STATE OF CONNECTICUT *v.* RAYMOND TUCKER
(AC 38935)

Alvord, Prescott and Mihalakos, Js.

Syllabus

The defendant, who had been on probation in connection with his conviction of the crime of conspiracy to commit assault in the first degree, appealed

to this court from the judgment of the trial court revoking his probation and committing him to the custody of the Commissioner of Correction. During his probation, the defendant was arrested and charged with assault in the third degree for allegedly punching the victim in the face, causing her to suffer certain injuries. Following a hearing, the trial court found that the defendant committed assault in the third degree in violation of statute (§ 53a-61), thereby violating a general condition of his probation, and sentenced him to sixty-two months incarceration, execution suspended after three years, followed by three years probation. On appeal, the defendant claimed, inter alia, that the trial court erred in admitting into evidence a 911 recording allegedly made by the victim. *Held*:

1. The trial court did not abuse its discretion in admitting the 911 recording into evidence: that court properly overruled the defendant's lack of foundation objection to the admission of the 911 recording, as the court, to authenticate the recording, identified the unique numbering system of the recording to link it to the incident and properly considered the contents of the recording, which identified the victim, her address, the defendant both by name and physical description, and the nature of the victim's injuries, and because strict admissibility rules do not apply to probation hearings, it was within the trial court's discretion, as the trier of fact, to assess the reliability of the evidence in light of the circumstances reflected in the recording; moreover, the defendant failed to sustain his burden of providing this court with an adequate record to review his claim of a due process violation resulting from the admission of the recording, as he failed to request that the trial court conduct a balancing test under *State* v. *Shakir* (130 Conn. App. 458) to determine whether good cause existed for not allowing the defendant to confront the victim, and the defendant did not demonstrate an error so obvious that it required reversal under the plain error doctrine.
2. The trial court's finding that the defendant had violated his probation was not clearly erroneous and was supported by sufficient evidence and testimony in the record, including the defendant's statement to his probation officer that he had been in an altercation with the victim, the victim's medical records, which described her swollen, bloody lip and loose teeth, and the authenticated 911 recording in which the victim identified the defendant as the person who had assaulted her.
3. The trial court did not abuse its discretion in revoking the defendant's probation and sentencing him to a period of three years incarceration; that court properly considered the testimony of the defendant's probation officer, who indicated that he believed that the defendant was inappropriate for probation, as well as the testimony of the victim, who did not dispute that the defendant had hit her, and it also heard testimony concerning the defendant's extensive criminal record, prior probation violations and noncompliance with the conditions of his probation.

Argued October 18, 2017—officially released January 23, 2018

Procedural History

Substitute information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Fairfield, where the matter was tried to the court, *Devlin*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court; thereafter, the court, *Devlin*, *J.*, denied the defendant's motion for articulation; subsequently, the court, *Devlin*, *J.*, issued a memorandum of decision regarding the violation of probation. *Affirmed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Margaret E. Kelley*, supervisory assistant state's attorney, for the appellee (state).

Opinion

MIHALAKOS, J. The defendant, Raymond Tucker, appeals from the judgment of the trial court finding him in violation of probation pursuant to General Statutes § 53a-32. On appeal, the defendant claims that the court (1) erred in admitting a 911 recording into evidence, (2) erroneously found that the defendant had violated his probation, and (3) abused its discretion in imposing a sentence of three years incarceration. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the issues on appeal. On July 20, 2012, the defendant was convicted of conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-48 and 53a-59 (a) (4), and sentenced to six years incarceration, execution suspended after ten months, followed by five years of probation. On June 23, 2015, during his period of probation, the defendant

punched the victim[1] in the face, causing her to suffer a swollen and bloody lip, as well as loose teeth. The victim called 911, reported the incident and requested an ambulance. Bridgeport Police Officer Minerva Feliciano was dispatched to the victim's home to investigate a domestic violence assault. When Feliciano arrived, the victim had already been transported to Bridgeport Hospital. Feliciano drove to the hospital, and found the victim crying with a swollen and bloody lip. On the same day, the defendant called his probation officer, Patrick Higgins, and told him that he had gotten into an altercation with the victim and that she had possibly called the police. On August 1, 2015, the defendant was arrested for this incident and charged with assault in the third degree in violation of General Statutes § 53a-61. Rather than charge the defendant with a violation of probation immediately, Higgins arranged for him to attend anger management classes, but the defendant did not attend. On October 6, 2015, the state obtained an arrest warrant for the defendant for violation of probation pursuant to § 53a-32 on the basis of the domestic violence incident.

Following the violation of probation hearing on December 1, 2015, the court found by a preponderance of the evidence that the defendant, by assaulting the victim, violated a criminal law, § 53a-61, thereby violating a general condition of his probation. As a result of this violation, the court revoked the defendant's probation and sentenced him to sixty-two months incarceration, execution suspended after three years, followed by three years of probation. This appeal followed. Additional facts will be set forth as necessary.

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

I

The defendant first claims that the court erred in admitting the 911 recording into evidence at the violation of probation hearing. Specifically, the defendant argues that "[t]he trial court erred in admitting the 911 tape as reliable hearsay, as it was unreliable and uncorroborated, not admissible under any applicable hearsay exception, and admitted in violation of the defendant's due process rights." The defendant also argues that the 911 recording was not properly authenticated. To the extent this claim is not preserved, the defendant seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), or, alternatively, reversal as plain error. The state counters that the trial court reasonably exercised its discretion in overruling the defendant's objection to the admission of the recording of the victim's 911 call. The state also argues that the defendant cannot prevail on his due process claim because the record is inadequate to review that claim. We agree with the state.

The following additional facts are necessary for the resolution of this claim. At the violation of probation hearing, the state presented the testimony of Feliciano and Higgins. The state also introduced a copy of the victim's medical records into evidence and sought to introduce an audio recording of the victim's 911 call. The defendant objected to the admission of the 911 recording, stating the grounds for his objection as a "lack of foundation." The court overruled his objection and allowed the 911 recording to be admitted into evidence as a full exhibit.[2] In the 911 recording, the victim

[2] The following exchange occurred when the prosecutor offered the 911 recording into evidence as a full exhibit:

"[The Defendant's Counsel]: I'm going to object, Your Honor, for lack of foundation.

"The Court: Okay. State's position on the objection?

"[The Prosecutor]: State's position is that the markings on the item one for identification correspond to the same file number. Whether or not this witness has personal knowledge of the call is not the issue, it's whether or

reported to the dispatcher that the defendant had "hit [her] and put his hands on [her] and . . . [her] teeth . . . [were] messed up" and that "[h]e hit [her] in [her] mouth." The victim identified the defendant both by name and physical description, and also gave her own name and address to the dispatcher. Officer Feliciano testified that she was dispatched to the victim's address and later identified the victim by the same name at the hospital. While at the hospital, Feliciano also noticed that the victim had the injuries described in the 911 recording.

We turn to the defendant's claim that the trial court erred in admitting the 911 recording because it was not properly authenticated.[3] The state concedes that the

not it can be authenticated. And I think that 911 calls traditionally [are] allowed into evidence. And I cite *State* v. *Shakir*, 130 Conn. App. [458, 22 A.3d 1285, cert. denied, 302 Conn. 931, 28 A.3d 345 (2011)] . . . . It was a violation of probation hearing in which the state sought to introduce . . . a video interview of the minor complainant . . . claiming that [the tape] constituted reliable hearsay for the less rigid evidentiary standards in violation of probation hearings. The court allowed the video to be entered as evidence, again acknowledging that strict admissibility rules do not apply during violation of probation hearings, and indicated it would allow it for what it was, the victim's statement of the complaint. So, I think under those grounds, the state . . . can introduce it.

"The Court: So, this 096 number, is that a unique number that just applies to that case?

"[Feliciano]: Yes, sir.

"The Court: Okay, so if you went on a different call, it would have a different number?

"[Feliciano]: Every call has a different number.

"The Court: Okay. I'm going to overrule the objection. I think the unique file number is sufficient to authenticate it for this case. So, the exhibit number one is admitted as a full exhibit for this hearing."

[3] The defendant also claims that the court improperly admitted the 911 recording into evidence because it was unreliable and uncorroborated hearsay. Our review of the record indicates that the 911 recording was admitted after the defendant objected to its admission solely on the basis of a "lack of foundation." Both the state and the court understood the defendant's objection as pertaining to the authenticity of the recording. In denying a motion for articulation that the defendant filed during the pendency of this appeal, which requested, inter alia, that the court specify the evidence underlying the conclusion that the 911 tape was admitted as reliable hearsay,

defendant's authentication claim was properly preserved by the defendant's timely "lack of foundation" objection.

We first set forth our standard of review. Challenges to a trial court's evidentiary rulings in a probation revocation hearing "will be overturned on appeal only where there was an abuse of discretion and a showing by the [defendant] of substantial prejudice or injustice. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Young*, 81 Conn. App. 710, 714, 841 A.2d 737, cert. denied, 269 Conn. 901, 852 A.2d 733 (2004); see also *State* v. *Bullock*, 155 Conn. App. 1, 38, 107 A.3d 503, cert. denied, 316 Conn. 906, 111 A.3d 882 (2015).

At the outset, we emphasize that the Connecticut Code of Evidence does not apply to proceedings involving probation. Section 1-1 (d) (4) of the Connecticut Code of Evidence specifically provides: "The Code, other than with respect to privileges, does not apply in proceedings such as, but not limited to the following . . . [p]roceedings involving probation." See also *State*

the court stated that "[l]ack of authentication was the only ground advanced in support of the [defendant's] objection to the admission of the 911 tape."

The standard of review for a claim alleging an improper evidentiary ruling at trial is well settled. Appellate courts are "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. . . . 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 [the] objection, any appeal will be limited to the ground asserted." (Internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013). We conclude that because the defendant did not make a hearsay objection at trial, his hearsay claim is not preserved, and we decline to review it.

v. *Megos*, 176 Conn. App. 133, 147, 170 A.3d 120 (2017) ("The evidentiary standard for probation violation proceedings is broad. . . . [T]he court may . . . consider the types of information properly considered at an original sentencing hearing because a revocation hearing is merely a reconvention of the original sentencing hearing." [Internal quotation marks omitted.]). Furthermore, "[i]t is well settled that probation proceedings are informal and that strict rules of evidence do not apply to them." (Internal quotation marks omitted.) *State* v. *Shakir*, 130 Conn. App. 458, 464, 22 A.3d 1285, cert. denied, 302 Conn. 931, 28 A.3d 345 (2011).

"Both courts and commentators have noted that the showing of authenticity is not on a par with the more technical evidentiary rules that govern admissibility, such as hearsay exceptions, competency and privilege. . . . Rather, there need only be a prima facie showing of authenticity to the court. . . . Once a prima facie showing of authorship is made to the court, the evidence, as long [as] it is otherwise admissible, goes to the jury, which will ultimately determine its authenticity. . . . Of course, once this prima facie showing has been made, the opposing party may present evidence to dispute it. The test for the admission into evidence of sound recordings is the laying of a proper foundation to assure the authenticity of the recordings." (Citation omitted; internal quotation marks omitted.) *State* v. *Peay*, 96 Conn. App. 421, 434–35, 900 A.2d 577, cert. denied, 280 Conn. 909, 908 A.2d 541 (2006).

On the basis of our review of the record, we conclude that the trial court properly overruled the defendant's "lack of foundation" objection to the admission of the 911 tape. The court identified the unique numbering system of the recording to link it to this incident, as well as the contents of the recording and circumstances surrounding the incident, in order to authenticate that the recording was what the prosecutor claimed it to

be. The defendant never questioned that the voice on the 911 recording was anything other than the victim's voice. Moreover, because strict admissibility rules do not apply to probation hearings; *State* v. *Quinones*, 92 Conn. App. 389, 392, 885 A.2d 227 (2005), cert. denied, 277 Conn. 904, 891 A.2d 4 (2006); and the trier of fact was the court, not a jury, it was within the court's discretion upon listening to the audio recording to assess the reliability of the evidence in light of the circumstances reflected in it. See *State* v. *Shakir*, supra, 130 Conn. App. 465. In order to authenticate the recording, the court properly considered the contents of the recording, which identified the victim, her address, the defendant both by name and physical description, and the nature of the victim's injuries. See *State* v. *Valentine*, 255 Conn. 61, 77, 762 A.2d 1278 (2000) ("[t]elephone conversations may be authenticated by circumstantial evidence, if the party calling, in addition to stating his identity, relates facts and circumstances that, taken with other established facts, tend to reveal his identity" [internal quotation marks omitted]). Thus, we cannot conclude that it was an abuse of discretion to allow the 911 recording into evidence.

The defendant also claims that the court improperly admitted the 911 recording into evidence in that it violated his right to due process by failing to accord him the right to confront and cross-examine the adverse witnesses against him. The defendant argues that his objection, paired with the state's reference to *Shakir* in answering the objection; see footnote 3 of this opinion; served to preserve this matter in part. The defendant appears to concede, however, that, under our precedent in *Shakir* and *State* v. *Polanco*, 165 Conn. App. 563, 571–72, 140 A.3d 230, cert. denied, 322 Conn. 906, 139 A.3d 708 (2016), his due process claim is unpreserved.[4]

[4] This court has held that a defendant's due process claim is unpreserved where the defendant never argued to the trial court that it was required to balance his interest in cross-examining the victim against the state's good

To the extent the defendant's due process claim is unpreserved, he seeks review pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40, as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), or, alternatively, reversal under the plain error doctrine, codified at Practice Book § 60-5.

We begin by setting forth the relevant legal principles. Pursuant to *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *State* v. *Polanco*, supra, 165 Conn. App. 572. "[U]nless the defendant has satisfied the first *Golding* prong, that is, unless the defendant has demonstrated that the record is adequate for appellate review, the appellate tribunal will not consider the merits of the defendant's claim." (Internal quotation marks omitted.) Id., 572–73.

It is well established that the defendant is entitled to limited due process rights in a probation revocation

cause for not calling the victim as a witness. See *State* v. *Polanco*, supra, 165 Conn. App. 571; see also *State* v. *Shakir*, supra, 130 Conn. App. 465.

To the extent that the defendant's argument suggests that our holdings in *Shakir* and *Polanco* should be overruled as conflicting with United States and Connecticut Supreme Court precedent, that is not within the province of a three judge panel of the Appellate Court. We note that "this court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. The [overruling] may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 68 n.9, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011).

proceeding. "Probation revocation proceedings fall within the protections guaranteed by the due process clause of the fourteenth amendment to the federal constitution. . . . The revocation proceeding must comport with the basic requirements of due process because termination of that privilege results in a loss of liberty. . . . [T]he minimum due process requirements for revocation of [probation] include written notice of the claimed [probation] violation, disclosure to the [probationer] of the evidence against him, the opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses in most instances, a neutral hearing body, and a written statement as to the evidence for and reasons for [probation] violation. . . . Despite that panoply of requirements, a probation revocation hearing does not require all of the procedural components associated with an adversarial criminal proceeding." (Internal quotation marks omitted.) *State* v. *Barnes*, 116 Conn. App. 76, 79, 974 A.2d 815, cert. denied, 293 Conn. 925, 980 A.2d 913 (2009).

This court established in *State* v. *Shakir*, supra, 130 Conn. App. 458, that where hearsay evidence is offered in a probation revocation proceeding, due process safeguards require that the court must balance the defendant's interest in cross-examination against the state's good cause for denying the right to cross-examine. Id., 467. "In considering whether the court had good cause for not allowing confrontation or that the interest of justice [did] not require the witness to [appear] . . . the court should balance, on the one hand, the defendant's interest in confronting the declarant, against, on the other hand, the government's reasons for not producing the witness and the reliability of the proffered hearsay." (Internal quotation marks omitted.) *State* v. *Polanco*, supra, 165 Conn. App. 571, citing *State* v. *Shakir*, supra, 468.

This court has determined, however, that where the defendant does not request that the court conduct the *Shakir* balancing test or make a good cause finding, the record is inadequate for review of a due process claim under the first prong of *Golding*. See *State* v. *Shakir*, supra, 130 Conn. App. 468 ("[T]he factual underpinnings for the minor complainant's not being produced to testify that might amount to good cause were not developed via evidence on the record demonstrating whether producing her would cause great difficulty, expense or risk of harm. . . . [W]e conclude that the record is inadequate for our review under *Golding*."); see also *State* v. *Polanco*, supra, 165 Conn. App. 576 ("[T]he record is silent as to the state's reasons for not producing [the witness] at the probation revocation hearing and as to whether those reasons amount to good cause. Accordingly, we decline to review the defendant's unpreserved claim on the basis of an inadequate record.").

The defendant in the present case failed to sustain his burden of providing this court with an adequate record to review his claim of a due process violation. The defendant did not request that the court conduct the *Shakir* balancing test to determine whether good cause existed for not allowing the defendant to confront the victim. The state had no notice of the defendant's due process claim, and, accordingly, did not present evidence regarding its reasons for not producing the victim at this phase of the hearing. The record is silent as to the state's reasons for producing the 911 recording in lieu of the victim's testimony in the evidentiary phase of the probation revocation hearing, when she testified at the dispositional phase of the hearing later that day, and whether those reasons amounted to good cause. Under these circumstances, the state was not responsible for the gap in the evidence, and it would be patently unfair to address the defendant's due process claim on

the basis of this record. See *State* v. *Polanco*, supra, 165 Conn. App. 575. Accordingly, we decline to review the defendant's unpreserved due process claim on the basis of an inadequate record.

The defendant similarly cannot prevail under the plain error doctrine. "[The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. . . . [T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly." (Internal quotation marks omitted.) *State* v. *Sease*, 147 Conn. App. 805, 815 n.7, 83 A.3d 1206, cert. denied, 311 Conn. 932, 87 A.3d 581 (2014). On the basis of our review of the record, we conclude that the defendant has not demonstrated an error so obvious that it requires reversal under the plain error doctrine.

II

The defendant next claims that the trial court's finding that he had violated his probation was erroneous, as the only evidence to support this finding was the 911 recording, which was improperly admitted. The state argues that there was ample evidence to support the trial court's finding. We agree with the state.

As a preliminary matter, we set forth the legal principles and standard of review pertinent to our discussion. "With respect to the evidentiary phase of a revocation proceeding, [t]o support a finding of probation violation, the evidence must induce a reasonable belief that it is more probable than not that the defendant has

violated a condition of his or her probation." (Internal quotation marks omitted.) *State* v. *Megos*, supra, 176 Conn. App. 139. "This court may reverse the trial court's initial factual determination that a condition of probation has been violated only if we determine that such a finding was clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling. . . . A fact is more probable than not when it is supported by a fair preponderance of the evidence." (Internal quotation marks omitted.) *State* v. *Sherrod*, 157 Conn. App. 376, 382, 115 A.3d 1167, cert. denied, 318 Conn. 904, 122 A.3d 633 (2015).

The record reveals sufficient evidence from which the court reasonably could have found that the defendant violated his probation. The state elicited testimony from Higgins, who testified that the defendant called him on June 23, 2015, to tell him that the defendant had gotten into an altercation with the victim and that she had possibly called the police. The state also offered into evidence the victim's medical records describing her swollen, bloody lip and loose teeth. Feliciano testified that she was dispatched to the victim's address following the 911 call; she later interviewed the victim at the hospital and observed her injuries. The court also properly considered the authenticated 911 call, in which the victim identified the defendant as the person who assaulted her. Accordingly, we conclude that it was not clearly erroneous for the court to find that the defendant had violated his probation on the foregoing basis.

III

The defendant also claims that the court abused its discretion by revoking his probation and imposing an

additional three years incarceration. Having already determined that the state presented sufficient evidence to find a violation of probation, we now turn to the dispositional phase of the revocation of probation hearing. In the dispositional phase, "[i]f a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served." (Internal quotation marks omitted.) *State* v. *Faraday*, 268 Conn. 174, 185, 842 A.2d 567 (2004); see also *State* v. *Preston*, 286 Conn. 367, 375–76, 944 A.2d 276 (2008). In making the determination of whether a defendant's probation should be revoked, "the trial court is vested with broad discretion." (Internal quotation marks omitted.) *State* v. *Sherrod*, supra, 157 Conn. App. 382. "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling; reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Shakir*, supra, 130 Conn. App. 464.

In the dispositional phase of the hearing, the court properly considered the testimony of Higgins, who indicated that he believed that "at [that] time [the defendant] [was] inappropriate for probation," as well as the testimony of the victim, who did not dispute that the defendant had hit her, but requested that he not be punished or convicted. The court also heard testimony concerning the defendant's extensive criminal record and prior probation violations, as well as the defendant's noncompliance with the conditions of his probation.

After consideration of these factors, the court concluded that the defendant was not a suitable candidate for continued probation, stating: "I gave you a pass on the operating under suspension. I gave you a pass on the larceny six. I'm not giving you a pass on this . . . .

