CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

NICHOLAS CRISMALE *v.* CHRISTOPHER ANDREW WALSTON ET AL.
(AC 40026)

Lavine, Elgo and Bright, Js.

Syllabus

The plaintiff, a commercial fisherman, sought to recover damages from the named defendant, W, a seasonal fisherman, for defamation and malicious prosecution, alleging that W falsely and maliciously stated to enforcement officers of the Department of Energy and Environmental Protection that the plaintiff was trespassing on W's clam beds and stealing his clams. The plaintiff further alleged that, as a result of those statements, the plaintiff was arrested on charges for which he later was found not guilty. Following the plaintiff's arrest, W also told a newspaper reporter: "I nailed him, and I nailed him good." The plaintiff alleged that W was liable for slander for his statements to the enforcement officers and for his statement to the reporter, and that he was liable for malicious prosecution for reporting the plaintiff's alleged conduct to the enforcement officers. The trial court granted W's motion for summary judgment, concluding, as to the plaintiff's claim for malicious prosecution, that W did not initiate or procure the criminal proceedings against the plaintiff, and that the arrest and prosecution were based on independent findings of probable cause by the enforcement officers. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on his claim that there were genuine issues of material fact as to whether W acted with malice when he reported to the enforcement officers that the plaintiff was trespassing on his clam beds and stealing his claims, which was based on his claim that issues of material fact existed as to whether the qualified privilege, which protected W's statements to the enforcement officers, could be

defeated because the statements were made with malice: W produced evidence that demonstrated that he had a reasonable and good faith belief that the plaintiff was trespassing and stealing when he spoke with the enforcement officers, including an affidavit in which W attested that he saw the plaintiff, through binoculars, operating his boat on W's shellfishing lot and that he saw that clams were being harvested on the boat, affidavits in which enforcement officers, who determined that there was probable cause to arrest the plaintiff, attested that the plaintiff was on W's lot and that he was shellfishing on that lot, and deposition testimony from the plaintiff's workers that they had been harvesting clams until the enforcement officers approached the boat, and although the plaintiff submitted evidence that could demonstrate that he was not actively shellfishing on W's lot at the time of W's complaint to the department, that evidence did nothing to demonstrate that W did not have a reasonable and good faith belief that the plaintiff was shellfishing on W's lot; accordingly, the trial court properly determined that there was no evidence that W abused his privilege by acting with malice when he reported to the enforcement officers that the plaintiff was trespassing, shellfishing on his lot and stealing clams.

2. The plaintiff could not prevail on his claim that the trial court improperly rendered summary judgment on his slander claim, on the basis of W's statement to the newspaper reporter, after concluding that the statement was an opinion on a matter of public concern, namely, the plaintiff's arrest, that was protected by the fair comment privilege; although W's statement to the newspaper reporter was a statement of fact rather than an opinion of what might happen at the plaintiff's criminal trial, as W, in making his statement, was telling the reporter that he was the person responsible for alerting the authorities to the plaintiff's activities and that he detected those activities and exposed them to the enforcement officers, the uncontested facts established the truth of W's statement of fact, which created an absolute bar to the plaintiff's claim of slander, and, thus, summary judgment was appropriate as to that count.

3. The plaintiff's claim that there was a genuine issue of material fact as to whether W provided misleading information to the department, which induced the enforcement officers to arrest the plaintiff, was unavailing; W did not initiate the plaintiff's arrest but, rather, merely reported what he had seen to the department and its enforcement officers, who then arrested the plaintiff after having conducted their own investigation, which resulted in a finding of probable cause that one or more crimes had been committed, and the plaintiff did not produce any evidence to challenge the evidence produced by W that he had acted with probable cause and without malice in reporting the plaintiff's activities to the enforcement officers.

(*One judge concurring separately*)

Argued April 10—officially released August 7, 2018

Procedural History

Action to recover damages for, inter alia, defamation, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Wilson*, *J.*, granted the motion for summary judgment filed by the defendant Jeffrey Samorajczyk et al. and rendered judgment thereon; thereafter, the court granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Jennifer Antognini-O'Neill, for the appellant (plaintiff).

Christian A. Sterling, for the appellee (named defendant).

Opinion

BRIGHT, J. In this action alleging slander and malicious prosecution, the plaintiff, Nicholas Crismale, appeals from the summary judgment rendered by the trial court in favor of the defendant Christopher Andrew Walston.[1] The plaintiff claims that the trial court erroneously concluded that the defendant's statements were privileged and that there was no evidence that the defendant acted with malice. We affirm the judgment of the trial court.

In his complaint, the plaintiff alleges the following: He is a commercial fisherman, and the defendant is a

[1] The plaintiff also brought claims against two enforcement officers, Jeffrey Samorajczyk and Todd Aaron Chemacki, from the Department of Energy and Environmental Protection, in their individual capacities only. We note that Chemacki is referred to as Chenacki in the plaintiff's complaint and in the summons. Various pleadings, however, set forth his surname as Chemacki, and his own affidavit also provides that his surname is Chemacki. We, therefore, refer to him in this opinion as Chemacki. On April 21, 2016, the trial court rendered summary judgment in favor of Samorajczyk and Chemacki. The merits of that judgment are not before us. Throughout this opinion, we, therefore, refer to Walston as the defendant.

seasonal shell fisherman. On December 14, 2011, the defendant stated to Jeffrey Samorajczyk and Todd Aaron Chemacki, enforcement officers with the Department of Energy and Environmental Protection (department), whom the plaintiff also brought an action against in their individual capacities; see footnote 1 of this opinion; that the plaintiff was trespassing on the defendant's clam beds and stealing his clams. The defendant knew that the plaintiff "was innocent," however. As a result of the defendant's statements to the enforcement officers, the plaintiff was arrested on charges for which he later was found not guilty. The plaintiff suffered economic losses by having to defend himself, and he suffered anxiety and humiliation. The defendant also told a reporter for the Hartford Courant (reporter), following the plaintiff's arrest: "I nailed him, and I nailed him good." On the basis of these facts, the plaintiff alleged that the defendant was liable for slander for his statements to the enforcement officers and for his statement to the reporter, and he was liable for malicious prosecution for reporting the plaintiff's alleged conduct to the enforcement officers.

In response to the plaintiff's complaint, the defendant filed an answer and two special defenses. In his first special defense, which addressed both the slander count and the malicious prosecution count, the defendant claimed that his statements to the enforcement officers and the reporter were privileged because they "were made in good faith, without malice, in an honest belief in the truth of the statement, and in discharge of a public or private duty." Specifically, as to the allegation that he had slandered the plaintiff by his comment to the reporter, the defendant claimed that this statement also was privileged because it was his opinion, which was based on a true fact. In his second special defense, which specifically addressed the malicious prosecution count, the defendant claimed that he had

acted lawfully and with probable cause under the circumstances, and that he acted without malice, merely intending to bring the plaintiff to justice using the proper legal channels to report his information. The plaintiff pleaded a general denial in response to these defenses.[2]

On March 7, 2016, the defendant filed a motion for summary judgment on the ground that there were no genuine issues of material fact and that he was entitled to judgment as a matter of law. Specifically, as to count one, slander, the defendant argued that his statements to the enforcement officers were "subject to qualified immunity and [were] not made with malice . . . ." As to his statement to the reporter, he argued that this statement was "privileged and does not qualify as defamation since . . . [it] was an opinion and statements

[2] Practice Book § 10-57 requires: "Matter in avoidance of affirmative allegations in an answer or counterclaim shall be specially pleaded in the reply. Such a reply may contain two or more distinct avoidances of the same defense or counterclaim, but they must be separately stated."

The plaintiff in this case failed to specially plead malice as an exception to the defendant's special defense of qualified privilege and, instead, pleaded a general denial. He did, however, allege in his complaint that the defendant knew that the plaintiff was innocent when the defendant reported to the department that the plaintiff was stealing his clams. The defendant did not object when the plaintiff raised malice as a matter in avoidance in his opposition to the defendant's motion for summary judgment, and the trial court considered the malice allegation as though it had been specially pleaded in avoidance. We note that our Supreme Court previously has afforded the trial court "discretion to overlook violations of the rules of practice and to review claims brought in violation of those rules as long as the opposing party has not raised a timely objection to the procedural deficiency." *Schilberg Integrated Metals Corp.* v. *Continental Casualty Co.*, 263 Conn. 245, 273, 819 A.2d 773 (2003); see also *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 303, 94 A.3d 553 (2014) ("[t]hus, we conclude that the plaintiff's failure to plead specifically his entitlement to a particular . . . doctrine pursuant to Practice Book § 10-57, while not a good practice, does not operate as a bar or waiver of that doctrine if the record demonstrates that the defendant, nevertheless, was sufficiently apprised of the plaintiff's intention to rely on that doctrine and that the defendant has not been prejudiced by the plaintiff's lapse in pleading").

of opinion are *not* considered slanderous." (Emphasis in original.) As to count two, malicious prosecution, the defendant argued that "he did not initiate or procure the institution of criminal proceedings against the plaintiff, he acted with probable cause, and there was no malice." In support of his motion for summary judgment, the defendant submitted: his own affidavit; the plaintiff's December 24, 2014 responses to interrogatories and requests for production; affidavits of Samorajczyk and Chemacki; deposition excerpts of the plaintiff's workers, Hector Avila, Santos Bertrand, and Sandoval Maynor; and an excerpt from the plaintiff's deposition.

The plaintiff filed an opposition to the defendant's motion for summary judgment, arguing that there were issues of material fact as to both remaining counts of his complaint. He attached, in support of his opposition: excerpts of testimony from his criminal trial; the affidavits of Samorajczyk and Chemacki; portions of the plaintiff's deposition; the misdemeanor summons issued to him; the transcript of the department's emergency dispatch call from the defendant and its dispatch call to enforcement officers;[3] and the reporter's article, which had been published in the Hartford Courant. Oral argument on the motion and the objection thereto was heard on September 12, 2016.

On December 27, 2016, the trial court granted the defendant's motion for summary judgment. As to the cause of action sounding in slander for the defendant's statements to the enforcement officers, the court concluded that the statements were entitled to a qualified privilege because they were made to law enforcement, in good faith and without malice, after the defendant saw the plaintiff, through binoculars, on his shellfishing

[3] The defendant objected to the plaintiff's reliance on the transcript of the calls because it was not properly authenticated. The trial court agreed and held that the transcript was "not admissible for the purposes of this motion." The plaintiff does not challenge this ruling on appeal.

lot. As to the defendant's statement to the reporter, which was made after the plaintiff had been arrested, the court concluded, in relevant part, that this statement was entitled to the "fair comment" privilege as a statement of opinion on a matter of public concern namely, the plaintiff's arrest, and that the statement amounted to the defendant's opinion of what had occurred.[4] Finally, as to the plaintiff's count for malicious prosecution, the court concluded that, on the basis of the sworn affidavits of the arresting enforcement officers, attesting that there was probable cause to support the arrest of the plaintiff, and the absence of any evidence from the plaintiff that was contrary to those attestations, the defendant did not initiate or procure the criminal proceedings against the plaintiff, and that the arrest and prosecution were based on independent findings of probable cause by the enforcement officers. This appeal followed.

"The standard of review of a trial court's decision granting summary judgment is well established. 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 moving for summary judgment has the burden of showing the absence of

[4] "The privilege of 'fair comment' . . . was one of the most important privileges realized at common law, [and it] was a *qualified privilege* to express an opinion or otherwise comment on matters of public interest. . . . The privilege [however] was elevated to constitutional status . . . by . . . [the] United States Supreme Court . . . ." (Citations omitted; emphasis added.) *Goodrich* v. *Waterbury Republican-American, Inc.*, 188 Conn. 107, 114–15, 448 A.2d 1317 (1982). "[E]xpressions of pure opinion (those based upon known or disclosed facts) [now] are guaranteed virtually complete constitutional protection." (Internal quotation marks omitted.) Id., 118.

any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *St. Pierre* v. *Plainfield*, 326 Conn. 420, 426, 165 A.3d 148 (2017).

The plaintiff claims that the court erred in the following ways when rendering summary judgment: (1) as to his allegation of slander based on the defendant's report to enforcement officers, the plaintiff claims that there were genuine issues of material fact as to whether the defendant acted with malice in reporting that the plaintiff was trespassing on his clam beds and stealing his clams; (2) as to the allegations of slander based on the defendant's statement to the reporter, the plaintiff claims that the court erred as a matter of law in concluding that the comments were entitled to the fair comment privilege because they were opinion on a matter of public interest, rather than factual assertions; and (3) as to the count for malicious prosecution, the plaintiff claims that there were genuine issues of material fact as to whether the defendant acted with malice when he provided misleading information to the department, which resulted in the plaintiff's arrest. We consider each claim in turn.

I

DEFAMATION BY SLANDER

The plaintiff claims that the court improperly rendered summary judgment on the first count of his complaint, which sounds in slander. He argues that there were genuine issues of material fact as to whether the

defendant had acted with malice when he (1) reported to the enforcement officers that the plaintiff was trespassing on his clam beds and stealing his clams, and (2) when he provided a statement to the reporter. We are not persuaded.

"Although defamation[5] claims are rooted in the state common law, their elements are heavily influenced by the minimum standards required by the [f]irst [a]mendment. . . . At common law, [t]o establish a prima facie case of defamation, the plaintiff must demonstrate that: (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement. . . .

"A defamatory statement is defined as a communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him . . . . It is well settled that for a claim of defamation to be actionable, the statement must be false . . . and under the common law, truth is an affirmative defense to defamation . . . [and] the determination of the truthfulness of a statement is a question of fact for the jury. . . . Each statement furnishes a separate cause of action and requires proof of each of the elements for defamation. . . .

"Beyond these common-law principles, there are numerous federal constitutional restrictions that govern the proof of the tort of defamation, the applicability of which varies with (a) the status of the plaintiff as a public or private figure, and (b) whether the subject of

[5] " 'Defamation is comprised of the torts of libel and slander: slander is oral defamation and libel is written defamation.' *Skakel* v. *Grace*, 5 F. Supp. 3d 199, 206 (D. Conn. 2014)." *Gleason* v. *Smolinski*, 319 Conn. 394, 430 n.30, 125 A.3d 920 (2015).

the speech is a matter of public or private concern. Thus, there are four possibilities: (1) public person/public matter, (2) private person/public matter, (3) public person/private matter, and (4) private person/private matter. . . . The . . . elements of defamation, including the subsidiary historical facts, are . . . subject to proof under the preponderance of the evidence standard." (Citations omitted; footnote in original; footnote omitted; internal quotation marks omitted.) *Gleason* v. *Smolinski*, 319 Conn. 394, 430–32, 125 A.3d 920 (2015).

"With respect to common-law privilege defenses, we note by way of background, that [a] defendant may shield himself from liability for defamation by asserting the defense that the communication is protected by a qualified privilege. . . . When considering whether a qualified privilege protects a defendant in a defamation case, the court must resolve two inquiries. . . . The first is whether the privilege applies, which is a question of law over which our review is plenary. . . . The second is whether the applicable privilege nevertheless has been defeated through its abuse, which is a question of fact." (Internal quotation marks omitted.) Id., 432 n.32.

"Qualified privileges may be defeated by a showing, by a preponderance of the evidence; see *Miles* v. *Perry*, [11 Conn. App. 584, 590, 529 A.2d 199 (1987)]; of actual malice, also known as constitutional malice, or malice in fact. See, e.g., *Gambardella* v. *Apple Health Care, Inc.*, [291 Conn. 620, 634, 969 A.2d 736 (2009)] (common-law intracorporate communications privilege); *Goodrich* v. *Waterbury Republican-American, Inc.*, [188 Conn. 107, 114–15, 119–20, 448 A.2d 1317 (1982)] (fair comment privilege); see also *Konikoff* v. *Prudential Ins. Co. of America*, 234 F.3d 92, 99 (2d Cir. 2000) ('[t]he critical difference between common-law malice and constitutional malice, then, is that the former focuses on the defendant's attitude toward the plaintiff,

the latter on the defendant's attitude toward the truth')." *Gleason* v. *Smolinski*, supra, 319 Conn. 433 n.32.

"[M]alice is not restricted to hatred, spite or ill will against a plaintiff, but includes any improper or unjustifiable motive. . . . [A] qualified privilege is lost upon a showing of either actual malice, i.e., publication of a false statement with actual knowledge of its falsity or reckless disregard for its truth, or malice in fact, i.e., publication of a false statement with bad faith or improper motive. . . . Indeed . . . a showing of either actual malice or malice in fact suffices to defeat a qualified privilege in defamation cases . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Gambardella* v. *Apple Health Care, Inc.*, supra, 291 Conn. 630–31. "[A]ctual malice requires a showing that a statement was made with knowledge that it was false or with reckless disregard for its truth. . . . A negligent misstatement of fact will not suffice; the evidence must demonstrate a purposeful avoidance of the truth. . . . Further, proof that a defamatory falsehood has been uttered with bad or corrupt motive or with an intent to inflict harm will not be sufficient to support a finding of actual malice . . . although such evidence may assist in drawing an inference of knowledge or reckless disregard of falsity." (Citations omitted; internal quotation marks omitted.) Id., 637–38.

A

The Defendant's Report to the Enforcement Officers

The plaintiff claims that the court improperly rendered summary judgment on his claim for slander on the ground that there were genuine issues of material fact regarding whether the defendant had acted with malice when he reported to the enforcement officers that the plaintiff was trespassing on his clam beds and

stealing his clams. The plaintiff concedes that the statements to the enforcement officers were entitled to protection by a qualified privilege. He contends, however, that there are genuine issues of material fact as to whether the privilege could be defeated because the defendant's statements were made with malice. The defendant argues that the plaintiff failed to produce any evidence to substantiate his malice assertion while, in contrast, the defendant produced various affidavits and other evidence that demonstrate that he had a reasonable and good faith belief that the plaintiff was trespassing and stealing when he spoke with the enforcement officers. We agree with the defendant.

Among the evidence submitted by the defendant in support of his motion for summary judgment was his own affidavit in which he averred, in relevant part, that: he leased shellfishing lot 562 in the Long Island Sound, he has used that lot for several years, and he is very familiar with its location from the coast; he watches boats from the shoreline, through his binoculars, and he has viewed boat activity crossing his leased lot; on December 14, 2011, he was looking at Long Island Sound through his binoculars when he saw the plaintiff's boat, operated by the plaintiff, harvesting clams on lot 562, and he observed this activity for more than thirty minutes; on the basis of these observations, he called the department and reported what he had witnessed; and enforcement officers later arrived at the boat.

The defendant also submitted the affidavit of Chemacki, which provided in relevant part: he has been an enforcement officer with the department since 1999; he enforces shellfishing laws on Long Island Sound; on December 14, 2011, he and Samorajczyk responded, in uniform and by police boat, to a complaint that had been made to the department dispatch regarding commercial shellfishing activity; he saw a boat, actively harvesting shellfish with its dredge in water, pulling up clams on

a conveyer belt, with workers engaged in activity in the sorting area; the boat was being operated by the plaintiff; he recorded GPS navigation coordinates, which showed the boat to be on lot 562, which was leased by the defendant; the plaintiff could not produce his shellfishing license, which he was required to keep on board the boat while engaged in harvesting shellfish; and he concluded that there was probable cause that the plaintiff had engaged in activity that violated the law, including harvesting shellfish while on lot 562.

The defendant also submitted the affidavit of Samorajczyk, which provided in relevant part: he has been employed as an enforcement officer for the department since 1999 and he enforces the shellfishing laws along Long Island Sound; on December 14, 2011, he responded to a complaint that had been received by dispatch regarding commercial shellfishing; he contacted the defendant by telephone; the defendant told him that the plaintiff was actively harvesting clams on the defendant's lot; he saw the plaintiff's boat actively harvesting shellfish with its dredge in water, pulling up clams on a conveyer belt, with workers sorting the clams; the plaintiff was operating the boat; he asked the plaintiff where he was harvesting, and the plaintiff responded that he was harvesting on lot 44 but that he was off lot by a couple hundred feet; the plaintiff did not have a shellfishing license onboard; and he concluded that there was probable cause to arrest the plaintiff for, among other things, illegally harvesting clams on lot 562.

The defendant also attached the deposition testimony of some of the plaintiff's workers, including Avila. In his deposition, Avila stated in relevant part that they had been actively harvesting clams up until when the enforcement officers approached the boat. He further testified that the conveyor belt that brought the clams from the ocean floor onto the deck of the boat was

running until the enforcement officers boarded the boat, known as the Mighty Maxx. Bertrand and Maynor testified similarly in their respective depositions.

In opposition to the defendant's motion for summary judgment, the plaintiff submitted, among other things, a portion of the defendant's testimony from the plaintiff's criminal trial, which provided in relevant part: the defendant, while standing on the shoreline with binoculars, saw the plaintiff's boat from approximately 500 yards away; he could see the plaintiff operating the boat; he saw that both dredges were on the bottom and that the workers were culling clams; the boat was moving; the size of the defendant's lot is twenty acres; the boat was moving in and out of the entire twenty acres; he watched the boat for approximately one hour; and he called the department and reported what he saw.

The plaintiff also submitted a portion of his own testimony from his criminal trial, which provided in relevant part: he was off his lot on the day in question because he was turning around his boat; while he was turning around his boat, the dredge was up, off the bottom; there is a lot of speculation about the operation of his boat because it has new technology that is unfamiliar to most fishermen; and he was not clamming off his lot.

The plaintiff also submitted a portion of his own deposition testimony, which provided in relevant part: he was not harvesting clams or using the dredge when the enforcement officers approached the boat, but there were residual clams still making their way to the belt, which is twenty-seven feet long; he was not on the defendant's lot; and the defendant falsely and maliciously told enforcement officers that the plaintiff was trespassing on his clam beds and stealing his clams.

The plaintiff also submitted the Hartford Courant article on his arrest and prosecution, and he submitted

an unauthenticated transcript of the dispatch report from the department, which the court declined to consider. See footnote 3 of this opinion.

Viewing this evidence in the light most favorable to the plaintiff, we conclude that the plaintiff submitted no evidence in response to that submitted by the defendant to establish a genuine issue of material fact as to whether the defendant abused his privilege by acting with malice when he reported to the enforcement officers that the plaintiff was trespassing on his shellfishing lot and stealing his clams. The defendant submitted an affidavit in which he attested that he saw the plaintiff, through binoculars, operating his boat on the defendant's shellfishing lot and that he saw that clams were being harvested on the boat. The defendant then reported what he saw to the department and to enforcement officers, who responded by going to the plaintiff's boat. The officers attested that the plaintiff, in fact, was on the defendant's lot and that he was shellfishing on that lot. The enforcement officers also determined that there was probable cause to support an arrest of the plaintiff for, among other things, shellfishing on the defendant's lot. The plaintiff's workers also testified at their depositions that they had been harvesting clams right up until when the enforcement officers approached the boat.

Although the plaintiff submitted evidence that could demonstrate that he was not actively shellfishing on the defendant's lot at the time of the defendant's complaint to the department, that evidence did nothing to demonstrate that the defendant did not have a reasonable and good faith belief that the plaintiff, in fact, was shellfishing on lot 562. The plaintiff principally relies on three pieces of evidence from which he claims a reasonable jury could draw an inference of malice. First, he argues that the defendant had no basis for his statement that the Mighty Maxx' dredges were on the ocean

floor because it was impossible for the defendant to see the ocean floor from where he was standing on the shore. Although this is true, the plaintiff ignores his own testimony that his boat had such advanced technology that other fishermen did not understand it. In fact, in his appellate brief, the plaintiff explains that "the Mighty Maxx was unlike any conventional clamming boat. It looked like something out of another universe. Most fishermen were not familiar with how it operated." Without some evidence that the defendant knew of the Mighty Maxx' advanced technology, there would be no basis for a jury to conclude that the defendant acted with reckless disregard of the truth when he opined, on the basis of his observations, through binoculars, that the dredges of the plaintiff's boat were on the ocean floor.

Second, the plaintiff argues that a reasonable jury could conclude that the defendant's statement that he saw the conveyor belt moving demonstrates malice because it was impossible for the defendant to see the conveyor belt from the shore due to the physical characteristics of the Mighty Maxx. The plaintiff's contention is without merit because the defendant never made such a statement. At the plaintiff's criminal trial, the defendant testified to seeing the plaintiff's workers "culling clams on the table." When asked what that meant, the defendant testified that it meant "sorting them out on a table as they came up . . . in the dredge or in the suction dredge on the conveyor." Consequently, the defendant's statement was based on his observations of the workers, not on any observation of the workings of the boat.[6]

[6] We also question the plaintiff's reliance on the defendant's testimony during the plaintiff's criminal trial. Such testimony is absolutely privileged and cannot form the basis of a slander claim. See *Petyan* v. *Ellis*, 200 Conn. 243, 245–46, 510 A.2d 1337 (1986) ("There is a long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy. . . . The effect of an absolute

Third, the plaintiff relies on the defendant's statement to the reporter that he "nailed [the plaintiff and] nailed him good" as evidence of the defendant's malice. We are not persuaded. To the extent that statement was based on the plaintiff's reasonable conclusion from his observations as discussed previously, the statement is not evidence of actual malice.

Finally, the reasonableness of the defendant's conclusion from his observations was confirmed by the enforcement officers, who, after going onto the boat, observing harvesting taking place, confirming the position of the plaintiff's boat on the defendant's lot, and interviewing the plaintiff's workers, who said they were actively harvesting until the officers arrived, found probable cause to arrest the plaintiff for shellfishing on lot 562. Accordingly, we agree with the trial court that there was no evidence that the defendant abused his privilege by acting with malice when he reported to the enforcement officers that the plaintiff was trespassing on his shellfishing lot and stealing his clams. Summary judgment on this claim was appropriate.

B

The Defendant's Statement to the Reporter

The plaintiff also claims that the court improperly rendered summary judgment on his slander claim based on the defendant's statement to the reporter, after concluding that the statement was an opinion on a matter of public concern, protected by the fair comment privilege. The plaintiff asserts that this was an error in law because the statement was one of fact, rather than opinion. He contends that, when making this statement, the defendant was stating, as a matter of fact, that the plaintiff was a poacher. The defendant argues that his

privilege is that damages cannot be recovered for a defamatory statement even if it is published falsely and maliciously." [Citation omitted; internal quotation marks omitted.]).

statement to the reporter is privileged and that it does not qualify as defamation because it expresses his opinion on a matter of public importance, namely, the plaintiff's arrest and criminal trial, and, therefore, that the court properly determined that it was protected as fair comment. We agree with the plaintiff that the defendant's statement was a statement of fact; we disagree, however, that the statement could be considered defamatory.

"To prevail on a common-law defamation claim, a plaintiff must prove that the defendant published false statements about [him] that caused pecuniary harm. *Torosyan* v. *Boehringer Ingelheim Pharmaceuticals, Inc.*, 234 Conn. 1, 27, 662 A.2d 89 (1995). To be actionable, the statement in question must convey an objective fact, as generally, a defendant cannot be held liable for expressing a mere opinion. See *Mr. Chow of New York* v. *Ste. Jour Azur S.A.*, 759 F.2d 219, 230 (2d Cir. 1985) (no liability where restaurant review conveyed author's opinion rather than literal fact); *Hotchner* v. *Castillo-Puche*, 551 F.2d 910, 913 [2d Cir.] ('[a] writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be') [cert. denied sub nom. *Hotchner* v. *Doubleday & Co.*, 434 U.S. 834, 98 S. Ct. 120, 54 L. Ed. 2d 95 (1977)]." *Daley* v. *Aetna Life & Casualty Co.*, 249 Conn. 766, 795–96, 734 A.2d 112 (1999). In a civil action for defamation, where the protected interest is the plaintiff's personal reputation, the rule in Connecticut is that the truth of the allegedly defamatory statement of fact provides an absolute defense. See *Goodrich* v. *Waterbury Republican-American, Inc.*, supra, 188 Conn. 112.

Whether a statement is an assertion of a fact or an assertion of an opinion is a question of law. Id., 110–11. "A statement can be defined as factual if it relates to an event or state of affairs that existed in the past or

present and is capable of being known. . . . In a libel action, such statements of fact usually concern a person's conduct or character. . . . An opinion, on the other hand, is a personal comment about another's conduct, qualifications or character that has some basis in fact. . . .

"This distinction between fact and opinion cannot be made in a vacuum, however, for although an opinion may appear to be in the form of a factual statement, it remains an opinion if it is clear from the context that the maker is not intending to assert another objective fact but only his personal comment on the facts which he has stated. . . . Thus, while this distinction may be somewhat nebulous . . . [t]he important point is whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 111–12.

Here, the defendant, when interviewed by a reporter writing a newspaper article on the plaintiff's arrest, stated: "I nailed him, and I nailed him good." In his appellate brief, the plaintiff cites the definition of "nail" from Webster's Third New International Dictionary (1993). He states: "In this context, to 'nail' means 'to catch, trap . . . to detect and expose.' " Accepting the definition provided by the plaintiff, it appears clear to us that the defendant was telling the reporter that he was the person responsible for alerting the authorities to the plaintiff's activities; he detected those activities and exposed them to the enforcement officers, which is exactly what the parties agree happened in this case. Consequently, the defendant was stating a fact of what had happened, as opposed to an opinion of what might happen at the plaintiff's criminal trial.

We already have concluded that the plaintiff provided no evidence of malice in the defendant's report to the enforcement officers, and that the facts demonstrate that, after the enforcement officers conducted their own investigation, those officers found probable cause to arrest the plaintiff. See part I A of this opinion. Although the plaintiff after a criminal trial was found not guilty by a jury, that finding does not have any effect on the fact that the defendant, in good faith, reported the plaintiff's actions to the enforcement officers, even if it ultimately turned out that the state could not prove the resultant criminal charges against the plaintiff, and, further, even if the defendant had misconstrued the situation he reported, perhaps because of the advanced technology in the plaintiff's boat. By virtue of the uncontested facts of this case, as well as our analysis in part I A of this opinion, there is nothing false in the defendant's statement to the reporter; the defendant did alert the authorities to what he had seen, which, then, after investigation, prompted the plaintiff's arrest, which was based on probable cause. Accordingly, because the uncontested facts establish the truth of the defendant's statement of fact, the plaintiff's slander claim is barred. See *Goodrich* v. *Waterbury Republican-American, Inc.*, supra, 188 Conn. 114 ("[w]e need not inquire further, however, since the plaintiff conceded . . . that these statements were true, and this concession creates an absolute bar to his claim of libel as to these statements"). Accordingly, summary judgment was appropriate on this claim.

II

MALICIOUS PROSECUTION

Finally, the plaintiff claims that "there is a genuine issue of material fact as to whether the defendant provided misleading information to the [department, which] . . . induced the [enforcement] officers to

arrest the plaintiff." The defendant argues that he did not initiate the plaintiff's arrest, but, rather, he merely reported what he had seen to the department and its enforcement officers; those officers then arrested the plaintiff after having conducted their own investigation, which resulted in a finding of probable cause that one or more crimes had been committed. The defendant also argues that the plaintiff produced no evidence that he pressured the enforcement officers or that his report was based on anything other than a reasonable and good faith belief that the plaintiff was trespassing and illegally harvesting the defendant's clams. We agree with the defendant.

"An action for malicious prosecution against a private person requires a plaintiff to prove that: (1) the defendant initiated or procured the institution of criminal proceedings against the plaintiff; (2) the criminal proceedings have terminated in favor of the plaintiff; (3) the defendant acted without probable cause; and (4) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice. . . . The law governing malicious prosecution seeks to accommodate two competing and ultimately irreconcilable interests. It acknowledges that a person wrongly charged with criminal conduct has an important stake in his bodily freedom and his reputation, but that the community as a whole has an even more important stake in encouraging private citizens to assist public officers in the enforcement of the criminal law." (Citation omitted; internal quotation marks omitted.) *Bhatia* v. *Debek*, 287 Conn. 397, 404–405, 948 A.2d 1009 (2008).

Having concluded in part I A of this opinion that the defendant produced evidence that he had acted with probable cause and without malice in reporting the plaintiff's activities to the enforcement officers, and that the plaintiff produced no counterevidence, we conclude that the plaintiff, as a matter of law, cannot establish

that the court improperly rendered summary judgment on this count of his complaint.

The judgment is affirmed.

In this opinion ELGO, J., concurred.

LAVINE, J., concurring. I concur in the result, but write separately to express my disagreement with one aspect of the majority opinion.

The majority concludes that the statement made by the defendant Christopher Andrew Walston[1] to a reporter—"I nailed him, and I nailed him good"—is a statement of fact, as claimed by the plaintiff, Nicholas Crismale, not a statement of opinion, as asserted by the defendant, but is not defamatory. The majority opinion states that "it appears clear to us that the defendant was telling the reporter that he was the person responsible for alerting the authorities to the plaintiff's activities; he detected those activities and exposed them to the enforcement officers, which is exactly what the parties agree happened in this case."

I do not agree. In my view, the statement could be viewed as a statement of fact or a statement of opinion or an amalgam of both. It could be viewed as a statement of fact if interpreted to mean: "I am responsible for his arrest." However, to conclude that it is *merely* a statement of fact, the majority engages in some creative interpretation of the statement. The statement can be viewed as, in part, expressing an opinion because stating that you have "nailed" someone "good" does not seem to be merely a statement of objectively verifiable fact; rather, it also carries the broader implication that

[1] Jeffrey Samorajczyk and Todd Aaron Chemacki were also named as defendants. The trial court rendered summary judgment in favor of those defendants, and the merits of that judgment are not before this court. Throughout this concurring opinion, I, thus, refer to Walston as the defendant. See footnote 1 of the majority opinion.

a bad person is getting his or her just desserts by being harshly and deservedly punished. It is factual insofar as it states that the defendant's actions caused the plaintiff to be arrested; but it carries an implication of opinion insofar as it expresses the speaker's view that someone who *ought* to be punished *is being* punished. It is, in other words, not a mere factual assertion, but also a gleeful proclamation that justice has been done.

In determining whether a statement is fact or opinion, which is a question of law; see *Goodrich* v. *Waterbury Republican-American, Inc.*, 188 Conn. 107, 110, 448 A.2d 1317 (1982); context is critical. "To determine whether a statement constitutes protected opinion or actionable fact, courts consider the totality of the circumstances, including such factors as: (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared.

"The emphasis in the test for determining the actionability of an allegedly defamatory statement of opinion is whether the statement contains an objectively verifiable assertion. To ascertain whether the statements in question are provably false factual assertions, as required for defamation liability, courts consider the totality of the circumstances. In applying the totality of the circumstances test for determining whether a published statement constitutes an 'opinion,' the court seeks to determine whether the allegedly defamatory statements are objectively capable of proof or disproof, for a reader cannot rationally view an unverifiable statement as conveying actual facts. Where the allegedly defamatory statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content.

"It has also been ruled that in the context of a defamation claim, the test for whether a statement constitutes

fact or opinion is whether an ordinary or reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact . . . ." (Footnotes omitted.) 50 Am. Jur. 2d 533–34, Libel and Slander § 163 (2017).

Colloquial and figurative expressions used to embellish disclosed facts may be viewed as statements of opinion. *Goodrich* v. *Waterbury Republican-American, Inc.*, supra, 188 Conn. 121–22. In addition, "[s]tatements that are relative in nature and depend largely upon the speaker's viewpoint are expressions of opinion." *Fuste* v. *Riverside Healthcare Assn., Inc.*, 265 Va. 127, 132, 575 S.E.2d 858 (2018).

I would also note that the defendant repeated his statement that he had "nailed" the plaintiff. The second iteration was for emphasis, which, I think, supports the argument that the statement is tinged with opinion.

Under all of the circumstances, I believe that the statement resides more on the opinion side of the ledger and, thus, cannot be defamatory. However, I am unaware of any case decided by our Supreme Court or this court that clearly addresses this question in the present context.

For the foregoing reasons, I respectfully concur in the result.

STATE OF CONNECTICUT *v.* MARQUIS J. HARPER (AC 39300)

Alvord, Elgo and Pellegrino, Js.

Syllabus

Convicted of the crime of attempt to commit robbery in the first degree as an accessory in violation of statute (§§ 53a-8 [a], 53a-49 [a] [2], and 53a-134 [a] [2]), the defendant appealed to this court. The defendant's conviction stemmed from his alleged conduct in driving three individuals to the home of a friend, B, the victim, in order to steal marijuana from B. Upon arrival to B's home, the defendant stayed in his vehicle while the three individuals approached the house. One individual, who was

armed with a pistol, began a physical altercation with a friend of B's, who was exiting B's home at the time of the attempted robbery, and when B went outside to assist his friend, B was shot in the neck, which left him paralyzed from the chest down. On appeal, the defendant claimed, inter alia, that the evidence adduced at trial was insufficient to sustain his conviction and that the court improperly declined to furnish a jury unanimity instruction as he had requested. *Held*:

1. The defendant could not prevail on his claim that his conviction of attempt to commit robbery in the first degree as an accessory was not supported by sufficient evidence and could not be sustained because it required proof that he knew or believed that one of his cohorts would be armed with a deadly weapon during the attempted robbery; precedent from our Supreme Court plainly indicates that the offense of robbery in the first degree in violation of § 53a-134 (a) (2) does not require proof that the defendant intended to possess or intended for an accomplice to possess a deadly weapon, and that the mens rea requirement for attempt to commit a crime shall be no different from the mens rea requirement for the commission of the crimes by the principal, and, thus, an accomplice to an actual or an attempted robbery may be held criminally liable for his associate's display or threatened use of a purported weapon, even if he did not intend or even know that such display would occur, and the defendant did not offer a persuasive explanation for distinguishing between subsections (a) (1) and (a) (2) of § 53a-49, both of which proscribe intentional conduct on the part of a defendant in attempting to commit a criminal offense, and his claim that subsection (a) (2) contains an additional specific intent element of § 53a-49 was unavailing.
2. The defendant could not prevail on his claim that the trial court improperly declined to provide his requested instruction on jury unanimity with respect to reasonable doubt: the instructions provided by the court on both reasonable doubt and juror unanimity were sufficiently correct in law, adapted to the issues and provided ample guidance to the jury, and the requested instruction did not contain an accurate statement of the law, as it contravened the precept of reasonable doubt and the defendant's proposition that jurors must be instructed that unanimity is required on the nature or source of reasonable doubt was without legal support, the defendant having failed to provide any Connecticut authority to substantiate that novel assertion, and his reliance on federal case law having been plainly inapposite; accordingly, there was little likelihood that the instructions, considered as a whole, misled the jury into believing that the nature or source of their reasonable doubt had to be unanimously shared by all jurors, it was presumed that the jurors heeded the court's instructions, and in light of the particular facts of this case and mindful of the jury's obligation to construe the court's charge as a whole, there was no reasonable possibility that the trial court's charge misled the jury on the unanimity requirement.

