FATIMA K. DE ALMEIDA-KENNEDY *v.* JAMES KENNEDY (AC 40997)

Lavine, Sheldon and Elgo, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from various postjudgment orders of the trial court denying in part his motion for modification of unallocated alimony and child support, granting in part the plaintiff's motion for clarification and awarding the plaintiff attorney's fees incurred defending the motion for modification, and granting the plaintiff's motion for attorney's fees and expenses pending appeal. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly denied in part his motion for modification by rejecting his request to modify his unallocated alimony and child support obligation:

   a. The trial court did not abuse its discretion by denying the defendant's request to modify his unallocated alimony and child support obligation without first making findings under the child support guidelines; the defendant having failed to allege in his motion to modify or to raise at trial his claim that the order imposing the unallocated alimony and child support obligation substantially deviated from the child support

guidelines, the court properly did not make findings under those guidelines once it concluded that there was insufficient evidence of a substantial change in circumstances to warrant modification to the unallocated alimony and child support obligation.

b. The defendant's claim that the trial court, in denying in part his motion for modification, made an erroneous factual finding was unavailing; that court's finding that the defendant had admitted in his motion for modification that he had not experienced a substantial change in circumstances was not clearly erroneous and was supported by the record and the statements of the defendant at trial.

c. The trial court did not abuse its discretion in finding that the defendant failed to establish a change in circumstances to warrant modification to the unallocated alimony and child support obligation; the defendant having failed to state the basis on which he sought modification of his unallocated alimony and child support obligation, the trial court reasonably interpreted the defendant's request to modify his unallocated alimony and child support obligation as seeking a modification on the basis of a change in legal or physical custody, which did not occur, and although the defendant presented evidence of his increasing debt and filed financial affidavits with the court, the defendant failed to meet his burden of clearly and definitely establishing a substantial change in his financial circumstances so as to warrant a modification of his unallocated alimony and child support obligations.

2. The trial court abused its discretion in granting in part the plaintiff's motion for clarification and awarding the plaintiff attorney's fees incurred defending the defendant's motion for modification, as the bad faith exception to the general rule precluding an award of attorney's fees was not applicable here; the trial court did not make a finding that the defendant acted in bad faith by filing his motion for modification, and by granting in part the defendant's motion for modification, the court did not find that the defendant's claims were entirely without color.

The record was inadequate to review the defendant's claim that the trial court abused its discretion by granting the plaintiff's motion for attorney's fees and expenses pending appeal without considering the financial abilities of the parties, that court not having stated the basis for its award and the defendant having failed to object to the plaintiff's motion or to attend the hearing on the motion.

Argued November 29, 2018–officially released March 26, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Gould*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Wenzel*, *J.*, granted in part

and denied in part the defendant's motion for modification of alimony and child support, and the defendant appealed to this court; subsequently, the court, *Wenzel*, *J.*, granted the plaintiff's motion for clarification and motion for attorney's fees pending appeal, and the defendant filed amended appeals with this court. *Reversed in part; judgment directed.*

James Kennedy, self-represented, the appellant (defendant).

J. David Griffin, for the appellee (plaintiff).

Opinion

ELGO, J. In this postdissolution marital dispute, the defendant, James Kennedy, appeals from the judgment of the trial court in connection with certain postjudgment orders entered in favor of the plaintiff, Fatima K. De Almeida-Kennedy. On appeal, the defendant claims that the court improperly (1) denied in part his motion for modification, (2) granted in part the plaintiff's motion for clarification, in which she requested, inter alia, that the court address her prior motion for attorney's fees, and (3) granted the plaintiff's motion for attorney's fees and expenses pending appeal. We reverse the judgment of the trial court with respect to the defendant's second claim but affirm the judgment in all other respects.

The following facts and procedural history are relevant to this appeal. The marriage between the parties was dissolved on August 2, 2010. The judgment of dissolution incorporated the parties' separation agreement, which provided, inter alia, that the defendant would pay the plaintiff $1000 per week in unallocated alimony and child support. On December 9, 2014, that judgment was modified by agreement of the parties to provide, inter alia, that the defendant would pay the plaintiff $900 per week in unallocated alimony and child support.