[The victim] needs to get somebody else to be her boyfriend because you're going to jail because you're a batterer, you're controlling this woman and it's got to stop. . . . You're not a suitable candidate for probation. . . . Maybe you will be, but not right now." On the basis of this record, we conclude that the court did not abuse its discretion in revoking the defendant's probation and sentencing him to a period of incarceration.

The judgment is affirmed.

In this opinion the other judges concurred.

HUDEL GAMBLE *v.* COMMISSIONER OF CORRECTION
(AC 39971)

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

Syllabus

The petitioner, who had been convicted of the crime of manslaughter in the first degree with a firearm as an accessory in connection with the shooting death of the victim from multiple gunshot wounds, sought a writ of habeas corpus, claiming that his appellate counsel provided ineffective assistance by failing to raise a claim of insufficient evidence on direct appeal. Specifically, the petitioner, who was part of a group of individuals, including R and S, who all fired shots at the victim, claimed that the evidence could only support his conviction of manslaughter as a principal and, thus, could not support his conviction of that charge as an accessory. His claim was based on the fact that R testified that the petitioner fired the rifle from which the fatal shot was fired. The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly concluded that the petitioner failed to prove that he was prejudiced by his appellate counsel's performance, as there was sufficient evidence that the petitioner acted in concert with R and S to achieve the intended result of the death of the victim, and, therefore, it was not reasonably probable that the petitioner would have prevailed on direct appeal on a sufficiency claim: under a concert of action theory, it is immaterial who fired the fatal shot and what is material is whether the evidence shows that the petitioner acted in concert with others to bring about the death of the victim, which the

evidence here showed, and the fact that medical and ballistics evidence revealed that the fatal shot was fired from a certain rifle did not prevent application of the concert of action theory, as the jury reasonably could have been uncertain as to which individual fired the fatal shot and it did not need to make that determination to find the petitioner guilty of manslaughter under an accessorial theory of liability given that there is no meaningful distinction between principal and accessorial liability as a matter of law; moreover, contrary to the petitioner's claim, his acquittal of manslaughter as a principal and possession of an assault weapon did not preclude this court under the doctrine of collateral estoppel from examining the issue of whether he possessed or fired the rifle from which the fatal shot was fired, as that doctrine does not apply to a review of the sufficiency of the evidence, and it was not for this court to review any inconsistencies among the verdicts in this case, which are permitted under the law.

Argued October 5, 2017—officially released January 23, 2018

Procedural History

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

Jade N. Baldwin, for the appellant (petitioner).

Jo Anne Sulik, supervisory assistant state's attorney, with whom, on the brief, were *Adrienne Russo*, assistant state's attorney, and *Patrick J. Griffin*, state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The petitioner, Hudel Gamble, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly rejected his claim of ineffective assistance of appellate counsel. We are not persuaded by the petitioner's arguments, and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to the resolution of the petitioner's appeal. On November 29, 2005, Daniel Smith was driving a borrowed BMW in New Haven while Ricardo Ramos was seated in the front passenger seat. The petitioner later joined Ramos and Smith, and sat in the back seat. The petitioner, Ramos, and Smith proceeded to joyride around the "Hill" section of New Haven[1] while smoking marijuana. At that time, both the petitioner, who was seventeen years old, and Ramos, who was fifteen years old, were residents of the "Hill" section of New Haven. Ramos had known the petitioner and Smith for two to three years and would see both the petitioner and Smith on a daily basis.

At some point, Smith drove into the "Tre" section of New Haven.[2] Ramos noticed an acquaintance of his on Kensington Street, and Smith stopped the BMW. The woman stated in a loud voice that a man with whom Ramos had a "beef" was in the area. Smith drove around the block and upon returning to Kensington Street, Ramos spotted the victim, whom he believed had killed his cousin in the "Hill" section over a month earlier.

The victim was with a group of four or five individuals who were standing to the right of the BMW. Someone from the group fired shots at the BMW. The petitioner, Ramos, and Smith all returned fire. The victim sustained five gunshot wounds due to the entry, exit, and reentry of bullets, and ultimately died. The medical examiner recovered three different types of bullets from the victim's body. Ballistics evidence revealed that one of the

[1] There was evidence at the petitioner's criminal trial that Stevens Street and nearby Congress Street, where, respectively, Ramos and the petitioner lived at the time, were both in the "Hill" section of New Haven.

[2] Ramos testified at the petitioner's criminal trial that Kensington Street was in the "Tre" section of New Haven, and that driving on Orchard Street was a common route used to travel from the "Hill" section to the "Tre" section.

three bullets recovered from the victim's body was damaged, but that it had the characteristics of a .22 long rifle caliber bullet. Ballistics testing of the damaged bullet revealed that it could have been fired from various handguns, revolvers, semi-automatic pistols, and several types of long arms. This bullet entered the victim's right knee. A .38 caliber bullet, which ballistics testing revealed could have been fired from either a .38 revolver or a .357 magnum caliber revolver, entered the victim's right hip. A .30 caliber bullet, which ballistics testing established was fired from an SKS semiautomatic rifle that the police found under Ramos' bed following the shooting, traveled through the victim's right arm, reentered the right side of his chest, went through his right lung and grazed his diaphragm and liver. The official cause of the victim's death was from multiple gunshot wounds. The medical examiner testified that the victim's injuries to his knee and hip were treatable, but that the medical personnel were unable to treat successfully the victim's chest injury. The day after the shooting, Ramos learned that the victim was unknown to him and was not the individual with whom he had a "beef." The police did not find any latent fingerprints on the SKS rifle or its magazine.

The jury found the petitioner guilty of manslaughter in the first degree with a firearm as an accessory in violation of General Statutes §§ 53a-55 (a) (3) and 53a-8. The petitioner was also charged with, and found not guilty of, manslaughter in the first degree with a firearm in violation of § 53a-55 (a) (3), murder and murder as an accessory in violation of General Statutes §§ 53a-54a and 53a-8, conspiracy to commit murder in violation of General Statutes §§ 53a-54a and 53a-48 (a), possession of an assault weapon in violation of General Statutes §§ 53-202c and 53a-8, and conspiracy to possess an assault weapon in violation of §§ 53-202c and 53a-48 (a). The court, *Holden*, *J.*, sentenced the petitioner to thirty-seven and one-half years incarceration.

The petitioner, represented by Attorney William Westcott, unsuccessfully appealed his conviction.[3] See *State* v. *Gamble*, 119 Conn. App. 287, 987 A.2d 1049, cert. denied, 295 Conn. 915, 990 A.2d 867 (2010).

On August 25, 2016, the petitioner filed a third amended petition for a writ of habeas corpus, alleging the ineffective assistance of appellate counsel.[4] He alleged that his appellate counsel provided ineffective assistance by failing to raise a claim of insufficient evidence on direct appeal.

At the habeas trial, Westcott testified that he did not raise a sufficiency claim on direct appeal because he had not prevailed on a similar claim in a different appeal in which a defendant, who was convicted as an accessory, was part of a group of individuals who all fired shots at the victim, who they were "out to get." Attorney Daniel Krisch testified for the petitioner as an expert in appellate practice. He testified that the only evidence of the petitioner's aiding the principal was that he had handed Ramos a .22 caliber pistol which had caused the treatable injury to the victim's knee. He further testified that no reasonable jury could have convicted the petitioner of manslaughter as an accessory, and

[3] On direct appeal, Westcott claimed that the trial court improperly: "(1) accepted the jury's verdict finding [the petitioner] guilty of manslaughter in the first degree with a firearm under the theory of accessorial liability and not guilty of the same crime under the theory of principal liability, thereby (a) violating his right against double jeopardy, (b) resulting in his being convicted of the nonexistent crime of being an 'accessory,' (c) resulting in a legally inconsistent verdict and (d) returning a verdict in violation of the principles of collateral estoppel, and (2) suggested in its jury instructions that defense counsel had made an improper closing argument, thereby improperly highlighting the defendant's decision not to testify." *State* v. *Gamble*, supra, 119 Conn. App. 289.

[4] The petitioner also alleged ineffective assistance by his criminal trial counsel. After the habeas court denied his petition in its entirety, the petitioner filed an appeal challenging only the court's denial of his claim of ineffective assistance of appellate counsel.

there was a reasonable probability that an insufficiency claim would have been successful on direct appeal.

On November 28, 2016, the habeas court, *Sferrazza*, *J.*, issued a memorandum of decision denying the petition for a writ of habeas corpus. The court stated that "[w]here multiple shooters intentionally fire at someone, all the shooters can properly be convicted, through accessorial liability, of the homicide even though it was a companion's bullet that killed the victim. *State* v. *Delgado*, 247 Conn. 616, 627, [725 A.2d 306] (1999). Such a show of force aids the killer by eliminating or reducing methods of escape, by deterring others from attempting to assist the victim, and by thwarting detection through the confusion generated by such a fusillade." The court concluded that the petitioner could not prevail on his claim because he failed to prove prejudice under *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The court granted the petition for certification to appeal. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the petitioner claims that the habeas court improperly concluded that he failed to establish that his appellate counsel was ineffective by not raising insufficiency of evidence as an issue in his direct appeal. He contends that the court improperly concluded that he failed to prove that he was prejudiced by his appellate counsel's performance. We disagree.

We begin by setting forth our standard of review and the legal principles applicable to the petitioner's appeal. "Although a habeas court's findings of fact are reviewed under the clearly erroneous standard of review . . . [w]hether the representation a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by this court unfettered by the clearly

erroneous standard." (Citation omitted; internal quotation marks omitted.) *Ham* v. *Commissioner of Correction*, 301 Conn. 697, 706, 23 A.3d 682 (2011).

"In *Strickland* v. *Washington*, [supra, 466 U.S. 687], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense [by establishing a reasonable probability that, but for the counsel's mistakes, the result of the proceeding would have been different]. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." (Internal quotation marks omitted.) *Parrott* v. *Commissioner of Correction*, 107 Conn. App. 234, 236, 944 A.2d 437, cert. denied, 288 Conn. 912, 954 A.2d 184 (2008). With respect to the prejudice prong, "we must assess whether there is a reasonable probability that, but for appellate counsel's failure to raise the issue on appeal, the petitioner would have prevailed [on] . . . appeal, i.e., [obtaining] reversal of his conviction or granting of a new trial." *Small* v. *Commissioner of Correction*, 286 Conn. 707, 722, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). "[T]he task before us is not to conclude definitively whether the petitioner, on appeal, would have prevailed on his claim . . . . Rather, the task before us is to determine, under *Strickland*, whether there is a reasonable probability that the petitioner would have prevailed on appeal." (Emphasis omitted.) Id., 731. "To ascertain whether the petitioner can demonstrate such a probability, we must consider the merits of the underlying claim." Id., 728.

Underlying the petitioner's claim of ineffectiveness by appellate counsel is that there was insufficient evidence to support the petitioner's conviction of manslaughter in the first degree with a firearm as an accessory. "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." (Internal quotation marks omitted.) *State* v. *Abraham*, 64 Conn. App. 384, 400, 780 A.2d 223, cert. denied, 258 Conn. 917, 782 A.2d 1246 (2001).

"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." General Statutes § 53a-8 (a). This court has explained accessorial liability as follows: "To be guilty as an accessory, one must share the criminal intent and community of unlawful purpose with the perpetrator of the crime and one must knowingly and wilfully assist the perpetrator in the acts which prepare for, facilitate or consummate it. . . . Whether a person who is present at the commission of a crime aids or abets its commission depends on the circumstances surrounding his presence there and his conduct while there. . . .

"Since under our law both principals and accessories are treated as principals . . . if the evidence, taken in the light most favorable to sustaining the verdict, establishes that [the defendant] committed the [crime] charged or did some act which forms . . . a part thereof, or directly or indirectly counseled or procured

any persons to commit the offenses or do any act forming a part thereof, then the [conviction] must stand." (Citation omitted; internal quotation marks omitted.) *State* v. *Gonzalez*, 135 Conn. App. 101, 107–108, 41 A.3d 340 (2012), aff'd, 311 Conn. 408, 87 A.3d 1101 (2014). "[A]ccessorial liability is predicated upon the actor's state of mind at the time of his actions, and whether that state of mind is commensurate to the state of mind required for the commission of the offense." *State* v. *Foster*, 202 Conn. 520, 532, 522 A.2d 277 (1987).

General Statutes § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when . . . (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person." Accordingly, to be guilty of manslaughter as an accessory under this subsection, the petitioner must recklessly engage in conduct which created a grave risk of death to another and intentionally aid in the death of the victim.

At the center of the petitioner's claim on appeal is the testimony of Ramos, a key witness for the state, and the only person who was in the BMW at the time of the shooting who testified.[5] Ramos testified that the petitioner had given him a loaded .22 caliber pistol earlier on the day of the shooting when the two had met on the street. According to Ramos' testimony, Ramos fired a .22 caliber pistol two or three times, Smith reached across Ramos and fired a .357 caliber gun two or three times out of the open passenger side window and the petitioner fired shots from an SKS rifle while it rested on the open backdoor window of the BMW.

[5] The petitioner did not testify at his criminal trial, and Smith invoked his right to remain silent pursuant to the fifth amendment to the United States constitution when the prosecutor called him as a witness.

The petitioner claims that he was prejudiced by his appellate counsel's failure to raise a sufficiency claim because the evidence was insufficient to convict him of manslaughter under an accessorial theory of liability. Specifically, he argues that because Ramos testified that the petitioner fired the SKS rifle from which the fatal shot was fired, the evidence could only support conviction of manslaughter as a principal and could not support his conviction under an accessorial theory of liability. He further argues that the only evidence that he acted as an accessory was Ramos' testimony that the petitioner had handed Ramos a loaded .22 pistol prior to the shooting.[6] That event, the petitioner argues, could not establish the element of aiding in the victim's death because the .22 caliber bullet caused a nonfatal knee injury. He further argues that the evidence was insufficient to support his conviction because he was acquitted on the other charges and, in so arguing, raises the issue of collateral estoppel.[7]

[6] General Statutes § 53a-8 (b) provides: "A person who sells, delivers or provides any firearm, as defined in subdivision (19) of section 53a-3, to another person to engage in conduct which constitutes an offense knowing or under circumstances in which he should know that such other person intends to use such firearm in such conduct shall be criminally liable for such conduct and shall be prosecuted and punished as if he were the principal offender."

[7] The petitioner also argues that the habeas court erred in stating that the evidence at the petitioner's criminal trial supported a finding that the petitioner fired the SKS rifle from the same vehicle from which the fatal shot was fired "by another individual." He argues that this finding is internally inconsistent because the fatal shot was fired from the SKS rifle, and therefore the petitioner could not have both fired the SKS rifle and not have fired the fatal shot. Although the evidence at the petitioner's criminal trial indicated that the fatal shot was fired from the SKS rifle, a finding as to which individual fired the fatal shot is not material to the legal conclusion in this case because accessorial liability is based on a concert of action theory. See *Seligson* v. *Brower*, 109 Conn. App. 749, 753 n.2, 952 A.2d 1274 (2008).

The petitioner also argues that during the criminal trial, the prosecutor relied on the theory that the petitioner was the principal actor in the manslaughter and that in this habeas proceeding, the respondent, the Commissioner of Correction, changed the state's theory of liability by presenting a new theory that the petitioner may not have been the principal actor. We

The petitioner's arguments are unavailing. Ramos' testimony that the petitioner handed him a loaded .22 caliber pistol is not, as the petitioner argues, the only evidence supporting an accessorial theory of liability. In examining the underlying claim, we conclude that there was sufficient evidence to support his conviction of manslaughter as an accessory under a concert of action theory. Under a concert of action theory, it is immaterial who fired the fatal shot; what is material is whether the evidence shows that the petitioner acted with others to bring about the death of the victim. "[A] showing of concert of action between a defendant and [others] can provide a sufficient basis for accessorial liability." *State* v. *Ashe*, 74 Conn. App. 511, 518, 519, 812 A.2d 194 (evidence that defendant acted in concert with others with intent to kill rival gang members sufficient to support murder conviction under accessorial theory of liability), cert. denied, 262 Conn. 949, 817 A.2d 108 (2003); see also *State* v. *Diaz*, 237 Conn. 518, 544, 679 A.2d 902 (1996) ("Although the evidence did not clearly demonstrate which of the perpetrators actually fired the shot that fatally injured [the victim], the evidence did establish that the defendant and his companions together prepared and readied themselves for the ambush . . . [and] fir[ed] repeatedly into the vehicle with the intent to kill one or more of the passengers. . . . [Thus, the evidence] show[ed] sufficient concert of action between the defendant and his companion[s] to support . . . the accessory allegation . . . ." [Internal quotation marks omitted.]).

The evidence, when viewed in the light most favorable to sustaining the verdict, shows the following. The

disagree. The respondent did not depart from the state's theory of liability. First, during closing arguments, the prosecutor discussed the concepts of principal and accessorial liability and explained that one can be an accessory when he is part of a joint effort. Second, there is no meaningful distinction between principal and accessorial liability. See *State* v. *Hamlett*, 105 Conn. App. 862, 867, 939 A.2d 1256, cert. denied, 287 Conn. 901, 947 A.2d 343 (2008).

petitioner, Ramos, and Smith were joyriding together in the "Hill" section of New Haven. Smith drove to the "Tre" section of New Haven where a woman informed Ramos that the victim was in the area. Ramos believed that the victim had killed his cousin over a month earlier in the "Hill" section of New Haven. The three young men searched for the victim. Smith circled the block and Ramos spotted the victim on Kensington Street. A member of the victim's group fired shots at the BMW. The petitioner, Ramos, and Smith all fired shots at the victim. Medical and ballistics evidence revealed that the victim sustained gunshot wounds from three different caliber bullets which had been fired from three different model guns. The habeas court aptly stated: "Where multiple shooters intentionally fire at someone, all the shooters can properly be convicted, through accessorial liability, of the homicide . . . ."

The petitioner argues that the concert of action theory, as expressed in *State* v. *Delgado*, supra, 247 Conn. 622, is inapplicable to the present case. In *Delgado*, the victim was shot in the back of his leg and the back of his arm, and died from loss of blood due to the gunshot wounds. Id., 620. This court concluded that "[a]lthough the evidence did not reveal whether it was the defendant or [a fellow gang member] who had fired the shot that fatally injured the victim, the jury reasonably could have determined that there was sufficient concert of action between the defendant and [the fellow gang member] to support the accessory allegation." Id., 623. The petitioner argues that because there was no confusion in the present case that the fatal shot was fired from the SKS rifle, the concert of action theory could not support his conviction under an accessorial theory of liability. We are not persuaded.

The fact that medical and ballistics evidence revealed that the fatal shot was fired from an SKS rifle does not prevent the application of the concert of action theory.

The jury reasonably could have been uncertain as to which individual fired the fatal shot from the SKS rifle.[8] Moreover, the jury did not need to determine who fired the fatal shot in order to find the petitioner guilty of manslaughter under an accessorial theory of liability.[9]

The gravamen of the petitioner's argument is that the evidence supported a conviction of him as the principal and, therefore, the evidence was insufficient to support his conviction of manslaughter as an accessory. In *State* v. *Hamlett*, 105 Conn. App. 862, 867, 939 A.2d 1256, cert. denied, 287 Conn. 901, 947 A.2d 343 (2008), the defendant claimed that the trial court erred in denying

[8] The jury had for its consideration conflicting accounts as to who fired the SKS rifle. The petitioner's statement to police indicates that Ramos fired the SKS rifle. The petitioner indicated in his statement to police that he, Ramos, and Smith were joyriding in a BMW and that after a group fired guns at the BMW, Ramos returned fire using a black gun that was "at . . . best . . . an automatic." There was evidence that the SKS rifle was heavy and unwieldy; and defense counsel argued during closing argument that the petitioner was unable to maneuver the weapon. Ramos testified at trial that he did not see the petitioner with a firearm when he entered the BMW, and testified the petitioner fired the SKS rifle. Ramos conceded on cross-examination that he had given different versions of events to police and that he had informed police that the petitioner had fired the SKS rifle only after the police had found the SKS rifle under his bed. Ramos testified at trial that the petitioner and Smith told him to take the SKS rifle from the back seat of the BMW, and he grabbed it and put it under his bed. Ramos further testified that the petitioner and Smith dropped Ramos off following the shooting, circled around the block to Ramos' residence, and told Ramos to grab the SKS from the back seat of the BMW and that he grabbed it and placed it under his bed.

