigate constitutional issues only if a more direct route to justice has been foreclosed through no fault of the petitioner." (Citations omitted; internal quotation marks omitted.) *Salters* v. *Commissioner of Correction*, 141 Conn. App. 81, 87, 60 A.3d 1004, cert. denied, 308 Conn. 932, 64 A.2d 330 (2013). The reviewability of habeas claims not properly pursued on appeal is subject to the cause and prejudice standard. *Jackson* v. *Commissioner of Correction*, 227 Conn. 124, 132, 629 A.2d 413 (1993).

The petitioner's due process claim is axiomatically constitutional in nature. He argues, however, that because the record was inadequate to review his claim based on the trial court record and there is no firmly established and regularly followed procedural requirement for appellate counsel to investigate or augment the record, he did not procedurally default his claim. We note that the petitioner's trial counsel thoroughly cross-examined Ellis regarding the state's promise to him, to no avail, and that information regarding Ellis' sentencing only became available after the conclusion of the petitioner's criminal trial. Given the ambiguous

and contradictory statements of the prosecutor regarding any promise to Ellis, we fail to see how the petitioner could "properly raise" his claim on appeal from the record. Our conclusion is bolstered by the fact that the petitioner's appellate counsel was granted permission by the Superior Court to withdraw because she concluded there were no nonfrivolous claims to raise on appeal. We, therefore, hold that the petitioner did not procedurally default his claim because his more direct route to justice via appeal was foreclosed through no fault of his own.

Additionally, although we observe that our precedent has established that constitutional claims that could have been raised on appeal are subject to procedural default; *Jackson* v. *Commissioner of Correction*, supra, 227 Conn. 132; one may question the application of the procedural default doctrine to due process claims under *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its analogues, which also is well established in our precedent. See, e.g., *Salters* v. *Commissioner of Correction*, supra, 141 Conn. App. 87–91. Procedural default, being a prudential limitation, is really a form of judicial economy. See *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 447 n.18, 936 A.2d 611 (2007); see also *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 71, 136 A.3d 596 (2016) ("[t]he prudential considerations underlying the procedural default doctrine are principally intended to vindicate two concerns: federalism/comity and finality of judgments").

Our appellate courts have not yet carved out an exception for such claims as they have done for *Strickland*[8] claims. See *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 570–71. In *Johnson*, our Supreme

[8] *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Court held that "[i]f a petitioner can prove that his attorney's performance fell below acceptable standards, and that, as a result, he was deprived of a fair trial or appeal, he will necessarily have established a basis for cause and will invariably have demonstrated prejudice. . . . The similarity of the second part of the *Strickland* test . . . and of the prejudice prong of the cause and prejudice test of *Wainwright* [v. *Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)] makes a threshold showing of cause and prejudice unnecessary for ineffective assistance of . . . counsel claims. . . . [W]e conclude that it is simpler and more appropriate to move directly to the *Strickland* test. . . . There is no need to confuse this process by utilizing the cause and prejudice test." (Citations omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 570–71. This exception makes more sense when one considers that ineffective assistance claims generally require the testimony of counsel, for which a habeas proceeding is better suited.

Our Supreme Court has recognized that the showing of prejudice under the procedural default doctrine "is the same showing of prejudice that is required for *Strickland* or *Brady* errors"; *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 85; and the United States Supreme Court has observed that "[c]ause and prejudice . . . parallel two of the three components of . . . *Brady* . . . . Corresponding to the second *Brady* component (evidence suppressed by the [s]tate), a petitioner shows cause when the reason for his failure to develop facts in state-court proceedings was the [s]tate's suppression of the relevant evidence; coincident with the third *Brady* component (prejudice), prejudice within the compass of the cause and prejudice requirement exists when the suppressed evidence is material for *Brady* purposes. . . . Thus, if [a petitioner] succeeds in demonstrating cause and prejudice,

he will at the same time succeed in establishing the elements of his . . . *Brady* . . . due process claim." (Citations omitted; internal quotation marks omitted.) *Banks* v. *Dretke*, 540 U.S. 668, 691, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004).

We fail to see how the converse is not also true, namely, that the petitioner establishes cause and prejudice by establishing the suppression of material exculpatory evidence under *Brady* and its analogues. At least one federal Court of Appeals uses this approach. See *Akrawi* v. *Booker*, 572 F.3d 252, 261–62 (6th Cir. 2009). In *Akrawi*, the United States Court of Appeals for the Sixth Circuit upheld the District Court's decision to ignore procedural default and address the merits of the petitioner's due process claim "in the interest of judicial economy." (Internal quotation marks omitted.) Id., 261. Noting that "[t]he cause and prejudice standard tracks the last two elements of a *Brady* claim: suppression by the government and materiality"; (internal quotation marks omitted) id.; the Sixth Circuit opted to look "past procedural default to address the merits, because . . . if [the petitioner] succeeds in showing suppression of favorable evidence material to guilt or innocence, will have necessarily shown cause and prejudice excusing his procedural default." (Internal quotation marks omitted.) Id., 261–62. We are not at liberty to overrule this court's or our Supreme Court's precedents applying the procedural default doctrine to due process claims under *Brady* and its analogues, and indeed hold that there was no procedural default in this case; however, we believe the prudential considerations underlying the doctrine would warrant "looking past procedural default to address the merits"; id., 261; of such claims.

B

Alternatively, even if we were to assume that procedural default had occurred, we conclude that the petitioner has established cause and prejudice.

"[A] petitioner must demonstrate good cause for his failure to raise a claim . . . on direct appeal and actual prejudice resulting from the impropriety claimed in the habeas petition. . . . [T]he cause and prejudice test is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, inadvertence or ignorance . . . ." (Internal quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 71."The cause and prejudice requirement is not jurisdictional in nature, but rather a prudential limitation on the right to raise constitutional claims in collateral proceedings." (Internal quotation marks omitted.) Id.

"[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or that some interference by officials . . . made compliance impracticable, would constitute cause under this standard." (Internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, supra, 227 Conn. 137.

For a petitioner to demonstrate prejudice, he "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. . . . [T]he petitioner would have to demonstrate that, with the proper instruction, there was a substantial likelihood that the jury would not have found the petitioner guilty of the crime of which he

was convicted. . . . Substantial likelihood or reasonable probability does not require the petitioner to demonstrate that the jury more likely than not would have acquitted him had it properly been instructed. . . . This is the same showing of prejudice that is required for *Strickland* or *Brady* errors. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Citations omitted; internal quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 84–85.

1

We now proceed to our further analysis of the procedural default issue. The petitioner argues that there was cause for his procedural default because "[t]he factual basis for [his] claim was not reasonably available to [appellate] counsel, and it was the state's conduct at trial that made raising the claim on direct appeal impracticable." Specifically, the petitioner argues that it was reasonable for his appellate counsel to rely on the prosecutor's statements during the criminal proceedings denying that any consideration had been offered, to rely on the prosecutor to disclose all exculpatory materials and to rely on the prosecutor not to present false testimony or then to correct any false testimony. The petitioner claims that it was only when the prosecutor and Stawicki testified at the habeas trial that it became clear that Ellis' testimony was false because prior to their testimony, the prosecutor had repeatedly denied promising Ellis anything, despite the repeated requests for information by the petitioner's trial counsel about any discussions with or incentives offered to Ellis.[9]

[9] It was only after the trial court itself asked the prosecutor specifically if he informed Ellis that he would make his level of cooperation known to the sentencing judge that the prosecutor confirmed any level of discussion with Ellis.

The respondent counters that "all of the predicate facts necessary to litigate a *Giglio* claim[10] were available to the petitioner before appellate counsel withdrew from [the] case and long before the petitioner withdrew his appeal." (Footnote added.) In addition, the respondent argues that the state disclosed any exculpatory materials, and so there can be no cause attributable to the state's conduct.

In its memorandum of decision, the habeas court disagreed with the petitioner's argument that the evidence necessary to support his claim was not available at the time his direct appeal was pending. The court found that "[t]he evidence presented by the petitioner at the habeas trial that provides the basis for his claims . . . was known or knowable from November 23, 2005, until April 23, 2013. Given how long the appeal was pending before it was withdrawn, the petitioner could have filed, pursuant to Practice Book § 42-55, a petition[11] for a new trial based on newly discovered evidence. Section 42-55 expressly authorizes action on the

[10] See *Giglio* v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). A *Giglio* or *Napue* claim is one in which a defendant claims a violation of his due process right to a fair trial when a necessary cooperating witness' false testimony concerning any promise of consideration from the government for his testimony goes uncorrected before the jury. See id., 153–55; *Napue* v. *Illinois* 360 U.S. 264, 269–72, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). Both are considered subsets of *Brady*. See footnote 22 of this opinion.

[11] Although the habeas court referred to Practice Book § 42-55 as providing for a "petition" for a new trial, that section concerns a "motion" for a new trial. A "petition" for a new trial, which is commenced by a separate civil action, is governed by General Statutes § 52-270 and may be granted for, inter alia, "the discovery of new evidence . . . ." Because it is the Superior Court that grants a petition for a new trial, such a petition is clearly not part of an appeal. In addition, the statute governing the appeal rights of defendants, General Statutes § 54-95, makes clear that a defendant "may be relieved by appeal, petition for a new trial or writ of error . . . ." The disjunctive "or" in the statute further crystalizes our conclusion that a petition for a new trial is not part of an appeal.

Additionally, the rules of practice concerning motions for a new trial, Practice Book §§ 42-53 to 42-55, are contained in the chapter pertaining to trial procedure in criminal matters before the Superior Court, not in the

petition for [a] new trial even though an appeal is pending. The record from any proceedings conducted by the criminal court, the correct forum for the petitioner's claims, could then augment the record of the direct appeal." (Footnote added.)

In looking at the habeas court's reasoning, we must first conclude that it was error to suggest as support for a lack of cause that the petitioner could petition for a new trial. Because the respondent's return asserted only that the petitioner procedurally defaulted on the basis of his not having directly raised on appeal his due process claim, a fact the habeas court acknowledged just two paragraphs prior to its cause analysis, the court could not suggest then that the petitioner should have moved or petitioned for a new trial. A motion or petition for a new trial is not part of a direct appeal. See footnote 11 of this opinion. Although the court also cited *State* v. *Floyd*, 253 Conn. 700, 756 A.2d 799 (2000), in a footnote, for the proposition that the petitioner could have moved to augment the record on direct appeal, such a procedure is not necessary for a direct appeal.

In *Salters* v. *Commissioner of Correction*, supra, 141 Conn. App. 87–89, this court held that the petitioner procedurally defaulted his *Brady* claim because, at the time of his criminal trial, he and his trial counsel were aware of a cooperating witness' history of arrests that they claimed for the first time at the habeas trial the state had failed to disclose. Specifically, the petitioner's trial counsel discussed "at length" his theories as to the existence of the witness' records, but "he did not ask for an evidentiary hearing at that time." Id., 89. Counsel did not seek further disclosure from the state at trial, and the petitioner did not claim a *Brady* violation in his direct appeal. Id.

chapter containing our rules of appellate procedure. Therefore, we conclude that a motion for a new trial, likewise, is not part of an appeal.

This case is distinguishable from *Salters* because the petitioner's appellate counsel could not have developed a due process claim without extrarecord information of which she was unaware. We note that the petitioner's appointed appellate counsel, a highly experienced appellate attorney, had only the record in front of her in determining to move to withdraw as counsel. *Anders* requires only that appellate counsel look to the entire record in deciding whether there are appealable issues. *Anders* v. *California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). We conclude that it runs contrary to the spirit of *Anders* to then impose on appellate counsel the additional duty of investigating if there are also any possible claims outside of the record to determine if additional claims are viable.[12] See id.; see also *Banks* v. *Dretke*, supra, 540 U.S. 695–96 ("[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed" and "[a] rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process").

In *Strickler* v. *Greene*, 527 U.S. 263, 284–85, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999), the United States Supreme Court found unpersuasive the respondent warden's argument that the factual basis for the assertion of a *Brady* claim was available through an examination of the cooperating witness' trial testimony coupled with a letter published in a local newspaper and that diligent counsel would have sought a discovery order from the

[12] The respondent cites to, but then does not explain, a line in *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 194, where our Supreme Court stated that "attorney error short of ineffective assistance of counsel does not adequately excuse compliance with our rules of . . . procedure." (Internal quotation marks omitted.) Given the requirements of *Anders*, we would be hard-pressed to find ineffective assistance were it claimed, and, thus, we conclude that this quote is not relevant to the present case.

state court. "Mere speculation that some exculpatory material may have been withheld [should not] suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support." Id., 286.

We note that the *Anders* brief[13] filed by appellate counsel was thirty-five pages long and comprehensively addressed all possible claims emanating *from the record*.[14] This brief then had to be analyzed independently by the trial court before allowing appellate counsel to withdraw. See *Anders* v. *California*, supra, 386 U.S. 744. The trial court, in granting the motion to withdraw, implicitly then concluded that there were no nonfrivolous issues *in the record*.

Likewise, we cannot expect an incarcerated individual such as the petitioner, after appellate counsel has been permitted to withdraw by the Superior Court, to then be able to develop new claims from the confines of prison. Such expectations defy reason. Thus, we conclude that because the factual basis underlying the petitioner's due process claim was not fully available until after his appellate counsel, who had no duty to investigate it under *Anders*, moved to withdraw, such information was not reasonably available.[15] See *Waley* v.

[13] The *Anders* brief was not in the habeas trial record, but was included in the petitioner's trial court file. We have read the brief and take judicial notice of its contents. See *Grant* v. *Commissioner of Correction*, 87 Conn. App. 814, 817, 867 A.2d 145, cert. denied, 274 Conn. 918, 879 A.2d 895 (2005).

[14] The petitioner's criminal trial record shows that the prosecutor denied having made any deal with Ellis, though he eventually admitted that he had told Ellis that his sentencing judge would be told that Ellis gave a statement. Whatever then occurred between the prosecutor and Ellis after the trial does not appear in the record.

[15] We reject any notion that counsel "should have known of such claims through the exercise of reasonable diligence." See, e.g., *Stockton* v. *Murray*, 41 F.3d 920, 925 (4th Cir. 1994), cert. denied sub nom. *Stockton* v. *Angelone*, 515 U.S. 1187, 116 S. Ct. 37, 132 L. Ed. 2d 918 (1995). *Anders* requires that appellate counsel look to the record, nothing more. See *Anders* v. *California*, supra, 386 U.S. 744. We conclude that it would be unreasonable to expect appellate counsel who had nothing to do with the trial to look beyond the record for colorable claims on appeal. See *Amiel* v. *United States*, 209 F.3d 195, 198 (2d Cir. 2000) (appellant's claim preserved from procedural default

Johnston, 316 U.S. 101, 104–105, 62 S. Ct. 964, 86 L. Ed. 1302 (1942) ("The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime . . . extends . . . to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.").

Our conclusion that the petitioner has established cause for any procedural default is further supported by precedent from the United States Court of Appeals for the Second Circuit. For example, in *United States ex rel. Washington* v. *Vincent*, 525 F.2d 262, 268 (2d Cir. 1975), cert. denied sub nom. *Bombard* v. *Washington*, 424 U.S. 934, 96 S. Ct. 1147, 47 L. Ed. 2d 341 (1976),[16] the court reversed the District Court's denial of the petitioner's petition for a writ of habeas corpus where the prosecutor knowingly used false testimony from a cooperating witness concerning any promises of leniency for the witness. The cooperating witness denied having received any consideration from the prosecutor in exchange for his testimony. Id., 262–64. In fact, the witness had told the petitioner that he had been promised leniency on a gun possession charge in consideration for his testimony. Id., 265. The petitioner informed his trial counsel, but the conversation was not brought to the court's or the prosecutor's attention before or during trial, at which the petitioner was convicted on the underlying murder charge. Id. After the

where appellant was represented by new counsel on direct appeal and claim was based on events outside trial record).

[16] Although *Vincent* predates *Wainwright* v. *Sykes*, supra, 433 U.S. 72, its holding allowing the petitioner to make his due process claim despite possible procedural shortcomings is directly applicable and not in conflict with *Wainwright*.

trial, the petitioner's trial counsel inspected the transcript of the cooperating witness' weapons possession proceedings. Id. At those proceedings, the prosecutor revealed that he had promised several times to "see what [he] could do to help [the witness]." (Internal quotation marks omitted.) Id. The petitioner then instituted a coram nobis proceeding in state court, at which the prosecutor "repeatedly insisted that no specific offer had been extended." (Emphasis omitted.) Id. After being confronted with the transcript of the dismissal of the witness' weapons charge indictment, however, he conceded that a promise had been made. Id. The court, thereafter, granted the writ of coram nobis. Id., 266. The Appellate Division of the New York Supreme Court reversed the granting of the writ of coram nobis, holding that, although the prosecutor had committed gross impropriety, any error was harmless because "the jury was made fully aware of [the witness'] prior criminal record, of the pending gun charge and of the fact that he had consumed a large quantity of alcohol on the day of the murder." (Internal quotation marks omitted.) Id. The New York Court of Appeals affirmed that decision on the ground that "the defendant and his counsel, with knowledge of the facts, stood silently by and did nothing themselves to remedy the situation . . . ." (Internal quotation marks omitted.) Id. The petitioner then petitioned for a writ of habeas corpus in the United States District Court. Id., 267. The District Court denied the petition for a writ of habeas corpus on the basis of the trial and coram nobis judge's finding that the evidence was sufficient to convict the petitioner even absent the cooperating witness' testimony. Id. The Second Circuit, thereafter, reversed the judgment of the District Court. Id. The Second Circuit determined, after its own review of the record, that the witness' testimony was "the coup de grâce, unequivocally placing [the petitioner] at the scene of the crime with the

murder weapon in his pocket, the robbery proceeds in his hands, and a confession in his mouth." Id., 267–68. In contrast, the other witnesses' testimony "was far from overwhelming." Id., 267. The court also noted that the jury was deadlocked prior to finding the petitioner guilty and that, "[c]learly, it [was] reasonable to conclude that [the cooperating witness'] testimony tipped the balance . . . ." Id., 268. The court also held that "it would be inappropriate not to permit [the petitioner] to challenge the egregious and highly damaging prosecutorial misconduct solely because he and his lawyer may have failed to utilize all available means for exploring the prosecutor's highhandedness at the trial." Id. The court thought a different result might occur in a case "where the possible harm was less pronounced"; id.; but noted that "[t]he harm . . . was caused not so much by unawareness that [the witness'] testimony may have been perjured as by inability to respond effectively in view of [the prosecutor's] silence." Id., 268 n.9.

Here, in the present case, the respondent similarly argues that the petitioner had all of the predicate facts available to him to raise his due process claim on direct appeal; however, much like in *Vincent*, the harm stemmed not from unawareness of the falsity of Ellis' testimony but from Ellis' truculence and the petitioner's inability to respond effectively in light of the prosecutor's silence. In addition, and also like *Vincent*, it was not until the prosecutor himself testified at the habeas trial that there was a complete factual record to prove the petitioner's claim. We also note that, as in *Vincent*, Ellis was the key witness who put the petitioner at the crime scene with the likely murder weapon, a revolver, in his hand. Thus, we are persuaded by the reasoning in *Vincent* that it would be inappropriate not to permit the petitioner to challenge the prosecutor's knowing use of Ellis' false testimony.[17]

[17] The Second Circuit did think that the petitioner's trial counsel in *Vincent* had other alternatives, namely, that he could "have requested a side-bar

Therefore, the petitioner established cause for any procedural default.

2

The petitioner also argues that he has established the prejudice necessary to overcome procedural default because his claimed due process violation by the state was material to his conviction. The respondent does not present any argument or citation that would counter this claim. In fact, in the respondent's brief, he unequivocally states that "[b]ased on [his] review of the trial record, the [respondent] concedes that if this court were to overturn the habeas court and find a *Giglio* violation, the prosecution's failure to correct Ellis' false testimony was material to the petitioner's convictions of murder and conspiracy to commit murder because the state's case was not strong without Ellis' testimony."[18] This concession of materiality also concedes the prejudice necessary to overcome procedural default. See *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 84–85. Although we are not bound by

conference or an in camera proceeding at which he could put the matter of [the prosecutor's] promises directly to the prosecutor." *United States ex rel. Washington* v. *Vincent*, supra, 525 F.2d 268 n.8. There are two reasons why we are not swayed by this dictum. First, the respondent's return in this case claimed only procedural default through the petitioner's failure to directly appeal his due process claim, so anything that the petitioner's trial counsel could have done at trial simply is irrelevant. Second, in *Vincent*, the petitioner learned of the witness' deal from the witness himself, unlike in this case where the prosecutor responded affirmatively to the trial court's question regarding whether he would make Ellis' sentencing judge aware of his statement. Because we also conclude that the petitioner's trial counsel exhausted his available means of exposing the prosecutor's promise to Ellis; see footnote 21 of this opinion; we fail to see another way that the jury would have learned of Ellis' uncorrected false testimony. And, unlike in *Vincent*, the prosecutor in this case bolstered Ellis' credibility by suggesting to the jury that Ellis had nothing to gain, sharpening the already substantial prejudice.

[18] It bears mentioning that the court found Ellis' testimony to be false, and the respondent also conceded its falsity during oral argument before this court.

the respondent's legal conclusions, we agree that Ellis' testimony was material to the petitioner's convictions for murder and conspiracy to commit murder. Ellis' testimony was the only testimony that placed the petitioner at the crime scene with the likely murder weapon, a revolver, in his hand.[19]

The habeas court, however, found that the petitioner did not establish prejudice because Ellis was "extensively questioned by [the petitioner's trial counsel] about his possible motivations for testifying," and the trial judge's instructions to the jury also addressed those potential motivations.[20] The habeas court further found

[19] Bennett, the other man charged with and tried for Williams-Bey's murder, did not testify at the petitioner's criminal trial.

[20] In a comprehensive charge, the trial court instructed the jury concerning Ellis' testimony as follows: "[I]n weighing the testimony of Benjamin Ellis, who is, as I mentioned, a self-confessed criminal, you should consider that fact. It may be that you would not believe a person who's committed a crime as readily as you would believe a person of good character. In weighing the testimony of an accomplice who has not yet been sentenced, or whose case, actually, to say correct[ly], has not yet been disposed of, it's still pending; you should keep in mind that he *may* be looking for some favorable treatment in the sentence or disposition of his own case. Therefore his testimony *may* have been colored by that fact. You must look, with particular care, at the testimony of an accomplice and scrutinize it very carefully before you accept it. There are many offenses that are of such character that the only persons capable, however, of giving useful testimony are those who themselves were implicated in the crime. It's for you to decide . . . what credibility you will give to Mr. Ellis, who has admitted his involvement in criminal wrongdoing, whether you will believe or disbelieve the testimony of Mr. Ellis, who, by his own admission, contributed to the crime charged by the state here. Like all other questions of credibility, this is a question you must decide based on all the evidence presented to you. You had an extensive opportunity to observe his demeanor on the stand. He was cross-examined extensively. His testimony, I must caution you, must be scrutinized carefully and if you find that he . . . intentionally assisted in the commission or aided in the commission of the offense or offenses, [with] which [the petitioner] is charged, you must be particularly careful in regard to his testimony. In weighing Mr. Ellis' testimony you should bear in mind that his charges arising from this incident are still pending. The ultimate charges he will face have not yet been determined. They *may* be the same. They *may* be changed. You should keep in mind that he *may* be looking for favorable treatment in the disposition of his own case. You may consider

that the state had no obligation to correct Ellis' false testimony because the state disclosed to the defense its promise to make Ellis' sentencing judge aware of his cooperation.

We will examine more fully the parameters of *Brady* materiality, particularly disclosure, in part III of this opinion, but we note that, although the petitioner's trial counsel indeed did question Ellis about his motivations, Ellis repeatedly stonewalled him. Trial counsel was unable to get Ellis to admit to the jury that he had some promise from the state regarding his cooperation. We do not know what more the petitioner's trial counsel could have done to present the state's promise to Ellis to the jury.[21] Thus, despite whatever awareness the petitioner might have had of the prosecutor's promise to

whether his testimony was colored by that fact and look, with particular care, upon his testimony and scrutinize it very carefully before you accept it. In addition, in considering his credibility, you may consider any motive he had for testifying falsely to implicate the accused. While Mr. Ellis has been charged with murder and conspiracy to commit murder of Kendall Williams-Bey, he's not yet been tried on those charges. In viewing this, you may consider the fact that the state's attorney *may*, without approval of the court, [change the] charges or possibly even drop [them] if the state's attorney states a reason for that . . . on the record. I have no indication, *nor is there any evidence, that that will be done.* But Mr. Ellis was cross-examined on those issues in general and in particular and you got the opportunity to evaluate his credibility. You may consider all of this in deciding whether Mr. Ellis has any interest in the outcome of this case or any bias . . . or prejudice concerning any party or any matter involved in the case." (Emphasis added.)

We note that the trial court stated that there was no evidence that the prosecutor would change or drop any charges in Ellis' pending case. At the later trial of this habeas petition, it became evident that the prosecutor dropped or reduced Ellis' charges, a fact that obviously is not in the petitioner's criminal trial record.

[21] In his brief, the respondent highlights the attempt of the petitioner's trial counsel to impeach Ellis with his false testimony. At oral argument, the respondent's counsel was asked what else the petitioner's trial counsel could have done when Ellis persisted with false testimony in light of the prosecutor's silence. Counsel argued that the petitioner's trial counsel could have asked for a stipulation or an instruction, or could have presented Ellis with the transcript of the proceeding in which the prosecutor put the agreement on the record.

Ellis, this situation is inapposite to that in which defense counsel is actually aware of false testimony and fails to bring it to either the jury's or the court's attention, which raises "the assumption . . . that he did so for strategic reasons," because when a "defendant [is] prevented from raising or pursuing the issue at trial by circumstances essentially beyond his control," that presumption of strategy is undermined. (Internal quotation marks omitted.) *United States* v. *Manual-Garcia*, 505 F.3d 1, 10–11 (1st Cir. 2007), cert. denied sub nom. *Villanueva-Rivera* v. *United States*, 553 U.S. 1019, 128 S. Ct. 2081, 170 L. Ed. 2d 819 (2008), citing *United States* v. *Iverson*, 648 F.2d 737, 739 (D.C. Cir. 1981). The court's jury instructions regarding witnesses' cooperation could not obviate the prejudice emanating from Ellis' false testimony. That is so because the jury did not hear at all about the state's promise to Ellis, however limited it was. Additionally, the prejudice was not obviated because the prosecutor's statements in closing arguments suggesting that Ellis had "everything to lose, nothing to gain," invited the conclusion that Ellis had no interest in the outcome of the case and this sharpened the prejudice of the testimony itself. Likewise, we are not convinced that the impeachment of Ellis through knowledge of his criminal convictions would suffice to mitigate any prejudice. In *Napue* v. *Illinois*, 360 U.S. 264, 270, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), the United States Supreme Court observed that it did "not believe that the fact that the jury was apprised of other grounds for disbelieving that the witness . . . may have had an interest in testifying against petitioner

Given the prosecutor's persistent denial of any promise, it is unlikely that he would have stipulated to the fact that Ellis' testimony on the issue was false, particularly in light of his later capitalization on Ellis' lie in closing argument. We similarly are unconvinced that any requested instruction would have been probable because it would have required the trial court to take judicial notice of the truth of a statement that it could not validate, as the court was not a witness to the promise made to Ellis.

turned what was otherwise a tainted trial into a fair one." Therefore, we conclude that the petitioner has established the requisite prejudice to overcome any procedural default. We next address the merits of his due process claim.

III

Finally, we address the petitioner's claims that his due process rights were violated, in contravention of *Napue* and *Giglio* v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972),[22] when the state elicited false testimony from Ellis at the petitioner's criminal trial, failed to correct the false testimony it had elicited, and then relied specifically on that false testimony during its closing argument in order to secure the petitioner's convictions. The respondent concedes both that Ellis' testimony was false and that it was material to the petitioner's convictions, but argues, nonetheless, that the prosecutor disclosed the full extent of the cooperation agreement on the record outside of the jury's presence, and, thus, that the prosecutor satisfied his due process obligations to the petitioner. We agree with

[22] In his operative petition, the petitioner framed his claim as follows: "Pursuant to the fifth, sixth and fourteenth amendments [to] the United States constitution, article first, §§ 8 and 9, of the Connecticut constitution, [*Brady*] and [*Adams*], the petitioner's constitutional rights were violated because the prosecuting authority failed to correct [the] false testimony of Benjamin Ellis and/or failed to disclose exculpatory materials."

At the habeas trial and in his appellate briefs, the petitioner referred to his claim as a violation of *Brady*, *Napue* and *Giglio*. We observe that, although *Napue* predated *Brady*, *Napue* and *Giglio* are often conflated with *Brady*. See *United States* v. *Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (*Napue* and *Giglio* fall within *Brady* rule). We, thus, take the petitioner's claim of a *Brady* violation to include references to *Napue* and *Giglio*, especially in light of his claim in his operative petition that Ellis testified falsely. See *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 363 n.6, 71 A.3d 512 (2013). Regardless, *Adams* incorporated *Brady*, *Napue* and *Giglio* into its framework, so a claim of an *Adams* violation would necessarily include the full breadth of the three cases, among others.

the petitioner that the prosecutor's use of Ellis' false testimony coupled with his statements in summation suggesting Ellis had no interest in the outcome violated the petitioner's due process rights. The jury was entitled to know any interest Ellis might have in the outcome that might motivate his testimony.

A

"The rules governing our evaluation of a prosecutor's failure to correct false or misleading testimony are derived from those first set forth by the United States Supreme Court in *Brady* v. *Maryland*, [supra, 373 U.S. 86–87], and we begin our consideration of the [petitioner's claim that his due process rights were violated] with a brief review of those principles. In *Brady*, the court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process [when] the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the [prosecutor]. . . . The United States Supreme Court also has recognized [in *Napue* v. *Illinois*, supra, 360 U.S. 269] that [t]he jury's estimate of the truthfulness and reliability of a . . . witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. . . . Accordingly, *the Brady rule applies not just to exculpatory evidence, but also to impeachment evidence* . . . which, broadly defined, is evidence having the potential to alter the jury's assessment of the credibility of a significant prosecution witness. . . . Because a plea agreement is likely to bear on the motivation of a witness who has agreed to testify for the state, such agreements are potential impeachment evidence that the state must disclose. . . .

"Not every failure by the state to disclose favorable evidence rises to the level of a *Brady* violation. Indeed,

a prosecutor's failure to disclose favorable evidence will constitute a violation of *Brady* only if the evidence is found to be material. The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial . . . . *United States* v. *Bagley*, [473 U.S. 667, 675, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)]. In a classic *Brady* case, involving the state's inadvertent failure to disclose favorable evidence, the evidence will be deemed material only if there would be a reasonable probability of a different result if the evidence had been disclosed. *Bagley*'s touchstone of materiality is a reasonable probability of a different result, and the adjective [reasonable] is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. . . .

"When, however, a prosecutor obtains a conviction with evidence that he or she knows or should know to be false, *the materiality standard is significantly more favorable to the defendant.* [A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *United States* v. *Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); accord *State* v. *Ouellette*, 295 Conn. 173,

186, 989 A.2d 1048 (2010). This standard . . . applies whether the state solicited the false testimony or allowed it to go uncorrected; e.g., *Napue* v. *Illinois*, supra, 360 U.S. 269; and is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless beyond a reasonable doubt. . . . This strict standard of materiality is appropriate in such cases not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process. *United States* v. *Agurs*, supra, 104 . . . . In light of this corrupting effect, and because the state's use of false testimony is fundamentally unfair, prejudice sufficient to satisfy the materiality standard is readily shown . . . such that reversal is virtually automatic . . . unless the state's case is so overwhelming that there is no reasonable likelihood that the false testimony could have affected the judgment of the jury." (Citations omitted; emphasis added; footnotes omitted; internal quotation marks omitted.) *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 369–73, 71 A.3d 512 (2013).

"In *Strickler* v. *Greene*, [supra, 527 U.S. 281–82], the United States Supreme Court identified the three essential components of a *Brady* claim, all of which must be established to warrant a new trial: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the [s]tate, either willfully or inadvertently; and prejudice must have ensued. . . . Under the last *Brady* prong, the prejudice that the defendant suffered as a result of the impropriety must have been material to the case, such that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine

confidence in the verdict." (Internal quotation marks omitted.) *State* v. *Ortiz*, 280 Conn. 686, 717, 911 A.2d 1055 (2006).

"[A] trial court's determination as to materiality under *Brady* presents a mixed question of law and fact subject to plenary review, with the underlying historical facts subject to review for clear error. . . . Finally, in the present case, we conduct the required independent review of the record . . . ." (Citation omitted; internal quotation marks omitted.) *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 264, 112 A.3d 1 (2015).

Because neither the petitioner nor the respondent disputes the finding[23] that Ellis' testimony concerning a promise to make his cooperation known to his sentencing judge was false,[24] which clearly was impeachment evidence, we need only determine if the improper elicitation of that testimony and reliance upon it materially prejudiced the petitioner. See *Giglio* v. *United States*, supra, 405 U.S. 153–55; see also *Napue* v. *Illinois*, supra, 360 U.S. 269–71.

As previously noted in part II B 2 of this opinion, the respondent concedes that "if this court were to . . . find a *Giglio* violation, the prosecution's failure to correct Ellis' false testimony was material to the petitioner's convictions of murder and conspiracy to commit murder because the state's case was not strong without Ellis' testimony." We conclude that such a due process violation exists.

[23] The habeas court's finding of the falsity of Ellis' statement is a factual determination subject to clear error review. See *State* v. *Satchwell*, 244 Conn. 547, 561–62, 710 A.2d 1348 (1998). We find no clear error in this finding. In addition, the respondent concedes that the finding as to the falsity of Ellis' testimony was not clearly erroneous.

[24] The petitioner and the respondent disagree on when the petitioner and his various counsel learned about the falsity of Ellis' testimony, but for reasons that will become clearer in our discussion, such a distinction is irrelevant.

In *Adams* v. *Commissioner of Correction*, supra, 309 Conn. 361–62, our Supreme Court affirmed this court's determination that the state's failure to correct false and misleading testimony from a cooperating witness was material, entitling the petitioner, Sean Adams, to a new trial. At the petitioner's criminal trial, the cooperating witness had "testified falsely that he had not been promised any consideration on his then pending charges in two unrelated criminal cases in exchange for his testimony against the petitioner and the petitioner's codefendants." Id., 363. The witness in *Adams* also vastly inflated the length of his possible maximum sentence in his testimony, claiming he could face thirty-eight years when the sentencing judge had limited his sentence to four years. Id. The prosecutor did not correct the false testimony, apparently, because he was unaware of the agreement. Id. Prior to Adams' original criminal trial, the witness had pleaded guilty in his separate cases, and he accepted the plea offer of no more than four years imprisonment. Id., 364. If he then cooperated with the state in Adams' case, however, the witness would have had the right to argue for a more lenient sentence. Id. After the witness testified in Adams' case, the prosecutor in the witness' case recommended to the sentencing judge that the court vacate the witness' guilty pleas on two of his charges and impose an unconditional discharge on a third because the witness had testified favorably in three cases, one of which involved Adams. Id., 364–66. The *Adams* petitioner then filed a petition for a writ of habeas corpus. Id., 363. In its memorandum of decision, the habeas court assumed that the witness' testimony was false and misleading, but concluded that the testimony was not material. Id., 366. On appeal to the Appellate Court, the respondent conceded that the state had failed to correct the witness' false testimony at Adams' criminal trial. Id., 367. The Appellate Court held that there was a reasonable likelihood that the witness' testimony could have affected

the jury's verdict, and it reversed the judgment of the habeas court. Id. Noting that no weapon was ever recovered and that the only physical evidence connecting the petitioner to the crime scene was a yellow jacket, the significance of which depended on the cooperating witness' and his brother's credibility, our Supreme Court, after granting the respondent's petition for certification to appeal from the Appellate Court's decision, concluded that the state's case depended largely on the credibility of two witnesses, one of whom was the cooperating witness. Id., 374. After remarking on the inconsistencies in the testimony of the other witness; id., 374–80; and the lack of any depth in the testimony of the cooperating witness' brother; id., 380–81; our Supreme Court also concluded that the testimony of the cooperating witness was significant, as "was any evidence that could cast doubt on his credibility." Id., 381. The court observed that the witness' testimony was consistent with his police statements, that "[c]ross-examination . . . was extensive and focused [and that] . . . [h]e also was questioned about the relation between his eventual decision to testify and his pending criminal charges"; id., 381–82; however, he "effectively rebuffed efforts by defense counsel to demonstrate that he was motivated to testify against the petitioner and his codefendants by any promise or expectation of leniency." Id., 382. The court was not persuaded that the calling into question of the witness' credibility by other means could substitute for the knowledge that he had been promised leniency for his testimony against the petitioner. Id., 386. The court also noted that the prosecutor repeatedly endorsed the witness' credibility during rebuttal closing argument, suggesting that he "wouldn't lie in this situation" and that the witness was "not [t]here just to nail the guys we have on trial." (Internal quotation marks omitted.) Id., 387–88. Thus, because the state's case was not strong, resting entirely

on the credibility of its witnesses, and the jury deliberated for ten days before reaching its verdict; id., 389; the court in *Adams* was "unable to conclude that [the witness'] perjurious testimony was so relatively insignificant that the state's failure to correct it d[id] not warrant relief under the strict materiality standard applicable in [the] case," and it granted the petitioner a new criminal trial. Id., 390.

The court in *Adams* did not address the issue of disclosure because it clearly did not occur in that case, but, instead, the court only dealt with materiality. Setting aside the disclosure issue, which we address in part III B of this opinion, we conclude that Ellis' testimony was material.

Unlike *Adams*, the prosecutor in the present case was also the prosecutor in Ellis' guilty pleas after the petitioner's criminal trial. Thus, there could not be a logical claim that the prosecutor was unaware of the promises made to Ellis, because he promised to bring Ellis' testimony to the attention of the sentencing judge. Similar to *Adams*, however, Ellis denied having received any consideration, despite defense counsel's repeated efforts to get him to admit the benefits he would receive from the prosecutor for his testimony against the petitioner. The prosecutor in this case then used his closing argument to enhance Ellis' credibility by arguing that Ellis had everything to lose and *nothing to gain* and that he was "in the mix." He also claimed that he did not know if Ellis expected anything, even though he had told Ellis that the state would bring Ellis' testimony to the attention of his sentencing judge. At that point, Ellis already had testified in a manner favorable to the prosecution. He was also the only witness tying the petitioner to the murder scene at the time of the killing. He was also the only witness to place a revolver in the petitioner's hands at the time and place of the shooting. There was no physical evidence in this

case that would tie the petitioner to the crime scene. In *Adams*, at least there was one piece of physical evidence, a yellow jacket. Here, the prosecutor knew that he had promised Ellis that he would bring the fact of his cooperation to the attention of his sentencing judge if he testified truthfully at the petitioner's criminal trial.

In addition, in the present case, the state's case arguably was weaker than it was in *Adams*.[25] As opposed to *Adams*, where there were at least two eyewitnesses, Ellis, who was not even an eyewitness to the shooting, was the only witness who placed the petitioner at the crime scene. He is also the only witness who put a revolver, which expert testimony established was the likely murder weapon, in the petitioner's hand. The respondent points out that Douglas also testified in a manner that implicated the petitioner; however, her testimony was based on an alleged admission to her by the petitioner. She was not an eyewitness to the murder. She was unhappy with the petitioner for personal reasons; her testimony made clear that she was angry at the petitioner for alleged infidelities. One of her letters to him stated, "I will take your f-ing freedom you bitch." For these reasons, we conclude that there is a reasonable likelihood that Douglas' testimony alone would have been insufficient to convict the petitioner of murder and conspiracy to commit murder. When the issues with Douglas' testimony are considered with Ellis' tainted testimony, and the complete lack of physical evidence that would tie the petitioner to the crime scene, we conclude that there is a reasonable likelihood of a different result because Ellis' false testimony, or the reliance on it by the prosecutor in his closing argument, could have affected the verdict of the jury. See *Merrill* v. *Warden*, 177 Conn. 427, 431, 418 A.2d 74 (1979) ("The

[25] The respondent concedes that the state's case against the petitioner was not strong without Ellis' testimony.

fact that [the witness] was a key witness made his credibility crucial to the state's case. In assessing his credibility the jury [was] entitled to know that he was testifying under false colors. Such knowledge could have affected the result."); *State* v. *Grasso*, 172 Conn. 298, 302, 374 A.2d 239 (1977) ("[w]hen a conviction depends entirely upon the testimony of certain witnesses . . . information affecting their credibility is material in the constitutional sense since if they are not believed a reasonable doubt of guilt would be created"). Therefore, under *Adams*, the petitioner has established that Ellis' false testimony was material to his conviction.

B

Our inquiry, however, does not end with the determination that false material testimony was elicited at the petitioner's criminal trial. The respondent contends that because the extent of the state's agreement with Ellis was disclosed to the petitioner's criminal trial counsel, the state did not suppress exculpatory evidence and, thus, did not violate the petitioner's due process rights. Although the petitioner disagrees that the full extent of the state's agreement was disclosed, he also argues that such disclosure needed to be made *to the jury*. This disagreement as to what level of disclosure is required stems from a split in this court's precedent regarding whether, under *Hines* v. *Commissioner of Correction*, 164 Conn. App. 712, 138 A.3d 430 (2016), and *State* v. *Jordan*, 135 Conn. App. 635, 42 A.3d 457 (2012), aff'd in part, rev'd in part on other grounds, 314 Conn. 354, 102 A.3d 1 (2014), disclosure of an agreement between the state and a cooperating witness needs to be made only to the defendant or whether it also must be made to the jury. We conclude, however, that this is neither the time nor the case for us to decide between these precedents because we conclude that, under either the *Hines* or *Jordan* standard, the state violated the petitioner's due process rights.