Argued April 17—officially released August 7, 2018

Procedural History

Substitute information charging the defendant with the crimes of conspiracy to commit robbery in the first degree and attempt to commit robbery in the first degree as an accessory, brought to the Superior Court in the judicial district of New Haven and tried to the jury before the court, *Alander*, *J.*; thereafter, the trial court granted a motion for a judgment of acquittal as to the conspiracy count; verdict and judgment of guilty of attempt to commit robbery in the first degree as an accessory, from which the defendant appealed to this court. *Affirmed.*

Temmy Ann Miller, assigned counsel, with whom, on the brief, was *Owen Firestone*, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *John P. Doyle, Jr.*, senior assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Marquis J. Harper, appeals from the judgment of conviction, rendered after a jury trial, of one count of attempt to commit robbery in the first degree as an accessory in violation of General Statutes §§ 53a-8 (a), 53a-49 (a) (2) and 53a-134 (a) (2). On appeal, the defendant claims that (1) the evidence adduced at trial was insufficient to sustain his conviction and (2) the court improperly declined to furnish a jury unanimity instruction requested by the defendant. We disagree and, accordingly, 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. The defendant, Kevin Blackman, Marquis Winfrey, and Anthony Carmichael were smoking marijuana together

in Hamden on the evening of July 1, 2010. When they later discussed how to obtain more marijuana, the defendant proposed robbing the victim, John Belcher. The defendant assured the others that the victim had marijuana at his residence.[1]

At that time, the four individuals were inside the defendant's vehicle. The defendant then placed a telephone call to the victim and confirmed that he was home. During that call, the defendant identified himself to the victim, who had never received a telephone call from the defendant. When that brief conversation concluded, the defendant drove his vehicle toward the victim's residence. Carmichael was seated in the front passenger seat, while Blackman and Winfrey were in the back of the vehicle.

The defendant parked his vehicle on Fawn Ridge Drive in Hamden, a dead end street 986 feet from the victim's residence. He positioned his vehicle on a corner pointed in the direction of Woodin Street; to do so, the defendant had to turn around his vehicle on that dead end street. The defendant, at that time, informed the others that he "just was the driver" and would stay with the vehicle.

While the defendant remained in the vehicle, Blackman, Winfrey, and Carmichael exited and walked to the victim's residence. Blackman and Winfrey wore black masks that concealed everything but their eyes. Blackman also wore what Winfrey testified was a "White Sox hat" and carried a firearm as he approached the residence. Kevin Russell, a friend of the victim, was exiting the residence as the men arrived. From his kitchen, the victim watched as a masked individual

[1] At trial, the victim testified that he knew the defendant's family "very well" and played basketball with the defendant at a local park. The victim further testified that, on those occasions, he smoked marijuana with the defendant.

approached and began "tussling back and forth" with Russell. The victim came outside and noticed that the assailant was holding a gun. As he looked for an object to strike him with, the victim saw "a flash and [heard] a loud noise" and then fell face down to the ground. The victim sustained a gunshot wound to the neck, which ultimately left him paralyzed from the chest down. At trial, Winfrey testified that he witnessed Blackman shoot the victim.

The assailants immediately fled the scene. Carmichael returned to the defendant's waiting car and the defendant began to drive away. The defendant also picked Blackman up as he was leaving the area and drove him home. Winfrey, who lived nearby on Fawn Ridge Drive, ran home on foot.

During their criminal investigation, the police recovered a Chicago White Sox baseball cap from the scene of the crime. Subsequent testing at the state forensic laboratory confirmed the presence of DNA belonging to Blackman on the cap. Blackman thereafter was arrested and charged with various crimes stemming from his involvement in the attempted robbery.[2] Winfrey also was arrested after the police learned of his alleged involvement in that incident. While in police custody, Winfrey provided a statement admitting his involvement therein. Winfrey, at that time, indicated that the defendant, Blackman, and Carmichael also were involved.[3]

When the police interviewed the defendant, he initially denied having any involvement in the attempted

[2] Blackman ultimately pleaded guilty to conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-48 and 53a-59 (a) (1), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2) and criminal possession of a firearm in violation of General Statutes § 53a-217.

[3] At trial, Winfrey testified that he subsequently pleaded guilty to conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (2) and 53a-48 stemming from his involvement in the attempted robbery of the victim.

robbery and asked "who made a statement against him, what was said in the statement, and what other evidence [the police] had to implicate his involvement." Approximately thirty-seven minutes into that interview, the defendant admitted that he had driven Blackman, Winfrey, and Carmichael to Fawn Ridge Drive, but maintained that he did so "without knowledge of what was going to happen."

The defendant was arrested and charged with conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2) and attempt to commit robbery in the first degree as an accessory in violation of §§ 53a-8 (a), 53a-49 (a) (2) and 53a-134 (a) (2). A jury trial followed. After the state rested its case-in-chief, the defendant moved for a judgment of acquittal on the conspiracy count, claiming that the evidence was insufficient because there was no evidence, direct or circumstantial, that the defendant had agreed or intended that his coconspirators would use a firearm during the robbery. See *State* v. *Pond*, 315 Conn. 451, 489, 108 A.3d 1083 (2015). In response, the state conceded that although a firearm was used in the attempted robbery of the victim, "there wasn't any evidence that [the defendant] knew that there was a firearm present." The court agreed with the defendant, stating that because no such evidence was introduced at trial, the jury could not reasonably find "that element of the crime of conspiracy to commit robbery in the first degree" proven beyond a reasonable doubt. Accordingly, the court rendered a judgment of acquittal on the conspiracy charge. The defendant then rested without presenting any evidence.

After providing a detailed charge, the court submitted the remaining count of attempt to commit robbery in the first degree as an accessory to the jury. The jury found the defendant guilty and the court rendered judgment accordingly. The court thereafter sentenced the

defendant to a term of fifteen years incarceration, execution suspended after five years, followed by a three year term of probation. From that judgment, the defendant now appeals.

I

The defendant first claims that the evidence adduced at trial was insufficient to sustain his conviction of attempt to commit robbery in the first degree as an accessory in violation of §§ 53a-8 (a), 53a-49 (a) (2) and 53a-134 (a) (2). He contends that a conviction of that offense requires proof that he knew or believed that one of his accomplices would be armed with a deadly weapon during the attempted robbery. Because it is undisputed that no such evidence was presented at trial, the defendant maintains that his conviction cannot stand. We disagree.

"In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support [its] verdict." (Internal quotation marks omitted.) *State* v. *Allan*, 311 Conn. 1, 25, 83 A.3d 326 (2014). In applying that test, "we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Stephen J. R.*, 309 Conn. 586, 594, 72 A.3d 379 (2013).

As the defendant notes in his principal appellate brief, the crux of his claim concerns the proper interpretation

of the pertinent statutes underlying his conviction. Section 53a-8, which governs accessorial liability, provides in relevant part: "(a) A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender." The criminal offense at issue in the present case is robbery in the first degree. Section 53a-134 (a) (2), which defines that offense, provides that "[a] person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in [General Statutes §] 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . is armed with a deadly weapon . . . ." Section 53a-133, in turn, defines robbery as "when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny."[4] Lastly, § 53a-49 (a) (2) provides that "[a] person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." On appeal, the defendant claims that the offense of attempt to commit robbery

[4] "A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. . . ." General Statutes § 53a-119.

in the first degree as an accessory in violation of §§ 53a-8 (a), 53a-49 (a) (2) and 53a-134 (a) (2) requires proof of an additional mental state—namely, that he believed that one of his accomplices would be armed with a deadly weapon.

In considering that claim, we do not write on a clean slate. Our Supreme Court has addressed the statutes in question on multiple occasions. That precedent plainly indicates that the offense of robbery in the first degree in violation of § 53a-134 (a) (2) does not require proof that a defendant intended to possess a deadly weapon. See *State* v. *Avila*, 223 Conn. 595, 609, 613 A.2d 731 (1992); *State* v. *Crosswell*, 223 Conn. 243, 261 n.14, 612 A.2d 1174 (1992); *State* v. *McCalpine*, 190 Conn. 822, 833, 463 A.2d 545 (1983). Furthermore, as our Supreme Court has observed, "the legislature [has] expressly provided and clearly intended that the mens rea requirement for . . . attempting to commit a crime shall be no different from the mens rea requirement for the commission of [the] crime by a principal." *State* v. *Pond*, supra, 315 Conn. 470. As a result, "[a]n accomplice to an actual or attempted robbery may be held criminally liable for his associate's display or threatened use of a purported weapon and thus convicted of the more serious crime of robbery in the second degree, even if he did not intend or even know that such a display would occur. . . . In defining the various degrees of the crime of robbery, the legislature has made a reasonable determination that, if an individual willingly participates in a robbery or attempted robbery, during which one of the perpetrators actually threatens the use of deadly force, that individual should be held criminally liable for the increased risk that injury or death will result, even if he did not specifically intend for the threat to be made." (Citation omitted; emphasis omitted.) Id., 476. Accordingly, a conviction as an accessory to an

attempted robbery in the first degree pursuant to §§ 53a-8, 53a-49 (a) (2), and 53a-134 (a) (2) does not require the state to demonstrate that the accused intended for an accomplice to possess a deadly weapon.

Also relevant is *State* v. *Harrison*, 178 Conn. 689, 690, 425 A.2d 111 (1979), which, like the present case, involved a conviction for the crime of accessory to an attempted robbery in the first degree. In outlining the elements essential to that crime, the court explained: "The state must prove beyond a reasonable doubt that the accused possessed the intent to commit the crime charged. The defendant here was charged with accessory to attempted robbery. The statutes governing that crime are [§§] 53a-8, 53a-49 (a) (2), and 53a-134 (a) (2). The accessory statute, § 53a-8, sets forth the element of intent as a twofold requirement: that the accessory have the intent to aid the principal and that in so aiding he intend to commit the offense with which he is charged. . . . The criminal attempt statute, § 53a-49 (a) (2), also has as an element the intent to commit the crime attempted. Finally, § 53a-134 (a) (2), robbery in the first degree, requires as an element of the crime the intent of the defendant to deprive another of property or to appropriate it to himself or a third person. See General Statutes §§ 53a-133 and 53a-119." (Citation omitted; emphasis omitted; footnotes omitted.) Id., 694. To convict a defendant as accessory to an attempted robbery in the first degree pursuant to those statutes, the court held that the state must "prove beyond a reasonable doubt that the defendant: (1) intended to aid the . . . principals in [the robbery], and (2) intended to deprive another of property." Id., 694–95.

Although the court in *Harrison* recognized that a violation of § 53a-134 (a) (2) required proof that a participant in the crime "is armed with a deadly weapon"; id., 694 n.4; the court did *not* hold that any particular mental state with respect thereto was required on the

part of an accessory to that crime, a distinction that it emphasized four years later in *State* v. *McCalpine*, supra, 190 Conn. 822. After noting that *Harrison* involved a defendant "charged as an accessory to attempted robbery" in violation of §§ 53a-8, 53a-49 (a) (2), and 53a-134 (a) (2), our Supreme Court stated that "[c]ontrary to the defendants' allegations, [*Harrison*] imposed no requirement that the accessory [to the attempted robbery] possess the intent . . . to possess a deadly weapon." Id., 832–33. This court, as an intermediate appellate body, is bound by those previous judicial interpretations. See *State* v. *Bush*, 325 Conn. 272, 288–89, 157 A.3d 586 (2017); *State* v. *Carrillo Palencia*, 162 Conn. App. 569, 581 n.9, 132 A.3d 1097, cert. denied, 320 Conn. 927, 133 A.3d 459 (2016).

The defendant's attempt to distinguish between subsections (a) (1) and (a) (2) of § 53a-49, our criminal attempt statute, is equally unavailing. Both proscribe intentional conduct on the part of a defendant in attempting to commit a criminal offense. Whereas subsection (a) (1) pertains to a defendant who "[i]ntentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be," subsection (a) (2) pertains to a defendant who "intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." The defendant claims that the "circumstances as he believes them to be" language utilized in § 53a-49 (a) (2) "establishes an additional mental state requirement" that, as applied to the present case, necessitated proof that he believed that one of his accomplices was armed with a deadly weapon during the attempted robbery. We disagree. As our Supreme Court clarified in *State* v. *Pond*, supra, 315 Conn. 464, the possession or brandishing of a deadly weapon is not

an attendant circumstance, but rather "is quintessential criminal conduct" that constitutes a "conduct element" of the criminal offense.[5] For that reason, the court explained that "if one participant decides to brandish a gun in what had been planned as an unarmed robbery, his accomplices may be convicted of robbery in the first degree for their role in the crime, regardless of their knowledge or intention with regard to the weapon." Id., 480.

Furthermore, the defendant, in arguing that § 53a-49 (a) (2) contains an additional specific intent element, has offered no persuasive explanation for so differentiating between subsections (a) (1) and (a) (2) of our criminal attempt statute. In this regard, we are mindful that in 2015, our Supreme Court recognized that "the legislature [has] expressly provided and clearly intended that the mens rea requirement for . . . attempting to commit a crime shall be no different from the mens rea requirement for the commission of [the] crime by a principal." *State* v. *Pond*, supra, 315 Conn. 470. In the years since that decision was published, the General Assembly has not seen fit to amend § 53a-49 (a) in any manner. Because the legislature is presumed to be aware of the court's interpretation of a statute, "its subsequent nonaction may be understood as a validation of that interpretation." (Internal quotation marks omitted.) *State* v. *Canady*, 297 Conn. 322, 333, 998 A.2d 1135 (2010).

In light of the foregoing, we reject the defendant's claim that his attempted robbery in the first degree as

[5] In *State* v. *Pond*, supra, 315 Conn. 461–62, the court discussed "the well established, if somewhat arcane, distinction between three types or categories of essential elements that define each criminal offense: conduct, results, and attendant circumstances." The court contrasted "conduct elements," such as "the brandishing of a weapon," from "attendant circumstances," such as "circumstantial features of the weapon used (e.g., whether a firearm is registered or operational)." Id., 462.

an accessory required proof that he knew or believed that one of his cohorts would be armed with a deadly weapon during the attempted robbery. His claim of evidential insufficiency, therefore, fails.

II

The defendant also claims that the court improperly declined his request to provide an instruction on jury unanimity with respect to reasonable doubt. We do not agree.

"The standard of review for claims of instructional impropriety is well established. [I]ndividual jury instructions should not be judged in artificial isolation . . . but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury. . . . A challenge to the validity of jury instructions presents a question of law over which [we have] plenary review." (Citation omitted; internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 528–29, 180 A.3d 882 (2018).

The following additional facts are relevant to the defendant's claim. At trial, the defendant submitted a request to charge, in which he sought, inter alia, an instruction on jury unanimity with respect to reasonable

doubt. That proposed instruction stated: "A further point of clarification is necessary on the concept of reasonable doubt. You will recall that I have instructed you at the outset of this case that the jury's verdict must be unanimous. You are instructed that it is *not* necessary that jurors agree on the nature of or the source of the reasonable doubt. Moreover, it is not even necessary that the juror be able to explain or articulate what the reasonable doubt is. All that is required is that the jurors each agree that one (or more) reasonable doubt(s) exist(s) after a full review of the evidence or lack of evidence in the case. By way of example, each of the six jurors may have a different reason or reasons why he or she believes that the [s]tate has failed to prove its case beyond a reasonable doubt. As long as the jurors unanimously agree on the general proposition that the [s]tate has not proven its case beyond a reasonable doubt, the unanimity is achieved. There need not be unanimity on the underlying causes for such a belief." (Emphasis in original.)

The court held a charging conference on March 18, 2016, at which the defendant reiterated that request, arguing that "the unanimity required for the conviction is one thing, but . . . [the jurors] also have to be instructed that they don't need to be unanimous in their—what their doubt might be. . . . [T]hey need to be told they don't need to agree as to why they don't want to convict." The state objected to that request,[6] and the court thereafter declined to furnish the requested

[6] During the charging conference, the prosecutor stated in relevant part: "If a juror has a reasonable doubt . . . they're going to have that for whatever underlying reasons they are going to have. There's no support or authority in the case [law] that we need to tell them well, if you have a different type of reasonable doubt, then this one has a different type of reasonable doubt, then we run into problems, and I'm concerned about the other way too. If you don't have a reasonable doubt, then I'm thinking well, I've got to sit and explain why I don't have a reasonable doubt versus this one on reasonable doubt. There's no authority in the law for it."

instruction, stating: "I just don't think it's necessary, the reason being [that] the only time I tell [the jurors that] they need to be unanimous is on their verdict of guilty or not guilty. I don't refer to their need to be unanimous with respect to any other issue. So there's no reason for them to believe that they need to be unanimous on the issue of reasonable doubt. So I just don't think it's necessary. So for that reason, I decline to give it."

In its subsequent charge, the court instructed jurors that "the defendant is presumed to be innocent of each crime with which he has been charged. This presumption of innocence was with this defendant when he was presented for trial in this case. It continues with him throughout this trial unless and until such time as you, in the course of your deliberations, unanimously conclude that the state has overcome that presumption by proving him guilty beyond a reasonable doubt. . . . The state has the burden of proving that the defendant is guilty of the crime with which he is charged. The defendant has no burden in this case to prove he is not guilty or to present any evidence to disprove the charge against him. This means that the state must prove beyond a reasonable doubt each and every element necessary to constitute the crime charged. It is not enough for the state to prove only certain of those elements, because if proof of even one element is lacking, you must find the accused not guilty." The court then provided a comprehensive instruction on reasonable doubt, the propriety of which is not contested in this appeal.[7]

[7] The court stated: "[T]he state has the burden of proving the defendant guilty beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. Some of you may be aware that in civil cases, jurors are told that it is necessary to prove only that a fact is more likely true than not true. In criminal cases, the [state's] proof must be more persuasive than that. It must be beyond a reasonable doubt. A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given

Following a series of instructions on the elements of the charged offense, the court then provided an instruction to jurors on the issue of unanimity, stating: "I want to impress upon you that you are duty bound as jurors to apply the law as I outlined it, to determine the facts on the basis of the evidence as it has been presented, and then to render a verdict of guilty or not guilty as to the offense charged. *Your verdict must be unanimous.* There is no such thing as a majority vote of a jury in Connecticut. Rather, *you must all agree on the verdict.*" (Emphasis added.) The court continued: "When you are in the jury room, listen to each other and discuss the evidence and issues in the case among yourselves. Each of you has the duty to consult with one another and to deliberate in an effort to agree *unanimously on a verdict* if you can do so without violating your individual judgment and conscience. While each of you must decide the case for yourself and not merely acquiesce in the conclusion of your fellow jurors, you should examine the issues and the evidence before you with candor and frankness and with proper regard for the opinions of each other." (Emphasis added.)

The jury later returned a verdict in which it found the defendant guilty of attempt to commit robbery in the first degree as an accessory. In accepting that verdict, the court canvassed the jurors to confirm that "each of you do say unanimously that the defendant is guilty" of that criminal offense. All members of the jury responded affirmatively.

full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence.

"In this world, we know very few things with absolute certainty. In criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you are not firmly convinced of the defendant's guilt, you must give the defendant the benefit of the doubt and find him not guilty."

On appeal, the defendant claims that the court improperly declined to provide his requested instruction on jury unanimity. Relying on *State* v. *Casey*, 201 Conn. 174, 178, 513 A.2d 1183 (1986), he argues that the court was obligated to furnish that instruction because it "was relevant to the issues of the case and was an accurate statement of the law."

Contrary to the contention of defendant, we conclude that the requested instruction does not contain an accurate statement of the law. It is well established that reasonable doubt "must be based on reason . . . and if [a juror] cannot attribute a reason for it then . . . it is not a reasonable doubt." *State* v. *Moss*, 189 Conn. 364, 366, 456 A.2d 274 (1983); accord *State* v. *Coward*, 292 Conn. 296, 317, 972 A.2d 691 (2009) (reasonable doubt is doubt for which juror conscientiously can provide reason). The instruction requested by the defendant contravenes that precept, as it incorrectly states that "it is not even necessary that the juror be able to explain or articulate what the reasonable doubt is. All that is required is that the jurors each agree that one (or more) reasonable doubt(s) exist(s) after a full review of the evidence or lack of evidence in the case." As our Supreme Court has observed, "[a] trial court is under no obligation to give a requested jury instruction that does not constitute an accurate statement of the law." *State* v. *Wilson*, 242 Conn. 605, 628, 700 A.2d 633 (1997).

In addition, the proposition advanced by the defendant—that jurors must be instructed that unanimity is not required on "the nature or the source of the reasonable doubt"—is without legal support. The defendant has provided no Connecticut authority to substantiate that novel assertion, and the one federal case on which he relies is plainly inapposite. In *Mills* v. *Maryland*, 486 U.S. 367, 369, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), the United States Supreme Court considered the propriety of Maryland's capital punishment sentencing

scheme. The court emphasized that "[t]he decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make." Id., 383. For that reason, the court explained, "[i]n reviewing death sentences, the [c]ourt has demanded even greater certainty that the jury's conclusions rested on proper grounds." Id., 376. The court also recognized that "in a capital case . . . the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence . . . ."[8] (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id. 374–75.

After the defendant in *Mills* was found guilty of first degree murder, the sentencing phase of trial commenced, at which the defendant raised various mitigating circumstances. Id., 369–70. In its charge, the judge instructed jurors that they "must consider whether the aggravating circumstance . . . has been proven beyond a reasonable doubt. If you unanimously conclude that it has been so proven, you should answer that question yes. *If you are not so satisfied, then of course you must answer no*." (Emphasis in original; internal quotation marks omitted.) Id., 378. On its verdict form, the jury subsequently "marked 'no' beside each referenced mitigating circumstance and returned a sentence of death." Id., 370. In light of the ambiguity in the court's instructions and the verdict form itself, the United States Supreme Court ultimately held that there was "a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all

[8] Under the sentencing scheme at issue in *Mills*, "if the sentencer finds that any mitigating circumstance or circumstances have been proved to exist, it then proceeds to decide whether those mitigating circumstances outweigh the aggravating circumstances and sentences the defendant accordingly." *Mills* v. *Maryland*, supra, 486 U.S. 375.

[twelve] jurors agreed on the existence of a particular such circumstance." Id., 384. For that reason, the court vacated the defendant's death sentence and remanded the matter for further proceedings. Id.

The present case is both contextually and factually distinguishable from *Mills*. This is not a capital case, at which an "even greater" measure of scrutiny applies. Id., 376. Nor is this a case in which the court's instructions, considered as a whole, likely led jurors to believe that the basis for reasonable doubt on the part of an individual juror had to be shared by all members of the jury. To the contrary, the court's instructions repeatedly apprised jurors that their *verdict* must be unanimous, stating in unequivocal terms that "you must all agree on the verdict" and "[y]our verdict must be unanimous." At the same time, the court in its instructions emphasized that each juror was obligated "to deliberate in an effort to agree unanimously on a verdict if you can do so without violating *your individual judgment and conscience. . . . [E]ach of you must decide the case for yourself and not merely acquiesce in the conclusion of your fellow jurors* . . . ." (Emphasis added.) We must presume that the jurors heeded those instructions. See *State* v. *Parrott*, 262 Conn. 276, 294, 811 A.2d 705 (2003). Accordingly, in contrast to *Mills*, there is little likelihood that the instructions in the present case misled the jury into believing that the "nature or the source of [their] reasonable doubt" had to unanimously be shared by all jurors.

In his request to charge, the defendant cited to *Dunn* v. *Perrin*, 570 F.2d 21 (1st Cir. 1978), cert. denied, 437 U.S. 910, 98 S. Ct. 3102, 57 L. Ed. 2d 1141 (1978), and *State* v. *Moss*, supra, 189 Conn. 364, in support of his proposed instruction. As the trial court noted during its charging conference, neither case has any relevance to the issue of unanimity among jurors, and the defendant on appeal has abandoned his reliance on those

decisions. Furthermore, the defendant has provided no authority indicating that any jurisdiction has adopted the proposition advanced by him—that jurors in a criminal trial must be instructed that unanimity is not required on "the nature or the source of the reasonable doubt." For that reason, and in light of the court's observation that "the only time I tell [the jurors that] they need to be unanimous is on their verdict of guilty [and] I don't refer to their need to be unanimous with respect to any other issue," the court concluded that the requested instruction was unnecessary. We concur with that determination. On the particular facts of this case, and mindful of our obligation to construe the court's charge as a whole; *State* v. *Jones*, 320 Conn. 22, 53, 128 A.3d 431 (2015); we are not persuaded that there is any reasonable possibility that the trial court's charge misled the jury on the unanimity requirement. The instructions provided by the court on both reasonable doubt and juror unanimity were sufficiently correct in law, adapted to the issues and provided ample guidance to the jury. The defendant, therefore, cannot establish instructional error on the part of the trial court.

The judgment is affirmed.

In this opinion the other judges concurred.

DAVID TAYLOR *v.* ANTHONY WALLACE
(AC 40362)

Alvord, Keller and Beach, Js.

Syllabus

The plaintiff, who was incarcerated following his conviction of murder, commenced the present action seeking money damages for alleged legal malpractice by the defendant attorney, who previously had represented the plaintiff with respect to a consolidated habeas action brought by the plaintiff concerning his murder conviction. The plaintiff alleged that the defendant provided deficient representation and used the plaintiff's name and circumstance to commit fraud against the state. The trial

court granted the defendant's motion to dismiss and rendered judgment of dismissal, concluding that the defendant was entitled to immunity pursuant to statute (§ 4-165) as to the legal malpractice claim and that the plaintiff did not have standing to pursue his fraud claim. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on his claim that the trial court improperly dismissed the complaint on the ground that the defendant was entitled to immunity under § 4-165, which was based on his claim that the defendant was not entitled to immunity because his actions were egregious and reckless, and performed outside the scope of his employment; pursuant to *Heck* v. *Humphrey* (512 U.S. 477), the United States Supreme Court held that if success in a tort action would necessarily imply the invalidity of a conviction, the action must be dismissed unless the underlying conviction has been invalidated, and because the plaintiff here has been convicted and that conviction has withstood a number of attacks and has never been invalidated, the plaintiff's claim was not ripe for adjudication, and, therefore, this court did not reach the issue of immunity.
2. The plaintiff could not prevail on his claim that the trial court erred in concluding that he lacked standing to pursue his claim that, because of the defendant's malpractice, the defendant committed fraud against the state and, indirectly against the plaintiff, causing the plaintiff injury; the plaintiff's claim that he was injured as a result of the defendant's purported fraud on the state was unavailing because the plaintiff did not claim that he himself was defrauded, only that he was an unwitting and unwilling participant, and because the entirety of his claim was derivative of any injury the state may have suffered, the plaintiff was not classically aggrieved and lacked standing to pursue his fraud claim.
3. The plaintiff's claim that the trial court improperly denied his motion for reargument was unavailing; this court having rejected the plaintiff's claim that the trial court erred in dismissing his case for lack of subject matter jurisdiction, there was no basis on which to find that the trial court abused its discretion in denying his motion to reargue.

Argued April 19—officially released August 7, 2018

Procedural History

Action seeking to recover damages as a result of the defendant's alleged legal malpractice, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the court, *Bright*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

David P. Taylor, self-represented, the appellant (plaintiff).

Stephen R. Finucane, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, *Jane R. Rosenberg*, solicitor general, and *Terrence M. O'Neill*, assistant attorney general, for the appellee (defendant).

Opinion

BEACH, J. The plaintiff, David Taylor, appeals from the judgment of the trial court dismissing his one count complaint sounding in legal malpractice against the defendant, Anthony Wallace. On appeal, the plaintiff claims that the trial court erred in (1) dismissing the complaint; (2) concluding that the plaintiff lacked standing to assert his claim of fraud; and (3) denying the plaintiff's motion for reargument. The defendant claims that the action was not ripe because the underlying conviction had not been vacated. We affirm the judgment.

The following facts and procedural history are pertinent to our decision. In a previous criminal case, the plaintiff pleaded guilty to murder under the *Alford* doctrine[1] on September 12, 2001, and was sentenced to twenty-five years imprisonment.[2] In the following years, he has brought at least twelve petitions seeking posttrial relief and has included as grounds for the relief claims of ineffective assistance of counsel.[3] The defendant was appointed to represent the plaintiff in one of the habeas

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[2] For a more complete exposition of the facts leading to the plaintiff's imprisonment, see generally *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 936 A.2d 611 (2007).

[3] See, e.g., *Taylor* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-14-4006607-S; *Taylor* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-12-4004709-S (January 23, 2014), appeal dismissed, Appellate Court, Docket No. 36585 (October 21, 2015).

proceedings; the representation occurred between February 16, 2011, and January 28, 2014.

In his present complaint alleging legal malpractice, dated April 18, 2016, the plaintiff alleged that the defendant provided deficient representation and used the plaintiff's name and circumstance to commit fraud against the state. On June 8, 2016, the defendant moved to dismiss the complaint on the basis that the plaintiff's claims were barred by statutory immunity. At oral argument on the motion, the defendant claimed additionally that the plaintiff lacked standing to claim that the defendant had defrauded the state. After oral argument, the court granted the motion to dismiss, concluding that the defendant was entitled to statutory immunity as to the plaintiff's legal malpractice claim. The court also addressed the plaintiff's claim that the defendant committed fraud against the state, and concluded that the plaintiff did not have standing to pursue that claim. This appeal followed. Additional facts will be set forth as necessary.

We begin with generally applicable legal principles. "[In reviewing] the trial court's decision to grant a motion to dismiss, we take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . [A] motion to dismiss admits all facts well pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts." (Citation omitted; internal quotation marks omitted.) *May* v. *Coffey*, 291 Conn. 106, 108, 967 A.2d 495 (2009).

"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. . . .

"Subject matter jurisdiction [implicates] the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The objection of want of jurisdiction may be made at any time . . . [a]nd the court or tribunal may act on its own motion, and should do so when the lack of jurisdiction is called to its attention. . . . The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, 265 Conn. 423, 429–30, 829 A.2d 801 (2003).

I

The plaintiff's first claim on appeal is that the trial court erred in dismissing the complaint on the ground that the defendant was entitled to statutory immunity pursuant to General Statutes § 4-165. Specifically, he claims that the defendant is not entitled to immunity because "some of the defendant's actions were not only egregious, wanton and reckless, but were also performed outside the scope of his employment." The defendant maintains that the court properly decided the immunity issue in favor of the defendant but also counters, for the first time on appeal, that the plaintiff's claim is not ripe for judicial review because the allegations in his complaint, if true, undermine or imply the invalidity of the plaintiff's criminal conviction, which has never been invalidated. We agree with the defendant that the controversy is not ripe, and do not reach the issue of immunity.

"[J]usticiability comprises several related doctrines . . . [including ripeness]. . . . A case that is nonjusticiable must be dismissed for lack of subject matter

jurisdiction. . . . [B]ecause an issue regarding justiciability raises a question of law, our appellate review [of the ripeness of a claim] is plenary. . . . [T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . . Accordingly, in determining whether a case is ripe, a trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent [on] some event that has not and indeed may never transpire." (Citation omitted; internal quotation marks omitted.) *Janulawicz* v. *Commissioner of Correction*, 310 Conn. 265, 270–71, 77 A.3d 113 (2013).

"In general, the plaintiff in an attorney malpractice action must establish: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages. . . . [T]he plaintiff typically proves that the defendant attorney's professional negligence caused injury to the plaintiff by presenting evidence of what would have happened in the underlying action had the defendant not been negligent." (Citations omitted; internal quotation marks omitted.) *Lee* v. *Harlow, Adams & Friedman, P.C.*, 116 Conn. App. 289, 297, 975 A.2d 715 (2009).

An issue of subject matter jurisdiction may be raised at any time, even at the appellate level. See *Fort Trumbull Conservancy, LLC* v. *New London*, supra, 265 Conn. 430. In this instance, the defendant raised the issue of jurisdiction in his brief to this court. The plaintiff did not file a reply brief. At oral argument, he forthrightly conceded several times that he could not meet the standard set forth in *Heck* v. *Humphrey*, 512 U.S. 477, 486–87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

In the present case, the plaintiff remains incarcerated as a result of his conviction of murder in 2001. He has

filed multiple habeas petitions; the defendant represented him in a consolidated habeas action between 2011 and 2014. Despite multiple attempts, the plaintiff has not invalidated his conviction, and, at the time of argument before this court, at least one habeas action alleging that the defendant provided ineffective assistance as habeas counsel was pending. See *Taylor* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-14-4006607-S.

In his brief, the defendant asserts that the case should be dismissed for lack of ripeness. Relying to a degree on *Heck* v. *Humphrey*, supra, 512 U.S. 486–87, the defendant suggests that this case is not ripe for adjudication because (1) a habeas corpus action is pending, and sound policy considerations militate against the possibility of inconsistent resolutions arising out of the same transaction; (2) the injury resulting from alleged professional negligence in this instance is incarceration,[4] and, as the plaintiff remains validly incarcerated in any event, any consideration of damages would invoke a hypothetical inquiry; and (3) the holding of *Heck* v. *Humphrey*, supra, 512 U.S. 477, should be adopted by this court. We agree.

We begin by examining *Heck*. There, a prisoner brought an action pursuant to 42 U.S.C. § 1983 alleging that unlawful procedures had led to his arrest, that exculpatory evidence had knowingly been destroyed, and that unlawful identification procedures had been used at this trial. *Heck* v. *Humphrey*, supra, 512 U.S. 478–79. He claimed monetary relief and did not seek release from custody. Id., 479. His conviction had been

[4] The plaintiff claims in his complaint that his tort damages include "mental anguish and torment"; he does not expressly seek release from incarceration in this action. Similarly, he does not specifically allege incarceration as the injury arising from the defendant's alleged failure to meet the standard of care. We do not see any reasonable scenario of recovery, however, that does not necessarily undermine the validity of the conviction.

affirmed and a federal habeas petition had been denied. Id. The United States Court of Appeals for the Seventh Circuit had affirmed the District Court's dismissal of the plaintiff's action, reasoning that "[i]f, regardless of the relief sought, the plaintiff [in a federal civil rights action] is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so." (Footnote omitted; internal quotation marks omitted.) Id., 479–80.

The United States Supreme Court affirmed, although on slightly different reasoning. Id., 490. It began its analysis with a discussion of the common law of torts, and analogized the circumstance of the case before it to malicious prosecution: an element of the cause of action under the common law is a favorable outcome of the underlying criminal case against the plaintiff. Id., 484. The element was required in order to avoid inconsistent resolutions and collateral attacks on convictions. Id., 484–85.

The court concluded "that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, *or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid*, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal . . . or called into question by a federal court's issuance of a writ of habeas corpus . . . . A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the [trial] court must consider

whether a judgment in favor of the plaintiff would necessarily imply the invalidity of this conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." (Emphasis altered; footnote omitted.) Id., 486–87. The court noted that the injury of being convicted and imprisoned is not compensable under § 1983 unless the conviction has been overturned. Id., 487 n.7.

We agree with the policy enunciated in *Heck*: if success in a tort action would necessarily imply the invalidity of a conviction, the action is to be dismissed unless the underlying conviction has been invalidated. Although the issue has not been addressed by an appellate court in this jurisdiction, *Heck* has been followed in Superior Court decisions. See, e.g., *Tierinni* v. *Coffin*, Superior Court, judicial district of Tolland, Docket No. CV-14-5005868-S (May 21, 2015) (60 Conn. L. Rptr. 450); see also *Alston* v. *Sullivan*, Superior Court, judicial district of New Haven, CV-16-5036474-S (September 29, 2016).

The rationale in *Heck* is similar to other limitations in our tort law. Malicious prosecution, of course, requires as an element a favorable outcome of the underlying prosecution. *Lopes* v. *Farmer*, 286 Conn. 384, 389, 944 A.2d 921 (2008), citing *Heck* v. *Humphrey*, supra, 512 U.S. 477. A tort case is not ripe for adjudication if resolution of an unresolved underlying case is necessary for reliable adjudication. See, e.g., *Esposito* v. *Specyalski*, 268 Conn. 336, 348–49, 844 A.2d 211 (2004). Principles of issue preclusion bar collateral attack on a judgment. See, e.g., *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 343–45, 15 A.3d 601 (2011).

In *Tierinni* v. *Coffin*, supra, 60 Conn. L. Rptr. 450, the Superior Court reasoned that an incarcerated prisoner's

complaint alleging legal malpractice should be dismissed. The court observed that the extant claim of ineffective assistance of counsel in a habeas action and his claim of legal malpractice in the case sub judice arose from the same set of facts; the tort claim, then, was not ripe for adjudication. Id., 453. The court reasoned that if it were "to adjudicate the plaintiff's claim during the pendency of the plaintiff's habeas petition, there is a risk that [the] court could determine the defendant's performance was insufficient while the habeas court determines it was sufficient, or vice versa." Id. Further, "[b]ecause an invalidation of the underlying criminal matter through the plaintiff's pending [habeas] petition is a necessary precursor to this legal malpractice claim . . . the plaintiff's legal malpractice claim has not yet accrued . . . ." Id.

In the present case, the plaintiff has been convicted and that conviction has withstood a number of attacks. For so long as the conviction stands, an action collaterally attacking the conviction[5] may not be maintained.

II

The plaintiff next claims that the trial court erred in concluding that the plaintiff lacked standing to pursue his claim that, because of his malpractice, the defendant committed fraud against the state and, indirectly,

[5] The plaintiff insists that he is not attacking the conviction, but is merely seeking monetary damages. One difficulty with his position is that the injury, a necessary element in a tort action, is the conviction. To prove his malpractice action, he presumably would have to prove that he would not have sustained the injury had professional negligence not occurred. Thus, a successful result in this case would necessarily imply that the conviction was improper. Inconsistency of judgments is avoided by the requirement that the conviction first be vacated.

Put differently, a court could not provide practical relief in the current posture. If the malpractice action were to be pursued, recovery for the injury would be barred as a collateral attack on a judgment. The action would be hypothetical, and thus nonjusticiable. See *Janulawicz* v. *Commissioner of Correction*, supra, 310 Conn. 270–71.

against the plaintiff. The habeas court concluded from the complaint that any fraud the defendant may have committed was against the state, not the plaintiff. The plaintiff argues that this conclusion is incorrect because the defendant used "the plaintiff's case and name to commit a criminal act, forcing him to become an unwitting and unwilling participant," such that injury to him was distinct from injury to the state.[6]

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. . . . The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue. . . .

"Two broad yet distinct categories of aggrievement exist, classical and statutory. . . . Classical aggrievement requires a two part showing. First, a party

[6] The plaintiff also argues that, as a third-party beneficiary of the defendant's contract with the state to serve as assigned habeas counsel, the plaintiff had "a specific, personal and legal interest in that agreement." The plaintiff did not raise a breach of contract claim, either directly or as a third-party beneficiary, in his complaint. Because we conclude that the plaintiff's claimed injuries are at most derivative of the alleged injuries to the state, we need not consider this argument.

must demonstrate a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the [alleged conduct] has specially and injuriously affected that specific personal or legal interest. . . .

"Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, supra, 265 Conn. 430–31.

The plaintiff's argument that he was injured as a result of the defendant's purported fraud is unavailing because the plaintiff does not claim that he himself was defrauded, only that he was "an unwitting and unwilling participant." Therefore, the entirety of his claim is derivative of any injury the state may have suffered. The plaintiff is not classically aggrieved and, therefore, lacks standing to pursue his fraud claim.[7] See *Scarfo* v. *Snow*, 168 Conn. App. 482, 497, 146 A.3d 1006 (2016) ("[i]f the injuries claimed by the plaintiff are remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so" [internal quotation marks omitted]).

III

Finally, the plaintiff claims that the trial court erred in denying the plaintiff's motion for reargument. We review a court's denial of a motion to reargue for an abuse of discretion. *Roe # 1* v. *Boy Scouts of America Corp.*, 147 Conn. App. 622, 647, 84 A.3d 443 (2014). Because we reject the plaintiff's claims that the trial

[7] The plaintiff also argues that he is statutorily aggrieved but points to no statute that would provide standing.

court erred in dismissing his case for lack of subject matter jurisdiction, there is no basis on which to find an abuse of discretion. The plaintiff's claim, therefore, fails.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* EZEQUIEL R. R.* (AC 40846)

Keller, Elgo and Beach, Js.