[9] The petitioner argues that no evidence existed that he shot any weapon other than the SKS rifle. The petitioner's statement to the police, if believed, indicated that Ramos fired the SKS rifle. Furthermore, the victim's injuries indicated that shots had been fired from three different types of firearms. Ed Beamon, a New Haven resident, testified that in the early evening of November 29, 2005, he was sitting on his neighbor's front porch on Kensington Street when he heard shots being fired, and he ran out to the victim and observed shots being fired from the front and rear passenger sides of a "maroon" car. The petitioner admitted in his statement to police that he was seated in the back seat of the BMW during the shooting. The jury reasonably could have inferred that the petitioner fired one of the three weapons.

his motion for acquittal on his conviction of assault in the first degree because the evidence showed that he was the principal shooter and, therefore, he could not be found guilty as a "mere" accessory. Id., 867. This court noted that it was reasonable that the jury was unable to determine who shot the victim and concluded that the evidence was sufficient to support a conviction of assault as a principal or accessory because the defendant and another man confronted the victim with guns and the victim suffered gunshot wounds. Id., 867–68. The court rejected the defendant's argument that evidence sufficient to convict the defendant as a principal would be insufficient to convict him under an accessorial theory of liability. Id., 869. The court concluded: "Connecticut long ago adopted the rule that there is no practical significance in being labeled an accessory or a principal for the purpose of determining criminal responsibility. . . . The modern approach is to abandon completely the old common law terminology and simply provide that a person is legally accountable for the conduct of another when he is an accomplice of the other person in the commission of the crime. . . . Connecticut has taken the same approach through General Statutes § 53a-8. . . . There is no meaningful distinction between principal and accessory liability; they are simply theories for proving criminal liability. Given that a defendant may be convicted as an accessory even though he was charged only as a principal . . . we reject his argument that evidence sufficient to convict a defendant as a principal would be insufficient for a conviction under the theory of accessory liability." (Citations omitted; internal quotation marks omitted.) Id., 868–69.

In this case, the jury expressed uncertainty as to principal and accessorial liability. The court instructed the jury on the manslaughter charge under both principal and accessorial theories of liability. The jury initially

indicated on the verdict form that the petitioner was not guilty on all counts. The foreperson then explained that "something [was] wrong." The court informed the jury to communicate its concerns to the court via a note. The foreperson stated in a note that the jury had reached a verdict on manslaughter as an accessory, and was waiting to hear the clerk read that charge. The court recalled the jury and the verdict was vacated and rerecorded. The court then divided the manslaughter charge into principal and accessorial liability. The jury found the petitioner not guilty of manslaughter as a principal and guilty of manslaughter as an accessory. The jury's concern and the court's resultant division of the manslaughter charge does not alter the longstanding principle expressed in *Hamlett* that, as a matter of law, there is no meaningful distinction between principal and accessorial liability. See id., 869. We conclude that there was sufficient evidence that the petitioner acted in concert with Ramos and Smith to achieve the intended result, the death of the victim.

The petitioner also argues that the evidence is insufficient to support his conviction of manslaughter as an accessory because the jury acquitted him of both manslaughter as a principal and possession of an assault weapon. The petitioner argues that because of his acquittals, this court is collaterally estopped from examining the issue of whether he possessed or fired the SKS rifle, which the legislature defines as an "assault weapon." See General Statutes § 53-202a et seq. The petitioner further argues that this court, when reviewing the sufficiency claim, likewise cannot examine whether he fired the .22 pistol or the .357 revolver because the court granted the petitioner's motion for acquittal as to the charge of carrying a pistol without a permit.[10]

[10] The petitioner's trial counsel argued before the trial court that the state presented no evidence that the petitioner did not have a permit and, therefore, the petitioner should be acquitted of the charge of carrying a pistol without a permit. The state agreed. The court found that there was no evidence supporting any of the elements of the charge.

The doctrine of collateral estoppel does not apply to a review of the sufficiency of the evidence. "[C]ollateral estoppel principles do not apply in a single trial to preclude a verdict of guilty on an offense which includes elements in common with an offense for which the jury has returned a verdict of not guilty." *State* v. *Ortiz*, 29 Conn. App. 825, 836 n.6, 618 A.2d 547 (1993). As a result, the petitioner's acquittals do not preclude this court from examining all the evidence presented at trial when analyzing a claim challenging the sufficiency of the evidence. See id.; see also *State* v. *Stevens*, 178 Conn. 649, 653–56, 425 A.2d 104 (1979) (jury verdict acquitting defendant of larceny does not bar conclusion on appeal that sufficient evidence existed to support conviction of conspiracy to commit larceny).

Furthermore, we cannot review any inconsistencies among the verdicts in this case. "In [*State* v. *Arroyo*, 292 Conn. 558, 583, 585–86, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010)] the Supreme Court affirmed its holdings in *State* v. *Whiteside*, 148 Conn. 208, 169 A.2d 260, cert. denied, 368 U.S. 830, 82 S. Ct. 52, 7 L. Ed. 2d 33 (1961), and *State* v. *Rosado*, 178 Conn. 704, 425 A.2d 108 (1979), that factually and logically inconsistent verdicts are permissible. . . . The *Arroyo* court also held that legally inconsistent verdicts are permissible and, thus, not reviewable, adopting the rule of *United States* v. *Powell*, 469 U.S. 57, 69, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984)." (Citation omitted; internal quotation marks omitted.) *State* v. *Acosta*, 119 Conn. App. 174, 187, 988 A.2d 305, cert. denied, 295 Conn. 923, 991 A.2d 568 (2010). "The law permits inconsistent verdicts because of the recognition that jury deliberations necessarily involve negotiation and compromise. . . . [I]nconsistency of the verdicts is immaterial. . . . That the verdict may have been the result of compromise, or a mistake on the part of the jury, is possible. But verdicts

cannot be upset by speculation or inquiry into such matters." (Citation omitted; internal quotation marks omitted.) *State* v. *Knight*, 266 Conn. 658, 670, 835 A.2d 47 (2003).

We conclude that it was not reasonably probable that the petitioner would have prevailed on direct appeal on a sufficiency claim and, therefore, the petitioner has not demonstrated that he was prejudiced by Westcott's failure to raise that claim on direct appeal. Accordingly, we conclude that the habeas court properly rejected the petitioner's claim of ineffective assistance of appellate counsel.[11]

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN K. FINNEY *v.* CAMERON'S AUTO TOWING REPAIR
(AC 39526)

Lavine, Sheldon and Elgo, Js.

Syllabus

The plaintiff sought to recover damages from the defendant towing company for, inter alia, breach of contract in connection with the defendant's alleged failure to repair his motor vehicle, which had been towed to the defendant's vehicle storage facility following the plaintiff's involvement in a motor vehicle accident that rendered the vehicle inoperable. Specifically, the plaintiff alleged, inter alia, that the defendant had failed to give him a timely estimate for the repair of his towed vehicle, and that he had delayed retrieving the vehicle from the defendant's facility

[11] The petitioner further argues that the habeas court erred in failing to address the deficiency prong of *Strickland* and should have found that appellate counsel's performance was deficient. Because the habeas court properly determined that the petitioner had failed to prove prejudice, it was not required to address the performance prong. "Because both prongs of the *Strickland* test must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." *King* v. *Commissioner of Correction*, 73 Conn. App. 600, 602–603, 808 A.2d 1166 (2002), cert. denied, 262 Conn. 931, 815 A.2d 133 (2003).

because he had been falsely informed that the vehicle was being repaired. Thereafter, the defendant filed a counterclaim in which it alleged that it had a lien on the plaintiff's vehicle for storage and towing charges pursuant to the statute (§ 14-150 [g]) that pertains to motor vehicles that are a menace to traffic or have been abandoned, and sought a declaration of abandonment by the trial court, so that the vehicle could be sold to satisfy the towing and storage charges. Subsequently, the trial court rendered summary judgment in favor of the defendant on the plaintiff's complaint and on the defendant's counterclaim, from which the plaintiff appealed to this court. *Held* that the trial court properly determined that the defendant was entitled to summary judgment on the plaintiff's complaint, as the defendant established that there was no genuine issue of material fact as to its right to prevail on the plaintiff's claims that it breached its contract to repair his vehicle and that the unpaid storage fees that accrued resulted from its delay in giving the plaintiff an estimate of the cost to repair his vehicle and alleged misrepresentation to the plaintiff that it was repairing his vehicle: the defendant submitted an affidavit from its owner, which stated that the owner had never agreed to repair the plaintiff's vehicle and that the plaintiff was free to pick up his vehicle at any time after he paid the towing and storage fees, and, because the plaintiff failed to submit countering affidavits or other evidence that contradicted that evidence, the court was entitled to rely on those uncontradicted averments; nevertheless, the trial court improperly rendered summary judgment in favor of the defendant on its counterclaim against the plaintiff because the defendant failed to state any basis on which it was entitled to judgment on the claim therein pleaded, as the defendant failed to recite the language or requirements of § 14-150 (g), the statute pursuant to which it claimed it was entitled to judgment on its counterclaim, nor did it argue that it had satisfied those requirements, and subsection (a) of § 14-150, pursuant to which it sought summary judgment declaring that the plaintiff's vehicle was abandoned, did not pertain to the plaintiff's vehicle, which was neither abandoned on any highway nor on the defendant's property without its consent, and, thus, the defendant's memorandum of law was devoid of any argument or analysis in support of its motion for summary judgment on the counterclaim.

Argued October 19, 2017—officially released January 23, 2018

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendant filed a counterclaim; thereafter, the court, *Wahla*, *J.*, granted the defendant's motion for summary

judgment on the complaint and the counterclaim, and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part; further proceedings.*

John K. Finney, self-represented, the appellant (plaintiff).

Edward W. Case, for the appellee (defendant).

Opinion

SHELDON, J. The plaintiff, John K. Finney, commenced this action alleging that the defendant, Cameron's Auto Towing Repair, breached its contract to repair his vehicle. The defendant denied that it had agreed to repair the plaintiff's vehicle and filed a counterclaim alleging that the plaintiff had failed to pay it for the towing and storage of his vehicle, and, thus, that he had abandoned it. The plaintiff appeals from the summary judgment rendered in favor of the defendant on his complaint and the defendant's counterclaim. We conclude that the trial court properly determined that the defendant was entitled to summary judgment on the plaintiff's complaint because it established that there was no genuine issue of material fact as to its right to prevail on the plaintiff's claim. We further conclude, however, that the court erred in granting summary judgment in favor of the defendant on its counterclaim against the plaintiff because the defendant failed to state any basis upon which it was entitled to judgment on the claim therein pleaded, either in its motion for summary judgment or in its supporting memorandum of law. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

The following facts are undisputed. On November 12, 2015, the plaintiff was involved in a motor vehicle accident that rendered his vehicle inoperable. At the command of the Connecticut State Police, the plaintiff's

vehicle was towed to the defendant's vehicle storage facility, where it remained. The plaintiff never paid the defendant for towing his vehicle or for storing the vehicle at its facility.

The self-represented plaintiff commenced this action on February 1, 2016. In his complaint, he alleged that the defendant had failed to give him a timely estimate for the repair of his vehicle. The plaintiff claimed that, ten days after the defendant towed his vehicle to its facility, it gave him an oral estimate of the cost to repair his vehicle, in the approximate amount of $867, which he agreed to pay. The plaintiff further alleged that he waited another ten days for the repairs to be completed, but then was informed by the defendant that the "car was up for abandonment." On March 3, 2016, the plaintiff filed a revised complaint, in which he once again claimed, inter alia, that the defendant had failed to give him a "timely estimate" for the repair of his vehicle, and that he had delayed retrieving the vehicle from the defendant's facility because he had been led to believe that the vehicle was being repaired, when in fact, it was not.[1]

On May 2, 2016, the defendant filed an answer and special defenses to the plaintiff's complaint. In its answer, the defendant denied "any and all allegations relating to fraud" that the plaintiff had made against it and left the plaintiff to his proof as to all of his other allegations of "wrongdoing." By way of special

[1] Attached to his revised complaint, the plaintiff submitted a document entitled, "Laws that were violated," and lists the following: abandoned motor vehicles; larceny by extortion; fraud and false statements, including fraudulent/intentional misrepresentation, intentional negligence, failure to warn, and false information and hoaxes; tortious interference; unsworn declaration under penalty of perjury; general admissibility of relevant evidence; perjury; accessory after the fact; punitive damages. Because the plaintiff merely set forth these alleged violations in list form, as an attachment to his complaint, they were not properly pleaded in his complaint.

defenses, the defendant claimed that the plaintiff's complaint failed to state a claim upon which relief could be granted and that the plaintiff had "failed to mitigate his damages by failing, refusing and neglecting to pay for the towing and storage of his vehicle and take possession of the same in a timely manner." The defendant also filed a counterclaim in which it alleged, inter alia, that: "Pursuant to [General Statutes] § 14-150 (g), the [defendant] has a lien on the [plaintiff's] vehicle for storage and towing charges, and as a result seeks a declaration of abandonment by [the] court, so that the vehicle can be sold to satisfy the towing and storage charges."

The next day, on May 3, 2016, the defendant filed a motion for summary judgment and a supporting memorandum of law, on the ground that "there is no dispute as to any material fact regarding the plaintiff's claim in this action." The plaintiff did not file a written objection to the motion, or any affidavits or other documentation in opposition thereto. Although the plaintiff was present in court the first time the defendant's motion for summary judgment appeared on the short calendar, neither the defendant nor its counsel was present, and so the motion was marked off. The next time the motion appeared on the short calendar, on June 6, 2016, the plaintiff did not appear, but the hearing on the motion proceeded, with the defendant, through its counsel, presenting the only argument.

By way of an order dated July 29, 2016, the court rendered summary judgment in favor of the defendant on the plaintiff's complaint and on the defendant's counterclaim. In its order, the court stated: "After the defendant came into possession of the plaintiff's vehicle, the defendant advised [the] plaintiff of the towing and storage charges. The plaintiff had not paid the storage charges or the towing charges as of the day of the

hearing [on the defendant's motion for summary judgment]. The plaintiff did not have collision insurance on the day of [his motor vehicle accident] and had left his vehicle with the defendant at its storage facility. The defendant filed a counterclaim." The court thereafter ruled on the motion as follows: "For the foregoing reasons the court concludes [that] there are no genuine issues of material fact and [that] there is no showing of wrongful conduct alleged as to the defendant. Therefore, the court grants summary judgment as to the plaintiff's complaint on all charges and grants the defendant's counterclaim, [pursuant to] § 14-150 (a)." This appeal followed.

"Our review of the trial court's decision to grant a motion for summary judgment is plenary." (Internal quotation marks omitted.) *Brusby* v. *Metropolitan District*, 160 Conn. App. 638, 646, 127 A.3d 257 (2015). 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. . . . Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact *together with the evidence disclosing the existence of such an issue*. . . . It is not enough . . . for the opposing party merely to assert the existence of such a disputed issue. . . . Mere assertions of fact, whether contained in a complaint or in a brief, are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court [in support of a motion for summary judgment]. . . .

"As a general rule, then, [w]hen a motion for summary judgment is filed and supported by affidavits and other documents, an adverse party, by affidavit or as otherwise provided by . . . [the rules of practice], must set forth specific facts showing that there is a genuine issue for trial, and if he does not so respond, summary judgment shall be entered against him. . . . Requiring the nonmovant to produce such evidence does not shift the burden of proof. Rather, it ensures that the nonmovant has not raised a specious issue for the sole purpose of forcing the case to trial." (Emphasis in original; internal quotation marks omitted.) *Marsala* v. *Yale-New Haven Hospital, Inc.*, 166 Conn. App. 432, 458–59, 142 A.3d 316 (2016). In other words, the failure of a nonmoving party to controvert by affidavit or otherwise any of the facts set forth in an affidavit filed by the movant in support of summary judgment entitles the court in deciding the summary judgment motion to rely upon those facts as stated. *Fogarty* v. *Rashaw*, 193 Conn. 442, 444–45, 476 A.2d 582 (1984).

The plaintiff first challenges the summary judgment rendered in favor of the defendant on his complaint. It is undisputed that the plaintiff failed to pay the towing and storages fees he owed to the defendant. He claims, however, that the storage fees that accrued resulted from the defendant's delay in giving him an estimate of the cost to repair his vehicle and misrepresentation to him that it was repairing his car after it had agreed to do so. Attached to its motion for summary judgment, the defendant submitted an affidavit of its owner, Salvatore Sena, Jr., who averred, inter alia, that he had never agreed to repair the plaintiff's vehicle and that the plaintiff had been free to pick up his vehicle at any time after he paid the towing and storage fees. The plaintiff, having failed to file an objection to the defendant's motion, much less any countering affidavits or other evidence in opposition thereto, did not refute any of

the averments in Sena's affidavit. Because the plaintiff failed to provide any evidentiary support for his claim that the defendant had agreed to repair his vehicle and to provide him an estimate of the cost of such repairs, the court was entitled to rely on Sena's uncontradicted averments that the defendant had never agreed with the plaintiff to make or estimate the costs of such repairs. In the absence of any genuine issue of material fact as to the formation of such an agreement between the parties, the court properly determined that the defendant was entitled to judgment on his claim of breach of contract as a matter of law.

The court also granted summary judgment on the defendant's counterclaim. The defendant did not specify in its motion for summary judgment that it was seeking judgment on the counterclaim. Instead, in the memorandum of law attached to its motion, it set forth only the factual basis for its argument that there was no genuine issue of material fact as to the claim of breach of contract set forth in the plaintiff's complaint. As to its own counterclaim, by contrast, the defendant simply described the claim as follows: "The defendant has filed a counterclaim seeking a declaration of abandonment by [the] court due to the plaintiff's failure to pay for the towing and storage charges or to otherwise make arrangements to pay for the same." Thereafter, in the last paragraph of its memorandum of law, the defendant merely asked the court, in conclusory fashion, to grant summary judgment in its favor on the plaintiff's complaint and "order the plaintiff's vehicle abandoned pursuant to [§] 14-150 (a), so that the defendant can sell said vehicle to recover [its] losses for towing and storage charges the plaintiff failed to pay."

The defendant did not recite the language or requirements of the statute pursuant to which it claimed it was entitled to judgment on its counterclaim; nor did it argue that it had satisfied those statutory requirements,

and thus become entitled to judgment on the counterclaim as a matter of law. Section 14-150 (a), the statute pursuant to which the defendant sought summary judgment declaring that the plaintiff's vehicle was abandoned, and the statute cited by the trial court in granting the defendant's motion for summary judgment, provides as follows: "Any person who abandons any motor vehicle within the limits of any highway or upon property other than such person's own without the consent of the owner thereof for a period longer than twenty-four hours shall have committed an infraction and shall be fined not less than eighty-five dollars. The last owner of record of a motor vehicle found abandoned, as shown by the files of the Department of Motor Vehicles, shall be deemed prima facie to have been the owner of such motor vehicle at the time it was abandoned and the person who abandoned the same or caused or procured its abandonment." So written, § 14-150 (a) does not pertain to the plaintiff's vehicle, which was neither abandoned on any highway nor on the defendant's property without its consent. Hence, although the defendant may be entitled to judgment under a different subsection of § 14-150, particularly subsection (g),[2] as it

[2] General Statutes § 14-150 (g) provides: "The owner or keeper of any garage or other place where such motor vehicle is stored shall have a lien upon the same for such owner's or keeper's towing or storage charges, or both, that result from towing or storage under this section. Unless title has already vested in the municipality pursuant to subsection (d) of this section, if the current market value of such motor vehicle as determined in good faith by such owner or keeper does not exceed one thousand five hundred dollars and such motor vehicle has been stored for a period of not less than fifteen days, such owner or keeper may, unless an application filed by the owner pursuant to subsection (e) of this section is pending and the owner of such motor vehicle has notified such owner or keeper that such application for hearing has been filed, sell the same for storage and towing charges owed thereon, provided a notice of intent to sell shall be sent to the commissioner, the owner and any lienholder of record of such motor vehicle, if known, five days before the sale of such vehicle. If the current market value of such motor vehicle as determined in good faith by such owner or keeper exceeds one thousand five hundred dollars and if such motor vehicle has been so stored for a period of forty-five days, such owner or keeper shall,

claimed in its counterclaim, its memorandum of law is devoid of any argument or analysis in support of its motion for summary judgment on the counterclaim. The defendant, thus, failed to show that it was entitled to judgment on the counterclaim as a matter of law.

The judgment on the complaint is affirmed. The judgment on the counterclaim is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANTHONY C. MANOUSOS
(AC 39376)

Keller, Prescott and Beach, Js.