1

In *Jordan*, the state had disclosed to both the trial judge and defense counsel the nature of its deals with the cooperating witnesses before they testified at the defendant's trial. *State* v. *Jordan*, supra, 135 Conn. App. 658–61. Each witness then took the stand and both lied about whether they had been promised anything by the state. Id. The prosecutor failed to correct their testimony. Id., 659–61. On cross-examination, defense counsel tried to elicit from one witness whether the state had made a promise to him, which he denied, but then did not question the other witness. Id. This court in *Jordan* concluded that the prosecutor committed impropriety by failing to correct the testimony. Id., 666–67. Although the prosecutor had informed the trial court and defense counsel, the Appellate Court still found the disclosure to be inadequate. Id. "Given the witnesses' subsequent misleading testimony . . . this advance notice to the court and counsel outside the presence of the jury was inadequate, as the jurors could well have been left with the impression, created by [the witnesses'] testimony, that neither had any incentive to testify favorably for the state. Under these circumstances, we conclude that the prosecutor had a duty to correct the record before the jury." Id., 666–67. When this court went on to analyze the *Williams*[26] factors, however, it concluded, due to additional testimony and physical evidence that implicated the defendant, that the defendant was not harmed by the prosecutor's failure to correct the witnesses' misleading testimony. Id., 667–68. Our Supreme Court granted certification to appeal and affirmed in part this court's decision in *Jordan*. *State* v. *Jordan*, 314 Conn. 354, 358, 102 A.3d 1 (2014). As to the defendant's due process claim, however, the court disposed of that claim solely on the ground that the defendant was not harmed because

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

there was "sufficient independent evidence of the defendant's guilt."[27] Id., 366. The court also stated clearly that "nothing in this opinion should be construed to suggest that we concur in the Appellate Court's determination that improprieties occurred." Id., 369 n.7.

Although disclosure of materially exculpatory evidence to defense counsel would suffice under *Brady*, and *Napue* and *Giglio* are subsets of *Brady*; see footnote 22 of this opinion; our review of our state and federal precedents imply that disclosure to the jury is required in the case of known, but uncorrected, false testimony. Our Supreme Court's first discussion of *Giglio* occurred in an opinion reversing a defendant's conviction and ordering a new trial where the defendant's sixth and fourteenth amendment rights to confront the witnesses against him were violated. *State* v. *Annunziato*, 174 Conn. 376, 379–80, 387 A.2d 566 (1978). This reversal stemmed from the related federal habeas corpus proceedings of the defendant's father, who was his codefendant. In *United States ex rel. Annunziato* v. *Manson*, 425 F. Supp. 1272, 1274–81 (D. Conn.), aff'd, 566 F.2d 410 (2d Cir. 1977), the United States District Court granted a writ of habeas corpus for the petitioner father after our Supreme Court denied his direct appeal and denied his petition for certification to appeal from the dismissal of his habeas petition. The petitioner originally had been convicted of conspiracy to commit murder on the basis of the testimony from a cooperating witness, who had denied receiving any consideration

[27] Our Supreme Court concurred with this court's determination that there was "no reasonable likelihood that the potentially misleading testimony could have affected the judgment of the jury" because "there was overwhelming evidence of the defendant's guilt even without the testimony of [the witnesses]." *State* v. *Jordan*, supra, 314 Conn. 371–72. Here, Ellis' testimony placing the petitioner at the scene of the killing with the likely murder weapon in his hand was vital to the petitioner's conviction, so we cannot similarly say that the jury was unaffected by his testimony and the prosecutor's subsequent reliance on it during closing argument.

from the state for his testimony. Id., 1274–75, 1278. Prior to his criminal trial, the petitioner filed discovery motions seeking exculpatory information or material, which the court granted, but the state represented that it had none. Id., 1277. After the petitioner was convicted, the cooperating witness testified in another trial, where the petitioner's trial counsel learned that the witness "had made a deal with the state and federal governments that, in return for his giving evidence at [the] petitioner's trial and others, [the] pending state felony charges against him would be dropped, he would receive leniency on a bank robbery charge and immunity from prosecution for crimes to which he confessed while supplying information to the government." Id. The District Court found "that the state's misbehavior in [the] case could have affected the outcome of the trial" because the cooperating witness "was the state's chief witness against [the petitioner]. His testimony was all that directly tied [the] petitioner to the shooting . . . ." Id., 1279. The court also found that the witness' credibility had been "subjected to considerable scrutiny," but that "testimony of the complete deal would not have been merely cumulative. . . . In the face of [the witness'] denial as to the existence of any promise and the suppression by the prosecution of the full terms of the deal, defense counsel's argument challenging [the witness'] motive and interest was reduced to speculation and inference." Id. The court also found that "if the full terms of the agreement had been presented accurately *to the jury*, that evidence would have created a reasonable doubt as to the petitioner's guilt."[28]

[28] The petitioner also claimed that his sixth and fourteenth amendment rights to confront the witnesses were violated when the trial court refused to allow his trial counsel to cross-examine the witnesses on charges pending against them to show bias, interest or motive. *United States ex rel. Annunziato* v. *Manson*, supra, 425 F. Supp. 1275. The District Court agreed; id., 1277; and the Second Circuit affirmed. *Annunziato* v. *Manson*, 566 F.2d 410, 414 (2d Cir. 1977).

(Emphasis added.) Id., 1280–81. The Second Circuit affirmed the District Court's decision and recognized the importance of disclosing any agreements to the jury as fact finder in *Annunziato* v. *Manson*, 566 F.2d 410, 414 (2d Cir. 1977). The court, citing *Agurs* and *Giglio*, held that "where a prosecution witness falsely denies the existence of a leniency agreement, there is no need to prove deliberate design to suborn or conceal perjury on the part of the prosecution. . . . In evaluating bias and interest, *the jury* should be informed that the witness hopes for leniency on current charges *and* that the prosecutor has a present leverage over the fate of the witness. A conviction on such testimony will stand, of course, but *the jury* is entitled to make its own assessment of the witness with all the cards on the table." (Emphasis altered.) Id.; compare with *State* v. *Hackett*, 182 Conn. 511, 520, 438 A.2d 726 (1980) (finding no error in failure to allow question regarding plea bargaining that occurred prior to plea agreement because "[i]n contradistinction to *Annunziato* v. *Manson*, [supra, 412], the bargain that the witness had struck with the state *was fully disclosed to the jury*" [emphasis added]).

Our Supreme Court discussed these two *Annunziato* federal court opinions when deciding the direct appeal of the *Annunziato* petitioner's son in *State* v. *Annunziato*, supra, 174 Conn. 376. The charges against the son arose out of the same facts as the charges against the father. Id., 376–78. Although the court disposed of the appeal on the confrontation clause claim as independently relied on by the defendant's father in his federal habeas cases; see footnote 28 of this opinion; the court also discussed the parameters of the father's due process claim, noting that the Second Circuit found "that disclosure of the bargain *to the jury* would have created a reasonable doubt as to [the petitioner father's] guilt [and] concluded that his due process rights had been

violated under the principles of" *Brady*, *Giglio* and *Agurs*. (Emphasis added.) Id., 379–80.

We note that although *State* v. *Annunziato*, supra, 174 Conn. 376, has not been cited for the proposition that disclosure under *Giglio* means disclosure to the jury, it is not an outlier in this state's jurisprudence declaring as much. See *Merrill* v. *Warden*, supra, 177 Conn. 430–31 (petition for writ of habeas corpus granted where jury not made aware of nature of witness' deal with prosecutor); see also *State* v. *Paradise*, 213 Conn. 388, 400, 567 A.2d 1221 (1990) ("[t]he thrust of *Giglio* and its progeny [is] to ensure that the jury knows the facts that might motivate a witness in giving testimony" [internal quotation marks omitted]), abrogated in part on other grounds by *State* v. *Skakel*, 276 Conn. 633, 693, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006).

Jordan and the *Annunziato* trio of cases accord well with *Napue* itself. In *Napue* v. *Illinois*, supra, 360 U.S. 267–72, the United States Supreme Court reversed the denial of the petitioner's postconviction habeas petition where the prosecutor both elicited and failed to correct the false testimony of a cooperating witness who had testified against the petitioner. The court in *Napue* was unpersuaded that the petitioner's criminal trial was fair because the jury learned of other grounds for disbelieving the witness, and noted that "[h]ad *the jury* been apprised of the true facts . . . it might well have concluded that [the witness] had fabricated testimony in order to curry the favor of the very representative of the [s]tate who was prosecuting the case in which [the witness] was testifying, for [the witness] might have believed that such a representative was in a position to implement (as he ultimately attempted to do) any promise of consideration." (Emphasis added.) Id., 270. The court in *Napue* also observed that the final testimony of the witness that the jury heard was whether he

had been promised any consideration for his testimony, which the court concluded meant that the prosecutor must have thought it was important to establish before the jury.[29] Id., 270–71.

Later, in *Giglio* v. *United States*, supra, 405 U.S. 150–55, the United States Supreme Court extended *Napue* to include the situation where the lead prosecutor is unaware that a second prosecutor has promised the cooperating witness consideration for his testimony, and then the witness lies about such consideration at trial. The court noted that the District Court "proceeded on the theory that even if a promise had been made by [the second prosecutor] it was not authorized and its disclosure *to the jury* would not have affected its verdict." (Emphasis added.) Id., 153. The court reversed, stating that "neither [the second prosecutor's] authority nor his failure to inform his superiors or associates [was] controlling." Id., 154. In discussing the materiality of the witness' testimony, the court reasoned that "the [g]overnment's case depended almost entirely on [the witness'] testimony; without it there could have been no indictment and no evidence to carry the case to the jury. [The witness'] credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility *and the jury was entitled to know of it*." (Emphasis added.) Id., 154–55.

As was the case in *Giglio*, we cannot help but observe that the state's case was also almost entirely dependent on Ellis' testimony. His credibility, therefore, was

[29] In this case, we also observe that the prosecutor must have thought it was important to deny that Ellis had been promised any consideration for his testimony because he stated in both his closing and rebuttal arguments that Ellis had everything to lose and nothing to gain in giving his statements to the police and that any expectations he might have were "in his mind . . . ."

important, and evidence of his promise from the prosecutor would be relevant to his credibility. It bore on whether he had anything to gain by his testimony. Therefore, the jury was entitled to know of it.[30]

Under the *Jordan* standard, it is crystal clear that the prosecutor failed to disclose his promise to Ellis to the jury or to correct what the habeas court found and the respondent conceded was Ellis' false testimony to the jury. *Jordan* and its antecedents would require that the jury be made aware of the agreement. That did not happen here. Although the prosecutor disclosed his promise to Ellis to the defense, "[t]he [petitioner] gains nothing, however, by knowing that the [state's] witness has a personal interest in testifying unless he is able to impart that knowledge to the jury." *United States* v. *Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977); see also *Alcorta* v. *Texas*, 355 U.S. 28, 31, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957) (knowing use of false testimony offends due process because of false impression given to jury); *Sivak* v. *Hardison*, 658 F.3d 898, 909 (9th Cir. 2011) ("It is irrelevant whether the defense knew about the false testimony . . . because defendants [cannot] waive the freestanding ethical and constitutional obligation of the prosecutor as a representative of the government to protect the integrity of the court and the criminal justice system. . . . Whether defense counsel

[30] In reading *Giglio* and *Napue* against *Brady*, it becomes clearer how disclosure in *Brady* can mean disclosure to the defendant while disclosure in *Napue* and *Giglio* can mean disclosure to the jury. In *Brady* v. *Maryland*, supra, 373 U.S. 84, the suppressed evidence was a statement made to the police by a codefendant. Under the rules of evidence, such a statement would be admissible as evidence for substantive purposes. See also *State* v. *Whelan*, 200 Conn. 743, 753–54, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). When a witness gives false testimony, however, the prosecutor and the witness himself are the keepers of the truth. Without evidence of the falsity of the statement through admission by the witness, disclosure to the defendant or his counsel of any consideration the state offers to a cooperating witness is useless unless the jury gets to hear it.

is aware of the falsity of the statement is beside the point." [Citations omitted; internal quotation marks omitted.]).

2

On the other hand, if the standard for disclosure, instead, is governed by *Hines*, the level of disclosure required is merely that the state makes defense counsel aware of the agreement.[31] See *Hines* v. *Commissioner*

[31] The ambiguity in what level of disclosure is required seems to have started with *State* v. *Paradise*, supra, 213 Conn. 388. Besides pointing out that *Giglio* is meant to ensure that the jury knows the facts, the court in *Paradise* also cited to a case from the United States Court of Appeals for the Third Circuit, which stated: "Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue* require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading." (Internal quotation marks omitted.) Id., 400, quoting *United States* v. *Harris*, 498 F.2d 1164, 1169 (3d Cir.1974), cert. denied sub nom. *Young* v. *United States*, 419 U.S. 1069, 95 S. Ct. 655, 42 L. Ed. 2d 665 (1974). This language from *Harris* that was cited in *Paradise* was later quoted in *State* v. *Ouellette*, supra, 295 Conn. 186, which was then cited in *Hines* without attribution to *Harris*. *Hines* v. *Commissioner of Correction*, supra, 164 Conn. App. 727–28. In *Ouellette*, however, the plea agreement with the cooperating witness was revealed to the defendant, judge *and the jury*. *State* v. *Ouellette*, supra, 187.

Additionally, *Harris* did not turn on what level of disclosure was required because "defense counsel waived their objections to the impropriety by consciously failing to take any steps to minimize the resulting prejudice." *United States* v. *Harris*, supra, 498 F.3d 1166. Indeed, in discussing the waiver issue, the court pointed out defense counsel's lack of effort to disclose the government's agreement with the cooperating witness *to the jury* or to proffer the prosecutor's stipulation regarding the same *to the jury*. Id., 1170.

Likewise, in *Paradise*, our Supreme Court found it unnecessary to determine if the defendant's claims regarding false testimony concerning an agreement with the state were true because the cooperating witness stated in his testimony that he hoped to receive a lower sentence by testifying. *State* v. *Paradise*, supra, 213 Conn. 400–401. Because *the jury* actually learned of the witness' motivation for testifying, there was no *Giglio* violation. Id., 401. Thus, any citation to *Ouellette*, *Harris* or *Paradise* for the notion that *Giglio* is satisfied by disclosure to the court or defense without notifying the jury does not arise out of the facts of any of those cases.

Previously in this opinion, we also observed that *Brady*, *Napue* and *Giglio* often are conflated. See footnote 22 of this opinion; *United States* v. *Bagley*, supra, 473 U.S. 676. We have no doubt that this conflation plays a role in the confusion over what level of disclosure is required because disclosure

of Correction, supra, 164 Conn. App. 726. In *Hines*, the petitioner claimed that the state failed to disclose that it had made promises to a codefendant in exchange for his cooperation. Id., 720. The state denied any such promises, but this court held that the state had promised to remain silent at the codefendant's sentencing and to convey to the judge his cooperation. Id., 725. Nevertheless, the court concluded that because the prosecutor told defense counsel, albeit casually, that this was the extent of the agreement, a disclosure had been made, and, thus, the state was not required to correct the codefendant's testimony. Id., 728.

Here, the petitioner and the respondent disagree about whether the disclosure to defense counsel was adequate to satisfy the state's obligation under *Brady*. We must observe that the prosecutor initially denied that any promise had been made to Ellis. It was not until the trial court stated that, in the past, prosecutors would make a witness' cooperation known to the sentencing judge, and then asked the prosecutor if that was the case here, that the prosecutor acknowledged what he had promised to Ellis. Absent the trial court's question, there would have been absolutely no disclosure of any kind on the state's part.[32]

Assuming that the prosecutor satisfied his disclosure requirement under *Hines*, we conclude that the petitioner still was harmed when the state bolstered Ellis'

to defense counsel is all that is required in a typical *Brady* case. See *State* v. *Dolphin*, 195 Conn. 444, 455–56, 488 A.2d 812 ("[e]vidence known to the defendant or his counsel, or that is disclosed, even if during trial, is not considered suppressed as that term is used in *Brady*"), cert. denied, 474 U.S. 833, 106 S. Ct. 103, 88 L. Ed. 2d 84 (1985).

[32] Much like our Supreme Court said in *Ouellette* and elsewhere, we "are cognizant of the exhortation of the United States Supreme Court that 'it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.' *Napue* v. *Illinois*, supra, 360 U.S. 269. Only through complete and candid disclosure of a witness' interest can *the jury* accurately gauge the credibility of the testimony proffered." (Emphasis added.) *State* v. *Ouellette*, supra, 295 Conn. 190.

testimony during closing and rebuttal arguments. As we have noted, the prosecutor stated that Ellis "wanted to get [his testimony] off his chest. He knew and knows that his statements put him in the mix." He also argued that Ellis "had everything to lose, nothing to gain, by giving these statements," and that Ellis "has been charged with this crime, too. And his position is he's only the driver, he had nothing to gain by giving these statements. He, clearly, said he wasn't made any promises. Does he expect something? That's in his mind. I don't know. But the reality is: he is in the mix."

In *Hines*, however, there is nothing in the decision indicating that the prosecutor obscured the witness' interest in the outcome during summation. Likewise, two recent habeas appeals arising out of the same crime, *Gomez* v. *Commissioner of Correction*, 178 Conn. App. 519, 176 A.3d 559 (2017), cert. granted, 328 Conn. 916, 180 A.3d 962 (2018), and *Brown* v. *Commissioner of Correction*, 179 Conn. App. 358, 179 A.3d 794, cert. denied, 328 Conn. 919, 181 A.3d 91 (2018), do not involve a scenario where the prosecutor bolstered the cooperating witnesses' false testimony about no promise when each witness, in fact, did have an interest in the outcome of the case.

In *Gomez*, the petitioner claimed that agreements between the state and the witnesses to bring their cooperation to the attention of their sentencing judge went undisclosed. *Gomez* v. *Commissioner of Correction*, supra, 178 Conn. App. 534. The habeas court found that at least one of the defense attorneys was aware of the agreement. Id. Citing *Hines*, this court rejected the claim of nondisclosure on the basis of the habeas court's finding that the defense attorney was aware of the arrangement. Id., 535–36. The petitioner in *Gomez* also argued that his due process rights were violated when the witnesses' false testimony was presented at his criminal trial. Id., 538. Although noting the tension

between *Jordan* and *Hines*, this court held that because the agreements were disclosed, the state was not required to correct the false testimony. Id., 540–41. In *Brown*, this court rejected the same claims the petitioner in *Gomez* made, namely, that the state failed to disclose its agreements with the witnesses. *Brown* v. *Commissioner of Correction*, supra, 367–68. In both cases, this court also rejected the petitioners' arguments that the state failed to disclose impeachment evidence of the witnesses relating to how the state assisted in reducing their bonds. Id., 368–73; *Gomez* v. *Commissioner of Correction*, supra, 536–38. In *Gomez*, this court held that because the transcripts were available to the petitioner, there was no failure to disclose. Id. In *Brown*, however, this court held that "the petitioner did not present evidence at his habeas trial that compelled a finding that the state reached an agreement" with the witnesses respecting their bond hearings. *Brown* v. *Commissioner of Correction*, supra, 373. We, therefore, distinguish *Hines*, *Gomez* and *Brown* from the present case because none of those cases involved the knowing use of false testimony by the prosecutor in closing argument.

Our state courts have not addressed a situation where an agreement concerning a cooperating witness and the state was disclosed to the court and defense counsel, but the prosecutor nonetheless argued that the cooperating witness had everything to lose and nothing to gain in closing and rebuttal arguments. However, multiple federal Courts of Appeals have addressed similar situations. "Standing alone, a prosecutor's comments upon summation can 'so [infect] a trial with unfairness as to make the resulting conviction a denial of due process.' " *Jenkins* v. *Artuz*, 294 F.3d 284, 294 (2d Cir. 2002),[33] quoting *Darden* v. *Wainwright*, 477

[33] *Jenkins* was cited approvingly in *State* v. *Ouellette*, supra, 295 Conn. 186, for its discussion of the application of *Napue* and *Brady* to undisclosed plea agreements.

U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). In *Jenkins*, the Second Circuit observed that the prosecutor in that case bolstered her witness' credibility in closing arguments "by falsely suggesting the absence of a deal between [a cooperating witness] and the prosecution." *Jenkins* v. *Artuz*, supra, 294. The prosecutor claimed that she had never met the witness prior to trial, and, "[n]oting that there was no bad blood between [the witness] and the defendant . . . asked the jury to conclude that [the witness] had no reason to lie." (Internal quotation marks omitted.) Id. The court held that the prosecutor's "attempt to hide [the witness'] plea agreement from the jury and to use the false impression of its absence to bolster his credibility [left the court] with no doubt that [the prosecutor's] behavior violated [the petitioner's] due process rights." Id. The Second Circuit tempered this holding, stating that it "need not determine whether [the prosecutor's] summation independently abridged [the petitioner's] due process rights. It plainly sharpened the prejudice resulting from the use of [the witness'] initial untruthful testimony. The advocacy shown in the record . . . has no place in the administration of justice and should neither be permitted nor rewarded." (Internal quotation marks omitted.) Id., 294–95. Notably, the prosecutor in *Jenkins* acknowledged to the trial court that the state and the cooperating witness "had entered a plea agreement, as a condition of which he had agreed to cooperate and testify truthfully and fully, and that she expect[ed] it [would] come out on direct [examination]."[34] (Internal quotation marks omitted.) Id., 287.

In a prior case, *DuBose* v. *Lefevre*, 619 F.2d 973, 974–79 (2d Cir. 1980), the Second Circuit reversed the District Court's denial of a petition for a writ of habeas

[34] The prosecutor even objected when defense counsel attempted to elicit the truth of any deal on cross-examination. *Jenkins* v. *Artuz*, supra, 294 F.3d 288.

corpus where a cooperating witness falsely denied having received consideration from the prosecutor and the prosecutor then argued in summation that the witness had made no deal with the state, "but had chosen to testify to the truth with knowledge that it could only lead to continuation of her existing jail confinement." In fact, the cooperating witness had made a deal with the prosecutor, which came out during her plea hearing four days after the petitioner had been convicted. Id., 975–76. The petitioner then filed a motion to set aside the verdict on the basis of newly discovered evidence because of prosecutorial misconduct. Id., 976. The trial court found that no deal had been struck between the witness and the prosecutor, which the Appellate Division affirmed, and leave to appeal to the New York Court of Appeals was denied. Id., 977. The petitioner then applied for a writ of habeas corpus in the federal District Court, which denied the petition. Id. On appeal, the Second Circuit reversed, holding that "[t]he [s]tate's attempt to reconcile its evidence at [the petitioner's] trial that it had not offered [the witness] any kind of deal or any kind of promise or anything in exchange for her testimony with its repeated flat statements at the [the witness'] plea hearing that it made an agreement . . . long before the murder trial started [to recommend] acceptance of the misdemeanor plea strains credulity almost to the breaking point." (Internal quotation marks omitted.) Id., 978. Holding that an agreement indeed had been made, which was not made known *to the jury*, and that the jury could have rejected the witness' testimony on that basis, the court concluded that "[t]he fact that the promise may not have taken a specific form did not allow the prosecution to avoid disclosing *to the jury* the fair import of its understanding with the witness when the question arose during cross-examination and redirect." (Emphasis added.) Id., 978–79. The court then held that the petitioner was harmed

because without the cooperating witness' testimony, the state had virtually no case.[35] Id., 979. Concluding that, under *Giglio*, the jury was entitled to know of the prosecutor's deal with the cooperating witness, the court reversed the judgment of the District Court with instruction to grant the writ. Id.

We are persuaded by the Second Circuit's reasoning that any knowledge by the court or defense counsel through disclosure of a plea agreement can be thwarted by the prosecutor's examination of a witness or closing arguments, which requires reversal. See *Jenkins* v. *Artuz*, supra, 294 F.3d 295–96; *United States* v. *Wallach*, 935 F.2d 445, 456 (2d Cir. 1991) ("if it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic" [internal quotation marks omitted]);[36] *Adams* v. *Commissioner of Correction*, supra, 309 Conn. 372 ("because the state's use of false testimony is fundamentally unfair, prejudice sufficient to satisfy the materiality standard is 'readily shown' . . . such that

[35] The only evidence placing the petitioner in *DuBose* at the crime scene other than the witness' testimony stemmed from "an incoherent and frenzied statement by [the petitioner] when he went to the police station looking for one of the investigating officers, and, while dashing his head on a railing, said something described by various witnesses as 'I killed him' or 'I kill 'im' or 'I'll kill him' and later, while rolling on the floor, accused the investigator of tricking him. The prosecution contended this was a confession." *DuBose* v. *Lefevre*, supra, 619 F.2d 974.

[36] *Wallach* also distinguishes between situations where the prosecutor knows or should have known of perjured testimony and those where he does not. In the case "[w]here the prosecution knew or should have known of the perjury, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." (Internal quotation marks omitted.) *United States* v. *Wallach*, supra, 935 F.2d 456. But, "[w]here the government was unaware of a witness' perjury . . . a new trial is warranted only if the testimony was material and the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." (Internal quotation marks omitted.) Id. This is not a case where the prosecutor was unaware of what he promised to the witness, so we need only conclude that Ellis' false testimony could have affected the jury's judgment, which we do.

'reversal is virtually automatic' " [citation omitted]). We, therefore, conclude that, even to the extent that the petitioner's trial counsel was aware of the state's agreement with Ellis, which would satisfy the disclosure requirement of *Hines*, such a disclosure was effectively negated by the prosecutor's harmful bolstering of Ellis during closing arguments. We note that *Jenkins* and *DuBose* are not outliers, and the Second Circuit is not the only federal court of appeals to rule in this manner.[37] See *United States* v. *Stein*, 846 F.3d 1135, 1147 (11th Cir.) ("where the government not only fails to correct materially false testimony but also affirmatively capitalizes on it, the defendant's due process rights are violated despite the government's timely disclosure of evidence showing the falsity"), cert. denied, U.S. , 138 S. Ct. 556, 199 L. Ed. 2d 436 (2017); *Shih Wei Su* v. *Filion*, 335 F.3d 119, 127–30 (2d Cir. 2003) (sufficient prejudice found where witness lied about not having been promised anything in exchange for testimony, lie went uncorrected, and prosecutor bolstered witness' credibility in summation, despite different prosecutor having made deal with witness); *DeMarco* v. *United States*, 928 F.2d 1074, 1077 (11th Cir. 1991) ("the prosecutor's argument to the jury capitalizing on the perjured testimony reinforced the deception of the use of false testimony and thereby contributed to the deprivation of due process"); *Brown* v. *Wainwright*, 785 F.2d 1457, 1464 (11th Cir. 1986) ("[t]he government has a duty not to exploit false testimony by prosecutorial argument affirmatively urging to the jury the truth of what it knows to be false"); *United States* v. *Sanfilippo*, supra,

[37] Although, as noted, other federal Courts of Appeals have held that the prosecutor's knowing use of such false testimony in summation violates due process despite any disclosure to the defendant, we are particularly attuned to the Second Circuit opinions because, after the petitioner in this case exhausts his remedies in our state courts, it augurs how his case would turn out in federal court. That other circuits have ruled in the same manner only bolsters our conclusion.

564 F.2d 179 (reversal merited when government "not only permitted false testimony of one of its witnesses to go to the jury, but argued it as a relevant matter for the jury to consider").[38] We conclude that these cases accord well with United States Supreme Court precedent. See *United States* v. *Agurs*, supra, 427 U.S. 103 ("the [United States Supreme] Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair"); *Miller* v. *Pate*, 386 U.S. 1, 7, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967) ("[T]he [f]ourteenth [a]mendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. . . . There has been no deviation from that established principle. . . . There can be no retreat from that principle here." [Citations omitted.]); *Mooney* v. *Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791 (1935) (Due process "is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a [s]tate has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a [s]tate to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.").

[38] One federal Court of Appeals has gone so far as to hold that due process was violated where the prosecutor elicited false testimony from a government witness and argued during closing argument that the witness was credible, then conceded in rebuttal argument that the witness had lied, but argued that the lie was unimportant because the defense could no longer explain why the lie was important. *United States* v. *LaPage*, 231 F.3d 488, 492 (2000), amended, 271 F.3d 909 (9th Cir. 2001) (adding dissent). Another held that due process was violated despite the prosecutor disclosing some of the terms of the agreement to the jury in his opening statement because the whole agreement was not disclosed and "an opening statement is not evidence." *United States* v. *Bigeleisen*, 625 F.2d 203, 208 (8th Cir. 1980).

Given the circumstances of this case, the promise between Ellis and the prosecutor as disclosed was not necessarily something that, at the time, would have been favorable to the petitioner. Ellis had not testified at that point. It was possible that he would testify placing the petitioner at the crime scene, which ultimately he did, but it also was possible that he would recant his pretrial statements to police, as witnesses sometimes do. See *State* v. *Whelan*, 200 Conn. 743, 746, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). Once Ellis had testified, however, and did not recant his statements, but, indeed, inculpated the petitioner, it would have been clear then to the prosecutor that the state's agreement with Ellis to bring his level of cooperation to the sentencing judge was favorable to Ellis. The prosecutor's closing and rebuttal arguments, therefore, could not fairly suggest to the jury, as did the prosecutor, that Ellis had everything to lose and nothing to gain.[39] At that point, Ellis could have expected to have advanced beyond mere hope to an expectation of some favorable treatment in his own case. Such information should have been made known to the jury so that, in weighing the testimony of Ellis, it could have weighed any potential effect that the promise of the prosecutor to bring Ellis' cooperation, at that point in a favorable manner, to the attention of the sentencing judge might have had on Ellis' testimony. For the prosecutor to argue that Ellis had everything to lose and nothing to gain when Ellis had testified favorably for the prosecution and had been promised that his testimony would be disclosed to his sentencing judge cannot be justified.[40]

[39] The respondent argues that the prosecutor's comment that Ellis had "nothing to gain" referred to his statements to police. At worst, the respondent claims, the remarks were ambiguous. The respondent's argument ignores both the context of the statement and the bevy of other remarks the prosecutor made in summation that falsely implied that Ellis had been made *no promises* and that any expectations were in his mind.

[40] What occurred with Ellis' later pleas and sentence reductions is relevant in confirming that a promise, in fact, had been made, but only to prove that

C

Finally, we address the respondent's argument that should we find a due process violation, we, nonetheless, should uphold the petitioner's separate conviction on the tampering with a witness charge. The respondent contends that none of the evidence emanating from Ellis' testimony had any bearing on the tampering charge. The petitioner argues that the conviction of tampering "is buoyed by the assumption that the petitioner is guilty" of the murder and conspiracy to commit murder charges. We agree with the respondent.

In order to be convicted of tampering with a witness, the state must prove that a defendant, "believing that an official proceeding is pending or about to be instituted . . . induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding." General Statutes § 53a-151 (a).

In the petitioner's criminal trial, evidence was introduced of letters the petitioner had sent to Douglas. In one letter to Douglas, the petitioner wrote: "If anybody come trying to talk to you to death like you know me, and, shit, of course you know me and what not, but *you don't tell nobody that you don't know shit and don't want to* . . . ."[41] (Emphasis added.) In another letter, the petitioner wrote that "I'm schooling you on keeping your head right . . . ."

Given the elements required to prove tampering with a witness, we conclude that the jury reasonably could

the petitioner's due process rights were violated at his criminal trial. Outside of this confirmation, neither our *Jordan* nor *Hines* analyses depends on what occurred after trial because the due process violation either occurred when the prosecutor failed to disclose to the jury his promise to Ellis (*Jordan*) or when the prosecutor relied on Ellis' false testimony in closing and rebuttal arguments (*Hines*/*Jenkins*).

[41] Although the petitioner used a double negative, it is clear from context that he did not want Douglas to testify about any involvement the petitioner may have had.

have found that the petitioner attempted to induce Douglas to withhold testimony. Despite the petitioner's argument that the conviction is "buoyed" by his other convictions and Ellis' false testimony regarding them, tampering with a witness can be established even absent other convictions. See *State* v. *Gethers*, 197 Conn. 369, 370, 497 A.2d 408 (1985). We, therefore, conclude that Ellis' false testimony was not material to the tampering with a witness charge or conviction.[42]

The judgment is reversed in part and the case is remanded with direction to render judgment granting the petition for a writ of habeas corpus, vacating the petitioner's underlying convictions under §§ 53a-54 and 53a-48 and ordering a new trial on those offenses; the judgment is affirmed as to the petitioner's underlying conviction under § 53a-151.

In this opinion the other judges concurred.

MARCOS MERCADO *v.* COMMISSIONER OF CORRECTION
(AC 39802)

Alvord, Keller and Prescott, Js.

Syllabus

The petitioner, who had been convicted of murder, felony murder, and robbery in the first degree, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance by, inter alia, failing to object to the use of testimony elicited from the petitioner on cross-examination and from his former girlfriend, B, in the state's rebuttal, regarding whether the petitioner had acknowledged to B that he

[42] The petitioner was sentenced to an effective sentence of sixty years of incarceration, which included a sixty year term for the murder charge, a twenty year term for the conspiracy to commit murder charge, which was ordered to run concurrent with the murder sentence, and a five year term for the tampering charge, which was ordered to run consecutive to the conspiracy sentence, but concurrent with the murder sentence. We note that the petitioner has been incarcerated since before his conviction on the charges and that he likely has served his sentence on the tampering conviction by this point in time.

had committed certain crimes in the past. The petitioner also claimed that his trial counsel was ineffective in failing to object to evidence pertaining to the petitioner's possession of a certain assault rifle seized incident to his arrest, and failing to present testimony from a firearms expert to prove that the assault rifle was not the murder weapon. The habeas court rendered judgment denying the habeas petition on the ground that the petitioner had failed to establish that trial counsel's claimed errors prejudiced him and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, as the petitioner failed to show that there was a reasonable probability that but for trial counsel's alleged unprofessional errors, the result of the proceeding would have been different: it was unlikely that the preclusion of the challenged evidence would have changed the result of the petitioner's criminal trial when viewed in the context of the overwhelming amount of evidence against the petitioner, including his voluntary confession to the police that he shot the victim with the assault rifle that he retrieved from the trunk of his vehicle and that he took the victim's game console, which was corroborated by forensic evidence and the testimony of, inter alia, the state's experts and B, and the petitioner could not show that if his trial counsel had presented the evidence of his own firearms expert, the result of his criminal trial would have been different, as the petitioner failed to show that such an expert would have offered any opinions in addition or contrary to those of the state's expert at his criminal trial; furthermore, the petitioner could not prevail on his claim that his trial counsel had provided ineffective assistance by failing to object to the state's recalling of B on rebuttal and to adequately preserve that issue for purposes of appellate review, as the testimony of the petitioner's criminal defense expert at the habeas trial established only that this court did not review the petitioner's claim on direct appeal because it was not preserved for appeal, and in the absence of expert testimony that this court would have reversed the petitioner's conviction had trial counsel preserved the record for appeal, the petitioner had provided no basis from which a court could find a reasonable probability that the result of his appeal would have been different.

Argued March 20—officially released July 24, 2018

Procedural History

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

petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Peter Tsimbidaros, for the appellant (petitioner).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Kelli A. Masi*, senior assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Marcos Mercado, appeals from 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 abused its discretion in denying his petition for certification to appeal and improperly rejected his claim that his trial counsel rendered ineffective assistance. Specifically, the petitioner claims that his trial counsel rendered ineffective assistance by failing: (1) to take appropriate measures at trial to preclude the introduction of evidence of the petitioner's prior commission of crimes; (2) to take appropriate measures to preclude, or failing to call an expert to challenge, the state's introduction of firearms and ballistics evidence; and (3) to adequately preserve an issue for appellate review. We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal. Accordingly, we dismiss the appeal.

The following facts, as set forth by this court on the petitioner's direct appeal, are relevant to our resolution of the petitioner's claims. "On December 26, 2007, the Southington police went to the apartment of the victim, Thomas Szadkowski, at 81 Academy Street to check on his welfare, as he had not reported to work that day. The police found the victim in his kitchen, lying dead of a gunshot wound. During their search of the victim's

apartment, the Southington and state police observed a number of open windows on the screen of the victim's computer. One window depicted an America Online instant message exchange between the [petitioner] and the victim, which took place between approximately 8:45 and 9:45 p.m. on December 24, 2007.

"The instant message screen revealed that the victim had invited the [petitioner] to his apartment. Another open screen displayed the [petitioner's] photograph and profile. The [petitioner] accepted the invitation and drove to the victim's apartment. After the [petitioner] and the victim engaged in a sexual act, the [petitioner] retrieved a gun from his motor vehicle, returned to the victim's apartment and shot him. When he left the apartment, the [petitioner] took the victim's Xbox 360 game console (Xbox). On December 26, 2007, the [petitioner] gave the Xbox to a former girlfriend, Laurel Brooks, as a gift for her younger brother. The [petitioner] was arrested at his home in New Britain on December 30, 2007. He subsequently signed a written statement and confessed, during a videotaped interview, to having shot the victim.[1]" (Footnote in original.) *State* v. *Mercado*, 139 Conn. App. 99, 100–101, 54 A.3d 633, cert. denied, 307 Conn. 943, 56 A.3d 951 (2012).

The court appointed Attorneys Christopher D. Eddy and Kenneth W. Simon to represent the petitioner. In a substitute long form information, the state charged the petitioner with murder in violation of General Statutes § 53a-54a, felony murder in violation of General Statutes

[1] "The [petitioner] filed a motion to suppress his statements claiming that they were the product of police intimidation and coercion and therefore were not voluntary. The court denied the motion to suppress. Before the jury, the [petitioner] testified that his written and videotaped statements were not the truthful product of his free will. He agreed to sign the statements to provide the police with the information they wanted in order to end the police questioning." *State* v. *Mercado*, 139 Conn. App. 99, 101 n.3, 54 A.3d 633, cert. denied, 307 Conn. 943, 56 A.3d 951 (2012).

§ 53a-54c, and robbery in the first degree in violation of General Statutes § 53a-134 (a) (2). After a trial, the jury found the petitioner guilty of all three counts. The trial court, *Espinosa*, *J.*, merged the felony murder conviction into the murder conviction and sentenced the petitioner to a total effective sentence of seventy years incarceration on the murder and robbery charges. The petitioner appealed from the judgment of conviction, which this court affirmed. See id., 100, 107. The petitioner then petitioned for certification to our Supreme Court, which that court denied. *State* v. *Mercado*, 307 Conn. 943, 56 A.3d 951 (2012).

On March 3, 2016, the petitioner filed a third amended petition for a writ of habeas corpus, in which he alleged the ineffective assistance of his trial counsel. Specifically, as summarized by the habeas court in its memorandum of decision, the petitioner claimed that his trial counsel provided him with ineffective assistance by "failing to object, exclude, or move to limit the use of testimony elicited from the petitioner on cross-examination and from Laurel Brooks, in the state's rebuttal, regarding whether the petitioner had acknowledged to Brooks having committed robberies in the past . . . failing to object, exclude, or move to limit the use of evidence pertaining to the petitioner's possession of a .223 caliber [AR-15] Bushmaster assault rifle seized incident to his arrest . . . failing to present testimony from a firearms expert to prove that [the] Bushmaster rifle was not the murder weapon; and . . . failing to investigate adequately the possibility that Richard Diaz was the real culprit."[2]

A trial commenced before the habeas court, *Sferrazza*, *J.*, on October 3, 2016. The court heard testimony from Lieutenant Joseph Rainone, a Waterbury police officer who testified at the petitioner's criminal trial as

[2] Diaz is the petitioner's cousin.

a firearms expert for the state; Dr. Albert Harper, a firearms expert; Attorneys Eddy and Simon; Diaz; Carmen Baez, an investigator for the Office of the Public Defender; Attorney Sebastian DeSantis, a Connecticut criminal defense attorney; and the petitioner.

After trial, in a written memorandum of decision dated October 13, 2016, the habeas court denied the petition for a writ of habeas corpus. The court determined that the petitioner had failed to establish that trial counsel's claimed errors prejudiced him. The petitioner then filed a petition for certification to appeal, which the habeas court denied. This appeal followed.

"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. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . 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."

(Internal quotation marks omitted.) *Brown* v. *Commissioner of Correction*, 179 Conn. App. 358, 364, 179 A.3d 794, cert. denied, 328 Conn. 919, 181 A.3d 91 (2018).

"We examine the petitioner's underlying claim[s] of ineffective assistance of counsel in order to determine whether the habeas court abused its discretion in denying the petition for certification to appeal. Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Parrott* v. *Commissioner of Correction*, 107 Conn. App. 234, 236, 944 A.2d 437, cert. denied, 288 Conn. 912, 954 A.2d 184 (2008).