Syllabus

Convicted of the crimes of aggravated sexual assault of a minor, sexual assault in the first degree, risk of injury to a child, and sexual assault in the fourth degree in connection with his alleged sexual abuse of the minor victim, the defendant appealed. The trial court held a hearing on the admissibility of a video recording of a forensic interview of the victim by a clinical child interview specialist, C, and ruled that certain statements made during that interview were admissible pursuant to the medical diagnosis or treatment exception to the hearsay rule. On appeal, the defendant claimed, inter alia, that the trial court erred by admitting into evidence the video recording of the forensic interview because the primary purpose of the interview was to obtain from the victim facts of the alleged sexual abuse to assist in a criminal investigation, and medical treatment was merely a secondary motive. *Held*:

1. The trial court properly determined that the victim's statements made during the forensic interview fell within the medical diagnosis or treatment exception to the hearsay rule and, thus, did not abuse its discretion in admitting the video recording of the forensic interview into evidence: the defendant's reliance on the "primary purpose" standard for determining the admissibility of the victim's statements under the medical diagnosis or treatment exception to the hearsay rule was misplaced, as statements during a forensic interview of a child that are offered solely under the medical diagnosis and treatment exception are admissible if such statements are reasonably pertinent to obtaining medical diagnosis or treatment, even if the primary purpose of the declarant's statements

* 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 use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

was not to obtain medical diagnosis and treatment, and in the present case there was sufficient evidence in the record to demonstrate that the victim's statements to C were reasonably pertinent to obtaining medical diagnosis and treatment to satisfy the requirement of that exception to the hearsay rule in light of the circumstances leading up to the victim's interview, the fact that the interview took place in a hospital, C's statements to the victim during the interview, including C's statement informing the victim that their conversation would be video recorded in case C or a doctor had any questions later on, and the fact that the victim did obtain a medical examination and was referred for therapy; furthermore, the presence of a police officer behind a one-way mirror during the interview, or the victim's knowledge that a police officer was observing the forensic interview, did not preclude the victim's statements from falling within the medical diagnosis or treatment exception to the hearsay rule.

2. The defendant's unpreserved claim that the trial court improperly allowed C to render an expert opinion that appeared to be based on the facts of the case was not reviewable: defense counsel's initial objection to C's testimony in the absence of the jury did not sufficiently raise the issue that the testimony was indirectly vouching for the credibility of the victim, as defense counsel emphasized that the testimony regarding the victim's delayed disclosure did not corroborate that the alleged abuse actually occurred and did not adequately apprise the court that C's use of hypotheticals impermissibly suggested that she was indirectly vouching for the victim's credibility, and, thus, the defendant was not relieved of his duty to make further objections if he thought C impermissibly related her testimony to the facts of the case; furthermore, after the jury reentered the courtroom, defense counsel objected for the first time to C's testimony on the ground that C was relating her testimony to the facts of the case, the trial court addressed that objection by providing a curative instruction, defense counsel subsequently objected again to an answer given by C but immediately withdrew his objection and did not object when C then provided an answer that is the subject of the present appeal, and, thus, defense counsel's failure to object to the portions of C's testimony challenged on appeal demonstrated that defense counsel did not believe that C's statements were improper or that he was satisfied with the curative instruction the court previously provided.

Argued May 17—officially released August 7, 2018

Procedural History

Substitute information charging the defendant with the crimes of aggravated sexual assault of a minor and sexual assault in the fourth degree, and with two counts of the crime of sexual assault in the first degree and

four counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of New Britain, where the court, *D'Addabbo*, *J.*, denied the defendant's motion to preclude certain evidence; thereafter, the matter was tried to the jury; subsequently, the court granted in part the defendant's amended motion to preclude certain evidence; thereafter, the court denied the defendant's motions for a judgment of acquittal; verdict of guilty; subsequently, the court denied the defendant's motion for a new trial, granted in part the defendant's amended motion for a judgment of acquittal, and vacated the verdict of guilty as to one count of sexual assault in the first degree and one count of risk of injury to a child; judgment of guilty of aggravated sexual assault of a minor, sexual assault in the first degree, sexual assault in the fourth degree and three counts of risk of injury to a child, from which the defendant appealed. *Affirmed.*

Justin T. Smith, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Christian M. Watson*, supervisory assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Ezequiel R. R., appeals from the judgment of conviction, rendered following a jury trial, of one count of aggravated sexual assault of a minor in violation of General Statutes § 53a-70c (a) (1), one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), three counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and one count of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A).[1] On appeal, the defendant claims

[1] At sentencing, the court vacated a conviction of sexual assault in the first degree and a conviction of risk of injury to a child, determining that both convictions were lesser included offenses of the aggravated sexual

that the trial court erred by (1) admitting into evidence a video recording of a forensic interview between a clinical child interview specialist and the child victim, and (2) allowing the clinical child interview specialist to render an expert opinion that appeared to be based on the facts of the case. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The victim was born on December 22, 2000, in Buffalo, New York. The victim's biological mother and biological father ended their relationship when she was two years old and the victim's mother began a relationship with the defendant shortly thereafter. During their near decadelong relationship, the defendant moved in with the victim and her mother, and the defendant and the victim's mother had two daughters together, one born in 2006 and one in 2009. Between approximately 2009 and 2012, the defendant sexually assaulted the victim in different residences that the defendant shared with the victim, the victim's mother, and the victim's two younger siblings.

In 2009, when the assaults first began, the family was living in a two bedroom apartment in Rocky Hill. Around this time, on a few different occasions, the defendant asked the victim to play the "ah game" with him when her mother was at work and her younger siblings were napping. On the first occasion, the victim thought the defendant was asking her to play a board game with him. Instead, the defendant led the victim to his bedroom, proceeded to pull down his pants, and lay with her on the bed. He instructed her "to open up [her] mouth and say ah and put [her] mouth on his penis," and then told her "that all boys and girls . . . played the game . . . ." The victim followed the defendant's demands and stopped a couple minutes later

assault of a minor conviction. Neither of these vacated convictions are part of the judgment of conviction being appealed.

when she no longer wanted to do it. The defendant made the victim do this on multiple occasions.

In September, 2010, the family moved into another two bedroom apartment in Rocky Hill. At this new apartment, the defendant routinely climbed into the victim's bed with her in the morning and proceeded to inappropriately touch her.[2] He would lie behind the victim with her back to his chest and would touch her breasts and vagina under her clothes with his hand. During this time, the victim could feel the defendant's erect penis against her back as he lay behind her.

On a different occasion, while the victim's mother was in the shower and the victim was eating lunch in the kitchen of the apartment, the defendant threw the victim over his shoulder and carried her into his bedroom. Against her will, he "pinned [her] onto the bed," pulled down her pants, and proceeded to lick her vagina. The victim tried to use her hands to push him away, but she was not strong enough to do so. After a couple of minutes, the defendant stopped holding her down; the victim pulled her pants up and yelled at the defendant. The defendant threatened the victim by telling her that she was "going to go out there and act happy or else he was going to drown [her] and [her] mom in a river." The victim did not report this incident to anyone at the time because she was "scared that he would hurt [her] and [her] mom."

The defendant and the victim's mother eventually ended their relationship. The victim, her mother, and her two siblings moved into an apartment in Hartford

[2] The victim and her two siblings shared a bedroom that contained a bunk bed; the victim occupied the top bunk and her two younger siblings occupied the bottom bunk. The victim testified that when some of the incidents occurred, her two younger siblings were sleeping in the same bedroom, and that the defendant climbed a ladder that led to the top bunk in order to get into bed with her.

without the defendant, and in June, 2014, the then thirteen year old victim disclosed to her mother some of the things that the defendant had done to her beginning when she was eight or nine years old.

The next day, on June 27, 2014, the victim's mother brought her to the Connecticut Children's Medical Center in Hartford. The victim spoke with the doctors and told them about the defendant's sexual interactions with her. At the conclusion of that consultation, the emergency room doctor referred her to the Greater Hartford Children's Advocacy Center at Saint Francis Hospital and Medical Center.

On July 9, 2014, the victim was interviewed at the Greater Hartford Children's Advocacy Center by Lyndsey Craft, a clinical child interview specialist. This interview was recorded on video and was observed by a doctor, two medical residents, a Department of Children and Families (department) worker, and a detective from the Rocky Hill Police Department, who all observed from behind a one-way mirror.[3] The victim spoke with Craft and described her physical encounters with the defendant. On the basis of the victim's disclosures during her interview, Detective Frank Dannahey of the Rocky Hill Police Department prepared an arrest warrant for the defendant, and he was arrested. At trial, the victim testified about the assaults the defendant subjected her to. In addition, the jury heard testimony from Craft about her work with the Greater Hartford

[3] Craft testified that she is a member of a multidisciplinary team. As set forth in the statute, the purpose of these teams "is to advance and coordinate the prompt investigation of suspected cases of child abuse or neglect, to reduce the trauma of any child victim and to ensure the protection and treatment of the child." General Statutes § 17a-106a. A multidisciplinary team generally "consists of mental health and law enforcement professionals, as well as department employees, all of whom work collaboratively to investigate and treat cases of reported sexual abuse." *State* v. *Maguire*, 310 Conn. 535, 543, 78 A.3d 828 (2013). Craft, however, testified that protocols can vary depending on the jurisdiction within the state.

Children's Advocacy Center and about her interview with the victim. The video of the interview was also played for the jury. At the conclusion of the trial, the jury found the defendant guilty on all counts. The trial court sentenced him to a total effective sentence of twenty-five years incarceration, followed by ten years of special parole. This timely appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court erred by admitting into evidence, pursuant to the medical diagnosis or treatment exception to the hearsay rule, the video recording of the forensic interview between Craft and the victim. We disagree.

The following additional facts and procedural history are relevant to this claim. On March 11, 2016, the defendant filed a motion in limine to preclude the video recording of the victim's forensic interview with Craft from being admitted into evidence, arguing that the video recording contains hearsay, and that "no hearsay exception applies, including the medical treatment exception." A motion hearing was held on three separate days in April, 2016, prior to the commencement of the trial, and the court heard testimonial evidence from Craft and Nancy Eiswirth, the defendant's expert witness, who opined about the purposes of Craft's interview with the victim.

At the hearing, Craft testified about her educational background in social work and her job as a clinical child interview specialist for the Greater Hartford Children's Advocacy Center. She testified that when the victim and her mother first arrived at the center, the victim's mother was required to sign Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320d et seq., compliant release forms because the interview was going to be made part of the victim's

medical record. After these administrative tasks were completed, Craft indicated that she met with the victim alone in one of the adolescent interview rooms to speak with her. Craft testified that these types of interviews are recorded to "minimize the amount of times a child needs to speak about the same event."[4]

Furthermore, when asked what Craft thought the "most important or primary purpose" of the interviews she conducted was, Craft responded that it was to "formulate the treatment . . . which the child is going to receive, whether it be . . . medical treatment or therapeutic treatment, counseling, [or] therapy." Craft went on to testify about her interview with the victim and indicated that she conducted it in a neutral and nonleading way. Based on the victim's statements to Craft about the assaults, Craft recommended that the victim have a thorough medical examination with one of the medical professionals at the Greater Hartford Children's Advocacy Center and recommended that the victim begin therapy. Craft testified that the victim did receive an examination by Nina Livingston, a medical doctor, following the interview with her. Craft testified that Livingston serves as the medical director at the Greater Hartford Children's Advocacy Center, and is also the medical director of the Suspected Child Abuse and Neglect program at Connecticut Children's Medical Center.

During the parties' arguments on the motion, defense counsel argued, inter alia, that the responses elicited from the victim were "not obtained for medical purposes [because] there was no diagnosis obtained" and that "Craft's interview itself [was] not medically coded and that she did not provide any reasons going forward

[4] In addition, at the beginning of Craft's interview with the victim, she informed the victim that their conversation would be video recorded in case Craft or the doctor had any questions later on, and that this was done so they did not have to keep asking her the same questions over again.

that there was a medically needed reason for a diagnosis." The state responded by arguing that the victim's statements to Craft "were reasonabl[y] pertinent to obtain medical diagnosis or treatment and that . . . Craft sufficiently occupied a position within the chain of medical care to bring [the victim's] statement within the scope" of the exception. The state highlighted the fact that "after the interview was done, [Livingston] based her medical treatment or her medical exam around the questions and answers that [the victim] provided to . . . Craft."

On April 25, 2016, the court denied the motion to preclude the video recording of the forensic interview and later provided a written articulation of its decision. The court stated, in relevant part, that "[i]t should be noted that the definition of medical health provider in the stream of medical treatment has been expanded by our case law to include a social worker," citing to *State* v. *Cruz*, 260 Conn. 1, 10, 792 A.2d 823 (2002). After considering everything before it, the court found that the victim's "purpose was to obtain medical diagnosis and treatment and that the examiner was competent in achieving that result." The court then considered whether the "presence of the Rocky Hill police, a representative of [the department], and medical personnel alter [the victim's] purpose?" (Internal quotation marks omitted.) The court found that the "presence of these individuals does not supplant [the victim's] purpose. The examiner's goal was to obtain appropriate medical treatment for [the victim]. [Craft] did not consult with [the department] or the police prior to the interview and received no requests for clarification of [the victim's] answers. . . . Dr. Livingston followed the interview with an examination, and the [victim] was involved in therapy. Medical assistance and mental health therapy sometimes is necessary, even if there are no visible wounds. Testimonial evidence at the hearing was that

the [victim] had spoken to the Rocky Hill police prior to the interview. The criminal investigation had already begun prior to the interview." As such, the court reemphasized that the "credible evidence presented at the hearing was that the information was presented from [the victim] for medical diagnosis and treatment," and that the court considered it "trustworthy."

On April 24, 2016, the defendant filed an amended motion in limine requesting that in the event the court permitted the jury to view the video recording, that it preclude certain statements from being played to the jury. On the second day of trial, the court addressed the motion, determining that some of the statements in question were not relevant for the purposes of diagnosis or medical treatment. Thus, the court granted the motion in part, and denied it in part. Consistent with the court's ruling, the video was redacted to omit certain statements that the court determined were not relevant.

On the third day of trial, the state offered the video recording redacted in accord with the court's ruling. The court acknowledged the defendant's previous objection, made note of its ruling, and admitted the video recording into evidence.[5] The state proceeded to play the video for the jury.

We begin our analysis by setting forth our well established standard of review for evidentiary claims. "To the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the

[5] In his motion for a new trial, the defendant renewed his challenge to the admission of the video recording, which the trial court denied.

law, however, for an abuse of discretion. . . . In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought." (Internal quotation marks omitted.) *State* v. *Griswold*, 160 Conn. App. 528, 536, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015).

At the outset, it is important that we note that the defendant does not make a sixth amendment constitutional challenge to the admission of the video recording. He concedes, as he must, that such a challenge cannot be made because the victim, who was interviewed in the video recording, testified at trial. As our case law has made manifest, when a victim appears at trial and is subject to cross-examination by the defendant, *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and its progeny do not apply. See *State* v. *Estrella J.C.*, 169 Conn. App. 56, 70, 148 A.3d 594 (2016).

The defendant, relying primarily on *State* v. *Arroyo*, 284 Conn. 597, 935 A.2d 975 (2007), argues that the "primary purpose" standard is the proper standard for determining admissibility under the medical diagnosis or treatment exception to the hearsay rule, and that the court failed to apply it. *Arroyo* involved a confrontation clause challenge to the admission of a forensic interview. See id., 615, 625. The defendant claims that because the declarant was available to testify at trial in *Arroyo*, and because our Supreme Court "still conducted an analysis of whether the statements were testimonial under *Crawford*," the primary purpose standard

is applicable here.[6] We find this argument unpersuasive. As this court has previously noted, "[a]fter our Supreme Court decided . . . *Arroyo* . . . and *State* v. *Maguire*, 310 Conn. 535, 563–71, 78 A.3d 828 (2013), it was unclear whether statements made during a forensic interview were inadmissible unless the *primary* purpose of the interview was for medical diagnosis or treatment. Subsequent to those cases, this court decided in *Griswold* that, if statements made during a forensic interview of the child are offered solely under the medical diagnosis and treatment exception, and the child is subject to cross-examination at trial, then such statements need only be reasonably pertinent to medical diagnosis and treatment to be admissible. . . . Accordingly, pursuant to *Griswold*, such statements are admissible even if the primary purpose of the declarant's statements was not to obtain medical diagnosis and treatment." (Citation omitted; emphasis in original.) *State* v. *Eddie N. C.*, 178 Conn. App. 147, 172 n.13, 174 A.3d 803 (2017), cert.

[6] In support of the defendant's argument, he acknowledges that "[a]lthough it appears [our Supreme Court] did not have to analyze the statements at issue under *Crawford*, it chose that framework for the admissibility of the medical statements at issue." He further argues that this court should overrule our previous cases that have used an "at least in part" type analysis, and that we should instead use the primary purpose test that he suggests is required. The line of cases that the defendant challenges have concluded that forensic interview statements are admissible under the medical diagnosis or treatment exception when the purpose of the interview was, at least in part, to determine whether the victim was in need of medical treatment, and that the statements were reasonably pertinent to achieving those ends. See, e.g., *State* v. *Abraham*, 181 Conn. App. 703, 713, A.3d , cert. denied, 329 Conn. 908, A.3d (2018); *State* v. *Eddie N. C.*, 178 Conn. App. 147, 171, 174 A.3d 803 (2017), cert. denied, 327 Conn. 1000, 176 A.3d 558 (2018); *State* v. *Estrella J.C.*, supra, 169 Conn. App. 74–75; *State* v. *Griswold*, supra, 160 Conn. App. 552–53, 557; *State* v. *Donald M.*, 113 Conn. App. 63, 71, 966 A.2d 266, cert. denied, 291 Conn. 910, 969 A.2d 174 (2009).

Recognizing that one panel of this court cannot overrule another panel of this court; see *Samuel* v. *Hartford*, 154 Conn. App. 138, 144, 105 A.3d 333 (2014); the defendant filed a motion requesting en banc review prior to submitting his reply brief in this case. His motion was denied on April 18, 2018. Accordingly, we decline the defendant's invitation to depart from this court's precedent.

denied, 327 Conn. 1000, 176 A.3d 558 (2018). As such, the defendant's reliance on the "primary purpose" standard in *Arroyo* is misplaced.

Having determined that no *Crawford* challenge is present on appeal, and guided by *Griswold*, we conclude that the applicability of the medical diagnosis and treatment exception to the hearsay rule must be determined on the merits of the exception itself, not by using the primary purpose standard. As to the relevant law, "[i]t is well settled that . . . [a]n out-of-court statement offered to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception to the general rule applies." (Internal quotation marks omitted.) *State* v. *Carrion*, 313 Conn. 823, 837, 100 A.3d 361 (2014); Conn. Code Evid. § 8-2. Section 8-3 (5) of the Connecticut Code of Evidence titled, "Statement for purposes of obtaining medical diagnosis or treatment," provides an exception to the hearsay rule, requiring that the statement be "made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as *reasonably pertinent* to the medical diagnosis or treatment." (Emphasis added.) Conn. Code Evid. § 8-3 (5). "The rationale underlying the medical treatment exception to the hearsay rule is that the patient's desire to recover [her] health . . . will restrain [her] from giving inaccurate statements to a physician employed to advise or treat [her]." (Internal quotation marks omitted.) *State* v. *Cruz*, supra, 260 Conn. 7.

Additionally, the statement sought to be excluded from the hearsay rule need not be made to a physician so long as the person is acting within the chain of medical care.[7] Id., 10 (finding that social worker can act

[7] Because the defendant on appeal does not challenge the trial court's determination that Craft was acting in the victim's chain of medical care, and because he conceded the point at trial, we limit our inquiry to whether

within chain of medical care). "Although [t]he medical treatment exception to the hearsay rule requires that the statements be both pertinent to treatment and motivated by a desire for treatment . . . in cases involving juveniles, our cases have permitted this requirement to be satisfied inferentially." (Citation omitted; internal quotation marks omitted.) *State* v. *Telford*, 108 Conn. App. 435, 441–42, 948 A.2d 350, cert. denied, 289 Conn. 905, 957 A.2d 875 (2008). Thus, "statements of a declarant may be admissible under the medical treatment exception if made in circumstances from which it reasonably may be inferred that the declarant understands that the interview has a medical purpose. Statements of others, including the interviewers, may be relevant to show the circumstances." (Emphasis omitted.) *State* v. *Abraham*, 181 Conn. App. 703, 713, A.3d , cert. denied, 329 Conn. 908, A.3d (2018).

In the present case, we have little difficulty concluding that there was sufficient evidence in the record to demonstrate that the victim's statements to Craft were reasonably pertinent to obtaining medical diagnosis and treatment to satisfy the requirements of the medical diagnosis or treatment exception to the hearsay rule. To begin, after the victim first visited Connecticut Children's Medical Center, an emergency room doctor referred her to the Greater Hartford Children's Advocacy Center. After arriving at the Greater Hartford Children's Advocacy Center, located on the premises of Saint Francis Hospital and Medical Center, for the forensic interview, the victim met with Craft in one of the adolescent interview rooms to speak about what had happened to her. At the beginning of their conversation, Craft informed the victim that their conversation would be video recorded in case Craft or the doctor had any questions later on. Craft informed the victim

the victim's statements to Craft were reasonably pertinent to her medical diagnosis or treatment.

that this was done so that they did not have to keep asking the victim questions "over and over and over again."

Furthermore, during the motion in limine hearing, Craft testified that the victim was reporting "significant contact that could indeed pass along [sexually transmitted diseases], as well as other sexually transmitted infections." Craft also testified that although the victim had no physical complaints at the time, she seemed to exhibit some symptoms of post-traumatic stress disorder. Based on Craft's interview with the victim, she recommended the victim have a thorough medical exam with one of the medical professionals at the Greater Hartford Children's Advocacy Center, and also that she begin therapy. The video recording of the victim's interview with Craft, in addition to a report Craft prepared at the conclusion of the interview, were made part of the victim's medical record. Following the interview, Craft spoke with Livingston to ensure that Livingston understood everything that Craft obtained from the interview, and based on Craft's recommendation, the victim did in fact obtain a medical evaluation by Livingston. The circumstances leading up to the victim's interview, the location where the interview took place, Craft's statements to the victim during the interview, and the fact that the victim did obtain a medical examination and was referred for therapy, could lead an objective observer to reasonably infer that the victim's statements were given in order to obtain medical treatment and diagnosis. See *State* v. *Abraham*, supra, 181 Conn. App. 713.

The defendant argues that the primary purpose of the forensic interview was to obtain from the victim facts of the alleged sexual abuse to assist in a criminal investigation but concedes, however, that the secondary motive was for medical treatment. Even if we were to assume the defendant is correct that the primary

purpose was not for medical treatment, statements from the victim nevertheless may be admissible so long as there is sufficient evidence that the statements were reasonably pertinent to obtaining medical diagnosis and treatment. See *State* v. *Griswold*, supra, 160 Conn. App. 552–53, 557; see also *State* v. *Donald M.*, 113 Conn. App. 63, 71, 966 A.2d 266 (forensic interview statements admissible under medical diagnosis and treatment exception because purpose of interview was, at least in part, to determine whether victim was in need of medical treatment), cert. denied, 291 Conn. 910, 969 A.2d 174 (2009).

The defendant focuses his argument on the fact that there was some police involvement surrounding the interview. He argues, in part, that the presence of a police officer behind the one-way mirror during the interview demonstrates that the purpose of the interview was not for medical treatment or diagnosis. Additionally, he argues that the victim was well aware that there was police involvement and that her words were going to be used against the defendant. Even so, the mere presence of a police officer behind a one-way mirror or even the victim's knowledge that a police officer was observing the interview does not preclude a statement from falling within the medical diagnosis and treatment exception. See *State* v. *Miller*, 121 Conn. App. 775, 783, 998 A.2d 170 (purpose of interview was for medical treatment even though victim knew that police officers were present during interview), cert. denied, 298 Conn. 902, 3 A.3d 72 (2010). Craft testified that she did not discuss anything with the police officer prior to her interview with the victim, and even when Craft consulted with the people standing behind the mirror during a brief break, the police officer did not ask Craft to ask any additional questions. Although many of Craft's questions did focus on determining what had

happened to the victim in her encounters with the defendant, we find the record sufficient to conclude that the victim's statements made during the forensic interview with Craft were reasonably pertinent to her receiving medical treatment and diagnosis.

Accordingly, we conclude that the court properly determined that the victim's statements made during the forensic interview fell within the medical diagnosis and treatment exception to the hearsay rule. The court did not abuse its discretion in admitting the video recording of the forensic interview into evidence.

II

The defendant's second claim on appeal is that the court improperly allowed Craft to render an expert opinion that appeared to be based on the facts of the case. Specifically, he argues that three statements Craft made during her testimony were admitted in violation of *State* v. *Favoccia*, 306 Conn. 770, 51 A.3d 1002 (2012), in which our Supreme Court concluded that concerns about indirect vouching for the credibility of witnesses require our courts to limit expert testimony about the behavioral characteristics of child sexual assault victims to that which is stated in general or hypothetical terms. Id., 803–805. Because the defendant did not preserve this claim for appellate review, we decline to review it.[8]

"The 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. . . . Our rules of practice make it clear that when

[8] We also note that the defendant does not ask for any extraordinary method of review and that the claim is not of a constitutional nature such that review is warranted pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).

an objection to evidence is made, a succinct statement of the grounds forming the basis for the objection must be made in such form as counsel desires it to be preserved and included in the record. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of his objection, any appeal will be limited to the ground asserted. . . .

"These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Internal quotation marks omitted.) *State* v. *Francis D.*, 75 Conn. App. 1, 8, 815 A.2d 191, cert. denied, 263 Conn. 909, 819 A.2d 842 (2003); see also Practice Book § 60-5 (appellate courts not bound to consider claim of error unless it was distinctly raised at trial or arose subsequent to trial).

We briefly rehearse additional facts relevant to this claim. On day three of the trial, the prosecutor asked Craft if it was normal for a child that is sexually abused to "tell someone what happened right after the incident." After Craft responded, "No," defense counsel objected to the question itself and to the line of questioning in general. Outside the jury's presence, defense counsel questioned whether Craft was "qualified to be able to give . . . verified scientific information as to what children do if they are abused." After being given the opportunity to voir dire the witness, defense counsel agreed that the witness "can talk about the issue of delayed disclosure . . . ." Defense counsel argued, however, that testimony concerning delayed disclosure

was permissible, "[s]o long as the limitation is . . . that the fact that there was a delayed disclosure is not corroborative or any proof that anything occurred." After hearing the prosecutor's assurances that this type of question would not be asked, the court responded to defense counsel's concerns by noting: "I don't think that question is going to be asked. If that question is asked, I know how to answer that—I know how to rule on that." The court asked defense counsel if it addressed his concerns and if the issue had been resolved. Defense counsel responded that "the court's ruled, and we'll move forward." The court responded: "Okay. I just—whether or not you agree with my ruling is fine. I just want to make sure I covered what you raised." Defense counsel responded, "You have."

Shortly after the jury reentered the courtroom and the prosecutor continued his questioning, defense counsel objected to a question asked by the prosecutor. The prosecutor asked Craft: "[W]hen a child is sexually abused, do they normally tell someone what happened right after the incident happens?" Defense counsel argued that the "question assumes an abuse has occurred." In response, the court asked the prosecutor to rephrase the question, and the prosecutor did so. Soon thereafter, defense counsel objected to one of Craft's responses to a question. This time, he argued that the testimony impermissibly related to the facts of the case. In response, the court sustained the objection and issued a sua sponte curative instruction stating that "Craft is testifying as based on her experience. You are to determine whether it applies in this case or not." After the next question was asked, defense counsel objected on the same ground but immediately withdrew the objection before the court could inquire further.

Thereafter, the prosecutor asked Craft: "What factors, based on the job that you do, affect when a child ultimately discloses sexual abuse? Are there certain

factors?" Craft provided an answer that is the subject of the present claim.[9] The defendant argues that the testimony was inadmissible because it indirectly related the facts of this case to her testimony. The defendant, however, did not object to the question or the testimony.

The defendant asserts on appeal that he was not required to make any further objections after the statements he now challenges on appeal were made. The defendant claims that because trial counsel raised the issue of Craft's "testimony being construed as vouching for the credibility of the victim outside of the presence of the jury and because the court ruled upon that motion," Practice Book § 60-5 requires no further objection.[10]

[9] Craft responded: "So, when a child decides to disclose, we think of it as two different processes. So it's either an accidental disclosure or a purposeful disclosure. An accidental disclosure is a child tells their friend, and then their friend goes and tells the school social worker, and that school social worker then calls down the child. The child didn't intend to disclose. She was looking or she was talking with a friend about it. *A purposeful disclosure is when the child's ready. They go and they talk to their mom. They go and talk to the doctor.* They make that actual disclosure.

"When a child is ready to disclose their alleged abuse certain factors come into play, such as . . . they don't want the abuse to continue. They found the power within themselves to try to stop it. They are afraid that *the abuse may happen to their younger siblings* or to somebody else they love and care about. Sometimes . . . if the person's in a caretaking role and they try to discipline the child, the child will then say, really, you're going to discipline me when you've been doing x, y and z. So it all depends on what . . . is going on for them at the time. A lot of times children disclose *when they've been removed from the perpetrator for a while* so they know that they feel safe. It's really dependent on, on what's going on for the child at the time." (Emphasis added.) We have emphasized those portions of Craft's testimony that the defendant challenges on appeal.

[10] Practice Book § 60-5 provides in relevant part: "In jury trials, where there is a motion, argument, or offer of proof or evidence in the absence of the jury, whether during trial or before, pertaining to an issue that later arises in the presence of the jury, and counsel has fully complied with the requirements for preserving any objection or exception to the judge's adverse ruling thereon in the absence of the jury, the matter shall be deemed to be distinctly raised at the trial for purposes of this rule without a further objection or exception provided that the grounds for such objection or

We disagree with the defendant's reliance on Practice Book § 60-5. Contrary to the defendant's argument, trial counsel's initial objection in the absence of the jury did not sufficiently, or at all, raise the issue that Craft's testimony was indirectly vouching for the credibility of the victim. Instead, defense counsel simply emphasized to the court that he wanted it to "be made clear that in no way [does] the fact that the disclosure is delayed in any way corroborate that abuse actually occurred." At no point during the court's colloquy with defense counsel did he invoke *Favoccia* as his authority for his objection or specifically apprise the court that Craft's use of hypotheticals impermissibly suggested that she was indirectly vouching for the victim's credibility. Because defense counsel's initial objection did not adequately apprise the court of the ground on which the defendant now relies, the defendant was not relieved of his duty to make further objections if he thought Craft impermissibly related her testimony to the facts of the case. See Practice Book § 60-5.

As reflected in our discussion of this claim, shortly after the jury came back into the courtroom following defense counsel's initial objection, defense counsel objected to one of the prosecutor's questions on the ground that the "question assumes an abuse has occurred." As the court indicated it would do, it "responded accordingly" by asking the prosecutor to rephrase the question. The prosecutor complied. After a few additional questions were asked, defense counsel objected once again. This time, however, the objection was not on the ground that the question assumed an abuse occurred; rather, it was the first time defense counsel objected to testimony on the ground that Craft was relating her testimony to the facts of the case. The court addressed the objection by providing a curative

exception, and the ruling thereon as previously articulated, remain the same. . . ."

instruction. Shortly thereafter, defense counsel objected once again to an answer given by Craft but immediately withdrew his objection. Although other objections were made, they were made in response to statements not challenged in this appeal.

As the state points out, the failure to object to the three statements the defendant now challenges on appeal presumably shows that defense counsel did not believe that Craft's statements were improper, or that he was satisfied with the curative instruction the court previously gave. There is no obligation for the court, which is not an advocate for either party but a neutral arbiter over the trial, to raise objections on the defendant's behalf. Because the defendant failed to put the court on notice of the potential error "while there [was] still time for the court to act," we conclude that the defendant failed to preserve his claim. (Internal quotation marks omitted.) *State* v. *Francis D.*, supra, 75 Conn. App. 8. Accordingly, we decline to afford it review.

The judgment is affirmed.

In this opinion the other judges concurred.

COURTNEY GREEN *v.* COMMISSIONER OF CORRECTION
(AC 39313)

Alvord, Prescott and Beach, Js.

Syllabus

The petitioner, who had been convicted on a plea of guilty of three counts of assault in the first degree, sought a writ of habeas corpus, alleging that he was entitled to certain credits toward his time served under an administrative directive implemented by the respondent, the Commissioner of Correction, pursuant to the commissioner's authority under the statute (§ 18-98e) pertaining to risk reduction earned credits. Specifically, he alleged that, under an agreement he had signed with staff of the Department of Correction, he was eligible to be awarded credit at the rate of five days per month, and that although the commissioner

changed the way risk reduction credits are awarded pursuant to a new directive, the petitioner should have been "grandfathered" in to receive credit of five days per month. Pursuant to the rule of practice (§ 23-24) that provides that the habeas court shall issue the writ unless, inter alia, it appears that the court lacks jurisdiction, the habeas court disposed of the petition sua sponte and without a hearing. Thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The petitioner's claim that the habeas court improperly dismissed his habeas petition without holding a hearing was unavailing: the petitioner provided no authority supporting his claim that § 23-24 requires the habeas court to hold a hearing before declining to issue a writ, and § 23-24 does not require the habeas court to hold a hearing prior to concluding that it lacks jurisdiction over the writ, as that rule was intended to permit a habeas court to conduct a preliminary review of a petition prior to further adjudication of the writ to weed out those petitions the adjudication of which would be a waste of precious judicial resources either because the court lacked jurisdiction over it, the petition was wholly frivolous, or it sought relief that the court simply could not grant, and the text of § 23-24 plainly contemplates that the habeas court notify the petitioner of its actions after it reaches a decision on whether the case should proceed further and not before taking such actions; moreover, because requiring the habeas court to appoint counsel for a petitioner and hold a hearing over this class of petitions would constitute a considerable drain of state resources and frustrate the habeas court's ability to focus on those petitions that are worthy of adjudication, this court declined to graft a hearing requirement onto § 23-24 in the absence of language mandating such a procedure.

2. The habeas court properly dismissed the habeas petition for lack of jurisdiction: although the petitioner alleged that he was being deprived of risk reduction credits to which he was entitled, he did not have a constitutionally protected liberty interest in risk reduction credits, as § 18-98e confers broad discretion on the commissioner to award such credits, and there was no basis from which the habeas court could have concluded that the commissioner altered the discretionary nature of the risk reduction credit program by entering into a binding contract with the petitioner, who merely alleged a legal conclusion regarding the existence of a binding contract that was unsupported by any facts alleged in the petition and failed to append the contract to his petition or to cite any language from it demonstrating that he was entitled to receive five days of risk reduction credit per month; moreover, nothing alleged in the petition supported the petitioner's assertion, made for the first time on appeal, that the contract was his offender accountability plan, and even if the petitioner had properly alleged a breach of contract claim against the commissioner, it would not have been sufficient to invoke the habeas court's jurisdiction because the petitioner, at best,

had a contractual interest in such credits rather than a constitutionally protected liberty interest, and for the commissioner to have the statutory authority to enter into an agreement with an inmate that strips away the commissioner's discretion in the future administration of risk reduction credits would contravene the plain language of the statute and the legislature's clear intent that the program be discretionary in nature.

Argued April 24—officially released August 7, 2018

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver*, *J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Nicholas A. Marolda, assigned counsel, with whom were *Temmy Ann Miller*, assigned counsel, and, on the brief, *Owen R. Firestone*, assigned counsel, for the appellant (petitioner).

Steven R. Strom, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Courtney Green, appeals from the judgment of the habeas court disposing of his petition for a writ of habeas corpus for lack of jurisdiction. On appeal, the petitioner claims that the court improperly disposed of his petition because it (1) incorrectly concluded that it lacked jurisdiction and (2) failed to conduct a hearing on that issue prior to disposing of the petition. We disagree with the claims of the petitioner and, accordingly, affirm the judgment.

We begin by setting forth the relevant procedural history. The petitioner currently is serving a sentence of twenty years of incarceration after pleading guilty on April 21, 2009, to three counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5).

On May 11, 2016, the petitioner, representing himself, filed a petition for a writ of habeas corpus.

Therein, the petitioner alleged that on or about August 28, 2011, the respondent, the Commissioner of Correction (commissioner), implemented[1] the Risk Reduction Earned Credit (RREC) program pursuant to his authority under General Statutes § 18-98e.[2] He stated that the "RREC allowed . . . [him] to be awarded time at the discretion of the commissioner . . . at the rate of five days per month for participation in programs or activities [and] good conduct and obedience to departmental rules . . . ." Although the petitioner admitted in his petition that the risk reduction credits were awarded at the commissioner's discretion, he also alleged that he signed an "agreement with department staff" that entitles him to receive five risk reduction credits per month.

The petitioner further alleged that on February 1, 2016, the commissioner sent a memo to inmates informing them that he was changing the way he awarded risk reduction credits pursuant to a new policy outlined in Department of Correction, Administrative Directive 4.2A. The directive provided that, thereafter, the amount of credits an inmate would be eligible to receive each month would be based on the inmate's risk classification—a level four inmate could earn up to three days of credit per month, a level two or three inmate could earn up to four days, and a level one inmate could earn up to five days. Moreover, a level four

[1] The petitioner did not indicate in his petition the manner in which the RREC program was implemented. He appears to allege that it was implemented through Administrative Directive 4.2 (A) (3), although he did not attach any such directive either to his petition or brief on appeal.

[2] Although § 18-98e was the subject of technical amendments in 2018; see Public Acts 2018, No. 18-155, § 3; those amendments have no bearing on the merits of this appeal. For purposes of clarity, we refer to the current revision of the statute.

inmate could apply to have reinstated the additional two credits per month that he was earning previously.

The petitioner further alleged that he continues to be in compliance with the aforementioned "agreement" and, despite the change in policy, should therefore "be grandfathered [in] to receive five days RREC per month, pursuant to . . . § 18-98e." He thus requested the habeas court's intervention and that it "reinstate the RREC of five days per month that [he] signed a contract for . . . ."

On May 19, 2016, the habeas court, *Oliver*, *J.*, disposed of the petition sua sponte pursuant to Practice Book § 23-24 (a) (1)[3] because the court lacked subject

[3] Practice Book § 23-24 is titled "Preliminary Consideration of Judicial Authority" and provides in subsection (a) that the habeas court "shall promptly review any petition for a writ of habeas corpus to determine whether the writ shall issue. The judicial authority shall issue the writ unless it appears that: (1) the court lacks jurisdiction; (2) the petition is wholly frivolous on its face; or (3) the relief sought is not available." If the court declines to issue the writ, it must notify the petitioner. Practice Book § 23-24 (b).

Although the habeas court stated in its brief order that it was dismissing the petition, it explicitly relied upon Practice Book § 23-24 in doing so. Because that provision authorizes the habeas court to decline to issue the writ for lack of jurisdiction, we construe the court's disposition of the petition to be a decision to decline to "issue the writ." The meaning of that phrase can be ascertained by reference to historical practices regarding the service and issuance of writs of habeas corpus in our state. At one point in time, a habeas petition was filed with the court prior to it being served on the commissioner. General Statutes (1918 Rev.) § 6033. The court would then determine whether to issue the writ. General Statutes (1918 Rev.) § 6033. It was only if the court decided to issue the writ that the petition would be served on the commissioner by an officer of the court and a subsequent habeas trial be held. General Statutes (1918 Rev.) § 6033; see also *Adamsen* v. *Adamsen*, 151 Conn. 172, 176, 195 A.2d 418 (1963) ("Our statute requires that the application for a writ of habeas corpus shall be verified by the affidavit of the applicant for the writ alleging that he verily believes the person on whose account such writ is sought is illegally confined or deprived of his liberty. . . . The only purpose served by the application is to secure the issuance of the writ in the discretion of the court. The issues on which any subsequent trial is held are framed by the return and the pleadings subsequent thereto." [Citation omitted; internal quotation marks omitted.]). Put differently, "[t]he issuance of the writ did not determine the

matter jurisdiction over it, citing *Petaway* v. *Commissioner of Correction*, 160 Conn. App. 727, 125 A.3d 1053 (2015), cert. dismissed, 324 Conn. 912, 153 A.3d 1288 (2017). The court did not hold a hearing prior to reaching this determination.