Syllabus

Convicted of the crime of arson in the first degree, the defendant appealed to this court, claiming, inter alia, that the trial court improperly denied his motions to suppress certain statements that he had made to the police and items that were confiscated from him during an investigatory stop and subsequent patdown of his person for weapons. The investigatory stop and subsequent patdown were conducted after an officer on patrol received a report from a police dispatcher reporting a fire and

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unless an application filed by the owner pursuant to subsection (e) of this section is pending and the owner of such motor vehicle has notified such owner or keeper that such application for hearing has been filed, sell the same at public auction for cash, at such owner's or keeper's place of business, and apply the avails of such sale toward the payment of such owner's or keeper's charges and the payment of any debt or obligation incurred by the officer who placed the same in storage, provided if the last place of abode of the owner of such motor vehicle is known to or may be ascertained by such garage owner or keeper by the exercise of reasonable diligence, notice of the time and place of sale shall be given to such owner and any lienholder of record by mailing such notice to such owner by certified mail, return receipt requested, at such last usual place of abode, at least five days before the time of sale. At any public auction held pursuant to this subsection, such garage owner or keeper may set a minimum bid equal to the amount of such owner's or keeper's charges and obligations with respect to the tow and storage of the motor vehicle. If no such bid is made, such owner or keeper may sell or dispose of such vehicle."

that the man suspected of starting the fire had taken off in a certain direction. The officer saw the defendant 300 yards from the scene of the arson, asked him where he was coming from, and noticed that the defendant was wearing only jeans and a T-shirt in chilly weather, and that he was out of breath, perspiring and had a deer in headlights look about him. The police handcuffed the defendant and performed the patdown after they noticed a bulge in his front left pocket. The police searched the pocket and found certain items, which were seized along with a hooded sweatshirt and an umbrella that the defendant was carrying. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly denied his motions to suppress the statements that he had made to the police and the items seized during the investigatory stop and patdown, which was based on his assertion that the police lacked a reasonable and articulable suspicion that he was involved in criminal activity:

a. The trial court properly determined, under the totality of the circumstances, that the police had a reasonable and articulable suspicion to conduct the investigatory stop; the defendant was in close proximity in time and space to the fire, he was the only person on foot in the area, he had a deer in headlights look about him when he saw the police officer who stopped him, which heightened the officer's suspicion, the officer's suspicion was further supported by his observations that the defendant was breathing heavily and perspiring, and was wearing only jeans and a T-shirt, despite chilly and rainy weather, and although the defendant's ethnicity and the color of his sweatshirt did not match the description of the suspect given by the dispatcher, those factors were unimportant in comparison to the factors that gave rise to a reasonable and articulable suspicion on the part of the officer.

b. The limited patdown of the defendant for weapons was proper, as the totality of the circumstances supported the trial court's finding that the officers reasonably believed that he may have been armed and dangerous: the bulge in the defendant's pocket observed by the police was strong justification for the patdown, as it indicated that the defendant may have been carrying a weapon, the officers had reason to suspect that the defendant had set a house on fire while someone was inside the house and then fled, the fact that the defendant was handcuffed during the patdown did not automatically render it unlawful, and his cooperation with the police during the patdown did not undermine its legality, as a handcuffed suspect may still present a danger to the police; moreover, because the investigatory stop and patdown were proper, the seizure of the items from the defendant's pocket as well as his sweatshirt and umbrella was warranted, it having been reasonable for the police to enlarge the scope of the search by detaining the defendant for a showup identification and seizing the items he was carrying, and, therefore, the defendant's claim that his subsequent statements to

the police should not have been admitted into evidence as fruit of the poisonous tree was unavailing.

2. The trial court did not violate the defendant's right to a fair trial or to the assistance of counsel by compelling the defendant to disclose to the state prior to trial the substance of the opinions of his expert witness; contrary to the defendant's claim, the court's action did not implicate his right to the assistance of counsel, the court did not preclude the testimony of the defendant's expert, nor did it order the defendant to make written disclosures, even though it was authorized to do so under the applicable rule of practice (§ 40-27), the court acted within its broad discretion to maintain the orderly procedure of the proceeding by ordering the defendant's expert to appear to make an offer of proof regarding the substance of the expert's opinions to obviate the need, in the middle of trial, for the state to request a continuance to prepare for cross-examination, and the issue thereafter resolved itself when the defendant voluntarily supplied the state with the expert's written report.

Argued October 18, 2017—officially released January 23, 2018

Procedural History

Substitute information charging the defendant with the crime of arson in the first degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *White*, *J.*, denied the defendant's motions to suppress certain evidence; thereafter, the matter was tried to the jury; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Stephan E. Seeger, with whom, on the brief, was *Igor G. Kuperman*, for the appellant (defendant).

Linda F. Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Paul J. Ferencek*, senior assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Anthony C. Manousos, appeals from the judgment of conviction, rendered after a jury trial, of arson in the first degree in violation of General Statutes § 53a-111 (a) (1). The defendant claims that the trial court improperly (1) denied his motions

to suppress various tangible items collected from him, as well as oral statements that he made to the police during an investigatory stop and subsequent patdown search for weapons; and (2) compelled him to disclose prior to trial the substance of the opinions of the expert witness he intended to call at trial. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts on the basis of the evidence adduced at trial. On December 3, 2014, at approximately 12:40 p.m., the Stamford police received a 911 call from Brenda Ortiz. Ortiz reported that the multifamily home located at 52 Highland Road, in which she rented the first floor apartment, was on fire. The property was owned by the defendant and was in need of substantial repairs. The defendant had been unable to sell the house despite repeated efforts to find a buyer.

On that day, Ortiz had been asleep on the couch in her living room when she was awakened by a strong smell of gasoline. Unsure of where the smell was coming from, Ortiz headed toward the porch. The smell became even stronger as she walked into the foyer, so she propped open the foyer door to ventilate the area with fresh air.

Ortiz then went back inside her apartment to call her husband. Once inside, she heard the foyer door slam shut, as well as footsteps on the stairs leading to the second and third floor apartment units. Ortiz went back into the foyer, where she saw "two legs and a pair of boots" traversing up the stairs. She yelled out to the defendant,[1] who did not stop or respond. Although Ortiz

[1] Ortiz initially did not know that this person was the defendant, her landlord. Shortly after the police had taken the defendant into custody, however, she identified the defendant at a street showup identification procedure as the same person who had run from 52 Highland Road. At trial, she identified the defendant as her landlord.

could not see the defendant's face, she noticed that the person was wearing jeans and black boots.

Ortiz went back inside her apartment and dialed 911. As she was dialing, she heard a loud explosion. Ortiz looked back into the foyer and saw a "fireball" coming out of the stairwell. She also saw the defendant running down the stairs wearing the same jeans and boots she had observed just moments beforehand, as well as a black hooded sweatshirt.

Ortiz then grabbed her car keys and ran outside, where she saw the defendant walking quickly down the sidewalk. She chased after him, yelling, "yo, what the fuck you just did?" The defendant turned back, saw Ortiz, and took off running toward Grove Street.

Ortiz then got into her truck and attempted to track him down. Unable to locate him, Ortiz drove back to 52 Highland Road and parked on the street. She then provided a description of the defendant to the 911 operator. Soon after, police and fire personnel arrived.

Meanwhile, Sergeant Russell Gladwin of the Stamford Police Department was patrolling in his vehicle on Grove Street when he received a dispatch reporting a fire at 52 Highland Road. The dispatcher reported that the man suspected of starting the fire had taken off down Highland Road and was headed toward Grove Street.

Gladwin responded to the call, as he was only a short distance away. As Gladwin turned right from Grove Street onto Highland Road, he encountered the defendant coming out of an empty grassy lot to his left. Gladwin stopped the defendant and asked where he was coming from. The defendant spontaneously offered to show Gladwin his driver's license.

Officer Jonathan Rizzitello arrived in the area shortly after Gladwin. As Rizzitello approached, Gladwin gestured to him to handcuff the defendant. Rizzitello then

conducted a patdown search for weapons, and seized the defendant's hooded sweatshirt and umbrella, which he was carrying, as well as two sets of keys and a box of wooden matches found in the defendant's jeans pocket.[2]

Edward Rondano, a Stamford police officer assigned to the department's crime scene unit, also reported to the residence located at 52 Highland Road. A fire marshal pointed out to Rondano that there were two used matches on the floor in front of the stairway. Rondano collected the matches and stored them in plastic bags.

At about 2:15 p.m., an arson investigator, Detective Paul Makuc of the state police, arrived at the residence. Upon entering the foyer, Makuc smelled gasoline. Makuc also saw an irregular burn pattern on the carpet covering the foyer stairwell. Specifically, Makuc noticed that the carpet on the top of the stairs was intact, although portions of the carpet on the lower half of the stairs had been destroyed by fire.

Makuc believed that the irregular burn pattern indicated that an accelerant may have been poured on the staircase, suggesting arson. He therefore decided to secure the scene and apply for a warrant to search the residence, as well as the defendant's clothing and his girlfriend's white Mercedes, which was found parked a short distance down the street.

After the warrants were issued, Makuc and his team reconvened and began their investigation. The team concluded that the basement, attic unit, and second floor units did not incur any interior fire damage, while on the first floor the foyer stairwell and closet directly beneath it were severely damaged.

A trained canine aided Makuc in detecting the possible origin of the fire. In the stairwell, the canine alerted

[2] Additional facts regarding the investigatory stop and subsequent patdown will be set forth in part I of this opinion.

to both ends of the irregular burn pattern, indicating the presence of an accelerant such as gasoline. The canine did not alert to any other areas in the home, including the closet underneath the foyer stairwell. After completing their investigation of the residence, Makuc and his team members concluded that the fire originated in the foyer stairwell and was incendiary in nature—meaning that it was "set by human hands with the use of an ignitable liquid in conjunction with an ignition source consistent with an open flame . . . [such as] a match or a lighter."

Makuc and his team then returned to the Stamford police station, where they executed search warrants for the defendant's clothing items and his girlfriend's vehicle. Makuc's canine alerted to the defendant's black hooded sweatshirt, as well as to one of his boots. Makuc then searched the pockets of the sweatshirt and found two partially burnt wooden matches, a white cotton mask, and two cotton gloves. Forensic testing later confirmed the presence of gasoline on the gloves, boot, and hooded sweatshirt.

In the trunk of the vehicle belonging to the defendant's girlfriend, Makuc found a white garbage bag containing a red, plastic five gallon gasoline can, as well as metal containers filled with Coleman fuel. Makuc also found an opened five-pack of white masks containing four of the five masks. Forensic testing later confirmed that the fibers from the masks found in the trunk were consistent with white fibers found in the defendant's beard.

In the front console of the vehicle, the investigators found a receipt from Home Depot for a purchase dated December 3, 2014—the same day of the fire—for a five gallon plastic gasoline container. In addition, a pressure sprayer was found in the backseat of the vehicle. Forensic testing later confirmed the presence of gasoline in

both the five gallon plastic container and the pressure sprayer.

The defendant was subsequently arrested and, following a jury trial, convicted of arson in the first degree in violation of § 53a-111 (a) (1). He was sentenced to fourteen years of incarceration, followed by eleven years of special parole. This appeal followed.

I

The defendant first claims that the trial court improperly denied his motion to suppress the tangible items collected from his person, and oral statements that he made to the police following the investigatory stop and subsequent patdown for weapons conducted by officers Gladwin and Rizzitello. Specifically, the defendant argues that the police lacked a reasonable and articulable suspicion to stop him, as well as a reasonable belief that he may have been armed and dangerous. We disagree.

The following additional facts, which the trial court found following an evidentiary hearing, and procedural history are relevant to this claim. On December 3, 2014, at approximately 12:40 p.m., Gladwin responded to a radio dispatch about a fire at 52 Highland Road. The dispatcher reported that the woman who called 911 had seen a Hispanic male wearing a gray sweater fleeing the scene.

Gladwin, who was driving down Grove Street a short distance away, responded to the call. He reached Highland Road within twenty seconds of receiving the dispatch. Upon turning onto Highland Road, Gladwin saw the defendant walking out of an empty grassy lot about 300 feet from the fire. Although it was forty degrees and raining that day, the defendant was wearing only jeans and a T-shirt. The defendant was also carrying

an umbrella and something that looked to Gladwin to be an outer garment.

Gladwin rolled down his window and asked the defendant where he was coming from. The defendant gestured back toward the empty lot and stated "over there." The defendant then spontaneously offered to show Gladwin his driver's license, which listed a Norwalk address. Gladwin noticed that the defendant was out of breath, perspiring, and had a "deer in headlights" look.

Shortly after Gladwin encountered the defendant, Rizzitello arrived at the scene. At that point, Gladwin believed that detaining the defendant was appropriate. Gladwin therefore gestured to Rizzitello to handcuff the defendant.

As he was approaching the defendant, Rizzitello noticed a bulge in his front left pocket. Rizzitello then performed a patdown on the outside of the defendant's clothing for weapons. In doing so, he felt something "sharp and hard" in the defendant's front left pocket. Rizzitello then searched the contents of that pocket and found two sets of keys and a box of wooden matches.

Rizzitello informed Gladwin of what he found. Gladwin instructed him to secure the items, as well as the defendant's umbrella and black hooded sweatshirt. Gladwin also instructed Rizzitello to detain the defendant in anticipation of a potential street showup identification procedure.

As Rizzitello was escorting the defendant to his vehicle, the defendant spontaneously asked, "What's going on?" Rizzitello told the defendant that the police had received a report of a fire at 52 Highland Road, and that a man suspected of possibly starting the fire was seen fleeing down that street. Without being asked or otherwise prompted, the defendant stated that he

owned that residence, his girlfriend had dropped him off there to collect rent from his tenants, he knocked on the door and nobody was home, and that he then began walking to meet his girlfriend at a mall.

A short while later, Officer Sean Boeger of the Stamford Police Department's major crimes unit asked Rizzitello to show him the items taken from the defendant. Boeger noticed that the defendant's black hooded sweatshirt smelled heavily of gasoline, and that the wooden matches that the defendant was carrying in his pocket were similar to the ones found on the floor of the foyer at the residence.

Boeger then decided to question the defendant. After Boeger properly apprised the defendant of his *Miranda*[3] rights, the defendant voluntarily waived his rights and agreed to talk to Boeger. In response to Boeger's questions, the defendant made a number of statements, including that (1) his girlfriend had dropped him off at the corner of Highland Road and Grove Street; (2) he was not wearing his jacket that day because he "ran hot"; (3) he had been walking in the empty grassy lot to see how the "leaves were being piled up on the lot"; (4) his hooded sweatshirt smelled like gasoline because he had been using a leaf blower; and (5) he was carrying the box of matches because they had sentimental value to him.

Furthermore, when Boeger asked the defendant why the wooden matches in his pocket appeared to match those found in the foyer of the residence, he told Boeger to question Ortiz, who, he claimed, owed him $3000 in unpaid rent and whom he had seen "speeding out of the driveway" earlier that day. When Boeger told the defendant that he thought the defendant had set the

[3] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

fire, the defendant accused Boeger of trying to get him to admit to something that he would not.

The defendant filed a motion to suppress the tangible items collected from his person, as well as his girlfriend's vehicle, following his arrest. He also later filed a second motion to suppress oral statements that he made to various officers the day of his arrest.

On February 22, 2016, the trial court, *White, J.*, issued a memorandum of decision addressing both of the defendant's motions to suppress. The court concluded that, on the basis of the totality of the circumstances, the police had a reasonable and articulable suspicion to conduct an investigatory stop and subsequent patdown of the defendant. Specifically, the court found persuasive that (1) Gladwin responded to the dispatch and, within twenty seconds, encountered the defendant approximately 300 feet from the fire; (2) the defendant was carrying a sweatshirt in accordance with the description of the possible suspect relayed in the dispatch; (3) the defendant was winded and wearing only a T-shirt even though it was cold and damp that day; and (4) the defendant was the only person on foot in the immediate area.

Furthermore, the court determined that the police had a reasonable belief that the defendant may have been armed and dangerous considering the serious nature of the crime. The court also concluded that the police were entitled to search the contents of the defendant's front left pocket after feeling something "sharp and hard" during the patdown of the outside of his clothes. The court therefore denied the defendant's motions, and the tangible items seized from the defendant, as well as his statements, were later admitted as evidence at trial.

We begin by setting forth the relevant standard of review. "[O]ur standard of review of a trial court's findings and conclusions in connection with a motion to

suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct . . . .'' (Internal quotation marks omitted.) *State* v. *Saturno*, 322 Conn. 80, 87-88, 139 A.3d 629 (2016).

In evaluating the constitutionality of a search and seizure, however, the court must ''undertake a more probing factual review . . . .'' (Internal quotation marks omitted.) *State* v. *Edmonds*, 323 Conn. 34, 39, 145 A.3d 861 (2016). Thus, ''[a]lthough we must, of course, defer to the trial court's factual findings, our usual deference . . . is qualified by the necessity for a scrupulous examination of the record to ascertain whether [each] finding is supported by substantial evidence . . . .'' (Internal quotation marks omitted.) Id.

A

The defendant argues that Gladwin lacked the requisite reasonable and articulable suspicion that the defendant was involved in criminal activity in order to make a lawful investigatory stop. The defendant maintains that he was stopped ''based on (1) his location near the crime scene, (2) the fact that he was the only male on the street in an otherwise wholly residential area during daytime hours, (3) his choice of attire, and (4) . . . his initial surprised reaction to being stopped by . . . Gladwin,'' and that such facts did not justify the investigatory stop. We disagree.

''Under the fourth amendment to the United States constitution, and under article first, § 7, and article first, § 9, of the Connecticut constitution,[4] a police officer

[4] We note that our appellate courts ''repeatedly [have] observed that the language of article first, § 7, of the state constitution closely resembles the language of the fourth amendment to the federal constitution. . . . In light of this textual similarity, it is not surprising that . . . we consistently have recognized that, in determining whether article first, § 7, has been violated,

may briefly detain an individual for investigative purposes if the officer has a reasonable and articulable suspicion that the individual has committed or is about to commit a crime." (Footnotes added and omitted.) *State* v. *Trine*, 236 Conn. 216, 223, 673 A.2d 1098 (1996). "Reasonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available and known by the police, would have had that level of suspicion." (Internal quotation marks omitted.) *State* v. *Nash*, 278 Conn. 620, 633, 899 A.2d 1 (2006). "Courts have used a variety of terms to capture the elusive concept of [reasonable and articulable suspicion]. . . . But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account." (Internal quotation marks omitted.) Id.

The totality of the circumstances supports a finding of reasonable and articulable suspicion. It is well established that "[p]roximity in time and place of the stop to the crime is highly significant in the determination of whether an investigatory detention is justified by reasonable and articulable suspicion." (Internal quotation marks omitted.) *State* v. *Houghtaling*, 155 Conn. App. 794, 813, 111 A.3d 931 (2015), aff'd, 326 Conn. 330, 163 A.3d 563 (2017). The court found that it took Gladwin no longer than twenty seconds to reach Highland Road after receiving the dispatch, and that the defendant was stopped 300 feet from the residence. See *Navarette* v. *California*, U.S. , 134 S. Ct. 1683, 1689, 188 L. Ed. 2d 680 (2014) (reasonable suspicion existed to stop suspected drunken driver eighteen minutes after 911 caller reported his location, which was roughly nineteen highway miles south of where he

we employ the same analytical framework that would be used under the federal constitution." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Kelly*, 313 Conn. 1, 15, 95 A.3d 1081 (2014).

was stopped; "[t]hat sort of contemporaneous report has long been treated as especially reliable"); see also *United States* v. *Jackson*, 652 F.2d 244, 248 (2d Cir.) (reasonable suspicion existed to stop suspect whose vehicle was coming from direction in which robber had fled on foot less than five minutes earlier), cert. denied, 454 U.S. 1057, 102 S. Ct. 605, 70 L. Ed. 2d 594 (1981); *State* v. *Kyles*, 221 Conn. 643, 661, 607 A.2d 355 (1992) (reasonable suspicion existed to stop suspect sighted less than two miles from crime scene ten minutes after commission of crime). Indeed, the fact that the defendant was stopped in particularly close proximity in time and space to the residence and the fire strongly supports a finding of reasonable suspicion.

Furthermore, the defendant was the only person on foot in the area. Gladwin testified that, "based on the call we had, and the fact that there was *no one else on that street*, [he] thought it was strange that there was someone right there in close proximity to [the fire]." (Emphasis added.) This fact further supports a finding of reasonable suspicion. See *United States* v. *McCargo*, 464 F.3d 192, 197 (2d Cir. 2006) (reasonable suspicion existed to stop suspect, who was walking alone with no other pedestrians about, approximately 200 feet west of crime scene just minutes after reported burglary attempt), cert. denied, 552 U.S. 1042, 128 S. Ct. 645, 169 L. Ed. 2d 515 (2007).

Moreover, the defendant had a "classic deer in headlights" look on his face when he saw Gladwin. This court has previously held that "the reaction of the suspect to the approach of police" is yet another factor that may support a finding of reasonable suspicion. (Internal quotation marks omitted.) *State* v. *Houghtaling*, supra, 155 Conn. App. 813. In particular, "nervous . . . behavior is a pertinent factor in determining reasonable suspicion." *Illinois* v. *Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). The defendant's apparent

surprise at seeing a police officer therefore heightened Gladwin's reasonable suspicion that the defendant was involved in the arson.