"In order to establish an ineffective assistance of counsel claim a petitioner must meet the two-pronged test enunciated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Specifically, the claim must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . Because both prongs of *Strickland* must be demonstrated for the petitioner to prevail, failure to prove either prong is fatal to an ineffective assistance claim." (Citation omitted; internal quotation marks omitted.) *Hall* v. *Commissioner of Correction*, 152 Conn. App. 601, 608, 99 A.3d 1200, cert. denied, 314 Conn. 950, 103 A.3d 979 (2014). "[A] court need not determine the deficiency of counsel's performance if consideration of the prejudice

prong will be dispositive of the ineffectiveness claim." (Internal quotation marks omitted.) *Parrott* v. *Commissioner of Correction*, supra, 107 Conn. App. 237.

The petitioner contends on appeal that the habeas court abused its discretion in denying his petition for certification to appeal because his trial counsel rendered ineffective assistance in three respects. He first claims that trial counsel was ineffective in "failing to take appropriate measures to preclude the admission of the highly prejudicial evidence of Mr. Mercado's prior commission of crimes." Specifically, he argues that trial counsel "did not adequately object" when the state elicited testimony from the petitioner at his criminal trial regarding statements he allegedly made to Brooks about committing crimes in the past,[3] and "did not adequately object" when the state recalled Brooks on rebuttal.[4]

[3] On January 1, 2008, Brooks gave a voluntary statement to Detective Jay Suski of the Southington Police Department, in which she stated: "Marcos has talked to me in the past about committing crimes. He's talked about wanting to do robberies. He would give me details about how he would tie people up or break into their home when they weren't home."

[4] Before the state called Brooks to testify during its case-in-chief, trial counsel filed a motion in limine to preclude her from "testifying concerning the [petitioner's] alleged past about committing crimes." (Internal quotation marks omitted.) *State* v. *Mercado*, supra, 139 Conn. App. 102. Trial counsel argued that the probative value of such testimony would be outweighed by its prejudicial effect. Id. The trial court granted the motion in limine with respect to the state's direct examination of Brooks, finding that "the prejudice outweighs the probative value with respect to the statement that [the petitioner] has talked to me [Brooks] in the past about committing crimes." (Internal quotation marks omitted.) Id., 102–103. The court, however, explicitly noted that "the motion is granted *with respect to the testimony on direct examination. If the defense on cross-examination opens the door or upon cross-examination of the* [*petitioner*], then this would not—the court's order doesn't apply." (Emphasis added; internal quotation marks omitted.) Id., 103.

The state offered Brooks' testimony in conformity with the court's order. Id. On cross-examination of the petitioner, the state requested permission from the court to question the petitioner about whether he had made these statements to Brooks. Id., 103–104. Trial counsel objected, arguing that the probative value of the petitioner's statements were outweighed by their prejudicial effect. Id., 104. The court overruled the objection, and the state

The petitioner's second claim is that trial counsel was ineffective in failing to take appropriate measures to preclude, or failing to call an expert to challenge, the state's introduction of firearms and ballistics evidence. Specifically, he argues that trial counsel did not "take appropriate measures to preclude the introduction of highly prejudicial irrelevant evidence, including the .223 caliber AR-15 Bushmaster assault [rifle] seized from [the petitioner's] home, two .22 caliber bullets, and references to a conversion kit which would not have rendered the AR-15 Bushmaster capable of firing .22 caliber bullets." He further argues that trial counsel was ineffective in failing to introduce expert testimony to establish that "the conversion kit the state alleged Mr. Mercado possessed did not render the .223 caliber AR-15 Bushmaster weapon capable of firing the fatal bullet." The petitioner contends that these errors "provided a basis for the jury to convict the [petitioner] on side issues."

Finally, and closely related to his first claim, the petitioner claims that by failing to object to the state's

questioned the petitioner about these statements. Id. The petitioner denied making the statements. Id. During its rebuttal case, the state recalled Brooks, and elicited testimony regarding these statements. Id. Trial counsel did not object to recalling Brooks or her resulting testimony. Id., 104–105.

On direct appeal to this court, the petitioner claimed that (1) the trial court abused its discretion by permitting the prosecutor to cross-examine him about prior misconduct that did not fall within the exception governing admissibility of prior misconduct evidence contained in § 4-5 (b) of the 2009 edition of the Connecticut Code of Evidence, now § 4-5 (c), and (2) the prosecutor's "deliberate violation" of the court's ruling on the motion in limine while examining Brooks on rebuttal warranted reversal of his conviction. See id., 100, 105. With respect to the first claim, this court concluded that because trial counsel objected to the state eliciting this testimony only on the basis that the evidence was more prejudicial than probative, not that it constituted inadmissible prior misconduct, the claim was not preserved for appeal. Id., 104, 106–107. With respect to the second claim, this court concluded that because trial counsel did not object to the state's examination of Brooks on rebuttal, seek to have her rebuttal testimony stricken, or request a limiting or curative instruction, that claim was likewise unpreserved for appeal. Id., 105–106. This court declined to review those unpreserved evidentiary claims and affirmed the judgment of the trial court. Id., 107.

recalling of Brooks on rebuttal, trial counsel "failed to adequately preserve [the] issue for purposes of appellate review." He notes that, on direct appeal of his conviction to this court, this court declined to review his claims related to the admission of Brooks' testimony because "the issue had not been properly preserved by trial [counsel] during the criminal proceeding." See footnote 4 of this opinion. He contends that "his conviction would have been overturned had trial [counsel] preserved the issue properly." We address the petitioner's claims together.

"Because the court determined that the petitioner had not proven that he was prejudiced by the performance of his trial counsel, our focus on review is whether the court correctly determined the absence of prejudice." *Weinberg* v. *Commissioner of Correction*, 112 Conn. App. 100, 108, 962 A.2d 155, cert. denied, 291 Conn. 904, 967 A.2d 1221 (2009). "With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." (Internal quotation marks omitted.) Id., 107.

We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal. The petitioner failed to satisfy his burden of

showing a reasonable probability that had trial counsel objected to the complained of evidence, or presented the testimony of a firearms expert, the fact finder would have had a reasonable doubt respecting guilt. Notably, the petitioner presented no support for his contention that "the jury did not consider the evidence overwhelming" beyond the fact that the jury deliberated for four days before reaching a verdict.[5] Upon review, nothing in the record suggests that but for the claimed errors of trial counsel, the result of the trial would have been different.[6]

[5] The petitioner argues that "the record reveals the jury considered Brooks' testimony central to its determination of guilt since the jury sought portions of her testimony played back." The record reveals that the jury did in fact request that one segment of Brooks' testimony be played back during its deliberations but, as stated by the trial court, requested only: "Can we hear Laurel Brooks' *initial testimony March 3rd*. That's number one. Number two: Can we see the letter that Marcos wrote to Laurel?" (Emphasis added.) The first request related to Brooks' testimony during the state's case-in-chief, and the second referred to a letter that was marked for identification during the trial. The court accommodated the first request, but denied the second. Notably, Brooks did not testify during the state's case-in-chief regarding the petitioner's prior commission of crimes; she did so only when the state recalled her on rebuttal. The record does not reflect that the jury, at any time, requested playback of Brooks' testimony on rebuttal. We therefore reject this argument as unsupported by the record.

[6] In his brief to this court, the petitioner repeatedly refers to the trial court's "threshold determination" that the evidence regarding his alleged statements to Brooks was prejudicial. He argues that "[t]he criminal trial court as a threshold matter determined the prejudice to the [petitioner] of this evidence outweighed its probative value in granting [trial counsel's] motion in limine to preclude this evidence. Therefore, this evidence has already been deemed prejudicial by the judge who actually presided over the criminal trial." According to the petitioner, "the prejudicial nature of the evidence has been established."

The petitioner appears to conflate a determination by the trial court that a piece of evidence is prejudicial with a determination of prejudice, in the context of an ineffective assistance claim, pursuant to *Strickland*. As the petitioner correctly notes, "[e]vidence is prejudicial when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence." (Internal quotation marks omitted.) *State* v. *Reynolds*, 152 Conn. App. 318, 326, 97 A.3d 999, cert. denied, 314 Conn. 934, 102 A.3d 85 (2014). In the context of an ineffective assistance claim, however, for a petitioner to satisfy his burden of proving

We note that "[t]he strength of the state's case is a significant factor in determining whether an alleged error caused prejudice to the petitioner. The stronger the case, the less probable it is that a particular error caused actual prejudice." (Internal quotation marks omitted.) *Weinberg* v. *Commissioner of Correction*, supra, 112 Conn. App. 115. As the habeas court rightfully concluded, the state's case against the petitioner included an "overwhelming" amount of forensic evidence and testimony to support a finding of guilt. That evidence included: (1) physical evidence at the crime scene that "largely corresponded" with details supplied by the petitioner in his voluntary confession;[7] (2) Brooks' testimony that the petitioner brought her an Xbox, without its box, on December 26, 2007, which she later gave to Detective Jay Suski of the Southington Police Department; (3) testimony of Officer Michael David Kahn, a systems administrator for the town of Southington, that Xbox serial numbers are unique to each unit; (4) Detective Suski's testimony that the serial number on the Xbox seized from Brooks' home matched

that he was prejudiced by counsel's deficient performance, "[i]t is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Weinberg* v. *Commissioner of Correction*, supra, 112 Conn. App. 107. These inquiries are distinct. We therefore reject the petitioner's argument that prejudice was established at the trial court because the court granted his motion in limine.

[7] For example, in the petitioner's voluntary statement to Lieutenant James P. Wardwell, the petitioner confessed to shooting the victim a single time "around his face," dragging the victim's body from the living room to the kitchen, covering the victim's face with a cloth, and pouring "soap or something" all around the victim's body. Those details were corroborated by evidence that the victim died of a single shot to the head, which went from front to back, a "contact transfer blood pattern blood-like stain" between the living room and kitchen, what appeared to be a pillow burned over the face of the victim, and "an Arm and Hammer-type of liquid, blue liquid that was poured on the [victim]," as well as the laundry detergent bottle recovered near the victim's body.

the serial number listed on a receipt seized from the victim's home; (5) Brooks' testimony that when the petitioner visited her on December 26, he was exhibiting strange behavior, including physically shaking; (6) Brooks' testimony that during that visit, the petitioner told her he had "done something," and that "there was a witness, but there's not anymore," and then asked "how come it doesn't bother him"; (7) Lieutenant Rainone's testimony that upon comparing a .22 caliber bullet recovered in the petitioner's backyard, where the petitioner engaged in target shooting, with the .22 caliber bullet removed from the victim's head, he determined that the two bullets were fired from the same gun; (8) Lieutenant Rainone's testimony that, although the .223 caliber AR-15 seized from the petitioner's home was incapable of firing a .22 caliber bullet, it could be modified to fire a .22 caliber bullet; (9) evidence that demonstrated that the petitioner had access to both .22 caliber firearms, as well as adapters capable of allowing the seized AR-15 to fire a .22 caliber bullet; (10) images of messages exchanged between screen names associated with the petitioner and the victim,[8] showing that the petitioner had communicated with the victim on the evening of December 24, 2007, and arranged to meet at the victim's home; (11) forensic analysis of the petitioner's and the victim's computers confirming that communication occurred between the petitioner and the victim on December 24, 2007; (12) testimony of Diaz, whom the petitioner attempted to portray as the perpetrator of the crimes here, regarding his verifiable alibi on Christmas Eve, 2007;[9] and (13) Diaz' testimony

[8] In the petitioner's voluntary statement to Lieutenant James P. Wardwell, he admitted to using the screen name "Marcos Mercado, Jr."

[9] Specifically, at the criminal trial, Diaz testified that on December 24, 2007, he went to church with his wife and his daughter around 6 p.m. Because it was Christmas Eve, the church was full of other parishioners. Following the church service, he, his wife, and his daughter celebrated Christmas Eve with his mother-in-law and father-in-law at their house. He, his wife, and his daughter returned to their apartment in Southington around 1 a.m. on Christmas morning.

that when he visited the petitioner while the petitioner was incarcerated prior to his trial, the petitioner confessed to him that "he did it."

Perhaps most significantly, the petitioner also voluntarily confessed to killing the victim and then taking his Xbox.[10] In a voluntary statement given to Lieutenant James P. Wardwell of the New Britain Police Department, the petitioner confessed to communicating with the victim on the evening of December 24, 2007, via America Online instant messenger, arranging to meet the victim at the victim's home so that the petitioner could perform a sexual act on the victim, visiting the victim's home soon after arranging the meeting, performing the agreed upon sexual act on the victim, and then shooting the victim with an AR-15 that he retrieved from the trunk of his vehicle. As the habeas court noted, that confession was video recorded. At the petitioner's criminal trial, both an audio-visual recording and a transcript of the confession were admitted as full exhibits.

His testimony at the habeas trial was largely consistent with his prior testimony at the criminal trial. The habeas court found Diaz' testimony to be "very credible, including his statement that his cousin, the petitioner, admitted to him that he killed the victim." "[T]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The 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.) *Mourning* v. *Commissioner of Correction*, 169 Conn. App. 444, 455, 150 A.3d 1166 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

[10] As we have noted, before his criminal trial, the petitioner moved to suppress his confession, claiming that it was not voluntary. See footnote 1 of this opinion. The court denied the motion to suppress. *State* v. *Mercado*, supra, 139 Conn. App. 101 n.3. The petitioner subsequently testified before the jury that his written and videotaped statements "were not the truthful product of his free will," and "[h]e agreed to sign the statements to provide the police with the information they wanted in order to end the police questioning." Id. The jury obviously did not credit his version of events. As the habeas court noted, "the petitioner makes no claim that [the evidence of his confession] was inadmissible evidence at his criminal trial."

When considered in light of the petitioner's detailed, and largely corroborated confession, it is difficult to imagine how trial counsel's claimed errors caused him to suffer prejudice. See *Lewis* v. *Commissioner of Correction*, 89 Conn. App. 850, 866, 877 A.2d 11 (agreeing with habeas court's conclusion that even if trial counsel should have objected to witness' testimony regarding petitioner's post-*Miranda* silence, petitioner was not prejudiced as result of counsel's failure to do so because state had already elicited testimony that petitioner twice confessed to killing victim), cert. denied, 275 Conn. 905, 882 A.2d 672 (2005).

We agree with the habeas court that the inculpatory evidence against the petitioner was "overwhelming and rooted in the petitioner's voluntary confession, which the jury had . . . occasion to review visually and audibly. The specifics of that confession were corroborated in every salient respect by forensic evidence and testimony. The purported deficiencies of defense counsel were truly insignificant when weighed against the evidence that supported the jury's verdict." Viewed in the context of this overwhelming amount of evidence against him, it is unlikely that preclusion of the challenged evidence would have changed the result of the petitioner's criminal trial. See, e.g., *Arthur* v. *Commissioner of Correction*, 162 Conn. App. 606, 624, 131 A.3d 1267 ("we conclude on the basis of our review of the evidence that the petitioner cannot demonstrate prejudice because the [challenged] evidence was not significant to the state's case"), cert. denied, 323 Conn. 915, 149 A.3d 496 (2016); cf. *Eubanks* v. *Commissioner of* Correction, 166 Conn. App. 1, 21, 140 A.3d 402 ("the failure of the petitioner's trial counsel to object to the admission of [the witness'] . . . testimony on hearsay grounds prejudiced the petitioner because when the corroborating evidence is viewed in the absence of the substantive use of that testimony, there is very little

evidence to support the petitioner's conviction"), cert. granted, 323 Conn. 911, 149 A.3d 980 (2016).

It is also unlikely that had trial counsel presented the testimony of a firearms expert, the jury would have had a reasonable doubt concerning guilt.[11] As the habeas court concluded: "The prosecution's *own* expert testified before the jury that the Bushmaster, in the condition in which it was found, could *not* have fired the deadly shot. Both the fatal bullet and the bullet recovered from the petitioner's backyard were fired out of

[11] In his voluntary statement to Lieutenant Wardwell, the petitioner claimed that he shot the victim with the .223 caliber AR-15 that the police seized from his house at the time of his arrest. He claimed that he used an adapter, which modified the AR-15 to allow it to shoot .22 caliber bullets. At the criminal trial, the unmodified AR-15 was entered into evidence as a full exhibit. The state's firearms expert, Lieutenant Rainone, testified that, in its unmodified condition, the AR-15 was incapable of firing the .22 caliber bullet that killed the victim. Trial counsel did not call a firearms expert.

At the petitioner's habeas trial, Lieutenant Rainone again testified that the AR-15 admitted at the petitioner's criminal trial, in its unmodified condition, was incapable of firing the .22 caliber bullet that killed the victim. The petitioner presented the testimony of a firearms expert, Dr. Harper, who testified, consistent with Lieutenant Rainone's testimony, that the AR-15 admitted at the petitioner's criminal trial was incapable of firing a .22 caliber bullet. He further testified that even if the AR-15 was modified to fire a .22 caliber bullet, the two bullets recovered from the victim's head and the petitioner's backyard could not have been fired from the AR-15 in the condition in which it was seized, unless the barrel was changed. Dr. Harper testified that, with respect to the issue of the murder weapon, he agreed with Lieutenant Rainone's testimony that the AR-15 seized and entered into evidence at the petitioner's criminal trial did not fire the .22 caliber bullet that killed the victim.

When trial counsel was questioned about the admission of the AR-15 at the petitioner's criminal trial, Attorney Eddy testified that trial counsel engaged a firearms expert, but that expert "came to the same conclusion as Lieutenant Rainone," so trial counsel made the tactical decision to allow the state to introduce the AR-15. This allowed trial counsel to argue to the jury that the gun recovered from the petitioner's home was not the murder weapon, even according to the state's own expert. Attorney Simon testified that trial counsel hired a firearms expert, but that his opinions were "not particularly helpful." He testified that he argued to the jury that the seized AR-15 was not the murder weapon, and that trial counsel thought that such an argument was "as good as it got" for the petitioner.

the same barrel, but that barrel was not the one present on the Bushmaster found at the petitioner's residence." (Emphasis in original.) On the basis of this, the court found that "[t]he jury was completely educated by the state's expert to the precise facts about which a defense expert might testify."

We agree with the habeas court's determination that, because the petitioner failed to show that an expert would have offered any opinions in addition or contrary to those of the state's expert at his criminal trial, he could not show that if trial counsel had presented the evidence of his own expert, the result of his criminal trial would have been different. The petitioner, therefore, failed to show that he was prejudiced by trial counsel's failure to present cumulative expert testimony. See, e.g., *Hall* v. *Commissioner of Correction*, supra, 152 Conn. App. 610 ("[b]ecause the videotape was merely cumulative of the testimony of numerous eyewitnesses who identified the petitioner as the [perpetrator], the petitioner cannot show 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" [internal quotation marks omitted]); *Weinberg* v. *Commissioner of Correction*, supra, 112 Conn. App. 108 (affirming habeas court's conclusion that petitioner had failed to demonstrate that he was prejudiced by trial counsel's failure "to disprove adequately that the knife seized from the petitioner's apartment could have caused the victim's wounds," on the basis that petitioner's evidence at habeas trial regarding knife "was not substantively different from the evidence trial counsel elicited from the medical examiner during the underlying criminal trial"); *Madagoski* v. *Commissioner of Correction*, 104 Conn. App. 768, 775-76, 936 A.2d 247 (2007) (concluding that petitioner failed to demonstrate that fact finder would have reasonable doubt as to petitioner's guilt

if trial counsel had interviewed and called potential witness, because "his testimony, at most, would have been cumulative of other evidence"), cert. denied, 286 Conn. 905, 944 A.2d 979 (2008).

Finally, with respect to the petitioner's claim that trial counsel failed to preserve an issue for appeal, the petitioner has failed to satisfy his burden of showing a reasonable probability that, had trial counsel objected to Brooks' testimony, his conviction would have been overturned on appeal. The habeas court rejected the petitioner's argument that but for trial counsel's alleged errors, the outcome of his appeal would have been different. The petitioner, in his brief to this court, argues that he has shown prejudice by pointing to the trial court's "threshold determination in granting the [petitioner's] motion in limine that the evidence was indeed prejudicial," and "the expert legal testimony introduced at the habeas trial." Upon review of the record, however, it is clear that Attorney DeSantis' testimony to which the petitioner refers establishes only that this court did not review the petitioner's claim on direct appeal because it was not preserved for appeal, which is not in dispute.

A further review of Attorney DeSantis' testimony reveals that he testified only that a reasonably competent attorney would have objected to the state's attempt to ask the petitioner about his "other crimes" conversation with Brooks, which, if sustained, would have had the effect of precluding "other crimes testimony" from Brooks. He further testified that if the objection were overruled, it would have preserved the record for appeal. At no time did Attorney DeSantis testify that had trial counsel preserved the record for appeal, this court would have reversed the petitioner's conviction. Therefore, in light of the fact that the petitioner has provided no basis from which a court could find a reasonable probability that the result of his appeal

would have been different, we agree with the habeas court's finding that the petitioner failed to prove that he was prejudiced by this claimed error.

Simply put, even if we were to determine that trial counsel's performance was deficient, in light of our review of the record and the sheer strength of the state's case against the petitioner, we conclude that the petitioner's claim that the result of his criminal proceedings would have been different is highly speculative at best.[12] The petitioner has failed to demonstrate that the issues raised are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions deserve encouragement to proceed further. Accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

[12] In support of his argument that his counsel's deficient performance prejudiced him, the petitioner repeatedly cites to this court's decision in *State* v. *Coccomo*, 115 Conn. App. 384, 972 A.2d 757 (2009), rev'd, 302 Conn. 664, 31 A.3d 1012 (2011). He contends that, in *Coccomo*, this court "overturned a conviction on the basis that the prejudicial impact on the defendant of the evidence outweighed its probative value."

In *Coccomo*, the defendant was convicted of three counts of manslaughter in the second degree with a motor vehicle, three counts of misconduct with a motor vehicle, and one count of operating a motor vehicle while under the influence of intoxicating liquor or drugs. *State* v. *Coccomo*, supra, 115 Conn. App. 385–86. On direct appeal, the defendant argued that the trial court improperly admitted consciousness of guilt evidence which was more prejudicial than probative. Id., 386, 401. This court agreed, and concluded that the trial court abused its discretion in admitting the challenged evidence, and that because the state's case was not very strong, "the admission of the prejudicial evidence . . . likely tipped the scale in favor of the state." Id., 402. This court reversed the judgment of conviction and remanded the case for a new trial. Id.

The petitioner's reliance on *Coccomo* is misplaced for several reasons, the most obvious of which being that, on appeal to our Supreme Court, that court reversed the judgment of this court and remanded the case for affirmance of the judgment of conviction. *State* v. *Coccomo*, 302 Conn. 664, 697, 31 A.3d 1012 (2011).

MAGEE AVENUE, LLC *v.* LIMA CERAMIC TILE, LLC, ET AL.
(AC 39847)

DiPentima, C. J., and Moll and Lavery, Js.

Syllabus

The plaintiff brought this action against the defendants, M and L Co., to recover unpaid rent, alleging claims for breach of contract and unjust enrichment. The defendants filed a motion for summary judgment and, one day before a hearing on that motion, they filed a copy of a lease agreement and an affidavit from M. The trial court granted the motion for summary judgment as to M and rendered judgment thereon, finding that M did not enter into an agreement with the plaintiff in his individual capacity but did so only as L Co.'s managing member. On appeal to this court, the plaintiff claimed, inter alia, that the trial court improperly rendered summary judgment as to M because M's affidavit was untimely and insufficient, and that the court improperly permitted and considered M's testimony during the hearing. *Held*:

1. Although the trial court incorrectly stated that the complaint was "stricken" as to M, the record demonstrated that the court rendered summary judgment in favor of M on all three counts, and, therefore, the plaintiff appealed from a final judgment.
2. The trial court improperly rendered summary judgment in favor of M; given that, under the applicable rule of practice ([2016] § 17-45) at the time of hearing, the plaintiff was required to file its evidence in opposition to the motion for summary judgment at least five days before the hearing on the motion, M should not have been allowed to file his initial affidavit in support of his motion one day before the hearing, which affected the plaintiff's ability to respond to M's factual assertions with supporting documents, and, therefore, M's affidavit was untimely and should not have been considered by the trial court.
3. The trial court improperly permitted and considered M's live testimony regarding the contents of his affidavit and his personal knowledge of it during the hearing on the motion for summary judgment; that court's consideration of M's testimony necessarily required it to make credibility determinations and factual findings, which created genuine issues of material fact that made summary judgment improper.
4. The trial court improperly rendered summary judgment in favor of M on the count alleging unjust enrichment; because the written motion for summary judgment was directed to the two breach of contract counts only, and because M never moved for summary judgment on the unjust enrichment count, nor did the defendants' counsel ever ask that the unjust enrichment count be included in the motion, the trial court was not free to render summary judgment on that count sua sponte.

Argued May 21—officially released July 24, 2018

Procedural History

Action to recover unpaid rent, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, Housing Session at Norwalk, where the court, *Rodriguez, J.*, granted the defendants' motion for summary judgment as to the defendant Moufid Makhraz and rendered judgment thereon; thereafter, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Richard J. Rapice, with whom, on the brief, were *Peter V. Lathouris* and *Conor J. McLaughlin*, certified legal intern, for the appellant (plaintiff).

Raymond W. Ganim, for the appellee (defendant Moufid Makhraz).

Opinion

LAVERY, J. The plaintiff, Magee Avenue, LLC, appeals from the judgment of the trial court rendering summary judgment in favor of the defendant, Moufid Makhraz,[1] on the plaintiff's complaint alleging two counts of breach of contract and one count of unjust enrichment. On appeal, the plaintiff claims that the trial court improperly (1) rendered summary judgment because the defendant's affidavit in support of the defendants' motion for summary judgment was untimely and insufficient; (2) permitted and considered the defendant's testimony during the hearing on the motion; and (3) permitted the defendant to amend orally his motion for summary judgment to include all counts when the written motion only sought relief from the two counts of breach of

[1] Makhraz and Lima Ceramic Tile, LLC, were named as defendants. This appeal pertains to the court's rendering of summary judgment in favor of Makhraz alone. For clarity, we will refer to Makhraz as the defendant, the parties collectively as the defendants, and Lima Ceramic Tile, LLC, as Lima.

contract. We agree with the plaintiff's claims and reverse the judgment.

The following facts, as alleged in the complaint, and procedural history are relevant to our decision. On December 7, 2011, the plaintiff and the defendants entered into a month-to-month lease for the defendants to rent 46-50 Magee Avenue in Stamford. Per the terms of the lease agreement, the defendants were to pay $3500 per month. The defendants failed to make timely rental payments. The defendants also were required to keep the premises clean, sanitary, and in good condition, and to return the premises to the plaintiff in a condition "identical" to that which existed when they took possession, except for ordinary wear and tear. The defendants were required to reimburse the plaintiff for the cost of any repairs resulting from damage to the premises through misuse or negligence. The defendants, however, caused damage to many parts of the premises but did not pay for the damage.

On February 23, 2016, the plaintiff filed a complaint against the defendants. In its three count amended complaint dated June 1, 2016, the plaintiff claimed that the defendants breached the lease agreement by failing to pay the full amount of rent and late fees and by damaging the premises and failing to pay for the damage and cost of collection, and that the defendants were unjustly enriched by failing to pay for the use and occupancy of the premises or for the damage the defendants caused to the premises. On July 26, 2016, the defendants filed a motion for summary judgment, claiming that "no contractual relationship existed between the [p]laintiff and the [d]efendants in this action." Specifically, the defendants argued in their memorandum of law in support of their motion for summary judgment that the contract at issue did not involve either defendant because the tenant in the contract was identified as "Lima Tile, Inc." The defendants therefore argued that there was

no written agreement between the plaintiff and either defendant. The plaintiff objected to the motion, claiming that the motion was inadequate, per Practice Book § 17-45, because no supporting documents were attached to the motion. The plaintiff also claimed that the identification of "Lima Tile, Inc." was a scrivener's error and that the defendants had ratified the agreement. Attached to the plaintiff's objection was an affidavit from the plaintiff's principal explaining that he searched the secretary of the state's online records for "Lima Tile, Inc.," but could find only "Lima Ceramic Tile, LLC." Appended to the affidavit were screen shots from his web search, as well as a copy of a check made out to the plaintiff from Lima, which was signed by the defendant.

A hearing on the motion for summary judgment was scheduled for October 4, 2016. The day before the hearing, the defendants filed a copy of the lease agreement and the defendant's affidavit. In the affidavit, the defendant stated that he signed the lease agreement as Lima's manager and did not rent the property individually or personally. At the hearing the next day, the defendants agreed that Lima would remain in the case but pressed the motion for summary judgment as to the defendant. The plaintiff argued that the defendant should remain in the case also, as it would seek to pierce the corporate veil, if necessary. The plaintiff asked the court to consider that the defendants had filed their affidavit only the day before, which affidavit the plaintiff claimed was insufficient and unsupported. When the plaintiff objected on the basis that the affidavit did not include a statement that it was made on personal knowledge, the defendants' counsel offered for the court to hear the defendant's testimony. Over the plaintiff's objection, the court heard the defendant's testimony, in which he claimed to have rented the premises as Lima's managing member and not for his own personal use, and that he

had personal knowledge as to his testimony. After the defendant's testimony, the plaintiff again objected, noting that the briefs did not ask for testimony and that, because the rules of practice call for documentary evidence to support a motion for summary judgment, the mere fact that the defendant had to testify meant that there was a factual issue in dispute.

In a memorandum of decision filed on October 4, 2016, the trial court found that the defendant did not enter into an agreement with the plaintiff in his individual capacity, but only as Lima's managing member, and it stated that the complaint was "stricken" as to the defendant. The plaintiff filed a motion to reargue, which the court denied.[2] This appeal followed. Additional facts will be set forth as needed.

On appeal, the plaintiff claims that the trial court improperly rendered summary judgment because the defendant's affidavit in support of his motion was untimely and insufficient, permitted and considered the defendant's testimony during the hearing on the motion, and permitted the defendant to amend orally his motion for summary judgment to include judgment on all counts when the written motion only sought relief from the two counts of breach of contract.

"Our review of the trial court's summary judgment rulings is plenary . . . and the general principles governing those rulings are well established. In deciding a motion for summary judgment, the trial court must view

[2] In his motion to reargue, the plaintiff argued that the defendants introduced no admissible evidence to sustain their burden, that the court improperly considered the defendant's live testimony, that the court improperly ruled that "[t]he complaint is stricken" in a decision on a motion for summary judgment, that the court improperly considered summary judgment on the unjust enrichment count sua sponte when the defendants never sought such relief, and that the court did not address specific arguments with respect to certain material facts raised by the plaintiff. (Emphasis omitted.)

the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Doe* v. *West Hartford*, 328 Conn. 172, 191–92, 177 A.3d 1128 (2018).

I

Before we address the merits of the plaintiff's claims, we must consider whether this appeal was taken from a final judgment. Although the defendants moved for summary judgment on the first two counts only, the trial court's memorandum of decision on the motion stated that "[t]he complaint is *stricken* as to [the defendant]." (Emphasis added.) We, therefore, must determine whether the court rendered summary judgment or whether it struck the complaint as to the defendant without rendering judgment.

"Jurisdiction of the subject-matter is the power [of the court] to hear and determine cases of the general class to which the proceedings in question belong. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . . Where a decision as to whether a court has subject matter jurisdiction is required, every presumption favoring jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.) *Raudat* v. *Leary*, 88 Conn. App. 44, 48, 868 A.2d 120 (2005).

"[C]ertain basic principles . . . distinguish the procedural devices of a motion for summary judgment and a motion to strike. Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . .

"In contrast, a motion to strike, pursuant to Practice Book § 10-39 (a), shall be used whenever any party wishes to contest . . . the legal sufficiency of the allegations of any . . . [claim] . . . to state a claim upon which relief can be granted . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Bank of New York Mellon* v. *Mauro*, 177 Conn. App. 295, 314–15, 172 A.3d 303, cert. denied, 327 Conn. 986, 175 A.3d 45 (2017).[3]

[3] Practice Book § 61-3 provides in relevant part that "[a] judgment disposing of only a part of a complaint . . . is a final judgment if that judgment disposes of all causes of action in that complaint . . . brought by or against a particular party or parties. Such a judgment shall be a final judgment regardless of whether judgment was rendered on the granting of a motion to strike pursuant to Section 10-44 . . . [or] by summary judgment pursuant to Section 17-44 . . . ."

Additionally, Practice Book § 10-44 provides in relevant part that "where an entire complaint . . . or any count in a complaint . . . has been stricken, and the party whose pleading or a count thereof has been so stricken fails to file a new pleading within . . . fifteen day[s], the judicial authority may, upon motion, enter judgment against said party on said stricken complaint . . . ."

Here, we are not asked to treat a motion for summary judgment as a motion to strike, but to treat the court's use of the word "stricken" to mean that it intended to render summary judgment in favor of the defendant. The defendant moved for summary judgment, and the trial court noted that the memorandum of decision pertained to the defendant's motion for summary judgment; however, the trial court's memorandum of decision inexplicably stated that it was striking the complaint as to the defendant, and the court denied reargument when presented with this conundrum.

In its complaint, the plaintiff alleged that the defendant breached the lease agreement and was unjustly enriched. Whether the defendant was a party to the agreement is a factual question, and not a question of whether the complaint was legally sufficient to state a claim for relief. See *Sandella* v. *Dick Corp.*, 53 Conn. App. 213, 222, 729 A.2d 813, cert. denied, 249 Conn. 926, 733 A.2d 849 (1999). There was no challenge to the legal sufficiency of the complaint; therefore, a motion to strike would not have been an appropriate vehicle for relief. See *Velecela* v. *All Habitat Services, LLC*, 322 Conn. 335, 341 n.4, 141 A.3d 778 (2016).

Although the court's use of the language "[t]he complaint is stricken" was incorrect, we nonetheless construe the decision as rendering summary judgment in favor of the defendant on all three counts. Simply put, the court was not asked to strike the complaint; it was asked to render judgment in favor of the defendant. "Although it is preferable for a trial court to make a formal ruling on each count, we will not elevate form over substance when it is apparent from the memorandum of decision [what] the trial court [did]." *Normand Josef Enterprises, Inc.* v. *Connecticut National Bank*, 230 Conn. 486, 488 n.1, 646 A.2d 1289 (1994); *Raudat* v. *Leary*, supra, 88 Conn. App. 49; see also *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 718, 183 A.3d 1164 (2018) (reviewing court looks to complaint and

memorandum of decision to determine whether trial court explicitly *or implicitly* disposed of each count). Given these circumstances, and cognizant that every presumption favoring jurisdiction should be indulged, we conclude that the court rendered summary judgment for the defendant on all counts; therefore, the plaintiff appealed from a final judgment, and we address the merits of its claims.

II

The plaintiff first claims that the trial court improperly rendered summary judgment because the defendant's affidavit in support of his motion was untimely and insufficient. Specifically, the plaintiff argues that the defendant's affidavit was (1) untimely and should not have been considered as valid evidence, (2) self-serving hearsay and insufficient support for the motion, and (3) insufficient to determine that there were no genuine issues of material fact regarding the plaintiff's claim of unjust enrichment. We agree with the plaintiff that the defendant's affidavit was untimely and should not have been considered.

Practice Book (2016) § 17-45 provided, in relevant part, that "[a] motion for summary judgment shall be supported by such documents as may be appropriate, including but not limited to affidavits . . . . The motion shall be placed on the short calendar to be held not less than fifteen days following the filing of the motion *and the supporting materials*, unless the judicial authority otherwise directs. . . . Any adverse party shall *at least five days* before the date the motion is to be considered on the short calendar file opposing affidavits and other available documentary evidence."[4] (Emphasis added).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any

[4] Section 17-45 currently requires the adverse party to file its response to the motion within forty-five days of the filing of the motion, as opposed to

issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book [§ 17-45] . . . ." (Internal quotation marks omitted.) *State Farm Fire & Casualty Co.* v. *Tully*, 322 Conn. 566, 573, 142 A.3d 1079 (2016).

If mere assertions of fact are insufficient to establish the existence of a material fact, then they are insufficient to establish the *lack* of an existence of material

at least five days before the hearing on the motion. Practice Book § 17-45 (b). Although "[p]rocedural statutes and rules of practice ordinarily apply retroactively . . . [they] will not be applied retroactively if considerations of good sense and justice dictate that [they] not be so applied." (Internal quotation marks omitted.) *Narayan* v. *Narayan*, 305 Conn. 394, 403, 46 A.3d 90 (2012). We conclude that those considerations dictate that the rule that should be applied in this case is the one that was in effect at the time of the hearing on the motion for summary judgment; otherwise, we would effectively be pulling the rug out from under the plaintiff, who complied with the rule as written at the time. Even if we were to apply the current version of § 17-45, we would be troubled by the defendants' failure to support their motion with appropriate documents because "the moving party shall not claim the motion for summary judgment to the short calendar less than forty-five days after the filing of the motion for summary judgment"; Practice Book § 17-45 (c); and the defendants did not file their supporting documents within that timeframe.

fact in the face of opposing evidence.[5] In essence, the plaintiff here was required to respond to mere factual assertions with its own supporting affidavits and documentation before the defendant presented his evidence in support of those assertions in the first place. Considering that, under the rules of practice at the time of the hearing, an adverse party was required to file its evidence in opposition to a motion for summary judgment at least five days before the hearing on the motion, we fail to see how the defendant here should have been permitted to file his initial affidavit in support of the motion one day before the hearing. The defendant's affidavit therefore was untimely and should not have been considered by the trial court.[6] Therefore, because the trial court should not have considered the defendant's affidavit, the court improperly rendered summary judgment in favor of the defendant.

III

The plaintiff next claims that the trial court improperly permitted and considered the defendant's live testimony during the hearing on the motion for summary judgment.[7] We agree.

"The fundamental purpose of summary judgment is preventing unnecessary trials. . . . If evidentiary presentations and testimony were to be permitted, the intent to reduce litigation costs by way of the summary judgment procedure would be undermined, and there

[5] Practice Book § 17-45 "does not require affidavits when the relevant facts are available to the court and unchallenged by the nonmoving party . . . ." *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 324 n.12, 77 A.3d 726 (2013). The present case does not involve such a scenario.

[6] Because we conclude that the trial court's consideration of the defendant's untimely affidavit was improper, we do not consider the plaintiff's alternative arguments that the affidavit was self-serving hearsay and insufficient on its face.

[7] Although we conclude that the court improperly rendered summary judgment because the defendant's affidavit was untimely, we also consider this claim because it provides an alternative ground for affirmance.

may as well be a trial on the merits." (Citation omitted; internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Henderson*, 175 Conn. App. 474, 487, 167 A.3d 1065 (2017). "A summary judgment should be summary; that is, made in a prompt, simple manner without a full-scale trial. The opposition to such a motion may include the filing of affidavits or other documentary evidence; Practice Book § 17-45; but does not include the live testimony of any witnesses." *Braca* v. *Utzler*, 134 Conn. App. 460, 463 n.4, 38 A.3d 1249 (2012).

Here, it is undisputed that the defendant testified regarding the contents of his affidavit and his personal knowledge of it. The court's consideration of this testimony necessarily required it to make credibility determinations and factual findings, a reality supported by the court's memorandum of decision, in which it stated that "the court *finds* [that] the defendant . . . did not enter into an agreement with the plaintiff . . . in his individual capacity but only as the managing member of . . . Lima Ceramic Tile, LLC." (Emphasis added.) Because the court made credibility determinations, there were axiomatically genuine issues of material fact, and summary judgment therefore was improper.

IV

The plaintiff finally claims that the trial court improperly permitted the defendant to orally amend his motion for summary judgment to include judgment on all counts when the written motion was directed only to the two counts of breach of contract. We agree that the court improperly adjudicated the third count.

The defendants' written motion sought summary judgment on both breach of contract counts against both defendants on the basis that neither defendant was a party to the contract. At the hearing on the motion, the defendants withdrew their motion as to Lima. The plaintiff takes exception to the trial court's rendering

of summary judgment as to the defendant on *all* counts. The only discussion about the addition of the third count alleging unjust enrichment occurred when the defendants' counsel alerted the court that they were withdrawing their motion as to Lima. The following colloquy took place:

"The Court: [Defendants' counsel], on your motion for summary judgment, did you wish to add anything that's not in the pleadings on the record, because if you don't, that's okay. I'll take the papers once I address [the plaintiff's counsel].

"[The Defendants' Counsel]: What I would address, Your Honor, is that for purposes of today, we've agreed that Lima Ceramic Tile . . . could remain as a defendant in this matter. We're not going to pursue that. But to the extent that they're suing [the defendant] in his individual capacity based on this lease, we would ask for summary judgment, and there's an affidavit attached, and I have nothing else to add.

"The Court: All right. I haven't really examined the pleadings in this case yet. . . . Is there a count addressing [the defendant] as an individual defendant?

"[The Defendants' Counsel]: Your Honor, it appears that all three of the counts reference him as a defendant.

"The Court: All right.

"[The Defendants' Counsel]: So the first count as I'm reading it is a nonpayment of rent count. The second count appears to be a count claiming damages to the property, and the third count is an unjust enrichment as well as a damage claim.

"The Court: All right. But is [the defendant] named as a defendant in each of those counts?

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

"The Court: All right. And the agreement between yourself and [the plaintiff's counsel] is that Lima Ceramic Tile remain as the defendant?

"[The Defendants' Counsel]: Well, I've offered that. That hadn't been accepted yet, but that was the offer that I extended this morning, that Lima could remain in but that [the defendant] should not be part of this in an individual capacity.

"The Court: All right. [Plaintiff's counsel]?