On December 28, 2015, the defendant filed the present motion for modification in which he requested, inter alia, that his unallocated alimony and child support obligation be modified.[1] On May 12, 2017, the plaintiff filed a motion for attorney's fees, asking the court to order the defendant to pay her attorney's fees incurred defending the defendant's motion for modification. The court received evidence on both motions in a trial held over the course of several days beginning on July 24, 2017, and concluding on August 2, 2017. By order dated September 29, 2017, the court granted in part and denied in part the defendant's motion for modification. Relevant to this appeal, the court denied the defendant's request to modify his unallocated alimony and child support obligation.[2]

The defendant filed the present appeal on October 27, 2017. On October 30, 2017, the plaintiff filed a motion for clarification as to the trial court's September 29, 2017 ruling, requesting, inter alia, that the trial court

[1] The defendant's motion for modification, as relevant to his request to modify his unallocated alimony and child support obligation, stated: "Paragraph 4 of the court's December 9, 2014 order provides, 'The parties agree that the [defendant's] obligation to pay unallocated support and alimony shall be reduced to $900 per week.' Neither the original August 2, 2010 court order nor the two subsequent December 9, 2014 orders modifying the original order provide for a term of the unallocated support period. Accordingly, [the defendant] seeks an order immediately terminating the unallocated support term and the entry of one of the following child support orders: 1. In the event that physical custody of both children is awarded to the [defendant], the following order shall enter: 'The [plaintiff] shall pay child support according to the guidelines in the amount of $x.00 per week to be paid bi-weekly.' 2. In the event that physical custody is not modified, 'The [defendant] shall pay the [plaintiff] child support in the amount of $x.00 per week according to the guidelines to be paid bi-weekly.' "

[2] The court's order stated in relevant part: "The third proposed modification seeks modification of the unallocated support and alimony award to [the] plaintiff. The defendant admits there is no claim for any substantial change in circumstance in the motion and the court finds there was no sufficient evidence of such in any event. This proposed modification is denied."

issue a ruling on her May 12, 2017 motion for attorney's fees. At the same time, the plaintiff also filed a motion for attorney's fees and expenses pending appeal. On November 16, 2017, the trial court held a hearing, which the defendant did not attend, on the plaintiff's motion for clarification and motion for attorney's fees and expenses pending appeal. On that same date, the court (1) granted in part the plaintiff's motion for clarification, ordering the defendant "to pay the sum of $11,250 to plaintiff's counsel as a sanction for bringing a baseless motion," and (2) granted the plaintiff's motion for attorney's fees and expenses pending appeal, ordering the defendant to pay "an advance of $10,000 as a retainer to be applied with regard to the appeal from the court's order." Subsequently, the defendant filed two new appeals from the court's November 16, 2017 orders, which, pursuant to Practice Book § 61-9, we have treated as amendments to the defendant's original appeal. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly denied in part his motion for modification by rejecting his request to modify his unallocated alimony and child support obligation. We disagree.

We begin by noting that "[t]he well settled standard of review in domestic relations cases is that this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Notwithstanding

the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citations omitted; internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 336, 152 A.3d 1230 (2016).

The defendant claims that the trial court abused its discretion by (1) ordering the unallocated alimony and child support amount of $900 to continue without making findings under the child support guidelines, (2) concluding that the defendant admitted there was no change in circumstances, and (3) concluding that there was insufficient evidence of a change of circumstances to justify modification. We address each claim in turn.

A

The defendant claims that the court abused its discretion by ordering that his current obligation to pay unallocated alimony and child support be continued without making findings under the child support guidelines. He claims that his request to modify his unallocated alimony and child support obligation automatically triggers the court's duty to make specific findings pursuant to the child support guidelines, even if he made no such request. We disagree.

"[Section] 46b-86 governs the modification of [an unallocated alimony and] child support order after the date of a dissolution judgment. . . . Section 46b-86 (a)[3] permits the court to modify [unallocated alimony and] child support orders in two alternative circumstances.

[3] General Statutes § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support . . . may, at any time thereafter, be . . . modified by the court upon a showing of a substantial change in the circumstances of either party or upon a showing that the final order for child support substantially deviates from the child support guidelines established pursuant to section 46b-215a . . . ."

Pursuant to this statute, a court may not modify [an unallocated alimony and] child support order unless there is first either (1) a showing of a substantial change in the circumstances of either party or (2) a showing that the final order for child support substantially deviates from the child support guidelines . . . .'' (Citation omitted; footnote added; footnote omitted; internal quotation marks omitted.) *Weinstein* v. *Weinstein*, 104 Conn. App. 482, 491–92, 934 A.2d 306 (2007), cert. denied, 285 Conn. 911, 942 A.2d 472 (2008).