Finally, Gladwin's observations that the defendant was wearing only jeans and a T-shirt, despite the chilly and rainy weather, and was breathing heavily and perspiring supported Gladwin's reasonable suspicion that the defendant was running from the arson scene, as the police dispatcher had reported. See *State* v. *Braxton*, 196 Conn. 685, 691–92, 495 A.2d 273 (1985) (fact that suspect, who was discovered near crime scene within minutes of commission of crime, was perspiring and breathing heavily supported inference that he had been running to avoid apprehension); see also *State* v. *Wilson*, 178 Conn. 427, 430, 436, 423 A.2d 72 (1979) (officer had reasonable grounds to arrest two suspects who had reportedly fled on foot and were sweating and breathing heavily when apprehended on cold November night two miles from attempted robbery); *State* v. *Miller*, 137 Conn. App. 520, 539–40, 48 A.3d 748 (reasonable suspicion existed to stop suspect who was sweating profusely and who was in close temporal and physical proximity to scene of burglary), cert. denied, 307 Conn. 914, 54 A.3d 179 (2012).

The defendant also argues that Gladwin lacked the "requisite particularity of description" to stop the defendant because the color of his sweatshirt, as well as his ethnicity, did not match the description of the suspect relayed by the dispatcher. Specifically, the dispatcher described the suspect as a Hispanic male wearing a gray sweater, while the defendant is a Caucasian male who was carrying a black hooded sweatshirt.

Our Supreme Court, however, has held that "[t]he police . . . are not required to confirm every description of the perpetrator that is broadcast over the radio. What must be taken into account is the strength of

those points of comparison which do match up and whether the nature of the descriptive factors which do not match is such that an error as to them is not improbable . . . .'' (Internal quotation marks omitted.) *State* v. *Kyles*, supra, 221 Conn. 663. As the trial court correctly noted, ''the defendant's race, ethnicity and the color of the garment he was carrying were relatively unimportant [factors] in comparison to the fact that he was a male, he was carrying an outer garment which could have been a sweater or a sweatshirt, he was the only person on the street and he was a short distance from the scene of the fire at the time Gladwin saw him.'' See *State* v. *Gregory*, 74 Conn. App. 248, 258–60, 812 A.2d 102 (2002) (reasonable suspicion existed even though defendant was described by officer to dispatch as having short hair and wearing gray pants, black sneakers, gray jacket, and black hooded sweatshirt, while defendant, whose hair was tightly braided in cornrows, was wearing jeans, brown boots, and black hooded sweatshirt when stopped; description provided was sufficiently similar taken together with additional facts that supported reasonable suspicion), cert. denied, 262 Conn. 948, 817 A.2d 108 (2003). Accordingly, we conclude that the court properly determined that, under the totality of the circumstances, the investigatory stop was justified by a reasonable and articulable suspicion.

B

The defendant next argues that the police lacked the requisite reasonable belief that the defendant may have been armed and dangerous to justify a patdown for weapons. The defendant asserts that besides the serious nature of the crime, there was ''absolutely nothing in the record that could explain why the police officers thought that the defendant posed a threat to their safety . . . .'' We disagree.

"If, during the course of a lawful investigatory detention, the officer reasonably believes that the detained individual might be armed and dangerous, the officer may undertake a patdown search of the individual to discover weapons." *State* v. *Trine*, supra, 236 Conn. 223–34. "In the case of the self-protective search for weapons, [the officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. . . . The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that [the officer's] safety or that of others was in danger. . . . And in determining whether the officer acted reasonably in such circumstances, due weight must be given . . . to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of [the officer's] experience." (Citation omitted; internal quotation marks omitted.) *State* v. *Nash*, supra, 278 Conn. 631–32.

Again, the totality of the circumstances supports a finding that the officers reasonably believed that the defendant may have been armed and dangerous. Before the patdown, Rizzitello observed a bulge in the defendant's front left pocket, indicating that he may have been carrying a weapon. This fact alone constitutes strong justification for a patdown. See *Pennsylvania* v. *Mimms*, 434 U.S. 106, 112, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) (bulge in defendant's jacket "permitted the officer to conclude that [the defendant] was armed and thus posed a serious and present danger"); see also *United States* v. *Hamilton*, 978 F.2d 783, 785 (2d Cir. 1992) (patdown was justified after officer observed unidentifiable bulge in defendant's pants).

Additionally, the officers had reason to suspect the defendant of committing a serious crime—namely, setting a house on fire while someone was inside—in broad

daylight, and then fleeing the scene. These facts support the officers' reasonable belief that they may have been dealing with an armed and dangerous felon. See *United States* v. *Edwards*, 53 F.3d 616, 618 (3d Cir. 1995) (patdown of individual suspected of credit card fraud was reasonable because crime occurred "in broad daylight," which could "lead [the officer] to believe that the perpetrators might have armed themselves to facilitate their escape if confronted").

The defendant further argues that the patdown was illegal because the defendant was cooperative and already handcuffed by Rizzitello prior to being patted down. Our Supreme Court, however, as well as federal courts, have held that a handcuffed suspect may still present a danger to the police. See *United States* v. *Wallen*, 388 F.3d 161, 166 (5th Cir. 2004), (rejecting argument that suspect in handcuffs does not present danger to police), cert. denied, 544 U.S. 967, 125 S. Ct. 1747, 161 L. Ed. 2d 613 (2005); see also *State* v. *Nash*, supra, 278 Conn. 645–48 (patdown conducted in lobby of police station while defendant was handcuffed was valid). Thus, the fact that the defendant was handcuffed during the patdown does not automatically render it unlawful.

Likewise, the defendant's cooperation did not undermine the legality of the patdown. Certainly, a suspect's refusal to cooperate, as well as hostile, evasive behavior, may further support an officer's belief that a suspect is armed and dangerous. See *State* v. *Mann*, 271 Conn. 300, 324, 857 A.2d 329 (2004), cert. denied, 544 U.S. 949, 125 S. Ct. 1711, 161 L. Ed. 2d 527 (2005). That does not mean, however, that the inverse is necessarily true—that a suspect's cooperation eliminates the officer's belief that the suspect is armed and dangerous. In the present case, there were other facts present that justified the patdown, such as the fact that Rizzitello observed a bulge in the defendant's pocket, and the

serious and possibly violent nature of the crime. We therefore conclude that the limited patdown of the defendant for weapons was proper.

C

Having determined that the investigatory stop and subsequent patdown of the defendant were proper, we conclude that the seizure of the matchbox found in the defendant's front left pocket, as well as the defendant's sweatshirt and umbrella, was also warranted. It is well established that "[t]he results of the initial [investigatory] stop may arouse further suspicion or may dispel the questions in the officer's mind. If the latter is the case, the stop may go no further and the detained individual must be free to go. If, on the contrary, the officer's suspicions are confirmed or are further aroused, the stop may be prolonged and the scope enlarged as required by the circumstances." (Internal quotation marks omitted.) *State* v. *DelValle*, 109 Conn. App. 143, 155, 950 A.2d 603, cert. denied, 289 Conn. 928, 958 A.2d 160 (2008). Therefore, as the trial court correctly noted, it was reasonable for the police to enlarge the scope of the search by detaining the defendant for a showup identification and seizing the items he was carrying after discovering that he was in possession of matches and had just come from 52 Highland Road, the location of a suspected arson.

Finally, because we conclude that the officers lawfully conducted an investigatory stop and patdown, the defendant's claim that his subsequent statements should not have been admitted because they constitute the "fruit of the poisonous tree" necessarily fails. To the extent that the defendant argued to the trial court that the statements were also inadmissible because they resulted from an unlawful custodial interrogation, he has not advanced that claim on appeal.

II

The defendant next claims that the trial court violated his right to a fair trial and to the assistance of counsel by compelling him to disclose, prior to trial, the opinions of his expert witness. We disagree.

The following additional facts are relevant to the resolution of the defendant's claim. On October 8, 2015, the state filed a discovery motion invoking Practice Book §§ 40-26[5] and 40-27[6] in which it requested that the defendant disclose in writing "any reports or statements of experts made in connection with the case" as well as any other "relevant material and information not covered by Practice Book [§] 40-26 which the judicial authority determines [on] good cause should be made available."

In response to the state's motion, the defendant filed a disclosure identifying Michael K. Higgins, Sr., as his expert witness. The defendant's disclosure also stated the various topics to which Higgins would testify, including the origin and cause of the fire, burn pattern recognition, and flammability of the materials involved, among other topics. The disclosure, however, did not provide any substantive information beyond the list of topics.

[5] Practice Book § 40-26 provides in relevant part that "[u]pon written request by the prosecuting authority . . . the defendant . . . shall . . . disclose in writing to the prosecuting authority the existence of and make available for examination . . . the following items . . .

"(2) [a]ny reports or statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments or comparisons, which the defendant intends to offer in evidence at trial or relating to the anticipated testimony of a person whom the defendant intends to call as a witness."

[6] Practice Book § 40-27 provides in relevant part that "[u]pon written request by a prosecuting authority . . . the judicial authority may direct the defendant to disclose in writing . . . any other relevant material and information not covered by Section 40-26 which the judicial authority determines on good cause shown should be made available."

On January 8, 2016, the state filed a motion in limine to preclude Higgins from testifying until the sum and substance of his testimony was disclosed to the state. In its motion, the state posed six questions in response to the topics listed by the defendant, such as whether Higgins disagreed with the state investigators that the fire was incendiary in nature, and Higgins' opinion as to the origin and cause of the fire. The defendant did not respond.

On January 12, 2016, the court first addressed the state's motion in limine. The state argued that it was entitled to have "some idea of what . . . particularly the person is going to be testifying to . . . ." The defense responded that it was not required to provide an expert report because Higgins had not written one.

The court postponed deciding the state's motion in the hope that the parties would resolve the dispute without its intervention. The court advised the parties that if they had not come to an agreement by January 14, 2016, then it would set a date for Higgins to appear in court to disclose the sum and substance of his testimony regarding the cause and origin of the fire. On January 13, 2016, the court again addressed the state's motion, during which it repeated its warning that "if you don't [come to an agreement], then either Friday of this week or Tuesday of next week . . . your expert should be here and we'll have a hearing outside the presence of the jury, and we'll take it from there."

On January 14, 2016, the parties told the court that the defense had agreed to file a written response to the state's motion, including answers to the six questions posed therein. On January 15, 2016, the state reported that the defendant's response to its motion in limine failed to provide any substantive information regarding Higgins' testimony. The defense responded that it was "unprecedented in a criminal case that [the defense

was] being required to answer interrogatories," and that it was not required to reveal its strategy to the state or provide "insight into the defense mind . . . ."

The state responded that the questions in its motion in limine were not interrogatories, but rather necessary follow-up questions to the initial skeletal disclosure by the defense. The state further responded that it simply needed to have some understanding of the substance of Higgins' testimony so that it could avoid needing to request a lengthy continuance in the middle of the trial. The court then ordered Higgins to appear on January 19, 2016, so the defense could make an offer of proof regarding his testimony.

Higgins, however, did not appear in court as ordered. Rather, the defendant filed a supplemental disclosure on that date, which included very brief responses to each of the six questions posed in the state's motion in limine. The court advised the defendant that because he failed to provide the "sum and substance of what [Higgins] was going to testify about on various points," it was going to "consider either preventing [Higgins] from testifying at all or limiting his testimony." The court did not at any point, however, order Higgins to generate an expert report.

The next day, the defense unexpectedly provided the state with a report prepared by Higgins containing his opinion as to the cause and origin of the fire. Higgins was subsequently qualified as an expert witness and testified for the defense during its case-in-chief.

The defendant argues that the court's actions "coerced the defendant's disclosure of information regarding the anticipated testimony of his expert witness well in excess of what the rules of practice require him to produce." The defendant further argues that the court left him no choice but to direct Higgins to draft a report for the "benefit of the state." We disagree.

We first turn to ascertaining the appropriate standard of review for this claim. The defendant asserts that the court impaired his ability to present a defense and compelled him to disclose his trial strategy prematurely, which diluted his right to the assistance of counsel. Accordingly, the defendant contends, we should exercise plenary review of his claim because it is of constitutional magnitude. For the following reasons, we disagree that the court's actions in compelling the defendant to disclose prior to trial the substance of the opinions of his expert witness implicated his constitutional rights and conclude that the defendant is simply attempting to clothe a nonconstitutional claim in constitutional garb. See, e.g., *State* v. *Romero*, 269 Conn. 481, 505, 849 A.2d 760 (2004).

First, the defendant concedes, as he must, that Higgins' testimony was not limited or precluded in any way and that he was "ultimately allowed to present his defense in full with the aid of his expert's testimony." Instead, the defendant argues, in essence, that he has a constitutional right to present expert testimony without first disclosing to the state *any* of the substance of his expert's opinion.

The defendant cites no authority—nor could we find any—that supports his assertion. In fact, the few cases the defendant does rely on only serve to reinforce our conclusion that the court's order in no way implicated the defendant's constitutional rights. With respect to his argument that the court's actions intruded on his constitutional right to present a defense, the defendant cites cases that discuss the court's exclusion of certain evidence at trial. See, e.g., *State* v. *West*, 274 Conn. 605, 622, 626–27, 877 A.2d 787 (trial court's ruling that unidentifiable fingerprints were inadmissible did not violate defendant's constitutional right to present defense), cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005); *State* v. *Cerreta*, 260 Conn. 251,

259–63, 796 A.2d 1176 (2002) (trial court's exclusion of exculpatory hair and fingerprint evidence violated the defendant's constitutional right to present defense); *State* v. *Carter*, 228 Conn. 412, 416–17, 426–27, 636 A.2d 821 (1994) (trial court's exclusion of victim's criminal record that supported defendant's claim of self-defense violated defendant's constitutional right to present defense). As we have noted repeatedly, however, Higgins' testimony was not precluded, nor limited, in any way, and the defendant himself concedes that he was able to present his defense in full. "A defendant may not successfully prevail on a claim of a violation of his right to present a defense . . . if [the defendant] adequately has been permitted to present the defense by different means." *State* v. *Santana*, 313 Conn. 461, 470, 97 A.3d 963 (2014). Therefore, his argument fails.

With respect to his assertion that the trial court infringed on his sixth amendment right to the assistance of counsel, the defendant relies heavily on *State* v. *Lenarz*, 301 Conn. 417, 22 A.3d 536 (2011). In that case, the state obtained and reviewed extensive privileged communications between the defendant and his attorneys outlining the defense trial strategy, including how the defense planned to undermine the complaining witness' credibility. Id., 421, 444–46. The state then used those privileged communications to "anticipate and thereby neutralize" potential weaknesses in the complainant's testimony and avoid "what otherwise might have been a devastating cross-examination of that witness." Id., 446.

In the present case, unlike in *Lenarz*, the state did not obtain any privileged material. The defendant himself acknowledges this. Moreover, the defendant cites no case law that suggests that, absent facts similar to those in *Lenarz*, disclosure of an expert witness' opinion prior to trial violates the defendant's right to assistance of counsel.

Our appellate courts have repeatedly held that "[t]he sixth amendment does not confer the right to present testimony free from the legitimate demands of the adversary system. . . . The adversary system of trial is hardly an end in itself; it is not . . . a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system [for a rule that] is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." (Citation omitted; internal quotation marks omitted.) *State* v. *Boucino*, 199 Conn. 207, 213, 506 A.2d 125 (1986). Accordingly, we conclude that the court's actions did not implicate the defendant's right to the assistance of counsel and that plenary review is not appropriate.

Instead, we emphasize that "[t]he purpose of criminal discovery is to prevent surprise and to afford the parties a reasonable opportunity to prepare for trial." (Internal quotation marks omitted.) *State* v. *Wilson F.*, 77 Conn. App. 405, 419, 823 A.2d 406, cert. denied, 265 Conn. 905, 831 A.2d 254 (2003). To that end, "[t]he trial court has broad discretion in applying sanctions for failure to comply with discovery orders." (Internal quotation marks omitted.) *State* v. *Colon*, 71 Conn. App. 217, 241, 800 A.2d 1268, cert. denied, 261 Conn. 934, 806 A.2d 1067 (2002); Practice Book § 40-5. We review the court's actions in managing discovery pursuant to the abuse of discretion standard. *State* v. *Colon*, supra, 241–42.

Moreover, if the defendant has properly characterized his claim as one concerning the admissibility of expert witness testimony, "[w]e [also] review a trial court's decision [regarding the admission of] expert testimony for an abuse of discretion. . . . We afford our trial courts wide discretion in determining whether to admit expert testimony and, unless the trial court's

decision is unreasonable, made on untenable grounds . . . or involves a clear misconception of the law, we will not disturb its decision." (Internal quotation marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 123, 156 A.3d 506 (2017).

We turn then to the ultimate question of whether the trial court abused its discretion in compelling the defendant to disclose prior to trial the substance of the opinions of his expert witness. We conclude that it did not.

The state's discovery motion invoked Practice Book §§ 40-26 and 40-27. Practice Book § 40-27 expressly authorizes the court to "direct the defendant to disclose *in writing* to the prosecuting authority . . . relevant material and information . . . which the judicial authority determines on good cause shown should be made available." (Emphasis added.) Therefore, even if the court had ordered the defendant to disclose in writing the expert opinions that he intended to offer through the testimony of Higgins, the court would have been authorized in doing so.

The court, however, never actually ordered the defendant to make any written disclosures. Indeed, the record shows that the court would have preferred that it not get involved in the discovery dispute at all. The court repeatedly instructed the defendant and the state to resolve the issue without court interference. It was only after it became apparent as a result of the defendant's continued incremental and incomplete disclosures that the parties would not be able to resolve the dispute that the court ordered Higgins to appear to make an offer of proof outside the presence of the jury. Moreover, after the defendant voluntarily supplied Higgins' report, the court did not have to conduct the offer of proof or make a finding of good cause. Thus, the issue resolved itself.

The defendant relies on *State* v. *Genotti*, 220 Conn. 796, 601 A.2d 1013 (1992), for the proposition that Practice Book § 40-26—which contains the language previously set forth in former Practice Book § 769, the provision at issue in that case—does not require a defendant's expert witness to prepare a report or statement in anticipation of trial. Id., 808–809. In *Genotti*, our Supreme Court held that the trial court improperly excluded the testimony of the defendant's expert witness after the witness failed, pursuant to court orders, to create a report summarizing the results of various tests he had conducted in preparation for trial. Id., 803, 808–809.

The defendant is correct that Practice Book § 40-26, like former § 769, does not require an expert to generate a report if he or she has not already done so. In the present case, however, the state also invoked § 40-27, which, unlike § 40-26, does in fact authorize a court to order a defense expert to provide certain information, in writing, to the state. More importantly, in the present case, the court neither (1) ordered Higgins to generate a report, nor (2) precluded Higgins' testimony. Thus, *Genotti* is not controlling here.

In sum, it is well established that the court has "broad, general authority to act to maintain the orderly procedure of the [proceeding], and to prevent any interference with the fair administration of justice." (Internal quotation marks omitted.) *Carmon* v. *Commissioner of Correction*, 148 Conn. App. 780, 786, 87 A.3d 595 (2014). The court was therefore authorized in ordering Higgins to appear to make an offer of proof to obviate the need, in the middle of trial, for the state to request a continuance in order to prepare its cross-examination, recall its own expert to testify regarding the opinions offered by Higgins, and/or request a *Porter*[7] hearing.

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

We are unpersuaded that the court abused its discretion in any manner.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ACEION BROWN (AC 38855)

Keller, Bright and Mihalakos, Js.

Syllabus

The defendant, who had been convicted, on a plea of guilty, of the crime of possession of more than four ounces of marijuana, appealed to this court from the judgment of the trial court denying his petition for a writ of error coram nobis. In his petition, the defendant sought to vacate his conviction, claiming that, at the time he had entered the plea, he did not understand the immigration consequences that would result from the plea and conviction, and that his trial counsel's failure to advise him of those consequences constituted ineffective assistance of counsel. The trial court, after considering the petition on its merits, denied the petition. *Held* that the trial court lacked subject matter jurisdiction to consider the merits of the petition for a writ of error coram nobis: the defendant could have raised his ineffective assistance of counsel claim in a habeas petition while he was in custody related to the subject conviction or in a petition for a new trial for a period of three years subsequent to the date of that conviction, and, therefore, he had prior alternative legal remedies available to him, which deprived the trial court of jurisdiction to entertain the petition; accordingly, because the trial court lacked jurisdiction over the petition for a writ of error coram nobis, it should have rendered judgment dismissing rather than denying the petition.

Argued November 14, 2017—officially released January 23, 2018

Procedural History

Information charging the defendant with the crimes of possession of narcotics with intent to sell, possession of narcotics within 1500 feet of a school and possession of more than four ounces of marijuana, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, where the defendant

was presented to the court, *Lobo*, *J.*, on a plea of guilty to possession of more than four ounces of marijuana; judgment of guilty; thereafter, the court, *Alexander*, *J.*, denied the defendant's petition for a writ of error coram nobis, and the defendant appealed to this court. *Improper form of judgment; judgment directed.*

Vishal K. Garg, for the appellant (defendant).