"[The Plaintiff's Counsel]: Yes, Your Honor. We would contend that both parties are to remain. If you look closely at the month-to-month lease agreement, it is signed by [the defendant], but there's no indication whether he's signing as manager or otherwise. We would also indicate that we fully intend to pierce the corporate veil should we need to. We have no idea where the assets remain on this matter, and so we would ask that [the defendant] remain as a defendant as well in this matter.

"The Court: All right. Those are your claims. Is there anything that you want to argue in support of your claims that is not in the pleadings? That's basically what I'm asking the two of you. . . .

"[The Defendants' Counsel]: No, Your Honor."

The unjust enrichment count otherwise was not discussed. In its memorandum of decision, the trial court rendered summary judgment as to all three counts in favor of the defendant.

Perhaps most importantly, the defendant never moved for summary judgment on the unjust enrichment claim. The discussion between the trial court and counsel merely addressed that the unjust enrichment count was in the complaint, but nowhere does the defendants' counsel specifically ask that the count be included in

the motion. In fact, when the court asked if there was anything that counsel wanted to argue in support of their claims that was not in the pleadings, the defendants' counsel said *no*.

"[A] court may not grant summary judgment sua sponte, and . . . pursuant to Practice Book § [17-44], a person seeking summary judgment . . . must file an appropriate motion addressed to it." *Hope's Architectural Products, Inc.* v. *Fox Steel Co.*, 44 Conn. App. 759, 762–63 n.4, 692 A.2d 829, cert. denied, 241 Conn. 915, 696 A.2d 985 (1997); see also *Mamudovski* v. *BIC Corp.*, 78 Conn. App. 715, 726, 829 A.2d 47 (2003) ("[b]ecause the court bypassed the procedural requirements of Practice Book §§ 17-44 and 17-45, and did not receive a knowing waiver of those requirements from the plaintiff, it was an abuse of discretion for the court to rule on the defendant's oral motion for summary judgment"), appeal dismissed, 271 Conn. 297, 857 A.2d 328 (2004).

Here, because the defendant did not move for summary judgment on the unjust enrichment count, the trial court was not free to render summary judgment on that count sua sponte.[8] Therefore, it was improper for the court to render summary judgment for the defendant on the unjust enrichment claim.

The judgment is reversed and the case is remanded for further proceedings.

In this opinion the other judges concurred.

[8] The defendant, without citation to any authority, essentially claims that the plaintiff waived its argument that the trial court could not allow the defendant to orally amend his motion by not objecting during the hearing; however, as we have noted, the record does not indicate that the defendants actually asked for the court's permission to add the unjust enrichment count to the motion. We fail to see how the plaintiff could have objected to a request to add the unjust enrichment count to the motion for summary judgment when that request was never made.

STATE OF CONNECTICUT *v.* WALTER BOBBY AYALA (AC 39171)

Lavine, Moll and Bishop, Js.

Syllabus

Convicted of the crimes of sexual assault in the fourth degree and of risk of injury to a child in connection with his alleged sexual abuse of the twelve year old victim, the defendant appealed to this court. Before trial, the trial court had granted the defendant's motion to obtain the victim's mental health records. The court conducted an in camera review and found that portions of the record were probative of the victim's mental capacity to know or correctly relate the truth and had the potential to show motive or bias. As a result, the court disclosed redacted copies of the records to the defendant. On appeal, the defendant claimed, for the first time, that the trial court abused its discretion in failing to disclose the redacted portions of the victim's mental health records, thereby violating his constitutional right to confrontation. *Held* that the trial court did not abuse its discretion in its selection of records to disclose and those portions to withhold from the defendant following its in camera review, as the records provided to the defendant secured his constitutional right to confront the victim at trial; that court properly disclosed all materials especially probative of the witness' capacity to relate the truth or to observe, recollect, and narrate relevant occurrences, and the defendant was able to utilize pertinent details disclosed in the records to thoroughly cross-examine and to question the victim about her past self-injurious behavior and her resultant hospitalization, her depression, the contents of her journal, her strained relationship with her mother, her long held desire to live in New York with her father, her dislike of the defendant, and her knowledge of the fact that her neighbor's niece had made false sexual assault allegations in an attempt to extricate herself from her living situation, which demonstrated that the defendant was able to fully and effectively cross-examine the victim about her possible motives, biases, and capacity to relate the truth.

Argued May 16—officially released July 24, 2018

Procedural History

Substitute information charging the defendant with two counts of the crime of sexual assault in the fourth degree and with one count of the crime of risk of injury to a child, brought to the Superior Court in the judicial

district of New Britain, geographical area number fifteen, and tried to the jury before the court, *Keegan*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Donald F. Meehan, with whom, on the brief, was *Walter C. Bansley IV*, for the appellant (defendant).

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Elizabeth M. Moseley*, assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The defendant, Walter Bobby Ayala, appeals from the judgment of conviction, rendered following a jury trial, of two counts of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A), and one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that the trial court abused its discretion by failing to disclose redacted portions of the victim's mental health records following the court's in camera review of the records pursuant to *State* v. *Esposito*, 192 Conn. 166, 471 A.2d 949 (1984), thereby violating his sixth and fourteenth amendment right to confrontation. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. The defendant resided with the then twelve year old victim,[1] the victim's mother, and the victim's two younger siblings in an apartment in New Britain. The defendant was in a relationship with the victim's

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

mother. During one unspecified night in March, 2011, the defendant came into the victim's room while she was sleeping on two separate occasions. During one encounter, he touched her buttocks, and during the other encounter, he touched the victim's vagina and attempted to pull down her pajama pants.[2]

The incident was not reported to the police until April, 2012, when the victim disclosed the abuse to her father and his fiancé while visiting them in New York. At this time, the victim spoke to a New Britain police officer over the phone. The victim's allegations prompted the New York Administration for Children's Services and the Connecticut Department of Children and Families (department) to conduct an investigation. Members of the department interviewed the victim as part of its investigation. The victim also received treatment at the Wheeler Clinic in Connecticut.

The defendant was subsequently arrested and charged with two counts of sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A) and one count of risk of injury to a child in violation of § 53-21 (a) (2). Before trial, the defendant filed a motion to obtain records from the department and the Wheeler Clinic pertaining to the victim's mental health pursuant to *State* v. *Esposito*, supra, 192 Conn. 166, and *State* v. *Bruno*, 236 Conn. 514, 673 A.2d 1117 (1996), arguing that the records were probative of the victim's mental capacity to know or correctly relate the truth and had the potential to show motive or bias. The court granted the motion and, after the victim consented, the court conducted an in camera review of the victim's department file and her Wheeler Clinic file. The court found that portions of the records were probative of the victim's mental capacity to know or correctly relate the

[2] At trial, the victim testified that she was unsure of the order in which these events occurred.

truth and had the potential to show motive or bias. As a result, the court disclosed redacted copies of the records to the defendant. At trial, the jury returned a verdict of guilty as to all charges. The court subsequently sentenced the defendant to a total effective sentence of eight years of incarceration and twelve years of special parole. This appeal followed. Additional facts will be set forth as necessary.

We first address whether the defendant's claim that the court violated his right to confrontation by failing to disclose redacted portions of the victim's mental health records following its in camera review of those records is reviewable. We note, at the outset, that the defendant failed to preserve this issue at trial. Our Supreme Court has indicated that, when a court has conducted an in camera review and has disclosed only a portion of the material sought, it is necessary for the defendant to object to any of the court's redactions at the trial stage before raising the claim on appeal. See *State* v. *Cecil J.*, 291 Conn. 813, 829 n.12, 970 A.2d 710 (2009) (noting that it was "incumbent" on defendant to object to trial court's redactions at trial); *State* v. *Harris*, 227 Conn. 751, 761, 631 A.2d 309 (1993) (defendant objected to court's limited disclosure of personnel file after in camera review and challenged action on appeal).

In his brief, the defendant asserts that "to the degree this claim is not preserved," he is entitled to review under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). 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. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40. "The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim." (Internal quotation marks omitted.) *State* v. *Britton*, 283 Conn. 598, 616, 929 A.2d 312 (2007).

Golding's first prong is satisfied because the defendant has provided us with an adequate record to review his constitutional claim. *Golding*'s second prong is also satisfied because an erroneous restriction on the defendant's access to a witness' confidential records "implicates the defendant's constitutional right to impeach and discredit state witnesses." (Internal quotation marks omitted.) *State* v. *Bruno*, supra, 236 Conn. 532. Accordingly, the defendant's claim is reviewable. His claim fails, however, under *Golding*'s third prong.

We set forth the applicable principles necessary to review the defendant's claim on the merits. "The need to balance a witness' statutory privilege to keep psychiatric records confidential against a defendant's rights under the confrontation clause is well recognized." *State* v. *Slimskey*, 257 Conn. 842, 855, 779 A.2d 723 (2001). Our Supreme Court has set forth the procedure used to strike this balance. "If . . . the claimed impeaching information is privileged there must be a showing that there is reasonable ground to believe that the failure to produce the information is likely to impair the defendant's right of confrontation such that the witness' direct testimony should be stricken. Upon such a showing the court may then afford the state an opportunity to secure the consent of the witness for the court

to conduct an in camera inspection of the claimed information and, if necessary, to turn over to the defendant any relevant material for the purposes of cross-examination. If the defendant does make such showing and such consent is not forthcoming then the court may be obliged to strike the testimony of the witness. If the consent is limited to an in camera inspection and such inspection, in the opinion of the trial judge, does not disclose relevant material then the resealed record is to be made available for inspection on appellate review. If the in camera inspection does reveal relevant material then the witness should be given an opportunity to decide whether to consent to release of such material to the defendant or to face having her testimony stricken in the event of refusal." *State* v. *Esposito*, supra, 192 Conn. 179–80.

"Upon inspecting the records in camera, the trial court must determine whether the records are especially probative of the witness' capacity to relate the truth or to observe, recollect and narrate relevant occurrences. . . . If the court determines that the records are probative, the state must obtain the witness' further waiver of his privilege concerning the relevant portions of the records for release to the defendant, or have the witness' testimony stricken. . . . Once the trial court has made its inspection, the court's determination of a defendant's access to the witness' records lies in the court's sound discretion, which we will not disturb unless abused." (Internal quotation marks omitted.) *State* v. *McMurray*, 217 Conn. 243, 257–58, 585 A.2d 677 (1991). This court has also recognized that "[a]lthough the constitutional right of cross-examination guarantees the opportunity for effective cross-examination . . . that does not mean cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . . That right does not include, in a word, unrestricted cross-examination."

(Internal quotation marks omitted.) *State* v. *Calderon*, 82 Conn. App. 315, 330, 844 A.2d 866 (2004), cert. denied, 270 Conn. 905, 853 A.2d 523 (2004), cert. denied, 543 U.S. 982, 125 S. Ct. 487, 160 L. Ed. 2d 361 (2004). Accordingly, we review the trial court record, including the records that were disclosed and those portions that were not provided to the defendant, to determine whether the court abused its discretion in limiting the defendant's access to the victim's mental health records.

Pursuant to the teaching of *State* v. *Esposito*, supra, 192 Conn. 166, this court conducted a review of the undisclosed portions of the records at issue. On the basis of that review, we conclude that the court did not abuse its discretion in its selection of records to disclose and those portions to withhold from the defendant. We conclude, as well, that the records provided to the defendant secured his constitutional right to confront the victim at trial. In sum, the court properly disclosed all materials especially probative of the witness' capacity to relate the truth or to observe, recollect, and narrate relevant occurrences. As a result, the defendant was able to utilize pertinent details disclosed in the records to thoroughly cross-examine the victim. During the trial, the defendant was able to question the victim about her past self-injurious behavior and her resultant hospitalization, her depression, the contents of her journal, her strained relationship with her mother, her long held desire to live in New York with her father, her dislike of the defendant, and her knowledge of the fact that her neighbor's niece had made false sexual assault allegations in an attempt to extricate herself from her living situation. The defendant was thus able to fully and effectively cross-examine the victim about her possible motives, biases, and capacity to relate the truth.

The judgment is affirmed.

In this opinion the other judges concurred.

HILARIO'S TRUCK CENTER, LLC *v.* LAURA RINALDI ET AL.

(AC 39966)

Sheldon, Keller and Prescott, Js.

Syllabus

The plaintiff towing company sought to recover damages from N Co., an insurance company, and its insured, R, arising out of vehicle recovery and storage services that the plaintiff performed following a motor vehicle accident involving R's vehicle. The plaintiff alleged that N Co. breached an implied contract to pay the cost of the expenses that the plaintiff had incurred and that N Co. was liable to it for money damages because it was a third-party beneficiary of R's insurance contract with N Co. The trial court granted N Co.'s motion to dismiss, and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that the trial court properly dismissed the plaintiff's action as to N Co., that court having properly determined that the plaintiff, as a third-party claimant, lacked standing to maintain a direct action against N Co.: the plaintiff failed to identify any express language in the contract from which it could be determined that N Co. and R intended to create a direct obligation to the plaintiff specifically and the contract, which did not list the plaintiff as an insured or refer to the plaintiff, was devoid of any reference to entities like the plaintiff that might provide automobile recovery, towing and storage service to R, and certain language in the policy that obligated N Co. to pay for property damage as a result of an accident arising out of the use of R's automobile did not evince an intent to create a direct obligation by N Co. to any third person or entity, known or unknown, who suffered property damage as a result of R's use of her vehicle or who expended funds on R's behalf to mitigate property damage suffered by others, as that assertion confounded the distinction between those persons or entities that might foreseeably benefit from R's contractual receipt of liability coverage with those persons or entities to whom both R and N Co. specifically intended that N Co. would assume a direct obligation; moreover, denying the plaintiff third-party beneficiary status did not undermine sound public policy, and the plaintiff's out-of-state authority for such proposition was inapposite and unpersuasive, as those cases involved actions brought by or against the named insured under the insurance contracts at issue and did not involve the question of whether a towing company should be deemed a third-party beneficiary to an insurance contract between the automobile owner and an insurance company.

Argued April 10—officially released July 24, 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 Danbury, where the court, *Truglia, J.*, granted the motion to dismiss filed by the defendant Nationwide Insurance Company, and rendered judgment thereon, and the plaintiff appealed to this court. *Affirmed.*

Kenneth A. Votre, for the appellant (plaintiff).

Rene G. Martineau filed a brief for the appellee (defendant Nationwide Insurance Company).

Opinion

PRESCOTT, J. The principal issue in this appeal is whether a company that provided automobile towing services to an insured motorist has standing as a third-party beneficiary to bring a direct breach of contract action against the insurance company that provided automobile liability coverage to the insured. We conclude, under the circumstances of this case, that the company is not an intended third-party beneficiary of the insurance contract and therefore lacks standing to bring a direct action against the insurer.

The plaintiff, Hilario's Truck Center, LLC, appeals from the judgment of the trial court granting the motion to dismiss filed by the defendant, Nationwide Insurance Company (Nationwide), as to counts one and three of the complaint. Those counts alleged breach of contract on the basis of Nationwide's refusal to pay for towing services provided to the defendant Laura Rinaldi.[1] The plaintiff claims on appeal that the court improperly granted Nationwide's motion to dismiss because the plaintiff is a third-party beneficiary to the insurance

[1] Rinaldi is named as a defendant in counts one and two of the complaint. She has not participated in the present appeal. For clarity, we refer to the defendants individually by name and collectively as the defendants.

contract between Nationwide and Rinaldi and therefore has standing to bring claims directly against Nationwide for breach of contract.[2]

The following facts and procedural history, as recited by the trial court in its memorandum of decision, are relevant to the resolution of this appeal. On March 17, 2015, Rinaldi was involved in a motor vehicle accident on Route 34 in Newtown. Rinaldi's vehicle left the roadway, traveled over a rock wall, rolled over, and landed in a wooded area some distance from the road. Newtown Police responded to the scene and, shortly thereafter, requested the plaintiff's services to recover and tow Rinaldi's vehicle. Removal of the vehicle required a heavy duty wrecker and a flatbed truck. The plaintiff provided these services, as well as "a crush wrap to protect the vehicle" while it was towed from the accident scene. The plaintiff submitted invoices for its towing services to Nationwide. At the time the court issued its decision, neither defendant had paid the plaintiff for its services, and Rinaldi's vehicle was stored on the plaintiff's property.

The plaintiff commenced the underlying action against the defendants to recover for the towing and vehicle recovery expenses that it incurred as a result of Rinaldi's motor vehicle accident. The plaintiff brought a three count complaint. The first count alleges breach of an implied contract against both defendants.[3] Specifically, the plaintiff alleges that "[t]he law implies a contractual obligation to pay the cost of services rendered

[2] We note that the court's judgment dismissing all of the counts against Nationwide constitutes an appealable final judgment, although counts one and two remain pending as to Rinaldi. Practice Book § 61-3 provides in relevant part: "A judgment disposing of only a part of a complaint, counterclaim, or cross complaint is a final judgment if that judgment disposes of all causes of action in that complaint, counterclaim, or cross complaint brought by or against a particular party or parties. . . ."

[3] In its motion to dismiss, Nationwide stated that the third count was the "sole count pending against [it]." The court, however, in its memorandum of decision, assumed that the plaintiff also asserted a claim for liability for

on the automobile owner," and that the defendants breached this implied contract by refusing to pay the plaintiff for its services.

The second count sounds in unjust enrichment against Rinaldi. It alleges that Rinaldi "received the benefit of having the vehicle removed from the scene and towed to the plaintiff's storage facility" and continues "to enjoy the benefit of the plaintiff's recovery, towing and storage services for [her] vehicle despite not paying the plaintiff just compensation for [its] services, to the plaintiff's detriment."

The third count alleges breach of contract against Nationwide on the theory that Nationwide is liable for money damages to the plaintiff because it is a third-party beneficiary of Rinaldi's insurance contract with Nationwide. The third count incorporates by reference the allegations of the first two counts and further alleges that, despite being properly notified of the plaintiff's claims for services provided to Rinaldi, Nationwide wrongfully has refused to pay the plaintiff's invoice for those services.

In response to the complaint, Nationwide filed a motion to dismiss on the basis that the court lacked subject matter jurisdiction because the plaintiff did not have standing to bring claims directly against it. In its memorandum in support of the motion to dismiss,

breach of express and implied contract against Nationwide in the first count, although the allegations in count one are less than clear. Other than under the third-party beneficiary doctrine, the plaintiff has made no arguments on appeal regarding its standing to bring a direct claim against Nationwide for breach of an express or implied contract between the plaintiff and Nationwide. Therefore, any claim as to the propriety of the court's ruling with respect to count one has been abandoned by the plaintiff on appeal. *Cummings* v. *Twin Tool Mfg. Co.*, 40 Conn. App. 36, 45, 668 A.2d 1346 (1996) ("[if] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned" [internal quotation marks omitted]).

Nationwide claimed that the plaintiff lacked standing because it is not a party to the insurance contract between Nationwide and Rinaldi and neither party intended to assume a direct obligation to the plaintiff.[4] Additionally, Nationwide argued that the contract at issue excludes coverage for towing expenses, and, therefore, even if the plaintiff had standing to bring an action pursuant to the contract, Nationwide is not liable for the cost of the towing services rendered by the plaintiff.

The plaintiff filed an objection to the motion and a memorandum in support of the objection. Following oral argument on the motion, the court, *Truglia*, *J.*, granted the motion to dismiss in a written memorandum of decision. In that decision, the court concluded that the plaintiff was not a third-party beneficiary to the contract and, therefore, did not have standing to sue Nationwide for breach of the insurance contract. This appeal followed.

The plaintiff claims on appeal that the trial court improperly granted Nationwide's motion to dismiss because the plaintiff is a third-party beneficiary to the insurance contract between the defendants and, therefore, has standing to bring a direct claim against Nationwide. We disagree.

We begin by setting forth the applicable principles of law and standards of review. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter

[4] Nationwide attached to its memorandum in support of the motion an uncertified, unauthenticated letter denying Rinaldi's claim for towing expenses. Nationwide also provided the certified, authenticated declaration page of the insurance contract and the insurance contract in its entirety. The plaintiff has not asserted that the court improperly relied upon these submissions.

alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Beecher* v. *Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 134, 918 A.2d 880 (2007); see Practice Book § 10-30 (a) (1) ("[a] motion to dismiss shall be used to assert . . . lack of jurisdiction over the subject matter").

"[L]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." (Internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 347, 977 A.2d 636 (2009). As is the case here, "if the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein." (Emphasis in original; internal quotation marks omitted.) Id, 347–48.

"The issue of standing implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. Practice Book § [10-30] (a). [I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." (Internal quotation marks omitted.) *May* v. *Coffey*, 291 Conn. 106, 113, 967 A.2d 495 (2009). "It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *New England Pipe Corp.* v. *Northeast Corridor Foundation*, 271 Conn. 329, 335, 857 A.2d 348 (2004). "Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, our review is plenary." (Internal quotation marks omitted.) *May* v. *Coffey*, supra, 113.

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [If] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 397–98, 89 A.3d 392, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014).

A person or entity that is not a named insured under an insurance policy and who does not qualify, at least arguably, as a third-party beneficiary, lacks standing

to bring a direct action against the insurer. *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 215–18, 982 A.2d 1053 (2009); cf. *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, 266 Conn. 572, 580–81, 833 A.2d 908 (2003). "[T]he fact that a person is a foreseeable beneficiary of a contract is not sufficient for him to claim rights as a third party beneficiary." *Grigerik* v. *Sharpe*, 247 Conn. 293, 317–18, 721 A.2d 526 (1998). "Performance of a contract will often benefit a third person. But unless the third person is an intended beneficiary[5] . . . no duty to him is created." (Footnote added.) 2 Restatement (Second), Contracts § 302, comment (e) (1981).

"A third party beneficiary may enforce a contractual obligation without being in privity with the actual parties to the contract." (Footnote omitted.) *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 230, 654 A.2d 342 (1995). "Therefore, a third party beneficiary who is not a named obligee in a given contract may sue the obligor for breach." Id., 230–31. "[T]he ultimate test to be applied [in determining whether a person has a right of action as a third-party beneficiary] is whether the intent of the parties to the contract was that the promisor should assume a direct obligation to the third party [beneficiary] and . . . that intent is to be determined from the terms of the contract read in the light of the circumstances attending its making, including the motives and

[5] Section 302 of 2 Restatement (Second) of Contracts (1981) defines intended and incidental beneficiaries as follows:

"(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

"(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

"(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

"(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary."

purposes of the parties. . . . Although . . . it is not in all instances necessary that there be express language in the contract creating a direct obligation to the claimed third party beneficiary . . . the only way a contract could create a direct obligation between a promisor and a third party beneficiary would have to be . . . because the parties to the contract so intended." (Citation omitted; internal quotation marks omitted.) *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, supra, 266 Conn. 580–81. "[B]oth contracting parties must intend to confer enforceable rights in a third party"; (internal quotation marks omitted) id., 581; in order to give the third party standing to bring suit. This requirement "rests, in part at least, on the policy of certainty in enforcing contracts," which entitles each party to a contract "to know the scope of his or her obligations thereunder." (Internal quotation marks omitted.) Id.

To the extent that the plaintiff's claims require us to interpret the contract between Rinaldi and Nationwide, "[c]onstruction of a contract of insurance presents a question of law for the court which this court reviews de novo." (Internal quotation marks omitted.) *Board of Education* v. *St. Paul Fire & Marine Ins. Co.*, 261 Conn. 37, 40, 801 A.2d 752 (2002). "It is the function of the court to construe the provisions of the contract of insurance. . . . The [i]nterpretation of an insurance policy . . . involves a determination of the intent of the parties as expressed by the language of the policy . . . [including] what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . [A] contract of insurance must be viewed in its entirety, and the intent of the parties for entering it derived from the four corners of the policy . . . [giving the] words . . . [of the policy] their natural and ordinary meaning . . . ." (Internal quotation marks omitted.) *Hartford*

Casualty Ins. Co. v. *Litchfield Mutual Fire Ins. Co.*, 274 Conn. 457, 463, 876 A.2d 1139 (2005); accord *QSP, Inc.* v. *Aetna Casualty & Surety Co.*, 256 Conn. 343, 351–52, 773 A.2d 906 (2001). "If the terms of the [insurance] policy are clear and unambiguous, then the language from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . Under those circumstances, the policy is to be given effect according to its terms." (Citation omitted; internal quotation marks omitted.) *Taylor* v. *Mucci*, 288 Conn. 379, 384, 952 A.2d 776 (2008); see also *Hartford Casualty Ins. Co.* v. *Litchfield Mutual Fire Ins. Co.*, supra, 274 Conn. 463.

The plaintiff has failed to identify any express language in the insurance contract from which this court could conclude that Rinaldi and Nationwide intended to create a direct obligation to the plaintiff specifically. Certainly, the plaintiff is not listed as an insured and, indeed, is not referred to or mentioned at all in the contract. Moreover, the contract is devoid of any reference generally to entities like the plaintiff that might provide automobile recovery, towing and storage service to Rinaldi.[6]

The present case is unlike *Wilcox* v. *Webster Ins., Inc.*, supra, 294 Conn. 206. In *Wilcox*, the members of a limited liability company made a claim against the defendant insurer on an automobile policy and umbrella policy issued to their company for indemnification against claims arising from automobile accidents

[6] The contract, by its terms, excluded coverage to Rinaldi for towing services unless (1) Rinaldi paid an additional premium and (2) coverage for towing was expressly noted on the declaration page of the contract. It is undisputed that Rinaldi did not pay an additional premium for towing coverage and coverage for towing expenses is not listed on the declarations page. Even if Rinaldi had contracted for towing coverage, however, that fact would not necessarily mean that the Rinaldi and Nationwide intended to create a direct contractual obligation to any person or entity that provided towing services to Rinaldi.

involving company vehicles. Id., 211–13. The members directly sued the insurance company for breach of contract as a third-party beneficiary after their claim had been denied by the insurer. Id. One of the members was a specifically named insured on the automobile policy; the other was a specifically named insured on the umbrella policy, and the umbrella policy listed the company's automobile policy as an "underlying" insurance policy for the umbrella coverage. Id., 210, 218.

In *Wilcox*, our Supreme Court held that the parties arguably intended to cover the members of the limited liability company. Id., 218–19. Therefore, the members had standing to sue because they had a colorable claim that they were either named insureds or third-party beneficiaries to the contract between the limited liability company and the insurance company. Id. By contradistinction, unlike the members in *Wilcox*, the plaintiff here was not named in any part of the insurance contract and the plaintiff has not directed our attention to any language in the contract showing that the defendants, the named parties, intended to establish a direct obligation to the plaintiff.[7]

The plaintiff, in its attempt to establish that Rinaldi and Nationwide intended to assume a direct contractual obligation to it, relies upon the following language in

[7] *Gateway Co.* v. *DiNoia*, supra, 232 Conn. 223, is also instructive. In that case, our Supreme Court concluded that the owner of a premises, The Gateway Company (Gateway), was not a named party to a contract assigning the lease for the premises from the lessee to Lena DiNoia, the sublessee, it was an intended third-party beneficiary of the assignment. Id., 225, 232. In the lease assignment contract between DiNoia and the original lessee, DiNoia assumed all of the obligations that the lessee had in his contract with Gateway. Id., 226. This included the obligation to keep the premises in "good order and repair." Id., 225. Although Gateway was not a named party to the assignment, our Supreme Court concluded that, "as a matter of law . . . the intent expressed in the plain language of the lease between DiNoia and [the original lessee] created a direct obligation from DiNoia to Gateway [so] that . . . Gateway was a third party beneficiary [lease assignment contract]." Id., 232.

the contract providing Rinaldi coverage for property damage: "We will pay for damages for which you are legally liable as a result of an accident arising out of the . . . use . . . of your auto. Damages must involve . . . property damage or . . . bodily injury." The insurance contract defines property damage as the "(a) destruction of tangible property; (b) damage or injury to it; and (c) loss of its use." As a factual matter, the plaintiff argues that because Rinaldi's automobile came to rest following the accident on the real property of a third person, Rinaldi incurred liability to the property owner for damage to the real property and the plaintiff mitigated Rinaldi's liability by removing the vehicle from the property and towing it away. From these facts and the language of the contract providing coverage for property damage, the plaintiff leaps to the legal conclusion that Rinaldi and Nationwide intended that Nationwide assume a direct obligation to the property owner, and by further extension, to the plaintiff itself.

We disagree with the plaintiff that the provision of liability coverage in the contract for property damage evinces an intent to create a direct obligation by Nationwide to any third person or entity, known or unknown, (1) who suffers property damage as a result of Rinaldi's use of her vehicle or (2) who, although not suffering property damage itself, expends funds on Rinaldi's behalf to mitigate property damage suffered by others. The plaintiff's assertion simply confounds the distinction between those persons or entities that might foreseeably benefit from Rinaldi's contractual receipt of liability coverage with those persons or entities to whom both Rinaldi and Nationwide specifically intended that Nationwide would assume a direct obligation. As we previously have discussed, "the fact that a person is a foreseeable beneficiary of a contract is not sufficient for him to claim rights as a third party beneficiary." *Grigerik* v. *Sharpe*, supra, 247 Conn. 317–18; see

also *Macomber* v. *Travelers Property & Casualty Corp.*, 261 Conn. 620, 642, 804 A.2d 180 (2002) (in context of settling claims, insurer owes no fiduciary duty to third-party claimant because "such a duty would interfere with the insurer's ability to act primarily for the benefit of *its* insured" [emphasis in original]). The language of the insurance contract should not be tortured to impose a direct obligation on Nationwide to the potentially astronomical number of possible persons or entities that might suffer property damage[8] resulting from Rinaldi's use of her vehicle or who might mitigate property damage suffered by others.

The plaintiff argues that denying it third-party beneficiary status undermines sound public policy, because, in the plaintiff's view, "any other rule would provide the insured with the economic incentive to allow the loss to occur, to the detriment of the insurer, quite possibly the insured, and in a fair number of cases, to the general public as well." We reject this contention.

In advancing its public policy argument about mitigation of damages, the plaintiff relies on out-of-state authority that we find to be unpersuasive. Specifically, the plaintiff cites *State Farm Mutual Automobile Ins. Co.* v. *Toro*, 127 N.J. Super. 223, 316 A.2d 745 (Law Div. 1974), and *Spurgeon* v. *Certain Underwriters at Lloyd's, London*, United States District Court, Docket No. 3:05CV100, 2008 WL 53111 (N.D.W. Va. Jan. 2, 2008), amended in part on other grounds, Docket No. 3:05CV100, 2008 WL 360562 (N.D.W. Va. Feb. 8, 2008).

[8] Indeed, the plaintiff's assertion with respect to the property damage provision of the contract could be applied equally to the provisions providing Rinaldi liability coverage for bodily injury. Thus, under the plaintiff's theory, Nationwide would have also undertaken a direct obligation to any person suffering bodily injury on account of Rinaldi's use of her vehicle and to those that provide the injured person medical treatment or rehabilitative services.

In *Toro*, a declaratory judgment action was brought by an insurance company against its insured to determine whether towing and storage charges incurred following a collision were recoverable *by the insured* as consequential damages under an uninsured motorist endorsement. *State Farm Mutual Auto Ins. Co.* v. *Toro*, supra, 127 N.J. Super. 224. Although the court in *Toro* stated that costs associated with towing a motor vehicle are proximately caused by the underlying motor vehicle accident, the court did so in the context of discussing the scope of relief available to the insured in light of the policies underlying uninsured motorist coverage law.

In *Spurgeon*, a towing company that rendered services as a result of a motor vehicle accident sued the insured for towing costs. *Spurgeon* v. *Certain Underwriters at Lloyd's, London*, supra, 2008 WL 53111, *2. The insurance company refused to defend its insured in the action or to pay the charges incurred for towing. Id. The insured then sued the insurance company, which filed a motion for summary judgment on the ground that the insurance policy did not cover towing services. Id.

The court in *Spurgeon* found that the insurance company was liable *to the insured* for the towing and storage costs because there was a provision in the insurance policy between the parties that required the insured to mitigate damages. Id., *3. ("[a] policy provision requiring the insured to protect the vehicle from harm or damage following a collision permits the insured to recover expenses of towing the vehicle to a place of safety").

We do not find these cases relevant. Both cases involve actions brought by or against the named insured under the respective insurance policies. Neither case involved the question of whether a towing company should be deemed a third-party beneficiary to an insurance contract between the automobile owner and an

insurance company. Moreover, in *Spurgeon* and *Toro*, the courts' public policy conclusions relied on the fact that the named insured was seeking coverage. This reasoning does not, as the plaintiff argues, extend to "the service professionals who cleared the damage from the property."

Limiting the availability of direct breach of contract actions against insurers to those third persons or entities to whom the parties to the contract intend to create a direct obligation will not, contrary to the plaintiff's assertion, discourage third parties from mitigating property damage. If a towing company renders services after an accident, other avenues exist for the towing company to seek recovery for those services. We may presume that in many instances, the insurance company will pay for the services if the policy provides for such coverage. If there is no coverage for towing expenses, the towing company can seek recovery from the owner of the vehicle directly. Importantly, pursuant to General Statutes § 38a-321,[9] if the towing company obtains a judgment in a direct action against an insured and the insured was entitled to coverage for such a loss, the judgment creditor towing company is subrogated to the rights of the insured and may bring a direct action against the insurer to recover on the insurance policy. See *Carford* v. *Empire Fire & Marine Ins. Co.*, 94 Conn. App. 41, 46, 891 A.2d 55 (2006) ("[a] third party claimant is subrogated to the rights of the insured, and is entitled

[9] General Statutes § 38a-321 provides in relevant part: "Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or death or damage to property, if the defendant in such action was insured against such loss or damage at the time when the right of action arose and if such judgment is not satisfied within thirty days after the date when it was rendered, such judgment creditor shall be subrogated to all the rights of the defendant and shall have a right of action against the insurer to the same extent that the defendant in such action could have enforced his claim against such insurer had such defendant paid such judgment."

to bring an action against the insurance company, only *after* judgment [emphasis in original]").

As a third-party claimant, the plaintiff lacks standing to maintain a direct action against the insurance company. Accordingly, the trial court properly granted the Nationwide's motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

CHRISTOPHER BARKER *v.* ALL ROOFS BY DOMINIC ET AL.
(AC 40535)

Sheldon, Bright and Harper, Js.

Syllabus

The defendant city of Bridgeport appealed to this court from the decision of the Compensation Review Board affirming the decision of the Workers' Compensation Commissioner determining that the city was the principal employer of the plaintiff when he suffered a compensable injury while working for an uninsured subcontractor of the city on city property. The plaintiff was repairing the roof of the city's transfer facility when he suffered his compensable injury. After a formal hearing, the commissioner found that the plaintiff was an employee of the uninsured subcontractor, which, pursuant to statute (§ 31-255), required the Second Injury Fund to pay the plaintiff's workers' compensation benefits in lieu of his uninsured employer. Subsequently, the Second Injury Fund filed a motion for an order declaring that at the time the plaintiff suffered his injury, the city was his principal employer pursuant to statute (§ 31-291) and, thus, that the city was liable to pay all compensation benefits due to him. After the commissioner found, inter alia, that the city was the plaintiff's employer, the city appealed to the board, which affirmed the commissioner's decision. On the city's appeal to this court, *held*:

1. The city could not prevail on its claim that § 31-291 was not intended to apply to governmental entities because such entities are not engaged in any trade or business, as required under § 31-291 for principal employer liability to attach: in *Massolini* v. *Driscoll* (114 Conn. 546), our Supreme Court construed that statutory language and determined that a municipality can be held liable as a principal employer of an uninsured subcontractor's employee, the board applied that precedent and determined that building maintenance is an essential obligation of the city and, thus,

part of the business of the city, and although the city claimed that *Massolini* was incorrectly decided in that it defined business in an overly broad manner, this court was bound by that precedent and could not alter or reinterpret that decision, especially given that the language of § 31-291 has not changed since *Massolini* was decided; moreover, the city's claim that the legislature abrogated the rule of *Massolini* by establishing the Second Injury Fund was unavailing, as the statute that created the Second Injury Fund contained no language that referred to or purported to modify § 31-291, the plaintiff's purported interpretation of the Second Injury Fund statute would effect a repeal by implication, which was not supported by our case law, and our Supreme Court has cited *Massolini* in the years since the Second Injury Fund was created as the legal basis for holding governmental entities liable as principal employers under § 31-291.

2. The city could not prevail on its claim that even if § 31-291 can be applied to governmental entities, the board committed error in affirming the commissioner's finding that the city was the plaintiff's principal employer because the roofing work the plaintiff performed for the city was not a part or process in the city's trade or business; the commissioner having properly concluded that the city has a responsibility to manage, maintain, repair and control its property, including its garbage and refuse disposal facilities, and, therefore, that the work of repairing the roof of a city owned building was a part or process in the trade or business of the city, the board properly affirmed the commissioner's finding that the city was the principal employer of the plaintiff.

Argued April 11—officially released July 24, 2018

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Third District determining that the defendant city of Bridgeport was the principal employer of the plaintiff, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the defendant city of Bridgeport et al. appealed to this court. *Affirmed.*

Joseph J. Passaretti, Jr., for the appellants (defendant city of Bridgeport et al.).

Joy L. Avallone, assistant attorney general, for the appellee (defendant Second Injury Fund).

Opinion

SHELDON, J. The defendant, the city of Bridgeport (city),[1] appeals from the decision of the Compensation Review Board (board) affirming the finding and order of the Workers' Compensation Commissioner for the Third District (commissioner) holding that the city was the principal employer of the plaintiff Christopher Barker when he suffered a compensable injury while working for an uninsured subcontractor of the city on city property, and thus that the city was liable, pursuant to General Statutes § 31-291,[2] for all workers' compensation benefits[3] due to him in connection with that injury. The city claims that the board erred in affirming the decision of the commissioner that the city was liable to the plaintiff as his principal employer because (1) § 31-291 does not apply to governmental entities and (2) even if § 31-291, in theory, can apply to a municipality, it does not impose principal employer liability on the city in this case because one fact essential to establishing such liability—that the work being performed by the plaintiff when he was injured was a part or process

[1] The defendants in the matter before the commissioner were All Roofs by Dominic, Howard Adams d/b/a Howie's Roofing, the city of Bridgeport, and its insurer, PMA Insurance Company. This appeal is brought by the city and its insurance company.

[2] General Statutes § 31-291 provides in relevant part that "[w]hen any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process in the trade or business of such principal employer, and is performed in, on or about premises under his control, such principal employer shall be liable to pay all compensation under this chapter to the same extent as if the work were done without the intervention of such contractor or subcontractor. . . ."

[3] The defendant Second Injury Fund is the appellee in this appeal. The plaintiff's direct employer did not have workers' compensation insurance. Under General Statutes § 31-355 (h), "[w]hen a finding and award of compensation has been made against an uninsured employer who fails to pay it, that compensation shall be paid from the Second Injury Fund . . . ." The plaintiff did not file briefs before the board or this court.

of the city's trade or business—has not been satisfied.[4] We affirm the decision of the board.

The record reveals the following facts and procedural history. In March, 2000, the city contracted with All Roofs by Dominic (All Roofs) to repair the roof of the city's transfer facility. All Roofs then subcontracted the repair work to Howard Adams d/b/a Howie's Roofing (Howie's Roofing), who in turn hired the plaintiff to perform per diem work on the project. On June 29, 2000, the plaintiff was injured when he fell from the roof of the transfer facility while performing such per diem work.

Following his injury, the plaintiff filed claims for workers' compensation benefits against Howie's Roofing, All Roofs and the city. Neither All Roofs nor Howie's Roofing carried a valid workers' compensation insurance policy. After a formal hearing, Commissioner George A. Waldron determined, on January 5, 2005, that when the plaintiff suffered his work related injury, he was an employee of Howie's Roofing, and thus that the commission had jurisdiction over his claim. Under General Statutes § 31-255, this finding required the Second Injury Fund to pay workers' compensation benefits to the plaintiff in lieu of his uninsured employer.

In 2014, the Second Injury Fund filed a motion for an order declaring that, at the time the plaintiff suffered his injury, the city was his principal employer within the meaning of § 31-291, and thus that the city was liable to pay all compensation benefits due to him in connection with that injury. Under § 31-291, "[w]hen

[4] We note that the language of § 31-291 refers to "a part or process *in* the trade or business of such principal employer . . . ." (Emphasis added.) Our Supreme Court, in decisions addressing § 31-291; see *Mancini* v. *Bureau of Public Works*, 167 Conn. 189, 194, 355 A.2d 32 (1974); *Massolini* v. *Driscoll*, 114 Conn. 546, 551, 159 A. 480 (1932); and the board in its decision interchangeably use the phrase "a part or process *of* the trade or business . . . ." We therefore do the same.

any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process in the trade or business of such principal employer, and is performed in, on or about premises under his control, such principal employer shall be liable to pay all compensation under this chapter to the same extent as if the work were done without the intervention of such contractor or subcontractor.''

Commissioner Jack R. Goldberg conducted a formal hearing on the Second Injury Fund's motion on November 19, 2015, and February 23, 2016. At the hearing, the city conceded that it had hired All Roofs to perform roofing work at its transfer facility and that the plaintiff's injury took place on municipal property, which was under the city's control. The city denied, however, that it was liable to pay the plaintiff's workers' compensation benefits as his principal employer because the roofing work the plaintiff was performing when he was injured was not a part or process of the city's trade or business. The commissioner later summarized the evidence on which the city based its denial of principal employer liability as follows: ''John Cottell, the city's Deputy Director of Public Works, testified at the formal hearing that the city did not retain an employee on staff to repair roofs because the need was not extensive enough to hire an employee. In addition, the city's collective bargaining agreement barred other employees from doing work outside their assigned trades. Cottell said it was the responsibility of his department to maintain city owned buildings. To accomplish that, the city would issue a work order to a contractor it had placed on the 'on-call list' and retain him as an outside contractor to do small projects such as the one the [plaintiff] had been working on. Cottell testified he was uncertain whether a sole proprietor such as All Roofs . . .

needed to provide proof of workers' compensation insurance before working on a city owned building. He testified that the city . . . was not in the roofing business in 2000."