The petitioner subsequently filed a petition for certification to appeal from the court's dismissal of his petition on May 31, 2016. On June 1, 2016, the court granted the petitioner's certification to appeal, as well as the petitioner's application for appointment of counsel. The petitioner timely filed the present appeal on June 15, 2016.

I

We first address the petitioner's claim that the habeas court improperly dismissed his petition because it failed to first hold a hearing on the issue of whether the court had jurisdiction.[4] The petitioner argues that, pursuant to this court's holding in *Boyd* v. *Commissioner of Correction*, 157 Conn. App. 122, 115 A.3d 1123 (2015), the habeas court cannot dismiss a petition sua sponte without fair notice to the petitioner and a hearing. We disagree.

In *Boyd*, this court concluded that it is an abuse of discretion for a habeas court to dismiss a petition sua sponte and without a hearing pursuant to its authority under Practice Book § 23-29 unless the petition "alleges the same grounds for relief sought in a previously denied petition, and fails to allege new facts or evidence . . . ." Id., 125. In the present case, however, unlike in

validity of the [petition] . . . . On the contrary, it served only to bring the parties before the court in order that the issue of the alleged illegal restraint might be solved." *Adamsen* v. *Adamsen*, supra, 177.

[4] For clarity and ease of analysis, we address the petitioner's claims in a different order than they are set forth in his brief. See *Lebron* v. *Commissioner of Correction*, 178 Conn. App. 299, 311 n.8, 175 A.3d 46 (2017), cert. denied, 328 Conn. 913, 179 A.3d 779 (2018).

Boyd, the court concluded that it lacked jurisdiction over the petition pursuant to its authority under Practice Book § 23-24,[5] rather than Practice Book § 23-29. Thus, we must determine whether Practice Book § 23-24 requires the court to hold a hearing prior to concluding that it lacks jurisdiction over the habeas petition.

This issue presents a question of law subject to plenary review. See *Menard* v. *Willimantic Waste Paper Co.*, 163 Conn. App. 362, 367, 134 A.3d 1248, cert. denied, 321 Conn. 907, 135 A.3d 279 (2016). In determining whether the court was required to hold a hearing, we first consider the language of the provision itself. See *Rivers* v. *New Britain*, 288 Conn. 1, 10–11, 950 A.2d 1247 (2008). Practice Book § 23-24 (a) states: "The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that: (1) the court lacks jurisdiction; (2) the petition is wholly frivolous on its face; or (3) the relief sought is not available." Practice Book § 23-24 (b) provides: "The judicial authority shall notify the petitioner if it declines to issue the writ pursuant to this rule." Thus, there is nothing in the language of Practice Book § 23-24 that requires the court to hold a hearing before disposing of the petition for lack of jurisdiction.

In our view, Practice Book § 23-24 is intended to permit a habeas court to conduct a preliminary review of a petition prior to further adjudication of the writ to weed out those petitions the adjudication of which would be a waste of precious judicial resources either

[5] The petitioner argues that Practice Book § 23-24 does not allow the habeas court to enter a judgment of dismissal. It is true that § 23-24 authorizes the court to "decline to issue the writ," rather than dismiss the petition, if it concludes, among other things, that it lacks jurisdiction. The court's decision to refrain from issuing the writ, however, is the functional equivalent of a dismissal of the petition. Thus, we disagree with the petitioner that the court's action was improper. See footnote 3 of this opinion.

because the court lacks jurisdiction over it, the petition is wholly frivolous, or it seeks relief that the court simply cannot grant. We reach this conclusion for two reasons. First, the language of the rule plainly contemplates that the habeas court notify the petitioner of its actions *after* it reaches a decision on whether the case should proceed further. See Practice Book § 23-24 (b). If the rule were intended to impose a hearing requirement, the drafters would undoubtedly have inserted language requiring that the petitioner be notified before the court took such actions.

Second, requiring the habeas court to appoint counsel for a petitioner and hold a hearing over this class of petitions would constitute a considerable drain of state resources and frustrate the habeas court's ability to focus on those petitions that are worthy of adjudication. It is indisputable that the high volume of habeas petitions has been an ongoing source of concern for policymakers and has prompted legislative reforms in recent years. See Public Acts 2012, No. 12-115; 55 H.R. Proc., Pt. 5, 2012 Sess., pp. 1587–91, remarks of Representative Gerald M. Fox III; see also 55 H.R. Proc., supra, p. 1591 ("one of the things that I always thought of when I heard about . . . [habeas corpus reform] is that all parties felt that there was a way to do this better and that there's a way to make sure that we can focus on those claims . . . that do have merit, that are potentially legitimate and weed out those claims that seem to be bogging down the process and using up a lot of resources where the end result, in all likelihood, would be nothing would come of it"). We therefore decline to graft a hearing requirement onto Practice Book § 23-24 in the absence of language mandating such a procedure.[6]

[6] Although we conclude that the habeas court was not required to hold a hearing before disposing of the petition in the present case, we urge the habeas court to exercise this authority sparingly and limit its use to those instances in which it is plain and obvious that the writ should not issue under Practice Book § 23-24.

The petitioner has presented no authority on appeal, from either this court or our Supreme Court, interpreting Practice Book § 23-24 as requiring the habeas court to hold a hearing before declining to issue the writ—nor has our review revealed any such authority. In light of the lack of authority to the contrary and the apparent policy reason underlying Practice Book § 23-24, and because the language of Practice Book § 23-24 does not explicitly require the court to hold a hearing before exercising its authority pursuant to that provision, we conclude that the petitioner was not entitled to a hearing in the present case.

II

Next, we address the petitioner's claim that the habeas court improperly dismissed his petition because it incorrectly concluded that it did not have jurisdiction. The petitioner argues that although the award of risk reduction credits ordinarily does not implicate an inmate's liberty interest because of the discretionary nature of the RREC program, he has a contractual right to such credits in this case that vitiates the discretionary nature of the program. He further argues that, because the commissioner's breach of this contract "bears directly on the duration of his sentence," he has invoked the jurisdiction of the habeas court. For the reasons set forth herein, we conclude that the court properly disposed of the petition because it lacked jurisdiction over it.

We begin with the applicable standard of review and relevant legal principles. "Our Supreme Court has long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court

to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Pentland* v. *Commissioner of Correction*, 176 Conn. App. 779, 784–85, 169 A.3d 851, cert. denied, 327 Conn. 978, 174 A.3d 800 (2017).

With respect to the habeas court's jurisdiction, "[t]he scope of relief available through a petition for habeas corpus is limited. In order to invoke the trial court's subject matter jurisdiction in a habeas action, a petitioner must allege that he is illegally confined or has been deprived of his liberty." (Internal quotation marks omitted.) *Joyce* v. *Commissioner of Correction*, 129 Conn. App. 37, 41, 19 A.3d 204 (2011). In other words, "a petitioner must allege an interest sufficient to give rise to habeas relief." (Internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 368, 163 A.3d 597 (2017). "In order to . . . qualify as a constitutionally protected liberty [interest] . . . the interest must be one that is assured either by statute, judicial decree, or regulation." (Emphasis omitted; internal quotation marks omitted.) *Fuller* v. *Commissioner of Correction*, 144 Conn. App. 375, 378, 71 A.3d 689, cert. denied, 310 Conn. 946, 80 A.3d 907 (2013).

We turn now to the petitioner's claim. At the outset, we note that because this appeal arises from the habeas court's ruling declining to issue the writ pursuant to Practice Book § 23-24, which is akin to dismissal of the petition "on the basis that the court lacked jurisdiction, we take the facts to be those alleged in the petition, including those facts necessarily implied from the allegations, construing them in favor of the petitioner for

purposes of deciding whether the court has subject matter jurisdiction." (Internal quotation marks omitted.) *Vitale* v. *Commissioner of Correction*, 178 Conn. App. 844, 850, 178 A.3d 418 (2017), cert. denied, 328 Conn. 923, 181 A.3d 566 (2018); see also *Pentland* v. *Commissioner of Correction*, supra, 176 Conn. App. 782 ("[i]n deciding whether to sua sponte dismiss the petitioner's habeas petition, the court was required . . . to take the facts to be those alleged in the petition").

The petitioner alleged that he is being deprived of risk reduction credits to which he is entitled, and thereby is being forced to serve a sentence of longer duration. In order to determine whether the court had jurisdiction, therefore, we must decide whether the petitioner has a constitutionally protected liberty interest in the risk reduction credits.

In his petition, the petitioner identified § 18-98e as the source of the commissioner's authority to implement the RREC program. Section 18-98e (a) states that "any person sentenced to a term of imprisonment for a crime committed on or after October 1, 1994 . . . *may be eligible* to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, *at the discretion of the Commissioner of Correction* . . . ." (Emphasis added.) Pursuant to § 18-98e, then, an inmate is not guaranteed a certain amount of risk reduction credits per month—or, in fact, any credits at all. Rather, the statute provides only that an inmate *may* be eligible to receive credits if the commissioner so chooses.

The fact that the commissioner is vested with such broad discretion in implementing the RREC program is significant. Our appellate courts have concluded, consistently, that an inmate does not have a constitutionally protected liberty interest in certain benefits—such as good time credits, risk reduction credits, and early

parole consideration—if the statutory scheme pursuant to which the commissioner is authorized to award those benefits is discretionary in nature.

For example, in *Abed* v. *Commissioner of Correction*, 43 Conn. App. 176, 682 A.2d 558, cert. denied, 239 Conn. 937, 684 A.2d 707 (1996), the petitioner filed a habeas petition challenging "the prospective denial of statutory good time credits." Id., 178. Prior to the filing of the petition, the commissioner administered a policy pursuant to which an inmate who was classified as a "safety threat" was precluded from earning good time credits. Id. The commissioner sought dismissal of the petition on the ground that the court lacked jurisdiction because the petitioner failed to raise a legally cognizable claim. Id., 178–79. The habeas court determined that the petitioner "had a justifiable expectation of earning good time credits based on the plain reading of" General Statutes § 18-7a (c), but disposed of the petition on other grounds. (Internal quotation marks omitted.) Id., 179.

On appeal in *Abed*, this court considered whether "the petitioner ha[d] alleged a liberty interest in good time credits he ha[d] not yet earned so as to raise a legally cognizable claim in his petition." Id., 180. This court reasoned that the petitioner's claim that the habeas court had jurisdiction to consider the merits of his petition "succeed[ed] only if the awarding of good time in Connecticut is mandatory." Id. The plain language of § 18-7a (c), however, provided that "the commissioner *may* award good time credits *at his discretion*." (Emphases altered.) Id. We therefore concluded that "because § 18-7a (c) does not require the commissioner to award good time credits, that section cannot create a liberty interest on which the petitioner may predicate habeas corpus relief." Id., 180–81; see also *Beasley* v. *Commissioner of Correction*, 50 Conn. App. 421, 434, 435, 718 A.2d 487 (1998) (directive that

precluded inmate in administrative segregation from earning statutory good time credits was proper use of commissioner's authority; § 18-7a [c] allowed commissioner to award credits at his discretion, so "[t]o conclude otherwise would render the discretionary nature of § 18-7a [c] superfluous"), aff'd, 249 Conn. 499, 733 A.2d 822 (1999).

Our Supreme Court considered a similar claim in *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 357. In that case, the petitioner filed a petition for a writ of habeas corpus challenging a statutory amendment to General Statutes § 54-125a that "eliminated the language [of the earlier version of that statute] that permitted [an inmate's] parole eligibility date to be advanced by the application of any earned risk reduction credit." Id., 365. The habeas court dismissed the petition, finding that it lacked subject matter jurisdiction. Id., 366. On appeal, our Supreme Court concluded that the basis for the court's dismissal was improper but that it nevertheless lacked jurisdiction to consider the merits of the petition for other reasons. Id., 368, 374.

Specifically, our Supreme Court determined in *Perez* that the habeas court lacked jurisdiction because the petitioner did not have a liberty interest in early parole eligibility or risk reduction credits. Id., 370–73. It noted that "parole eligibility under § 54-125a does not constitute a cognizable liberty interest sufficient to invoke habeas jurisdiction. . . . [T]he decision to grant parole is *entirely within the discretion* of the [Board of Pardons and Paroles]." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 371. It further noted that, "[w]ith respect to the risk reduction credit previously granted to the petitioner, he overlooks the fact that such credit is not vested in him because it could be rescinded by the [commissioner] at any time

in the [commissioner's] discretion for good cause during the petitioner's period of incarceration. The petitioner, in his brief, disputes that the award or revocation of risk reduction credit is wholly discretionary . . . . The petitioner's position, however, is manifestly contradicted by the plain language of § 18-98e (a) . . . . Although the legislature has provided guidance to the [commissioner] as to how to exercise his discretion, the [commissioner] still has broad discretion to award or revoke risk reduction credit. As such, the statute does not support an expectation that an inmate will automatically earn risk reduction credit or will necessarily retain such credit once it has been awarded." (Internal quotation marks omitted.) Id., 372; see also *Petaway* v. *Commissioner of Correction*, supra, 160 Conn. App. 734 (petitioner had no liberty interest in early parole eligibility because statute gave commissioner discretion in granting inmates parole).

Thus, as precedent from this court and our Supreme Court makes clear, the petitioner in the present case does not have a liberty interest in risk reduction credits because, as the petitioner himself admitted in his petition, the commissioner has broad discretion to implement the RREC program. The petitioner fails on appeal to set forth any persuasive authority that rebuts this conclusion.[7] Instead, his sole argument is that the commissioner somehow altered the discretionary nature of

[7] The petitioner relies on *Santobello* v. *New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 427 (1971), for the proposition that the state must honor a contract that it enters into with an inmate. We disagree that *Santobello* compels such a determination in the present case. The United States Supreme Court in *Santobello* considered a prosecutor's obligation to honor a plea agreement with a criminal defendant, and the decision reached by the court depended largely on the unique responsibilities of a prosecutor and the fairness considerations relevant to that stage of a criminal proceeding. Id., 257–61. The present case, by contrast, presents a completely different procedural posture. Moreover, neither concern considered by the court in *Santobello* dictates our resolution of the petitioner's claim. Thus, *Santobello* is inapposite.

the RREC program by entering into a binding contract with the petitioner, pursuant to which he is entitled to receive five days of risk reduction credit per month. We disagree.

To begin, we note that "[i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and, when it does not interfere with the rights of the other parties, to construe the rules of practice liberally in favor of the [self-represented] party." (Internal quotation marks omitted.) *Vitale* v. *Commissioner of Correction*, supra, 178 Conn. App. 850. The petition for a writ of habeas corpus, however, is still "essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint. . . . [T]he habeas court . . . does not have the discretion to look beyond the pleadings . . . ." (Internal quotation marks omitted.) Id., 851. Moreover, although the habeas court must accept all well pleaded facts as true, it "need not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings." (Internal quotation marks omitted.) *Coleman* v. *Commissioner of Correction*, 137 Conn. App. 51, 56, 46 A.3d 1050 (2012).

The petitioner's assertion that the agreement he was referring to in his petition constitutes a binding contract is a legal conclusion unsupported by any facts alleged in the petition. The petitioner failed to identify the alleged contract, attach it to the petition for the court's consideration, or cite any language from it that would demonstrate that he is entitled to receive five days of risk reduction credit per month. Thus, there was no basis from which the court could have concluded that the agreement was a binding contract.

The petitioner argues for the first time on appeal that the agreement he referenced in his petition is his Offender Accountability Plan (OAP) and that his OAP is a contract.[8] Again, nothing in the petition supports this assertion—the petitioner never once referenced his OAP or attached it to the petition for the court's consideration. Likewise, he has failed to set forth any authority on appeal that would support the conclusion that an OAP is a contract.

Moreover, even if the petitioner had properly alleged a breach of contract claim against the commissioner, it would not have been enough to invoke the habeas court's jurisdiction because the petitioner, at best, has a contractual interest in such credits rather than a constitutionally protected liberty interest. See *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 372 (The commissioner "has broad discretion to award or revoke risk reduction credit. As such, the statute does not support an expectation that an inmate will automatically earn risk reduction credit or will necessarily retain such credit once it has been awarded.").

Finally, we doubt that the commissioner has the statutory authority to enter into an agreement with an inmate that strips the commissioner of his discretion in the future administration of the RREC program. Such action would contravene the plain language of the statute and frustrate the legislature's clear intent that the

[8] The petitioner failed to include his OAP in his appendix to his appellate brief. The commissioner, however, included a blank OAP in his appendix. Our review of the blank OAP reveals that it is a form, signed by an inmate, that designates the specific programs that the inmate should participate in during his or her period of incarceration in order to avoid negatively impacting the inmate's earning of risk reduction credits, chances of obtaining supervised community release, or being granted parole. Although it notes that "[f]ailure to comply with the OAP recommendations . . . shall negatively impact your earning of Risk Reduction Earned Credit," it does not specify that the inmate will otherwise receive five days of risk reduction credit per month.

RREC program be discretionary in nature. See *Beasley* v. *Commissioner of Correction*, supra, 50 Conn. App. 435. Thus, for all the reasons stated herein, we conclude that the court properly disposed of the habeas petition for lack of jurisdiction.[9]

The judgment is affirmed.

In this opinion the other judges concurred.

THE GOODWIN ESTATE ASSOCIATION, INC. *v.* DARYL L. STARKE ET AL. (AC 40451)

Lavine, Moll and Flynn, Js.

Syllabus

The plaintiff sought to foreclose a statutory lien for unpaid common charges and assessments on a condominium unit owned by the defendant S. The trial court rendered judgment of foreclosure by sale. Thereafter, the court denied S's motions to open the judgment and to dismiss the action, and approved the sale of the property, and S appealed to this court. He claimed that the trial court improperly considered the equities and the length of time that the plaintiff had been deprived of its fees in denying his motion to dismiss. S also claimed that the trial court lacked subject matter jurisdiction because the plaintiff had not properly adopted its standard foreclosure policy, in violation of statute (§ 47-261b [b]) and the plaintiff's condominium declaration. *Held*:

1. S's claim that the trial court, in denying his motion to dismiss, improperly considered the equities and the length of time that the plaintiff had been

[9] The petitioner also argues that *Petaway* v. *Commissioner of Correction*, supra, 160 Conn. App. 727, which the court cited in its short judgment of dismissal, does not support the court's conclusion that it lacked jurisdiction. It is true that the resolution of the appeal in *Petaway* turned on the fact that the petitioner did not have a liberty interest in parole eligibility, rather than risk reduction credits. Id., 734. The court in *Petaway*, however, concluded that the reason the petitioner did not have a liberty interest is that the relevant statutory scheme gave the commissioner discretion to determine parole eligibility. Id. Likewise, § 18-98e gives the commissioner discretion to award risk reduction credits, which dictates that the petitioner in the present case does not have a liberty interest in the credits. *Petaway* therefore supports the conclusion that the court lacked jurisdiction to consider the merits of the petition.

deprived of its fees was unavailing, S having abandoned the claim by failing to brief it adequately.

2. S could not prevail on his claim that the trial court committed plain error in denying his motion to dismiss, which was based on his claim that he had not received notice from the plaintiff of its adopted standard foreclosure policy; the plaintiff's allegations and the record were enough to imply that a properly adopted standard foreclosure policy existed and that S received notice of the policy after adoption, as S previously acknowledged that he had received the policy, and he did not challenge the sufficiency of the affidavit of the plaintiff's property manager, which stated that the policy had been mailed to S.

Argued May 14—officially released August 7, 2018

Procedural History

Action to foreclose a statutory lien for unpaid common charges and assessments against a certain condominium unit owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Robaina*, *J.*, granted the plaintiff's motion for summary judgment as to liability; thereafter, the court, *Dubay*, *J.*, rendered judgment of foreclosure by sale; subsequently, the court, *Wahla*, *J.*, denied the named defendant's motions to open the judgment and to dismiss; thereafter, the court, *Wahla*, *J.*, granted the committee's motion for approval of the sale, deed, report, fees and expenses, and the named defendant appealed to this court; subsequently, the court, *Wahla*, *J.*, issued an articulation of its decisions. *Affirmed.*

Keith Yagaloff, for the appellant (named defendant).

John J. Bowser, for the appellee (plaintiff).

Opinion

FLYNN, J. The defendant Daryl L. Starke[1] appeals from a condominium foreclosure judgment in favor of

[1] The complaint listed several junior lienholders as defendants. Because this appeal concerns only claims made by Starke, all references to the defendant are to him alone.

the plaintiff, the Goodwin Estate Association, Inc., arising from the defendant's failure to pay common charges and assessments levied on his condominium unit. The defendant's sole reviewable claim on appeal stems from the trial court's denial of his motion to dismiss the action for lack of subject matter jurisdiction. The defendant claims that the trial court erred in denying his motion to dismiss because (1) the court improperly considered the equities and length of proceedings when deciding the motion, and (2) the plaintiff did not properly adopt its standard foreclosure policy in violation of statute and the plaintiff's declaration, thereby depriving the trial court of jurisdiction. We affirm the trial court's judgment.

This appeal has been preceded by a lengthy procedural history, which began with the commencement of this foreclosure action in 2014, approximately four years ago. The foreclosure action arises out of a $16,130.27 debt owed to the plaintiff condominium association for common charges and assessments. The foreclosure has been the subject of two motions to dismiss, two defendant's motions for reconsideration, three motions for articulation, four objections to summary judgment, and two appeals to this court. Against this backdrop, we lay out the following undisputed facts. The defendant purchased 84 Goodwin Circle, Hartford, a condominium within the Goodwin Estate, in 2009. Since August, 2014, the defendant has not paid his common charges and assessments. On October 20, 2014, the plaintiff initiated this foreclosure action against the defendant. On September 29, 2015, the plaintiff moved for summary judgment. The court granted the motion. On October 17, 2016, a foreclosure by sale was ordered for January 14, 2017. At that sale, Huntington National Bank, a junior lienholder and named defendant, was the winning bidder. The defendant moved to open the judgment and to dismiss the action on January 27 and

March 22, 2017, respectively. After a hearing, the court denied both motions and approved the committee sale, all on April 26, 2017. This timely appeal from the denial of the motion to open, the denial of the motion to dismiss, and the approval of the committee sale followed.[2] Thereafter, the defendant filed a motion for articulation of the orders denying both motions. An articulation dated November 13, 2017, followed. Additional facts will be set forth as necessary.

"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 alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting grant of the motion to dismiss will be de novo. . . .

"When a . . . court decides a jurisdictional question raised by a . . . motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . [I]n determining whether a court has subject matter jurisdiction, every

[2] The defendant filed his appeal within twenty days after the trial court's April 27, 2017 decisions denying the defendant's motions and approving the committee sale. Although the defendant's failure to appeal before the sale date stripped him of his right of redemption, his appeal is not moot because he is entitled to appeal from the denial of the motion to open and the approval of the committee sale; see *First Connecticut Capital, LLC* v. *Homes of Westport, LLC*, 112 Conn. App. 750, 755 n.4, 755–60, 966 A.2d 239 (2009); and, if successful on appeal, in showing that the court abused its discretion in denying his motion to open, then his interest in the property liened by the plaintiff would not be foreclosed.

presumption favoring jurisdiction should be indulged." (Citation omitted; internal quotation marks omitted.) *Avoletta* v. *State*, 152 Conn. App. 177, 182–83, 98 A.3d 839, cert. denied, 314 Conn. 944, 102 A.3d 1116 (2014).

I

We first consider the defendant's claim that the trial court erred in denying his motion to dismiss because it improperly considered the equities and length of proceedings when deciding the motion. The court's November 13, 2017 articulation dealt, in one memorandum, with both the defendant's motion to open and his motion to dismiss. A motion to open might have equitable aspects. See *Flater* v. *Grace*, 291 Conn. 410, 417–18, 969 A.2d 157 (2009); *GMAC Mortgage, LLC* v. *Ford*, 178 Conn. App. 287, 295, 175 A.3d 582 (2017); *Nelson* v. *Charlesworth*, 82 Conn. App. 710, 712, 846 A.2d 923 (2004); *Connecticut Savings Bank* v. *Obenauf*, 59 Conn. App. 351, 352, 758 A.2d 363 (2000). The defendant focuses, however, solely on the motion to dismiss, expressing his argument in his principal brief as follows: "The trial court erred in deciding the motion to dismiss when it considered the equities involved; and the length of time the [plaintiff] had been deprived of its fees; the defendant's refusal to pay the said fees/dues. . . . By considering . . . factors [other than whether the plaintiff properly adopted its standard foreclosure policy], such as the equities of the parties and the length of time the plaintiff had been deprived of its fees, the trial court erred." After the plaintiff noted in its brief that the trial court's articulation pertained to both the defendant's motion to dismiss and his motion to open, the defendant argued in reply that, because the trial court considered the two motions to be duplicative, the trial court necessarily considered equitable factors in deciding the motion to dismiss. Although ordinarily "we do not review claims raised for the first time in a reply brief"; *United Amusements & Vending Co.* v. *Sabia*, 179 Conn. App. 555, 560 n.1, 180 A.3d 630 (2018); the

defendant's reply brief added no new analysis on the matter.

The defendant points to no authority for his argument in either his principal or reply briefs. Although he acknowledges that the trial court's articulation dealt with both his motion to dismiss and his motion to open, he ignores the applicability of equitable principles that may be considered in deciding a motion to open. The defendant, however, implicitly acknowledged the propriety of applying equity to his motion to open, because in his memorandum of law in support of that motion, *he asked the court to consider equitable principles*. He cannot now seriously claim injury on the basis of the court's consideration that he so openly invited. The defendant's briefs do not provide us with any analysis of this argument other than his conclusory statement that the trial court erred. We therefore conclude that this argument is inadequately briefed and deem it abandoned. See *Gay* v. *Safeco Ins. Co. of America*, 141 Conn. App. 263, 269 n.3, 60 A.3d 1046 (2013).

II

The defendant also claims that the court erred in denying his motion to dismiss because the plaintiff did not adopt properly its standard foreclosure policy when it failed to include a copy of the new or amended rule with its notice to the unit owners. The defendant claims that the trial court's failure to grant his motion to dismiss on this basis is plain error. The defendant invokes the plain error doctrine because, although he raised issues concerning the adoption of the standard foreclosure policy in his motion to dismiss, he did not argue before the trial court that the affidavit of Peg Routhier, the plaintiff's property manager, was insufficient.

The following additional facts are relevant. In its complaint, the plaintiff alleged that the defendant was the owner of the condominium unit in question and had not paid his common charges and assessments, along with interest, costs and attorney's fees. The plaintiff

also alleged that its declaration was recorded and filed on the Hartford land records, and that the declaration provided the legal basis for those common charges and assessments. Additionally, the plaintiff alleged that it made a written request for payment, but that the defendant refused, and that the plaintiff had perfected a statutory lien against the subject property. The plaintiff also claimed to have filed a notice of pendency of the underlying action with the Hartford town clerk's office.

"[An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice. . . . [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . Put another way, plain error review is reserved for only the most egregious errors. When an error of such a magnitude exists, it necessitates reversal." (Citations omitted; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812–14, 155 A.3d 209 (2017).

Considering the defendant's claim against the standard for plain error, we conclude that there was not clear and harmful error. The defendant cites to *Neighborhood Assn., Inc.* v. *Limberger*, 321 Conn. 29, 45, 136 A.3d 581 (2016), for the proposition that notice must be given of a standard foreclosure policy for a court to assert jurisdiction. The defendant's argument misses the mark. In *Limberger*, the flaw leading to reversal was that that common interest community did not actually adopt a standard foreclosure policy in accordance with rule notice and comment requirements. Id.

Here, however, the defendant's sole argument in his motion to dismiss rested on his claim that he did not

receive notice of the adopted standard foreclosure policy. In its articulation on its denial of the defendant's motion to open and motion to dismiss, the trial court stated "that it is particularly noteworthy that the defendant has stated virtually in every motion and pleading before this court for the last approximately three years that he had not received the notice in the mail. The court has not found in his favor." The plaintiff, in its opposition to the motion to open, supported its argument that notice was proper with the affidavit of Peg Routhier, the property manager at the time the action was commenced, who averred that a copy of the standard foreclosure policy was mailed to the defendant. The defendant claims that this affidavit was deficient on its face to meet the notice requirements of General Statutes § 47-261b (b) because Routhier did not claim specifically to have sent a copy of the policy *after* adoption. The plaintiff's standard foreclosure policy was adopted on January 27, 2014. The defendant filed an affidavit on June 30, 2015, some seventeen months later, attached to his opposition to the plaintiff's first motion for summary judgment. He stated in paragraph 16: "The standard foreclosure policy for the [plaintiff] was received by me via e-mail and is attached hereto as Schedule A." The defendant does not explain why he would attach or refer to an unadopted draft proposal seventeen months after the adoption of the final policy by the plaintiff.

In considering the denial of a motion to dismiss, we must take the well pleaded facts as true, along with their necessary implications. *Avoletta* v. *State*, supra, 152 Conn. App. 182–83. We also must view the allegations and the existing record in the light most favorable to the pleader. Id., 182. Finally, we must indulge every reasonable presumption in favor of jurisdiction. Id., 183. Viewed through this lens, the plaintiff's allegations and the existing record are enough to imply that a properly

adopted standard foreclosure policy existed and the defendant received notice of the policy after adoption, making *Limberger* inapposite to this case. The defendant did not challenge the Routhier affidavit's sufficiency before the trial court; therefore, we will not look outside the record to—in essence—find as a factual matter that the adopted policy was not mailed to the defendant,[3] especially in light of his acknowledgment of receipt. As such, there can be no plain error warranting reversal concerning the defendant's claim that he did not receive the adopted standard foreclosure policy.[4]

The defendant also claims that the trial court committed plain error in failing to dismiss the action because the plaintiff did not record its standard foreclosure policy on the Hartford land records, which the defendant argues violated the plaintiff's declaration. This claim is presented for the first time on appeal. To the extent that we can address the defendant's plain error claim, the defendant has not shown that there was an error "so clear and so harmful that [the] failure to reverse the judgment would result in manifest injustice." (Internal quotation marks omitted.) *Maio* v. *New Haven*, 326 Conn. 708, 718 n.12, 167 A.3d 338 (2017).[5]

The judgment is affirmed.

In this opinion the other judges concurred.

[3] "It is well settled that we do not find facts." (Internal quotation marks omitted.) *In re Kyllan V.*, 180 Conn. App. 132, 141, 181 A.3d 606, cert. denied, 328 Conn. 929, 182 A.3d 1192 (2018).

[4] Because we decide this issue on its merits, we decline to address the plaintiff's argument that the General Assembly's amendment to General Statutes § 47-202 (31) has retroactive effect, which the plaintiff argues would make the defendant's claims academic.

[5] The defendant has raised other claims in his brief that are not reviewable because they are not briefed at all, inadequately briefed or raised for the first time on appeal. We are under no obligation to review these claims. See *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619–20, 99 A.3d 1079 (2014); *Gay* v. *Safeco Ins. Co. of America*, supra, 141 Conn. App. 269 n.3. We decline to do so here. To the extent we addressed the defendant's claim concerning the plaintiff's failure to comply with its declaration, which also was not raised at the trial court, we did so because the defendant claimed plain error.

MARK BANKS *v.* COMMISSIONER OF CORRECTION (AC 39830)

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

Syllabus

The petitioner, who had been convicted of kidnapping in the first degree, robbery in the first degree, and criminal possession of a pistol or revolver in connection with robberies at two stores, sought a writ of habeas corpus, claiming that the trial court's jury instruction on kidnapping violated his due process right to a fair trial. In one instance, he locked two individuals in a bathroom with something propped against the door, and in the other, he told two individuals to get into the bathroom and lock themselves in. At the petitioner's criminal trial, the court failed to provide a jury instruction in accordance with *State* v. *Salamon* (287 Conn. 509), in which our Supreme Court held that a defendant may be convicted of both kidnapping and another substantive crime if, at any time prior to, during or after the commission of that other crime, the victim is moved or confined in a way that has independent criminal significance, that is, the victim was restrained in an extent exceeding that which was necessary to accomplish or complete the other crime. *Salamon* also set forth factors for purposes of making the determination of whether a criminal defendant's movement or confinement of a victim was necessary or incidental to the commission of another crime. The petitioner claimed that the failure to instruct the jury in accordance with *Salamon* deprived the jury of the opportunity to consider whether his brief restraints of the individuals were incidental to his robberies and, therefore, were not kidnappings. The habeas court rendered judgment denying the habeas petition and, thereafter, granted the petition for certification to appeal, and the petitioner appealed to this court. He claimed that the habeas court improperly determined that the lack of a *Salamon* jury instruction concerning the intent and conduct necessary to find the petitioner guilty of kidnapping was harmless beyond a reasonable doubt. *Held* that the habeas court improperly concluded that the absence of the *Salamon* jury instruction constituted harmless error: the first three *Salamon* factors—the nature and duration of the victim's movement or confinement, whether that movement or confinement occurred during the commission of the separate offense, and whether the restraint was inherent in the nature of the separate offense—weighed

The defendant also claims that the trial court erred in finding that the motion to dismiss was untimely. He argues that "jurisdictional defects may be raised at any time . . . ." We reject this claim, however, because the defendant misconstrues the trial court's November 13, 2017 memorandum of decision. The trial court found therein that the defendant's motion for articulation was untimely, not his motion to dismiss.

in the petitioner's favor, as the movement to the bathrooms in both cases was brief in distance and the duration of movement and confinement lasted only a few minutes, the restraint occurred extremely close in time to the robberies, it was conceivable that jurors could view the fact that the petitioner moved the individuals into the bathrooms so that he could escape as being part and parcel of the robberies, and the habeas court improperly concluded that the movement and confinement of the four individuals at the two stores occurred after the robberies had been committed in that the crime of robbery does not necessarily terminate with the taking of anther's property, and because the jury could have found that the movement of the individuals to the bathrooms and confinement therein was inherent to the nature of the robberies at the two stores, in the absence of a *Salamon* instruction, there was nothing that prevented the jury from finding the petitioner guilty of kidnapping even if it had concluded that the restraint was incidental to the robberies; moreover, although the remaining *Salamon* factors did not afford the petitioner support, the significance of the factors that weighed in his favor outweighed the significance of those that supported a claim of harmless error, and the respondent Commissioner of Correction did not meet the considerable burden to persuade the court beyond a reasonable doubt that the absence of the *Salamon* jury instruction did not contribute to the jury verdict regarding the kidnapping counts, as the question of the petitioner's intent in the movement and confinement of the individuals was not uncontested or supported by overwhelming evidence, and, thus, the respondent failed to prove that the absence of a *Salamon* instruction was harmless beyond a reasonable doubt.

(*One judge dissenting*)

Argued October 23, 2017—officially released August 7, 2018

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed*; *judgment directed*; *further proceedings*.

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

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The dispositive issue in this appeal is whether the absence of a jury instruction required by our Supreme Court's seminal decision in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), and subject to a retroactive application in a subsequent collateral proceeding; see *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 12 A.3d 817 (2011); constituted harmless error. See *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 136 A.3d 596 (2016). This court recently articulated the issue as follows: "[A] defendant who has been convicted of kidnapping may collaterally attack his kidnapping conviction on the ground that the trial court's jury instructions failed to require that the jury find that the defendant's confinement or movement of the victim was not merely incidental to the defendant's commission of some other crime or crimes." *Wilcox* v. *Commissioner of Correction*, 162 Conn. App. 730, 736, 129 A.3d 796 (2016). Further, a reviewing court must conclude, beyond a reasonable doubt, that the absence of the *Salamon* instruction did not contribute to the kidnapping conviction. *White* v. *Commissioner of Correction*, 170 Conn. App. 415, 428, 154 A.3d 1054 (2017).

In this case, the respondent, the Commissioner of Correction, bears the arduous burden of demonstrating that the omission of an instruction on incidental restraint did not contribute to the verdict. See, e.g., id., 428–29. Accordingly, our task is *not* to determine whether sufficient evidence existed in the record to support a conviction of kidnapping or "whether a jury likely would return a guilty verdict if properly instructed; *rather, the test is whether there is a reasonable possibility that a properly instructed jury would reach a different result*." (Emphasis added.) *State* v. *Flores*, 301 Conn. 77, 87, 17 A.3d 1025 (2011). We conclude that, under the facts and circumstances of this

case, as well as the analysis established in our appellate precedent, the absence of the *Salamon* instruction was not harmless beyond a reasonable doubt. Accordingly, we reverse the judgment of the habeas court denying the petitioner's petition for a writ of habeas corpus, and remand the case with direction to vacate his kidnapping convictions and to order a new trial with respect to those charges.

The petitioner, Mark Banks, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, he claims that the decision of the habeas court violated his due process right to a fair trial pursuant to the fifth and fourteenth amendments to the United States constitution. Specifically, he contends that the court improperly determined that the lack of a jury instruction in his underlying criminal case concerning the intent and conduct necessary to find the petitioner guilty of kidnapping in accordance with *State* v. *Salamon*, supra, 287 Conn. 509, was harmless beyond a reasonable doubt. We agree with the petitioner.

The following facts and procedural history are relevant to this appeal. In 1997, following a jury trial, the petitioner was convicted of four counts of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (B),[1] four counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), and two counts of criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c.[2] The trial

[1] General Statutes § 53a-92 provides in relevant part: "(a) A person is guilty of kidnapping in the first degree when he abducts another person and . . . (2) he restrains the person abducted with intent to . . . (B) accomplish or advance the commission of a felony . . . ."

[2] The petitioner was convicted under two separate criminal cases, docket numbers CR-96-0161628-T and CR-96-0094045-T, that were consolidated for trial.

court sentenced the petitioner to a total effective sentence of twenty-five years incarceration[3] consecutive to any sentence the petitioner was presently serving.[4]

In 2000, following a direct appeal, this court affirmed the judgments of conviction, setting forth the following facts that a reasonable jury could have found concerning the petitioner's crimes: "Michael Kozlowski and Howard Silk were working [on the evening of August 30, 1995] at the Bedding Barn store in Newington. The [petitioner], posing as a customer, entered the store shortly before closing at 9 p.m.; there were no other customers in the store. Kozlowski approached the [petitioner] and began to show him some king-size beds. The [petitioner] pulled a large silver gun from a bag he was holding. The gun had a round cylinder. The [petitioner], while pointing the gun at Silk, ordered Kozlowski to open the cash register. After taking money from the register, the [petitioner] requested the store's bank bag or safe. The [petitioner] then asked Silk and Kozlowski for the money from their wallets. He then took money from Silk, but not from Kozlowski. Silk and Kozlowski were then locked in the bathroom with something propped against the door and told not to leave or they would be shot. A short time later, when Silk and Kozlowski heard the doorbell in the store ring, they assumed the robber had left, pushed open the bathroom door and called the police." *State* v. *Banks*, 59 Conn. App. 112, 116, 755 A.2d 951, cert. denied, 254 Conn. 950, 762 A.2d 904 (2000).

"Kelly Wright was working [on the evening of September 13, 1995] at the Bedding Barn store in Southington.

[3] The petitioner received a total effective sentence of fifteen years incarceration in CR-96-0161628-T. In CR-96-0094045-T, the petitioner was sentenced to a total effective sentence of ten years incarceration to be served consecutively to the sentence imposed in CR-96-0161628-T.