Nancy L. Walker, deputy assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Matthew W. Brodsky*, senior assistant state's attorney, for the appellee (state).

Opinion

MIHALAKOS, J. The defendant, Aceion Brown, appeals from the judgment of the trial court denying his petition for a writ of error coram nobis. We conclude that, in the circumstances presented, the court lacked jurisdiction to consider the merits of the petition, and we do not reach the merits of his ineffective assistance of counsel claim. Because the court should have dismissed the petition, rather than having denied it, we reverse the judgment of the trial court only as to the form of the judgment and remand the case with direction to dismiss the petition for a writ of error coram nobis.

The following facts and procedural history are relevant to our disposition of this appeal. The defendant is a native and citizen of Jamaica, and a permanent resident of the United States. He is the father of two children who are citizens of the United States. In December, 2011, the defendant pleaded guilty to possession of a controlled substance with intent to sell in violation of General Statutes § 21a-277 (b) and was sentenced to three years incarceration, execution suspended, and two of years probation. In April, 2013, the defendant was arrested again on multiple drug related charges.

On May 22, 2013, the defendant, represented by counsel, entered a guilty plea, under the *Alford* doctrine,[1] to the crime of possession of more than four ounces of marijuana in violation of General Statutes (Rev. to 2013) § 21a-279 (b) and admitted a violation of the probation imposed on his 2011 conviction. Prior to accepting his plea, the court, *Lobo*, *J.*, asked, while canvassing the defendant, if he understood that if he was not a United States citizen, he "may face the consequence of removal, exclusion from readmission to the [United States] or denial of naturalization, pursuant to federal law," to which the defendant responded, "[y]es, sir." The court then accepted his plea and sentenced him to a term of incarceration of 364 days.

The defendant completed his sentence on March 17, 2014. On the same day, the Department of Homeland Security served the defendant with a notice to appear, alleging that he was removable from the country on the basis of both his 2011 and 2013 convictions. Subsequently, on May 19, 2014, the immigration court ordered the removal of the defendant to Jamaica.

On February 10, 2015, the self-represented defendant filed a petition for a writ of error coram nobis, in which he alleged, inter alia, that he received ineffective assistance from his trial counsel and that, consequently, he lacked knowledge of the nature and consequences of the subject charge.[2] On this ground, he requested that the judgment of conviction be opened and vacated.

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

[2] In his petition for writ of coram nobis and his principal brief to this court, the defendant also claimed that the trial court erred in denying his claim that the court's canvass during his plea hearing was defective under General Statutes § 54-1j. The defendant subsequently withdrew this claim following the recent decision by our Supreme Court in *State* v. *Lima*, 325 Conn. 623, 630–31, 159 A.3d 651 (2017), which held that § 54-1j (a) does not require the trial court to "inquire directly of the defendant as to whether he has spoken with counsel about the possible immigration consequences of pleading guilty before the court accepts the defendant's guilty plea."

The court, *Alexander*, *J.*, held a hearing on the petition on April 23, 2015. At the hearing, the court indicated to the parties that it was concerned that it lacked jurisdiction to entertain a petition for a writ of error coram nobis, stating "the trial court . . . would be without jurisdiction to [hear] a habeas claim. Those claims are handled by habeas courts . . . [s]o an ineffective assistance claim is a matter that is taken before a habeas court as opposed to the original trial court . . . ." The court nevertheless proceeded to hear evidence on the merits of the petition. It reviewed a transcript of the defendant's plea proceeding, noting that the court had provided the defendant with the standard advisement regarding immigration consequences, and heard arguments from the defendant and the state on the merits of the petition. The defendant argued that he had not understood that serious immigration consequences, namely, that his 2013 conviction would render him deportable and permanently inadmissible to the United States, would result from his plea, and that his trial counsel's failure to advise him of these consequences constituted ineffective assistance of counsel. The state argued that the court should deny the petition on jurisdictional grounds because the defendant had adequate remedies under the law and could have filed a habeas petition, a petition for a new trial, a postsentencing motion to withdraw his guilty plea, or a direct appeal from his conviction. On August 18, 2015, the court issued a written memorandum of decision, in which it denied the defendant's petition on the merits, holding that the plea canvass did not violate General Statutes § 54-1j. This appeal followed.

During the pendency of this appeal, the defendant filed a motion for articulation, which requested, inter alia, that the court specify whether it concluded that it lacked jurisdiction to hear the claim of ineffective assistance of counsel raised in the petition. The court

granted this motion in part, stating, "[y]es, the court concluded that it lacked jurisdiction to hear a claim of ineffective assistance of counsel raised in a coram nobis petition because the defendant had habeas corpus relief available. *State* v. *Stephenson*, 154 Conn. App. 587, 592, 108 A.3d 1125 (2015)."

The defendant's sole claim on appeal is that the court erred in denying his petition on jurisdictional grounds.[3] The defendant primarily argues that a writ of habeas corpus had been unavailable to him because he was not aware that his guilty plea would have adverse immigration consequences until after his period of incarceration had ended. In response, the state argues that the trial court lacked jurisdiction to issue the writ because the defendant had alternative legal remedies available to him, such as a writ of habeas corpus or a petition for a new trial, and that, pursuant to *State* v. *Stephenson*, supra, 154 Conn. App. 592, the relevant question is not whether the defendant took advantage of those remedies but, rather, whether he could have pursued them. We agree with the state that the court lacked jurisdiction to consider a petition for a writ of error coram nobis.

We begin our analysis by setting forth 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. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ." (Internal quotation marks omitted.) *Richardson* v. *Commissioner of Correction*, 298 Conn. 690, 696, 6 A.3d 52 (2010).

[3] The defendant claims in his brief that the trial court "erred when it dismissed [his] writ of error coram nobis." Similarly, the state claims that the trial court "properly dismissed [the writ]." Our review of the record, however, reveals that the court *denied* rather than *dismissed* the defendant's petition.

"A writ of error coram nobis is an ancient common-law remedy which authorized the trial judge, within three years, to vacate the judgment of the same court if the party aggrieved by the judgment could present facts, not appearing in the record, which, if true, would show that such judgment was void or voidable. . . . A writ of error coram nobis lies only in the unusual situation where no adequate remedy is provided by law. . . . Moreover, when habeas corpus affords a proper and complete remedy the writ of error coram nobis will not lie." (Citations omitted; internal quotation marks omitted.) *State* v. *Henderson*, 259 Conn. 1, 3, 787 A.2d 514 (2002). "The errors in fact on which a writ of error [coram nobis] can be predicated are few. . . . This can be only where the party had no legal capacity to appear, or where he had no legal opportunity, or where the court had no power to render judgment." (Internal quotation marks omitted.) *Hubbard* v. *Hartford*, 74 Conn. 452, 455, 51 A. 133 (1902).

We note at the outset that, pursuant to General Statutes § 52-466 (a) (1),[4] the remedy of a writ of habeas corpus is only available while the petitioner is "in custody on the conviction under attack at the time the habeas petition is filed . . . ." (Internal quotation marks omitted.) *Foote* v. *Commissioner of Correction*, 170 Conn. App. 747, 752, 155 A.3d 823, cert. denied, 325 Conn. 902, 155 A.3d 1271 (2017). The record is clear that the defendant was released from custody on March 17, 2014, and did not file a petition for a writ of habeas corpus while he was incarcerated.

We are not persuaded by the defendant's argument that he could not have pursued a writ of habeas corpus while in custody because he did not learn of the adverse

[4] General Statutes § 52-466 (a) (1) provides in relevant part: "An application for a writ of habeas corpus . . . shall be made to the superior court . . . for the judicial district in which the person whose custody is in question is claimed to be illegally confined or deprived of such person's liberty."

immigration consequences until after he was released. Our recent decisions in *State* v. *Stephenson*, supra, 154 Conn. App. 587, and *State* v. *Sienkiewicz*, 177 Conn. App. 863, 172 A.3d 802 (2017), control our analysis of this issue. In *Sienkiewicz*, this court held that "[t]here can be no doubt . . . that the defendant would have had the ability to contest the effectiveness of counsel and the validity of his plea in a habeas action even if [adverse immigration consequences were] not imminent. In [*State* v. *Stephenson*, supra, 589] . . . [t]he record [did] not reflect that any adverse immigration consequences [had] yet occurred by the time the defendant was no longer in custody on the sentence in issue, and [the court] held that the defendant could have brought an action seeking a writ of habeas corpus. . . . *Stephenson* clearly holds that the prior availability of the writ of habeas corpus defeats the jurisdiction of the trial court to entertain a petition for a writ of error coram nobis." (Citations omitted; internal quotation marks omitted.) *State* v. *Sienkiewicz*, supra, 870–71;[5] see also *State* v. *Williamson*, 155 Conn. App. 215, 221, 109 A.3d 924 (2015) ("[n]either the defendant's probationary status nor his federal detention impeded his ability to petition for a writ of habeas corpus and, thereby, to raise a claim related to the representation afforded him by his trial counsel in connection with his guilty plea"). We conclude, therefore, that the defendant had the ability to file a petition for a writ of habeas corpus at any time that he was in custody.

In addition to a habeas corpus action, the defendant also had the legal remedy of a petition for a new trial available to him. General Statutes § 52-270 provides in

[5] Perhaps recognizing the binding precedent of *State* v. *Stephenson*, supra, 154 Conn. App. 587, and *State* v. *Sienkiewicz*, supra, 177 Conn. App. 863, the defendant has also urged us to overrule them. Consistent with this claim, on August 3, 2017, the defendant filed a motion requesting that this court hear the appeal en banc. That motion was denied by this court on September 14, 2017.

relevant part that the court "may grant a new trial of any action that may come before it . . . for other reasonable cause," so long as it is brought within three years after judgment is rendered. See General Statutes § 52-582 ("[n]o petition for a new trial in any civil or criminal proceeding shall be brought but within three years after the rendition of the judgment"). Our case law is clear that ineffective assistance of counsel claims may be brought in a petition for a new trial. *State* v. *Taft*, 306 Conn. 749, 768, 51 A.3d 988 (2012); see also *State* v. *Leecan*, 198 Conn. 517, 541, 504 A.2d 480 ("a claim of ineffective assistance of counsel is more properly pursued on a petition for a new trial or on a petition for a writ of habeas corpus rather than on direct appeal" [internal quotation marks omitted]), cert. denied, 476 U.S. 1184, 106 S. Ct. 2922, 91 L. Ed. 2d 550 (1986). In this case, the court rendered a judgment of conviction against the defendant on May 22, 2013. The defendant filed his petition for a writ of error coram nobis on February 3, 2015, less than three years after the date of his conviction. The limitation period on a petition for a new trial had not yet run, and, therefore, the defendant could also have pursued this alternative legal remedy.

In the present case, the defendant was subject to adverse immigration consequences during the entire period of his incarceration pursuant to the 2013 conviction. Because he could have raised his ineffective assistance of counsel claim in a habeas petition while he was in custody or in a petition for a new trial for a period of three years subsequent to the date of his conviction, he had alternative legal remedies available to him. *Stephenson* and *Sienkiewicz* clearly hold that the prior availability of an alternative legal remedy defeats the jurisdiction of the trial court to entertain a petition for a writ of error coram nobis. *State* v. *Stephenson*, supra, 154 Conn. App. 592; *State* v. *Sienkiewicz*,

supra, 177 Conn. App. 871. Having determined that the court lacked subject matter jurisdiction to consider the petition for a writ of error coram nobis, we conclude that the court should have dismissed rather than denied the petition.[6] See *State* v. *Stephenson*, supra, 592 (form of judgment improper where trial court denied petition for writ of error coram nobis over which it lacked jurisdiction); see also *Turner* v. *State*, 172 Conn. App. 352, 354, 160 A.3d 398 (2017) (trial court should have dismissed rather than denied petition for new trial over which it lacked subject matter jurisdiction).

The form of the judgment is improper, the judgment denying the petition for a writ of error coram nobis is reversed and the case is remanded with direction to render judgment dismissing the petition for a writ of error coram nobis.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* VAUGHN OUTLAW (AC 38419)

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

Syllabus

Convicted of the crime of assault of public safety personnel arising out of an incident in which the defendant spat on a correction officer, the defendant appealed to this court. The defendant testified that the correction officer used excessive force when escorting the defendant to and from his cell, after which the defendant spat on the officer. He claimed that any unwarranted or excessive force was not in the performance of the officer's duties and that the court committed plain error when it did not provide detailed language in its instructions to the jury as to

[6] In light of this conclusion, we do not reach the state's alternative argument in which it calls into question the viability of the writ of error coram nobis. See *State* v. *Sienkiewicz*, supra, 177 Conn. App. 869 ("[w]e decline the state's invitation to announce the demise of the writ of error coram nobis"); see also *State* v. *Stephenson*, supra, 154 Conn. App. 590 n.4 ("The state argues that, because of more recently created remedies, such as the petition for a new trial, the writ of coram nobis should be jettisoned . . . . We need not decide this issue, however, because even if the remedy does exist, the prerequisites for granting relief were not met here").

that element of the crime. The state claimed, inter alia, that the defendant explicitly waived his claim of instructional error. *Held*:

1. Contrary to the state's claim, the record was unclear as to whether the defendant explicitly waived his claim that the trial court should have given a detailed instruction concerning whether the correction officer was acting in the performance of his duties when he allegedly used unnecessary or unreasonable force; the colloquy between defense counsel and the court concerning the relevant instruction was ambiguous as to whether the defense counsel was affirming that he had not requested a self-defense instruction or whether he was waiving an instruction on unnecessary or unreasonable force.
2. The defendant could not prevail on his unpreserved claim that the trial court committed plain error by failing to instruct the jury that any unwarranted or excessive force by the correction officer was not within the performance of his duties; the defendant failed to establish the required patent or readily discernible error in the jury instruction as to warrant the extraordinary remedy of reversal, nor did he demonstrate that the failure to include that language resulted in manifest injustice, especially given that the challenged actions of the correction officer occurred prior in time to the defendant's conduct in spitting on the officer.

Argued October 4, 2017—officially released January 23, 2018

Procedural History

Substitute information charging the defendant with the crime of assault of public safety personnel, brought to the Superior Court in the judicial district of Tolland, and tried to the jury before the court, *Graham*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Mary A. Beattie, assigned counsel, for the appellant (defendant).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Andrew Reed Durham*, assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Vaughn Outlaw, appeals from the judgment of conviction, rendered after a jury trial, of assault public safety personnel in connection with his assault of an employee of the Department of Correction (department) in violation of General Stat-

utes § 53a-167c (a) (5).[1] On appeal, the defendant asserts that the court committed plain error when it did not include detailed language on the use of unwarranted or excessive force as part of its instructions to the jury on the second element of § 53a-167c (a) (5), which pertains to whether the employee was acting in the performance of his duties. The state contends that the defendant explicitly waived his claim at trial and failed to demonstrate that the court committed an obvious error resulting in manifest injustice. Because we agree with the state's latter argument, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On December 1, 2013, correction officers Thomas Langlois (victim) and Katie McClellan were escorting the defendant back from the shower room to his cell at Northern Correctional Institute. After returning the defendant back to his cell, the victim removed the defendant's leg shackles and stood outside the cell door.[2] McClellan and the victim testified that the defendant, who was instructed to remain on the bed, followed the victim toward the cell door and spat on the victim's face, mouth and eyes before the door closed.[3] Security footage of the incident was shown to the jury.

[1] General Statutes § 53a-167c (a) provides in relevant part: "A person is guilty of assault of public safety . . . personnel when, with intent to prevent a reasonably identifiable . . . employee of the Department of Correction . . . from performing his or her duties, and while such . . . employee . . . is acting in the performance of his or her duties . . . (5) such person throws or hurls, or causes to be thrown or hurled, any bodily fluid including, but not limited to, urine, feces, blood or saliva at such . . . employee . . . ."

[2] Northern Correctional Institute protocol requires an inmate under full restraint status to have his legs shackled and hands cuffed behind his back during transportation to and from the shower room. Once returned to his cell, the leg shackles are removed while the inmate kneels on the bed. The inmate remains on the bed until the officer leaves the cell and the door is secured. The handcuffs are removed through the food trap in the door.

[3] In contrast, the defendant testified that after the victim removed his leg shackles, the victim struck the defendant with the leg shackles wrapped around his fist, also known as a "monkey paw." In response, the defendant followed the victim toward the door while calling him "a few names." The

On April 8, 2015, following a jury trial, the defendant was convicted of assault of public safety personnel in violation of § 53a-167c (a) (5). On June 25, 2015, the court sentenced the defendant to forty-two months of incarceration to be served consecutively with the sentence he was already serving. This appeal followed.

On appeal, the defendant asserts that because he had testified that the victim used excessive force, the court committed plain error when it failed to include in its jury instructions, as part of the second element of § 53a-167c (a) (5), the "detailed language explaining that any unwarranted or excessive force is not within the performance of the officer's duties." (Emphasis omitted.) As a result of this omission, the defendant argues the jury may have been misled into believing that the victim was performing his duties as a correction officer when he allegedly mishandled and "monkey pawed" the defendant while escorting him to and from his cell. See footnote 3 of this opinion. The state contends, inter alia, that the defendant cannot establish that the court committed plain error by failing to provide the requested instruction because the defendant explicitly informed the court that he was not seeking a detailed instruction on self-defense to the assault charge.

The following additional facts are necessary for our discussion. The record reflects that the court had provided counsel with a draft of its proposed jury instructions on April 2, 2015. Thereafter, on April 6, 2015, the court held an in-chambers conference to discuss "some things relating to the charge . . . ." On April 7, 2015, during an on-the-record discussion between the court and defense counsel regarding the jury instructions, the following exchange occurred:

"The Court: There is sometimes a self-defense portion utilized in defining in the performance of duties. As I

defendant maintained that he did not spit on the victim. Additionally, the defendant testified that he objected to the victim's handling and controlling of his movements during escort to the shower.

understand it, that's not being requested by the defendant in this case; am I correct?

"[Defense Counsel]: Yes, Your Honor.

"The Court: So that's out. All right."

On April 8, 2015, after completing its charge, the court asked the parties, outside the presence of the jury, if they had any exceptions to the charge.[4] The defendant objected only to the intent element of the charge.[5]

[4] The court instructed the jury as follows: "The defendant is charged with assault on public safety personnel . . . . The statute [defining] this offense reads in pertinent part as follows: A person is guilty of assault of public safety personnel when, with intent to prevent a reasonably identifiable employee of the Department of Correction from performing his duties, and while said correction officer was acting in the performance of his duties, such person threw or hurled or caused to be thrown or hurled any bodily fluid including, but not limited to urine, feces, blood or saliva at a correction officer.

"For you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt: Element one, assault of officer. The first element is that the person allegedly assaulted, [the victim], was a reasonably identifiable Department of Correction employee. In addition, [he] had to be reasonably identifiable as a correction officer.

* * *

"Element two, in the performance of duties. The second element is that the conduct of the defendant occurred while . . . [the victim] was acting in the performance of his duties. The phrase, 'in the performance of his official duties,' means that the correction employee was acting within the scope of what he's employed to do and that his conduct was related to his official duties.

"The question of whether he was acting in good faith in the performance of his duties is a factual question for you to determine on the basis of the evidence in the case.

"In this case, there was testimony that [the victim] had concluded escorting [the defendant] to his cell from the shower area at the time of the alleged saliva, spitting or hurling.

"Element number three, intent to perform. The third element is that the defendant had specific intent to prevent [the victim] from performing his lawful duties. . . .

"Element four, by certain means. The fourth element the defendant hurled or caused to be hurled a bodily fluid, namely, saliva, at the correction officer."

[5] After the jury was excused and the court had noted defense counsel's exception to the intent element, the following exchange occurred:

I

As an initial matter, we address the state's assertion that the defendant explicitly waived his claim by "inform[ing] the trial court that he was not seeking the instruction that he now claims was plain error not to provide." We conclude that although the defendant is not entitled to an instruction based on a theory of self-defense, it is unclear from the record whether the defendant explicitly waived his claim that the court failed to include a detailed instruction on a theory of defense that the victim was not acting within the performance of his duties when he allegedly used unreasonable or unnecessary physical force.

Both parties agree that "when a defendant has been charged only with violations of § 53a-167c . . . he is not entitled to an instruction on self-defense." *State* v. *Davis*, 261 Conn. 553, 573, 804 A.2d 781 (2002); *State* v. *Baptiste*, 133 Conn. App. 614, 626 n.16, 36 A.3d 697 (2012), appeal dismissed, 310 Conn. 790, 83 A.3d 591 (2014); *State* v. *Salters*, 78 Conn. App. 1, 5, 826 A.2d 202, cert. denied, 265 Conn. 912, 831 A.2d 253 (2003). Rather, "[o]ur Supreme Court has determined that in a case in which a defendant is charged with assault of a peace officer or interfering with an officer, *in lieu of a self-defense instruction*, the court must provide a

"The Court: So I note your exception. Anything else?