By finding and order dated June 16, 2016, the commissioner concluded that at the time of the plaintiff's injury, the city was his principal employer pursuant to § 31-291, and thus that it was required to pay all benefits to which he was entitled under the Workers' Compensation Act. In reaching this conclusion, the commissioner found that pursuant to *Massolini* v. *Driscoll*, 114 Conn. 546, 159 A. 480 (1932), a municipality can be held liable as a principal employer of an uninsured contractor's or subcontractor's injured employee; that pursuant to *Pacileo* v. *Morganti, Inc.*, 10 Conn. App. 261, 522 A.2d 841 (1987), it is not necessary for an employer to have employees who perform the particular functions that the injured worker was performing when he was injured in order to be held liable as his principal employer; that pursuant to General Statutes § 7-148, the city has a responsibility to manage, maintain, repair and control its property, including its garbage and refuse facilities; and that, although the city had no roofers on its staff, the work of repairing roofs on city owned buildings was a part or process of the trade or business of the city. The city thereafter appealed to the board, claiming: first, that municipalities, as public or governmental entities, are not, by definition, engaged in any "trade or business," and thus they cannot be held liable as principal employers under § 31-291; second, that it is now the statutory responsibility of the Second Injury Fund, rather than of municipalities, to pay workers' compensation benefits to injured employees of their contractors and subcontractors that do not carry workers' compensation insurance; and third, that, even if the city could be found to have engaged in a "trade or business," it was not engaged in the trade or business of roofing

when the plaintiff suffered his injury, and thus it cannot be held liable, under § 31-291, as the plaintiff's principal employer, to pay him worker's compensation benefits. The board rejected each of these claims.

Before us on appeal, the city presents an amalgam of its above described arguments as a single claim of error: that the board erred in affirming the commissioner's finding that the city was the plaintiff's principal employer pursuant to § 31-291. In its brief, the city first suggests, as it argued before the board, that the principal employer statute never was intended to apply to public or governmental entities. Then it briefly reiterates its second claim raised before the board, that the creation of the Second Injury Fund abrogated prior case law from our Supreme Court, which held that § 31-291 can apply to municipalities. Third and finally, it makes its principal claim that it was not the plaintiff's principal employer because roofing was not a part or process in its trade or business when the plaintiff suffered his injury. We will address all of the city's claims, however incompletely they were briefed before us, because the Second Injury Fund has responded fully to each of them.

"As a threshold matter, we set forth the standard of review applicable to workers' compensation appeals. The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board." (Internal quotation marks omitted.) *Marandino* v. *Prometheus Pharmacy*, 294 Conn. 564, 572, 986 A.2d 1023 (2010).

I

The city first suggests, as it argued before the board, that § 31-291 was never intended to apply to governmental entities such as municipalities. Alternatively, it argues that even if § 31-291 at one time applied to municipalities, it ceased to do so with the creation of the Second Injury Fund, which has become responsible for paying workers' compensation benefits for all employees of uninsured employers like Howie's Roofing and All Roofs.

Under § 31-291, principal employer liability attaches "[w]hen any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process in the trade or business of such principal employer, and is performed in, on or about premises under his control . . . ." Section 31-291 involves three main elements: "(1) the relation of the principal employer and contractor must exist in work wholly or in part for the former; (2) the work must be on or about premises controlled by the principal employer; [and] (3) *the work must be a part or process in the trade or business of the principal employer*." (Emphasis added; internal quotation marks omitted.) *Gigliotti* v. *United Illuminating Co.*, 151 Conn. 114, 118, 193 A.2d 718 (1963).

A

The city first suggests that § 31-291 was not intended to apply to governmental entities because such entities are not engaged in any trade or business. The statutory language that the city asks us to interpret, however, was authoritatively construed by our Supreme Court in *Massolini*. There, in an opinion by which we are bound, the court expressly discussed as follows the statutory definitions of trade and business. "The language of the statute is disjunctive—'trade or business.' Both terms

are, therefore, to be given their natural meaning, and are not used synonymously. 'Trade' commonly connotes the buying, selling or exchanging of commodities. 'Business,' however, is a much broader term. . . . When applied to a public corporation, the term signifies the conduct of the usual affairs of the corporation, and such as commonly engage the attention of its officers." (Citations omitted.) *Massolini* v. *Driscoll*, supra, 114 Conn. 552. The court in *Massolini* concluded that a valid claim for compensation had been established against the city of Hartford because the plaintiff's decedent had been injured "while engaged in doing an act incidental to and in furtherance of the operations involved in the business of the city . . . ." Id., 553.

In rejecting the city's claim, the board correctly noted that *Massolini* "clearly stands for the proposition that a municipality *can* be a principal employer and it is indistinguishable from the present case on both the facts and on the law." (Emphasis in original.) Applying the rule of *Massolini*, the board determined that building maintenance is an essential obligation of the city, because "maintaining a public works department and addressing refuse collection are among the usual activities of municipal government . . . [and] maintaining its buildings and facilities in good repair are among those operations which enter directly into the successful performance of municipal government."

In seeking to persuade us not to follow *Massolini*, the city suggests that *Massolini* was decided incorrectly because the definition of "business" it used was unduly broad and at variance with the commonly understood meaning of that term. That argument, of course, must be rejected because our task as an intermediate appellate court is to enforce the decisions of our Supreme Court, not to alter them by reinterpretation. Because the language of § 31-291 has not changed since *Massolini* was decided, and our Supreme Court has never offered its own reinterpretation of such language, we must conclude that its meaning remains unchanged to this date,

and thus that municipalities can be held to be liable as principal employers under the statute.

B

As a fallback position, the city argues, as it claimed before the board, that the legislature abrogated the rule of *Massolini* by establishing the Second Injury Fund, the purpose of which assertedly is to ensure that all injured workers whose employers do not carry workers' compensation insurance, nonetheless, are paid all workers' compensation benefits to which they are entitled for their work related injuries through the Second Injury Fund.[5] There are two important reasons why this argument must be rejected as well. First, there is nothing in the statute creating the Second Injury Fund that even refers to, much less purports to modify, the principal employer statute. Any such construction of the Second Injury Fund statute would therefore effect a repeal by implication, which is strongly disfavored. See *Powers* v. *Ulichny*, 185 Conn. 145, 153, 440 A.2d 885 (1981).

The second reason for negating the city's argument that the rule of *Massolini* was abrogated by the state

[5] The city cites to General Statutes § 31-355, which provides in relevant part: "(a) The commissioner shall give notice to the Treasurer of all hearing of matters that may involve payment from the Second Injury Fund, and may make an award directing the Treasurer to make payment from the fund.

"(b) When an award of compensation has been made under the provisions of this chapter against an employer who failed, neglected, refused or is unable to pay any type of benefit coming due as a consequence of such award or any adjustment in compensation required by this chapter . . . such compensation shall be paid by the Second Injury Fund. . . .

"(c) The employer and the insurer, if any, shall be liable to the state for any payments made out of the fund in accordance with this section or which the Treasurer has become obligated to make from the fund, together with the cost of attorney's fees as fixed by the court. . . .

* * *

"(h) When a finding and award of compensation has been made against an uninsured employer who fails to pay it, that compensation shall be paid from the Second Injury Fund . . . ."

statute creating the Second Injury Fund is, as the board itself determined, our Supreme Court has cited *Massolini* in the years since the Second Injury Fund was created as the legal basis for holding governmental entities liable as principal employers under § 31-291. See *Mancini* v. *Bureau of Public Works*, 167 Conn. 189, 355 A.2d 32 (1974) (finding defendant, public entity, to be principal employer). Accordingly, we are persuaded that municipalities like the city still may be held liable as principal employers when the injured employees of their uninsured contractors or subcontractors qualify for such benefits under § 31-291.

II

The city finally claims that, even if § 31-291 can be applied to governmental entities, the board committed error in affirming the commissioner's finding that the city was the plaintiff's principal employer in this case because the roofing work he was performing for the city was not a part or process in the city's trade or business. The commissioner's conclusions on that issue, however, "must stand unless they could not reasonably or logically be reached on the subordinate facts." (Internal quotation marks omitted.) *Samaoya* v. *Gallagher*, 102 Conn. App. 670, 675, 926 A.2d 1052 (2007).

"Generally . . . whether the work in which the [worker] is engaged is a part or process in the trade or business of the principal employer is a question of degree and fact." (Internal quotation marks omitted.) *Mancini* v. *Bureau of Public Works*, supra, 167 Conn. 195. "[T]he words process in the trade or business . . . [include] all those operations which entered directly into the successful performance of the commercial function of the principal employer. . . . The issue also has been framed in terms of whether the defendant's employees ordinarily or appropriately would perform the work in question . . . *although this test is not nec-*

essarily conclusive." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 196. "[I]t is clear that the part or process element is intended to include all of those tasks which are required to carry on the principal employer's business." *Alpha Crane Service, Inc.* v. *Capitol Crane Co.*, 6 Conn. App. 60, 76, 504 A.2d 1376, cert. denied, 199 Conn. 808, 508 A.2d 769 (1986); see also *Mancini* v. *Bureau of Public Works*, supra, 195–96 (narrow construction of whether work to be done is part of trade or business "would contravene the frequent support given to a broad interpretation of the act").

In the present case, the commissioner's conclusion that, pursuant to § 7-148, the city has a responsibility to manage, maintain, repair and control its property, including its garbage and refuse disposal facilities, and therefore that the work of repairing the roof of a city owned building is a part or process in the trade or business of the city, must stand. Accordingly, we conclude that the board properly affirmed the commissioner's finding that the city was the principal employer of the plaintiff.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RAASHON JACKSON (AC 40433)

Lavine, Alvord and Beach, Js.

Syllabus

Convicted of the crimes of murder, conspiracy to commit murder and assault in the first degree in connection with a shooting, the defendant appealed, claiming, inter alia, that the trial court deprived him of a fair trial and his right to present a defense when it denied his motion in limine to preclude certain testimony of W, the state's expert witness, pertaining to cell phone site location data. The defendant and R, who also was involved in the shooting, were tried jointly to a jury. R's cousin, A, had

driven the defendant and R to and from the scene of the shooting. The state had retained W to analyze certain global positioning system and cell phone data to determine the locations of the defendant, R and A at the time of the shooting. During jury selection seven days before trial, the state disclosed to the defense a PowerPoint presentation that W had created. The court denied the defendant's motion in limine to preclude W's testimony, concluding that the state had not acted in bad faith in making the late disclosure and that the defendant had not been prejudiced. The court also denied the defendant's request for a six week continuance so that he could consult with an expert of his own. *Held*:

1. The trial court did not abuse its discretion in denying the defendant's motion in limine to preclude W from testifying or in denying the defendant's request for a six week continuance to consult with his own expert: that court determined that the state had not acted in bad faith, nor did the defendant claim bad faith by the state, defense counsel, in clarifying the issues that were the basis for the motion, stated that he was concerned about a portion of W's PowerPoint presentation that contained hearsay, which the court ultimately precluded, and given that twenty-one days had elapsed between the state's disclosure of the PowerPoint presentation and W's testimony, the court reasonably could have concluded that a six week continuance would have been too disruptive to the trial; moreover, defense counsel failed to renew his request for a continuance at the conclusion of the state's direct examination of W, the denial of a continuance was not so arbitrary as to vitiate logic and was not based on improper or irrelevant factors, and although the court improperly determined that the defendant was not prejudiced, as the defendant was prevented from potentially presenting the testimony of his own expert, the court ameliorated the prejudice by precluding a portion of W's PowerPoint presentation that defense counsel claimed contained hearsay, and by permitting defense counsel to confer with W regarding changes to the PowerPoint presentation, and defense counsel conducted an effective cross-examination of W; furthermore, even if the court abused its discretion, the defendant failed to demonstrate that the claimed error was harmful, as the state's case against him was relatively strong, W's testimony was corroborative of other testimony, and the jury viewed surveillance video and still images from the crime scene, as well as photographs and a text message from R that were recovered from the defendant's cell phone.

2. This court declined to review the defendant's unpreserved evidentiary claim that the trial court improperly permitted W to testify without first conducting a hearing pursuant to *State* v. *Porter* (241 Conn. 57) as to his qualifications and the reliability of his methodology: the defendant failed to request a *Porter* hearing, he conceded to the trial court that the evidence W offered was admissible through a proper expert and requested to voir dire W only as to his qualifications, and although this court has recognized that the rule set forth in *State* v. *Edwards* (325

Conn. 97)—that a police officer must be qualified as an expert witness before testifying about cell phone data and that cell phone data evidence is of a scientific nature requiring a *Porter* hearing—is retroactively applicable to pending cases, that did not compel the conclusion that an evidentiary claim made pursuant to *Edwards* is reviewable where, as here, the claim is unpreserved; accordingly, because the defendant failed to request a *Porter* hearing, his unpreserved evidentiary claim that the trial court erred in failing to hold a *Porter* hearing was not reviewable.

3. The trial court did not abuse its discretion in precluding the defendant from presenting testimony from his investigator to rebut W's testimony; it was not clear from defense counsel's proffer whether the investigator had sufficient knowledge regarding the cell site accessed by the defendant's phone, defense counsel did not request a hearing outside the presence of the jury to proffer the investigator's testimony or inform the trial court that he intended to rely on certain of W's conclusions, and defense counsel's proffer did not include whether the investigator had knowledge as to the geographical coverage area of the cell site at issue.

4. The defendant could not prevail on his claim that he was deprived of his right to present a defense when the trial court prevented him from introducing evidence that a gun used in the shooting had been found one year later on a person who was unrelated to the shooting; the trial court did not abuse its discretion in concluding that the proffered evidence was too remote in time to be relevant to show a lack of identity of the defendant as one of the shooters, as the court reasonably could have concluded that the fact that the weapon was found in the possession of a different individual almost one year after the crimes at issue did not render it either certain or more probable that the defendant was not one of the shooters.

5. The trial court did not abuse its discretion in admitting certain consciousness of guilt evidence concerning the defendant's failure to appear in court on unrelated matters subsequent to the shootings: the jury reasonably could have inferred that the defendant's failure to appear could have been influenced by his involvement in the shootings and indicated a consciousness of guilt in the shooting incident, and the evidence of his failure to appear was not more prejudicial than probative, as there was nothing in the record to indicate that it created a side issue that unduly distracted the jury, no significant amount of time was expended on the issue, and the jury reasonably could have inferred from a text message sent by R to the defendant that the defendant was aware that the police might seek him out in connection with the shootings; moreover, even if the defendant had presented evidence that he failed to appear in court because he had fled from the scene of an accident in which the police found a gun in the car he had been operating, the jury was entitled to make contrary inferences, and even if the court had considered the transcript of a prior proceeding in which defense counsel

made representations about his unsuccessful efforts to contact the defendant about his failure to appear in court, the transcript did not compel the conclusion that the defendant did not have notice of the court date.

Argued January 29—officially released July 24, 2018

Procedural History

Substitute information charging the defendant with four counts of the crime of assault in the first degree, and with the crimes of murder, conspiracy to commit murder and criminal possession of a firearm, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kavanewsky, J.*, granted the defendant's motion to sever the charge of criminal possession of a firearm; thereafter, the court granted the state's motion to consolidate the case for trial with that of another defendant; subsequently, the matter was tried to the jury; thereafter, the court denied in part the defendant's motion to preclude certain evidence, and denied the defendant's motions for a continuance and a mistrial, and to introduce certain evidence; verdict of guilty; subsequently, the court denied the defendant's motion for a judgment of acquittal or a new trial; thereafter, the state entered a nolle prosequi as to the charge of criminal possession of a firearm, and the court rendered judgment in accordance with the verdict, from which the defendant appealed. *Affirmed.*

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *C. Robert Satti, Jr.*, supervisory assistant state's attorney, and *Pamela J. Esposito*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Raashon Jackson, appeals from the judgment of conviction, rendered after

a jury trial, of one count of murder in violation of General Statutes § 53a-54a (a), one count of conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a (a), and four counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5). On appeal, the defendant claims that the trial court: (1) abused its discretion and deprived him of his rights to a fair trial and to present a defense when it denied his motion to preclude the testimony of the state's belatedly disclosed expert witness and refused to afford him a continuance to retain his own expert, (2) abused its discretion in admitting the testimony of the state's expert without conducting a *Porter* hearing,[1] (3) abused its discretion and deprived him of his right to present a defense when it excluded exculpatory evidence in the form of his investigator's testimony, (4) deprived him of his right to present a defense when it excluded exculpatory evidence regarding the discovery of a gun used in the crimes, and (5) abused its discretion in admitting certain consciousness of guilt evidence and instructing the jury as to that evidence. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. On September 10, 2013, Roderick Rogers called his cousin, David Anderson, seeking a ride. At 2:10 p.m., a social worker, William Muniz, went to Rogers' house in Bridgeport to discuss a job opportunity. Rogers told Muniz that he had to go somewhere but could be back in one hour. Muniz asked that Rogers call him when he returned home. As Muniz was leaving, Anderson was arriving. Anderson was on probation at the time, and his movements were tracked by a global positioning system (GPS) device he wore on his ankle.

[1] See *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998).Following our Supreme Court's decision in *State* v. *Edwards*, 325 Conn. 97, 156 A.3d 506 (2017), the defendant filed a supplemental brief setting forth this claim.

Anderson and Rogers left the house together, and Rogers directed Anderson to drive toward Palisade Avenue, a street a couple of blocks away from Rogers' house. After turning on Palisade Avenue, Rogers saw the defendant, who was a friend called Red Dreads. Anderson stopped the car, and the defendant got in on the rear passenger side. Rogers told Anderson to drive from the east side of the city to the "Terrace," located in the north end of Bridgeport. After turning into the Terrace, Rogers directed Anderson to turn around, park on a side street off Reservoir Avenue, and wait because he and the defendant would be right back. Rogers asked Anderson if he had an extra shirt, and Anderson told him to check the trunk. Rogers and the defendant got out of the car, went to the open trunk, shut the trunk, and walked down a hill.

At the time, a group of young men was gathered outside the Beardsley Terrace public housing complex. Rogers and the defendant approached the group and said, "y'all just came through the Ave shooting Braz, you all f'd up,"[2] and began shooting. Rogers and the defendant then ran off with the weapons in their hands. They returned to Anderson's car, and Rogers told Anderson to drive back down Reservoir Avenue. They drove to the corner of Stratford Avenue and Hollister Avenue, and Anderson parked the car. The defendant told Rogers he thought he had dropped a clip. After opening and shutting the car door, the defendant got out of the car, and walked toward Stratford Avenue. Anderson then drove Rogers home. Rogers called Muniz at 2:46 p.m., and Muniz returned to Rogers' home by 3 p.m.

Seven shell casings were recovered from the scene, and forensic analysis revealed that four were fired from

[2] One of the victims, Aijholon Tisdale, understood Rogers and the defendant to be showing disrespect by calling them "a Brazzie" because that is what they call people from the east end of Bridgeport.

one gun and three were fired from a different gun. One of the victims, LaChristopher Pettway, died from a gunshot wound to his mid-left back. Four others sustained gunshot wounds, including Tamar Hamilton, who was shot in the heel; Leroy Shaw, who was shot in the arm; Jauwan Edwards, who was shot in the buttocks; and Aijholon Tisdale, who was shot in the upper thigh. On September 16, 2013, Rogers was arrested. That day, Rogers sent a text message to the defendant indicating that "[d]ey taken [me]."

On March 10, 2014, the defendant was arrested. He was charged in the operative information with murder, conspiracy to commit murder, and four counts of assault in the first degree.[3] Upon the state's motion, the defendant's case was consolidated for trial with that of Rogers. After the presentation of evidence, a jury found the defendant guilty on all counts of the information.[4] The jury also answered "yes" to a set of written interrogatories indicating that the state had proven beyond a reasonable doubt that the defendant used a firearm during the commission of each crime. The defendant was sentenced to a total effective term of fifty-five years of incarceration. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that he was "deprived of a fair trial and of his right to present a defense when the court denied his motion to preclude the testimony

[3] The court previously had granted the defendant's motion to sever the count of criminal possession of a firearm from the state's long form information. The state later entered a nolle prosequi as to that count.

[4] The jury also found Rogers guilty of the same offenses: one count of murder in violation of § 53a-54a (a), one count of conspiracy to commit murder in violation of §§ 53a-48 (a) and 53a-54a (a), and four counts of assault in the first degree in violation of § 53a-59 (a) (5). Rogers and the defendant have appealed separately. See *State* v. *Rogers*, 183 Conn. App. 669, A.3d (2018).

of [Hartford Police Sergeant Andrew] Weaver." The defendant contends in the alternative that "[e]ven if the court's decision not to preclude Weaver's testimony was proper, it was certainly an abuse of discretion to deny a reasonable continuance for [the] defendant to consult with an expert." In a supplemental brief, the defendant further claims that "[t]he trial court abused its discretion when it allowed . . . Weaver to testify as an expert without ever conducting a *Porter* hearing to determine if he was qualified to testify as an expert and whether the methodology he used to support his opinion that [the] defendant was in the same location as Anderson and Rogers at the time of the crime was reliable." See footnote 1 of this opinion.

The following additional facts and procedural history are relevant to these claims. The defendant served a request for disclosure on the state in April, 2014, and filed a "motion for disclosure and hearing re: state's expert witnesses" dated April 21, 2015. In his motion, the defendant sought, inter alia, disclosure of the names of each expert witness the state intended to call at trial and the opinions to which each witness was expected to testify. The court addressed the motion during a hearing on April 29. The defendant anticipated that the state might offer an expert with respect to "pinpoint[ing] cell phones relative to towers and things like that," and stated that it was "unclear" what that expert's opinion may be with respect to the defendant's cell phone. The defendant anticipated that if the state disclosed an expert on this issue, he might file a motion in limine. The court responded: "Okay. So, what you're asking for is, if the state's going to call an expert to give opinion evidence about the proximity of [the defendant's] cell phone to a tower somewhere that you [would] like to know who that is and [what] they're going to say?" The defendant confirmed that was the disclosure he sought, and the state responded that it

had no objection to providing that information, but stated that it "can't definitively say who that might be at this time because we're still analyzing the data . . . ." The court responded: "But, I mean, if you selected somebody and they say, look, in my opinion, this cell phone was within, like, 100 feet of this tower . . . which is on this building, you'll disclose that to the defense?" The state replied that it would do so.

Jury selection began on August 3, 2015. On that date, the state provided the defendant with a list of potential witnesses that included Weaver's name under the heading of Hartford Police Department, but did not identify him as an expert witness. Throughout jury selection, the state identified Weaver to venire panels as a potential witness. On October 1, 2015, seven days before evidence began and while jury selection was still ongoing, the state provided the defendant with Weaver's resume and a file containing a PowerPoint presentation Weaver created. On October 7, the defendant filed a motion in limine seeking to preclude Weaver's testimony, specifically as it related to cell site location information, or, in the alternative, "a reasonable continuance in order that a defense expert may be retained (e.g., apply for and obtain funding authorization from the Office of the Chief Public Defender, allow for expert's review of necessary materials, etc.)". The defendant argued that he had not been provided foundational information for Weaver's opinion, and that the late disclosure caused him undue prejudice. The defendant claimed that he needed to hire his own expert, and that he could not identify, hire, and obtain funding for an expert, provide the potential expert with the material for review, and confer with the expert in the presentation of the defendant's defense in the short time before evidence was set to begin.

The court held a hearing on the defendant's motion in limine on October 20, 2015. The court referred to the

defendant's argument regarding the state's late disclosure of Weaver and then stated: "Also, from a more substantive point of view, I understand the motion in limine to say this . . . that Sergeant Weaver purportedly used . . . two devices or sets of data or software programs—I'm not sure how to characterize them—that the defense feels are problematic. One is cell tower related information that is accessible to law enforcement, and that's referenced in the moving papers. Accessible to law enforcement and it's not reflected on the data that's been produced pursuant to subpoena and witnesses here in court. And that [the] other is the use of what I'm just going to call a GeoTime . . . computer program. . . .

"[T]hose are really the issues that I'm trying to give the short version of [w]hat I see the defense raising as problematic. And what I would like to do is to approach it this way. Let me just say one more thing. The other area, in fairness to the defense, is the reliability of this GeoTime software and whether Sergeant Weaver is qualified as an expert to do what he's done. I think that fairly covers everything."

Defense counsel then responded: "Just two things, Your Honor. In terms of sergeant—well, I guess it's related. In terms of Sergeant Weaver's qualifications to testify as an expert and the state's memorandum in opposition, which seems to focus largely on the issue of whether or not the proffer[ed] purpose of Sergeant Weaver's testimony was generally inadmissible . . . I don't think we ever really contested that this type of information can be presented to a jury if coming in through a proper expert. And in terms of Sergeant Weaver's qualifications, we would just like to voir dire him during his testimony if he's allowed to testify. So, that's not really a basis. And then also—and I think there was one issue. . . . One issue that we see as substantive with respect to the—to the PowerPoint presentation

slideshow that he—that Sergeant Weaver has presented to us for review, and that is in particular the second page, which is that entire summary page."

Defense counsel then called Weaver to the witness stand. Weaver testified that the state's attorney's office had contacted him "two to three weeks ago" to inquire whether he would be willing to assist with a case in Bridgeport. The state's attorney's office sent Weaver hard copies and compact discs (CDs) of call detail records from three carriers: AT&T (for a cell phone number the state associated with Anderson), Sprint PCS (for a cell phone number the state associated with the defendant), and Metro PCS (for a cell phone number the state associated with Rogers). Weaver learned that the Metro PCS records contained the wrong set of tower information, and he downloaded the correct tower information from the National Cellular Assistance Data Center (NCADC) in the form of an Excel spreadsheet.[5] Weaver included that spreadsheet on the CD he created, made a second copy for the defense, and advised the state attorney's office that the records were ready. Weaver also e-mailed the PowerPoint presentation to the state. The state never picked up the two copies of the CD and told Weaver that it believed that it had the information it needed.

After the conclusion of Weaver's testimony during the hearing on the motion in limine, defense counsel argued that the state violated Practice Book § 40-11 by failing to disclose Weaver.[6] Defense counsel further

[5] We note that Weaver initially testified during the hearing on the defendant's motion in limine that Sprint PCS sent him the wrong set of tower information. During his testimony before the jury, however, he stated that he had made a mistake in his earlier testimony and that Metro PCS was the carrier that sent him the wrong tower data. Accordingly, the data that Weaver downloaded from the NCADC database in the form of an Excel spreadsheet corresponded to Rogers' cell phone, not the defendant's cell phone.

[6] Practice Book § 40-11 provides in relevant part: "(a) Upon written request by a defendant filed in accordance with Section 41-5 and without requiring any order of the judicial authority, the prosecuting authority, subject to

argued that he had never received the CDs Weaver prepared, which contained the cell tower records in the form of an Excel spreadsheet and a version of the PowerPoint presentation that contained a video, rather than a still image.[7] Reciting his efforts to obtain an expert even in the absence of the underlying tower data, defense counsel argued that he had been prejudiced in his ability to meaningfully challenge Weaver's testimony. Defense counsel requested that the court preclude Weaver's testimony, or in the alternative, grant him a reasonable continuance of at least six weeks.

The state explained that it had understood the court's April 29, 2015 order to require the state to disclose expert opinion evidence once the state received it. The state claimed that it provided Weaver's name on August 3, and that the "very first research of Sergeant Weaver by the Internet would give certainly an indication as to what he does." The state further responded that as soon as it became aware of Weaver's testimony in a Milford case, it provided the transcript to the defendant. The state claimed that it did not meet with Weaver until the "end of September" because it was in the process of jury selection for this trial and that another trial was

Section 40-40 et seq., shall promptly, but no later than forty-five days from the filing of the request, unless such time is extended by the judicial authority for good cause shown, disclose in writing the existence of, provide photocopies of, and allow the defendant in accordance with Section 40-7, to inspect, copy, photograph and have reasonable tests made on any of the following items . . .

"(3) Any reports or statements of experts made in connection with the offense charged including results of physical and mental examinations and of scientific tests, experiments or comparisons which are material to the preparation of the defense or are intended for use by the prosecuting authority as evidence in chief at the trial . . . ."

[7] One of the slides of Weaver's presentation contained a video depicting the movement of Anderson's GPS unit. Because Weaver had e-mailed the presentation as a PDF file, however, the video was not viewable. The video could only be viewed by opening the records contained on the CDs that were never picked up.

going forward. With respect to the CDs, the state stated that it had "no answer" to explain why they were not picked up or disclosed, and represented that it had not seen them.

With respect to prejudice, the state argued that it had "provided information from this file" early on in the case, that "everybody knew the cell phone evidence was clearly in this case and it was part of the investigation certainly from the early stages," and that defense counsel knew Anderson wore a GPS bracelet. In response to a question from the court regarding why the state delayed in retaining and meeting with Weaver, the state responded that both the state and defense counsel were preparing for other trials, and that in June, 2015, this case had been postponed until August.

In an oral ruling, the court stated: "[T]he problem I'm having is, while I know that we are all busy people, I don't think it's a fair interpretation of what the Practice Book requires and what the court orders were in this case to say that, okay, as soon as we have it we'll give it to you notwithstanding when we have it. I mean, what does that mean? Now, that would mean that you engage an expert and you have the product that you intend to offer through him the date before the evidence starts. I know that didn't happen here, but the product was delivered in October, October the first or thereabouts and the evidence started on October the eighth. I just don't—you know, these obligations for disclosure, which were filed, [somewhat] generic, others were much more specific made months ago. And while I don't disagree with the state that this type of evidence cannot be said to be unanticipated, the problem is that until the defense knows . . . what the state is going to present . . . it can't prepare to, you know, meet that evidence by either consulting other experts or retaining other experts or what have you. That's the problem I have. That's the problem I have here.

"I'm not saying that there was bad faith involved. I'm just saying that notwithstanding our schedules, I believe that . . . this was all an avoidable situation. You know, had—or have we been pressed, you know, the state could well have said, Your Honor, I need two days off from jury selection to go meet with expert so and so to see if we're going to use him, and that didn't happen. I'm . . . just troubled by the way that this all unfolded. Again, not that there was bad faith involved, but this was . . . in my mind, an avoidable situation."

In concluding that the defendant had not suffered prejudice, the court explained that "what the state intends to present here by way of cell phone evidence, the movement of these phones and . . . the GPS, is not what I would call a . . . matter that is so novel or cutting edge or unusual that the defendant would suffer prejudice as a result of allowing its use here in court in testimony through the witness." The court accordingly denied the defendant's motion in limine, but precluded from evidence two slides of Weaver's PowerPoint presentation, one depicting the video the defendant had never received; see footnote 7 of this opinion; and another containing hearsay. Defense counsel inquired whether the court also was denying the defendant's request for a continuance, to which the court replied that it was and that "[y]ou can renew your motion if you need be at the . . . end of direct. But based upon what I've heard so far, been presented with so far, I'm denying the request for a continuance." The defendant then moved for a mistrial, which the court denied.

Defense counsel also requested a copy of the Excel spreadsheet, and the state indicated that it was copying the CDs to provide to the defendant. The state further indicated that Weaver was returning to his office to redact the precluded information. The next afternoon, before Weaver was set to testify before the jury, defense counsel informed the court that in addition to making

redactions to the PowerPoint presentation, Weaver had made other revisions, including changing the representation of cell site coverage areas from ovals to pie wedges, which had the effect of narrowing the coverage areas. The court ordered a ten minute recess to allow defense counsel to confer with Weaver regarding the changes. Back on the record, defense counsel stated that although he had a better understanding of the changes, he was still unclear as to the reason for them. Defense counsel renewed his requests for preclusion and for a mistrial. In the alternative, the defendant sought a continuance in order to obtain the transcript from the prior day's hearing, or at a minimum, a continuance "until tomorrow to have an opportunity to digest all this material" and prepare for cross-examination the following day. Defense counsel noted that the state had given him CDs the day before, but that the CDs were not responsive to the defendant's requests and that new CDs provided that morning had not yet been reviewed by defense counsel. The court granted a continuance until the following morning and asked defense counsel whether he believed that time to confer with Weaver would be useful to him, to which defense counsel replied that he did. The court ordered Weaver to remain available to defense counsel from the time it adjourned, which appeared to be sometime after 4 p.m., until 4:45 or 4:50 p.m. The court further ordered the state to provide any of Weaver's spreadsheets that it had not yet provided to defense counsel.

The next morning, defense counsel informed the court that he had spent twenty minutes or one-half hour with Weaver, who "provided some clarification relative to the changes in his presentation." For the reasons that he previously had offered, the defendant then renewed his objection to the state's late disclosure of Weaver. Defense counsel stated: "But specific as to the changes, I can't say to the court that I'm not prepared

to go forward today and address those changes as needed." He further implied that the revision to the PowerPoint presentation "just magnifies the import of the prejudice to [the defendant] relative to not being able to get our own expert." The court inquired of defense counsel whether "these changes in the report impair your ability to cross-examine the witness to any greater extent [than] you feel you may have been impaired when you first made the motion to preclude . . . ." Defense counsel responded that they did not and represented to the court that he felt prepared to go forward.

Evidence then resumed, and the state called Weaver to the witness stand. After inquiring as to Weaver's experience and background, the state introduced Weaver's PowerPoint presentation into evidence. Defense counsel conducted a voir dire as to the PowerPoint presentation, and ultimately did not object to the presentation. Weaver testified that the states attorney's office had provided him with logs for Anderson's GPS device and call detail records for three phone numbers, and had asked him to map the location of Anderson's GPS and phone calls made and received for two of the phone numbers, which the state attributed to Rogers and the defendant. Using software called GeoTime, Weaver mapped these locations, which were depicted on the maps as a person figure in the center of 120 degree pie shaped coverage areas. Weaver's presentation contained fifteen different snapshots of maps and descriptions indicating Anderson's GPS location and whether the defendant's or Rogers' cell phone connected to a cell site with a "generally expected coverage area" in which Anderson's GPS was also located.

Snapshots nine through thirteen showed that the defendant's phone connected to a cell site whose coverage area included Anderson's GPS. Specifically, snapshot nine depicted the defendant's phone connected to

a cell site whose coverage area included the location of the shootings. Snapshot thirteen depicted Rogers' and the defendant's phones connected to a cell site that included the area of Stratford Avenue and Hollister Avenue, where Anderson's GPS was also located. Weaver opined that the "phones moved together or met with before and/or after . . . the [victim's] murder. They either traveled to or traveled from. [Rogers' phone] moved toward the [victim's] murder with the Anderson GPS. And the [defendant's] phone, the 6819 number, moved away and then when they actually made phone calls all together . . . within this area of Stratford and Hollister after the homicide."

At the conclusion of Weaver's direct examination, defense counsel did not renew the defendant's request for a continuance. On cross-examination, defense counsel questioned Weaver about a call made from Rogers' phone to the defendant's phone at 2:14 p.m. Weaver testified that he did not map the 2:14 p.m. call because the state's attorney's office had asked him only to plot the locations when the two phones were together, and the two phones were not together at the time of that call. Weaver also testified that he did not include any other cell sites in the area, and thus, his presentation did not depict any coverage overlap between towers. Last, Weaver's snapshots did not depict the movement of the phones.

On December 18, 2015, the defendant filed a motion for a judgment of acquittal or, in the alternative, a new trial. In his memorandum of law in support of the motion, the defendant claimed that the state's failure to timely disclose Weaver, and the court's failure to preclude Weaver's testimony or afford the defendant a reasonable continuance to retain his own expert, deprived the defendant of a fair trial. The court heard oral argument on January 22, 2016, and denied the defendant's motion.

A

We first address the defendant's claim that the court erred in permitting Weaver to testify and denying the defendant's alternative request for a six week continuance in order to permit him to retain his own expert. The defendant claims that the trial court's ruling constituted an abuse of discretion, and further, that it deprived him of a fair trial and of his right to present a defense.

We begin our analysis with the applicable legal principles and standard of review. Chapter 40 of the Practice Book governs discovery in criminal cases. Section 40-5 of the rules of practice provides in relevant part: "If a party fails to comply with disclosure as required under these rules, the opposing party may move the judicial authority for an appropriate order. The judicial authority hearing such a motion may enter such orders . . . as it deems appropriate, including . . . (2) Granting the moving party additional time or a continuance . . . (4) Prohibiting the noncomplying party from introducing specified evidence . . . (5) Declaring a mistrial . . . [or] (8) Entering such other order as it deems proper." See also *State* v. *Rabindranauth*, 140 Conn. App. 122, 135–36, 58 A.3d 361 (affirming trial court's preclusion of defense expert's testimony as sanction for late disclosure where defendant failed to comply with court's order requiring disclosure of expert witnesses by December 17, 2010, and did not disclose expert until January 3, 2011, one day before commencement of evidence), cert. denied, 308 Conn. 921, 62 A.3d 1134 (2013).

Practice Book § 40-5 gives "broad discretion to the trial judge to grant an appropriate remedy for failure to comply with discovery requirements." *State* v. *Wilson F.*, 77 Conn. App. 405, 417, 823 A.2d 406, cert. denied, 265 Conn. 905, 831 A.2d 254 (2003). This court previously has held that the "court must consider appropriate sanctions, but is under no obligation to impose

a penalty." Id., 419. "Generally, [t]he primary purpose of a sanction for violation of a discovery order is to ensure that the defendant's rights are protected, not to exact punishment on the state for its allegedly improper conduct. As we have indicated, the formulation of an appropriate sanction is a matter within the sound discretion of the trial court." (Internal quotation marks omitted.) *State* v. *Beaulieu*, 118 Conn. App. 1, 8–9, 982 A.2d 245, cert. denied, 294 Conn. 921, 984 A.2d 68 (2009).

"In determining what sanction is appropriate for failure to comply with court ordered discovery, the trial court should consider the reason why disclosure was not made, the extent of prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances. . . . As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." (Citations omitted; internal quotation marks omitted.) *State* v. *Cooke*, 134 Conn. App. 573, 578–79, 39 A.3d 1178, cert. denied, 305 Conn. 903, 43 A.3d 662 (2012). "In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Internal quotation marks omitted.) *State* v. *Beaulieu*, supra, 118 Conn. App. 8.

First, with respect to the defendant's claim that the court erred in not precluding Weaver's testimony, we conclude that the trial court did not abuse its discretion. We note that even in circumstances where the state has committed a discovery violation, "[s]uppression of relevant, material and otherwise admissible evidence is a severe sanction which should not be invoked lightly." (Internal quotation marks omitted.) *State* v. *Cooke*, supra, 134 Conn. App. 579; see also *State* v. *Hamlett*, 105

Conn. App. 862, 874, 939 A.2d 1256 (denial of proposed remedy of exclusion of police officer's field notes, which were not previously disclosed to defense and which affected defense strategy of contradicting victim through police report, was not abuse of discretion), cert. denied, 287 Conn. 901, 947 A.2d 343 (2008). Moreover, when the court offered its understanding of the defendant's challenges to Weaver's qualifications and the reliability of the software he used, defense counsel replied that those issues were not the bases for his motion and that he only wanted to voir dire Weaver as to his qualifications. Substantively, defense counsel clarified that he was concerned about a portion of Weaver's PowerPoint that contained hearsay, and the court ultimately precluded that portion.

We further conclude that the court did not abuse its discretion in denying the defendant's alternative request for a six week continuance to consult with an expert. With respect to circumstances of the untimely disclosure, although the court described the late disclosure as an "avoidable situation," the court determined that the state had not acted in bad faith. Moreover, the defendant had not claimed that the state had acted in bad faith, describing the focus of his motion to preclude as "the late disclosure on accident by the state." See *State* v. *Respass*, 256 Conn. 164, 188, 770 A.2d 471 ("because the noncompliance in this case was inadvertent . . . and there was no prejudice to the defendant, the trial court did not abuse its discretion by denying the defendant's motion to suppress the statement" [citation omitted]), cert. denied, 534 U.S. 1002, 122 S. Ct. 478, 151 L. Ed. 2d 392 (2001).

Regarding prejudice to the defendant, the court concluded that there had not been "a true prejudice visited upon the [defendant] by these circumstances." The court's prejudice analysis focused on the substance of Weaver's testimony, with the court concluding that the

proffered evidence was not "so novel or cutting edge or unusual that the defendant would suffer prejudice . . . ." That analysis overlooks the result of the late disclosure, which was that the defendant was prevented from consulting with, and potentially presenting the testimony of, his own expert. Thus, it is clear that the defendant suffered some measure of prejudice as a result of the late disclosure. The court did take certain steps to ameliorate the prejudice to the defendant, including precluding one slide of Weaver's presentation that contained a previously undisclosed video and recessing for the afternoon in order to permit defense counsel to confer with Weaver regarding changes to Weaver's presentation.