[4] At oral argument before this court, the respondent asserted, and the petitioner's counsel concurred, that at the time of his convictions, the petitioner was serving a sentence imposed in an unrelated case.

Shortly before 9 p.m., while Wright's roommate, Idelle Feltman, was waiting to take her home, the [petitioner] and an unknown woman, posing as customers, entered the store. The [petitioner] pulled a gun from a bag he was carrying, held it to Feltman's temple, and asked her to open the cash register and to give him money. The [petitioner] then requested the bank bag, which Feltman gave him. The [petitioner] then told Wright and Feltman to get into the bathroom and lock themselves in. Shortly thereafter, Feltman and Wright heard the door buzzer and surmised that the [petitioner] had left the store. They exited the bathroom and called the police." Id., 116–17.

On January 13, 2014, the petitioner filed the petition for a writ of habeas corpus underlying the present appeal, which he amended on August 12, 2016, alleging a violation of his due process right to a fair trial. In his amended petition, the petitioner challenged his two kidnapping convictions on the ground that the instructions given to the jury were not in accordance with *State* v. *Salamon*, supra, 287 Conn. 509. On October 14, 2016, the respondent filed his return to the amended petition. On October 17, 2016, both sides stipulated to a trial on the papers.[5]

[5] In its decision, the habeas court noted that the respondent had conceded that "had the holding of *State* v. *Salamon*, supra, [287 Conn. 509], prevailed in 1997, the petitioner would have been entitled to a jury instruction conforming to that holding." The issue of whether a *Salamon* instruction was required at the petitioner's criminal trial is not part of our consideration or analysis in this case. See, e.g., *State* v. *Jordan*, 129 Conn. App. 215, 220, 19 A.3d 241 (where state failed to argue that *Salamon* did not apply, reviewing court need only determine whether error was harmful to defendant), cert. denied, 302 Conn. 910, 23 A.3d 1248 (2011). We also note that "in *State* v. *Fields*, 302 Conn. 236, 24 A.3d 1243 (2011), our Supreme Court indicated that whenever kidnapping and another substantive offense are charged, a *Salamon* instruction ordinarily must be given." *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 425; cf. *Pereira* v. *Commissioner of Correction*, 176 Conn. App. 762, 777–78, 171 A.3d 105 (*Salamon* instruction not required in case where kidnapping had been completed, and therefore was not incidental to murder of victim), cert. denied, 327 Conn. 984, 175 A.3d 43 (2017).

On October 20, 2016, the court issued a memorandum of decision denying the petition. In its memorandum of decision, the court set forth a detailed version of events based on the transcript from the petitioner's criminal trial.[6] The habeas court concluded that the

[6] On appeal, the petitioner challenges certain factual findings made by the habeas court. Under the procedural circumstances of this case, we note our standard of review would differ from the usual standard due to the absence of live witnesses in the habeas trial. "Although we generally review a trial court's factual findings under the clearly erroneous standard, when a trial court makes a decision based on pleadings and other documents, rather than on the live testimony of witnesses, we review its conclusions as questions of law. *Morton Buildings, Inc.* v. *Bannon*, 222 Conn. 49, 53–54, 607 A.2d 424 (1992) (In this case, the trial court's determinations were based on a record that consisted solely of a stipulation of facts, written briefs, and oral arguments by counsel. The trial court had no occasion to evaluate the credibility of witnesses or to assess the intent of the parties in light of additional evidence first presented at trial. The record before the trial court was, therefore, identical with the record before this court. In these circumstances, the legal inferences properly to be drawn from the parties' definitive stipulation of facts raise questions of law rather than of fact.); *Giorgio* v. *Nukem, Inc.*, 31 Conn. App. 169, 175, 624 A.2d 896 (1993) ([i]f . . . [t]he trial court's conclusions as to intent were based not on such factors as the credibility of witnesses, or on the testimony of live witnesses as to the meaning of documents or as to circumstances surrounding the execution of those documents . . . but were instead based on the intent expressed in the contract itself and the affidavits submitted with the motion for summary judgment considered in the light of their surrounding circumstances . . . [t]hen the legal inferences to be drawn from the documents raise questions of law rather than of fact . . .)." (Internal quotation marks omitted.) *State* v. *Lewis*, 273 Conn. 509, 516–17, 871 A.2d 986 (2005); see also *State* v. *Kallberg*, 326 Conn. 1, 17–18, 160 A.3d 1034 (2017); *C. R. Klewin Northeast, LLC* v. *Bridgeport*, 282 Conn. 54, 87, 919 A.2d 1002 (2007) (when trial court makes decision based on pleadings on other documents, rather than on live testimony of witnesses, appellate court reviews its conclusions as questions of law and employs plenary review); cf. *State* v. *Lawrence*, 282 Conn. 141, 155–57, 920 A.2d 236 (2007) (improper for appellate court to supplement credibility determinations of fact finder, regardless of whether fact finder relied on cold printed record to make such determinations).

Thus, were we to review the factual findings challenged by the petitioner, we would employ the plenary, rather than the clearly erroneous, standard of review. We need not, however, determine whether the habeas court made factual findings that were improper as a matter of law. Instead, we conclude that the habeas petition should have been granted because the respondent failed to demonstrate that the absence of the *Salamon* instruction was harmless beyond a reasonable doubt regardless of whether the challenged findings were proper.

respondent demonstrated that the absence of a *Salamon* instruction at the petitioner's criminal trial constituted harmless error because the "movements and confinements [of the employees] were perpetrated *after* the crimes of robbery were committed and cannot conceivably be regarded as coincidental with or necessary to complete the substantive crimes of robbery. Depriving someone of their freedom of movement by imprisoning them in a bathroom subsequent to acquiring their money, although convenient for the robber, is not inherent in the crime of robbery. It is crystal clear that the petitioner's intent and purpose for locking up his robbery victims was to postpone their summoning of assistance and reporting of the crime to police, thus facilitating the petitioner's escape from the scene and delaying detection of his crime, identity, and/or whereabouts. Also, the petitioner extended the period of infliction of duress and distress for the victims by restraining them beyond the time of fulfillment of his quest, i.e., seizure of cash." (Emphasis in original.) The habeas court subsequently granted the petitioner's certification to appeal on October 27, 2016. This appeal followed.

The petitioner claims that the habeas court improperly determined that the lack of a jury instruction in his underlying criminal case concerning the intent and conduct necessary to find the petitioner guilty of kidnapping in accordance with *State* v. *Salamon*, supra, 287 Conn. 509, was harmless beyond a reasonable doubt. We agree.

The determination of whether the trial court's failure to provide a *Salamon* instruction constitutes harmless error is a question of law subject to plenary review. *Farmer* v. *Commissioner of Correction*, 165 Conn. App. 455, 459, 139 A.3d 767, cert. denied, 323 Conn. 905, 150 A.3d 685 (2016); see also *Hinds* v. *Commissioner of*

Correction, supra, 321 Conn. 65; *Nogueira* v. *Commissioner of Correction*, 168 Conn. App. 803, 814, 149 A.3d 983, cert. denied, 323 Conn. 949, 169 A.3d 792 (2016).

A review of the evolution of our kidnapping jurisprudence will facilitate the analysis in this case. Following the petitioner's criminal trial and direct appeal, our Supreme Court issued several significant decisions with respect to the crime of kidnapping. See *State* v. *Salamon*, supra, 287 Conn. 542–550; see also *State* v. *DeJesus*, 288 Conn. 418, 430–34, 438, 953 A.2d 45 (2008); *State* v. *Sanseverino*, 287 Conn. 608, 620–26, 949 A.2d 1156 (2008), overruled in part by *State* v. *DeJesus*, supra, 437, and superseded in part after reconsideration by *State* v. *Sanseverino*, 291 Conn. 574, 969 A.2d 710 (2009).

"In *Salamon*, we reconsidered our long-standing interpretation of our kidnapping statutes, General Statutes §§ 53a-91 through 53a-94a. . . . The defendant had assaulted the victim at a train station late at night, and ultimately was charged with kidnapping in the second degree in violation of § 53a-94, unlawful restraint in the first degree, and risk of injury to a child. . . . At trial, the defendant requested a jury instruction that, if the jury found that the restraint had been incidental to the assault, then the jury must acquit the defendant of the charge of kidnapping. . . . The trial court declined to give that instruction. . . .

"[W]e [thus] reexamined our long-standing interpretation of the kidnapping statutes to encompass even restraints that merely were incidental to and necessary for the commission of another substantive offense, such as robbery or sexual assault. . . . We ultimately concluded that [o]ur legislature . . . intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to and necessary for the commission of another

crime against that victim. *Stated otherwise, to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime. . . .*

"We explained in *Salamon* that *a defendant may be convicted of both kidnapping and another substantive crime if, at any time prior to, during or after the commission of that other crime, the victim is moved or confined in a way that had independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime.* Whether the movement or confinement of the victim is merely incidental to and necessary for another crime will depend on the particular facts and circumstances of each case. Consequently, when the evidence reasonably supports a finding that the restraint was not merely incidental to the commission of some other, separate crime, the ultimate factual determination must be made by the jury. For purposes of making that determination, the jury should be instructed to consider the various relevant factors, including the nature and duration of the victim's movement or confinement by the defendant, whether that movement or confinement occurred during the commission of the separate offense, whether the restraint was inherent in the nature of the separate offense, whether the restraint prevented the victim from summoning assistance, whether the restraint reduced the defendant's risk of detection and whether the restraint created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Hampton*, 293 Conn. 435, 459–60, 988 A.2d 167 (2009); see also *White* v. *Commissioner of Correction*, supra, 170 Conn. App.

423–24; *Wilcox* v. *Commissioner of Correction*, supra, 162 Conn. App. 742.

Next, in *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 742, our Supreme Court considered whether its decisions in *State* v. *Salamon*, supra, 287 Conn. 509, *State* v. *Sanseverino*, supra, 287 Conn. 608, and *State* v. *DeJesus*, supra, 288 Conn. 418, applied retroactively to collateral attacks on final judgments. It ultimately concluded that "when an appellate court provides a new interpretation of a substantive criminal statute, an inmate convicted under a prior, more expansive reading of the statute presumptively will be entitled to the benefit of the new interpretation on collateral attack. We decline, however, the petitioner's invitation to adopt a per se rule in favor of full retroactivity." Id., 760; see also *Farmer* v. *Commissioner of Correction*, supra, 165 Conn. App. 459–460; *Eric M.* v. *Commissioner of Correction*, 153 Conn. App. 837, 844–45, 108 A.3d 1128 (2014), cert. denied, 315 Conn. 915, 106 A.3d 308 (2015); *Epps* v. *Commissioner of Correction*, 153 Conn. App. 729, 735, 104 A.3d 760 (2014) ("[o]ur Supreme Court later ruled that its holding in *Salamon* is retroactive"), appeal dismissed, 327 Conn. 482, 175 A.3d 558 (2018) (certification improvidently granted).

Finally, in *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 61, our Supreme Court held that the procedural default rule does not apply to claims that the trial court failed to instruct the jury in accordance with *State* v. *Salamon*, supra, 287 Conn. 509, in cases rendered final before that decision was issued. The court also addressed the proper standard for determining when the failure to provide the jury with a *Salamon* instruction requires a new trial. Id., 76. It reasoned that the failure to instruct the jury in accordance with *Salamon* is considered to be an omission of an essential element of kidnapping, and thus, rises to the level of constitutional error. Id., 78.

"[T]he test for determining whether a constitutional error is harmless . . . is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. . . . A jury instruction that improperly omits an essential element from the charge constitutes harmless error [only] if a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . . ." (Internal quotation marks omitted.) Id., 77–78; see also *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 770; *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 427–28; *Nogueira* v. *Commissioner of Correction*, supra, 168 Conn. App. 812–13; see generally *State* v. *Fields*, 302 Conn. 236, 245–46, 24 A.3d 1243 (2011) (on direct appeal, jury instruction that omits essential element from charge constitutes harmless error only if reviewing court concluded, beyond reasonable doubt, that omitted element was uncontested and supported by overwhelming evidence such that jury verdict would have been same absent error); *State* v. *Flores*, supra, 301 Conn. 83 (on direct appeal, test for determining whether constitutional error in jury instruction is harmless is whether it appears beyond reasonable doubt that error complained of did not contribute to verdict).[7] We emphasize that to prevail on

[7] After oral argument, we stayed the present appeal, sua sponte, until the final disposition of *Epps* v. *Commissioner of Correction*, supra, 153 Conn. App. 729. Our Supreme Court granted certification in *Epps* to determine, inter alia, "[w]hether . . . in a collateral proceeding, where the petitioner claims that the trial court erred by omitting an element of the criminal charge in its final instructions to the jury, is harm measured in accordance with *Brecht* v. *Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), or is harm measured in accordance with *Neder* v. *United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)?" *Epps* v. *Commissioner of Correction*, 323 Conn. 901, 150 A.3d 679 (2016).

Under the *Brecht* standard, reversal of a criminal conviction is warranted when error at the petitioner's underlying criminal trial had a "substantial and injurious effect or influence in determining the jury's verdict." (Internal quotation marks omitted.) *Brecht* v. *Abrahamson*, supra, 507 U.S. 637. Under

his habeas claim that the absence of a *Salamon* instruction did not constitute harmless error, the petitioner is *not* required to establish that there was insufficient evidence to convict him or that a properly instructed jury likely would find him guilty. *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 85; *State* v. *Flores*, supra, 301 Conn. 87.

We now turn to the petitioner's claim, and the dispositive issue,[8] that is, whether the respondent failed to

the *Neder* standard, a petitioner is not entitled to habeas relief if "a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Neder* v. *United States*, supra, 527 U.S. 17.

Our Supreme Court dismissed *Epps* because "[t]he respondent had squarely argued to the habeas court that the petition should be assessed under the harmless beyond a reasonable doubt standard. The respondent never argued in the alternative that a higher standard of harmfulness should apply to collateral proceedings even if the petitioner's claim was not subject to procedural default, despite federal case law applying a higher standard since 1993." *Epps* v. *Commissioner of Correction*, 327 Conn. 482, 485, 175 A.3d 558 (2018). In the present case, at the habeas trial, there was no request that the *Brecht* standard apply.

Following the release of *Epps* v. *Commissioner of Correction*, supra, 327 Conn. 482, we afforded the parties an opportunity to file supplemental briefs addressing the question of the appropriate standard for assessing harm. The parties filed supplemental briefs with this court on February 2, 2018. The petitioner contends that we should follow the path of our Supreme Court in *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 56, and *Luurtsemma* v. *Commissioner of Correction*, supra, 299 Conn. 740, and apply the harmlessness beyond a reasonable doubt standard. The respondent claims that the petitioner's claim fails under either standard or, in the alternative, this court should adopt the *Brecht* standard.

"It is axiomatic that, [a]s an intermediate appellate court, we are bound by Supreme Court precedent and are unable to modify it . . . . [W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.) *State* v. *Madera*, 160 Conn. App. 851, 861–62, 125 A.3d 1071 (2015). Accordingly, we will employ the test set forth in *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 56, and *Luurtsemma* v. *Commissioner of Correction*, supra, 299 Conn. 740.

[8] The dissent centers its analysis on *State* v. *Salamon*, supra, 287 Conn. 509. In that case, our Supreme Court reconsidered the interpretation of

establish that the absence of a *Salamon* instruction constituted harmless error. Specifically, the petitioner argues that, on the basis of the evidence presented at his criminal trial, "it would have been reasonable for jurors to conclude that the brief restraint that occurred during the commission of the robbery was incidental to the robbery, and therefore, was not a kidnapping. Because the petitioner was deprived of the opportunity of having the jurors consider this issue, which was susceptible to more than one interpretation, the respondent did not prove the error was harmless beyond a reasonable doubt."

The respondent counters that the habeas court properly concluded that the absence of the *Salamon* instruction constituted harmless error because "[t]he petitioner had completed the robberies without need for, and prior to, moving and restraining the [employees], and he moved and restrained them simply to facilitate his escape without detection." We agree with the petitioner.

"To answer the question of whether the absence of the *Salamon* standard constituted harmless error

our kidnapping statutes and required the jury instruction if the evidence reasonably supports the finding that the restraint in a particular case was not merely incidental to the commission of another crime. Id., 547–48.

Salamon, of course, is the necessary starting point for these types of cases. The law, however, has developed beyond the rule established in *Salamon*. As we have discussed in greater detail, the *Salamon* rule retroactively applies to collateral proceedings on judgments rendered final prior to *Salamon*. See *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 740. Furthermore, in habeas proceedings, such as the present case, where a petitioner was entitled to a *Salamon* instruction, the burden of establishing harmlessness beyond a reasonable doubt lies with the respondent with respect to the omitted jury instruction. See *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 56. Our review of the present case, therefore, must include the *Salamon* principles as considered in the context of a habeas proceeding where the question is limited to whether the respondent proved to this court that the absence of the jury instruction was harmless beyond a reasonable doubt. See, e.g., id.; *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 415; *Nogueira* v. *Commissioner of Correction*, supra, 168 Conn. App. 803.

requires us to examine the factors and principles enunciated in that case." *Nogueira* v. *Commissioner of Correction*, supra, 168 Conn. App. 840. "[*A*] *defendant may be convicted of both kidnapping and another substantive crime if, at any time prior to, during or after the commission of that other crime, the victim is moved or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime.*" (Emphasis added.) *State* v. *Salamon*, supra, 287 Conn. 547–48. We iterate that "to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." Id., 542.

The *Salamon* court set forth a list of factors "[f]or purposes of making [the] determination [of whether a criminal defendant's movement or confinement of a victim was necessary or incidental to the commission of another crime; specifically] the jury should be instructed to consider the various relevant factors, including [1] the nature and duration of the victim's movement or confinement by the defendant, [2] whether that movement or confinement occurred during the commission of the separate offense, [3] whether the restraint was inherent in the nature of the separate offense, [4] whether the restraint prevented the victim from summoning assistance, [5] whether the restraint reduced the defendant's risk of detection and [6] whether the restraint created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense." Id., 548.

With respect to the first *Salamon* factor, the nature and duration of the victim's movement or confinement, the petitioner argues: "The movement to the bathroom in both cases was brief in distance and the duration

of the movement and confinement lasted only a few minutes. In addition, the restraint occurred extremely close in time to the robbery and it is conceivable that jurors would view the fact that [the] petitioner moved the employees into the bathroom so that he could escape as being part and parcel of the robbery." The respondent counters that "[o]n the facts of this case, the nature and duration of the movements and confinements reinforce their independent significance." We agree with the petitioner that this factor weighs in his favor.

Analysis of this factor is guided by our decision in *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 430–432, where we observed: "[I]n *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 92–93, our Supreme Court attempted to categorize various *Salamon* incidental restraint cases with differing degrees of confinement or movement: Although no minimum period of restraint or degree of movement is necessary for the crime of kidnapping, an important facet of cases where the trial court has failed to give a *Salamon* instruction and that impropriety on appellate review has been deemed harmless error is that longer periods of restraint or greater degrees of movement demarcate separate offenses. See *State* v. *Hampton*, supra, 293 Conn. 463–64 (defendant confined victim in a car and drove her around for approximately three hours before committing sexual assault and attempted murder); *State* v. *Jordan*, [129 Conn. App. 215, 222–23, 19 A.3d 241] (evidence showed the defendant restrained the victims to a greater degree than necessary to commit the assaults even though assaultive behavior spanned entire forty-five minute duration of victims' confinement) [cert. denied, 302 Conn. 910, 23 A.3d 1248 (2011)]; *State* v. *Strong*, [122 Conn. App. 131, 143, 999 A.2d 765] (defendant's prolonged restraint of victim while driving for more than one hour from one town to another not

merely incidental to threats made prior to the restraint) [cert. denied, 298 Conn. 907, 3 A.3d 73 (2010)]; and *State* v. *Nelson*, [118 Conn. App. 831, 860–62, 986 A.2d 311] (harmless error when defendant completed assault and then for several hours drove victim to several locations) [cert. denied, 295 Conn. 911, 989 A.2d 1074 (2010)]. *Thus, as these cases demonstrate, multiple offenses are more readily distinguishable—and, consequently, more likely to render the absence of a Salamon instruction harmless—when the offenses are separated by greater time spans, or by more movement or restriction of movement.*

"*Conversely, multiple offenses occurring in a much shorter or more compressed time span make the same determination more difficult and, therefore, more likely to necessitate submission to a jury for it to make its factual determinations regarding whether the restraint is merely incidental to another, separate crime.* In those scenarios, [in which] kidnapping and multiple offenses occur closer in time to one another, it becomes more difficult to distinguish the confinement or restraint associated with the kidnapping from another substantive crime. The failure to give a proper *Salamon* instruction in those scenarios is more likely to result in harmful error precisely because of the difficulty in determining whether each crime has independent criminal significance. See *State* v. *Thompson*, [118 Conn. App. 140, 162, 983 A.2d 20 (2009)] (within fifteen minutes defendant entered victim's car, pushed her behind a building and sexually assaulted her) [cert. denied, 294 Conn. 932, 986 A.2d 1057 (2010)]; *State* v. *Flores*, [supra, 301 Conn. 89] (defendant's robbery of victim in her bedroom lasted between five and twenty minutes); *State* v. *Gary*, [120 Conn. App. 592, 611, 992 A.2d 1178] (defendant convicted of multiple sexual assaults and an attempted sexual assault that were in close temporal proximity to the defendant's restraint of

the victim; thus court determined evidence reasonably supports a finding that the restraint merely was incidental to the commission of other crimes, namely, sexual assaults and attempted sexual assault; lack of *Salamon* instruction harmful error) [cert. denied, 297 Conn. 910, 995 A.2d 637 (2010)]." (Emphasis added; internal quotation marks omitted.); see generally *Wilcox* v. *Commissioner of Correction*, supra, 162 Conn. App. 743 (review of appellate decisions reveals that absence of *Salamon* instruction is generally more prejudicial where kidnapping related actions were closely aligned in time, place and manner to other criminal acts and these factors are particularly crucial).

In the present case, at the criminal trial, the state presented testimony that the length of the entire store in Newington was "maybe thirty yards." In response to a question regarding the distance from the counter to the bathroom, Kozlowski stated: "[The bathroom is] actually right behind [the counter] but there is a wall. I mean, you'd have to walk maybe twelve, twenty, about twenty-four feet, basically a square." Silk testified that the two employees and the petitioner remained by the counter for approximately four to five minutes.

After moving the two employees to the bathroom, the petitioner then placed a mop handle behind the door. A few minutes later, the employees heard a bell that sounded when someone entered or exited the store. The employees then pushed open the door to the bathroom and called the police. Silk specifically indicated that the two employees remained in the bathroom for a period of time "[u]nder two minutes. Maybe even under a minute."

With respect to the criminal activity at the Southington store, Wright testified that the entire proceedings, from the time the petitioner entered the store until he left, lasted five to ten minutes. Feltman indicated

that her encounter with the petitioner in front of the cash register lasted four to five minutes. Feltman also noted that a narrow hallway, with three doors, connected the main showroom to the bathroom area. Wright and Feltman testified that they remained in the bathroom for a few minutes before exiting and calling the police.

In each instance, the petitioner's criminal conduct occurred at a single location. See *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 432. Furthermore, the robberies and purported kidnappings were not separated by a significant time period or distance. Id., 432–33. Under these facts, it is difficult to determine whether each crime had independent criminal significance. Id., 431. Given the "close temporal proximity to the alleged kidnapping and [the fact that] any confinement/movement was limited in nature and distance," this factor supports the petitioner's contention that the lack of a *Salamon* instruction was not harmless error. Id., 432–33; see also *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 79–80 (petitioner's actions were continuous, uninterrupted course of conduct and lasted a few minutes where he pursued, grabbed, threatened and sexually assaulted victim); *State* v. *Flores*, supra, 301 Conn. 87 (Supreme Court noted that where victim neither was bound nor moved physically, but was restrained on bed for no more than five minutes, failure to provide jury with *Salamon* instruction was not harmless); *Epps* v. *Commissioner of Correction*, supra, 153 Conn. App. 741 (evidence neither overwhelming nor undisputed regarding restriction of victim's movements during assault); cf. *State* v. *Hampton*, supra, 293 Conn. 464 (passage of substantial amount of time clearly showed defendant's intent to prevent victim's liberation for longer period of time or to greater degree than necessary to commit subsequent crimes); *Nogueira* v. *Commissioner of Correction*,

supra, 168 Conn. App. 841 (absence of *Salamon* instruction harmless where, inter alia, criminal conduct lasted for nearly two hours and was interrupted by actions of third party and victim's escape efforts); *Eric M.* v. *Commissioner of Correction*, supra, 153 Conn. App. 846–47 (failure to give *Salamon* instruction harmless where victim had been sexually assaulted for few minutes and restrained for five hours); *State* v. *Nelson*, supra, 118 Conn. App. 860–61 (court noted significance of substantial length of restraint and that five hour period of restraint constituted overwhelming evidence of intent to prevent liberation for longer period of time than necessary to commit assault).

Next, we consider the second *Salamon* factor, that is, whether the confinement or movement of the three store employees and Feltman occurred during the commission of the robberies. See, e.g., *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 433. The habeas court determined that "[t]hese movements and confinements were perpetrated *after* the crimes of robbery were committed and cannot conceivably be regarded as coincidental with or necessary to complete the substantive crimes of robbery. Depriving someone of their freedom of movement by imprisoning them in a bathroom subsequent to acquiring their money, although convenient for the robber, is not inherent in the crime of robbery." (Emphasis in original.) The respondent agrees with the habeas court's statement that the crime of robbery had been completed prior to the movement and confinement of the three store employees and Feltman, which supports the contention that the absence of the *Salamon* instruction was harmless. The petitioner maintains that the jury could have concluded that the placing of the three store employees and Feltman in the bathrooms was part of the robberies and that the robberies did not end as soon as the petitioner took the money. Again, we agree with the petitioner.

Initially, we address whether the robberies ended as soon as the petitioner took the money. At common law, robbery was defined as "the felonious taking of personal property from the person or custody of another by force or intimidation." *State* v. *Reid*, 154 Conn. 37, 39, 221 A.2d 258 (1966). In the present case, the petitioner was convicted of violating § 53a-134 (a) (4), which provides: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 *or of immediate flight therefrom*, he or another participant in the crime . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . ." (Emphasis added.) General Statutes § 53a-133, in turn, defines a robbery as follows: "A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny." See also *State* v. *Wallace*, 56 Conn. App. 730, 740–41, 745 A.2d 216, cert. denied, 253 Conn. 901, 753 A.2d 939 (2000).

The petitioner continued to display and threaten the use of a firearm after he had used or threatened the use of physical force in the act of committing a larceny at the Newington and Southington stores.[9] In other words, the jury could have determined that the petitioner continued to violate § 53a-134 (a) as he commandeered the three store employees and Feltman into

[9] General Statutes § 53a-119 provides in relevant part that "[a] person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. . . ."

the bathrooms and that the robbery offenses had not concluded with his taking of the money from each store. See also 67 Am. Jur. 2d, Robbery § 4 (2018) ("[r]obbery has been described as a continuing offense, or a continuous transaction, that is ongoing until the robber has won his or her way to a place of temporary safety." [Footnotes omitted.]); 77 C.J.S., Robbery § 1 (2018) ("[r]obbery is not confined to any fixed locus, but is frequently spread over a considerable distance and varying periods of time. Accordingly, robbery may be characterized as a continuing offense which is not complete until the robbers reach a place of temporary safety." [Footnote omitted.]).

Our determination that the crime of robbery may continue after the taking of the property finds support in our case law. For example, in *State* v. *Ghere*, 201 Conn. 289, 290, 513 A.2d 1226 (1986), the defendant challenged his conviction of attempt to commit robbery in the first degree as an accessory on the basis of insufficient evidence. Specifically, the defendant claimed that the state had failed to prove that he had "used or threatened to use force 'in the course of' attempting the larceny under . . . § 53a-133 and that, as a result, he could not be found guilty of attempted robbery in the first degree." Id., 296–97. In *Ghere*, the defendant and another man approached the victim in a supermarket parking lot, blocked him from proceeding into the store and asked for money. Id., 291–92. After a brief verbal exchange, the victim refused to give the defendant money. Id., 292. The defendant stepped toward the victim and displayed a blackjack. Id. The defendant then struck the victim in the face with the weapon, and then punched him several times in the stomach. Id. After the victim pretended to be unconscious, the defendant and his companion quickly departed from the parking lot without searching the victim. Id.

In rejecting the defendant's insufficiency claim, our Supreme Court stated: "We cannot agree with the defendant's position . . . that the use of force was not 'in the course of' the attempted robbery because the assault of the victim occurred subsequent to the demand for money. It is well established that, under . . . § 53a-133, *if the use of force occurs during the continuous sequence of events surrounding the taking or attempted taking, even though some time immediately before or after, it is considered to be 'in the course of' the robbery or the attempted robbery within the meaning of the statute.* . . . In the present case, although the defendant could have assaulted the victim for any number of reasons, including frustration, anger, fear or desire to keep the victim from pursuing him, the assault occurred within seconds of the demand for money. The blackjack was also apparently in the defendant's hand while the demand was made. From these facts the jury could reasonably have concluded that the force used 'was within the sequence of events directly connected with the attempted robbery.' " (Citations omitted; emphasis added.) Id., 297–98; see also *State* v. *Moore*, 100 Conn. App. 122, 129–130, 917 A.2d 564 (2007) (well within province of jury to find that defendant's threat was made during continuous sequence of events surrounding theft of property).

We applied this reasoning in *State* v. *Cooke*, 89 Conn. App. 530, 874 A.2d 805, cert. denied, 275 Conn. 911, 882 A.2d 677 (2005). In *Cooke*, the defendant claimed on appeal that, inter alia, there was insufficient evidence to support his conviction of felony murder. Id., 533. The defendant, along with two others, conducted an armed robbery of a "garage party" in Bridgeport, taking money, jewelry and other items from the guests. Id., 533–34. Police officers arrived and a shootout ensued. Id., 534. The victim, a guest at the party, died as a

result of a bullet fired from a gun carried by one of the defendant's fellow perpetrators. Id.

On appeal, the defendant argued that by the time the victim had been killed, the robbery had been completed, and therefore there was insufficient evidence for the jury to conclude that "the use of force was within the sequence of events directly connected to the robbery." (Internal quotation marks omitted.) Id., 535. In rejecting this argument, we relied on the reasoning in *State* v. *Ghere*, supra, 201 Conn. 297, and determined there was evidence for the jury to conclude that use of force, i.e., shooting at the police, was part of an effort to retain the stolen property and elude capture. *State* v. *Cooke*, supra, 89 Conn. App. 536–37. Additionally, there was evidence before the jury that the victim had made an effort to stop the defendant and his fellow perpetrators, and was shot and killed as a result thereof. Id., 537. Thus, there was sufficient evidence that the use of force had occurred during the continuous sequence of events related to the taking of property, even though some time had elapsed after the actual taking, so as to be considered in the course of the robbery. Id., 536–37.

For these reasons, we conclude that the habeas court improperly concluded that the movement and confinement of the three store employees and Feltman in both the Newington and Southington stores occurred after the robberies had been committed and could not "conceivably be regarded as coincidental with or necessary to complete the substantive crimes of robbery." We further disagree that it is "crystal clear" that the intent and purpose of the petitioner was to delay the three store employees and Feltman from summoning assistance and reporting his crimes to the police, thereby aiding in the petitioner's escape.[10] The jury reasonably

[10] We also conclude that the respondent's reliance on our decision in *State* v. *Golder*, 127 Conn. App. 181, 14 A.3d 399, cert. denied, 301 Conn. 912, 19 A.3d 180 (2011), is misplaced. In that case, the defendant entered the victim's Greenwich home for the purpose of stealing jewelry. Id., 183–84. He grabbed the victim, picked her up and asked where he could find the jewelry. Id.,

could have determined that the confinement and movement of the three store employees and Feltman after the taking of the money was part of the course of events of the robberies.

We again are guided by our decision in *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 415. In

184. The defendant grabbed the victim in a "bear hug" and carried her to kitchen, where he seized a bag of jewelry. (Internal quotation marks omitted.) Id. He then told the victim that he would place her in the basement; however, after she informed him of her asthma and claustrophobia, he instead took her to the bedroom and tied her to the bed with her husband's neckties. Id. The defendant then took her car keys and departed. Id. After approximately twenty-five minutes, the victim freed herself and called the police. Id., 184–185.

The defendant subsequently was convicted of various kidnapping, larceny and burglary offenses. Id., 187. In his direct appeal, the defendant claimed that the failure to provide the jury with a *Salamon* instruction constituted reversible error. Id., 187–88. We disagreed. "Here, the victim was restrained to an extent exceeding that which was necessary to accomplish or to complete the other crime, and restraining [the victim] was not necessary for the defendant to accomplish any crime. Therefore, the holding of *Salamon* does not control this case." (Footnote omitted.) Id., 190. Specifically, we reasoned that the crime of burglary had been completed when he entered the victim's home with the intent to take the jewelry. Id. After the completion of that crime, the defendant then moved the victim to the bedroom and tied her to the bed with her husband's neckties. Id. "While this restraint facilitated the defendant's escape, it was not necessary to accomplish the burglary, which already had been completed. We conclude that the restraint that occurred after the defendant took the jewelry from the kitchen closet had its own independent significance." Id., 190–91.

Golder is distinguishable from the present case. In the former, we determined that the underlying crime of burglary had been completed, and therefore the subsequent restraint of the victim constituted the independent crime of kidnapping. Furthermore, the restraint in that case lasted for a greater period of time, approximately twenty-five minutes, as compared to the relatively brief time periods in the present case. The defendant in *Golder* also physically moved the victim among several rooms and tied her to the bed. Id., 184–85. This level of restraint stands in marked contrast to the present case, where the petitioner moved the employees from areas near the cash register to bathrooms, from which they easily escaped following the petitioner's departure. Cf. *Nogueira* v. *Commissioner of Correction*, supra, 168 Conn. App. 842 (petitioner's asportation of victim to window well, essentially a deep hole, limited her escape options and acted as second level of restraint). Because the jury reasonably could conclude that the movement and confinement of the employees were part of the robberies of the two stores, the failure to provide a *Salamon* instruction constituted harmful error, and the respondent's reliance on *Golder* is misplaced.

that case, the petitioner, Phillip White III, had been convicted of kidnapping in the second degree with a firearm and burglary in the second degree with a firearm. Id., 419–20. White's conviction stemmed from his actions on June 24, 2003. Id., 417. On that day, White rang the doorbell of a home in Fairfield and told the teenage complainant who answered the door that he was selling magazines to earn money for college. Id. The complainant informed White that her parents were not home and that he should return later. Id. White requested to use the bathroom and entered the home without receiving permission from the complainant. Id. White made a second sales effort, but the complainant again declined to purchase any magazines. Id., 418.

White then closed the front door, placed his hand in his rear pocket, and informed the complainant that he had a gun. Id. After ordering her to sit on the couch, he learned that no one else was present in the home. Id. After a few minutes, White stated that he wanted to go upstairs and placed his hand on the complainant's elbow. Id. Upon this physical contact, the complainant began to cry and scream; in response, White instructed her to be quiet. Id. White also prevented the complainant's attempt to exit the home via the front door. Id. The complainant continued to scream, and White "suddenly stopped and said that he was just playing. [White] then called the complainant a 'scaredy-ass,' opened the front door and ran out of the house." Id., 418–19.

The court granted White's motion for summary judgment with respect to his habeas petition, concluding that he was entitled to a *Salamon* instruction and the absence of that instruction was not harmless. Id., 422. On appeal, we affirmed the summary judgment rendered in favor of the petitioner. Id., 439. In that case, the respondent claimed, with respect to the second *Salamon* factor, that the burglary had been completed prior to White's conduct that comprised the kidnapping,

specifically, that the burglary had been completed once White had entered the home and informed the complainant that he had a gun. Id., 433. According to the respondent, White's subsequent actions, such as compelling the complainant to sit on the couch, telling her to go upstairs and touching her arm, were unnecessary to accomplish the completed crime of burglary. Id.

We did not "find this unduly legalistic line of reasoning persuasive. The respondent's syllogism fail[ed] to recognize that the jury could have viewed [White's] actions . . . as *a continuous*, *uninterrupted course of conduct all relating to the burglary offense*." (Emphasis added.) Id. In support, we cited authority that a burglary continues until all parties participating in that crime have left the property. Id., 434. Acknowledging the propriety of the responent's argument that sufficient evidence for the burglary conviction attached at the point when White stated that he had a gun while in the home of the complainant, we nevertheless concluded that "the jury could have deemed the burglary to be in progress for the entirety of the ten minutes in which he was at the residence because he remained on the premises with the intent to commit a crime. . . . This is especially true under the facts of this case because the underlying crime that formed the basis of [White's] intent for his burglary charge was never completed, and, thus, the jury reasonably could have found that his intent to 'commit a crime therein' was ongoing up until the point at which he abruptly left the residence." (Citation omitted; emphasis omitted; footnote omitted.) Id., 434–35.[11] Ultimately, we were unable to conclude that had the jury been given a *Salamon* instruction, it

[11] The dissent misreads *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 433–35, to suggest that "there cannot be a finding of harmless error so long as the underlying crime is still ongoing and continuing . . . ." We do not read *White* so broadly. The discussion in *White* about the duration of the underlying burglary was in response to the particular arguments raised by the respondent in that case. See id.

would have found that White's actions confining or moving the complainant had not occurred during the commission of the burglary. Id., 435; see also *State* v. *Flores*, supra, 301 Conn. 87 (where victim was restrained on bed for brief time while defendant and accomplices searched bedroom for valuables and was released after perpetrators left house, Supreme Court could not conclude failure to provide jury with *Salamon* instruction was harmless).

Similarly, in the present case, we are unable to conclude that a properly instructed jury would have necessarily determined that the actions of the petitioner moving the three store employees and Feltman to the bathrooms and confining them therein took place after a completed robbery. As we previously noted, the crime of robbery does not necessarily terminate with the taking of another's property. The jury reasonably could have determined that petitioner's actions following his receipt of the money from the cash registers were part of a continuous sequence of events directly connected to the robberies of the Newington and Southington stores. Accordingly, the second *Salamon* factor supports the petitioner.

Next, we consider the third *Salamon* factor, that is, whether the restraint was inherent in the nature of the separate offense of robbery. The respondent recognizes that in *State* v. *Fields*, supra, 302 Conn. 247–48, our Supreme Court specifically rejected the argument that when restraint is not an element of the underlying crime, a *Salamon* instruction is not required and instead determined that the jury must decide whether the restraint was merely incidental to the underlying crime or had independent criminal significance.[12] Stated differently, because restraint is not an element of § 53a-134

[12] In *Fields*, our Supreme Court stated: "On the contrary [to the state's argument], restraint may be used in the commission of the underlying offense, including assault, as in the present case, even though it is not an element of that offense. Thus, depending on the facts of the underlying crime, the fact finder reasonably might conclude that the kidnapping was

(a) (4), the proper question is whether the petitioner's restraint of the three employees and Feltman was inherent to the robbery of the stores. See *White* v. *Commissioner of Correction*, supra, 170 Con. App. 436. The respondent argues that the restraint here was not incidental to the robberies, which, in the respondent's view, had been completed. We disagree.

We previously have rejected the respondent's argument that the robberies at the Newington and Southington stores had been completed at the time of the movement and confinement of the three employees and Feltman. Furthermore, we iterate that the jury could have found that the movement of the three store employees and Feltman from the sales floor to the bathrooms, and confinement therein, was inherent to the nature of the robberies at the two stores. See id., 435–37. In the absence of a *Salamon* instruction, there was nothing to prevent the jury from finding the petitioner guilty of kidnapping even if it had concluded that the restraint was incidental to the robberies. *State* v. *Fields*, supra, 302 Conn. 252. Accordingly, we conclude that the third *Salamon* factor weighs in favor of the petitioner.