"[The Prosecutor]: Nothing from the state.

"[Defense Counsel]: Thank you, Your Honor.

"The Court: You're welcome. All right. And for the record, counsel's already confirmed they've reviewed the charge, the exhibits and the information. I'm correct, am I not?

"[The Prosecutor]: Correct, Your Honor.

"The Court: Correct?

"[Defense Counsel]: I've seen everything, Your Honor. I'm trying to write and listen.

"The Court: I understand, but I mean you've seen it. All right. You approved it, so, all right. Let's bring the jurors back in." On appeal, the defendant is not challenging the intent element of the charge.

detailed instruction that the state must establish that the police officer had been acting in the performance of his duty and that a person is not required to submit to the unlawful use of physical force during the course of an arrest . . . .'' (Emphasis added; internal quotation marks omitted.) *State* v. *Dunstan*, 145 Conn. App. 384, 390, 74 A.3d 559, cert. denied, 310 Conn. 958, 82 A.3d 626 (2013). ''This court has further concluded that an officer's exercise of reasonable force is inherent in the performance of duties, and therefore unreasonable and unnecessary force by a police officer would place the actions outside the performance of that officer's duties.'' Id.; see also *State* v. *Davis*, supra, 571 (''a detailed instruction that the state must establish that the police officer had been acting in the performance of his duty and that a person is not required to submit to the unlawful use of physical force during the course of an arrest . . . stands in lieu of a self-defense instruction''); *State* v. *Baptiste*, supra, 627 (''[o]ur Supreme Court has determined that a defendant is entitled to a detailed instruction on the element of 'in the performance of his duties' in lieu of an instruction regarding self-defense''); *State* v. *Salters*, supra, 9 (''[t]he proper defense . . . was that [the correction officer] was not acting within the performance of his duties when he used physical force on the defendant'').

''The rationale behind our Supreme Court's determination in *Davis* was based on the requirement that the state must prove beyond a reasonable doubt that the officer was acting in the performance of his duties as an element of § 53a-167c and the fact that excessive or unreasonable physical force by the officer would place his actions outside the performance of his duties. . . . The defendant would be entitled to an acquittal if the state failed to prove that the use of force was within the performance of the officer's duties.'' (Citation omitted; footnote omitted.) *State* v. *Salters*, supra, 78 Conn. App.

5–6. "A correctional officer, therefore, is statutorily authorized to use reasonable physical force in the performance of his duties. Clearly, if the defendant claimed that the force used was excessive or unnecessary, the proper *defense* in this case would have been that [the correction officer's] use of physical force on the defendant was not in the performance of his duties." (Emphasis added.) Id., 8.[6]

For this reason, the colloquy that occurred regarding the defense instruction appears ambiguous. When the

[6] See element two of "Interfering with an Officer—§ 53a-167a," Connecticut Criminal Jury Instructions 4.3-1, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited January 16, 2018); element two of "Assault of Public Safety, Emergency Medical, Health Care, or Public Transit Personnel—§ 53a-167c," Connecticut Criminal Jury Instructions 4.3-3, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited January 16, 2018).

We note the difference between the theory of self-defense and a defense of unreasonable or unnecessary physical force. "Under a theory of self-defense, a criminal defendant basically admits engaging in the conduct at issue, but claims that that conduct was legally justified." (Internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, 119 Conn. App. 530, 539, 988 A.2d 881, cert. denied, 296 Conn. 902, 991 A.2d 1103 (2010). "A theory of self-defense is a justification defense . . . [that] represents a legal acknowledgment that the harm caused by otherwise criminal conduct is, under special justifying circumstances, outweighed by the need to avoid an even greater harm or to further a greater societal interest." (Internal quotation marks omitted.) Id. A theory of self-defense involves the defendant admitting to the conduct at issue, e.g., assaulting the victim, while justifying the use of force.

In contrast, a defense of unreasonable or unnecessary physical force, by operation, focuses on the victim's actions during the assault, e.g., whether the victim was acting within the performance of his or her duties. The defense applies regardless of whether the defendant admits to the assaultive conduct because it negates the second element of assault on a correction officer and "[t]he defendant would be entitled to an acquittal if the state failed to prove that the use of force was within the performance of the officer's duties." *State* v. *Salters*, supra, 78 Conn. App. 6. Furthermore, our case law describes the detailed instruction for "in the performance of duties" as standing in lieu of a self-defense instruction. *State* v. *Davis*, supra, 261 Conn. 571; see generally D. Borden & L. Orland, 5A Connecticut Practice Series: Criminal Jury Instructions (4th Ed. 2016-2017 Supp.) § 14.2, p. 205–207.

court asked whether the defendant was seeking a "self-defense portion utilized in defining in the performance of duties" and requested clarification that it is "not being requested by the defendant in this case," defense counsel responded "yes." One interpretation of defense counsel's response is that the defendant explicitly was affirming that he had not requested a self-defense instruction, to which the parties knew, as a matter of law, he was not entitled. Another interpretation is that the defendant explicitly was waiving his claim of unreasonable or unnecessary physical force, because the court's question focused specifically on "defining in the performance of duties" as pertaining to the second element of § 53a-167c. See footnote 6 of this opinion. In the absence of contrary evidence, "[j]udges are presumed to know the law . . . and to apply it correctly." (Internal quotation marks omitted.) *In re Harlow P.*, 146 Conn. App. 664, 674 n.3, 78 A.3d 281, cert. denied, 310 Conn. 957, 81 A.3d 1183 (2013); accord *State* v. *Reynolds*, 264 Conn. 1, 29 n.21, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). Nevertheless, on the basis of this brief colloquy alone, the record is unclear as to whether the defendant was (1) agreeing with the court that he was not entitled to a theory of self-defense; (2) explicitly waiving his claim for a detailed instruction on a defense of unreasonable or unnecessary physical force in defining the performance of duties; or (3) doing both. Although we are unable to make a determination as to explicit waiver, for the reasons set forth in part II of this opinion, we conclude that the defendant cannot prevail on his claim of plain error.

II

The defendant seeks to prevail on his unpreserved claim of instructional error pursuant to the plain error doctrine. We initially note that, in *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011), our Supreme

Court concluded that "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal."

Our review of the record shows that the court gave the parties its draft instructions five days in advance, provided ample opportunity for their review and solicited comments from counsel. The defendant raised an objection only to the intent element of the jury charge.[7] Although the record is unclear as to whether the defendant explicitly waived his claim of instructional error, he nevertheless implicitly waived his claim pursuant to the standard set forth in *Kitchens*. Recently, however, our Supreme Court reasoned in *State* v. *McClain*, 324 Conn. 802, 815, 155 A.3d 209 (2017), that a *Kitchens* waiver does not foreclose claims of plain error. As such, we consider the defendant's claim of instructional error under the plain error doctrine.

"It is well established that the plain error doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved [and nonconstitutional in nature], are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [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

[7] See footnote 5 of this opinion.

judgment . . . for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly." (Footnote omitted; internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 595–96, 134 A.3d 560 (2016).

There are two prongs of the plain error doctrine; 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." (Emphasis in original; internal quotation marks omitted.) Id., 597; accord *State* v. *McClain*, supra, 324 Conn. 812. "With respect to the first prong, the claimed error must be patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . With respect to the second prong, an appellant must demonstrate that the failure to grant relief will result in manifest injustice." (Citations omitted; internal quotation marks omitted.) *State* v. *Jackson*, 178 Conn. App. 16, 20–21, A.3d (2017).

In the present case, the defendant states: "Plain error occurred when the trial court did not instruct the jury that any unwarranted or excessive force by [the victim] was not within the performance of his duties. This instructional language was required by the facts of the case and settled case law."[8] The essence of the defendant's argument is that because he had testified that the victim mishandled and "monkey pawed" him—allegations of unwarranted or excessive force—the victim

[8] The defendant specifically relies on the following: "In effect, a detailed instruction that the state must establish that the police officer had been acting in the performance of his duty and that a person is not required to submit to the unlawful use of physical force during the course of an arrest,

was not acting in performance of his duties as a correction officer when the defendant spat on the victim; thus, a reasonable jury could determine that the second element of § 53a-167c was not satisfied when the assault occurred. The defendant contends that the court failed to provide the detailed instruction in element two of the Connecticut Criminal Jury Instructions 4.3-1.[9]

"To prevail under the first prong of a plain error analysis, an appellant must demonstrate that the alleged error is obvious in the sense of not debatable. . . . [T]his inquiry entails a relatively high standard, under which it is not enough for the [appellant] simply to demonstrate that his position is correct. Rather, the [appellant] must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal." (Internal

whether the arrest itself is legal or illegal, stands in lieu of a self-defense instruction in such cases. Consequently, the failure to provide such instructions when the defendant has presented evidence, no matter how weak or incredible, that the police officer was not acting in the performance of his duty, effectively operates to deprive a defendant of his due process right to present a defense." *State* v. *Davis*, supra, 261 Conn. 571.

[9] The instruction states: "In determining whether the officer was acting in the performance of (his/her) duties, you must consider another provision in our law that justifies the use of physical force by correction officers. That statute provides that an authorized official of a correctional institution or facility may, in order to maintain order and discipline, use such physical force as is reasonable and authorized by the rules and regulations of the department of correction.

"If you find that the force used by the officer was not reasonable, you will find that <insert name of officer> was not acting within the performance of (his/her) official duties while attempting to (arrest / prevent the escape of) the defendant." (Emphasis omitted; footnote omitted.) Connecticut Criminal Jury Instructions, supra, 4.3-1.

We note that the preamble of the criminal jury instructions found on the Judicial Branch website clearly states that it "is intended as a guide for judges and attorneys" and that "[t]he use of these instructions is entirely discretionary and their publication by the Judicial Branch is not a guarantee of their legal sufficiency." Connecticut Criminal Jury Instructions, available at http://www.jud.ct.gov/ji/Criminal/Criminal.pdf (last visited January 16, 2018). See, e.g., *State* v. *Reyes*, 325 Conn. 815, 822 n.3, 160 A.3d 323 (2017); *State* v. *Hall-Davis*, 177 Conn. App. 211, 242 n.14, A.3d (2017).

quotation marks omitted.) *State* v. *Jackson*, supra, 178 Conn. App. 24. The court's instruction to the jury, which appears to mirror the criminal jury instructions, instructed that "there was testimony that [the victim] had concluded escorting [the defendant] to his cell from the shower area at the time of the alleged saliva, spitting or hurling." The jury heard testimony from McClellan, the victim and the defendant regarding the events surrounding the assault and made a credibility determination. More importantly, the defendant never raised this defense of unreasonable or unnecessary physical force at any point during the trial proceedings.

We also note a temporal disconnect in the defendant's argument. The defendant argues that because the victim mishandled him while escorting him to and from the shower room and "monkey pawed" him after taking off his leg shackles—actions that occurred and concluded prior in time to his spitting on the victim while he was standing outside the cell door—the victim therefore was not acting in the performance of his duties at the time of the assault. This retaliatory conduct stands in contrast to the application of this defense as discussed in *State* v. *Davis*, supra, 261 Conn. 557 (defendant fought with police officers during arrest); *State* v. *Baptiste*, supra, 133 Conn. App. 618 (defendant fought with police officers during drug investigation); *State* v. *Salters*, supra, 78 Conn. App. 3 (defendant fought with correction officers during melee). We conclude that the defendant has not established the required patent or readily discernible error in the jury instruction as to warrant the extraordinary remedy of reversal.

In summary, under the plain error doctrine, we do not find that the court committed any error, let alone error "so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *State* v. *Jamison*,

supra, 320 Conn. 596. Nor has the defendant demonstrated that failure to include the detailed language on the use of unreasonable or unnecessary physical force resulted in manifest injustice. The court instructed the jury in accordance with the elements of § 53a-167c, and the defendant did not raise or request any detailed instruction on a defense. "The charge was presented to the jury in such a way that no injustice was done to the defendant." *State* v. *Salters*, supra, 78 Conn. App. 9. Accordingly, the defendant cannot prevail on his claim of plain error.

The judgment is affirmed.

In this opinion the other judges concurred.

DANNY BROWN *v.* COMMISSIONER OF CORRECTION (AC 39476)

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

Syllabus

The petitioner, who had been convicted of the crimes of murder and conspiracy to commit murder, sought a writ of habeas corpus, claiming, inter alia, that the state had violated his due process rights by suppressing material exculpatory evidence in violation of *Brady* v. *Maryland* (373 U.S. 83). Specifically, the petitioner claimed that the state failed to disclose evidence of express or implied agreements it allegedly had made with two witnesses, V and S, both of whom also had been charged in connection with the underlying murder, in exchange for their testimony at the petitioner's criminal trial. The habeas court rendered judgment denying the habeas petition and thereafter denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal as to the petitioner's *Brady* violation claim, that court having properly concluded that the state had not committed a *Brady* violation with respect to its agreements with V and S to bring their cooperation in the petitioner's criminal trial to the attention of the court in their criminal proceedings; the habeas court's finding that the state had disclosed the agreements to the petitioner prior to his criminal trial was not clearly erroneous and was supported by the evidence in

the record, and because the petitioner did not present evidence that compelled a finding by the habeas court that the state also had agreements with V and S to give them favorable treatment at their bond hearings, the petitioner's *Brady* claim and his related claim that the state improperly failed to correct the false testimony of V and S at his criminal trial necessarily failed.

2. The habeas court did not abuse its discretion in denying the petition for certification to appeal as to the petitioner's claim that his trial counsel was ineffective in failing to adequately cross-examine V and S, which was based on the fact that counsel did not order, review or utilize transcripts of their bond hearings: the record demonstrated that the reduction of S's and V's bonds, as well as the incentive of S and V to testify at the petitioner's trial, repeatedly was brought to the attention of the jury, which was presumed to have followed the accomplice testimony instruction that it had been given by the trial court, and, therefore, the petitioner failed to demonstrate a reasonable probability that, but for his trial counsel's failure to obtain the bond hearing transcripts and to cross-examine S and V therewith, the result of his criminal trial would have been different.

Argued November 13, 2017—officially released January 23, 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, *Cobb*, *J.*; thereafter, the petition was withdrawn in part; judgment denying the petition; subsequently, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

James E. Mortimer, assigned counsel, with whom, on the brief, was *Michael D. Day*, assigned counsel, for the appellant (petitioner).

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

Opinion

ELGO, J. The petitioner, Danny Brown, known also as Daniel Brown,[1] appeals following the denial of his

[1] At the habeas trial, the petitioner repeatedly was referred to as "Danny Brown." The appeal form filed with this court indicates that it was filed by

petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner claims that the court abused its discretion by denying his petition for certification to appeal, and by rejecting his claims that (1) the state violated his rights to due process and a fair trial by failing to disclose material exculpable evidence and failing to correct false testimony from certain witnesses at his criminal trial, and (2) his criminal trial counsel rendered ineffective assistance. We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal and, therefore, dismiss the appeal.

This case involves a homicide in New London. As the Supreme Court recounted in the petitioner's direct appeal, "James 'Tiny' Smith and Darrell Wattley fought at a party on July 4, 1995. Wattley sliced Smith's throat with a box cutter, wounding him superficially. On the afternoon of July 13, 1995, [the petitioner] and [Jamie] Gomez picked Smith up at the house of Smith's mother, and drove him to [Anthony] Booth's apartment at 93 State Pier Road in New London. When the three men arrived at Booth's apartment, Booth told them that he had asked Angeline Valentin, who lived in the same building, to call Wattley over to the building so that Wattley and Smith could fight. Booth, [the petitioner], Gomez and Smith watched television while they waited for Wattley to arrive. During their wait, and while [the petitioner] was rummaging through a grey knapsack, Booth asked [the petitioner] whether he '[had worn] gloves when he loaded it.' Booth also had a knife in his hand. When Smith asked Booth why he needed the knife, Booth replied: '[D]on't worry about it, we are just going to fight him.'

"Danny Brown a/k/a Daniel." In its decision on his direct appeal, the Supreme Court referred to the petitioner as "Daniel Brown." *State* v. *Booth*, 250 Conn. 611, 613, 737 A.2d 404 (1999), cert. denied sub nom. *Brown* v. *Connecticut*, 529 U.S. 1060, 120 S. Ct. 1568, 146 L. Ed. 2d 471 (2000).

"When Valentin called to say that Wattley was on his way, the four men left the building and went outside. Gomez and [the petitioner] went to the north side of the building while Smith and Booth went to the south side and hid behind a bush. While they were waiting, Booth was talking on a cellular telephone to either [the petitioner] or Gomez. After approximately fifteen minutes, a car arrived and Wattley got out. Wattley walked toward the north end of the building, where [the petitioner] and Gomez were waiting. Smith and Booth then entered the building on the south side and began to ascend the stairs. When Smith and Booth reached the third floor, where Valentin's apartment was located, they heard gunshots below. Smith and Booth then ran to exit the building. As they descended the stairs, they saw Wattley lying face down in the second floor hallway with blood everywhere. Booth then stabbed Wattley a couple of times before Smith and Booth fled the building.

"The four men ran to a red Mitsubishi, which was parked on State Pier Road, east of the building. This car was owned by Gomez' girlfriend, Dawn Waterson. Gomez sat in the driver's seat, and [the petitioner], Smith and Booth sat in the passenger seats. As they drove away, [the petitioner] said 'I robbed that nigger too.' [The petitioner] had a knife in his lap, which he threw out of the window while they were driving. Gomez drove Waterson's car across town and parked it behind a mall. The four men walked through a cemetery before splitting up. In the cemetery, Booth told them that, if questioned, he and [the petitioner] would say that they had been together. In addition, Booth told Smith and Gomez to come up with an alibi. The four men then separated.

"A few hours after the murder, Booth approached Valentin in the parking lot of 93 State Pier Road. Booth told her that they shot 'him.' Booth also told Valentin

that he knew that she would not have lured Wattley to the building if she had known that they intended to murder him." (Footnote omitted.) *State* v. *Booth*, 250 Conn. 611, 614–15, 737 A.2d 404 (1999), cert. denied sub nom. *Brown* v. *Connecticut*, 529 U.S. 1060, 120 S. Ct. 1568, 146 L. Ed. 2d 471 (2000).

The petitioner subsequently was arrested and a consolidated trial with Booth and Gomez followed, at the conclusion of which the jury found all three defendants guilty of murder in violation of General Statutes § 53a-54a, and conspiracy to commit murder in violation of General Statutes §§ 53a-54a and 53a-48 (a).[2] Id., 613. The petitioner directly appealed from that judgment of conviction, which our Supreme Court affirmed in a consolidated appeal with Booth and Gomez. Id., 663.

The petitioner commenced this habeas action in 2013. On March 15, 2016, he filed a second amended petition for a writ of habeas corpus that contained two counts. The first alleged ineffective assistance on the part of his criminal trial counsel, Attorney Jeremiah Donovan, in failing to adequately cross-examine and impeach the testimony of Smith and Valentin.[3] In the second count, the petitioner alleged a due process violation stemming from the state's handling of allegedly exculpatory evidence regarding the testimony of Smith and Valentin. More specifically, the petitioner alleged that the state "failed to disclose material favorable evidence to the petitioner with respect to an express or implied agreement" with both Smith and Valentin "for favorable treatment in [their] then pending criminal case[s] and

[2] The court sentenced the petitioner to a total effective term of fifty-five years incarceration. *State* v. *Booth*, supra, 250 Conn. 613.

[3] The first count of the petition also alleged that Donovan was deficient in failing "to adequately advise the petitioner concerning his right [to] sentence review and failed to adequately pursue the same . . . ." The petitioner withdrew that claim at his habeas trial.

failed to correct [their] false or misleading testimony concerning the same . . . .''

A habeas trial was held on March 5, 2016, at which Donovan was the sole witness.[4] In its subsequent memorandum of decision, the habeas court rejected the petitioner's claims. With respect to his ineffective assistance of counsel claim, the court concluded that the petitioner failed to satisfy the prejudice prong of *Strickland* v. *Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As to his claims regarding the suppression of allegedly exculpatory evidence, the court found that the petitioner failed to prove the existence of an agreement between the state and Smith and Valentin that the state had suppressed. In so doing, the court acknowledged that Donovan, in his habeas testimony, confirmed that the state had assured Smith and Valentin that their ''cooperation [at the petitioner's criminal trial] would be taken into consideration upon sentencing.'' The court nonetheless found that the petitioner had not met his burden in demonstrating that the state suppressed evidence of that assurance. The court further found that ''even if the [state] had suppressed evidence, the petitioner also failed to prove that this evidence would have been material.'' The court, therefore, denied the petition for a writ of habeas corpus. The petitioner then filed a petition for certification to appeal to this court, which the habeas court denied, and this appeal followed.