Although the late disclosure deprived the defendant of the opportunity to consult with his own expert, defense counsel conducted an effective cross-examination of Weaver. See *State* v. *Cooke*, supra, 134 Conn. App. 580 (noting, in concluding that court did not abuse its discretion in granting two day continuance for defense counsel to prepare to cross-examine expert regarding supplemental DNA report, that "the defendant was able to raise and did raise challenges to the credibility of the DNA results during his cross-examination"). In the present case, defense counsel was able to elicit testimony that the defendant's and Rogers' phones were not together when Rogers called the defendant at 2:14 p.m., shortly before the shootings. Weaver also testified that he did not include any other cell sites in the area, and thus, his presentation did not depict any coverage overlap between towers or anything else that might affect the signals or coverage area.[8]

[8] Weaver testified that coverage areas may also be mapped by hand. Weaver testified that a coverage area often extends approximately 60 to 70 percent into the next closest coverage area, [96] and therefore a more precise coverage area may be determined by measuring 51 or 61 percent into the next closest coverage area, a process Weaver described as "[v]ery difficult . . . ."

Having determined that the defendant was not prejudiced by the state's late disclosure, the court had no occasion to analyze the feasibility of rectifying any prejudice by a continuance. Although we recognize that the requested continuance likely would have cured any then existing prejudice to the defendant as a result of the late disclosure; see *State* v. *Van Eck*, 69 Conn. App. 482, 498–99, 795 A.2d 582 (court did not abuse discretion in electing to continue matter for almost one month for defendant to obtain records, which were not previously disclosed to him), cert. denied, 260 Conn. 937, 802 A.2d 92, and cert. denied, 261 Conn. 915, 806 A.2d 1057 (2002); we are mindful that granting the six week continuance requested would have caused a substantial disruption to the trial. The state provided Weaver's PowerPoint presentation to defense counsel on October 1, 2015, while jury selection was ongoing. Jury selection was initially completed on October 7, 2015, the day the defendant filed his motion to preclude. On the morning of October 8, the court conducted additional voir dire after one of the jurors was excused, and evidence began that afternoon. The hearing on the motion to preclude was not held until October 20, 2015. By that date, the court already had held seven days of trial, and a lengthy continuance certainly would have affected all involved in the trial, including the jury. See *State* v. *Brown*, 242 Conn. 445, 460, 700 A.2d 1089 (1997) (trial court took into consideration "the length of the requested continuance and its potentially negative effect on the jury" and thus did not abuse its discretion in denying motion for continuance). By October 22, when Weaver testified before the jury, twenty-one days had elapsed since the state's disclosure, and the court reasonably could have concluded, had it reached the feasibility of rectifying the prejudice by a continuance, that a six week continuance would have been too disruptive to the trial.

The state argues in its brief that the trial court did not abuse its discretion in declining to order a continuance

because the defendant abandoned his request for a continuance. The state underscores the court's instruction to defense counsel that "[y]ou can renew your motion if you need be at the . . . end of direct," and defense counsel's failure to do so at that time.[9] In *State* v. *Sewell*, 95 Conn. App. 815, 819, 898 A.2d 828, cert. denied, 280 Conn. 905, 907 A.2d 94 (2006), this court considered the defendant's claim that the trial court improperly denied his motion for a mistrial on the basis of the state's failure to provide material regarding the content of a witness' testimony. Concluding that the trial court had not abused its discretion, this court considered that the trial court had "ordered a one day continuance and indicated that it would allow defense counsel more

[9] We note that defense counsel had made a similar request to preclude the testimony of another of the state's expert witnesses, Heather Degnan. The court denied the motion to preclude but stated: "At the end of her direct examination I will excuse the jury for a moment and if you feel you need to renew the motion or make any other requests for relief I will hear that." At the end of direct examination, the court held a sidebar conference, after which defense counsel cross-examined Degnan. After another witness testified and the jury was excused for lunch, defense counsel put on the record a further objection to Degnan's testimony as to the ability to conduct DNA testing on shell casings.

The court then stated: "[I]n terms of the examination of Mrs. Degnan, Heather Degnan, I made my ruling before. Counsel's just putting [on] the record why she believes that ruling creates prejudice to her client. But I would say this much, too, in fairness to the court, I—I expressly said before the start of the examination of Mrs. Degnan, after I made my ruling that at the end of her testimony, direct, that I would excuse the jury and give counsel an opportunity to be heard further for reconsideration of the ruling or for any further relief. I called counsel up to sidebar, and I believe I said, correct me if I'm wrong, do you want me to excuse the jury now so you can be heard on that matter. This was at sidebar. And counsel did say no, we'll go forward with cross-examination and put it on the record at a later time what you just put on the record. . . .

"So, you know, there was no request to excuse the jury to say, Judge, we ask you to reconsider your ruling and strike the testimony, we ask for a continuance in our cross-examination of the witness so that we can look into this further. I'm just—you know, I need to complete the record, too, as to what did occur. Counsel elected to go directly to cross-examination. So, I understand your position, but I just want the record to be complete in all respects."

time if requested." Id., 821. The following day, defense counsel did not request additional time, and this court concluded that "the continuance the [trial] court granted was a curative action offered to remedy any then existing prejudice to the defendant." Id.; see also *State* v. *Cooke*, supra, 134 Conn. App. 580 (noting, in analysis of whether trial court abused its discretion in denying motion to preclude and granting shorter continuance than requested to prepare for cross-examination of expert witness regarding supplemental DNA report disclosed on first day of evidence at trial, that on day that court ultimately scheduled cross-examination, "the defendant did not object on the basis of a lack of time or ability to have his expert review the supplemental report, and the court explicitly asked both parties' counsel whether they wanted to be heard on any matter, to which both replied in the negative").

We do not construe the defendant's failure to repeat his request for a continuance at the conclusion of Weaver's direct examination as an abandonment of that request. We believe it relevant, however, to the discussion of whether the court abused its discretion, in that the court expressly identified the conclusion of direct examination as an appropriate opportunity for defense counsel to renew his request, and defense counsel failed to renew his request at that moment.

The question of whether the court abused its discretion in failing to order a continuance in order to permit the defendant to consult with his own expert witness is a close one. We disagree with the trial court that the defendant suffered no prejudice as a result of the late disclosure. Ultimately, however, we cannot conclude that the court's ruling denying the request for a six week continuance was "so arbitrary as to vitiate logic" or was "based on improper or irrelevant factors." (Internal quotation marks omitted.) *State* v. *Beaulieu*, supra,

118 Conn. App. 8. We note that the trial court did sanction the state for its late disclosure, although the sanction issued was mild in comparison to that requested by defense counsel.[10] Accordingly, we conclude that the court did not abuse its discretion.[11]

[10] As noted previously, the court first precluded one slide of Weaver's PowerPoint presentation that depicted the movement of Anderson's GPS unit, on the basis of the state's failure to provide the video to defense counsel. Thereafter, upon learning that Weaver had made changes to his presentation, the court suspended testimony for the afternoon to permit defense counsel to meet with Weaver to prepare for cross-examination.

[11] Our determination that the court did not abuse its discretion leads us to conclude further that the court's failure to grant a continuance or preclude Weaver's testimony did not violate the defendant's constitutional rights to a fair trial and to present evidence in his defense. In his brief, the defendant argues that "[t]his claim implicates his constitutional rights to a fair trial and to present a defense and, therefore, is of constitutional magnitude." The two cases he cites involve the trial court's exclusion of evidence offered by defendants in their defense, rather than evidence offered by the state, and do not support his argument. See *State* v. *Barletta*, 238 Conn. 313, 322–23, 680 A.2d 1284 (1996) (concluding that trial court's exclusion of defendant's proffered expert testimony did not constitute error of constitutional dimension, where defendant sought to introduce expert testimony to impeach witness who had already, in her own testimony, provided jury with "substantial reason to question her reliability and credibility"); *In re Adalberto S.*, 27 Conn. App. 49, 56–57, 604 A.2d 822 (trial court deprived defendant of his right to present a defense, which was offered when it excluded evidence of alleged beating he sustained at hands of police when they apprehended him in support of his defense of justification to charge of interfering with officer), cert. denied, 222 Conn. 903, 606 A.2d 1328 (1992).

The defendant presents no authority to support his contention that the trial court's failure to preclude Weaver's testimony or to grant a continuance implicates his constitutional rights to a fair trial or to present a defense. Furthermore, this court has previously suggested that a trial court's failure to issue sanctions on the basis of a discovery violation does not implicate a defendant's constitutional rights. See *State* v. *Stanley*, 161 Conn. App. 10, 33 n.9, 125 A.3d 1078 (2015) ("[w]hether the court imposes sanctions on the state [for discovery violations] does not implicate the defendant's constitutional rights"), cert. denied, 320 Conn. 918, 131 A.3d 1154 (2016); see also *State* v. *Colon*, 71 Conn. App. 217, 241, 800 A.2d 1268 ("Where discovery concerns inculpatory evidence, there exists no constitutional right to the disclosure of such evidence and, therefore, the rules of the court regulate any such disclosure. . . . In that event, [t]he trial court has broad discretion in applying sanctions for failure to comply with discovery orders." [Citation omitted; internal quotation marks omitted.]), cert. denied, 261 Conn. 934,

We further conclude that even if the court's denial of the defendant's request for a continuance constituted an abuse of discretion, the defendant has not demonstrated that the claimed error was harmful. "[W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error." (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). "[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.) *State* v. *Pascual*, 305 Conn. 82, 93, 43 A.3d 648 (2012).

In the present case, Weaver's testimony, although important to the state's case, also was corroborative of other testimony presented to the jury. The jury heard Anderson's detailed description of the events on the day of the shootings. Anderson identified the defendant as the man he picked up on Palisade Avenue on the afternoon of the shootings. Anderson testified that he dropped the defendant and Rogers off near the scene of the shootings and heard "firecracker sounds" while

806 A.2d 1067 (2002). Accordingly, we conclude that the defendant has not shown a violation of his constitutional right to a fair trial or to present a defense.

they were gone. Surveillance videos further corroborated much of Anderson's testimony, including that the defendant told Rogers he thought he had dropped a clip before getting out of Anderson's car at Stratford Avenue and Hollister Avenue. The jury viewed surveillance video and associated still images, which depicted a man opening and closing the rear passenger door of Anderson's car before getting out at Stratford Avenue and Hollister Avenue. The man appeared to have dreadlocks and was wearing a hat with a visible logo. The state entered into evidence photographs recovered from the defendant's cell phone showing the defendant with dreadlocks and wearing a hat with a similar shaped logo; those photographs were taken on September 17, 2013, less than one week following the shootings. The state also entered into evidence a hat matching that worn in the photographs, which was recovered from the defendant's car on September 17, 2013. The jury also heard evidence that on September 16, 2013, Rogers was arrested and had sent the defendant a text message indicating that "[d]ey taken [me]."

Finally, the state's case against the defendant was relatively strong. The jury heard Anderson's testimony, as well as other circumstantial evidence, including that of the defendant's consciousness of guilt. See part IV of this opinion; see also *State* v. *Pugh*, 176 Conn. App. 518, 533, 170 A.3d 710 (concluding that "the state presented a strong case against the defendant, even if some of the evidence was circumstantial"), cert. denied, 327 Conn. 985, 175 A.3d 43 (2017); *State* v. *Hayward*, 116 Conn. App. 511, 520, 976 A.2d 791 (concluding that state's case was strong despite fact that evidence with respect to defendant's use of dangerous instrument was "in large part circumstantial"), cert. denied, 293 Conn. 934, 981 A.2d 1077 (2009). Accordingly, we conclude that even if the court abused its discretion in failing to grant the defendant's request for a continuance, the

defendant has not demonstrated that the claimed error was harmful.

B

Following our Supreme Court's decision in *State* v. *Edwards*, 325 Conn. 97, 156 A.3d 506 (2017), the defendant filed a supplemental brief claiming that "[t]he trial court abused its discretion when it allowed Sergeant Weaver to testify as an expert without conducting a *Porter* hearing[12] to determine if he was qualified to testify as an expert and whether the methodology he used to support his opinion that [the] defendant was in the same location as Anderson and Rogers at the time of the crime was reliable." (Footnote added.) The defendant acknowledges that defense counsel did not request a *Porter* hearing, but maintains that the claim is reviewable because of "the presumption of retroactivity" of *Edwards*. The state responds that "[i]t is well established that a question of whether evidence satisfies the admissibility standards prescribed in *Porter* is a claim 'of evidentiary dimension,' which, if unpreserved, is not entitled to appellate review." We conclude that the defendant's evidentiary claim is unpreserved, and we therefore decline to afford it review.

In *Edwards*, our Supreme Court resolved two issues of first impression when it held that a police officer

[12] See *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998). "A *Porter* analysis involves a two part inquiry that assesses the reliability and relevance of the witness' methods. . . . First, the party offering the expert testimony must show that the expert's methods for reaching his conclusion are reliable. . . . Second, the proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract. . . . Put another way, the proponent of scientific evidence must establish that the specific scientific testimony at issue is, in fact, derived from and based [on] . . . [scientifically reliable] methodology." (Internal quotation marks omitted.) *State* v. *Steele*, 176 Conn. App. 1, 33 n.21, 169 A.3d 797, cert. denied, 327 Conn. 962, 172 A.3d 1261 (2017).

testifying regarding cell phone data needed to be qualified as an expert witness and that the cell phone data evidence was of a scientific nature such that a *Porter* hearing was required. *State* v. *Edwards*, supra, 325 Conn. 133. In *Edwards*, the defendant had filed a motion in limine "seeking to preclude the admission of cell phone data and requested a hearing pursuant to [*Porter*]." Id., 118. Although our Supreme Court has not yet had occasion to address the question of whether *Edwards* applies retroactively to pending cases, this court twice has recognized that it does. See *State* v. *Turner*, 181 Conn. App. 535, 549 n.13, A.3d (2018) (stating that *Edwards* "retroactively applies to the present case because 'a rule enunciated in a case presumptively applies retroactively to pending cases' "); *State* v. *Steele*, 176 Conn. App. 1, 34, 169 A.3d 797 (concluding that "*Edwards* is controlling as to this [evidentiary] issue on appeal"), cert. denied, 327 Conn. 962, 172 A.3d 1261 (2017).

In the present case, the defendant did not request a *Porter* hearing. Moreover, when the court took up the defendant's motion in limine and reviewed its understanding of the defendant's issues with respect to the state's late disclosure of Weaver, it stated that "from a more substantive point of view" it understood the defendant's motion to include issues surrounding "the reliability of this GeoTime software and whether Sergeant Weaver is qualified as an expert to do what he's done." Defense counsel responded: "I don't think we ever really contested that this type of information can be presented to a jury if coming in through a proper expert. And in terms of Sergeant Weaver's qualifications, we would just like to voir dire him during his testimony if he's allowed to testify. So, that's not really a basis."

Notwithstanding his failure to request a *Porter* hearing, his concession to the court that the evidence was

admissible through a proper expert, and his request to voir dire Weaver only as to his qualifications, the defendant argues on appeal that his evidentiary claim that the court failed to hold a *Porter* hearing is reviewable on the basis of the presumption of retroactivity. He claims that because defense counsel could not have anticipated our Supreme Court's holding in *Edwards*, he "could not have known that a *Porter* hearing was required before Weaver was allowed to testify, and therefore, could not possibly have waived any such claim." In support of this argument, the defendant cites decisions of our Supreme Court, including *State* v. *Hampton*, 293 Conn. 435, 457, 988 A.2d 167 (2009), in which the court retroactively applied its decision in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), to a pending appeal despite the defendant's failure to preserve the constitutional challenge to the trial court's instruction, citing "the general rule that judgments that are not by their terms limited to prospective application are presumed to apply retroactively . . . to cases that are pending . . . ." (Internal quotation marks omitted.) *State* v. *Hampton*, supra, 462 n.16. The defendant provides this court with no authority for the proposition that this general rule extends beyond constitutional challenges to evidentiary claims, and our appellate case law suggests that it does not. See *State* v. *Turner*, supra, 181 Conn. App. 549–50 (declining to review merits of unpreserved claim that defendant's due process right to fair trial was violated by introduction of expert testimony regarding call detail mapping analysis and admission of cell phone coverage maps because claim failed to satisfy *Golding*'s second prong in that it was evidentiary in nature and not of constitutional magnitude).

We conclude that this court's recognition that the rule announced in *Edwards* is retroactively applicable to pending cases does not compel the conclusion that an evidentiary claim made pursuant to *Edwards* is

reviewable in the event the claim has not been preserved. See *State* v. *Martinez*, 95 Conn. App. 162, 166 n.3, 896 A.2d 109 (concluding that even if new jury instruction rule announced in *State* v. *Patterson*, 276 Conn. 452, 886 A.2d 777 [2005], which was not of constitutional dimension, was retroactive, this court would decline to review defendant's unpreserved evidentiary claim that trial court failed to give jury instruction regarding credibility of jailhouse informants), cert. denied, 279 Conn. 902, 901 A.2d 1224 (2006); cf. *State* v. *Steele*, supra, 176 Conn. App. 24, 27, 31 (reviewing preserved claim that court improperly permitted lay testimony concerning historic cell site analysis where defendant had objected, inter alia, on ground that officer was " 'getting into the realm of expert testimony' " and had not been qualified as an expert and separately had made a motion to strike testimony regarding " 'cell phone coverage' " because officer was not competent to testify on that topic). Here, because the defendant failed to request a *Porter* hearing, we decline to review the defendant's unpreserved evidentiary claim that the court erred in failing to hold a *Porter* hearing.

II

The defendant claims that the court deprived him of his right to present a defense by precluding William Smith, the defendant's investigator, from providing testimony to rebut Weaver's testimony.

The following additional facts and procedural history are relevant to this second claim. At the conclusion of Weaver's testimony on October 22, 2015, defense counsel informed the court that he proposed to offer Smith's testimony regarding the unmapped 2:14 p.m. phone call made from Rogers' phone to the defendant's phone. Noting that he had not been able to retain his own expert because of the state's delayed disclosure, defense counsel represented that Smith had identified

the latitude and longitude of the cell site associated with the 2:14 p.m. call in the same call detail records Weaver had used, put the latitude and longitude into Google Maps to plot the location, traveled to that location on the west side of Bridgeport, and photographed the building and the cell site located on top of the building. The court confirmed that the defendant was not seeking a continuance, and defense counsel represented that he could have his witness testify that afternoon. Defense counsel claimed that this evidence would show the defendant's presence on the west side of Bridgeport at the time of the 2:14 p.m. phone call, which made it practically impossible for Anderson to have picked him up minutes later on the other side of town. The state had no objection to the defendant putting on this witness.

The court, however, questioned whether the testimony was "supposed to be representative of something that existed back in 2013 at the time this happened . . . ." The court further inquired whether Smith would "be able to testify the tower was up, that the tower wasn't down for repairs? Is he going to be able to testify about whether this was, you know, the words were one zone or eight zones or three zones?" Defense counsel responded that he thought that Weaver testified that all the relevant towers were three sided. Defense counsel further responded that Smith relied on the same records Weaver used to obtain the latitude and longitude, and had put that information into Google Maps, which he represented that Weaver had testified was an appropriate method to locate a point on a map. The court remarked that defense counsel could not represent that it was the exact tower, to which defense counsel replied: "Is this the tower? I don't know. But it's all I can offer, Your Honor." Defense counsel argued: "And again, I'm prejudiced . . . ."

Accepting defense counsel's representation as to the substance of Smith's testimony, the court stated that even if it were to accept the testimony as true, the court did not think it was "definitive enough, complete enough and material enough to" change its decision regarding a continuance. Defense counsel responded that he understood the court's ruling would not change with respect to the continuance, but that he was attempting to ameliorate the harm occasioned by the court's denial of his motion in limine by introducing evidence of the cell site location associated with the 2:14 p.m. phone call. Defense counsel noted that in the event the court was excluding Smith's testimony, the defendant would renew his request for a mistrial on the ground that the information as to the 2:14 p.m. phone call was exculpatory and that the failure to disclose it constituted a *Brady* violation.

The court then ruled: "Okay. I don't think it's been shown to be exculpatory. I don't think that it's any cause for a mistrial and you were very effective on cross in eliciting from Sergeant Weaver that the scope of what he was asked to do was very narrow. He could have taken this universe of information he had and done more with it, but I heard from the witness many times that all I was asked to do was to focus on certain dates and times and locations. Times and locations. And that was at the direction of the state. Be it they—they asked him to focus on what he acknowledged to be a much greater, you know, source—sources that are available to him. So, I understand that." In his memorandum of law in support of his motion for a new trial, the defendant argued that the court's preclusion of Smith's testimony constituted material error warranting a new trial.

"[T]he federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to

present a complete defense. . . . The sixth amendment . . . [guarantees] the right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, 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. . . . When defense evidence is excluded, such exclusion may give rise to a claim of denial of the right to present a defense. . . . A defendant is, however, bound by the rules of evidence in presenting a defense. . . . Although exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights, the constitution does not require that a defendant be permitted to present every piece of evidence he wishes." (Internal quotation marks omitted.) *State* v. *Sampson*, 174 Conn. App. 624, 635, 166 A.3d 1, cert. denied, 327 Conn. 920, 171 A.3d 57 (2017). "[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." (Internal quotation marks omitted.) *Deegan* v. *Simmons*, 100 Conn. App. 524, 540, 918 A.2d 998, cert. denied, 282 Conn. 923, 925 A.2d 1103 (2007).

We conclude that the court did not abuse its discretion in precluding Smith's testimony. Although the basis the court relied on in precluding Smith's testimony was not clearly articulated, the court's questions to defense counsel were addressed to the foundation for Smith's testimony. It was not clear from defense counsel's proffer whether Smith had sufficient knowledge to be examined and cross-examined regarding the cell site accessed by the defendant's phone, and defense counsel did not request a hearing outside of the presence of the jury to proffer Smith's testimony. Nor did he inform the court that he intended to rely on certain of Weaver's conclusions with respect to the generally expected coverage area of the cell site. Specifically, although defense

counsel sought to introduce Smith's testimony as to the location of the cell site to which the defendant's cell phone connected, defense counsel's proffer did not include whether Smith had any knowledge as to the geographical coverage area of the cell site in question. Accordingly, in light of the limited foundation, we conclude that the court did not abuse its discretion in precluding Smith's testimony.[13]

III

The defendant next claims that the court deprived him of his "right to present a defense when it prevented him from introducing highly relevant information that one of the guns used in the shooting was found on a person named Terrance Clark when he was arrested in August, 2014." The defendant claims that "[t]his was the only evidence connecting a particular gun to the shooting and, significantly, it was not connected to the defendant."

The following additional facts and procedural history are relevant to this claim. On October 22, 2015, the state filed a motion in limine to preclude the defendant from introducing testimonial evidence of Bridgeport Police Officer Mark Martocchio and Marshall Robinson from the state forensic laboratory regarding the recovery of a firearm from Clark upon his arrest on August 23, 2014. Specifically, the state argued that the proposed third-party culpability evidence was not relevant, as the weapon was not found in Clark's possession until almost one year after the crime. The court took up the motion in limine, stating that it understood that the defendant wanted to present the testimony of Martocchio, who would testify that he recovered the weapon

[13] Our conclusion that the court properly precluded the evidence leads us to conclude further that the preclusion of the evidence did not violate the defendant's constitutional right to present evidence in his defense. See footnote 14 of this opinion.

from Clark on August 23, 2014, and Robinson, who would testify that the shell casings in evidence were discharged from the weapon found in Clark's possession. Defense counsel argued that the evidence was "fundamentally relevant to our defense" in that the weapon was not found in the defendant's possession or tied to him in any way. The state responded that it understood the claim of relevancy to be with respect to third-party culpability and argued that the evidence was not relevant because it lacked a direct connection. Clark's name previously had never come up during the trial, and thus there was no indication that he was present at the scene of the crime. The court rejected defense counsel's argument that the delay in finding the weapon went to the weight of the evidence, not its admissibility. Granting the state's motion in limine, the court stated that it was concerned about the "fundamental relevance" of the evidence and questioned how it could assist the jury in determining the issues in this case.

We note at the outset that the defendant did not challenge before the trial court the state's view of the evidence as purported third-party culpability evidence. In fact, defense counsel noted during oral argument before the trial court: "As [the state] recognizes, we haven't submitted, *which*, *we intend*, *a third-party culpability instruction*, particularly as to Mr. Clark." (Emphasis added.) In its brief to this court, the state argued that the trial court "properly excluded the proffered testimony as irrelevant to establish third-party culpability." The defendant did not file a reply brief. During the rebuttal portion of his oral argument before this court, the defendant represented that he had not offered the evidence to show third-party culpability, but rather to show simply that the gun was found in the possession of a third party and was not connected to the defendant.

The trial court clearly found that the proposed evidence was not relevant to the issues in the case. Given that the "admissibility of evidence of [third-party] culpability is governed by the rules relating to relevancy"; (internal quotation marks omitted) *State* v. *Schovanec*, 326 Conn. 310, 319, 163 A.3d 581 (2017); the court was not required to proceed further in its analysis, whether the court understood the claim to be one of general relevance or one in furtherance of a defense of third-party culpability. "Determining whether evidence is relevant and material to critical issues in a case is an inherently fact-bound inquiry. . . . As a general principle, evidence is relevant if it has a tendency to establish the existence of a material fact. One fact is relevant to another fact whenever, according to the common course of events, the existence of the one, taken alone or in connection with other facts, renders the existence of the other either certain or more probable." (Internal quotation marks omitted.) *State* v. *Rodriguez*, 107 Conn. App. 685, 710, 946 A.2d 294, cert. denied, 288 Conn. 904, 953 A.2d 650 (2008).

"Although the standard for relevancy is quite low, it is often applied with some rigor. . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter. . . . The determination of relevance must be made according to reason and judicial experience." (Citations omitted; internal quotation marks omitted.) *State* v. *Thomas*, 177 Conn. App. 369, 395–96, 173 A.3d 430, cert. denied, 327 Conn. 985, 175 A.3d 43 (2017). "[T]he trial court's ruling on the relevancy of . . . evidence will be reversed on appeal only if the court has abused its discretion or an injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Rodriguez*, supra, 107 Conn. App. 710.

The defendant argues that because the sole issue before the jury was "whether or not the defendant was one of the shooters," the proffered evidence was "relevant to show a lack of identity as to the defendant." We disagree. The trial court reasonably could have concluded that the fact that the weapon was found in the possession of a different individual on August 23, 2014, almost one year after the crimes at issue, did not render it "either certain or more probable" that the defendant was not one of the shooters on September 10, 2013. See *Sullivan* v. *Metro-North Commuter Railroad Co.*, 96 Conn. App. 741, 749, 901 A.2d 1258 (2006) (report, offered "to support the plaintiff's contention that the decedent's death was foreseeable to the defendant on the basis of its knowledge of the statistical data contained in the report concerning reported crimes at Connecticut [railroad] stations," was not relevant in part because it was based on data compiled from 1985 through 1987, and decedent's death did not occur until 1992), rev'd on other grounds, 292 Conn. 150, 971 A.2d 676 (2009); *State* v. *Skidd*, 104 Conn. App. 46, 63, 932 A.2d 416 (2007) ("[T]he court properly ruled that the map was not relevant because it did not depict the parking lot as it existed in July, 2003. The court correctly determined that the inferences that could be drawn from the map would be relevant only if the events had occurred in 2001, when the map was created, and were not relevant to the incident of July, 2003."). Accordingly, we conclude that the court did not abuse its discretion in concluding that the proffered evidence was too remote in time to be relevant to show a lack of identity.[14]

[14] Our conclusion that the court properly precluded the evidence on the ground of relevance leads us to conclude further that the preclusion of the evidence did not violate the defendant's constitutional rights to a fair trial and to present evidence in his defense. See *State* v. *Davis*, 298 Conn. 1, 11, 1 A.3d 76 (2010) ("[i]f, after reviewing the trial court's evidentiary rulings, we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail"); *State* v. *Adorno*, 121 Conn. App. 534, 547–48, 996 A.2d 746 (if proffered evidence is not

IV

The defendant's final claim is that the court abused its discretion in admitting consciousness of guilt evidence that "on two occasions after the shooting, [the] defendant did not appear in court on an unrelated matter."

The following additional facts and procedural history are relevant to this claim. Prior to September 17, 2013, the defendant had scheduled court dates in Norwalk Superior Court on matters unrelated to the shootings. On September 17, 2013, one week after the shootings, the defendant was driving a motor vehicle in Bridgeport when he was involved in an accident. He left the scene of the accident before police arrived. Detective Martin Heanue of the Bridgeport Police Department responded to the accident and collected evidence from the vehicle, including the defendant's cell phone, two criminal appearance bonds for cases unrelated to the shootings, and a gun. Heanue learned the phone number of the cell phone, and applied for a search warrant for the call detail records. Heanue eventually identified the driver of the vehicle as the defendant.

Before Heanue had testified to his investigation of the accident, the state had sought to introduce evidence that the defendant had failed to appear for two court dates in Norwalk as consciousness of guilt evidence, and defense counsel objected on the ground of relevance. In argument outside the presence of the jury, the state claimed that the two criminal appearance bonds found in the vehicle showed that the defendant had notice of the Norwalk court dates. Defense counsel responded to the state's argument by positing that the defendant had not appeared in court because he knew that the police had recovered a gun from the vehicle and that the police were investigating him in connection

relevant, right of confrontation is not affected and evidence is properly excluded), cert. denied, 297 Conn. 929, 998 A.2d 1196 (2010).

with that gun. Defense counsel further argued that he was put in an "impossible position" because he did not want to introduce the evidence about the gun.

The court, recognizing that the jury had not yet heard any connection between the appearance bonds and the car at issue, ruled that the appearance bonds could not yet be admitted as full exhibits, but advised that assuming the state could provide the connection, the criminal appearance bonds would be admissible subject to redaction of the listed offenses. The court further stated: "I understand that the defense has another argument they could put forward but simply because he can't put that argument forward, I don't think that the state is precluded from asking the jury to infer that he did not appear and argue later that the reason he did was because of his implication in a shooting that occurred days before." The court indicated that defense counsel could renew his objection when the state later moved to admit the appearance bonds into evidence, and the court would reconsider its ruling if there was reason to do so.

On October 22, 2015, the state and defense counsel alerted the court that they had reached an agreement regarding the defendant's failures to appear for his court dates. Defense counsel again noted that she objected to the evidence coming in at all as "unduly prejudicial and not probative of anything that is pertinent to this case, particularly given the lapse in time between the incident . . . and the date that [the defendant] didn't appear." Defense counsel further argued that defense counsel in the unrelated proceedings had not notified the defendant of one of the two court dates. After putting those arguments on the record, the state and defense counsel requested, in the presence of the jury, that the court take judicial notice of the following

facts.[15] On September 11, 2013, and September 16, 2013, the defendant was scheduled to appear in Norwalk Superior Court and he did appear on both of those dates. The defendant was scheduled to appear in court on October 2, 2013, but he failed to appear on that date. He was scheduled to appear in court on October 9, 2013, on which date the defendant again failed to appear, and he was ordered rearrested. The defendant was arrested and taken into custody on October 17, 2013. The nature of the charges at issue in the Norwalk proceedings was not disclosed to the jury.

The court agreed to take judicial notice of the facts represented and instructed the jury that these matters were unrelated to the shootings, and that the jury was to draw no adverse inferences against the defendant. The court explained that the facts were not offered to show that the defendant is a person of bad character. In its final charge, the court instructed the jury as to consciousness of guilt evidence and stated that the "state claims that in October, 2013, after the shootings in Bridgeport, [the defendant] allegedly did not appear for an unrelated case he had in Norwalk."[16] Defense

[15] The court asked the parties whether they were referring to a stipulation. The prosecutor responded that "[w]e're not asking it be designated as a stipulation, merely an agreement for the record." The prosecutor further stated: "What I mean is that the court is going to take judicial notice. In other words, [defense counsel] and I agreed that if the court takes judicial notice of the following facts that would be acceptable as a presentation to the jury." The court agreed to do so, and after counsel recited the agreed on facts before the jury, the court instructed the jury that it was "taking judicial notice of what's just been represented because they represent official court proceedings within Norwalk." The court further instructed the jury that it could accept the representations as true "without the need for offering further evidence on the matters."

[16] The court instructed, in relevant part: "Now, in any criminal trial it is permissible for the state to show that conduct or statements made by a defendant after the time of the alleged offense may have been influenced by the criminal act itself; that is, the conduct or statements show a consciousness of guilt.

"The state claims that the following conduct is evidence of consciousness of guilt . . . as to Raashon Jackson, the state claims that in October, 2013,

counsel took an exception to the instruction "for reasons previously stated that are unduly focusing on a piece of notice and it being too attenuated to the crime."[17]

On appeal, the defendant claims that "there was simply no basis for concluding that defendant's failure to appear in court in Norwalk was motivated by an attempt to evade apprehension for the shooting." In support of this claim, he argues that: (1) there was no evidence that the defendant was under investigation at the time or that he was aware he was under investigation; (2) the court was aware that the police had found a gun in the car when he fled the scene of the accident; and (3) the court was aware that the transcript of the October 9, 2013 proceeding showed that the defendant did not have notice of that court date. We are not persuaded by the defendant's arguments.

We begin our analysis with a review of the applicable legal principles. "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is irrelevant or too remote if there is such a want

after the shootings in Bridgeport, he allegedly did not appear for an unrelated case he had in Norwalk.

"Such acts or statements do not, however, raise a presumption of guilt. If you find the evidence proved and you also find that the acts or statements were influenced by the criminal act and not by any other reason, you may, but are not required to, infer from this evidence that the defendant was acting from a guilty [conscience]. Remember, though, that you must limit your consideration of this type of evidence to only the particular defendant against whom it is alleged.

"It is up to [you] as judges of the facts to decide whether either of the defendants' acts or statements, if proved, reflect a consciousness of guilt and to consider such in your deliberations in conformity with these instructions."

[17] Defense counsel reiterated his argument on the consciousness of guilt evidence in his motion for a new trial.

of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter. . . . Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative." (Internal quotation marks omitted.) *State* v. *Coccomo*, 302 Conn. 664, 669, 31 A.3d 1012 (2011).

"In a criminal trial, it is relevant to show the conduct of an accused, as well as any statement made by him subsequent to the alleged criminal act, which may fairly be inferred to have been influenced by the criminal act. . . . Generally speaking, all that is required is that . . . evidence [of consciousness of guilt] have relevance, and the fact that ambiguities or explanations may exist which tend to rebut an inference of guilt does not render [such] evidence . . . inadmissible but simply constitutes a factor for the jury's consideration. . . . The fact that the evidence might support an innocent explanation as well as an inference of a consciousness of guilt does not make [the admission of evidence of consciousness of guilt] erroneous. . . . [T]he court [is] not required to enumerate all the possible innocent explanations offered by the defendant. . . . [I]t is the province of the jury to sort through any ambiguity in the evidence in order to determine whether [such evidence] warrants the inference that [the defendant] possessed a guilty conscience. . . . Moreover, evidence of a defendant's consciousness of guilt is admissible only if its probative value outweighs its prejudicial effect." (Citation omitted; internal quotation marks omitted.) *State* v. *Gonzalez*, 315 Conn. 564, 593–94, 109 A.3d 453, cert. denied, U.S. , 136 S. Ct. 84, 193 L. Ed. 2d 73 (2015).

"We review a trial court's evidentiary rulings for abuse of discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's

ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citation omitted; internal quotation marks omitted.) Id., 593.

Applying these principles to the present case, we conclude that the defendant's failure to appear on two dates following the shootings "may fairly be inferred to have been influenced by the criminal act" of causing the death of one person and the assault of four others. (Internal quotation marks omitted.) *State* v. *Coccomo*, supra, 302 Conn. 671. The jury reasonably could have inferred that the defendant's failure to appear for his court dates indicated consciousness of guilt in the multiple shootings. See *State* v. *Davis*, 98 Conn. App. 608, 626–30, 911 A.2d 753 (2006) (jury reasonably could have inferred that evidence that defendant had complied with terms of his parole and attended monthly meetings with his parole officer prior to shooting but missed meetings after shooting indicated consciousness of guilt), aff'd, 286 Conn. 17, 942 A.2d 373 (2008), overruled in part by *State* v. *Payne*, 303 Conn. 538, 549, 34 A.3d 370 (2012). Although that was not the only possible explanation for the defendant's conduct, "[t]he fact that the evidence might support an innocent explanation as well as an inference of a consciousness of guilt does not make [the admission of such evidence] erroneous." (Internal quotation marks omitted.) *State* v. *Coccomo*, supra, 672.

We further conclude that the evidence was not more prejudicial than probative. Our Supreme Court "has identified four factors relevant to determining whether the admission of otherwise probative evidence is unduly prejudicial. These are: (1) where the facts offered may unduly arouse the [jurors'] emotions, hostility or sympathy, (2) where the proof and answering evidence it

provokes may create a side issue that will unduly distract the jury from the main issues, (3) where the evidence offered and the counterproof will consume an undue amount of time, and (4) where the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) *State* v. *Hill*, 307 Conn. 689, 698, 59 A.3d 196 (2013). "[A]ll adverse evidence is [by definition] damaging to one's case, but [such evidence] is inadmissible *only if* it creates *undue* prejudice so that it threatens an injustice were it to be admitted." (Emphasis in original; internal quotation marks omitted.) *State* v. *Coccomo*, supra, 302 Conn. 673.

In the present case, the facts of the failures to appear do not rise to the level of prejudice identified in any of the four factors. In his brief to this court, the defendant argues only that he was prejudiced because "the evidence created side issues that unduly distracted the jury from the main issue." We disagree. There is nothing in the record to support the defendant's argument that the court's taking judicial notice of the failures to appear created an unduly distracting side issue. Furthermore, no significant amount of time was expended on this issue, which was brief in the context of a trial that spanned more than ten days.

We further reject as contrary to our case law the defendant's argument that the evidence was improperly admitted because there was no evidence that he was under investigation for the shootings at the time or that he was aware he was under investigation. See *State* v. *Hill*, supra, 307 Conn. 700–702 (rejecting claim that evidence defendant fled from police when they tried to stop his vehicle "prior to the issuance of an arrest warrant and before the police were actively searching for [the defendant] in connection with the . . . shootings" was not probative of consciousness of guilt). "[T]he state is not required, as a matter of law, to establish that the defendant had actual knowledge that he was

being charged with a criminal offense before introducing evidence of his flight." (Internal quotation marks omitted.) *State* v. *Barnes*, 112 Conn. App. 711, 730, 963 A.2d 1087 (2009) ("[t]he court properly [allowed] the state to present evidence of the defendant's flight even if the state failed to introduce direct or inferential evidence that the defendant knew that he was wanted by the police" [internal quotation marks omitted]); see also *State* v. *Holmes*, 64 Conn. App. 80, 87, 778 A.2d 253 ("the state was not required to show that the defendant had knowledge that the police were actively looking for him for the evidence of flight to be introduced to the jury to infer consciousness of guilt"), cert. denied, 258 Conn. 911, 782 A.2d 1249 (2001). In any event, the jury heard evidence that on September 16, 2013, Rogers was arrested and had sent the defendant a text message indicating that "[d]ey taken [me]." From this evidence, the jury reasonably could have inferred that the defendant was aware that the police might seek him out in connection with the shootings.

We also reject the defendant's argument that the jury could not reasonably have concluded that he failed to appear because he had a guilty conscience as to the shootings. The defendant maintains that he actually failed to appear because the police found a gun that he illegally possessed in the car that he owned and that he fled following the accident. The defendant chose, as a matter of trial strategy, not to present this alternative explanation to the jury because he concluded that the evidence regarding the gun was damaging. Had he chosen to present his explanation, the jury reasonably could have inferred that the defendant failed to appear because of the presence of the gun in the car he was operating, but it was also entitled to make contrary inferences. See *State* v. *Watts*, 71 Conn. App. 27, 36, 800 A.2d 619 (2002) (evidence that the defendant procured false identification badge, which defendant claimed he used in another incident, unrelated to charges at issue,

was properly admitted as consciousness of guilt evidence, where "[e]ven if the jury reasonably could have inferred on the state of this record that the defendant had used the identification badge *exclusively* in an unrelated activity, it was entitled to make contrary inferences" [emphasis in original]).

Last, regarding the defendant's argument that the court was aware that the transcript of the October 9, 2013 proceeding showed that the defendant did not have notice of that court date, we conclude that the defendant has not demonstrated that the evidence was improperly admitted on this basis. In the transcript of the October 9, 2013 proceeding, defense counsel represented that he had "not spoken to" the defendant and that he "did reach out" but had not "heard from him." Notwithstanding that the state and defense counsel requested that the court take judicial notice of the defendant's court proceedings in Norwalk rather than introducing the transcripts of those proceedings into evidence, even if the court were to consider the representations of defense counsel during the October 9 proceeding, the transcript does not compel the conclusion that the defendant did not have notice of the court date. Accordingly, we cannot conclude that the court abused its discretion in admitting consciousness of guilt evidence of the defendant's failure to appear in court.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RODERICK ROGERS (AC 40125)

Lavine, Alvord and Beach, Js.