In support of his request to modify his unallocated alimony and child support obligation, the defendant did not specifically allege either a substantial change in circumstances or that the December 9, 2014 order imposing that obligation substantially deviated from the child support guidelines. See footnote 1 of this opinion. The court read the defendant's request as seeking a modification of his unallocated alimony and child support obligation on the basis of a change in legal or physical custody and, in closing argument, the defendant specifically stated that he was ''requesting financial modifications due to a substantial change in circumstance.''[4]

On the basis of our review of the record, we conclude that the defendant never raised before the trial court his claim that his unallocated alimony and child support

[4] In closing argument, the following colloquy between the court and the defendant occurred:

''[The Defendant]: One of the issues that is before the court is the issue of unallocated, and terminating unallocated.

''The Court: That's your third requested modification.

''[The Defendant]: Yes, Your Honor.

''The Court: I took that to be premised on if there's a change in sole legal custody, and—and/or a change in the primary physical custody that we would need to revisit the child support payments. Was that what that was about?

''[The Defendant]: I'm sorry, Your Honor. Absolutely—it's not only that, but also under what I understand is [§] 46b-86 (a). In other words, even if custody doesn't change, I'm still requesting financial modifications due to a substantial change in circumstance.''

obligation substantially deviated from the child support guidelines.[5] "It is well established that an appellate

[5] In his reply brief, the defendant asserts that he raised "the second basis for modification" at trial. He cites to his closing argument, during which the following colloquy occurred:

"[The Defendant]: I am asking the court to take into account what my present financial circumstances are, and to order a modification on—

"The Court: And is that shown in your request for modification of the child support? Can you just show me where you say there's been a substantial change in my financial circumstances, and on that basis I'm asking you to change the ordered support?

"[The Defendant]: It was—to answer your question, no, Your Honor, it was something that I had, throughout this process, understood that in applying for the modification and including the financials, I had never understood that it was something that wouldn't come up in argument, and that my present circumstances would not be—could—might not be viewed. So I—I understand what Your Honor is saying. It's my understanding from the discussions had with [the plaintiff] throughout this process, it would—it would very much surprise me if—if it weren't something that—my understanding, Your Honor, was in providing in the F.M. 220 [worksheet for the Connecticut child support and arrearage guidelines] and the updated financial affidavit, it was my understanding that I didn't have to raise the issue of substantial change because the statute . . . .

"The Court: What statute?

"[The Defendant]: I'm sorry, it's two statutes, Your Honor, 46b-86 (a) and then it's—I'm not sure if I have it correct, but it's in 46b-86, where it states that if your income changes by greater than 15 percent, then there's a rebuttable presumption that it's a—it's a substantial change in financial circumstance. I did not anticipate—

"The Court: No, but that doesn't address my concern, which is where do you put the other side on notice that you're claiming there's a substantial change in circumstance and that you're asking for a change in child support based on that.

"[The Defendant]: I had understood, Your Honor, throughout this process of 20 months that it was never something that was unclear. . . . And my understanding, Your Honor, by filing the F.M. 220 [worksheet for the Connecticut child support and arrearage guidelines] and filing the—the financial affidavit, it was my understanding that it could be put before the court at any time even up until now that the financial circumstances have changed."

We note that the following colloquy, which the defendant does not cite to in his brief, also occurred:

"The Court: And where has that been—where's the evidence on a substantial change in circumstance?

"[The Defendant]: Your Honor, during my testimony, and during my cross-examination, it was introduced both financial affidavits that are current versus 2014, and also income tax returns for 2014, 2015, 2016. Your Honor, I also submitted the—the Connecticut Guidelines for statutory child support. And if Your Honor—as Your Honor's reviewing that, it—it shows that the amount—the weekly amount including a 20 percent arrearage would currently be $456 weekly under the guidelines. And [the plaintiff's attorney], I know, has made arguments and—and suggested that deductions on the—on my federal tax return have some bearing on the financial affidavit. But, Your Honor, if you look at the calculations, they don't. Even—even if Your

court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court *the precise* matter on which its decision is being asked. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party. . . . It therefore follows that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Corrarino* v. *Corrarino*, 121 Conn. App. 22, 29–30, 993 A.2d 486 (2010).

The defendant argues that "[t]he court had a duty to review the prior record and apply due diligence in making the required determination [under the child support guidelines], even if not requested to do so by either party." We disagree.

To support this proposition, the defendant relies on General Statutes § 46b-215b (c), which provides: "In any proceeding for the establishment or modification of a child support award, the child support and arrearage guidelines shall be considered in addition to and not

Honor disregarded my wife as a partner [in my business], which I don't believe would be valid or—or right—but even if Your Honor did disregard, even with an arrearage the weekly amount would be $688.80 according to the—according to the guidelines."