On appeal, the petitioner claims that the court abused its discretion in denying the petition for certification to appeal. Our standard of review for such claims is

[4] The petitioner also introduced into evidence transcripts of various proceedings and informations involving the petitioner, Smith, and Valentin. In addition, a copy of the July 24, 1996 request for disclosure filed by Donovan prior to the petitioner's criminal trial was admitted into evidence, in which Donovan requested, inter alia, disclosure of ''any benefit offered to or conferred upon [any] witness by the prosecuting authority.''

well established. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Citation omitted; internal quotation marks omitted.) *Ramos* v. *Commissioner of Correction*, 172 Conn. App. 282, 294, 159 A.3d 1174, cert. denied, 327 Conn. 904, 170 A.3d 1 (2017). With that standard in mind, we turn to the substantive claims raised by the petitioner.

I

The petitioner first contends that the court abused its discretion in denying his petition for certification to appeal because the state violated his right to due process and a fair trial by failing to disclose material exculpatory evidence in contravention of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The petitioner claims that the state suppressed evidence

of an agreement between the state and Smith and Valentin in exchange for their testimony at the petitioner's criminal trial.

"The law governing the state's obligation to disclose exculpatory evidence to defendants in criminal cases is well established. The defendant has a right to the disclosure of exculpatory evidence under the due process clauses of both the United States constitution and the Connecticut constitution. . . . In order to prove a *Brady* violation, the defendant must show: (1) that the prosecution suppressed evidence after a request by the defense; (2) that the evidence was favorable to the defense; and (3) that the evidence was material. . . .

"It is well established that [i]mpeachment evidence as well as exculpatory evidence [fall] within *Brady*'s definition of evidence favorable to an accused. . . . [An express or implied] plea agreement between the state and a key witness is impeachment evidence falling within the definition of exculpatory evidence contained in *Brady* . . . .

"The [United States] Supreme Court established a framework for the application of *Brady* to witness plea agreements in *Napue* v. *Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), and *Giglio* v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). . . . Drawing from these cases, [the Connecticut Supreme Court] has stated: [D]ue process is . . . offended if the state, although not soliciting false evidence, allows it to go uncorrected when it appears. . . . If a government witness falsely denies having struck a bargain with the state, or substantially mischaracterizes the nature of the inducement, the state is obliged to correct the misconception. . . . Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue* require that the prosecutor apprise the court when he knows that his witness is giving testimony that

is substantially misleading. . . . A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." (Citations omitted; internal quotation marks omitted.) *State* v. *Ouellette*, 295 Conn. 173, 185–86, 989 A.2d 1048 (2010).

As our Supreme Court has explained, "[t]he prerequisite of any claim under the *Brady*, *Napue* and *Giglio* line of cases is the existence of an undisclosed agreement or understanding between the cooperating witness and the state." Id., 186. In its memorandum of decision, the habeas court found that no specific agreement existed between the state and either Smith or Valentin, apart from the state's assurance that it would bring their cooperation to the attention of the court in their respective criminal proceedings.

The petitioner now challenges the propriety of that determination. His claim is governed by the clearly erroneous standard of review. "The existence of an undisclosed plea agreement is an issue of fact for the determination of the trial court. . . . [W]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Citations omitted; internal quotation marks omitted.) *State* v. *Floyd*, 253 Conn. 700, 737, 756 A.2d 799 (2000). "[A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 742, 937 A.2d 656 (2007). In reviewing the factual findings of a habeas court, "[t]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must

defer to the [court's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Elsey* v. *Commissioner of Correction*, 126 Conn. App. 144, 153, 10 A.3d 578, cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011).

In this habeas proceeding, the petitioner bore the burden "to prove the existence of undisclosed exculpatory evidence." *State* v. *Floyd*, supra, 253 Conn. 737. We agree with the habeas court that the petitioner did not satisfy that burden.

A

In its memorandum of decision, the court found that the state had assured both Smith and Valentin that it would bring their cooperation in the petitioner's criminal trial to the attention of the court in their respective criminal proceedings. The court further found that the state disclosed that agreement to the petitioner prior to his criminal trial.

The evidence in the record substantiates those findings. Donovan testified at the habeas trial that, in multiple conversations with the prosecutor, he was apprised that the state made "no promises to [Smith and Valentin] other than to bring their cooperation to the attention of the sentencing judge" in their respective proceedings. On the basis of his extensive experience dealing with the New London County Office of the State's Attorney, Donovan explained that the state's agreement to bring Smith's and Valentin's cooperation to the court's attention, but not make any specific promises or representations, was consistent with its general practice at that time. Donovan further confirmed that he was aware of that agreement prior to the petitioner's criminal trial.

The court, as the sole arbiter of credibility, was free to credit that testimony. See *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 604, 103 A.3d 954 (2014) ("we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude" [internal quotation marks omitted]); *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 448, 936 A.2d 611 (2007) ("[t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony" [internal quotation marks omitted]). Moreover, at the conclusion of the habeas trial, the petitioner's counsel conceded that "[w]ith respect to the evidence that was introduced, [Donovan] was made aware that [Smith and Valentin's] cooperation would be brought to the sentencing judge's attention."

On the basis of that evidence, the court properly could find that the state disclosed to the petitioner its agreement with Smith and Valentin to bring their cooperation to the attention of the court in their respective criminal proceedings. That finding, therefore, is not clearly erroneous.

B

The petitioner nevertheless claims that, beyond the agreement addressed in part I A of this opinion, a specific agreement existed between the state and both Smith and Valentin regarding the lowering of their respective bonds, which was not disclosed to the petitioner.[5] Under Connecticut law, the petitioner bore the burden of proving the existence of that agreement.

[5] At the habeas trial, the court asked the petitioner's counsel to clarify the nature of the allegations contained in the second count of the operative petition for a writ of habeas corpus. Counsel at that time confirmed that the second count was predicated exclusively on the state's "preexisting agreement with [Smith and Valentin] to not object to the bond hearing" that allegedly existed and was not disclosed to the petitioner.

Walker v. *Commissioner of Correction*, 103 Conn. App. 485, 493, 930 A.2d 65, cert. denied, 284 Conn. 940, 937 A.2d 698 (2007).

The following additional facts, as reflected in the record and as recited in this court's recent decision on the habeas action involving one of the petitioner's coconspirators,[6] are relevant to this claim. "On September 13, 1995, Valentin testified during a probable cause hearing for Booth that implicated Booth in Wattley's murder. During Valentin's bond hearing on October 5, 1995, Bernard Steadman, her attorney, represented: 'I have discussed this matter with the state and they would—my understanding is that there would be no objection to her moving out of state, should she be released on a bond, and provided that she maintain contact with—to or with their office either through me or directly.' Steadman asked the court to consider releasing Valentin on a promise to appear and allowing her to travel to New Jersey, given her cooperation with the state, and because Wattley's murder appeared to be gang related.[7] Paul E. Murray, the supervisory assistant state's attorney (prosecutor),[8] informed the court: 'I did indicate to [Steadman], Your Honor, that I would bring to the court's attention [Valentin's] cooperation, and I think I've done that.' The prosecutor also informed the

[6] In *Gomez* v. *Commissioner of Correction*, 178 Conn. App. 519, 521–22, A.3d (2017), this court affirmed the judgment of the habeas court denying Gomez' second petition for a writ of habeas corpus, which contained allegations that largely mirror those advanced in the present action. See id., 524–25.

[7] At the consolidated criminal trial, Waterson testified that the petitioner, Booth, and Gomez "were members of the 20 Love gang." *State* v. *Booth*, supra, 250 Conn. 637. As our Supreme Court noted in the petitioner's direct appeal, "there was other testimony concerning [the petitioner's] alleged gang membership that properly was admitted at trial." Id., 639.

[8] "Murray represented the state at the . . . consolidated criminal trial. He also represented the state in connection with the criminal proceedings against Valentin and Smith." *Gomez* v. *Commissioner of Correction*, 178 Conn. App. 519, 529 n.9, A.3d (2017).

court that he had spoken with Valentin's mother about Valentin going to New Jersey and that 'both [Valentin] and her mother have agreed . . . to keep the state apprised as to her location and how she can be reached . . . .' In the event that she did not keep the state apprised of her location, the prosecutor stated that '[the state] will find her and she will have forfeited whatever benefits she has gained from her cooperation to this point.' He also stated: 'I'm not sure whether a promise to appear is the appropriate thing, but I think certainly a substantial reduction in her bond is appropriate.' Thereafter, the prosecutor stated that he would not object to a written promise to appear and informed the court: 'I think if I were in your position, I would not be averse to a written promise to appear. I'm trying to be careful as to—as to the record I'm making.'

"After considering, inter alia, the 'cooperative aspects of this matter,' the court, *Purtill*, *J.*, reduced Valentin's bond from $100,000 to a written promise to appear and permitted her to reside in New Jersey. Immediately following that decision, the following colloquy took place in open court:

" '[The Prosecutor]: . . . For the record, I would indicate I do not disagree at all with the court's decision. I was trying to be careful with the record because of obvious cross-examination effect. In consideration, I want the record to be clear that *the only representations made to* [*Valentin*] *were that any cooperation would be brought to the attention of the sentencing court. There was no quid pro quo for a specific bond recommendation.*

" '[Steadman]: That is true, Your Honor.' . . .

"On March 14, 1996, during a consolidated probable cause hearing for [the petitioner and Gomez], Smith provided testimony that implicated [them] in Wattley's murder. [Gomez and his trial counsel] attended this

hearing, and so did Donovan, [the petitioner's] lawyer. At the beginning of Smith's testimony, the following examination took place in open court:

" '[The Prosecutor]: And you are in fact charged with murder, felony murder, and conspiracy to commit murder with respect to the case that we are going to talk about, is that right?

" '[Smith]: Yes.

" '[The Prosecutor]: And is it fair to say that *other than bringing your cooperation to the attention of the sentencing court*, you haven't been promised anything in return for your testimony?

" '[Smith]: No.

" '[The Prosecutor]: You say 'no.' That is the truth, isn't it?

" '[Smith]: That's the truth.' . . .

"On May 3, 1996, approximately two months after Smith testified at the consolidated probable cause hearing, the court, *Parker*, *J.*, addressed Smith's motion for modification of his bond. The state did not object to the motion. Counsel for Smith represented that the reasons for requesting a bond modification were that Smith's life had been threatened and he had cooperated with the state. Thereafter, the court reduced Smith's bond from $500,000 to $100,000 and permitted him to travel throughout the continental United States.

"On May 10, 1996, the court, *Purtill*, *J.*, amended the terms of Smith's bond, making it a $100,000 nonsurety bond with a nominal real estate bond. During this hearing, the prosecutor stated that the state had been in

contact with a parole officer in Alabama, who agreed to arrange weekly reporting with Smith if he were allowed to reside there. The court asked that the state 'reduce that condition to writing and give a copy to . . . Smith.' Smith was then permitted to be released on bond." (Emphasis in original; footnotes added and footnote in original.) *Gomez* v. *Commissioner of Correction*, 178 Conn. App. 519, 529–31, A.3d (2017).

On appeal, the petitioner renews his claim that a specific agreement existed between the state and Smith and Valentin regarding the lowering of their respective bonds. He presented the habeas court with no evidence of such a specific agreement. The petitioner did not call Smith, Valentin, or their trial attorneys as witnesses at the habeas trial, nor did he introduce the testimony of the prosecutor. The only evidence he submitted to support his claim was the transcripts of the bond hearings, which merely indicate that the state did not object to the bond reductions contemplated therein. The transcripts also contain statements regarding the specific rationales for those bond reductions. In Smith's case, it was the undisputed fact that "his life [had] been threatened" while incarcerated. In Valentin's case, it was because she was only sixteen years old, had no criminal record at the time of the July 13, 1995 homicide, and her family was planning on moving out of state due to "the gang involvement" in that homicide. See footnote 7 of this opinion. In granting the requested bond reduction, the court, *Purtill*, *J.*, stated that it was "considering mainly the youth of this young lady and the fact that she would have to be—if she was kept in confinement here, it would have to be in segregation because of the circumstances; and for a person of her age it probably is not at all appropriate, as mentioned by counsel. That's the main reason the bond is being reduced."

Furthermore, those bond hearing transcripts do not indicate that any agreement existed between the state and Smith and Valentin, apart from the assurance that their cooperation in the petitioner's criminal proceeding would be brought to the sentencing judge's attention. As the prosecutor expressly stated during Valentin's October 5, 1995 bond hearing: "I want the record to be clear that the only representations made to [Valentin] were that any cooperation would be brought to the attention of the sentencing court. There was no quid pro quo for a specific bond recommendation." In response, Valentin's attorney stated, "That is true, Your Honor."[9]

That testimony is consistent with that offered by Donovan at the petitioner's habeas trial. Donovan testified that, as a matter of practice, the New London County Office of the State's Attorney would not make "any specific promises" apart from the assurance that the cooperation of such witnesses would be brought to the attention of the court in their own criminal proceedings.

Our review of the record reveals that the petitioner did not present evidence at his habeas trial that compelled a finding that the state reached an agreement with Smith and Valentin to give favorable treatment at their bond hearings in exchange for their testimony at the petitioner's criminal trial. In light of the foregoing, the court properly concluded that the petitioner had not met his burden in demonstrating the existence of a specific agreement between the state and Smith and Valentin regarding their bond proceedings. Absent such an agreement, the petitioner's *Brady* claim, as well as his related claim that the state failed to correct false testimony related thereto, necessarily fails. See *State* v. *Ouellette*, supra, 295 Conn. 186.

[9] Smith engaged in a similar colloquy with the prosecutor during the March 14, 1996 hearing. See *Gomez* v. *Commissioner of Correction*, supra, 178 Conn. App. 530–31.

II

The petitioner also claims that the court abused its discretion in denying his petition for certification to appeal because Donovan rendered ineffective assistance by failing to adequately cross-examine and impeach the testimony of Smith and Valentin at trial. That claim is premised on the undisputed fact that Donovan did not order, and thus did not review and utilize, the transcripts of Smith and Valentin's bond hearings.

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 668]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Although a petitioner can succeed only if he satisfies both prongs, a reviewing court can find against a petitioner on either ground." (Citations omitted; internal quotation marks omitted.) *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 668–69, 159 A.3d 1112 (2017).

Although he did not obtain the transcripts of their bond hearings, Donovan testified that, at the time of the petitioner's trial, he was aware that Smith and Valentin "had been released on bond." Donovan testified that he knew why their bonds had been reduced, which he utilized in his cross-examination of those witnesses at trial. The transcripts of the petitioner's trial, which were admitted into evidence at the habeas trial, demonstrate

that Donovan questioned both Smith[10] and Valentin[11] extensively on the issue of their bond reductions, and

[10] During Smith's testimony, the following colloquy occurred:

"[Donovan]: . . . As you sit here today, you recognize that there's some connection between your being a free man today and your testifying against these defendants?

"[Smith]: Rephrase that again.

"[Donovan]: Do you think that there may be a connection between your being a free man today—

"[Smith]: I'm not totally free.

"[Donovan]: When you leave this courtroom, you'll leave without shackles on, right?

"[Smith]: Yeah.

"[Donovan]: And when you leave this courtroom, you'll go back home . . . .

"[Smith]: Yeah. . . .

"[Donovan]: Sleep in your own bed?

"[Smith]: Yeah. . . .

"[Donovan]: There won't be any bars on the window?

"[Smith]: No. . . .

"[Donovan]: . . . [T]he point is, that there is a connection between your being able to enjoy all those things and the fact that you're sitting up there on the [witness] stand trying to put the blame on these men, isn't there?

"[Smith]: I'm just telling the truth.

"[Donovan]: Isn't there a connection between your waking up in the morning, eating your own breakfast, going to bed in your own bed at night, doing your own job, being a free man, and your sitting on the stand testifying on behalf of the state?

"[Smith]: I'm testifying on my own behalf, telling the truth. . . .

"[Donovan]: It just happens that you came in and testified in a probable cause hearing, and then miraculously after that you were no longer in jail?

"[Smith]: I was bonded out.

"[Donovan]: Bonded out, yeah. What was your bond when you were arrested?

"[Smith]: Half a million.

"[Donovan]: And what was your bond when you were bonded out?

"[Smith]: I don't know, my lawyer took care of that.

"[Donovan]: Isn't there some connection maybe between your bonding out and your cooperation?

"[Smith]: No connection."

[11] During Valentin's testimony, the following colloquy occurred:

"[Donovan]: Life is more pleasant outside of jail than it is in jail, right?

"[Valentin]: Yes.

"[Donovan]: Now, do you remember the last time you testified in court; you were in jail, weren't you?

"[Valentin]: Yes, I was.

"[Donovan]: They brought you from jail here to testify?

"[Valentin]: Yes.

the motivations therefor, during the petitioner's criminal trial. Furthermore, as the habeas court noted in its memorandum of decision, the transcripts reveal "that counsel for the petitioner's codefendants also questioned both Valentin and Smith concerning their bond reductions. During [their] cross-examination of Valentin, they both questioned her regarding the fact that her $150,000 bond was reduced to a promise to appear after she testified at a preliminary hearing. Furthermore, [Booth's attorney] questioned Smith regarding the fact that his $500,000 bond was reduced and he was subsequently released after he testified at the probable cause hearing." In addition, both Smith and Valentin in their testimony at the petitioner's trial admitted that they hoped that their cooperation would be taken into account with regard to their pending charges.

"[Donovan]: And they brought you here to testify against [Booth], didn't they?

"[Valentin]: Yes.

"[Donovan]: And you did testify against [Booth], didn't you?

"[Valentin]: Yes, I did.

"[Donovan]: After you testified against [Booth], you were released from jail, weren't you?

"[Valentin]: Yes, I was.

"[Donovan]: Do you think there might be, there just might be, some connection between you testifying against [Booth] and your not being in jail anymore?

"[Valentin]: No.

"[Donovan]: You don't see any connection at all?

"[Valentin]: (Witness nods in the negative.)

"[Donovan]: You think that had you not testified against [Booth], you would be released right now, do you?

"[Valentin]: I don't know.

"[Donovan]: This is something that your lawyer has handled for you—

"[Valentin]: Yes.

"[Donovan]: —is that right, arranged for you to get out of jail?

"[Valentin]: Yes.

"[Donovan]: And you don't think that your cooperating with [the state in Booth's proceeding] has anything to do with your being in New Jersey right now?

"[Valentin]: I don't know.

"[Donovan]: You don't know. What do you think in your heart?

"[Valentin]: To be honest, I don't know. I never really much—I didn't pay mind to that. I never really sat down and thought about it."

We also note that, in their closing remarks to the jury, Donovan and counsel for the petitioner's codefendants all reminded jurors of the circumstances surrounding the bond reductions for Smith and Valentin, and suggested that those reductions were connected to their testimony in the consolidated trial. They thus encouraged the jury to consider that connection in assessing their credibility as witnesses. Additionally, in its charge to the jury, the court provided an accomplice testimony instruction, which cautioned jurors that the testimony of an accomplice could be "colored" by the fact that such witnesses may "be looking for or hoping for some favorable treatment in the sentence or disposition of his or her case . . . ."[12] Absent an indication to the contrary, the jury is presumed to have heeded that instruction. See *State* v. *Wooten*, 227 Conn. 677, 694, 631 A.2d 271 (1993) ("[j]urors are presumed to follow the instructions given by the judge" [internal quotation marks omitted]).

The record before the habeas court thus demonstrates that the reduction of Smith's and Valentin's bonds, as well as Smith's and Valentin's incentive to testify at the petitioner's trial, repeatedly was brought to the attention of the jury at the petitioner's trial. The petitioner has not demonstrated how Donovan's failure to obtain the transcripts of the bond proceedings

[12] The court instructed the jury in relevant part: "Now, in this case, we have what we call 'accomplice testimony.' Certain of the witnesses, by their own testimony, participated in one way or another in the criminal conduct charged by the state in this case. In weighing the testimony of [an] accomplice who is a self-confessed criminal, you must consider that fact. . . .

"Also, in weighing the testimony of [an] accomplice who has not yet been sentenced or whose case has not yet been disposed of, you should keep in mind that he or she may, in his or her own mind, be looking for or hoping for some favorable treatment in the sentence or disposition of his or her case, and that therefore, he or she may have such an interest in the outcome of this case that his or her testimony may be colored by that fact.

"Therefore, the jury must look with particular care at the testimony of accomplices and scrutinize it very carefully before you accept it."

resulted in prejudice, apart from asserting that a review of those transcripts would have enabled him to impeach Smith's and Valentin's allegedly false testimony that there was no specific agreement between them and the state regarding those bond proceedings. That assertion fails in light of the habeas court's determination that no such agreement had been proven, and thus no *Brady* violation transpired, which determinations we have affirmed in part I of this opinion. On our thorough review of the record, we conclude that the habeas court properly determined that the petitioner has not demonstrated a reasonable probability that, but for Donovan's alleged failure to obtain the bond hearing transcripts and cross-examine Smith and Valentin therewith, the result of the petitioner's criminal trial would have been different. Accordingly, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.