Syllabus

Convicted of the crimes of murder, conspiracy to commit murder and assault in the first degree in connection with a shooting incident that resulted in the death of one of the victims, the defendant appealed, claiming, inter alia, that the trial court improperly precluded him from introducing certain evidence that a firearm used in the shooting incident had been

found in the possession of a third party. The defendant and J, who also was involved in the shooting, were tried jointly to a jury. The defendant's cousin, A, had driven the defendant and J to and from the scene of the shooting. The state had retained W to analyze certain global positioning system and cell phone data to determine the locations of the defendant, J and A at the time of the shooting. The defendant, prior to trial, had filed a motion in limine, seeking, inter alia, to preclude the admission of certain of the state's evidence pertaining to cell phone towers. The trial court did not rule on the defendant's motion. During trial, J filed a motion in limine to preclude W's testimony and certain maps that W had prepared. The court denied J's motion after a hearing out of the presence of the jury. The defendant did not ask questions or oppose W's proposed testimony during the hearing and did not object during trial to W's testimony or to other evidence that was admitted during W's testimony. The trial court also granted the state's motion to preclude J from introducing evidence that one of the firearms used in the shooting had been found in the possession of a third party. The defendant's counsel remained silent during argument on the state's motion and thereafter indicated to the court that he did not intend to offer any other evidence pertaining to the firearm. *Held*:

1. The defendant's claim that the trial court improperly precluded him from introducing evidence that a firearm that was used in the shooting was found in the possession of a third party was not reviewable, the defendant having failed to preserve the claim for review; a defendant who wants to preserve for appeal a nonconstitutional claim that was raised by a codefendant in a consolidated trial must join the codefendant's claim or separately make the claim himself, and the defendant here conceded that he did not independently object to the state's motion to preclude the evidence or attempt to introduce the evidence himself.
2. The defendant could not prevail on his unpreserved claim that the trial court violated his constitutional right to present a defense when it precluded him from introducing certain third-party culpability evidence, which he claimed was relevant to his theory that A was one of the shooters; because the foundation of the defendant's claim was a relevance claim that he did not distinctly raise before the trial court, the defendant's constitutional claim was premised on a distinct, and unpreserved, claim of relevance, which was an evidentiary matter, and even if the defendant requested review of it pursuant to *State* v. *Golding* (233 Conn. 213), the claim, being evidentiary in nature, failed under the second prong of *Golding*.
3. This court declined to review the defendant's unpreserved evidentiary claim that the trial court improperly permitted W to testify without first holding a hearing as to the reliability of his methodology: the defendant did not identify where in the record he had objected to W's testimony or requested a hearing, apart from a request contained in his motion in limine, nor did he identify where in the record the court ruled on his

motion in limine, he did not join in J's motion to preclude W's testimony, and even if he had, J's counsel did not request such a hearing; moreover, the defendant failed to demonstrate that W's testimony or the maps that W prepared had substantially affected the jury's verdict, as that evidence was cumulative of and paled in comparison to other unchallenged evidence that was before the jury.

Argued January 29—officially released July 24, 2018

Procedural History

Substitute information charging the defendant with four counts of the crime of assault in the first degree, and with the crimes of murder and conspiracy to commit murder, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kavanewsky, J.*, granted the state's motion to consolidate the case for trial with that of another defendant; thereafter, the matter was tried to the jury; subsequently, the court granted the state's motion to preclude certain evidence; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

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

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *C. Robert Satti, Jr.*, supervisory assistant state's attorney, and *Pamela J. Esposito*, senior assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Roderick Rogers, appeals from the judgment of conviction, rendered following a consolidated jury trial,[1] of one count of murder in violation of General Statutes § 53a-54a (a), one count of

[1] The present appeal is a companion case to an appeal filed by Raashon Jackson, the codefendant in the consolidated jury trial. See *State* v. *Jackson*, 183 Conn. App. 623, A.3d (2018).

conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a (a), and four counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5). On appeal, he claims that the trial court improperly (1) precluded the introduction of evidence that one of the firearms used in the shooting of the victims was eventually found in the possession of a third party, (2) excluded evidence of a text message conversation he claims was relevant to third-party culpability in violation of his right to present a defense pursuant to the sixth and fourteenth amendments to the federal constitution, and (3) admitted into evidence maps depicting the location of cell phones,[2] and related testimony, without first conducting a *Porter*[3] hearing. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts that provide the context for this appeal. At approximately 2:30 p.m. on September 10, 2013, a group of individuals—LaChristopher Pettway, Aijholon Tisdale, Jauwan Edwards, Leroy Shaw, and Tamar Hamilton—congregated outside the Trumbull Gardens housing project, located in the north end of Bridgeport. At this same time, two men approached the group, and one of them said, "y'all just came through the Ave shooting Braz, you all f'd up." The two men then pulled out nine millimeter handguns and shot at the group. One bullet struck Pettway in the back, piercing his lung; Pettway later died from his gunshot wound. Tisdale, Edwards, Shaw, and Hamilton were also struck by bullets; each of them survived the assault. After the shooting, the two men ran away toward a nearby street. During the

[2] The defendant refers to the challenged evidence as "cellular telephone tower ping data," "maps," and related testimony. The challenged evidence consisted of testimony and documentary evidence regarding maps depicting the location of certain cell phones based on the historical billing records for those cell phones.

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

ensuing police investigation into the shooting, Hamilton, Shaw, and Tisdale identified the defendant as one of the men who shot at them.

By way of an amended long form information, the state charged the defendant with one count of murder, one count of conspiracy to commit murder, and four counts of assault in the first degree. A jury found the defendant guilty of all counts. The court accepted the jury's verdict, rendered judgment, and sentenced the defendant to a total effective sentence of forty-five years imprisonment.[4] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's claim that the court improperly precluded him from introducing evidence that one of the firearms used in the shooting of the victims was eventually found in the possession of a third party. Because we conclude that the defendant failed to preserve this evidentiary claim for appeal, we decline to address it.

The following procedural history is relevant. On the basis of the police investigation, the state also charged Raashon Jackson, a codefendant, with the same crimes as the defendant. The court consolidated their cases for trial. During the course of the consolidated jury trial, on October 22, 2015, the state filed a motion in limine seeking to preclude Jackson from introducing evidence that one of the two firearms used in the September 10, 2013 shooting was found in the possession

[4] On the charge of murder, the court sentenced the defendant to forty-five years imprisonment; on the charge of conspiracy to commit murder, the court sentenced the defendant to twenty years imprisonment; and on each of the four charges of assault in the first degree, the court sentenced the defendant to twenty years imprisonment. The sentences ran concurrently with one another.

of a third party.[5] The state argued that such evidence was not relevant as third-party culpability evidence because it failed to demonstrate a "direct connection" between the third party and the subject shooting.[6]

The court heard argument regarding the state's motion in limine, at which time Todd A. Bussert, counsel for Jackson, made two interrelated arguments regarding the proffered evidence. First, the firearm was relevant simply because it was one of the firearms used in the September 10, 2013 shooting, and second, "it is significant that it wasn't found in *Mr. Jackson's* possession or [in] any way tied to him." (Emphasis added.) Following argument, the court granted the state's motion in limine and precluded the introduction of such evidence. The defendant and his counsel, James J. Pastore, remained silent throughout oral argument. When the court inquired whether "*either* defendant intend[s] to put on any other evidence [regarding the firearm found in the third party's possession]"; (emphasis added); Bussert and Pastore both indicated that they did not.

"[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly." (Internal quotation marks omitted.) *State* v. *Miranda*, 327 Conn. 451, 464–65, 174 A.3d 770 (2018).

The defendant concedes that he did not independently object to the state's motion in limine. He also

[5] The subject firearm was found in the possession of Terrance Clark on August 23, 2014—approximately eleven months after the September 10, 2013 shooting—when he was arrested on unrelated charges.

[6] In Connecticut, third-party culpability evidence may be deemed relevant and admissible only if the defendant first demonstrates a "direct connection" between the charged crime and a third party. See footnote 10 of this opinion.

concedes that he did not attempt to introduce the evidence proffered by Jackson. Nonetheless, he argues that he "was not . . . required to obtain a second ruling on the same issue in order to preserve the record for review." We disagree. A defendant who wants to preserve a nonconstitutional issue for appeal raised by a codefendant in a consolidated trial must either join the claim advanced by his or her codefendant or otherwise separately make the claim. See *State* v. *Gould*, 241 Conn. 1, 9 n.3, 695 A.3d 1022 (1997) (defendant did not advance codefendant's claim at trial; "[w]hen a defendant does not join a codefendant's motion for tactical or other reasons, the defendant cannot later complain of the procedure on appeal"); *State* v. *Walton*, 227 Conn. 32, 55 n.20, 630 A.2d 990 (1993) (defendant did not join codefendants' midtrial motions for separate trial, nor did he make his own similar motion; Supreme Court "presume[d] that his silence in the face of a similar midtrial motion by [a codefendant], specifically joined by [a second codefendant], was for tactical or other reasons he deemed to be valid"); *State* v. *Tok*, 107 Conn. App. 241, 245 n.2, 945 A.2d 558 (defendant could not raise unpreserved evidentiary claim on appeal based on codefendant's objection, citing *Gould*), cert. denied, 287 Conn. 919, 951 A.2d 571 (2008). Accordingly, the defendant did not preserve this issue for appeal and, therefore, we decline to address it.[7]

II

The defendant next claims that the trial court improperly precluded him from introducing certain third-party

[7] The defendant's reliance on *State* v. *Velky*, 263 Conn. 602, 614–15, 821 A.2d 752 (2003) (jury trial with one defendant; clear indication that defendant's efforts would have been futile based on trial court's pretrial conference statements regarding specific evidentiary claim raised on appeal), and *People* v. *Mezon*, 80 N.Y.2d 155, 160–61, 603 N.E.2d 943, 589 N.Y.S.2d 838 (1992) (jury trial with one defendant; trial court "stated unequivocally that it would permit oral motion," notwithstanding state's opposition), fails to persuade us to reach a different result.

culpability evidence in violation of his right to present a defense pursuant to the sixth and fourteenth amendments to the federal constitution. He argues that the trial court improperly prevented him from cross-examining David Anderson, a witness for the state, about a text message conversation that allegedly appeared on Anderson's cell phone. According to the defendant, "[e]vidence that . . . Anderson had been seeking ammunition eight days before the shooting would have been relevant to support the defendant's theory that . . . Anderson was one of the shooters . . . ." In response, the state contends that the defendant did not raise the specific relevance claim he pursues on appeal and, therefore, that the evidentiary basis for his claim is unreviewable. Alternatively, the state argues that, even if we were to review the defendant's claim in accordance with *Golding*,[8] it fails to satisfy *Golding*'s second, third, and fourth prongs. Because we conclude that the defendant's claim hinges on an unpreserved relevancy argument, we agree with the state.

Anderson, the defendant's cousin, testified at trial on behalf of the state. According to him, on September 10, 2013, he drove the defendant and Jackson in his white 2004 Nissan Maxima to the north end of Bridgeport at approximately 2 p.m. The defendant instructed him to drive to an area near the Trumbull Gardens housing project.[9] While Anderson was driving on a street near the Trumbull Gardens housing project, the defendant said that "he [had] seen someone he knew," and that Anderson should park the car and then wait for him and Jackson until they returned. The defendant and Jackson then exited the car and headed toward whomever the defendant recognized. Shortly thereafter,

[8] See *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).

[9] Anderson testified that the state had charged him with conspiracy to commit murder in connection with the September 10, 2013 shooting.

Anderson heard "firecracker sounds." Approximately two minutes after Anderson parked his car, the defendant and Jackson returned and entered Anderson's Nissan Maxima, and the defendant told Anderson, "[a]ll right, go ahead." Anderson heard sirens as he then drove the defendant and Jackson away from the area.

During cross-examination, Pastore, counsel for the defendant, sought to question Anderson about a text message conversation that allegedly appeared on Anderson's cell phone. Pastore asked Anderson, "[w]ho is Popa Anderson?" Anderson did not answer that question, however, as the prosecutor immediately objected and claimed that the inquiry was not relevant. Outside the presence of the jury, Pastore represented to the court: "There's a text message from Mr. Anderson's phone from a Popa Anderson to another individual by the name of Los Des, and I'm asking and inquiring of who those individuals are." The following colloquy then took place:

"The Court: Well, what else—what else would you have though to make that relevant?

"[Pastore]: Well, depending on how the person answers the questions, the relevancy—

"The Court: I mean, what's your proffer? Do you know?

"[Pastore]: The relevancy is, there's a—there's a chat between those individuals regarding—

"The Court: Between?

"[Pastore]: Anderson—this Popa Anderson and this Los Des regarding thirty-two shells or a request for [.38 caliber] shells.

"The Court: Okay.

"[Pastore]: On September 2, eight days before the alleged incident here.

"The Court: Okay. And spit it out for me. How's that relevant to what's on the trial here?

"[Pastore]: Well, some of the casings that were recovered were [.38 caliber shells].

"The Court: Okay.

"[Pastore]: So, I'm inquiring of this witness, first of all, who those individuals are, and then whether or not he's—whether he's aware that that chat occurred.

"The Court: Is there anything more than that?

"[Pastore]: No, Your Honor.

"The Court: Right now?

"[Pastore]: No, Your Honor.

"The Court: So, you have these text messages from these two individuals you want to—and you're saying that on his phone there's a request by this witness?

"[Pastore]: It was a request by someone entitled Popa Anderson.

"The Court: For?

"[Pastore]: The exact text is: Yo, bitch, do you know anybody with [.38] shells?

"The Court: So, it's not even this witness who's making the request for the [.38 shells], it's somebody purportedly texting him?

"[Pastore]: No. The text is from an individual named Popa Anderson.

"The Court: Who's the one requesting or asking about the [.38 shells]?

"[Pastore]: Popa Anderson.

"The Court: Not this witness?

"[Pastore]: I don't—I don't—

"The Court: The witness is being inquired of by Popa Anderson about [.38] shells.

"[Pastore]: No. No.

"The Court: That's what—

"[Pastore]: Well, that's why—I think I first need to establish who that individual is, and so that's my first question to this witness.

* * *

"The Court: So, it's a text between two other people about [.38] caliber shells that somehow appears up on his phone.

"[Pastore]: Correct.

"The Court: Sustained. Bring the jurors back in."

Following the court's ruling, Pastore cross-examined Anderson on different matters. The defendant now claims on appeal that the trial court deprived him of his right to present a defense under the sixth and fourteenth amendments to the federal constitution.

"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. . . . A defendant's right to present a defense is rooted in the compulsory process and confrontation clauses of the sixth amendment. . . . Furthermore, the sixth amendment rights to confrontation and to compulsory process are made applicable to state prosecutions through the due process clause of the fourteenth 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). We review an evidentiary ruling by the trial court for an abuse of discretion. See, e.g., *State* v. *Calabrese*, 279 Conn. 393, 406–407, 902 A.2d 1044 (2006).

It is also well established that "[a]ppellate review of evidentiary rulings is ordinarily limited to the specific legal [ground] raised by . . . trial counsel. . . . To permit a party to raise a different ground on appeal than [that] raised during trial would amount to trial by ambuscade, unfair both to the trial court and to the opposing party." (Internal quotation marks omitted.) *State* v. *Jones*, 115 Conn. App. 581, 601, 974 A.2d 72, cert. denied, 293 Conn. 916, 979 A.2d 492 (2009); see also *State* v. *Adorno*, 121 Conn. App. 534, 548 n.4, 996 A.2d 746 ("[o]rdinarily, we will not consider a theory of relevance that was not raised before the trial court"), cert. denied, 297 Conn. 929, 998 A.2d 1196 (2010).

On appeal, the defendant claims that the trial court's ruling preventing him from asking Anderson, "[w]ho is Popa Anderson," and continuing that inquiry, deprived him of the opportunity to present relevant evidence that Anderson "was one of the shooters . . . ." More specifically, he maintains that such evidence was relevant third-party culpability evidence that "raise[d] more than a bare suspicion that Mr. Anderson was one of

the two shooters." He did not, however, distinctly assert this claim of relevance at trial, notwithstanding the opportunity to do so after the court repeatedly asked defense counsel to state the relevance of the proffered evidence. Rather, Pastore maintained that such evidence was more generally relevant because "some of the casings that were recovered [from the scene of the shooting were the same caliber as those discussed in the text message conversation]." The defendant's constitutional claim is therefore premised on a distinct, and unpreserved, claim of relevance, an evidentiary matter. See *State* v. *Jones*, supra, 115 Conn. App. 601 (declining to review relevance claim raised for first time on appeal within context of defendant's claim that trial court deprived him of his constitutional right to cross-examine witnesses).

We also note that the defendant now raises an unpreserved constitutional claim on appeal—without requesting *Golding* review. We agree with the state, however, that even if we were to apply *Golding* to the defendant's unpreserved constitutional claim; see *State* v. *Elson*, 311 Conn. 726, 754–55, 91 A.3d 862 (2014) (overruling "affirmative request" requirement); the defendant's claim fails to satisfy *Golding*'s second prong. See *State* v. *Golding*, 213 Conn. 233, 239, 567 A.2d 823 (1989) (second prong requires claim to be of constitutional magnitude), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). As previously stated, the foundation of the defendant's constitutional claim regarding the proffered evidence is a relevance claim that the trial court did not distinctly have before it.[10] The defendant, therefore, clothes the

[10] Although third-party culpability evidence is governed generally by rules relating to relevancy, specific requirements determine its admissibility. See, e.g., *State* v. *Hedge*, 297 Conn. 621, 635, 1 A.3d 1051 (2010) ("[t]he defendant must . . . present evidence that directly connects a third party to the crime"); *State* v. *Arroyo*, 284 Conn. 597, 609, 935 A.2d 975 (2007) (proffered third-party evidence must "establish a direct connection to a third party, rather than raise merely a bare suspicion regarding a third party"). The

issue in constitutional garb, but it is actually evidentiary in nature. See *State* v. *Jones*, supra, 115 Conn. App. 602 (defendant's constitutional claim failed to satisfy second prong of *Golding* because "[i]t [was] . . . merely a claim of relevance"). Accordingly, the defendant cannot prevail on his claim.

III

The defendant's final claim is that the trial court improperly admitted into evidence maps depicting the location of cell phones and related testimony. More specifically, he argues that the court improperly declined to hold a *Porter* hearing to determine the admissibility of testimony and maps developed by Andrew Weaver, a witness for the state, which described the defendant's movements on September 10, 2013, according to his cell phone use. The defendant maintains that the court was required to hold a *Porter* hearing "to determine whether the software program . . . Weaver used to create the map[s] showing the location of the defendant's cell phone was reliable." According to the defendant, the court abused its discretion when it failed to do so, and such evidence substantially affected the verdict. The state argues that the defendant's claim is unreviewable and, alternatively, that any error was harmless. We agree with the state that the claim is unreviewable and, even if it were reviewable, any error was harmless.

The following additional facts, which the jury reasonably could have found, and procedural history are relevant to this claim. Prior to trial, the defendant filed a

record does not indicate that the trial court sustained the state's objection on the ground that the defendant failed to meet these strict requirements. Cf. *State* v. *Hedge*, supra, 633 (claim that defendant's constitutional right to present defense was violated deemed reviewable because, "although the defendant initially sought to introduce the evidence for a more limited purpose, the trial court treated the proffered testimony as third party culpability evidence" and because, following court's ruling, "the defense treated the testimony as giving rise to a third party culpability claim").

motion in limine seeking to "[preclude] the admission of cellular telephone tower 'ping' evidence. In the alternative, the defendant request[ed] a hearing pursuant to . . . *Porter* to determine the scientific reliability of said evidence." The defendant's motion was dated July 17, 2014, and was filed with the court that same day.[11]

On October 20, 2015, after trial began, the court held a hearing outside the presence of the jury in connection "with the motion in limine to preclude testimony of Sergeant Andrew Weaver *filed by Mr. Jackson's counsel, dated October 7 [2015]*." (Emphasis added.) The court initially understood Jackson's motion to challenge Weaver's testimony as being based on two grounds. First, the state's disclosure of Weaver's anticipated testimony was late or incomplete, and second, the software used by Weaver to generate certain maps was "problematic." The court also noted: "The other area [it wanted to address], in fairness to the defense, is the reliability of this GeoTime software [used by Weaver] and whether . . . Weaver is qualified as an expert to do what he's done."

Responding to the court's statements, Bussert stated in relevant part: "Just two things, Your Honor. . . . In terms of . . . Weaver's qualifications to testify as an expert and the state's memorandum in opposition, which seems to focus largely on the issue of whether or not the proffer purpose of . . . Weaver's testimony was generally inadmissible . . . I don't think we ever really contested that this type of information can be presented to a jury if coming in through a proper expert. And in terms of . . . Weaver's qualifications, we would just like to voir dire him during his testimony if he's allowed to testify. So, that's not really a basis. And then also—and I think there was one issue. . . . One issue

[11] Although the record is unclear, it appears that Pastore, in a pretrial proceeding, had asked the court to address his motion in limine at trial.

that we see as substantive with respect to the—to the PowerPoint presentation slideshow that he—that Sergeant Weaver has presented to us for review, and that is in particular the second page, which is that entire summary page."

Weaver testified during the hearing and, following the hearing, the court denied the motion in limine and permitted the state to introduce Weaver's testimony and the maps he created. Although he was present during this hearing, Pastore did not ask any questions, nor did he oppose Weaver's proposed testimony or the maps he had prepared.[12]

The state thereafter called Weaver to testify at trial. He testified, on direct examination, that he had prepared certain maps based on "GPS [global positioning system] material for a person by the name of Mr. Anderson" and "data from three different cell phones" provided by the state.[13] According to Weaver, the maps, which were contained in a PowerPoint presentation that was admitted into evidence, portrayed Anderson's specific movements before and after the September 10, 2013 shooting. Weaver testified that those maps were partially based on location data he received from the state that derived from a GPS bracelet Anderson wore on his ankle. Weaver also testified that the maps depicted, generally, where the defendant and Jackson made or received certain calls on their cell phones before and after the shooting.[14] These maps demonstrated that Anderson, the defendant, and Jackson were

[12] At the start of the hearing, the court noted that it would permit Pastore to cross-examine Weaver in connection with the hearing on Jackson's motion in limine.

[13] Bussert initially conducted a voir dire of Weaver regarding the PowerPoint presentation of the maps he created. Pastore, however, indicated that he did not have an objection to the admissibility of Weaver's PowerPoint presentation.

[14] For a comprehensive review of how law enforcement uses cell phone call records to approximate the locations of an individual at a particular time, see, e.g., *State* v. *Steele*, 176 Conn. App. 1, 14–24, 169 A.3d 797, cert. denied, 327 Conn. 962, 172 A.3d 1261 (2017).

in the area of the shooting when it took place, and left the area soon after the shooting. At trial, the defendant did not object to Weaver's testimony, nor did he object to the PowerPoint presentation containing the maps Weaver prepared using the GeoTime software.

We now set forth the legal principles governing our review of the defendant's claim. "We review a trial court's decision [regarding the admission of] expert testimony for an abuse of discretion. . . . If we determine that a court acted improperly with respect to the admissibility of expert testimony, we will reverse the trial court's judgment and grant a new trial only if the impropriety was harmful to the appealing party." (Internal quotation marks omitted.) *State* v. *Steele*, 176 Conn. App. 1, 32, 169 A.3d 797, cert. denied, 327 Conn. 962, 172 A.3d 1261 (2017). "It is [also] well settled that this court is not bound to consider any claimed error unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim." (Internal quotation marks omitted.) *Peeler* v. *Commissioner of Correction*, 170 Conn. App. 654, 677, 155 A.3d 772, cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017).

The defendant relies on our Supreme Court's decision in *State* v. *Edwards*, 325 Conn. 97, 156 A.3d 506 (2017), in which the court "was presented with two issues of first impression, specifically, whether: (1) 'a police officer needed to be qualified as an expert witness before he could be allowed to testify regarding cell phone data'; id., 127; and (2) 'the evidence introduced through [the police officer] was of a scientific nature such that a [*Porter* hearing] was required.' . . . The court answered those two questions in the affirmative, concluding that the trial court improperly admitted cell phone data and cell tower coverage maps into evidence without qualifying the police officer as an expert and conducting a *Porter* hearing to determine whether the

officer's testimony was based on a reliable scientific methodology." (Citations omitted; footnote omitted.) *State* v. *Turner*, 181 Conn. App. 535, 550–51, A.3d (2018).

We conclude that the defendant failed to preserve his evidentiary claim for appeal. Although he directs our attention to points in the record where the court ruled on *Jackson's October 7, 2015* motion in limine, he does not direct our attention to where in the record the court distinctly ruled on his July 17, 2014 motion in limine.[15] Nor does he direct our attention to where he objected to the introduction of Weaver's testimony or where he requested a *Porter* hearing, apart from the request contained in his July 17, 2014 motion in limine. The defendant also did not join Jackson's motion in limine and, even if he had, counsel for Jackson did not request a *Porter* hearing. See *State* v. *Jackson*, 183 Conn. App. 623, 650, A.3d (2018). Finally, our independent review of the record fails to reveal where the court either ruled on the defendant's motion in limine or otherwise denied his request for a *Porter* hearing. Accordingly, the defendant's evidentiary claim is unpreserved.[16] See, e.g., *Peeler* v. *Commissioner of Correction*, supra, 170 Conn. App. 677; see also *State* v. *Turner*,

[15] In support of his argument that his claim is preserved, the defendant relies on the following portion of the court's oral ruling: "[E]xcept to an extent that I'm going to say right now, I'm going to deny the motion in limine because I don't feel that there's been true—a true prejudice *visited upon the defendants by these circumstances*. I won't go back to how I feel about those circumstances." (Emphasis added.) We note that the court was particularly concerned with the alleged late disclosure of Weaver's testimony and his PowerPoint presentation, and its oral ruling makes no mention of a *Porter* hearing. Indeed, Bussert did not request such a hearing. See *State* v. *Jackson*, supra, 183 Conn. App. 650. Accordingly, we are unpersuaded that the defendant's evidentiary claim is properly preserved by this excerpt of the court's ruling.

[16] The defendant also contends that his evidentiary claim is reviewable because our Supreme Court's decision in *Edwards*, which was decided while his appeal was pending, applies retroactively to pending cases. See, e.g., *State* v. *Hampton*, 293 Conn. 435, 457, 988 A.2d 167 (2009) ("judgments that are not by their terms limited to prospective application are presumed to

supra, 181 Conn. App. 551 (dictates of *Edwards* raise evidentiary concerns); *State* v. *Stephen O.*, 106 Conn. App. 717, 723 n.4, 943 A.2d 477 (evidentiary claim unpreserved for appeal because, "[a]though [the defendant's pretrial motion in limine] arguably encompassed the evidence at issue . . . the record does not reflect that the court at any time acted on this motion"), cert. denied, 287 Conn. 916, 951 A.2d 568 (2008).[17]

Even if the defendant's claim was properly before this court, he has failed to demonstrate that Weaver's testimony or the maps he created substantially affected the verdict. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper evidentiary ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength

apply retroactively . . . to cases that are pending" [internal quotation marks omitted]). Although this court has recognized that the rule announced in *Edwards* is retroactively applicable; see *State* v. *Turner*, supra, 181 Conn. App. 549 n.13 (stating that *Edwards* "retroactively applies to the present case because 'a rule enunciated in a case presumptively applies retroactively to pending cases' "); we are unpersuaded that the defendant's claim is reviewable. See *State* v. *Jackson*, supra, 183 Conn. App. 652–53 (recognizing retroactivity of *Edwards*, but declining to review unpreserved evidentiary claim pursuant to *Edwards*).

[17] The state also argues that the defendant's claim regarding the cell phone coverage maps is unreviewable because his motion in limine sought only to preclude cell phone tower "ping" evidence, rather than the maps created by Weaver based on "historical billing records." According to the state, "Ping evidence is completely different from the mapping of a defendant's location using historical billing records." Thus, the state maintains that the defendant failed, at trial, to challenge the *specific* evidence presented by the state through Weaver. We need not address this argument and therefore express no opinion on it.

of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, 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.) *State* v. *Edwards*, supra, 325 Conn. 133.

The testimony from Weaver and the maps depicting the location of the cell phones were cumulative and paled in comparison to other unchallenged evidence before the jury. Anderson testified that he picked up the defendant and Jackson in his white Nissan Maxima, drove them to an area near the September 10, 2013 shooting at the Trumbull Gardens housing project, dropped them off at a nearby street at approximately the same time the shooting occurred, and then drove them away from the area after hearing "firecracker sounds" and approaching sirens. See, e.g., *State* v. *Edwards*, supra, 325 Conn. 134 (evidentiary error deemed harmless because, even without improperly admitted cell phone data and maps, jury could conclude that defendant was in area when robberies occurred based on other unchallenged evidence). Although the defendant disputes Anderson's credibility on appeal, he does not challenge the admissibility of his testimony. Additionally, during the police investigation and at trial, some of the victims positively identified the defendant as one of the men who shot them. See, e.g., *State* v. *Bouknight*, 323 Conn. 620, 627–29, 149 A.3d 975 (2016) (evidentiary error deemed harmless based on multiple eyewitnesses identifying defendant as shooter).[18]

[18] The state's case against the defendant also consisted of consciousness of guilt evidence. Anderson testified that, although he had been untruthful with investigating officers at times, the defendant had told him to say certain

Other evidence before the jury further corroborated the maps depicting the location of the cell phones presented through Weaver. The maps Weaver created demonstrated that Anderson was in the area of the shooting when it happened, based on a GPS ankle bracelet that Anderson wore at the time. According to Weaver, the GPS logs provided the "[s]pecific" location of an individual. On appeal, the defendant does not challenge the admissibility of this GPS evidence. The state also introduced surveillance camera footage depicting Anderson's white Nissan Maxima traveling toward the Trumbull Gardens housing project at approximately the time of the shooting, being within ninety-one yards of the shooting approximately when it happened, and that two men exited the car at approximately 2:31 p.m.

Weaver also testified that cell phone data can only approximate the cell phone's location to a general "coverage area." In other words, he acknowledged the limited accuracy of the challenged evidence. Bussert even cross-examined him on the fact that cell phone data can only provide an "approximation" as to a cell phone's location. And although Pastore's cross-examination of Weaver was limited, Weaver acknowledged that the location of the defendant's cell phone was not depicted in some of the slides contained in Weaver's PowerPoint presentation. See, e.g., *State* v. *Edwards*, supra, 325 Conn. 135 (improperly admitted evidence deemed harmless due, in part, to rigorous cross-examination "on the accuracy of the cell phone data"). Accordingly, we cannot conclude that admitting into evidence Weaver's testimony and the maps depicting the location of

things to the police. According to Anderson, the defendant told him: "If anyone asks [where he was at the time of the shooting], tell them that he was with me." See, e.g., *State* v. *Schmidt*, 92 Conn. App. 665, 675–76, 886 A.2d 854 (2005) (consciousness of guilt evidence goes to defendant's state of mind and "may be inferred to have been influenced by the criminal act" [internal quotation marks omitted]), cert. denied, 277 Conn. 908, 894 A.2d 989 (2006).

the cell phones, even if improper, substantially affected the verdict.

The judgment is affirmed.

In this opinion the other judges concurred.

KIRK B. DAVIS ET AL. *v.* PROPERTY OWNERS ASSOCIATION AT MOODUS LAKE SHORES, INC., ET AL.
(AC 39163)

DiPentima, C. J., and Keller and Elgo, Js.

Syllabus

The plaintiff homeowners sought a declaratory judgment to determine, inter alia, that they had an easement by implication over certain real property of the defendants, a property owners association and certain of its officers. The plaintiffs, whose real property abutted a portion of the association's property, claimed that the only means of access from their property to a certain public road was via a driveway over a portion of the association's property. The trial court summarily denied the plaintiffs' motions in limine to preclude testimony by certain of the defendants' expert witnesses and, following a trial to the court, rendered judgment for the defendants, from which the plaintiffs appealed to this court. *Held*:

1. The trial court did not abuse its discretion in denying the plaintiff's motions in limine, which sought to preclude the testimony of the defendant's experts, H, a surveyor, and D, a photogrammetrist, on the ground that they were disclosed too late; the plaintiffs, who received notice that the defendants planned to call a surveyor ten months before trial and that the defendants planned to present the testimony of a photogrammetrist nine months before trial, failed to demonstrate that the lengthy delay between the time of disclosure and the time when trial resumed did not afford them an ample opportunity to rebut the testimony at issue, as the lengthy delay gave them ample opportunity to mitigate any purported harm caused by the timing of the defendants' disclosure in that the plaintiffs were able to depose the defendants' experts and to consult their own expert in order to present rebuttal evidence, and the plaintiffs never alerted the court that they needed an additional continuance for the purposes of rebutting the untimely disclosed evidence, did not renew their objection when the defendants' experts testified and, in fact, stipulated to the admissions of D's photogrammetric analysis and H's composite map.

2. The plaintiffs' claim that the trial court improperly failed to find that they had an easement by implication over the defendants' property was unavailing; the trial court having thoroughly addressed the issues raised by the plaintiffs with respect to this claim in a thorough and well reasoned memorandum of decision, this court adopted the trial court's memorandum of decision as a proper statement of the facts and the applicable law on those issues.

Argued April 17—officially released July 24, 2018

Procedural History

Action for, inter alia, a judgment declaring that the plaintiffs have an easement over certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Aurigemma, J.*, granted the defendants' motion for a nonsuit as to certain counts of the complaint; thereafter, the matter was tried to the court, *Domnarski, J.*; subsequently, the court denied the plaintiffs' motions to preclude certain evidence; judgment for the defendants, from which the plaintiffs appealed to this court. *Affirmed.*

Scott W. Jezek, with whom, on the brief, was *Deborah L. Barbi*, for the appellants (plaintiffs).

Troy A. Bataille, for the appellees (defendants).

Opinion

KELLER, J. The plaintiffs, Kirk B. Davis and Elyssa J. Davis, appeal from the judgment of the trial court in favor of the defendant Property Owners Association at Moodus Lake Shores, Inc.[1] The plaintiffs claim on appeal that the court erred by (1) denying their motions in limine seeking to preclude the defendants' experts from testifying and (2) not finding that the plaintiffs

[1] Alan B. Collette, Donald Sama, and Gail Sama also are defendants in this case. The Property Owners Association at Moodus Lake Shores, Inc., individually, will be referred to as the association. The term defendants will refer to Collette, the Samas and the association, collectively.

had an easement by implication over the defendants' property. We affirm the judgment of the trial court.

On January 19, 2012, the plaintiffs commenced a ten count action against the defendants seeking to quiet title on a parcel of land, a declaratory judgment for an easement, and monetary damages for tortious conduct. In the first count of the complaint, the plaintiffs sought a declaratory judgment establishing an easement over the association's property. In support, the plaintiffs alleged the following: In 2003, the plaintiffs purchased a "certain . . . parcel of land, with the buildings and other improvements thereon, known as 38 Hilltop Road, Moodus"; the association is "the incorporated association of owners of land at Moodus Lake Shores, charged with the responsibility of maintenance as a residential resort area"; the plaintiffs are members of the association; the association owns the parcel of land abutting the eastern edge of the plaintiffs' property; Alan B. Collette is a member of the board of directors and the current president of the association; Donald Sama is a member of the board of directors for the association; Gail Sama is a member of the board of directors of the association and the current secretary; since 1962, the only means of access to a public road from the plaintiffs' property is by crossing over the northwest corner of the association's parcel; between 1962 and 2007, the plaintiffs' and their predecessors had "unfettered access and egress" from their property to Hilltop Road via a driveway over the northwest corner of the association's lot; in 2007, the defendants installed wheel stops on the association's parcel, affecting the plaintiffs' access to their property; in 2009, the wheel stops were removed and the plaintiffs installed a planter "on or near the boundary line" of the association's and the plaintiffs' properties; in August, 2010, the defendants removed the planter and built a fence that substantially blocked the plaintiffs' ability to gain access to their

property; in November, 2011, the defendants extended the fence, completely blocking off the plaintiffs' access and entrapping their vehicles, leading to police involvement on multiple occasions; the plaintiffs no longer have a practical method of reaching a public road; and the defendants no longer acknowledge that the plaintiffs have an easement over the association's property.

In the second count, the plaintiffs sought a judgment quieting title to a northwestern portion of the association's parcel pursuant to General Statutes § 47-21.[2] In count three, the plaintiffs claimed that an easement by implication[3] over that northwestern portion of the association's property is reasonably necessary for the plaintiffs in order for the plaintiffs to have access to a public road. In the fourth count, the plaintiffs claimed an easement by prescription over the same portion of the association's lot.

In the fifth count, the plaintiffs alleged that the defendants have "maliciously erected fences, barriers or other structures blocking the access and egress rights of the plaintiffs, and trapping their motor vehicles inside of said fences and barriers . . . ." In addition, the plaintiffs alleged that the fences "have no purposes and/or

[2] General Statutes § 47-21 provides: "Any conveyance or lease, for any term, of any building, land or tenement, of which the grantor or lessor is ousted by the entry and possession of another, unless made to the person in actual possession, shall be void."

[3] "[A]n implied easement is typically found when land in one ownership is divided into separately owned parts by a conveyance, and at the time of the conveyance a permanent servitude exists as to one part of the property in favor of another which servitude is reasonably necessary for the fair enjoyment of the latter property. . . . In the absence of common ownership . . . an easement by implication may arise based on the actions of adjoining property owners. . . . There are two principal factors to be examined in determining whether an easement by implication has arisen: (1) the intention of the parties; and (2) whether the easement is reasonably necessary for the use and normal enjoyment of the dominant estate." (Internal quotation marks omitted.) *Sanders* v. *Dias*, 108 Conn. App. 283, 288, 947 A.2d 1026 (2008).

are useless to the defendants," and have impaired the value of the plaintiffs' property and diminished the plaintiffs' enjoyment of it. The plaintiffs sought relief pursuant to General Statutes §§ 52-570[4] and 52-480."[5]

In counts six through nine, the plaintiffs brought causes of action seeking monetary damages from the defendants. In count six, the plaintiffs claimed that the defendants were liable for the intentional infliction of emotional distress for their conduct toward the plaintiffs associated with the construction and alterations to the fence. In count seven, the plaintiffs alleged that the defendants, by constructing the fence, created an unreasonable risk of physical and emotional harm. In the eighth count, the plaintiffs alleged that the defendants' use of their property amounted to a private nuisance. In the ninth count, the plaintiffs alleged that the defendants were liable for civil conspiracy for having performed the unlawful acts described in counts six, seven, and eight.

In the tenth count, the plaintiffs sought to remove Collette, Donald Sama, and Gail Sama as directors of the association. In support of this count, the plaintiffs stated, among other things, that Collette, Donald Sama, and Gail Sama breached their fiduciary duty to the association by ignoring valid votes of the board of directors/members, failing to provide full details of board actions and meeting minutes to members, taking unauthorized actions, eliminating the bidding process for roadwork contracts, "making or breaking rules as they

[4] General Statutes § 52-570 provides: "An action may be maintained by the proprietor of any land against the owner or lessee of land adjacent, who maliciously erects any structure thereon, with intent to annoy or injure the plaintiff in his use or disposition of his land."

[5] General Statutes § 52-480 provides: "An injunction may be granted against the malicious erection, by or with the consent of an owner, lessee or person entitled to the possession of land, of any structure upon it, intended to annoy and injure any owner or lessee of adjacent land in respect to his use or disposition of the same."

deem fit," removing other board members, and "treating the [association] as their own personal fiefdom by ignoring votes, ignoring budgets, and holding secret or illegal meetings . . . ."[6]

The defendants answered on November 20, 2012, and denied the plaintiffs' claims. In addition, the defendants raised nine special defenses. Specific to the plaintiffs' easement by implication claim, the defendants asserted that the plaintiffs "could and can" access their property without crossing over the association's property.

On June 25, 2014, the defendants filed a motion for nonsuit pursuant to Practice Book §§ 13-14 and 17-31. The defendants argued that, despite court orders to do so, the plaintiffs had not provided evidence to support their causes of action seeking damages for personal injuries and emotional distress. The plaintiffs did not respond to this motion. On September 2, 2015, the court, *Aurigemma*, *J.*, granted this motion for nonsuit on counts six through nine, and the portion of count five seeking monetary damages. See footnote 6 of this opinion.

Following a bench trial, the court found the following facts. The plaintiffs purchased their lakefront property in 1998; at this time, there was a small seasonal house on the property. The association's property, which is comprised of a parking lot and a beach area, abuts the eastern edge of the plaintiffs' property. Hilltop Road runs along the northern edge of the plaintiffs' property.

When the plaintiffs' predecessors in interest, Joseph A. Querion and Frances B. Querion, purchased the parcel that now comprises a majority of the plaintiffs' property, it could be accessed only by foot. In order to gain vehicle access to the lot, the Querions purchased a

[6] Only the court's decision on the plaintiffs' easement by implication allegations, the third count of their complaint, is at issue on appeal.

parcel of land from the defendants' predecessors in interest. The "deed for the land acquired by the Querions, to be used to access their property, did not contain any grant of easement to use the adjoining land of the association for purposes of ingress and egress. . . . Furthermore, there are no later deeds or grants in the chains of title for the plaintiffs' or [association's] property that establish a right-of-way or easement over the defendants' property in favor of the plaintiffs." "A driveway was constructed in 1966, which involved the removal of [a] ledge in the vicinity of Hilltop Road. To prevent erosion of the driveway, an erosion wall [made] of rocks was constructed in the vicinity of the thirty-five foot long common boundary [between the plaintiffs' and defendants' property]." This erosion wall was constructed entirely on the plaintiffs' property. As this erosion wall was sited between the historical driveway and the association's property, "the historical location of the subject driveway was entirely on the plaintiffs' property, and no portion was located on the [association's] property."

In 2003, the plaintiffs renovated their property. The plaintiffs extensively remodeled their house to convert it into a larger, year-round residence. In addition, the plaintiffs made alterations to the slope of their property and constructed a new driveway. The regrading efforts eliminated a two foot ledge between the plaintiffs' and the association's properties. A portion of the new driveway encroached on the association's property.