On the basis of our review of the transcript of the trial, however, it cannot fairly be said that these statements made in closing arguments served to advance an argument that the defendant should be granted a modification because the court's order of unallocated alimony and child support substantially deviated from the presumptive amount under the child support guidelines. See *Shamitz* v. *Taffler*, 145 Conn. App. 132, 136 n.5, 75 A.3d 62 (2013).

in lieu of the criteria for such awards established in sections 46b-84, 46b-86, 46b-130, 46b-171, 46b-172, 46b-215, 17b-179 and 17b-745." The defendant argues that the court was required to consider and make findings under the child support guidelines when determining whether his unallocated alimony and child support obligation should be modified. The court, however, considered the defendant's request to modify his unallocated alimony and child support obligation on the basis of a substantial change in circumstances.

"In the context of a trial court's consideration of a motion to modify, the guidelines become relevant only *after* a change in circumstances has been shown, if that is the ground urged in support of modification . . . or in determining whether the existing child support order substantially deviates from the guidelines, if that is the ground urged in support of modification." (Citation omitted; emphasis added.) *Mullin* v. *Mullin*, 28 Conn. App. 632, 635–36, 612 A.2d 796 (1992). Accordingly, because the defendant did not raise as a basis for the court's review his claim that his unallocated alimony and child support obligation substantially deviated from the child support guidelines, the court properly did not make findings under the child support guidelines when it determined that there was not sufficient evidence of a substantial change in circumstances to justify modification. Accordingly, the defendant's claim fails.

B

The defendant next claims that the court abused its discretion in denying his request to modify his unallocated alimony and child support obligation because its conclusion that he "had admitted there was no change in circumstance" was clearly erroneous. We disagree.

"With regard to the trial court's factual findings, the clearly erroneous standard of review is appropriate. . . . A factual finding is clearly erroneous when it is

not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . Simply put, we give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses." (Internal quotation marks omitted.) *Salzbrunn* v. *Salzbrunn*, 155 Conn. App. 305, 312, 109 A.3d 937, cert. denied, 317 Conn. 902, 114 A.3d 166 (2015).

In its September 29, 2017 order granting in part and denying in part the defendant's motion for modification, with respect to the defendant's request to modify his unallocated alimony and child support obligation, the court stated, "The defendant admits there is no claim for any substantial change in circumstance *in the motion* . . . ." (Emphasis added.) In his brief, the defendant mischaracterizes the court's statement by omitting the court's specific reference to the defendant's motion. On the basis of our review of the trial transcript, including, specifically, the defendant's statements during closing argument; see footnote 5 of this opinion; we conclude that the court's finding as to the state of the record before it was not clearly erroneous. Accordingly, the defendant's claim fails.

C

The defendant next claims that the court abused its discretion in concluding that there was not sufficient evidence of a change in circumstances to justify modification. We disagree.

"As to the substantial change of circumstances provision of § 46b-86 (a), [w]hen presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial

circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and . . . make an order for modification. . . . A party moving for a modification of a child support order must clearly and definitely establish the occurrence of a substantial change in the circumstances of either party that makes the continuation of the prior order unfair and improper. . . . The power of the trial court to modify the existing order does not, however, include the power to retry issues already decided . . . or to allow the parties to use a motion to modify as an appeal. . . . Rather, [t]he court has the authority to issue a modification only if it conforms the order to the distinct and definite changes in the circumstances of the parties. . . . The inquiry, then, is limited to a comparison between the current conditions and the last court order. . . . The party seeking modification bears the burden of showing the existence of a substantial change in the circumstances." (Citations omitted; internal quotation marks omitted.) *Weinstein* v. *Weinstein*, supra, 104 Conn. App. 492–93.

As previously indicated, the defendant did not state precisely on what basis he sought modification of his unallocated alimony and child support obligation. See footnote 1 of this opinion. The court reasonably read the defendant's request to alter his unallocated alimony and child support obligation as seeking a modification on the basis of a change in legal or physical custody; see footnote 4 of this opinion; a change which did not occur. The defendant argues that he also "articulated a request . . . to modify based on a change in financial circumstance right through closing argument," which the plaintiff does not dispute.