The remaining *Salamon* factors, whether the restraint prevented the three employees and Feltman from summoning assistance, whether the restraint reduced the risk of detection and whether the restraint created a significant danger or increased the risk of harm to the victim independent of that posed by the robbery, afford the petitioner little, if any, support. See, e.g., *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 437–38. We disagree with the statement

merely incidental to the underlying crime irrespective of whether that crime requires the use of restraint. A *Salamon* instruction is necessary in such cases to ensure that the defendant is convicted of kidnapping only when the restraint that forms the basis of the kidnapping charge has criminal significance separate and apart from that used in connection with the underlying offense." *State* v. *Fields*, supra, 302 Conn. 248.

in the petitioner's brief that the confinement in the bathroom did not prevent the three employees and Feltman from summoning assistance or reduce the risk of detection.

Nevertheless, the significance of the *Salamon* factors that do weigh in favor of the petitioner, namely, the nature and duration of the movement and confinement of the employees, whether such confinement occurred during the commission of the robbery and whether the restraint was inherent in the nature of the robbery, outweighs the significance of those that support the respondent's claim of harmless error. See *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 437–38 (certain *Salamon* factors cut in favor of respondent, but did not trump significance of others that weighed in favor of petitioner); see also *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 92–93 (noting that where confinement or restraint associated with kidnapping occurs in close time frame to other offense, failure to provide *Salamon* instruction more likely to result in harmful error because of difficulty in determining whether each crime had independent criminal significance).

We emphasize the respondent's considerable burden in this appeal. First, as we previously have explained in some detail, the law of kidnapping has evolved significantly since the time of the petitioner's criminal trial. These developments apply retroactively to his convictions. Following a concession that the petitioner was entitled to a *Salamon* instruction at the criminal trial, the respondent is required under our law to persuade this court beyond a reasonable doubt that the absence of the instruction did not contribute to the jury verdict regarding the kidnapping counts. *State* v. *Field*, supra, 302 Conn. 245–46; *State* v. *Flores*, supra, 301 Conn. 83; see also *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 77–78 (jury instruction that improperly omit-

ted essential element from charge constitutes harmless error only if reviewing court concludes beyond reasonable doubt that omitted element was uncontested and supported by overwhelming evidence such that verdict would have been same absent error). After considering and applying the *Salamon* factors, and guided by the precedent of our appellate courts, we are not satisfied that the question of the petitioner's intent in the movement and confinement of the three employees and Feltman in the Newington and Southington stores was uncontested or supported by overwhelming evidence.

A jury provided with a *Salamon* instruction reasonably could determine that the petitioner's movement and confinement of the three employees and Feltman in the bathrooms was done in furtherance of the August 30, 1995 and September 13, 1995 robberies.[13] See, e.g., *State* v. *Flores*, supra, 301 Conn. 87 (test is not whether jury would return a guilty verdict if properly instructed, but rather whether it was reasonably possible that jury, instructed in accordance with *Salamon* might find petitioner's conduct constituted robbery but did not rise to level of kidnapping). Put differently, considering the de minimis movement and confinement[14] of the three

[13] The dissent contends that we have expanded "the definition of the word 'necessary' to apply to conduct that was unnecessary to complete the robberies, but simply made their completion easier." As we discuss in greater detail in *Bell* v. *Commissioner of Correction*, 184 Conn. App. 150, 171–72 n.11, A.3d (2018), the asportation of the victim in *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 80, was not necessary for the completion of sexual assault. Nevertheless, our Supreme Court determined that the petitioner in that case was entitled to a new trial based on consideration of the *Salamon* factors, primarily minimal movement of the victim and the fact that the multiple offenses occurred in a compressed time span. Id., 93–94.

[14] Our use of the phrase "de minimis" refers to the brief distance and relatively short period of time between the robbery and the restraint and confinement of the three employees and Feltman by the petitioner, when compared to other cases addressing a conviction for kidnapping and another crime. See, e.g., *State* v. *Hampton*, supra, 293 Conn. 463–64 (defendant confined victim in car and drove her around for three hours prior to sexual assault). We do not ignore or minimize the increased fear experienced by the four victims in this case at the hands of the petitioner. See *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 80 n.15; *State* v. *Flores*, supra, 301 Conn. 88.

employees and Feltman after the petitioner took the money from cash registers, as well as the uncertainty in ascertaining whether the movement and confinement of these individuals in the bathrooms was a continuous, uninterrupted course of conduct related to the robberies or an independent criminal act, we cannot conclude that the respondent satisfied his heavy burden in this case. See *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 92–93 (where kidnapping and other offenses occur closer in time to one another, it becomes more difficult to distinguish confinement or restraint associated with kidnapping from other crimes and lack of *Salamon* instruction more likely to result in harmful error because of difficulty in determining whether each crime had independent criminal significance); *Wilcox* v. *Commissioner of Correction*, supra, 162 Conn. App. 743 (absence of *Salamon* instruction is generally more prejudicial in cases where perpetrator's kidnapping related actions were closely aligned in time, place and manner to other criminal acts). Thus, because the respondent has not proven that the absence of a *Salamon* instruction was harmless beyond a reasonable doubt, the petitioner is entitled to the remedy of the reversal of the kidnapping convictions and a remand for a new trial on those offenses. See *State* v. *DeJesus*, supra, 288 Conn. 434–39.

The judgment of the habeas court is reversed and the case is remanded with direction to render judgment granting the petition for a writ of habeas corpus, vacating the petitioner's convictions under § 53a-92 (a) (2) (B) and ordering a new trial on those offenses.

In this opinion PRESCOTT, J., concurred.

KELLER, J., dissenting. I respectfully dissent. I conclude that under the facts and circumstances of this case, as well as the analysis established in our Supreme

Court precedent, the absence of the instruction mandated by *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), was harmless beyond a reasonable doubt. I do not believe there is a reasonable probability that a properly instructed jury would reach a different result based on its required analysis of the factors enunciated in *Salamon*. Therefore, I would affirm the judgment of the habeas court denying the amended petition for a writ of habeas corpus filed by the petitioner, Mark Banks.

The majority correctly states both the standard of review and the burden of the respondent, the Commissioner of Correction. Thus, I begin with a discussion of the *Salamon* decision, because I believe the majority strays too far from the rule enunciated therein, which distinguishes a kidnapping from a restraint that is incidental to and necessary for the commission of some other crime against a victim.[1]

The facts in *Salamon* involved the defendant being charged with kidnapping in the second degree as a result of the following conduct.[2] "The victim disembarked the train in Stamford and began walking toward

[1] At one point, the majority concludes that the jury was free to determine "that the confinement and movement of the [four individuals] after the taking of the money was part of the course of events of the robberies," which is not the standard we are required to apply under *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008). I agree completely with Judge Lavine's eloquent dissent in *Bell* v. *Commissioner of Correction*, 184 Conn. App. 150, 174, A.3d (2018) (*Lavine*, *J.*, dissenting), a case of two robberies that involved stealing money from restaurant safes and the petitioner's ordering the victims into restaurant walk-in refrigerators, closing them inside, and telling them not to leave. Judge Lavine's criticism of the majority's analysis in that case aptly describes the problem I have with the majority's analysis here. The majority expands the definition of the word "necessary" to apply to conduct that was unnecessary to complete the robberies, but simply made their completion easier.

[2] The defendant in *Salamon* also was charged with risk of injury to a child and unlawful restraint in the first degree. Charges of attempted sexual assault in the third degree and three counts of assault in the third degree were withdrawn before trial, but the court concluded that the defendant was entitled to an instruction that he cannot be convicted of kidnapping if

a stairwell in the direction of the main concourse. At that time, the victim noticed the defendant, who was watching her from a nearby platform. As the victim approached the stairwell, she observed that the defendant was following her. The defendant continued to follow the victim as she ascended the stairs. Before the victim reached the top of the stairs, the defendant caught up to her and grabbed her on the back of the neck, causing her to fall onto the steps. The victim, who had injured her elbow as a result of the fall, attempted to get up, but the defendant, who had positioned himself on the steps beside her, was holding her down by her hair. The victim screamed at the defendant to let her go. The defendant then punched the victim once in the mouth and attempted to thrust his fingers down her throat as she was screaming. Eventually, the victim was able to free herself from the defendant's grasp, and the defendant fled. . . . According to the victim, the altercation with the defendant lasted at least five minutes." Id., 515.[3]

In *Salamon*, our Supreme Court held that "to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." Id., 542. The court noted that the issue in *Salamon*

the restraint imposed on the victim was merely incidental to an assault, regardless of whether the state tried him for assault because the facts reasonably supported an assault conviction. *State* v. *Salamon*, supra, 287 Conn. 550 n.35.

[3] I note that in light of these facts, our Supreme Court concluded that a reasonable jury could find either that the defendant's restraint of the victim was merely incidental to or necessary for his underlying assault, or that his restraint of the victim constituted a kidnapping. It determined that the facts of the case were a close call and ordered a new trial for the defendant on the kidnapping charge. *State* v. *Salamon*, supra, 287 Conn. 549. If the actions of the defendant in *Salamon* could reasonably have constituted a kidnapping, I do not see how the defendant's actions in the present cases could reasonably constitute anything but kidnappings.

"directly implicates only a relatively narrow category of criminal cases, that is, kidnapping cases in which the restraint involved is incidental to the commission of another crime." Id., 523.

"First, in order to establish a kidnapping, the state is not required to establish any minimum period of confinement or degree of movement. When that confinement or movement is merely incidental to the commission of another crime, however, the confinement or movement must have exceeded that which was necessary to commit the other crime. [T]he guiding principle is whether the [confinement or movement] was so much the part of another substantive crime that *the substantive crime could not have been committed without such acts* . . . . In other words, the test . . . to determine whether [the] confinements or movements involved [were] such that kidnapping may also be charged and prosecuted when an offense separate from kidnapping has occurred asks whether the confinement, movement, or detention was merely incidental to the accompanying felony or whether it was significant enough, in and of itself, to warrant independent prosecution. . . .

"Conversely, a defendant may be convicted of both kidnapping and another substantive crime if, at any time prior to, during or after the commission of that other crime, the victim is moved or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime. Whether the movement or confinement of the victim is merely incidental to and necessary for another crime will depend on the particular facts and circumstances of each case. Consequently, when the evidence reasonably supports a finding that the restraint was not merely incidental to the commission of some other, separate crime, the ultimate factual determination must be made by the jury. . . .

"Second, we do not retreat from the general principle that an accused may be charged with and convicted of more than one crime arising out of the same act or acts, as long as all of the elements of each crime are proven. Indeed, because the confinement or movement of a victim that occurs simultaneously with or incidental to the commission of another crime ordinarily will constitute a substantial interference with that victim's liberty, such restraints still may be prosecuted under the unlawful restraint statutes. Undoubtedly, many crimes involving restraints already are prosecuted under those provisions." (Citations omitted; emphasis added; footnotes omitted; internal quotation marks omitted.) Id., 546–48. Our Supreme Court noted that the rule of *Salamon* "is relatively narrow and directly affects only those cases in which the state cannot establish that the restraint involved had independent significance as the predicate conduct for a kidnapping" and would not "force a major shift in prosecutorial decision making." Id., 548.

The Supreme Court also stated that "[f]or purposes of making [the] determination [of whether a criminal defendant's movement or confinement of a victim was necessary or incidental to the commission of another crime] the jury should be instructed to consider the various relevant factors, including [1] the nature and duration of the victim's movement or confinement by the defendant, [2] whether that movement or confinement occurred during the commission of the separate offense, [3] whether the restraint was inherent in the nature of the separate offense, [4] whether the restraint prevented the victim from summoning assistance, [5] whether the restraint reduced the defendant's risk of detection and [6] whether the restraint created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense." Id. I believe an analysis of the *Salamon* factors, half of which the majority does not analyze in any detail, requires affirmance of the kidnapping convictions in this case.

Prior appeals addressing the lack of a *Salamon* instruction at a criminal trial in which the defendant or habeas petitioner was convicted of both kidnapping and an underlying offense reveal that the determination of whether the absence of such an instruction was harmless beyond a reasonable doubt is highly dependent on the facts and circumstances of each case. "Analyses of *Salamon* claims have focused on a variety of factors in determining whether a kidnapping conviction can stand, but the timing, location, and manner in which the [petitioner] commits criminal acts against a victim are particularly crucial factors." *Wilcox* v. *Commissioner of Correction*, 162 Conn. App. 730, 743, 129 A.3d 796 (2016).

After *Salamon*, this court and our Supreme Court have concluded that restraining a victim for a brief duration in connection with an underlying offense can still constitute kidnapping. See *State* v. *Ward*, 306 Conn. 718, 736–37, 51 A.3d 970 (2012); *State* v. *Lewis*, 148 Conn. App. 511, 517, 84 A.3d 1238, cert. denied, 311 Conn. 940, 89 A.3d 349, cert. denied, U.S. , 135 S. Ct. 132, 190 L. Ed. 2d 101 (2014); *State* v. *Ayala*, 133 Conn. App. 514, 522–23, 36 A.3d 274, cert. denied, 304 Conn. 913, 40 A.3d 318 (2012).[4]

[4] I note that *State* v. *Ward*, supra, 306 Conn. 718, *State* v. *Ayala*, supra, 133 Conn. App. 514, and *State* v. *Lewis*, supra, 148 Conn. App. 511, are direct criminal appeals analyzing whether there was sufficient evidence to support a kidnapping conviction. Reliance on these cases can be problematic in habeas appeals because the petitioner only has to demonstrate that the respondent cannot prove that the absence of a *Salamon* instruction at his underlying criminal trial was harmless beyond a reasonable doubt, a different standard than proving lack of sufficient evidence to convict on direct appeal. See *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 91, 136 A.3d 596 (2016). My reliance on these cases is limited to support the proposition that a reasonable jury, having been instructed in accordance with *Salamon*, properly may find that confinement of a short duration constitutes kidnapping.

In *State* v. *Ward*, supra, 306 Conn. 741, our Supreme Court determined that the trial court improperly granted the defendant's motion for a judgment of acquittal on his kidnapping conviction because the jury, provided with a proper *Salamon* instruction, reasonably could have decided that moving

This court has observed that the movement and confinement of a victim after the defendant commits the underlying offense is more likely to have independent criminal significance. See *White* v. *Commissioner of Correction*, 170 Conn. App. 415, 436, 154 A.3d 1054 (2017); see also *State* v. *Golder*, 127 Conn. App. 181, 190–91, 14 A.3d 399, cert. denied, 301 Conn. 912, 19 A.3d 180 (2011). In *State* v. *Golder*, supra, 183, the defendant entered the victim's residence with the intent to steal her jewelry. Upon unexpectedly encountering the victim inside the residence as she walked toward her bedroom, the defendant grabbed her, moved her to the kitchen while holding her in a bear hug, released her, and took a bag of jewelry from the closet. Id., 184. At that point, the defendant told the victim that he was going to have to put her in the basement, but changed his mind after the victim told him she was claustrophobic and asthmatic, and moved her instead to the bedroom. Id. The defendant then "asked if she had any rope. [The victim] responded that she did not have any, so the defendant took some neckties . . . and 'hogtied' her to the bed. The defendant then asked [the

the victim down a hallway and restraining her for ten to fifteen minutes was not incidental to the crime of sexual assault. In *State* v. *Lewis*, supra, 148 Conn. App. 517, the evidence was sufficient to support the defendant's kidnapping conviction under the rule of *Salamon* when, after committing the crime of assault, the defendant dragged the victim across the ground and tried to force her into a car. The victim resisted until plainclothes police officers arrived, forcing the defendant to let go of the victim. Id., 514. Also, in *State* v. *Ayala*, supra, 133 Conn. App. 522–23, this court found that after the defendant committed the crime of burglary, his actions against the victim amounted to restraint with sufficient independent criminal significance to constitute the crime of kidnapping. The defendant in *Ayala* forced his way into the victim's apartment and once inside "stuck . . . a black handgun into [the victim's] stomach, threatened to kill her and inquired about the whereabouts of his girlfriend. The victim informed the defendant that his girlfriend was not at her residence, at which time the defendant pushed her and demanded that she sit on the couch. The defendant then searched the residence for his girlfriend, and when he was unable to find her, he left . . . ." (Footnote omitted.) Id., 516–17.

victim] where she kept her car and where the keys for it were located. [The victim] told him the keys were in her pocketbook, and the defendant went into the kitchen. [The victim] attempted to release herself from the bed, and the defendant returned to ask [the victim] if the car had an alarm. When the defendant left for the second time, [the victim] freed herself and called 911. [The victim] was tied to the bed for a total of twenty to twenty-five minutes." Id., 184–85. On the basis of these facts, this court concluded that there was no reasonable possibility that the jury was misled by the lack of a *Salamon* instruction. Id., 191.

Faced with a similar issue, this court reached the same result in *Nogueira* v. *Commissioner of Correction*, 168 Conn. App. 803, 845, 149 A.3d 983, cert. denied, 323 Conn. 949, 169 A.3d 792 (2016), and concluded that a reasonable fact finder could not find that the petitioner's restraint and confinement of the victim was incidental to and necessary for the completion of his crime of sexual assault. The petitioner in *Nogueira* was convicted of kidnapping and sexual assault following a trial to the court, but claimed in a subsequent habeas proceeding that the kidnapping conviction did not comply with the principles set forth in *Salamon*. Id., 809. This court disagreed because the petitioner dragged the victim approximately 113 feet to a window well, where he sexually assaulted her for two hours. Id., 838. By moving the victim to the window well, the petitioner decreased his risk of detection and increased the risk of harm to the victim because the window well was lined with rocks. Id., 841–42. Moreover, the window well served as a secondary form of restraint and hindered the victim's ability to escape. Id., 842.

In light of the principles of *Salamon* and guided by the cases which have applied those principles, I conclude that the respondent in the present case has met the burden of establishing that the lack of a *Salamon*

instruction in the petitioner's underlying criminal trial was harmless beyond a reasonable doubt. On the basis of my review of the record and my cognizance of the dictates of *Salamon*, I conclude that when presented with the facts of the underlying crime, a reasonable jury could not find the petitioner's restraint of the victims in each of the cases against him to have been incidental to and necessary for the commission of the robberies. I agree with the habeas court's conclusion that the evidence in the record demonstrates that the petitioner's restraint and abduction of the victims were sufficiently distinct from his crimes of robbery to constitute independently significant kidnappings.

The following facts were before the jury when it reached its verdict in the first case. With respect to the earlier of the two robberies, on direct examination, Michael Kozlowski testified that he was working at the Newington Bedding Barn on August 30, 1995, at about 9 p.m. As Kozlowski prepared to close the store, the petitioner entered. Kozlowski testified that he approached the petitioner with the belief that the petitioner was a customer. When Kozlowski showed the petitioner a king-size bed, the petitioner said, "let me count my money," and reached into his bag and produced a gun. Kozlowski testified that the petitioner said, "[d]on't try anything, I'll bust you one, just walk over to the register." The petitioner then told him to get behind the counter and pointed his gun at Kozlowski's chest. Kozlowski testified that, after the petitioner took the money from the cash register and a wallet from his coworker, Howard Silk, "[the petitioner] moved us . . . down to the hallway into the bathroom and . . . he then put us into the bathroom and put a mop handle or something behind the door." Kozlowski testified that the petitioner, as they walked down the hallway to the bathroom, said, "[d]on't try anything; I'll blow your head off . . . ." Kozlowski indicated that after the petitioner

closed the bathroom door and locked Kozlowski and Silk in there, "we ducked down thinking he was going to shoot through the door because it was only a piece of plywood, basically, and [a] couple of minutes after, we heard a bell, which is on the front door, [which rings whenever someone enters or leaves the store] . . . we then . . . kicked the door, basically, and went downstairs."

Silk testified that he also was working at the Newington Bedding Barn during the evening of August 30, 1995. Silk stated that, as he was in the process of closing the store, he noticed the petitioner following Kozlowski toward the counter. As the petitioner and Kozlowski approached, Silk realized that the petitioner was pointing a gun at Kozlowski's back. Silk testified that the petitioner told Kozlowski and Silk that he wanted the money, so Kozlowski took the money from the register as the petitioner pointed the gun at Silk's chest. After Silk told the petitioner that there was no safe inside the store, the petitioner led Silk and Kozlowski toward the back of the store at gunpoint. Silk testified that he handed the petitioner the $17 in his wallet and then, the petitioner "proceeded to put us into the bathroom area" and attempted to jam the door with a mop handle. Silk testified that he believed that the petitioner put them in the bathroom so that he could escape and that after less than two minutes, he heard the bell ring that "goes off when [the door] opens and . . . [he] hoped that [the bell rung] when [the petitioner] left." After waiting for thirty seconds after hearing the doorbell ring, Silk and Kozlowski were easily able to open the bathroom door. Silk testified that they went downstairs into the basement of the building to the warehouse there to call 911 and wait for the police to arrive in the event that the petitioner was still on the first floor.

In the second case, Kelly Wright testified that she was working at the Southington Bedding Barn on September 13, 1995. She recalled that at 8:55 p.m., five

minutes before the store was set to close, while Wright's roommate, Idelle Feltman, was waiting in the store to take her home, the petitioner and an unidentified female entered the store. Wright testified that the petitioner and the female split up and appeared to be shopping for king-size beds. Wright testified that she was sitting behind the store counter when the petitioner arrived and that she rose in order to greet him because it was store policy to do so whenever a potential customer arrived. Before Wright could make it around the counter, however, the petitioner told her to get on the floor. Wright testified that she noticed that the petitioner had a gun in his hand and was holding it out parallel to the floor. The petitioner told Feltman to get the money from the register. Feltman gave the petitioner the money in the register in a bank bag. Wright testified that the petitioner then inquired if there was a basement in the store, and Feltman responded by telling the petitioner that there was no basement, but there was a bathroom. Wright testified that the petitioner led her and Feltman to the bathroom at gunpoint and told them to enter the bathroom, lock the door, and "not to be a hero, let the cops do their jobs." Wright stated that she heard a buzzer go off, which indicated that the door to the store had been opened. She and Feltman waited for a "little bit," unlocked the door, and left the bathroom to call 911. Wright estimated that about five to six minutes elapsed between the time the petitioner entered the store to the time she and Wright were able to contact the police.

Feltman testified that she went to the Southington Bedding Barn to pick up Wright from work because the two planned to go out to dinner. During her testimony, she recalled that two people, the petitioner and a woman, entered the store right before closing and that the pair split up after they entered the store. Feltman testified that the petitioner approached the counter and

removed a gun from his bag. He waved the gun and told her to give him the money in the register. Feltman emptied the register, which contained less than $100, and handed the money to the petitioner. Feltman testified that after he obtained the money, the petitioner inquired whether there was a basement in the store, and that Feltman and Wright replied that there was no basement, but there was a bathroom. Feltman stated that the petitioner led her and Wright in a single-file line to the bathroom and then instructed them to enter, while aiming the gun at them and causing them to be scared.[5] Feltman and Wright entered the bathroom and waited a minute or two after they heard the door buzzer that indicated someone had entered or left the store. At this point, the two left the bathroom and found a mattress that had been placed in the narrow hallway leading to the bathroom as a "barricade . . . ." Feltman testified that she pushed it off to the side and "walked right through."

The petitioner argues that the habeas court improperly concluded that the lack of a *Salamon* instruction was harmless beyond a reasonable doubt. On the basis of my review of the record in the present cases, I conclude that the lack of an instruction was harmless because I am persuaded beyond a reasonable doubt that the omission of an instruction on incidental and necessary restraint did not contribute to the verdict. In doing so, I, unlike the majority, set forth an analysis of all of the *Salamon* factors.

With respect to the first factor, the petitioner asserts that the nature and duration of the victims' movement

[5] Feltman, when describing her emotions as the petitioner led her down the hallway, testified: "I was scared. There was something about [his] eyes. I wanted to make sure that he knew that he was in control. I didn't want to . . . show him that I was fearful or anything like that. I didn't want him to think that I was going to freak out . . . ."

or confinement supports his claim because the confinement lasted only a few minutes and the victims were moved a short distance. Although the respondent must prove that the petitioner restrained and abducted the victims, proof "of kidnapping does not require proof that the victim was confined for any minimum period of time or moved any minimum distance." *State* v. *Salamon*, supra, 287 Conn. 531–32. In order to "to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." Id., 542. With respect to the nature of the confinement, the petitioner led the victims to the bathrooms at gunpoint under the threat of deadly force. The explicit threat of death constitutes sufficient control of the victims' liberation to support a kidnapping conviction. See *State* v. *Ayala*, supra, 133 Conn. App. 522–23 (implicit threat against victim's life constitutes sufficient confinement to prevent victim's liberation). Though the short-term duration of the victims' confinement does support the petitioner's claim that he is entitled to a new trial on the kidnapping charge, the petitioner's conduct, viewed in its entirety, evinces that he intended to frighten the victims, prevent their escapes and restrain them beyond what was necessary to commit the robberies. The short period of restraint does not outweigh the fact that the petitioner confined the victims at gunpoint after his prior activities in the stores had met all the elements of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4). A jury could not reasonably conclude that the nature and manner of confinement of the victims by forcing them into the bathrooms with the threat of deadly force after the petitioner obtained the money was merely incidental to and necessary for the commission of the robberies. Rather than finding that the movement and confinement

of the victims at gunpoint was incidental to and necessary to complete the robberies, reasonable jurors would undoubtedly find that a kidnapping also occurred because the defendant needlessly moved and confined the victims at gunpoint in order to further advance, or facilitate, his commission of the robberies.

Like the majority, I would conclude that the second factor weighs in the petitioner's favor. The evidence demonstrates that the petitioner's movement and confinement of the victims occurred during the commission of the robbery.[6]

[6] In *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 415, this court stated: "We next address the second relevant *Salamon* factor, that is, whether the movement or confinement occurred during the commission of the separate offense. The respondent argues that the absence of a *Salamon* instruction did not contribute to the kidnapping verdict here because the burglary had been completed prior to the petitioner's conduct comprising the kidnapping. More specifically, he argues that the offense of second degree burglary was complete once there [was] an unlawful entering or remaining in a building with the intent to commit a crime [therein] . . . and the petitioner gestured to his back pocket and told the [complainant] he had a gun. Therefore, he argues, any additional action the petitioner took after he represented by his words or conduct that he possessed a firearm—e.g., ordering the [victim] to sit on the couch, instructing her to move upstairs, touching her elbow in an attempt to get her to move faster—was not necessary to accomplish the already concluded offense of burglary. We do not find this unduly legalistic line of reasoning persuasive.

"The respondent's syllogism fails to recognize that the jury could have viewed the petitioner's actions here as a continuous, uninterrupted course of conduct all relating to the burglary offense. . . . [A]lthough liability for a burglary premised on an unlawful entry attaches upon a defendant crossing the threshold . . . authority exists that a burglary, once begun, continues until all parties participating in the burglary have left the property." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 433–34.

I am troubled by the suggestion in *White* that there cannot be a finding of harmless error so long as the underlying crime is still ongoing and continuing, which contradicts the holding in *Salamon* that a defendant "may be convicted of both kidnapping and another substantive crime if, at any time *prior* to, *during* or *after* the commission of that other crime, the victim is moved or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was *necessary* to accomplish or complete the other crime." (Emphasis added.) *State* v. *Salamon*, supra, 287 Conn. 547. A proper analysis does not entail pinpointing a precise moment when the crime of robbery ended so as to confine our consideration of whether a kidnapping occurred during conduct that occurred after the robberies.

With respect to the third factor, I observe that the petitioner asserts that because the restraint of the victims occurred contemporaneously with the robberies, a reasonable juror could consider that the restraint was merely incidental to the robberies. Restraint, however, is not an element of the crime of robbery; the inquiry is whether the restraint was incidental to and necessary for the commission of the robberies in these particular cases. See *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 436. Restraint that occurs after the underlying crime already has been committed supports the conclusion that the lack of a *Salamon* instruction was harmless error. See *State* v. *Golder*, supra, 127 Conn. App. 190–91. Once the petitioner obtained the money from the registers at gunpoint, his conduct satisfied all the elements of robbery in the first degree. Although the use of force after taking money can be viewed as part of the continuum of conduct that can constitute the crime of robbery; *State* v. *Ghere*, 201 Conn. 289, 297, 513 A.2d 1226 (1986); the relevant inquiry under *Salamon* is not whether the crime of robbery was still ongoing, but whether the use of force "exceed[ed] that which was *necessary* to accomplish or complete" the robbery. (Emphasis added.) *State* v. *Salamon*, supra, 287 Conn. 547. The petitioner "may be convicted of both kidnapping and another substantive crime if, at any time *prior* to, *during* or *after* the commission of that other crime, the victim is moved or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime." (Emphasis added.) Id. The analysis does not need to pinpoint a precise moment when the crime of robbery ended because the petitioner's threatened use of force in leading the victims to the bathroom can be considered as occurring during the commission of the simultaneous crimes of robbery

and kidnapping, and the prolonged use of force was not necessary to complete the robberies. Once the petitioner obtained the money from the register, he could have left the stores. Instead of leaving immediately, however, the petitioner led the victims to isolated parts of the stores at gunpoint and threatened to use deadly force. Cf. *State* v. *Flores*, 301 Conn. 77, 80–83, 17 A.3d 1025 (2011) (defendant entitled to new trial with *Salamon* instruction when use of force occurred solely in connection with commission of robbery and defendant immediately departed from scene after completing robbery).

Key facts that persuaded our Supreme Court in *Flores* that the lack of a *Salamon* instruction in that case could not be considered harmless beyond a reasonable doubt are absent in the present case. Specifically, in *Flores*, the restraint of the victim occurred at the location the defendant initially found the victim and occurred prior to the taking of any property, while the defendant and his accomplices searched that room for valuables. Additionally, the victim recognized the defendant in *Flores*, which alleviated her fear, and the victim was released immediately after the defendant and his accomplices had taken possession of the valuables. By contrast, the petitioner in the present case moved the victims, and confined them in a more secluded location and ensured that they did not emerge until after he escaped. Additionally, nothing in the present case alleviated the victims' fear. There is evidence that the petitioner's conduct after acquiring the money actually increased the victims' fear. Although, as our Supreme Court recognized in *Flores*, whether the use of force is necessary to complete the underlying crime is generally a question of fact for the jury, the factual dissimilarities in the present case when compared to *Flores* highlight why a reasonable jury would be precluded from finding that the petitioner's conduct did not constitute kidnapping.

As previously stated, I do not view the petitioner's restraint of the victims as incidental to and necessary to commit the robberies. Although the petitioner's threatened use of force in moving or confining a victim can be considered as occurring during the commission of the simultaneous crimes of robbery and kidnapping, his prolonged use of that threat of force cannot reasonably be considered as incidental to and necessary for the completion of the robberies. After the petitioner took possession of the money, his decision to move and confine the victims in a more secluded location can be viewed as an inflection point that shifts how a reasonable jury would view the significance of the petitioner's continuing use of the threat of force. As the evidence in the record reveals, the victims believed that the defendant's initial use of force upon entering the stores was to effectuate his goal of taking possession of the money. Once the petitioner possessed the money, the continued threat of deadly force to move the victims to a secluded part of the stores prolonged their fear and facilitated his escape. Viewing the petitioner's conduct in this light is not an unduly legalistic syllogism because the decisions the petitioner made increased the harmful and terrorizing impact on the victims.

Turning my attention to the fourth and fifth factors, I observe that the petitioner also argues that the victims were not prevented from summoning assistance and that the restraint did not make it easier for him to escape. The facts, however, reflect that this assertion is incorrect because the restraint of the victims, which was not incidental to and necessary for completion of the robberies, facilitated the petitioner's escape. After the petitioner obtained the money, the victims were led into the bathrooms at gunpoint. The victims were neither able to call 911 as the petitioner led them to the bathrooms, nor were they able to summon assistance from inside the bathrooms. Moreover, out of fear

that the petitioner was still in the stores, the victims remained in the bathrooms even after they heard the doorbells. It was not until the petitioner had escaped that the victims were able to call for help. The petitioner also made it more difficult for the victims to seek assistance by propping a broom or mop handle against the door after forcing the victims into bathroom at the Newington Bedding Barn and partially blocking the hallway leading from the bathroom with a mattress as he departed the Southington Bedding Barn. Even if the victims were able to get past these obstacles without great difficulty, the obstacles increased the amount of time that elapsed before the victims were able to summon assistance. For the same reasons that I conclude that the petitioner's actions facilitated his escape and prevented the victims from seeking assistance, I conclude that the petitioner, by placing the victims in the bathroom, decreased his risk of detection. By hindering the victims' ability to call for help, the petitioner was able to get farther away from the crime scenes before emergency responders were aware of the crimes.

Last, with respect to the sixth factor, the petitioner argues that the victims were not placed at risk of harm independent of that posed by the robberies. The facts in these cases reflect that this assertion is incorrect because the victims were subjected to an additional risk of both physical and emotional harm. In order to lead the victims to the bathrooms, the petitioner kept his gun targeted on them for a greater length of time than was necessary to effectuate the crime of robbery. This was inherently dangerous simply because the gun could have discharged due to a malfunction or an accident at any time. Furthermore, it increased the risk of a catastrophe because the victims, fearing for their lives, may have attempted to flee, resist or overcome the petitioner. The petitioner's actions after he obtained the money caused the victims to suffer additional emotional

distress. As the evidence in the record reveals, the petitioner's decision to lead the victims down narrow corridors, to secluded parts of the stores, hidden from public view, caused the victims additional fear.[7] The impact of this additional fear-provoking behavior would not have occurred if the petitioner had just left the stores after he took possession of the money.[8]

Under the facts and circumstances of this case, I conclude that a reasonable jury, provided with the proper, current interpretation of our kidnapping law, could not find that the restraint of the victims was incidental to and necessary to complete the commission of the robberies. The evidence presented by the state, considered as a whole, would prevent a reasonable jury from finding that no kidnappings occurred. Thus, the lack of a *Salamon* instruction in the petitioner's underlying criminal trial was harmless error, and I would affirm the judgment of the habeas court.

LEON BELL *v.* COMMISSIONER OF CORRECTION (AC 38401)

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

Syllabus

The petitioner, who had been convicted of kidnapping in the first degree, robbery in the first degree, burglary in the third degree and larceny in the third degree, sought a writ of habeas corpus. The petitioner had

[7] I disagree with the majority's assessment that the movement and confinement of the victims was "de minimis . . . ." The victims' testimony reflects that the movement and confinement at issue, occurring at gunpoint, gave rise to very real feelings of fear. The victims testified that they waited until they believed the defendant had fled before emerging from the bathrooms for fear they would be shot if they again confronted the defendant.

[8] Potential victims of robberies often are advised, if robbed, to hand over their valuables without resistance so that their risk of harm will not be increased. Imagine, then, the thoughts that rush through the mind of a cooperative victim when the perpetrator does not flee after obtaining the valuables sought, but instead, continues to threaten his victim with a weapon and forces him into a more secluded location. What victim at that point would not anxiously contemplate the possibility that he may possibly be murdered?

committed separate robberies at two restaurants during which he ordered the victims, employees at each restaurant, to open the restaurants' safes and to enter walk-in refrigerators. The petitioner claimed that he was denied due process when the trial court failed to instruct the jury, in accordance with *State* v. *Salamon* (287 Conn. 509), that he could not be convicted of kidnapping if his confinement or movement of the victims was merely incidental to his commission of the robberies. The trial court did not instruct the jury in accordance with *Salamon*, which had not been decided at the time of the petitioner's criminal trial and direct appeal. The habeas court determined that the petitioner failed to prove that he was denied due process, concluding that the lack of a *Salamon* instruction was harmless because the jury would have found him guilty even if it had been instructed properly pursuant to *Salamon*. The habeas court found that there was overwhelming and uncontested evidence that the petitioner's conduct in ordering the victims to enter the refrigerators was not inherent in or necessary to commit the robberies. The court thereafter rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court improperly denied the habeas petition, the respondent Commissioner of Correction having failed meet the arduous burden of demonstrating that the omission of an instruction on incidental restraint did not contribute to the verdict: the question of the petitioner's intent when he moved and confined the victims in the refrigerators was contested and was not supported by overwhelming evidence, as a properly instructed jury could have had reasonable doubt as to whether that movement and confinement constituted a continuous, uninterrupted course of conduct related to the robberies or independent criminal acts that established the petitioner's intent to prevent the victims' liberation for a longer period of time and to a greater degree than was necessary for the commission of the robberies; moreover, the petitioner's criminal conduct occurred at a single location, and the robbery and confinement were not separated by a significant time period or distance, which made it difficult to determine if the confinement of the victims had independent criminal significance, a properly instructed jury would not have concluded necessarily that the robberies were completed prior to the movement and confinement of the victims, but could have determined that the movement and confinement occurred during a continuous sequence of events that was related to the taking of money from the safes and was not a separate criminal offense, and the significance of those factors outweighed the significance of those that supported the respondent's claim of harmless error; accordingly, this court could not conclude that the absence of a *Salamon* instruction amounted to harmless error in the present case.

(*One judge dissenting*)

Argued October 24, 2017—officially released August 7, 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, *Oliver*, *J.*; thereafter, the petition was withdrawn in part; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed; judgment directed; further proceedings.*

David B. Rozwaski, assigned counsel, for the appellant (petitioner).

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

Opinion

DiPENTIMA, C. J. The petitioner, Leon Bell, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus.[1] The habeas court denied the petition after concluding that, although the petitioner was entitled to a jury instruction in accordance with the seminal case of *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), that failure was harmless beyond a reasonable doubt. The dispositive issue in this appeal is whether the habeas court correctly concluded that the absence of a *Salamon* instruction in the petitioner's criminal trial was harmless beyond a reasonable doubt. In a separate opinion, which we also release today; see *Banks* v. *Commissioner of Correction*, 184 Conn. App. 101, A.3d (2018); we considered the same legal claim under similar facts. In

[1] Although the operative petition for a writ of habeas corpus contained three counts alleging various grounds for a new trial, the petitioner argues only that the habeas court improperly rejected his due process claim regarding the absence of an incidental restraint instruction in accordance with *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008). His other claims are not at issue in this appeal.

Banks, we concluded that, under the facts of that case, the respondent, the Commissioner of Correction, failed to meet his burden to prove that the absence of the *Salamon* instruction was harmless beyond a reasonable doubt and therefore the habeas court in that case improperly denied the habeas petition. Id., 132. Our analysis and conclusion in *Banks* controls the resolution of the present case. Accordingly, we reverse the judgment of the habeas court and remand the case with direction to grant the petition for a writ of habeas corpus and to proceed with a new trial on the kidnapping charges.

The following facts and procedural history are relevant. After a jury trial, the petitioner was convicted of two counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), two counts of burglary in the third degree in violation of General Statutes § 53a-103 (a), two counts of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (B), and two counts of larceny in the third degree in violation of General Statutes § 53a-124 (a) (2). See *State* v. *Bell*, 93 Conn. App. 650, 652, 981 A.2d 9, cert. denied, 277 Conn. 933, 896 A.2d 101 (2006). Following the petitioner's convictions, the court, *Mullarkey*, *J.*, sentenced the petitioner to a total effective sentence of thirty-six years incarceration.