The renovations to the plaintiffs' property made it possible for vehicles to travel from the new driveway to the "vicinity of stairs on the [association's] property, which provided access to the beach. Between 2006 and 2011, the parties discussed the issue of the plaintiffs' new driveway and the stairs. Several arrangements for protecting the safety of people using the stairs [were put in place by both parties], including a curb stop, a

large planter, and a short barricade style fence. None of these arrangements produced long-lasting results that were acceptable to both parties. In September, 2011 . . . Collette, president of the . . . association, consulted an attorney about the rights and obligations of the association regarding the safety of members using the beach area . . . . In a letter to Collette, dated September 20, 2011, the attorney [wrote]: '[T]he [a]ssociation is within its legal rights and authority to act in connection with the use of its property by any party. . . . [T]he [a]ssociation is required to act in connection with the safety and protection of its members. . . . [F]ailure [to] act may result in a liability claim against the [a]ssociation. . . . Further, failure of the [a]ssociation to assert its rights may result in a future claim of easement by extended use.' " After receiving this letter, the association installed a fence along the common boundary.

The court ruled in favor of the defendants on all remaining counts. This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiffs claim that the court erred by denying their motions in limine seeking to preclude two of the defendants' expert witnesses, John L. Heagle, a surveyor, and Edward A. Dilport, a photogrammetrist,[7] from testifying at trial. The plaintiffs' main assertion is that these experts should not have been allowed to testify because they were disclosed too late.[8] The defendants argue that the plaintiffs were not prejudiced

[7] A dictionary defines photogrammetry as the "science of making reliable measurements by the use of usu[ally] aerial photographs in surveying and map making." Webster's New International Dictionary (3d Ed. 2002). A photogrammetrist is "a specialist in photogrammetry." Id.

[8] The defendants argue that the plaintiffs, by not objecting during the evidentiary portion of the trial, waived their claim that Dilport and Heagle should have been precluded from testifying. This assertion, however, is incorrect because, prior to the defendants' having presented the testimony of Dilport, the plaintiffs renewed their objection, stating: "[F]or the record,

because they had sufficient time to prepare before the experts testified and had a chance to present rebuttal evidence. We agree with the defendants.

The following additional facts are relevant to this claim. On November 14, 2014, the plaintiffs filed a proposed scheduling order, which the court accepted. This order required the defendants to disclose their witnesses by April 1, 2014. Trial commenced on November 12, 2014, and continued on November 13, 18 and 19, 2014. The plaintiffs provided the defendants with an overlay map created by their expert, Ronald C. Hurlburt, a surveyor, as the trial commenced. After a discussion with the parties in a chambers conference, the court offered the defendants time to review this map and consult an expert of their own. The defendants disclosed that they planned to present the testimony of Heagle, a land surveyor, on December 2, 2014. In response, on January, 16, 2015, the plaintiffs requested a continuance, seeking more time to investigate the content of Heagle's proposed testimony, which the court granted. The trial resumed on September 15, 16 and 17, 2015.

On December 2, 2014, the defendants disclosed Heagle, a land surveyor and civil engineer, as an expert witness. Heagle was expected to testify about "the boundary issues and questions relevant to [the present case] and, specifically, including the location and evidence pertaining to the easement or right-of-way at issue." On January 20, 2015, the defendants again filed a motion to disclose Heagle as an expert witness, essentially listing the same expected testimony.

On January 20, 2015, the defendants disclosed Lemuel G. Johnson, Jr., a photogrammetrist, as an expert. The

we had filed two motions in limine with respect to the disclosure of two expert witnesses by the defendant[s], [Heagle and Dilport], the essence of both being that they were untimely."

defendants disclosed that Johnson was "expected to testify concerning aerial photographs taken of the property in 2001, which . . . are maintained in the ordinary course of Golden Aerial Survey's[9] business and contained in its photographic inventory not expressly for the purpose of this litigation. In addition, [Johnson] is expected to testify concerning digital photogrammetric elevation measurements taken from the 2001 aerial photography of the subject site as depicted on the photogrammetric map of the subject area. . . . Finally, [Johnson] is expected to testify concerning the contents of [the] photogrammetric map of the subject area on [Hilltop Road] . . . ." (Footnote added.)

Due to concerns about Johnson's health, on June 4, 2015, the defendants filed a motion to disclose Dilport, another photogrammetrist and employee of Golden Aerial Surveys, Inc. The listed subject matter of Dilport's expected testimony was, in substance, the same as the proposed subject matter of Johnson's testimony. Specifically, the defendants disclosed that Dilport was expected to testify about the location of the historic driveway by analyzing aerial photographs taken in 2001.

The plaintiffs deposed Heagle once on December 3, 2014, and, again, on February 11, 2015. The plaintiffs deposed Dilport on July 2, 2015. On September 4, 2015, the plaintiffs disclosed Terry LeRoux, a photogrammetrist, as an expert witness. The plaintiffs stated that LeRoux would be a rebuttal witness and was expected to testify about high resolution photographs and anaglyphs[10] of the site.

[9] Johnson, at the time the motion to disclose was filed, was an employee of Golden Aerial Surveys, Inc.

[10] A dictionary defines anaglyph as "a stereoscopic motion or still picture in which the right component of a composite image usu[ally] red in color is superimposed upon the left component in a contrasting color (as bluish green) to produce a three-dimensional effect when viewed through correspondingly colored filters in the form of spectacles." Webster's New International Dictionary (3d Ed. 2002).

On September 11, 2015, the plaintiffs filed motions in limine to preclude the testimony of Heagle and Dilport. The plaintiffs premised their arguments in support of these motions on the fact that Dilport and Heagle were disclosed late, and that it would be prejudicial to allow them to testify because there would not be sufficient time to prepare for their testimony. They asserted that the late disclosure was particularly harmful with respect to Dilport because the January 20, 2015 disclosure was the first time that the defendants had mentioned that a photogrammetrist would testify. The plaintiffs noted that the scheduling order accepted by the court required the parties to disclose expert witnesses by April 1, 2014. In addition, they argued that Practice Book § 13-4 prohibits the late disclosure of experts. The defendants did not file a motion in opposition to the plaintiffs' motions in limine. The court summarily denied the plaintiffs' motions, without prejudice, and trial resumed on September 15, 2015.[11]

Johnson and Dilport both testified at trial. After Johnson and Dilport testified, the plaintiffs presented the testimony of LeRoux in rebuttal. The court found Johnson and Dilport to be credible and relied on their opinions in making factual findings. The court noted that LeRoux' testimony "generally agreed with Dilport's testimony and opinions." The court found, however, that LeRoux' lack of "any control point data . . . diminished the weight of his testimony."

We begin by setting forth the standard of review and principles of law pertinent to this claim. "[T]he motion in limine . . . has generally been used in Connecticut courts to invoke a trial judge's inherent discretionary powers to control proceedings, exclude evidence, and

[11] The court instructed the plaintiffs that it would reconsider their objection when the defendants' experts testified. At trial, the plaintiffs did not object when Heagle and Dilport testified, and they stipulated to the admissions of Dilport's photogrammetric analysis and Heagle's composite map.

prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citation omitted; internal quotation marks omitted.) *McBurney* v. *Paquin*, 302 Conn. 359, 378, 28 A.3d 272 (2011).

Practice Book § 13-4 (h) provides: "A judicial authority may, after a hearing, impose sanctions on a party for failure to comply with the requirements of this section. An order precluding the testimony of an expert witness may be entered only upon a finding that: (1) the sanction of preclusion, including any consequence thereof on the sanctioned party's ability to prosecute or to defend the case, is proportional to the noncompliance at issue, and (2) the noncompliance at issue cannot adequately be addressed by a less severe sanction or combination of sanctions." The plaintiffs argue that they were denied a fair trial because the defendants disclosed Heager and Dilport too late.[12] The plaintiffs assert that the defendants, by disclosing these experts in the manner in which they did, engaged in the "cat

[12] The plaintiffs also argue that they were especially prejudiced by Heagle and Dilport testifying because the court relied on their testimony in making findings favorable to the defendants. The issue on appeal, however, is whether the court erred by allowing Heagle and Dilport to testify by evaluating whether the plaintiffs had sufficient time to prepare for trial. The credibility of Heagle and Dilport does not factor into this determination. The inquiry as to whether the testimony provided by Heagle and Dilport was credible would only be relevant to determine if it was erroneous to allow them to testify, and, if so, was the harm caused by that error of such magnitude to warrant reversal.

and mouse game" that timely disclosure is meant to prevent. See *Pool* v. *Bell*, 209 Conn. 536, 541, 551 A.2d 1254 (1989). In *Pool*, our Supreme Court decided that a trial court's decision to preclude an expert witness from testifying when a party elected to disclose that witness only three weeks prior to the start of trial, having consulted with that expert for more than one year and having received a court order to disclose experts during that time, was not an abuse of discretion on the basis of the facts of that case. Id., 540–42. The present case does not contain the same facts that supported affirming the preclusion of the untimely disclosed expert in *Pool*. In the present case, the plaintiffs received notice that the defendants planned to call a surveyor ten months before trial resumed and that the defendants planned to present the testimony of a photogrammetrist nine months before trial resumed. Unlike *Pool*, the plaintiffs in the present case have failed to demonstrate that the lengthy delay between the time of disclosure and the time when trial resumed did not afford them an ample opportunity to rebut the testimony at issue. This lengthy delay gave the plaintiffs ample opportunity to mitigate any purported harm caused by the timing of the defendants' disclosure. Indeed, the record reveals that the plaintiffs took advantage of this opportunity to do so. The plaintiffs were able to depose the defendants' experts and they were also able to consult their own expert in order to present rebuttal evidence.

The defendants correctly assert that the plaintiffs could have sought a continuance to seek more time to prepare for trial. "A continuance is ordinarily the proper method for dealing with a late disclosure. . . . A continuance serves to minimize the possibly prejudicial effect of a late disclosure and absent such a request by the party claiming to have been thus prejudiced,

appellate review of a late disclosure claim is not warranted." (Citations omitted; internal quotation marks omitted.) *Rullo* v. *General Motors Corp.*, 208 Conn. 74, 79, 543 A.2d 279 (1988). If the plaintiffs believed that they needed additional time, instead of filing motions in limine on the ground that disclosure was untimely, or after those motions were denied, the plaintiffs could have asked the court for more time to prepare for trial. Regardless, they cannot persuade us that the court abused its discretion by allowing Heagle and Dilport to testify on the ground that the defendants disclosed these witnesses late, when they never alerted the court that they needed an additional continuance for the purposes of rebutting the untimely disclosed evidence. Also, although invited by the court, the plaintiffs never renewed their objection when the defendants' experts testified and in fact stipulated to the admissions of Dilport's photogrammetric analysis and Heagle's composite map.

Thus, the court did not abuse its discretion by denying the plaintiffs' motions in limine seeking to preclude the testimony of Heagle and Dilport because by the time that those motions were presented to the court, which was just before the trial was set to resume, the plaintiffs could not demonstrate how they were prejudiced.

II

The plaintiffs' second claim is that the court erred by not granting them an easement by implication. After examining the record and the briefs and considering the arguments of the parties, we are persuaded that the court correctly rendered judgment in favor of the defendants. The issues raised by the plaintiffs in this claim were resolved properly in the trial court's thorough and well reasoned memorandum of decision. We therefore adopt the memorandum of decision as the

proper statement of the relevant facts, issues and applicable law with respect to this issue only. *Davis* v. *Property Owners Association at Moodus Lake Shores, Inc.*, Superior Court, judicial district of Middlesex, Docket No. CV-12-6006823-S (February 24, 2016) (reprinted at 183 Conn. App. 704). It would serve no useful purpose for us to repeat the discussion contained therein. See *Seminole Realty, LLC* v. *Sekretaev*, 162 Conn. App. 167, 169, 131 A.3d 753 (2015), cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016).

The judgment is affirmed.

In this opinion the other judges concurred.

APPENDIX

KIRK DAVIS ET AL. *v.* PROPERTY OWNERS ASSOCIATION AT MOODUS LAKE SHORES, INC., ET AL.*

Superior Court, Judicial District of Middlesex
File No. CV-12-6006823-S

Memorandum filed February 24, 2016

Proceedings

Memorandum of decision after completed trial to court. *Judgment for defendants.*

Jeffrey M. Sachs, for the plaintiffs.

Elizabeth M. Cristofaro, for the defendants.

Opinion

DOMNARSKI, J. The plaintiffs, Kirk B. Davis and Elyssa J. Davis (Davis), own a parcel of land known as 38 Hilltop Road, in Moodus, Connecticut, which abuts

* Affirmed. *Davis* v. *Property Owners Assn. at Moodus Lake Shores, Inc.*, 183 Conn. App. 690, A.3d (2018).

land owned by the defendant, Property Owners Association at Moodus Lake Shores, Inc. (Association). Unless otherwise noted, the Association will be referred to as the defendant in this memorandum. The defendants Alan B. Collette, Donald Sama and Gail Sama are officers in the Association (individual defendants). The plaintiffs' property contains a house and driveway, and the defendant's property is comprised of a parking lot and beach area. Both properties have frontage on Hilltop Road. Before the court are the plaintiffs' claims for (1) a declaratory judgment seeking an easement, (2) judgment to quiet title pursuant to General Statutes § 47-33, (3) an easement by implication, (4) an easement by prescription and (5) malicious erection of a fence pursuant to General Statutes §§ 52-520 and 52-480. In their original complaint, the plaintiffs also sought damages for intentional infliction of emotional distress, negligent infliction of emotional distress, private nuisance, civil conspiracy and breach of fiduciary duty; those claims are not before the court. The trial began on November 12, 2014, and continued on November 13, 18 and 19, 2014. By agreement of the parties, the trial was continued to September 15, 2015; thereafter, evidence was presented on September 16 and 17, 2015. The parties submitted posttrial briefs on October 19, 2015; the court heard argument on the briefs on November 19, 2015. The court has conducted two "silent views" of the premises, with the consent of the parties and their counsel, outside of their presence.

The determinative issue in this case is the historical location of the plaintiffs' driveway, (historical driveway) as it relates to the defendant's property. The plaintiffs maintain that the driveway, in order to reach Hilltop Road, has always crossed over the parking area located on the defendant's property. For this reason, they claim they are entitled to the relief they seek. The defendant

maintains that the subject driveway was originally adjacent to its property and located entirely on the Davis property. It is the defendant's position that the plaintiffs, in order to provide wider and easier access to their property, unilaterally, and without legal authority, relocated and widened their driveway to travel over the defendant's property.

When the plaintiffs purchased their property in 1998, a small house on the property was used on a seasonal basis. It is undisputed that the plaintiffs made alterations to the driveway in late 2002 or early 2003. These alterations were part of expansion renovations made to the house in order to convert it from a seasonal dwelling to a much larger, year-round house.

An important exhibit in this case is an aerial photograph, commissioned by Golden Aerial Surveys, Inc., which was taken on April 29, 2001. (Exhibit 15.)[1] The parties agree that this photograph shows the plaintiffs' property and driveway, and the defendant's property. The parties do not agree as to where the driveway depicted in the photograph is located in relation to the defendant's property. The date of the photograph is important to the plaintiffs since the evidence established that the location of the driveway had not changed from 1966, the year it was created, to when the photograph was taken in 2001, a period of more than fifteen years. Use of the driveway over the defendant's land, for at least fifteen years, is an essential element of the plaintiffs' easement by prescription claim. The date of the photograph is also significant to the defendant. The aerial photograph was taken less than fifteen years from January 19, 2012, the date the plaintiffs brought this action.

[1] To facilitate record-keeping, counsel for the plaintiffs and the defendants agreed that their respective exhibits would all be marked with a "plaintiff's exhibit" sticker.

At the trial, the parties called many witnesses and submitted numerous exhibits, including a substantial number of photographs, in their efforts to persuade the court as to the location of the driveway in April, 2001. The task of demonstrating the location and boundary of the driveway was difficult because the topography of the plaintiffs' property has been dramatically altered, and many historical landmarks such as trees and ledge outcroppings have been removed.

There is one important feature of the subject properties which has not changed and is not contested—the boundary line in the area of this dispute. This boundary, between an easterly line of the plaintiffs' property and a westerly line of the defendant's property, is shown and depicted on a map entitled "Property Survey for The Property Owners Association of Moodus Lake Shores, East Haddam, Connecticut, Scale 1 "=20,' Oct. 2, 1990, Richard J. Ziobron, Surveyor" (Ziobron map) (exhibit 14). This boundary line begins at an iron pin or pipe (northern pin) located in the southerly line of Hilltop Road and travels in a generally southerly direction, thirty-five feet, to an iron pin or pipe (southern pin) shown on said map. This southern pin is located in the vicinity of steps on the defendant's property that are situated between the parking lot and the beach area. The original steps are shown on the subject map and replacement steps are located in the same general location. There is no dispute as to the location of this boundary line, and there is also no dispute that the northern pin or pipe, in the southerly line of Hilltop Road, has been in place since the survey was made in 1990.

As stated earlier, the plaintiffs' claim that the driveway for their property has always crossed over the defendant's parking lot in order to reach Hilltop Road. They further maintain that the entrance portion of the driveway has always been located to the east of the northern pin, upon the defendant's land. This claim is

disputed by the defendant; it claims the entrance portion of the driveway has historically been located to the west of the northern pin, solely upon the plaintiffs' land. The first task for the court is to make a factual determination as to the location of the entrance of the historical driveway in the vicinity of Hilltop Road.

STANDARD OF REVIEW

"It is an abiding principle of our jurisprudence that [t]he sifting and weighing of evidence is peculiarly the function of the trier [of fact]. [N]othing in our law is more elementary than that the trier [of fact] is the final judge of the credibility of witnesses and of the weight to be accorded to their testimony. . . . The trier has the witnesses before it and is in the position to analyze all the evidence. The trier is free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *Welsch* v. *Groat*, 95 Conn. App. 658, 664, 897 A.2d 710 (2006).

"It is well established that [in] a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony he reasonably believes to be credible. . . . It is the quintessential function of the fact finder to reject or accept certain evidence, and to believe or disbelieve any expert testimony. . . . The trier may accept or reject, in whole or in part, the testimony of an expert offered by one party or the other." (Citations omitted; internal quotation marks omitted.) *In re Carissa K.*, 55 Conn. App. 768, 781–82, 740 A.2d 896 (1999); see also *In re Jason R.*, 129 Conn. App. 746, 772–73, 23 A.3d 18 (2011), aff'd, 306 Conn. 438, 51 A.3d 334 (2012).

DISCUSSION

In fulfilling its responsibility as the finder of fact, this court is reminded of a jury instruction it has given on many occasions to jurors, who are also finders of fact.

"The party who asserts a claim has the burden of proving it by a fair preponderance of the evidence, that is, the better or weightier evidence must establish that, more probably than not, the assertion is true. In weighing the evidence, keep in mind that it is the quality and not the quantity of evidence that is important; one piece of believable evidence may weigh so heavily in your mind as to overcome a multitude of less credible evidence. The weight to be accorded each piece of evidence is for you to decide." Connecticut Judicial Branch Civil Jury Instructions 3.2-1 (revised January 1, 2008), available at https://www.jud.ct.gov/JI/Civil/Civil.pdf.

In this case, the evidence that has weighed heavily on the mind of the court is the photogrammetry[2] analysis of the Golden Aerial photograph, Exhibit 15. Before discussing this evidence, it is necessary to set forth facts related to physical features of the historical driveway. In 1965, the Association conveyed a portion of land that it owned to Joseph A. Querion and Frances M. Querion (Querions), the plaintiffs' predecessor in title, in order to facilitate access to what is now the plaintiffs' property. A driveway was constructed in 1966 which involved the removal of ledge in the vicinity of Hilltop Road. To prevent erosion of the driveway, an erosion wall built of rocks was constructed in the vicinity of the thirty-five foot long common boundary shown on the Ziobron map. See, in general, affidavit of Rita LaRose, exhibit 9. Prior to when the aerial photograph was

[2] Photogrammetry is the science of making reliable measurements using photographs, especially aerial photographs. See Webster's Third New International Dictionary (1993).

taken in April, 2001, Kirk Davis, a plaintiff, placed large timbers on the top of the erosion wall to prevent vehicles from traveling over it. These timbers were in a line, approximately eighteen feet in length.

The defendant presented expert testimony from Edward A. Dilport, an experienced photogrammetrist, and John L. Heagle, a licensed surveyor. Dilport examined the 2001 aerial photograph (exhibit 14) using a stereo image viewer, and other technology, in order to observe the features shown in the photograph and plot elevations of the land. The erosion wall, and the timbers on top of it, were visible in the photograph. Surveyor Heagle obtained information about certain control points in the vicinity of the driveway by taking physical measurements of landmarks shown in the photograph. Utilizing information provided by Heagle, Dilport was able to prepare a map, known as a planimetric map, showing a combination of physical features and elevations. (Dilport map.) (Exhibit 101.) On this map, the vertical elevations are accurate to plus or minus 0.5 feet, and the horizontal locations are accurate to plus or minus one foot.

Surveyor Heagle verified the accuracy of the Ziobron map and the location of the northern pin. Using the same scale, Heagle interposed the courses and distances of the Ziobron map onto the Dilport map to create a composite map. (Exhibit 104.) (Composite map.) This composite map shows the physical features shown on the aerial photograph, as depicted on the Dilport map, in relation to the boundaries of the defendant's property, as shown on the Ziobron map. This composite map shows that plaintiffs' driveway, in 2001, was located to the west of the timbers placed on top of the erosion wall, and entirely on the plaintiffs' property. The map shows that in the vicinity of Hilltop Road, the driveway entrance is located to the west of the northern pin. Furthermore, the elevations on the composite map

show that there was an approximate two foot drop in elevation from the plaintiffs' eastern boundary down to the defendant's property. This elevation change corresponds to the location of the erosion wall and timbers located on the eastern edge of the plaintiffs' driveway. Because of this historical elevation drop, it would be very difficult, if not impossible, for the plaintiffs and their predecessors, to use their driveway to drive onto the defendant's property. Heagle testified, based upon measurements from the map, that the northern pipe was located 2.5 feet from the northern edge of the timbers shown on the planimetric map. The court is persuaded by the analysis and research performed by Dilport and Heagle, and finds their testimony to be credible; the court accepts their opinions and conclusions as evinced by the maps they prepared.

The court finds by a preponderance of the evidence that the historical location of the subject driveway was entirely on the plaintiffs' property, and no portion was located on the defendant's property. Furthermore, the court finds the entrance of the subject driveway was located west of the northern pin. In addition to the evidence from Dilport and Heagle, this finding is supported by other direct evidence. The Ziobron map shows a stone wall running along the entire length of plaintiffs' eastern boundary. This map depiction substantially corresponds to the location of the timbers and elevations shown on the composite map. The Ziobron map does not show any driveway, or portion of one, that traverses the depicted stone wall to reach the defendant's property.

Several photographs depict the historical driveway viewed from its northern end, looking south. It is apparent from these photographs that the driveway was located to the right, or to the west of, the erosion wall and/or large timbers shown in the photographs. See exhibits 51 and 93.

A large tree was located in the vicinity of the western side of the driveway entrance. This tree was removed by Mr. Davis when he regraded the land during the course of alterations to his property. The tree is shown on the aerial photograph, exhibit 15. On the composite map, exhibit 104, the large tree is located south of the paved line of Hilltop Road and is marked by elevation "81.9." Based upon scaled measurements testified to by Dilbert, the tree is approximately six feet west of the western edge of the historical driveway and approximately seventeen feet west of the iron pin. It is undisputed that historically, this tree had a "one way" sign in front of it. This tree, and the one way sign, are depicted in exhibits 93, 46 and 47, and the uphill or western edge of the driveway is shown near the large tree. Considering the width of the driveway, approximately ten feet, and the driveway's proximity to the large tree, as shown in the photographs, it is reasonable to conclude that the driveway is located to the west of the northern pin, in the space between the northern pin and the large tree.

There are "before" and "after" photographs which support the court's finding as to the location of the driveway. The "before" photograph is exhibit 51, which shows pavement in the foreground, the historical driveway with its timbers, and a green, bushy tree or large shrub on the left side of the photograph. The beach steps shown on the Ziobron map are located to the right of the tree or shrub. The "after" picture is exhibit 68, which also shows pavement in the foreground, and the tree or shrub, which is next to the rebuilt steps. Comparing the photographs and the aforementioned physical features shows that the historical driveway was located in an area shown on the right half of exhibit 68. The northern pin is not shown in exhibit 68, but it is shown in a similarly oriented photograph, exhibit 128.

Two pieces of circumstantial evidence also support the finding that the subject driveway was not located on the defendant's property. First, the deed for the land acquired by the Querions, to be used to access their property, did not contain any grant of easement to use the adjoining land of the Association for purposes of ingress and egress. It is reasonable to infer that such an easement would have been included if it were necessary or desired. Furthermore, there are no later deeds or grants in the chains of title for the plaintiffs' or the defendant's property that establish a right-of-way or easement over the defendant's property in favor of the plaintiffs. Second, if the plaintiffs' predecessors had in fact established a driveway across the common boundary line onto the defendant's property at any time after 1966, it is reasonable to expect that such an encroachment would have been noted on the Ziobron map, which was prepared in 1990. No such driveway is shown on the Ziobron map. The Ziobron map is an "A" class survey, and the standards for such surveys are contained in the "Recommended Standards for Surveys and Maps in the State of Connecticut, Prepared and Adopted by the Connecticut Association of Land Surveyors, Inc., September 13, 1984, Effective January 1, 1987" (exhibit 105). Those standards require that "encroachments apparent from an inspection of the . . . subject premises shall be shown." Exhibit 105, p. 4.

The plaintiffs and their counsel diligently and zealously presented their case; they are commended for their efforts. Although it is not necessary to do so, the court believes it is appropriate to comment on portions of the evidence relied on by the plaintiffs. In light of the evidence pertaining to the physical features of the historical driveway discussed above, the court does not find the affidavit of Surveyor Ziobron (exhibit 10) to be credible. For the same reason, the court does not

accept the opinions and testimony of the plaintiffs' surveyor, Ronald C. Hurlburt. The court finds that the testimony of plaintiffs' photogrammetrist, Terry LeRoux, generally agreed with Dilport's testimony and opinions. LeRoux did not have the benefit of any control point data in forming his opinions. The lack of this data diminished the weight of his testimony. The evidence which supported the defendant's position as to the location of the historical driveway outweighed the claims made by Mr. Davis in his testimony.

The court finds the portions of the LaRose affidavit (exhibit 9) describing the need for the driveway, the date of its construction, and the erosion wall, to be credible. Again, in view of the accepted evidence regarding the driveway, the court does not find the portions of the affidavit related to the location of the driveway to be persuasive.

The plaintiffs called several witnesses, Rochelle Buchanon, Keith Knowles and Ralph Parady, who had entered and driven over the driveway in the years prior to the plaintiffs' purchase of the subject property (driveway witnesses). The testimony of these witnesses was not sufficient to persuade the court that the location of the historical driveway was where the plaintiffs claim. These witnesses testified that it was not possible to make a right turn into the driveway when traveling in an easterly direction down Hilltop Road. This fact is not determinative, since it is undisputed that the driveway could be entered when traveling in a generally southerly direction from Beach Road.

The driveway witnesses also testified that in order to enter the driveway, a driver would have to bear to the right, after traversing down Beach Road. This would be a necessary maneuver when the driveway is located to the west of the northern pin. In general, these witnesses testified that the entrance to the historical driveway was not a good one. The driveway entrance was

tilted, awkward, and had a dip, all due to the grade of Hilltop Road. The driveway was narrow, and had ledge on the right side and a stone wall on the left side. From its entrance, the driveway curved to the right and traveled along the plaintiffs' southern boundary.

The historical entrance to the driveway, at its intersection with Hilltop Road, looking south, is depicted in a photograph, plaintiffs' exhibit 93, page 2. The curve of the driveway, the ledge on the right side, and a portion of the stone wall on the left side, are all clearly shown in the photograph. Because of its narrow width, the driveway witnesses testified, a vehicle entering the driveway front-first would have to exit the driveway by backing out. Although a vehicle could be backed out entirely onto Hilltop Road or Beach Road, the witnesses testified that they would often exit the driveway onto Hilltop Road and then perform a "jackknife" turn into the defendant's parking lot when leaving the area.

To the extent some of the witnesses stated that they crossed over the defendant's property, south of the northern pin, in order to enter or exit the driveway, the court does not find these statements to be determinative. The witnesses testified that they were not aware of the northern pin or its location. The Ziobron map shows that the southern boundary of Hilltop Road is not a straight line, as it passes along the northern boundaries of the plaintiffs' and the defendant's properties, it jogs twenty feet to the north along the defendant's boundary. Similarly, the map shows the southern paved portion of Hilltop Road jogs to the south, from Beach Road, to meet the defendant's paved parking area. For this reason, it is possible the driveway witnesses may have believed they were traveling on the defendant's property, when in fact they were on Hilltop Road. Because of the narrow width of the driveway, its awkward alignment with Hilltop Road, and the drop-off in elevation between the two properties, which came very

close to the northern pin, it is not likely that a vehicle entering or exiting the driveway would ordinarily cross onto the defendant's property before driving onto Hilltop Road. This issue is addressed further below.

The plaintiffs submitted numerous photographs, many of them taken at the time they performed the renovations on their property. A number of the photographs depict the ledge removal operations. The court has spent many hours reviewing all of the photographs submitted, as well as the other exhibits in this case. When it visited the site, the court tried, as best it could, to find the place from where the photographs were taken. Many of the photographs were taken from the interior of the lot, looking out to the perimeter. Because of the curvature of the original driveway, the perspective of the photographs, the presence of ledge and construction equipment, it is difficult to discern the features of the historical driveway at its intersection with Hilltop Road. The plaintiffs have not submitted a preconstruction photograph that adequately shows the historical driveway in the location that they claim. The most discernable preconstruction photographs are exhibits 51 and 52. These exhibits show the erosion wall, the line of timbers and, in exhibit 51, pavement, presumably part of Hilltop Road, in the foreground. The exhibits do not show evidence of a driveway over the defendant's property. The photographs relied on by the plaintiffs are not persuasive.

Finally, the plaintiffs argue that the uphill angle of Hilltop Road dictates that the entrance of the historical driveway must have been to the east of the northern pin, since it is not physically possible to enter their property from a location that is west of the northern pin. This argument does not persuade the court. The testimony from the witnesses who used the historical driveway demonstrates that this was not a typical driveway entrance. Because of the upward angle of Hilltop

Road, and the downward change in grade from Hilltop Road onto the driveway, the entrance was unusual, and less than ideal. Although challenging, the entrance provided adequate access to the plaintiffs' property. The driveway was used in its historical location for over thirty years before the plaintiffs' alterations in 2003.

The plaintiffs have substantially changed the features of their land in the vicinity of Hilltop Road and the defendant's property. Most significantly, they regraded the area to remove the two foot drop in elevation which formerly existed along the common boundary. As noted earlier, the drop in elevation is shown on the composite map, exhibit 104. The change in elevation is also shown in a preconstruction photograph of the driveway, exhibit 52. The same general area shown in exhibit 52 is shown in exhibit 55, after the plaintiffs regraded the driveway area to remove the drop in elevation. Again, the same area is shown in exhibit 64, after the plaintiffs completed the house expansion and renovations. Exhibit 64 also shows the location of the northern pin, stake in foreground, as well as approximate location of the western edge of the historical driveway, distant stake. Kirk Davis admitted that he placed approximately fourteen cubic yards of fill in the area between the two stakes in order to make a garden. Surveyor Heagle probed in the area between the two stakes and did not find any ledge.

Using common knowledge, it is apparent to the court that if the plaintiffs restored the grade of their own property to the original elevations shown on the composite map, and removed the fill they placed in the vicinity of Hilltop Road, they would have a usable driveway entrance. They could enter their property to the west of the northern pin without crossing the defendant's property. Unless the plaintiffs created a turnaround area on their property, the court acknowledges that the plaintiffs will have to back out their vehicles

onto Hilltop Road. The testimony from the driveway witnesses establishes that after driving into the historical driveway front first, it was always necessary to back out; this was the way the historical driveway was utilized. The court will now review the counts of the plaintiffs' complaint in the light of the foregoing factual findings.

DECLARATORY JUDGMENT

In the first count the plaintiffs seek a declaratory judgment establishing a right-of-way and/or easement over the northwesterly portion of the defendant's property. As discussed below, the plaintiffs have not established the existence of an easement or right-of-way over the defendant's property. See Practice Book § 17-54.

QUIET TITLE

In the second count, the plaintiffs claim an interest by way of a right-of-way or easement over the northwesterly portion of the defendant's property. They seek a judgment quieting title to the northwesterly portion of the defendant's property. The parties have stipulated that the defendant Property Owners Association is the owner of the property which abuts the plaintiffs' easterly line. As discussed below, the plaintiffs have not sustained their burden of proof with regard to their claim. Judgment may enter for the defendants on count two.

EASEMENT BY IMPLICATION

"[A]n implied easement is typically found when land in one ownership is divided into separately owned parts by a conveyance, and at the time of the conveyance a permanent servitude exists as to one part of the property in favor of another which servitude is reasonably necessary for the fair enjoyment of the latter property. . . . In the absence of common ownership . . . an easement by implication may arise based on the actions

of adjoining property owners. . . . There are two principal factors to be examined in determining whether an easement by implication has arisen: (1) the intention of the parties; and (2) whether the easement is reasonably necessary for the use and normal enjoyment of the dominant estate." (Internal quotation marks omitted.) *Sanders* v. *Dias*, 108 Conn. App. 283, 288, 947 A.2d 1026 (2008).

In this case there was no servitude in existence when the defendant's predecessor conveyed the subject parcel of land to the Querions, the plaintiffs' predecessor. There was already a house on the adjoining property that the Querions owned, which was accessed, on foot, from Hilltop Road. The parcel conveyed by the defendant's predecessor was to provide vehicle access over a driveway to be constructed on the conveyed parcel. A driveway, the historical driveway, was constructed entirely upon the parcel conveyed. If such a driveway could not have been constructed only upon the Querions' land, it is reasonable to assume a right-of-way over the defendant's adjoining land would have been granted. The plaintiffs have failed to establish an intention to convey an easement over the defendants' property. The historical driveway provided access to the plaintiffs' property from 1966 to 2003. If the plaintiffs reestablish the historical driveway, west of the northern pin, it can once again provide access to the plaintiffs' property. The court cannot find that it is reasonably necessary to provide other access. Judgment may enter for the defendants on count three.

EASEMENT BY PRESCRIPTION

In the fourth count, the plaintiffs allege that they have acquired an easement by prescription over the defendant's land. "[General Statutes §] 47-37 provides for the acquisition of an easement by adverse use, or prescription. That section provides: No person may

acquire a right-of-way or any other easement from, in, upon or over the land of another, by the adverse use or enjoyment thereof, unless the use has been continued uninterrupted for fifteen years. In applying that section, this court repeatedly has explained that [a] party claiming to have acquired an easement by prescription must demonstrate that the use [of the property] has been open, visible, continuous and uninterrupted for fifteen years and made under a claim of right. . . . The purpose of the open and visible requirement is to give the owner of the servient land knowledge and full opportunity to assert his own rights. . . . To satisfy this requirement, the adverse use must be made in such a way that a reasonably diligent owner would learn of its existence, nature, and extent." (Internal quotation marks omitted.) *Slack* v. *Greene*, 294 Conn. 418, 427, 984 A.2d 734 (2009).

As mentioned at the beginning of this decision, location of the historical driveway on April 29, 2001, was a pivotal element of the plaintiffs' case. If the historical driveway was in fact located upon the defendant's land on that date, the plaintiff would satisfy the fifteen year use requirement for a prescriptive easement. Since the court has found that on April 29, 2001, the historical driveway was located entirely on the plaintiffs' land, the plaintiffs cannot meet this requirement.

There is an issue pertaining to the use of the historical driveway that should be addressed. The northern pin was located approximately two and one-half feet from the end of the erosion wall and timbers. The area to the north and east of the northern pin was, and is, in the vicinity of the paved portion of Hilltop Road. There was insufficient evidence to establish how much of the pin, if any, protruded above the level of the ground. The pin is not visible in exhibit 51, which depicts the area at the end of the erosion wall. In light of these facts, although it is not likely, the court acknowledges

that it is possible that a vehicle entering and exiting the historical driveway may have crossed over a portion of the defendant's property, in the area that is adjacent to the two and one-half foot portion of the plaintiffs' property that lay between the end of the timbers and the northern pin. However, the court expressly finds that it was not necessary to travel over the defendant's property to enter the historical driveway from Hilltop Road. Both the Ziobron map, exhibit 14, and the composite map, exhibit 104, show sufficient area on Hilltop Road to allow alignment of a vehicle to enter the historical driveway west of the northern pin. Mr. Knowles, who owned the plaintiffs' property from 1993 to 1998, credibly testified that he never crossed over the defendant's property when using the driveway.

Although the court acknowledges the possibility of occasional travel over a portion of the defendant's property, there was not sufficient evidence presented for the court to find continuous use. Furthermore, there was insufficient evidence for the court to determine the boundaries of the use with reasonable certainty. "A prescriptive right cannot be acquired unless the use defines its bounds with reasonable certainty." *Kaiko* v. *Dolinger*, 184 Conn. 509, 511, 440 A.2d 198 (1981). Judgment may enter for the defendants on count four.

MALICIOUS ERECTION OF FENCE

On November 20, 2011, members of the defendant association attempted to install a fence along the common boundary between the plaintiffs' and the defendant's land. The state police intervened, and the fence was not installed. Thereafter, on November 27, 2011, a low, barricade style, fence was installed along the entire length of the common boundary. This fence was removed by the plaintiffs shortly after its installation; it has not been reinstalled.

"[T]he ingredients necessary to state a cause of action under [General Statutes § 52-570 and § 52-480 are] as follows: (1) A structure erected on the owner's (defendant's) land; (2) a malicious erection of the structure; (3) the intention to injure the enjoyment of the adjacent landowner's land by the erection of the structure; (4) an impairment of the value of adjacent land because of the structure; (5) the structure useless to the defendant; (6) the enjoyment of the adjacent landowner's land in fact impaired." *Rapuano* v. *Ames*, 21 Conn. Supp. 110, 111, 145 A.2d 384 (1958).

The following facts are relevant to the determination of this count. As stated previously, the plaintiffs made substantial alterations to their driveway in 2003 by removing an erosion wall and lowering the elevation of their property to meet the elevation of the defendant's property. This change in grade allowed vehicles to travel over the common boundary and permitted vehicles to travel in the vicinity of stairs on the defendant's property, which provided access to the beach. Between 2006 and 2011 the parties discussed the issue of the plaintiffs' new driveway and the stairs. Several arrangements for protecting the safety of people using the stairs were tried, including a curb stop, a large planter, and a short barricade style fence. None of these arrangements produced long-lasting results that were acceptable to both parties. In September, 2011, Collette, president of the defendant Association, consulted an attorney about the rights and obligations of the Association regarding the safety of members using the beach area, and the Davis driveway. In a letter to Collette dated September 20, 2011, the attorney stated: "[T]he Association is within its legal rights and authority to act in connection with the use of its property by any party. . . . [T]he Association is required to act in connection with the safety and protection of its members. . . . [F]ailure is (sic) act may result in a liability claim against the

Association. . . . Further, failure of the Association to assert its rights may result in a future claim of easement by extended use." Exhibit 38. After receipt of this letter the Association took the steps, described above, to install a fence along the common boundary.

The court finds that the plaintiffs have failed to prove the elements of malicious erection of a fence by a preponderance of the evidence. It is apparent that at the time the fence was installed the relationship between the parties was strained, if not adversarial. However, considering all the circumstances, the court cannot find that the actions of the defendant Association were malicious. The Association had been advised by counsel that failure to take action regarding the issues related to the plaintiffs' driveway could have negative consequences to the Association. The fence fulfilled a useful purpose to the defendant, protecting people using its stairs from being struck by vehicles entering or exiting the plaintiffs' property. Although a fence would impair the plaintiffs' use of their property at the time, the plaintiffs presented insufficient evidence to establish that the fence was installed by the Association with the intention to injure the plaintiffs' enjoyment of their land. In view of the very short time that a fence was in place, the court cannot find that the value of the plaintiffs' property was impaired. Judgment may enter for the defendants on count five.

In their brief, the plaintiffs requested an order prohibiting any vertical obstruction above the northern pin which would obstruct the opening to both the beach parking lot and the plaintiffs' driveway. The court has found that the plaintiffs have not established legal rights over the defendant's property which would allow the court to enter such an order. However, the court does find that prior to the driveway alterations, the area between the northern end of the timbers/erosion wall and the northern pin, a distance of two and one-half

feet, was unobstructed. See exhibit 51. This unobstructed area was in the vicinity of the intersection of the paved portion of Hilltop Road, the defendant's paved parking lot, and the entrance of the historical driveway. The court observes that the lack of an obstruction in this area during the thirty plus years the historical driveway existed probably benefitted everyone operating a motor vehicle in the vicinity of this area.

CONCLUSION

The court declines to enter the declaratory judgment requested by the plaintiffs in count one. As to count two, there is no need to enter a judgment quieting title, the plaintiffs have failed to establish an interest in the defendant's property. Judgment may enter for the defendants in counts three, four and five.