In support of his claim that the court improperly determined that he did not present sufficient evidence of a substantial change in circumstances based on a

change in "financial circumstances," the defendant raises three arguments. First, the defendant contends that "[t]he court erred in not taking [his increasing debt] into account in determining what evidence was sufficient in its mind to cross the threshold necessary to consider modifying the financial orders in this case." The defendant argues that "[t]he second basis for crossing the evidentiary threshold is [the] plaintiff's veracity as evidenced by her admittedly fabricated financial affidavits." Third, the defendant broadly states that the financial affidavits he had filed with the court support his contention that "his financial circumstances have changed and not just in terms of net income." He argues that "[t]he court had to at least consider this in reaching a conclusion, but it did not, and that was an abuse of discretion and plain error." We find the defendant's arguments unavailing.

The court found that the defendant did not meet his burden of showing sufficient evidence of a substantial change in circumstances. The record supports the court's conclusion. The defendant, who moved for the modification, had the burden of clearly and definitely establishing the occurrence of a substantial change in circumstances, here, the "financial circumstances" of either party. On the basis of our review of the record, we conclude that the court did not abuse its discretion in denying the defendant's request to modify his unallocated alimony and child support obligation.

II

The defendant next claims that the court improperly granted in part the plaintiff's motion for clarification because it abused its discretion in granting the plaintiff attorney's fees without making a specific finding of bad faith.[6] We agree.

[6] The defendant also argues that the court improperly granted the plaintiff attorney's fees through a motion for clarification. Because we agree with the defendant that the court abused its discretion by not making a specific finding of bad faith, we need not address this argument.

"We begin by setting forth the standard of review and legal principles relevant to this claim. Whether to allow [attorney's] fees . . . and if so in what amount, calls for the exercise of judicial discretion. . . . An abuse of discretion in granting [attorney's] fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did. . . .

"In *Berzins* v. *Berzins*, [306 Conn. 651, 661, 51 A.3d 941 (2012)], our Supreme Court noted that [t]he common law rule in Connecticut, also known as the American Rule, is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. . . . One such exception is the inherent authority of a trial court to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . .

"Our Supreme Court explained the narrow scope of this exception in *Maris* v. *McGrath*, [269 Conn. 834, 848, 850 A.2d 133 (2004)], in which [it] upheld a trial court's determination that attorney's fees should be awarded to the defendant because the trial court had found both that the case was wholly without merit and that the plaintiff repeatedly had testified untruthfully and in bad faith. [Our Supreme Court] reiterated principles that [it] previously had articulated indicating that a litigant seeking an award of attorney's fees for the bad faith conduct of the opposing party faces a high hurdle. . . . In *Maris*, and reiterated in *Berzins*, the court quoted its previous decision in *CFM of Connecticut, Inc.* v. *Chowdhury*, 239 Conn. 375, 393, 685 A.2d 1108 (1996), overruled in part on other grounds by *State* v. *Salmon*, 250 Conn. 147, 154–55, 735 A.2d 333 (1999), stating: We agree, furthermore, with certain principles articulated by the Second Circuit Court of Appeals in determining whether the bad faith exception applies. To ensure . . . that fear of an award of [attorney's] fees against them will not deter persons with colorable

claims from pursuing those claims, we have declined to uphold awards under the bad-faith exception absent both clear evidence that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes . . . and a high degree of specificity in the factual findings of [the] lower courts. . . . Whether a claim is colorable, for purposes of the bad-faith exception, is a matter of whether a reasonable attorney could have concluded that facts supporting the claim might be established, not whether such facts had been established. . . . To determine whether the bad-faith exception applies, the court must assess whether there has been substantive bad faith as exhibited by, for example, a party's use of oppressive tactics or its wilful violations of court orders; [t]he appropriate focus for the court . . . is the conduct of the party in instigating or maintaining the litigation. . . . The court held that *Maris* makes clear that in order to impose sanctions pursuant to its inherent authority, the trial court must find *both* that the litigant's claims were entirely without color *and* that the litigant acted in bad faith." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Light* v. *Grimes*, 156 Conn. App. 53, 66–68, 111 A.3d 551 (2015).

In the present case, the court granted in part the plaintiff's motion for clarification and awarded the plaintiff attorney's fees "as a sanction for bringing a baseless motion." The court, however, not only failed to find that the defendant had acted in bad faith, but also by granting in part the defendant's motion for modification, it cannot be said that the court found the defendant's claims to be entirely without color.[7] Accordingly,

[7] The defendant also claims that the court erred to the extent that it based its decision to award the plaintiff attorney's fees on Article XVII of the separation agreement. As a second basis for granting the plaintiff attorney's fees, the court stated at the hearing on the plaintiff's motion for clarification and motion for attorney's fees pending appeal: "Under Article 17 of the decree it provides that in the event either party has breached any agreement,

we conclude that the court abused its discretion in granting the plaintiff attorney's fees for opposing the defendant's motion for modification.