The criminal charges stemmed from two separate incidents occurring at Friendly's restaurants, one in Manchester on April 12, 2001, and the other in Glastonbury on April 14, 2001, during which the petitioner instructed the respective victims, employees of Friendly's, to enter walk-in refrigerators after ordering them to open the restaurants' safes. See id., 652–53. The state charged the petitioner in two separate long form informations, which the court consolidated for trial; see id., 654; each information alleged one count each of robbery

in the first degree, burglary in the third degree, kidnapping in the first degree, and larceny in the third degree. Both kidnapping charges alleged in relevant part that the petitioner had violated § 53a-92 (a) (2) (B) when he "abducted another person and restrained the person abducted with the intent to accomplish and advance the commission of a felony (to wit: a robbery)."

After this court affirmed the petitioner's convictions on direct appeal and prior to the final determination of his first habeas petition,[2] the law fundamentally changed with regard to kidnapping offenses when our Supreme Court decided *State* v. *Salamon*, supra, 287 Conn. 509, and *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 12 A.3d 817 (2011). See, e.g., *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 66–69, 136 A.3d 596 (2016) (describing shift in interpretation of kidnapping statutes). "Pursuant to the holdings of these decisions, a [petitioner] who has been convicted of kidnapping may collaterally attack his kidnapping conviction on the ground that the trial court's jury instructions failed to require that the jury find that the [petitioner's] confinement or movement of the victim was not merely incidental to the [petitioner's] commission of some other crime or crimes." *Wilcox* v. *Commissioner of Correction*, 162 Conn. App. 730, 736, 129 A.3d 796 (2016); see also *Hinds* v. *Commissioner of Correction*, supra, 69 (as matter of state common law, policy considerations weighed in favor of retroactive application of *Salamon* to collateral attacks on judgments rendered final prior to release of *Salamon* decision).

The petitioner, self-represented at the time, commenced a second habeas action on June 8, 2012, which

[2] In his first habeas action, the petitioner alleged ineffective assistance of counsel. The habeas court, *Fuger*, *J.*, denied that petition. We dismissed the petitioner's appeal from the judgment of the habeas court in that case. See *Bell* v. *Commissioner of Correction*, 131 Conn. App. 904, 27 A.3d 115, cert. denied, 302 Conn. 949, 31 A.3d 383 (2011).

he later amended after being appointed counsel (operative petition). Among other allegations, he claimed that his two kidnapping convictions were invalid because the trial court had not instructed the jury in accordance with *Salamon* and *Luurtsema*.[3] The respondent filed a return on January 23, 2015, denying the material allegations of the operative petition. A one day habeas trial took place on January 28, 2015. At that proceeding, the habeas court admitted into evidence the transcripts from the petitioner's criminal trial.

The habeas court, *Oliver*, *J.*, issued its memorandum of decision on August 12, 2015. Although the operative petition contained three counts; see footnote 1 of this opinion; the court noted that "[t]he gravamen of the petitioner's claims is that his criminal jury was not properly instructed on the kidnapping charge[s] and that he, pursuant to . . . *State* v. *Salamon*, [supra, 287 Conn. 509], is entitled to have a properly instructed jury decide the kidnapping charge[s]." After determining that the petitioner's due process claim—count three—rested "[a]t the heart of all counts," the court noted that, as alleged, the petitioner's failure to prove count three would dispose of his additional claims. The court therefore first addressed count three.

The court concluded that the petitioner failed to prove that he was denied due process.[4] Although it

[3] The petitioner alleged that he had been deprived of due process because "at the time of his conviction[s], the kidnapping statute was invalid and unconstitutional." Due to the petitioner's reliance on *State* v. *Salamon*, supra, 287 Conn. 509, *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 740, and *State* v. *Sanseverino*, 287 Conn. 608, 949 A.2d 1156 (2008), overruled in part by *State* v. *DeJesus*, 288 Conn. 418, 437, 953 A.2d 45 (2008), and superseded in part after reconsideration by *State* v. *Sanseverino*, 291 Conn. 574, 579, 969 A.2d 710 (2009), however, the habeas court construed his claim as one based on a failure to properly instruct the jury. On appeal, the petitioner does not argue that the habeas court improperly construed any of his claims.

[4] The respondent did not plead procedural default, but the court granted without objection an oral motion to amend the return to include a claim of procedural default. Nonetheless, the habeas court addressed the petitioner's

determined that the jury should have been instructed in accordance with *Salamon*, the court concluded that the lack of such an instruction was harmless. With respect to assessing harm, the court considered whether, "in examining the entire record, this court [was] satisfied beyond a reasonable doubt that the omitted nonincidental restraint element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same if the jury had been so instructed." The court stated that the record "clearly demonstrate[d] the overwhelming and uncontested evidence of nonincidental restraint of the two victims." More specifically, it concluded that ordering both victims of the Manchester and Glastonbury robberies to enter walk-in refrigerators was "not necessary to commit the [robberies]. Any [such] restraint was not inherent in the [robberies] . . . and helped prevent the victim[s] from summoning assistance, thereby reducing the risk of the petitioner being detected." Accordingly, the court concluded, "beyond a reasonable doubt," that the jury would have found the petitioner guilty of two counts of kidnapping even if the jurors had been instructed properly pursuant to *Salamon*.

Due to the petitioner's failure to prove his due process claim, the court denied the petition for a writ of habeas corpus. Following that denial, the habeas court granted his petition for certification to appeal. This appeal followed. Additional facts will be set forth as necessary.

We begin with our standard of review. "In our review of the issues raised, we are mindful that, while [t]he underlying historical facts found by the habeas court

due process claim "on the merits because the respondent failed to properly raise procedural default in the return." See, e.g., *Ankerman* v. *Commissioner of Correction*, 104 Conn. App. 649, 654–55, 935 A.2d 208 (2007), cert. denied, 285 Conn. 916, 943 A.2d 474 (2008); see also *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 76 (*Salamon* claim not subject to procedural default).

may not be disturbed unless the findings were clearly erroneous . . . [q]uestions of law and mixed questions of law and fact receive plenary review." (Internal quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 65. "The applicability of *Salamon* and whether the trial court's failure to give a *Salamon* instruction was harmless error are issues of law over which our review is plenary." *Farmer* v. *Commissioner of Correction*, 165 Conn. App. 455, 459, 139 A.3d 767, cert. denied, 323 Conn. 905, 150 A.3d 685 (2016); see also *Hinds* v. *Commissioner of Correction*, supra, 60, 65; *Nogueira* v. *Commissioner of Correction*, 168 Conn. App. 803, 814, 149 A.3d 983, cert. denied, 323 Conn. 949, 169 A.3d 792 (2016).

The petitioner claims that the habeas court improperly concluded that he was not deprived of due process when the jury found him guilty of kidnapping in the first degree without being instructed pursuant to *Salamon*. According to the petitioner, placing both victims in walk-in refrigerators was "clearly incidental" to, and was part of the "continuous activity" of, robbing the Friendly's restaurants. Therefore, the petitioner argues that the habeas court improperly concluded that the lack of *Salamon* instructions was harmless beyond a reasonable doubt.[5]

In response, the respondent argues that the failure to give a *Salamon* instruction was "harmless under any applicable standard."[6] According to the respondent, the

[5] The petitioner also argues that the habeas court improperly engaged in a harmless error analysis after it concluded that the trial court should have given a *Salamon* instruction. We are unpersuaded by this argument. See, e.g., *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 77–81 (failure to charge jury according to *Salamon* subject to harmless error analysis); *White* v. *Commissioner of Correction*, 170 Conn. App. 415, 427–29, 154 A.3d 1054 (2017) (same); *Farmer* v. *Commissioner of Correction*, supra, 165 Conn. App. 465 (same).

[6] After oral argument, we stayed the present appeal, sua sponte, until the final disposition of *Epps* v. *Commissioner of Correction*, 153 Conn. App. 729, 104 A.3d 760 (2014), appeal dismissed, 327 Conn. 482, 175 A.3d 558 (2018) (certification improvidently granted). "Our Supreme Court granted

robberies occurred before the petitioner forced both victims into the walk-in refrigerators.[7] Because of this,

certification in *Epps* to determine '[w]hether . . . in a collateral proceeding, where the petitioner claims that the trial court erred by omitting an element of the criminal charge in its final instructions to the jury, is harm measured in accordance with *Brecht* v. *Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), or is harm measured in accordance with *Neder* v. *United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)?' " *Epps* v. *Commissioner of Correction*, 323 Conn. 901, 150 A.3d 679 (2016).

Under the *Brecht* standard, reversal of a criminal conviction is warranted when error at the petitioner's underlying criminal trial had a "substantial and injurious effect or influence in determining the jury's verdict." (Internal quotation marks omitted.) *Brecht* v. *Abrahamson*, supra, 507 U.S. 637. Under the *Neder* standard, a petitioner is not entitled to habeas relief if "a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Neder* v. *United States*, supra, 527 U.S. 17.

Our Supreme Court dismissed *Epps* because "[t]he respondent had squarely argued to the habeas court that the petition should be assessed under the harmless beyond a reasonable doubt standard. The respondent never argued in the alternative that a higher standard of harmfulness should apply to collateral proceedings even if the petitioner's claim was not subject to procedural default, despite federal case law applying a higher standard since 1993. *Epps* v. *Commissioner of Correction*, [327 Conn. 482, 485, 175 A.3d 558 (2018)]." (Internal quotation marks omitted.) *Banks* v. *Commissioner of Correction*, supra, 184 Conn. App. 113 n.7.

In the present case, the respondent did not argue, either to the habeas court or to this court, the applicability of the *Brecht* standard. Accordingly, we will employ the harmlessness beyond a reasonable doubt standard as stated in *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 56, and *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 740; see generally *Banks* v. *Commissioner of Correction*, supra, 184 Conn. App. 112–13 n.7.

[7] In response to questions during oral argument before this court, the respondent appeared to posit that a *Salamon* instruction was not required under the circumstances. See, e.g., *Pereira* v. *Commissioner of Correction*, 176 Conn. App. 762, 778, 171 A.3d 105 (*Salamon* instruction not required when restraint forming basis of kidnapping has independent legal significance and is otherwise "sufficiently disconnected" from other crime), cert. denied, 327 Conn. 984, 175 A.3d 43 (2017); *State* v. *Golder*, 127 Conn. App. 181, 191, 14 A.3d 399 (*Salamon* instruction not required where criminal conduct underlying kidnapping charge completed prior to restraint of victim), cert. denied, 301 Conn. 912, 19 A.3d 180 (2011). The respondent did not distinctly raise this argument in his brief. Instead, he argued in his brief that the *lack of* a *Salamon* instruction was "harmless under any applicable standard." Accordingly, we decline to consider the argument that a *Salamon* instruction was not required in the present case.

the respondent maintains that confining the victims in the walk-in refrigerators was not necessary to commit the robberies, nor was it the type of incidental restraint contemplated by *Salamon*. Simply put, the respondent contends that confining the victims in the walk-in refrigerators had independent legal significance, and "establish[ed] [the petitioner's] intent to prevent the victims' liberation for a longer period of time and to a greater degree than was necessary for the commission of the robberies."

The issue presented herein is not whether there was sufficient evidence to convict the petitioner of both kidnapping and robbery. *Banks* v. *Commissioner of Correction*, supra, 184 Conn. App. 103; see also *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 91. Similarly, it is not whether a reasonable probability exists that a jury, properly instructed in accordance with *Salamon*, would reach a different result. *Banks* v. *Commissioner of Correction*, supra, 103. Instead, the respondent bears the "arduous burden of demonstrating that the omission of an instruction on incidental restraint did not contribute to the verdict." Id. We conclude that this burden has not been met, and, therefore, we reverse the judgment of the habeas court.[8]

[8] The dissent argues that the relatively narrow principles set forth in *State* v. *Salamon*, supra, 287 Conn. 509, have undergone a "steady transmogrification" and become more expansive. We do not disagree with the substance of this assessment insofar as our Supreme Court has expanded the principles of *Salamon* to apply retroactively in collateral proceedings on judgments rendered final prior to *Salamon*. See *Wilcox* v. *Commissioner of Correction*, supra, 162 Conn. 736. More significantly, in *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 78, our Supreme Court imposed the burden of demonstrating harmless error on the respondent where the jury should have received a *Salamon* instruction but did not. This requires the reviewing court to conclude "beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . . ." (Internal quotation marks omitted.) Id., 77–78.

Our consideration of the petitioner's appellate claim, therefore, must include the principles regarding the crime of kidnapping stated in *State* v. *Salamon*, supra, 287 Conn. 509, as viewed through the lens shaped by the subsequent cases of *Hinds* v. *Commissioner of Correction*, supra, 321 Conn.

We recite, in some detail, the underlying facts surrounding the Manchester and Glastonbury robberies, which the jury reasonably could have found, as part of our analysis. See *Nogueira* v. *Commissioner of Correction*, supra, 168 Conn. App. 814–15; see also *State* v. *Bell*, supra, 93 Conn. App. 652–54. At approximately 1 a.m. on April 12, 2001, Cheryl Royer was the last employee to leave the Friendly's restaurant in Manchester. As she was exiting the restaurant, the petitioner approached her, stated that he had a gun, and ordered her to "get back inside" and to "give him the money." Once Royer informed the petitioner that she did not have any money, the petitioner told her "to get the money from the safe." The petitioner and Royer entered the restaurant together and walked to the manager's office, the location of the safe. Royer then opened the safe at the petitioner's direction and "was told to sit in the chair in the corner and turn away." After approximately "[a] minute" or "[a] matter of minutes" sitting in the chair, the petitioner told Royer "to go into the walk-in refrigerator." The walk-in refrigerator was approximately fifteen feet down the hall from the manager's office, and, after the petitioner finished looting the safe, he ordered Royer to proceed into the refrigerator. Once she entered the refrigerator, and after the refrigerator door shut behind her, the petitioner told her "to stay in there for fifteen minutes."[9] Royer smoked

56, *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 740, and *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 415, as well as others cited in the various opinions released today.

[9] According to Royer, the petitioner ordered her to remain in the refrigerator for fifteen minutes. The petitioner's statement to the police differed from Royer's testimony. Specifically, the petitioner indicated that he had instructed her to "step in [the refrigerator] for a minute and I'll come back and get you when I'm through."

In *Epps* v. *Commissioner of Correction*, 153 Conn. App. 729, 740–41, 104 A.3d 760 (2014), appeal dismissed, 327 Conn. 482, 175 A.3d 558 (2018) (certification improvidently granted), we noted that, under the applicable harmless error analysis, a reviewing court must be satisfied beyond a reasonable doubt that the omitted element was uncontested and support by overwhelming evidence. We also explained, in that case, that the allegations

part of a cigarette, and, after a few minutes, she left the refrigerator and ran into the office to call the police. The petitioner was not in the restaurant when Royer exited the refrigerator.

Two days later, on April 14, 2001, at approximately 6 a.m., Tricia Smith was the first employee to arrive for the opening shift at the Friendly's restaurant in Glastonbury. As she entered the restaurant, the petitioner approached her from behind and "told [her] to turn off the alarm." Smith testified: "He told me—he asked me where the safe was, I told him it was in the back dish room, [and] he told me to go back and open it." Smith did not see a gun, but the petitioner had something underneath his jacket that looked like one. Smith led the petitioner to the safe and, after opening it, "[the petitioner] told [her] to go into the walk-in cooler. So [she] unlocked it and got in." The walk-in refrigerator was ten feet away from the safe, and the petitioner ordered Smith into the refrigerator "[j]ust two [or] three minutes" after she first saw him. Once she was inside the refrigerator, the petitioner told her that "he would let [her] know when he was finished" and when it was safe to come out. Approximately two minutes after entering the refrigerator, Smith heard the petitioner say something that she could not make out. "[She] then waited a few more minutes after that" before she peeked out of the refrigerator to see if the petitioner had left the restaurant. Seeing that the petitioner had left, she exited the refrigerator and ran to the nearby gas station for help.

Finally, although the petitioner did not testify at trial, his statement to the police was read into the record and

regarding the criminal conduct neither were uncontested nor supported by overwhelming evidence, in part because the perpetrator disputed the victim's testimony of events at the crime scene. Id., 741. As a result, we declined to weigh the evidence in order to conclude that the missing *Salamon* instruction in the case was harmless. Id., 741–42.

became a full exhibit. In that statement, he confessed to both robberies. With respect to the Manchester robbery involving Royer, his statement provided in relevant part: "Once we were in the back room, [Royer] opened the safe. After she opened the safe, I asked her which one—which one is the walk-in refrigerator. She pointed to one, and I asked her to step in there for a minute and I'll come back and get you when I'm through. I then took the money out of the safe. . . . After I got the money, I left. The manager was still in the refrigerator when I left." With respect to the Glastonbury robbery involving Smith, the petitioner's statement provided in relevant part: "The only other robbery I did was the one in Glastonbury this morning, [April 14, 2001]. . . . I told [Smith] to open the safe. . . . After she opened the safe I told her to get in the refrigerator. After I got the money from the safe, I left."

We now turn to the legal principles governing whether an omitted jury instruction constitutes harmless error. It is undisputed that the trial court did not provide an incidental restraint instruction in accordance with *Salamon*. "[I]t is well established that a defect in a jury charge which raises a constitutional question is reversible error if it is reasonably possible that, considering the charge as a whole, the jury was misled. . . . [T]he test for determining whether a constitutional error is harmless . . . is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. . . . A jury instruction that improperly omits an essential element from the charge constitutes harmless error [only] if a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . . . The failure to charge in accordance with *Salamon* is viewed as an omission of an essential element

. . . and thus gives rise to constitutional error." (Citation omitted; internal quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 77–78; see also *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 770; *White* v. *Commissioner of Correction*, 170 Conn. App. 415, 427–28, 154 A.3d 1054 (2017); *Nogueira* v. *Commissioner of Correction*, supra, 168 Conn. App. 812–13; see generally *State* v. *Fields*, 302 Conn. 236, 245–46, 24 A.3d 1243 (2011) (on direct appeal, jury instruction that omits essential element from charge constitutes harmless error only if reviewing court concluded, beyond reasonable doubt, that omitted element was uncontested and supported by overwhelming evidence such that jury verdict would have been same absent error); *State* v. *Flores*, 301 Conn. 77, 83, 17 A.3d 1025 (2011) (on direct appeal, test for determining whether there is constitutional error in jury instruction is whether it appears beyond reasonable doubt that error complained of did not contribute to verdict).

"[W]e underscore that a determination of sufficient evidence to support a kidnapping conviction is *not* the appropriate yardstick by which to assess the likelihood of a different result [and that the burden of proving harmlessness rests with the respondent]." (Emphasis added.) *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 91; see id., 78. Similarly, the appropriate test is not whether a properly instructed jury likely would have found the petitioner guilty of kidnapping. Id., 85; see also *State* v. *Flores*, supra, 301 Conn. 87.

"To answer the question of whether the absence of the *Salamon* standard constituted harmless error requires us to examine the factors and principles enunciated in that case. . . . [*A*] *defendant may be convicted of both kidnapping and another substantive crime if, at any time prior to, during or after the commission of that other crime, the victim is moved*

or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime. . . . We iterate that to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime. . . .

"The *Salamon* court set forth a list of factors [f]or purposes of making [the] determination [of whether a criminal defendant's movement or confinement of a victim was necessary or incidental to the commission of another crime; specifically] the jury should be instructed to consider the various relevant factors, including [1] the nature and duration of the victim's movement or confinement by the defendant, [2] whether that movement or confinement occurred during the commission of the separate offense, [3] whether the restraint was inherent in the nature of the separate offense, [4] whether the restraint prevented the victim from summoning assistance, [5] whether the restraint reduced the defendant's risk of detection and [6] whether the restraint created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Banks* v. *Commissioner of Correction*, supra, 184 Conn. App. 114–15; see also *State* v. *Flores*, supra, 301 Conn. 84–85.

At this point, a discussion of *Banks* v. *Commissioner of Correction*, supra, 184 Conn. App. 101, facilitates our analysis. In that case, the petitioner, Mark Banks, was convicted in 1997 of four counts of kidnapping in the first degree, four counts of robbery in the first degree and two counts of criminal possession of a pistol or revolver. Id., 104. His convictions stemmed from the

events at two Bedding Barn stores in Newington and Southington. Id., 105–106. On August 30, 1995, Banks, posing as a customer, entered the Newington store shortly before closing time. Id., 105. After briefly speaking to one employee, Banks pulled a silver handgun from his bag and directed the employee to open the cash register. Id. After taking money, Banks moved the employee and his coworker to a nearby bathroom. Id. Banks propped a mop handle against the door to keep the employees in the bathroom. Id. After a brief time, the employees exited the bathroom and called the police. Id.

On the evening of September 13, 1995, Banks, along with an unknown woman, went to the Southington store where he again posed as a customer and held up a store employee and her friend at gunpoint. Id., 105–106. After taking money from the cash register and a bank bag, the petitioner ordered the two women to lock themselves in the bathroom, which they did. Id., 106. Shortly thereafter, the two women exited the bathroom and called the police. Id.

Following his conviction and unsuccessful direct appeal, Banks filed a petition for a writ of habeas corpus in which he challenged his kidnapping convictions on the ground that the jury in his criminal trial had not received a *Salamon* instruction. Id. In that case, the habeas court accepted the respondent's concession that Banks had been entitled to a *Salamon* instruction. Id., 106 n.5. "The habeas court concluded that the respondent demonstrated that the absence of a *Salamon* instruction at [Banks'] criminal trial constituted harmless error because the movements and confinements [of the victims] were perpetrated *after* the crimes of robbery were committed and cannot conceivably be regarded as coincidental with or necessary to complete the substantive crimes of robbery. Depriving someone of their freedom of movement by imprisoning them

in a bathroom subsequent to acquiring their money, although convenient for the robber, is not inherent in the crime of robbery. It is crystal clear that [Banks'] intent and purpose for locking up his robbery victims was to postpone their summoning of assistance and reporting of the crime to police, thus facilitating [Banks'] escape from the scene and delaying detection of his crime, identity, and/or whereabouts. Also, [Banks] extended the period of infliction of duress and distress for the victims by restraining them beyond the time of fulfillment of his quest, i.e., seizure of cash." (Emphasis in original; internal quotation marks omitted.) Id., 107–108.

Banks appealed from the decision of the habeas court, claiming that it improperly had concluded that the absence of the *Salamon* instruction was harmless error. Id., 104. Specifically, he argued that "it would have been reasonable for jurors to conclude that the brief restraint that occurred during the commission of the robbery was incidental to the robbery, and therefore, was not a kidnapping. Because [Banks] was deprived of the opportunity of having the jurors consider this issue, which was susceptible to more than one interpretation, the respondent did not prove the error was harmless beyond a reasonable doubt." (Internal quotation marks omitted.) Id., 114. Ultimately, we agreed with Banks and reversed the judgment of the habeas court. Id., 132.

In both *Banks* v. *Commissioner of Correction*, supra, 184 Conn. App. 101, and *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 430–32, we began our analysis with the first *Salamon* factor, that is, the nature and duration of the victims' movement or confinement by the perpetrator. Specifically, we observed: "[I]n *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 92–93, our Supreme Court attempted to categorize various *Salamon* incidental restraint cases with

differing degrees of confinement or movement: Although no minimum period of restraint or degree of movement is necessary for the crime of kidnapping, an important facet of cases where the trial court has failed to give a *Salamon* instruction and that impropriety on appellate review has been deemed harmless error is that longer periods of restraint or greater degrees of movement demarcate separate offenses. See *State* v. *Hampton*, [293 Conn. 435, 463–64, 988 A.2d 167 (2009)] (defendant confined victim in a car and drove her around for approximately three hours before committing sexual assault and attempted murder); *State* v. *Jordan*, [129 Conn. App. 215, 222–23, 19 A.3d 241] (evidence showed the defendant restrained the victims to a greater degree than necessary to commit the assaults even though assaultive behavior spanned entire forty-five minute duration of victims' confinement) [cert. denied, 302 Conn. 910, 23 A.3d 1248 (2011)]; *State* v. *Strong*, [122 Conn. App. 131, 143, 999 A.2d 765] (defendant's prolonged restraint of victim while driving for more than one hour from one town to another not merely incidental to threats made prior to the restraint) [cert. denied, 298 Conn. 907, 3 A.3d 73 (2010)]; and *State* v. *Nelson*, [118 Conn. App. 831, 860–62, 986 A.2d 311] (harmless error when defendant completed assault and then for several hours drove victim to several locations) [cert. denied, 295 Conn. 911, 989 A.2d 1074 (2010)]. *Thus, as these cases demonstrate, multiple offenses are more readily distinguishable—and, consequently, more likely to render the absence of a Salamon instruction harmless—when the offenses are separated by greater time spans, or by more movement or restriction of movement.*

"*Conversely, multiple offenses occurring in a much shorter or more compressed time span make the same determination more difficult and, therefore, more likely to necessitate submission to a jury for it to*

make its factual determinations regarding whether the restraint is merely incidental to another, separate crime. In those scenarios, [in which] kidnapping and multiple offenses occur closer in time to one another, it becomes more difficult to distinguish the confinement or restraint associated with the kidnapping from another substantive crime. The failure to give a proper *Salamon* instruction in those scenarios is more likely to result in harmful error precisely because of the difficulty in determining whether each crime has independent criminal significance. See *State* v. *Thompson*, [118 Conn. App. 140, 162, 983 A.2d 20 (2009)] (within fifteen minutes defendant entered victim's car, pushed her behind a building and sexually assaulted her) [cert. denied, 294 Conn. 932, 986 A.2d 1057 (2010)]; *State* v. *Flores*, [supra, 301 Conn. 89] (defendant's robbery of victim in her bedroom lasted between five and twenty minutes); *State* v. *Gary*, [120 Conn. App. 592, 611, 992 A.2d 1178] (defendant convicted of multiple sexual assaults and an attempted sexual assault that were in close temporal proximity to the defendant's restraint of the victim; thus court determined evidence reasonably supports a finding that the restraint merely was incidental to the commission of other crimes, namely, sexual assaults and attempted sexual assault; lack of *Salamon* instruction harmful error) [cert. denied, 297 Conn. 910, 995 A.2d 637 (2010)]. . . . [S]ee generally *Wilcox* v. *Commissioner of Correction*, supra, 162 Conn. App. 743 (review of appellate decisions reveals that absence of *Salamon* instruction is generally more prejudicial where kidnapping related actions were closely aligned in time, place and manner to other criminal acts and these factors are particularly crucial)." (Emphasis in original; internal quotation marks omitted.) *Banks* v. *Commissioner of Correction*, supra, 184 Conn. App. 116–18.

The minimal movement and confinement of Royer and Smith are very similar to those of the victims in

Banks. With respect to the Manchester incident in this case, the petitioner approached Royer as she was leaving the restaurant and, after indicating that he had a gun, ordered her back inside. The petitioner and Royer walked to the location of the safe inside, where he directed her to open it. After taking the money from the safe, the petitioner moved Royer to a walk-in refrigerator, where she was confined for a few minutes.

The criminal activity at the Glastonbury restaurant bears a marked resemblance to that at the Manchester location, albeit occurring in the early morning as opposed to after closing time. The petitioner approached Smith as she opened the doors of the restaurant. Intimating that he possessed a gun, the petitioner went inside with Smith, and the two immediately went to the restaurant's safe. The petitioner forced Smith to open the safe, and then moved her to, and confined her in, the walk-in refrigerator. Thus, the movements of Royer and Smith were limited to the area within the Friendly's, and the confinement occurred virtually contemporaneously with the taking of the money.

We iterate that, in each instance, the petitioner's criminal conduct occurred at a single location, and the robbery and confinement were not separated by a significant time period or distance. Therefore, it is difficult to determine whether the conduct in placing the restaurant employees into the walk-in refrigerators had independent criminal significance. In other words, "[g]iven the close temporal proximity to the alleged kidnapping and [the fact that] any confinement/movement was limited in nature and distance"; (internal quotation marks omitted); and for the reasons set forth in *Banks* v. *Commissioner of Correction*, supra, 184 Conn. App. 119, we conclude that this factor weighs in favor of the petitioner.

We next consider the second *Salamon* factor, that is, whether the confinement or movement of the restaurant employees occurred during the commission of the robberies. Id., 120. The habeas court's decision suggests, and the respondent explicitly argues in his appellate brief, that the robberies in both Manchester and Glastonbury had been completed prior to the petitioner's movement of Royer and Smith to the walk-in refrigerator. The respondent's view is that the movement to and confinement in the walk-in refrigerator constituted a separate offense that took place after a completed robbery. In *Banks*, we specifically rejected this argument, noting that the crime of robbery may continue after the taking of property. Id., 122. Accordingly, we disagree with the habeas court's conclusion that "[a]ny restraint was not inherent in the robbery itself . . . ." A properly instructed jury could have determined that the movement and confinement of Royer and Smith to the walk-in refrigerators occurred during the continuous sequence of events relating to the taking of the money. See id., 128. In other words, these actions of the petitioner constituted part of the course of events of the robbery, and not a separate criminal offense. See id., 124–25; see also *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 433–34. We conclude, therefore, that the second *Salamon* factor supports the petitioner.

The third *Salamon* factor, which is whether the restraint was inherent in the nature of the robbery, also supports the petitioner. We iterate that the jury would not have concluded necessarily that the robberies were completed prior to the movement and confinement of Royer and Smith. Thus, without a *Salamon* instruction, a jury could have found the petitioner guilty of kidnapping even if it concluded that restraint of these two employees was incidental to the robbery. See *Banks* v. *Commissioner of Correction*, supra, 184 Conn. App. 129; see also *State* v. *Fields*, supra, 302 Conn. 252; *White*

v. *Commissioner of Correction*, supra, 170 Conn. App. 435–37.[10] Accordingly, we conclude that the third *Salamon* factor weighs in favor of the petitioner.

We note that the remaining *Salamon* factors provide the petitioner little, if any, support for his claim that the absence of a *Salamon* instruction was not harmless. See *Banks* v. *Commissioner of Correction*, supra, 184 Conn. App. 129. Our reasoning in *Banks* regarding consideration of all the *Salamon* factors applies to the present case. "[T]he significance of the *Salamon* factors that do weigh in favor of the petitioner, namely, the nature and duration of the movement and confinement of the employees, whether such confinement occurred during the commission of the robbery and whether the restraint was inherent in the nature of the robbery, outweighs the significance of those that support the respondent's claim of harmless error. See *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 437–38 (certain *Salamon* factors cut in favor of respondent, but did not trump significance of others that weighed in favor of petitioner) . . . ." (Citation omitted.) *Banks* v. *Commissioner of Correction*, supra, 130.[11]

[10] In conducting this analysis, we do not intend to dismiss or ignore that the increased fear, if not terror, that Smith and Royer experienced as they were ordered into the confines of the walk-in refrigerator as commanded by the petitioner. See *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 80 n.15; *State* v. *Flores*, supra, 301 Conn. 88.

[11] The dissent accurately and succinctly sets forth the facts of *State* v. *Salamon*, supra, 287 Conn. 514–15, to distinguish the result in that case from the present case. In response, we note the facts in *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 56. In that case, the petitioner, Walter Hinds, wearing only underwear and a sleeveless shirt, followed the sixteen year old victim as she walked through a parking lot at night. Id., 61–62. Hinds pursued the fleeing victim, grabbed her, covered her mouth, threatened her, and threw her to the ground. Id., 62. He then dragged her to a grassy area between the parking lot and a small house, where it was darker, and sexually assaulted her.

In concluding that the absence of a *Salamon* instruction was not harmless, our Supreme Court noted that that conduct in *Hinds* was a continuous, uninterrupted course of conduct that lasted only minutes. Id., 80. Additionally, it observed that "when the evidence regarding the perpetrator's intent

We are cognizant of the respondent's somewhat Sisyphean[12] position in cases where the state had obtained a valid kidnapping conviction years prior to our Supreme Court's decisions in *State* v. *Salamon*, supra, 287 Conn. 509, *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 740, and *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 56, as well as a growing number of appellate cases applying and interpreting these precedents, only to later have that conviction overturned. Nevertheless, given these developments, and the fact that the petitioner in the present case was entitled to a *Salamon* instruction at his criminal trial, the respondent shoulders the burden to prove that the absence of that instruction was harmless beyond a reasonable doubt. After a review of the facts and controlling case law, we conclude that he has not met this burden because the question of the petitioner's intent when moving and confining Royer and Smith was contested and not supported by overwhelming evidence.

A properly instructed jury could have had reasonable doubt as to whether the petitioner moved and confined

is susceptible to more than one interpretation, that question is one for the jury." Id., 79. The court set forth various plausible explanations for Hinds' intent in moving the victim to the dark, grassy area. Id., 80. It then concluded that "[t]he close alignment in time and place of [the victim's] restraint and abduction to the sexual assault calls into serious question whether reasonable jurors would conclude that [Hinds] intended to restrain [the victim] for any purpose other than the commission of the sexual assault." Id., 93–94.

We do note, however, that Hinds could have sexually assaulted the victim at the specific location that he restrained the victim and threw her to the ground. Id., 62. He instead moved the victim to a different location. In other words, although it did not appear necessary for this asportation, our Supreme Court nevertheless concluded that the absence of the *Salamon* instruction was not harmless beyond a reasonable doubt.

[12] "Sisyphus, the mythical King of Corinth who was sentenced by Zeus to an eternity in Hades trying to roll a rock uphill which forever rolled back upon him." (Internal quotation marks omitted.) *Huch* v. *United States*, 439 U.S. 1007, 1012, 99 S. Ct. 622, 58 L. Ed. 2d 684 (1978) (Rehnquist, J., dissenting).

Royer and Smith in the walk-in refrigerators in furtherance of the robberies at the Manchester and Glastonbury Friendly's restaurants on April 12, 2001, and April 14, 2001, respectively. See, e.g., *State* v. *Flores*, supra, 301 Conn. 87 (test is not whether jury would return a guilty verdict if properly instructed, but rather whether it was reasonably possible that jury, instructed in accordance with *Salamon*, might find petitioner's conduct constituted robbery but did not rise to level of kidnapping). The minimal movement and confinement of the two employees after the taking of the money from the safes, coupled with the uncertainty as to whether the movement and confinement of Royer and Smith in the walk-in refrigerators was a continuous, uninterrupted course of conduct related to the robbery or an independent criminal act, precludes a conclusion that the respondent met his burden in the present case. See *Banks* v. *Commissioner of Correction*, supra, 184 Conn. App. 132 (citing *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 92–93, and *Wilcox* v. *Commissioner of Correction*, supra, 162 Conn. App. 743). Accordingly, we cannot conclude that the absence of the *Salamon* instruction amounts to harmless error in the present case. The petitioner is entitled to the reversal of his kidnapping convictions and a remand for a new trial on those charges. *Banks* v. *Commissioner of Correction*, supra, 132; see also *State* v. *DeJesus*, 288 Conn. 418, 434–39, 953 A.2d 45 (2008).

The judgment of the habeas court is reversed and the case is remanded with direction to render judgment granting the petition for a writ of habeas corpus, vacating the petitioner's convictions under § 53a-92 (a) (2) (B) and ordering a new trial on those offenses.

In this opinion SHELDON, J., concurred.

LAVINE, J., dissenting. Despite its thoughtful and well reasoned analysis, I disagree with the majority's conclusion that the respondent, the Commissioner of Correction, failed to prove that the absence of jury instructions in accordance with *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), was harmless error in the present case and, therefore, respectfully dissent.

My conclusion is informed by what I believe to be the steady transmogrification of the relatively narrow principles announced in *Salamon*, into something more expansive, as exemplified by the present case, *Banks* v. *Commissioner of Correction*, 184 Conn. App. 101, A.3d (2018), which this court also releases today, and others. Consequently, the seriousness of the conduct involving the normal incidents of what is typically thought of as kidnapping, and its devastating impact on victims, is being minimized because conduct that merely *facilitates* another crime—rather than that which is *necessary* to its completion—is being viewed as a continuation of the conduct associated with the other substantive offense. As will be discussed, I also believe that an analysis of the nonexhaustive six factors enunciated in *Salamon* supports affirmance of the habeas court's judgment.

Salamon provided a necessary corrective to the all too familiar scenario in which the state overcharged defendants by appending a kidnapping charge onto an assault, frequently a sexual assault. As the majority opinion in *Salamon* stated: "Unfortunately [the previous interpretation of the kidnapping law] has afforded prosecutors virtually unbridled discretion to charge the same conduct either as a kidnapping or as an unlawful restraint despite the significant differences in the penalties that attach to those offenses. Similarly, our prior construction of the kidnapping statutes has permitted prosecutors—indeed, it has encouraged them—to

include a kidnapping charge in any case involving a sexual assault or robbery. In view of the trend favoring reform of the law of kidnapping that existed at the time that our statutes were enacted, and in light of the stated goal of the [Commission to Revise the Criminal Statutes] of creating a modern, informed and enlightened penal code, it is highly likely that our legislature intended to embrace . . . reform, thereby reducing the potential for unfairness that had been created under this state's prior kidnapping statutes." *State* v. *Salamon*, supra, 287 Conn. 543–44.

The change brought about by *Salamon* was necessary and appropriate. Permitting kidnapping to be charged in many of these cases ignored the real core of the criminal conduct involved—assaultive behavior—and gave prosecutors a cudgel with which to thrash defendants, who were charged with two serious crimes, when only one had in essence been committed. This unreasonably lengthened a defendant's exposure and provided prosecutors with enormous leverage.

But like moss climbing up a tree, *Salamon*'s reach has crept steadily and now applies to situations beyond what I believe was originally contemplated by the case. A quick comparison of *Salamon* itself, and the instant case, puts my view into context.[1]

In *Salamon*, the defendant followed the victim up a flight of stairs. The victim fell and the defendant held her down by her hair. The defendant punched the victim in the mouth and attempted to thrust his fingers down her throat as she was screaming. The victim escaped and the defendant was arrested. Id., 515.

In its review of the law of kidnapping in Connecticut, the court noted that "[a]mong the evils that both the

[1] For a comprehensive review of post-*Salamon* cases, see *Nogueira* v. *Commissioner of Correction*, 168 Conn. App. 803, 149 A.3d 983, cert. denied, 323 Conn. 949, 169 A.3d 792 (2016).

common law and later statutory prohibitions against kidnapping sought to address were the isolation of a victim from the protections of society and the law and the special fear and danger inherent in such isolation." Id., 536. Severe sanctions for "relatively trivial types of restraint"; id., 538; were to be avoided, the court continued. The remedy proposed by the court in *Salamon* was as follows: "Our legislature, in replacing a single, broadly worded kidnapping provision with a gradated scheme that distinguishes kidnappings from unlawful restraints by the presence of an intent to prevent a victim's liberation, intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are *merely incidental* to and *necessary for* the commission of another crime against that victim. Stated otherwise, to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is *necessary* to commit the other crime." (Emphasis added.) Id., 542. It is noteworthy that the court used the word *necessary*, meaning required or essential; it did not refer to conduct which simply *facilitates* or *makes easier* the commission of the underlying crime.

Unfortunately, the cases are morphing from the easy task of concluding that holding down someone by their hair is incidental to the ongoing assault, to attempting to determine the defendant's often opaque and inchoate intent on the basis of his or her actions. Here, the conduct at issue involved petrifying innocent victims by pointing what appeared to be a gun at them, herding them into a refrigerator, telling them not to leave, closing them in—thereby isolating them from the outside world—and preventing them from communicating with someone to get help. All the while, and for every second,

the victims were undoubtedly terrified and probably afraid they were about to die. As the law in this area has developed, subsequent cases have minimized or overlooked the *merely incidental* to and *necessity* requirements of *Salamon* and have watered it down to apply to conduct that is not really *merely incidental* to or *necessary* to commit the underlying crime, but simply *facilitates* or makes completion of the underlying crime *easier* or *more convenient*. In other words, the *necessity* requirement is being eviscerated. This case provides a good illustration of this morphing.

It is true that judges and juries are often tasked with the difficult job of evaluating an actor's intent, but often, the intent involved is the intent to do a particular act. For example, a trier of fact may be asked to determine if someone intended to inflict "physical injury" or "serious physical injury" on another person. That, however, is far different than the amorphous task of determining how much time a defendant believes is *necessary* to commit a crime. Determining how much time is *necessary* to commit a crime—or what degree of force, coercion, or restraint is needed—in the eyes of an often violent criminal is an inherently impracticable, sometimes impossible, task. Suppose that the petitioner in this case, Leon Bell, believed, in good faith, that keeping someone locked up in a refrigerator *is necessary*, so he can escape to a hideout in northern California. Does this conduct meet the necessity test? Or to posit a closer case, suppose a defendant believes it *is necessary* to confine a victim until he reaches a nearby getaway car, but not until he gets on the highway 500 yards away? Can jurors really be expected to evaluate these sorts of matters in a meaningful, consistent, coherent way? Once the defendant has finished emptying a safe, or a victim's pockets, how can a jury be expected to determine what is in the defendant's mind in any rational, predictable manner as it relates to how much time is

required to complete a crime or escape? The likely result of this trend is to permit gratuitous harm to be inflicted on victims of robberies, and encourage a mishmash of verdicts with no principled core.

In summary, I believe the necessary correction accomplished by *Salamon* is losing its moorings and is being extended too far. I believe the *necessity* requirement should be resuscitated and *Salamon*'s application should be restricted in some appropriate way only to cases in which the restraint is truly part and parcel of the underlying crime.

Even if my view is rejected, I would still affirm the judgment of the habeas court in the present case pursuant to the nonexhaustive six factors set out in *Salamon*. See, e.g., *White* v. *Commissioner of Correction*, 170 Conn. App. 415, 430–39, 154 A.3d 1054 (2017). I agree with both the majority's recitation of the facts for each robbery in the present case and its narration of the law governing the respondent's heavy burden in the context of this collateral proceeding.[2] For the reasons that follow, however, I respectfully part ways with the majority

[2] The respondent's burden of proving that the absence of *Salamon* instructions, beyond a reasonable doubt, did not contribute to the verdict obtained; see, e.g., *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 77–78, 136 A.3d 596 (2016) (absence of *Salamon* instruction is harmless error "[only] if a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error" [internal quotation marks omitted]); is akin to the respondent demonstrating entitlement to a directed verdict on the same facts. See, e.g., *State* v. *Fields*, 302 Conn. 236, 253 n.17, 24 A.3d 1243 (2011) (properly instructed jury reasonably could conclude "that the defendant's restraint of [the victim] lasted for a period of time that was longer than necessary for the commission of the assault, [but] the state has failed to establish that the jury reasonably could *not* have reached a contrary conclusion" [emphasis in original]); *State* v. *Flores*, 301 Conn. 77, 87, 17 A.3d 1025 (2011) ("the test is whether there is a reasonable possibility that a properly instructed jury would reach a different result"); *Nogueira* v. *Commissioner of Correction*, 168 Conn. App. 803, 845, 149 A.3d 983 ("[u]nder the facts and circumstances of this case, we conclude that a reasonable fact finder, under the proper interpretation of our kidnapping law, *could not find* that the restraint of the victim was merely incidental

regarding the assessment of the *Salamon* factors. I address each robbery in turn.

In the robbery of the Friendly's restaurant in Manchester, with regard to the first *Salamon* factor, it was uncontested at trial that the petitioner ordered an employee, Cheryl Royer, into the walk-in refrigerator after she opened the safe. It was also uncontested that he ordered her to remain there for an indeterminate period of time. Although the *duration* of Royer's confinement for, at most, a few minutes was relatively minor; see, e.g., *State* v. *Hampton*, 293 Conn. 435, 463–64, 988 A.2d 167 (2009) (victim driven around more than three hours prior to assault and attempted murder); *Eric M.* v. *Commissioner of Correction*, 153 Conn. App. 837, 846, 108 A.3d 1128 (2014) (victim restrained, gagged, and handcuffed for at least five hours), cert. denied, 315 Conn. 915, 106 A.3d 308 (2015); *State* v. *Nelson*, 118 Conn. App. 831, 861, 986 A.2d 311 (victim restrained for several hours and was driven to several locations after assault), cert. denied, 295 Conn. 911, 989 A.2d 1074 (2010); the *nature* of her confinement was qualitatively different when compared with other cases. The petitioner isolated Royer in an enclosed space that was shielded from public view, the location of which was entirely separate from the safe in the manager's office. In other words, the situs and isolating nature of Royer's confinement is a significant feature of the Manchester robbery.[3]

to or an inherent part of the sexual assault crimes" [emphasis added]), cert. denied, 323 Conn. 949, 169 A.3d 792 (2016); see also *Bagley* v. *Adel Wiggins Group*, 327 Conn. 89, 102, 171 A.3d 432 (2017) ("[a] trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion" [internal quotation marks omitted]).

[3] The majority highlights the conflicting evidence between Royer's testimony and the petitioner's statement to police regarding how long the petitioner instructed Royer to remain inside the refrigerator. See footnote 9 of the majority opinion. I acknowledge this conflict and agree with the majority's reading of this court's decision in *Epps* v. *Commissioner of Correction*, 153 Conn. App. 729, 104 A.3d 760 (2014), appeal dismissed, 327 Conn. 482, 175 A.3d 558 (2018) (certification improvidently granted).

I acknowledge that, on the one hand, relatively short durations of restraint over limited distances can make it difficult to conclude, as a matter of law, that an alleged kidnapping was not incidental to another crime. See, e.g., *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 432–33. But on the other hand, a kidnapping conviction does not require any minimum or fixed period of confinement or degree of movement. See *State* v. *Salamon*, supra, 287 Conn. 546. Confinement for one minute can be as terrifying as confinement for hours, depending on the circumstances. The petitioner isolated Royer in a separate space within Friendly's that was secreted from public view and where she was certain not to be seen or found. He ordered her to remain there for either fifteen minutes or until he came back to get her. He also left her in the refrigerator after he fled the restaurant. In effect, Royer's isolation amounted to a "second level of restraint . . . ." *Nogueira* v. *Commissioner of Correction*, 168 Conn. App. 803, 842, 149 A.3d 983 (asportation of victim to window well, "essentially a deep hole," limited victim's escape routes), cert.

Under the specific facts of both robberies in the present case, however, I disagree that any such conflict between the evidence introduced at trial, along with the limited distance of the movement of either Royer or Tricia Smith, an employee at the other Friendly's restaurant in Glastonbury that was robbed, is dispositive with respect to the respondent's burden. The very *nature* of the confinement—a key consideration under the first *Salamon* factor—suffered by both Royer and Smith at the petitioner's hands is qualitatively different than in any Connecticut case that I am aware of, besides the opinion which this court also releases today. See *Banks* v. *Commissioner of Correction*, supra, 184 Conn. App. 101. How long the petitioner instructed Royer or Smith to remain inside the respective refrigerators arguably does bear on his intent to restrain them for a period of time exceeding that which was necessary to commit the respective robberies. Additionally, the time that either victim remained inside the refrigerators—i.e., the *duration* of their confinement—is also a relevant consideration. And so is the distance between the refrigerators and the safes. Nonetheless, I believe the very *nature* of the confinement in both robberies outweighs such considerations. In other words, the *nature* of the confinement is central to this court's analysis and is different from any Connecticut appellate case that I am aware of dealing with the issue presently before this court.

denied, 323 Conn. 949, 169 A.3d 792 (2016); see also *State* v. *Salamon*, supra, 536 ("[a]mong the evils that both the common law and later statutory prohibitions against kidnapping sought to address were the *isolation* of a victim from the protections of society and the law and *the special fear and danger inherent in such isolation*" [emphasis added]). Such conduct is overwhelming evidence of the petitioner's intent to restrain Royer to a greater degree and for a longer period of time than was necessary to accomplish the robbery. See *State* v. *Winot*, 294 Conn. 753, 768, 988 A.2d 188 (2010) (intent may be inferred from circumstances and "[a]n accused's own words . . . constitute particularly compelling, direct evidence of his intent").

With regard to the second *Salamon* factor, the respondent argues that Royer's confinement helped to facilitate the petitioner's escape and that he already had completed the robbery before ordering Royer into the refrigerator. The petitioner argues that the confinement of Royer was part of the ongoing robbery and therefore was not a separate, distinct act.

When the circumstances could be viewed as being part of "a continuous, uninterrupted course of conduct"; *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 79, 136 A.3d 596 (2016); I recognize that this tends to weigh in favor of having a jury decide whether the accused possessed the requisite level of intent to be found guilty of a kidnapping under *Salamon*. See, e.g., id.; *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 433–35. Nevertheless, *Salamon* makes clear that "a defendant may be convicted of both kidnapping and another substantive crime if, *at any time prior to, during or after* the commission of that other crime, the victim is moved or confined in a way that has independent criminal significance, that is, *the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime*."

(Emphasis added.) *State* v. *Salamon*, supra, 287 Conn. 547. "[T]he guiding principle is whether the [confinement or movement] was so much the part of another substantive crime that the substantive crime could not have been committed without such acts . . . ." (Emphasis added; internal quotation marks omitted.) Id., 546.

Even if the jury, in accordance with *Salamon*, had been instructed to consider whether the confinement of Royer occurred during the commission of the robbery, the verdict would have been the same because such confinement had independent legal significance. See, e.g., 51 C.J.S. 319, Kidnapping § 26 (2010) ("in the case of robbery, where the confinement of a victim is greater than that which is inherently necessary to rob them, the confinement while part of the robbery is also a separate criminal transgression"). The petitioner could have taken the money from the safe after Royer opened it. Instead, he compelled her to enter the refrigerator, an entirely separate and enclosed space, after she opened the safe, and left her there when he fled. At most, her confinement made the robbery easier to commit. See, e.g., *State* v. *Ward*, 306 Conn. 718, 739–41, 51 A.3d 970 (2012) (suggesting that confinement or movement not merely incidental when it makes underlying crime easier to commit). And on appeal, both parties agree that the petitioner left Royer in the refrigerator to help him escape. See, e.g., *State* v. *Crenshaw*, 313 Conn. 69, 84–85 n.9, 95 A.3d 1113 (2014) (kidnapping continues until liberty restored). The state even argued this same theory to the jury.[4] Ordering Royer into the

[4] During closing arguments before the jury, the prosecutor argued that the petitioner placed Royer in the refrigerator to facilitate his escape. The prosecutor stated in relevant part: "Cheryl Royer told you her intent was not to go back into that restaurant that night. It was certainly not to go into a walk-in freezer. . . . She was met by someone who threatened her, threatened her with the use of force, ordered her back inside, and then continued to restrain her by forcing her to go into the refrigerator. *And the intent in doing that, to me, clearly inferred this was to enable him to escape, to*

refrigerator and telling her to stay there, therefore, was neither incidental to nor necessary for the robbery.

Similarly, with regard to the third *Salamon* factor, the petitioner's restraint of Royer by isolating her in the refrigerator was not the type of restraint inherent in the nature of a robbery.[5] Some degree or type of restraint, though technically not an element of a robbery, is almost always necessary to rob someone. See General Statutes §§ 53a-91 (1) and 53a-133; see also *State* v. *Fields*, 302 Conn. 236, 247–48, 24 A.3d 1243 (2011). But I agree with the habeas court that the petitioner's confining of Royer in the refrigerator was not necessary to rob the Friendly's in Manchester. See, e.g., *State* v. *Jordan*, 129 Conn. App. 215, 223, 19 A.3d 241 (absence of *Salamon* instruction was harmless where defendant "controlled [the victims'] movement and prevented them from leaving" while he was not assaulting them and, therefore, actions were not merely incidental to assaults and sexual assault), cert. denied, 302 Conn. 910, 23 A.3d 1248 (2011). Therefore, the specific restraint at issue here—confining Royer inside the refrigerator—is compelling evidence that the petitioner

delay her, to keep her in the refrigerator until he could get away from the restaurant and be less likely to be caught." (Emphasis added.)

[5] The majority concludes that the third *Salamon* factor supports the petitioner. See *Bell* v. *Commissioner of Correction*, 184 Conn. App. 150, 170, A.3d (2018). I respectfully disagree and believe the majority's assessment of this factor illustrates how *Salamon* is slowly breaking free of its moorings. *Salamon* instructs that "[t]he guiding principle is whether the [confinement or movement] was *so much the part of another substantive crime that the substantive crime could not have been committed without such acts* . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Salamon*, supra, 287 Conn. 546. Simply put, the question is whether the confinement or movement was part and parcel of the other substantive offense. From this vantage point, I do not believe that a reasonable juror could conclude that the confinement in refrigerators of Royer and Tricia Smith, an employee at the other Friendly's restaurant in Glastonbury that was robbed, was part and parcel of either robbery, such that they *could not have been committed* without such confinement.

intended to restrain her for a period of time exceeding that which was necessary to commit the robbery.

Royer was also the only individual in the restaurant after closing at 1 a.m. Significantly, Royer's isolation in a separate and enclosed refrigerator prevented her from discerning what was happening, or summoning assistance, and reduced the petitioner's risk of detection. See *State* v. *Ward*, supra, 306 Conn. 736–38. And although the petitioner places great emphasis on the fact that Royer "[was] not locked in the [refrigerator] nor unable [to] seek help," this argument is unpersuasive with regard to the fourth and fifth *Salamon* factors. The petitioner explicitly stated to Royer that he had a gun and ordered her to remain inside the refrigerator. No reasonable juror, under those circumstances, could conclude that such restraint did not prevent Royer from summoning assistance or did not reduce the petitioner's risk of detection. Accordingly, the omitted element regarding the petitioner's intent to prevent Royer's liberation for a longer period of time or to a greater degree than was necessary to commit the Manchester robbery "was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . . ." (Internal quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 77–78.[6]

The facts and circumstances surrounding the Glastonbury robbery largely mirror those of the Manchester robbery, with one noteworthy difference. On April 14,

[6] Because the undisputed evidence at trial demonstrated that there was not a risk of the refrigerator door locking behind Royer, the habeas court concluded that placing Royer in the refrigerator did not create a significant danger or increase her risk of harm independent of that posed by the robbery. To the extent that this factor slightly weighs in favor of the petitioner, it is clearly outweighed by the remaining factors that demonstrate the petitioner's intent to prevent Royer's liberation for a longer period of time or to a greater degree than was necessary to commit the Manchester robbery. See, e.g., *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 438.

2001, the petitioner ordered Tricia Smith, the only Friendly's employee at the Glastonbury location at 6 a.m., to open the restaurant's safe and to then enter the walk-in refrigerator for an indefinite period of time. The undisputed evidence at trial further demonstrated that the petitioner took the money from the safe and left Smith inside the refrigerator when he fled. Both parties agree that this conduct facilitated his escape. Unlike the Manchester robbery, however, Smith testified that she heard the petitioner say something that she could not make out approximately two minutes after the petitioner ordered her to enter the refrigerator. The record does not provide any elucidation as to what the petitioner said, or if it was directed at Smith.

Notwithstanding this latter distinction, I believe that the record contains overwhelming and undisputed evidence that the petitioner intended to prevent Smith's liberation for a longer period of time or to a greater degree than was necessary to commit the Glastonbury robbery. I view this as a somewhat closer call than the Manchester robbery, but conclude nonetheless that the failure to provide an incidental restraint instruction in accordance with *Salamon* was harmless. See id.

Much like the Manchester robbery, the nature and situs of Smith's confinement is a key feature of the Glastonbury robbery when assessing the *Salamon* factors. With regard to the first and second *Salamon* factors, the petitioner's confinement of Smith essentially amounted to a "second level of restraint"; *Nogueira* v. *Commissioner of Correction*, supra, 168 Conn. App. 842; that restricted her movement to an extent exceeding that which was necessary to remove the money from the open safe. See *State* v. *Salamon*, supra, 287 Conn. 547. Although it was undisputed at trial that Smith's confinement was also for a relatively short period of time, it had independent legal significance. The petitioner left Smith inside the refrigerator after

taking the money from the safe, and Smith did not exit the refrigerator until a few minutes after the petitioner left the restaurant. See, e.g., *State* v. *Crenshaw*, supra, 313 Conn. 84–85 n.9. Again, at most, confining Smith inside the refrigerator made the robbery easier to commit, but was by no means "necessary." See, e.g., *State* v. *Ward*, supra, 306 Conn. 739–41.

With regard to the third *Salamon* factor, Smith's confinement was not so much a part of the robbery that the offense could not have been completed without it. *State* v. *Salamon*, supra, 287 Conn. 546. The petitioner could have taken the money from the safe immediately after Smith opened it. Instead, he secreted Smith inside a refrigerator outside of public view and effectively controlled her movements for an indeterminate period of time. See, e.g., *State* v. *Jordan*, supra, 129 Conn. App. 223. And with regard to the fourth and fifth *Salamon* factors, Smith's isolation prevented her from summoning assistance, reduced the petitioner's risk of detection, made it impossible for her to see or be seen by a third party, and undoubtedly was terrifying to her.[7] Regardless of what the petitioner might have said while Smith was inside the refrigerator, no reasonable juror could conclude that confining Smith inside the refrigerator was merely incidental to and necessary for the Glastonbury robbery. Simply put, the confinement of Smith in the refrigerator had independent criminal significance. See *Nogueira* v. *Commissioner of Correction*, supra, 168 Conn. App. 843.

Considering all the facts and circumstances, I conclude that no reasonable fact finder, even if properly instructed in accordance with *Salamon*, could find that

[7] Much like the evidence in the Manchester robbery, the evidence at trial did not demonstrate that Smith's confinement in the refrigerator created a significant danger or increased her risk of harm independent of that posed by the robbery. To the extent that the sixth *Salamon* factor weighs slightly in favor of the petitioner, it is clearly outweighed by the other *Salamon* factors.

the restraint of Royer and Smith was merely incidental to or a necessary part of either robbery. The uncontested and overwhelming evidence before the jury demonstrated that the petitioner intended to prevent the victims' liberation for a longer period of time or to a greater degree than was necessary to commit the robberies. See *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 77–78. Accordingly, the habeas court properly concluded that the absence of a *Salamon* instruction was harmless and, therefore, correctly denied the petitioner's second petition for a writ of habeas corpus. I therefore respectfully dissent.

STATE OF CONNECTICUT *v.* DEQUAN MCKETHAN (AC 40655)

Alvord, Keller and Bishop, Js.

Syllabus

Convicted under two informations of the crimes of murder, carrying a pistol without a permit and possession of narcotics, the defendant appealed to this court. He claimed that the trial court improperly granted the state's motion for joinder of the cases for trial because the conduct alleged in the murder case was significantly more brutal and shocking than the conduct alleged in the carrying a pistol without a permit and possession of narcotics case. *Held* that the trial court did not abuse its discretion in consolidating the two informations for trial, as the defendant failed to demonstrate that joinder resulted in substantial prejudice to him; although the defendant's conduct with respect to the murder charge was significantly more brutal and shocking than his conduct related to the carrying a pistol without a permit and possession of narcotics charges, the court's explicit instructions to the jury to consider each charge separately in reaching its verdict cured the risk of substantial prejudice to the defendant and, therefore, preserved the jury's ability to fairly and impartially consider the offenses charged in the jointly tried cases.

Argued January 22—officially released August 7, 2018

Procedural History

Information, in the first case, charging the defendant with the crimes of possession of narcotics, possession

of narcotics with intent to sell, possession of a weapon in a motor vehicle, and criminal possession of a pistol, and with possession of less than one-half ounce of a cannabis-type substance and the infractions of improper use of a marker, operating a motor vehicle with a suspended license, operating an unregistered motor vehicle and operating a motor vehicle without minimum insurance, and information, in the second case, charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New London, geographical area number twenty-one, where the court, *Jongbloed*, *J.*, granted the state's motion for joinder; thereafter, the state filed a substitute information; subsequently, the matter was tried to the jury; verdicts and judgments of guilty of murder, carrying a pistol without a permit and possession of narcotics; thereafter, the state entered a nolle prosequi as to the remaining charges, and the defendant appealed to this court. *Affirmed.*

S. Max Simmons, assigned counsel, for the appellant (defendant).

Lawrence J. Tytla, supervisory assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Dequan McKethan, appeals from the judgments of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a, carrying a pistol without a permit in violation of General Statutes § 29-35 (a), and possession of narcotics in violation of General Statutes § 21a-279 (a). On appeal, the defendant claims that the trial court improperly granted the state's motion for joinder of the two separate cases against him for trial. We disagree and, accordingly, affirm the judgments of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. On September 24, 2012, the defendant left the house that he shared with his girlfriend, Chelsea Vanderslice, on Summit Street in Norwich between 9:45 and 10 p.m. The defendant went back to his house around 10:45 or 11 p.m. but left again. The defendant gave his car keys to Duryll Barham and asked Barham to watch his car. Barham called the defendant around 2 or 3 a.m., and the defendant told him to return the car in front of the defendant's house, which Barham later did.

The defendant knew the victim, Darius Bishop, because the victim had previously sold the defendant marijuana. On the night of September 24, 2012, the victim called the defendant's cell phone four times between 10:11 and 10:26 p.m. In that same time period, the defendant called the victim's cell phone twice. By 1 a.m. on September 25th, the defendant and the victim were at the same location. Sometime between 2 and 3 a.m., they ended up outside the Charles Long Sports Complex in Bozrah, where the defendant shot the victim in the head, killing him.

Connecticut State Police responded to a 911 call around 7 a.m. and found the victim's body lying face down. He was barefoot, with his shoes lying next to his body and his driver's license in his left hand. A single .22 caliber shell casing was found on the ground underneath the victim's head. The brand of the shell casing was Super-X.

Officer Frank Callender, a Norwich police officer, found the victim's car parked on Bills Avenue in Norwich the next day, on September 26, 2012. Bills Avenue intersects with Summit Street, where the defendant lived.

That same day, Officer Avery Marsh, also with the Norwich Police Department, was patrolling the area of

Summit Street. He observed the defendant's red Nissan Maxima, which did not have a front license plate displayed. Through a check with the Department of Motor Vehicles, Officer Marsh discovered that the rear license plate on the red Nissan Maxima was registered to a 2004 Hyundai Santa Fe. After learning this information, Officer Marsh conducted surveillance of the car from a distance and eventually observed the defendant get into the car and drive south on Summit Street. Officer Marsh lost sight of the vehicle soon thereafter.

The next day, on September 27, 2012, Officer Marsh returned to the area of Summit Street and observed the defendant and Vanderslice occupying the red Nissan Maxima. Eventually, Vanderslice exited the vehicle, and the defendant drove down the street.

Officer Marsh pulled the defendant over, and almost as soon as the car stopped, the defendant moved his right arm in a downward motion. Officer Marsh recognized this movement as the defendant potentially trying to conceal something. When Officer Marsh approached the defendant's vehicle and asked for his driver's license, the defendant handed him a Connecticut identification card rather than a driver's license. The defendant's hand was shaking as he handed Officer Marsh his identification card, and he admitted that his driver's license was suspended. The defendant also admitted that his car was not registered and that it was not insured.

Officer Marsh asked the defendant to exit the vehicle and inquired whether he had any knives or guns on him. The defendant said that he did not have any knives on him. When Officer Marsh asked again specifically about guns, the defendant did not respond.

Officer Marsh then conducted a patdown of the defendant. During the patdown, Officer Marsh felt a small

bulge on the defendant's right pants pocket. When Officer Marsh looked down, he saw part of a plastic bag sticking out of the pocket, which he recognized as narcotics packaging. After removing the bag from the defendant's pocket, Officer Marsh saw that it contained a white powder-like substance, and the defendant said "that's flour, I'm not going to lie, I use it." Officer Marsh knew that "flour" was the street term for powder cocaine and subsequent testing confirmed that the bag contained .988 grams of cocaine.

Officer Marsh placed the defendant under arrest and searched the defendant's car. Officer Marsh discovered a .22 caliber handgun under the driver's seat. The defendant did not have a permit for the gun, and the gun was registered to a man named Timothy McDonald, who did not know the defendant. In addition, a box of Super-X .22 caliber bullets was found underneath the driver's seat of the vehicle. Super-X bullets were also found inside the gun. In a subsequent search of the defendant's residence, Detective Keith Hoyt of the Connecticut state police discovered an additional box of Super-X .22 caliber ammunition.

Ballistics tests confirmed that the .22 caliber handgun found in the defendant's car was the gun that fired the shell casing found underneath the victim's body. In addition, DNA testing revealed that the defendant's DNA was present on both the trigger and the magazine of the .22 caliber handgun found in his car.

After booking the defendant on the charges related to the motor vehicle stop, Officer Marsh informed the defendant that the state police wanted to talk to him. In response, the defendant stated: "[T]he state police, well, this must be a big deal. Officer, everything is mine." Later, however, he stated, "I can't believe I let my boy use my car and now there's a gun in it." In an interview with the state police, the defendant stated that someone

named "Dee" borrowed his car earlier that morning but provided no details as to who "Dee" was. When the defendant was served with an arrest warrant on the murder charge, he admitted that he "lied about some things and told the truth about other things" during his interview with the state police.

The state initially charged the defendant in two separate informations. On September 28, 2012, the state filed an information in docket numbers CR-12-0119509-S and MV-12-0158897-S charging the defendant with offenses related to the motor vehicle stop, including criminal possession of the pistol and possession of narcotics.[1] On December 10, 2012, the state filed an information in docket number CR-12-0120162-T charging the defendant with murder. On May 28, 2015, the state filed a motion for joinder of the two informations. The motion averred that the evidence of other crimes was cross admissible and that the cases arose out of a single transaction. The defendant filed a written objection to that motion, asserting that "the defendant will suffer substantial prejudice if these matters are tried at the same time before the same jury . . . ."

After hearing arguments from the parties on July 14, 2015, the court granted the motion for joinder on July 20, 2015. The court ruled that the evidence was not cross admissible, because although evidence from the motor vehicle stop would be admissible in the prosecution of the murder charge, the court was not convinced that evidence of the murder would be admissible in a trial of only the charges resulting from the motor vehicle stop. Conducting an analysis under *State* v. *Boscarino*, 204 Conn. 714, 529 A.2d 1260 (1987), however, the court concluded that joinder would not substantially prejudice the defendant. The court explained that (1) the

[1] The defendant was also charged with several motor vehicle offenses in this information. The state entered a nolle prosequi as to those charges.

charges involved discrete and distinguishable facts, (2) "although the charge of murder is certainly more violent than charges of narcotics and weapons violations, it does not rise to the level of substantial prejudice," and (3) joinder would not result in an overly long or complex trial. The state subsequently filed a substitute information that charged the defendant with murder in violation of § 53a-54a, carrying a pistol without a permit in violation of § 29-35 (a), and possession of narcotics in violation of § 21a-279 (a).

A jury trial followed, and the defendant was found guilty of all counts. The court sentenced the defendant to a total effective sentence of fifty six years of imprisonment. This appeal followed.

On appeal, the defendant claims that the trial court improperly granted the state's motion for joinder of the two separate cases against him for trial. Specifically, he argues that "[c]onsideration of the brutality of the murder in relation to the gun charge should have compelled the conclusion that joinder was improper . . . ."[2] The defendant further argues that no jury

[2] The state argues that the defendant's claim on appeal is not preserved. Specifically, the state argues that because the defendant argued before the trial court that the circumstances of the firearm and drug counts would prejudice the jury in its consideration of the murder count, he advances a new claim on appeal by arguing that the circumstances of the murder charge would prejudice the jury in its consideration of the firearm and drug charges. We disagree.

"[T]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." *State* v. *Jorge P.*, 308 Conn. 740, 754, 66 A.3d 869 (2013). "[T]he essence of the preservation requirement is that *fair notice* be given to the trial court . . . ." (Emphasis in original.) *State* v. *Ross*, 269 Conn. 213, 335–36, 849 A.2d 648 (2004).

We conclude that the defendant properly preserved his claim. The defendant filed a written objection to the state's motion for joinder, asserting that "the defendant will suffer substantial prejudice if these matters are tried at the same time before the same jury . . . ." At the hearing on this motion, the defendant argued: "The concern that we have as the defense is . . . that the addition of the charges adds the . . . prejudice that we're

instructions were given to cure the prejudicial effect of the joinder. We disagree.

We begin by setting forth the standard of review and legal principles that guide our analysis. "The principles that govern our review of a trial court's ruling on a motion for joinder or a motion for severance are well

concerned about. And it paints [the defendant] . . . in a prejudicial way as . . . somebody that's perhaps worse than someone who's merely charged in this case in the homicide of the . . . victim." Although the defendant's argument at the hearing on the motion, unlike his written objection, addressed only whether the addition of the possession charges would prejudice the murder charge, the trial court, in its ruling on the motion for joinder, addressed the specific issue presented to this court. In its ruling on the motion for joinder, the trial court explained: "[A]lthough the charge of murder is certainly more violent than charges of narcotics and weapons violations, it does not rise to the level of substantial prejudice." Because the trial court addressed the issue now on appeal, it is clear that the trial court was placed on reasonable notice of the claim.

In support of its argument, the state places great reliance on *State* v. *Snowden*, 171 Conn. App. 608, 157 A.3d 1209, cert. denied, 326 Conn. 903, 163 A.3d 1204 (2017). The defendant in *Snowden* similarly claimed on appeal that the trial court erred in permitting joinder of one information charging murder with a second information charging criminal possession of a firearm. Id., 610. Specifically, the defendant argued that the court failed to consider whether the allegations in the murder case were significantly more shocking and brutal than the allegations in the criminal possession case. Id., 613. Because the defendant objected to the joinder only on the basis of the admissibility of the evidence supporting the criminal possession charge in the murder charge, this court concluded that the defendant's "distinct claim" on appeal that the evidence supporting the murder charge was unduly prejudicial and not cross admissible in the criminal possession case was not properly preserved and declined to review the defendant's claim. Id., 616.

We conclude that *Snowden* is distinguishable from the present case. In *Snowden*, when the defendant objected to the joinder of his cases, he argued only that the evidence in his cases was not cross admissible. Id. Moreover, although the trial court in *Snowden* addressed the *Boscarino* factors to assess whether joinder would result in substantial prejudice, the court addressed only whether the possession and tampering charges were of a violent nature; it did not address the violent nature of the murder charge, which went to the heart of the defendant's argument on appeal. Unlike the trial court in *Snowden*, the trial court in this case specifically addressed the violent nature of the defendant's murder charge in its ruling, which the defendant presently challenges on appeal. We therefore conclude that the defendant's claim is preserved for appellate review.

established. Practice Book § 41-19 provides that, [t]he judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together. . . . In deciding whether to [join informations] for trial, the trial court enjoys broad discretion, which, in the absence of manifest abuse, an appellate court may not disturb. . . . The defendant bears a heavy burden of showing that [joinder] resulted in substantial injustice, and that any resulting prejudice was beyond the curative power of the court's instructions." (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 543–44, 34 A.3d 370 (2012).

"A long line of cases establishes that the paramount concern is whether the defendant's right to a fair trial will be impaired. Therefore, in considering whether joinder is proper, this court has recognized that, where evidence of one incident would be admissible at the trial of the other incident, separate trials would provide the defendant no significant benefit. . . . Under such circumstances, the defendant would not ordinarily be substantially prejudiced by joinder of the offenses for a single trial. . . . Accordingly, we have found joinder to be proper where the evidence of other crimes or uncharged misconduct [was] cross admissible at separate trials. . . . Where evidence is cross admissible, therefore, our inquiry ends.

"Substantial prejudice does not necessarily result from [joinder] even [if the] evidence of one offense would not have been admissible at a separate trial involving the second offense. . . . Consolidation under such circumstances, however, may expose the defendant to potential prejudice for three reasons: First, when several charges have been made against the defendant, the jury may consider that a person charged with doing so many things is a bad [person] who must have

done something, and may cumulate evidence against him . . . . Second, the jury may have used the evidence of one case to convict the defendant in another case even though that evidence would have been inadmissible at a separate trial. . . . [Third] joinder of cases that are factually similar but legally unconnected . . . present[s] the . . . danger that a defendant will be subjected to the omnipresent risk . . . that although so much [of the evidence] as would be admissible upon any one of the charges might not [persuade the jury] of the accused's guilt, the sum of it will convince them as to all. . . .

"[Accordingly, the] court's discretion regarding joinder . . . is not unlimited; rather, that discretion must be exercised in a manner consistent with the defendant's right to a fair trial. Consequently, [in *State* v. *Boscarino*, supra, 204 Conn. 722–24] we have identified several factors that a trial court should consider in deciding whether a severance or [denial of joinder] may be necessary to avoid undue prejudice resulting from consolidation of multiple charges for trial. These factors include: (1) whether the charges involve discrete, easily distinguishable factual scenarios; (2) whether the crimes were of a violent nature or concerned brutal or shocking conduct on the defendant's part; and (3) the duration and complexity of the trial. . . . If any or all of these factors are present, a reviewing court must decide whether the trial court's jury instructions cured any prejudice that might have occurred." (Citations omitted; internal quotation marks omitted.) *State* v. *LaFleur*, 307 Conn. 115, 155–56, 51 A.3d 1048 (2012).

In the present case, the court found that the evidence was not cross admissible, but nevertheless concluded that joinder was proper pursuant to the *Boscarino* factors.[3] The defendant relies solely on the second *Boscarino* factor to support his argument that joinder of the

[3] This court, therefore, does not need to address whether the evidence in the murder case was cross admissible in the drug possession and firearm

two cases was improper, and, therefore, we will not discuss the first and third factors in our analysis. The defendant argues that joinder was improper under the second *Boscarino* factor because the conduct alleged in the murder case was significantly more brutal and shocking than the conduct alleged in the carrying a pistol without a permit and possession of narcotics case.

Although we agree with the defendant that the second *Boscarino* factor weighs against joinder, we conclude that the defendant has not shown that joinder resulted in substantial prejudice. "Whether one or more offenses involved brutal or shocking conduct likely to arouse the passions of the jurors must be ascertained by comparing the relative levels of violence used to perpetrate the offenses charged in each information." (Internal quotation marks omitted.) *State* v. *Payne*, supra, 303 Conn. 551.

In the murder case, the jury heard evidence that the defendant shot and killed the victim in the middle of the night at an isolated location. The victim was found lying face down on the ground with his shoes set next to his body and his driver's license in his left hand.[4] In

possession case. See *State* v. *Devon D.*, 321 Conn. 656, 664–65, 138 A.3d 849 (2016) (At trial, "the state bears the burden of proving that the defendant will not be substantially prejudiced by joinder pursuant to Practice Book § 41-19. The state may satisfy this burden by proving, by a preponderance of the evidence, either that the evidence in the cases is cross admissible or that the defendant will not be unfairly prejudiced pursuant to the factors set forth in [*State* v. *Boscarino*, supra, 204 Conn. 722–24]." [Internal quotation marks omitted.])

[4] During its closing argument, the state pointed out the inferences that the jury could draw from these circumstances: "I can't tell you exactly why [the victim] had his sneakers off. I can't tell you why he was holding his license in his outstretched hand, but common sense tells you that he was taken to be executed and that's exactly what happened. His feet were clean. His shoes had just been taken off whether someone was searching him or didn't want him to flee or something, we don't know. But you look at those pictures and it looks like he was yelling and somebody came up and fired a bullet into his brain and left him there to bleed and die. That's what we're dealing with. You know it's not a joke, it's one of the most heinous things

the narcotics possession and carrying a pistol without a permit case, however, no violence was involved. Because the defendant's conduct in killing the victim in the murder case was significantly more brutal and shocking than his conduct in possessing narcotics and carrying a pistol without a permit, we conclude that the second *Boscarino* factor weighs against joinder and that the evidence from the murder case raised a risk of substantial prejudice with regard to the drug and firearm possession case. See *State* v. *Payne*, supra, 303 Conn. 551–52 (comparing relative levels of violence of felony murder, where victim was shot at close range, and tampering with jury, in which no violence was involved, stating "[w]e would be hard pressed to find cases that, when joined, raise a more significant concern regarding the relative levels of violence than the cases at issue here").

Having concluded that the defendant's conduct with respect to the murder charge could fairly be seen as brutal or shocking, we now must decide whether the court's jury instruction cured any potential prejudice. "On appeal, the burden rests with the defendant to show that joinder was improper by proving substantial prejudice that could not be cured by the trial court's instructions to the jury . . . ." (Internal quotation marks omitted.) *State* v. *Wilson*, 142 Conn. App. 793, 801, 64 A.3d 846, cert. denied, 309 Conn. 917, 70 A.3d 40 (2013). "[A]lthough a curative instruction is not inevitably sufficient to overcome the prejudicial impact of [inadmissible other crimes] evidence . . . where the likelihood of prejudice is not overwhelming, such curative instructions may tip the balance in favor of a finding that the defendant's right to a fair trial has been preserved." (Internal quotation marks omitted.) Id., 804.

that you can imagine, really one of the most horrible ways for someone to lose their life."

In the present case, the court's explicit instructions to the jury that it should consider the offenses separately ameliorated any possible prejudice that joinder may have caused. Although the defendant argues that no such instructions were given, we disagree. The court cautioned the jury at the start of trial and in its final instruction to consider each charge separately in reaching its verdict. Specifically, at the start of trial, the court instructed the jury: "Each charge against the defendant is set forth in the information in a separate paragraph or count and *each such offense must be considered separately by you in deciding this case*." (Emphasis added.)

In addition, in its final charge to the jury, the trial court instructed: "The defendant is entitled to and must be given by you a separate and independent determination of whether he is guilty or not guilty as to each of the counts. Each of the counts charged is a separate crime. The state is required to prove each element in each count beyond a reasonable doubt. Each count must be deliberated upon separately. The total number of counts charged does not add to the strength of the state's case. You may find that some evidence applies to more than one count. The evidence, however, must be considered separately as to each element in each count. Each count is a separate entity. You must consider each count separately and return a separate verdict for each count. This means you may reach opposite verdicts on different counts. A decision on one count does not bind you[r] decision on another count." Without evidence to the contrary, we presume that the jury followed these instructions. See *State* v. *Parrott*, 262 Conn. 276, 294, 811 A.2d 705 (2003) ("[b]arring contrary evidence, we must presume that juries follow the instructions given them by the trial judge" [internal quotation marks omitted]).

Thus, even though the murder charge could be viewed as brutal or shocking due to its comparative level of violence in relation to the possession charges, the murder charge "was not *so* brutal or shocking as to create a substantial risk that the jury, *with explicit instructions to treat each offense separately*, would nevertheless treat the evidence cumulatively." (Emphasis added; internal quotation marks omitted.) *State* v. *Wilson*, supra, 142 Conn. App. 803 (concluding that trial court did not abuse its discretion in consolidating two cases when trial court "repeatedly cautioned the jury to consider each charge separately in reaching its verdict").

We conclude that the court's jury instructions cured the risk of substantial prejudice to the defendant and, therefore, preserved the jury's ability to fairly and impartially consider the offenses charged in the jointly tried cases. See *State* v. *Davis*, 286 Conn. 17, 33–36, 942 A.2d 373 (2008) (concluding that trial court's jury instructions cured risk of prejudice to defendant); see also *State* v. *Rivera*, 260 Conn. 486, 493, 798 A.2d 958 (2002) ("[a]lthough we might disagree with the trial court's conclusion that the two cases were not brutal or shocking, we cannot say, as a reviewing court, that the trial court's conclusion, coupled with proper and adequate jury instructions, constituted an abuse of discretion"). We therefore conclude that the court did not abuse its discretion in consolidating the two informations for trial.

The judgments are affirmed.

In this opinion the other judges concurred.