III

The defendant's final claim is that the court improperly granted the plaintiff's motion for attorney's fees and expenses pending appeal because it abused its discretion by not considering the financial abilities of the parties. We decline to review that claim due to an inadequate record.

On October 30, 2017, the plaintiff filed a motion for attorney's fees and expenses pending appeal. The defendant did not object to the plaintiff's motion and did not attend the hearing on the motion. At the hearing, the

the offending party shall pay to the other the attorney's fees and court costs incurred in the enforcement of this provision. I typically read those provisions to include not only the enforcement, but also the defense of claimed violations of the agreement, especially when they're so lacking in merit."

Although the defendant does not explicitly raise this concern, we note that the plaintiff never claimed that the defendant breached the separation agreement in her motion for attorney's fees or motion for clarification in which she reasserted her motion for attorney's fees. Rather, the plaintiff at all times sought attorney's fees pursuant to General Statutes § 46b-62. As our Supreme Court has explained, "due to the adversarial nature of our judicial system, [t]he court's function is generally limited to adjudicating the issues *raised by the parties* on the proof they have presented and applying appropriate procedural sanctions on motion of a party." (Emphasis in original; internal quotation marks omitted.) *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 564, 898 A.2d 178 (2006). By raising this issue sua sponte at the hearing, which the defendant did not attend, the defendant was not afforded adequate notice of the issue addressed by the court. See *Pritchard* v. *Pritchard*, 103 Conn. App. 276, 288, 928 A.2d 566 (2007) (parties not afforded "adequate notice of the issues the court intended to address"). Furthermore, the plaintiff does not defend, support, or address this issue on appeal. In light of the foregoing, we conclude that the court improperly found for the plaintiff on this alternative ground. See *Somers* v. *Chan*, 110 Conn. App. 511, 528–29, 955 A.2d 667 (2008) (court improperly reached issues not before it); *Haynes Construction Co.* v. *Cascella & Son Construction, Inc.*, 36 Conn. App. 29, 33–39, 647 A.2d 1015 (same), cert. denied, 231 Conn. 916, 648 A.2d 152 (1994).

court stated: "Hearing no objection, I'll grant that motion and order the defendant to pay an advance of $10,000 as a retainer to be applied toward attorney's fees incurred by the plaintiff with regard to the appeal from the court's order [on the defendant's motion to modify]." In its written order, the court did not make any factual findings or state the basis for its award.

"[General Statutes §] 46b-62 governs the award of attorney's fees in dissolution proceedings. That section provides in part that the court may order either spouse . . . to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in [General Statutes §] 46b-82. . . . The criteria set forth in § 46b-82 are the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to [§] 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability of such parent's securing employment. . . . An award of counsel fees under [§ 46b-62] calls for the exercise of judicial discretion. . . . In exercising its discretion, the court must consider the statutory criteria set out in §§ 46b-62 and 46b-82 and the parties' respective financial abilities." (Citation omitted; internal quotation marks omitted.) *Blum* v. *Blum*, 109 Conn. App. 316, 330–31, 951 A.2d 587, cert. denied, 289 Conn. 929, 958 A.2d 157 (2008).

In the present case, the record does not reveal the court's reasoning and whether, or to what extent, it considered the criteria set forth in § 46b-82. "It is a well established principle of appellate procedure that the appellant has the duty of providing this court with a

record adequate to afford review. . . . [W]hen the decision of the trial court does not make the factual predicates of its findings clear, we will . . . assume that the trial court acted properly." (Internal quotation marks omitted.) Id., 331. Accordingly, due to an inadequate record, we are unable to address the defendant's claim that the court abused its discretion in awarding the plaintiff attorney's fees and expenses pending appeal.

The judgment is reversed only with respect to the award of attorney's fees incurred on the motion for modification and the case is remanded with direction to vacate that order. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

MATTHEW C. *v.* COMMISSIONER OF CHILDREN AND FAMILIES*

(AC 40957)

Lavine, Keller and Beach, Js.

Syllabus

The plaintiff father appealed to the trial court from the decision by the defendant, the Commissioner of Children and Families, denying him a hearing to challenge the defendant's decision to substantiate allegations that he neglected his two minor children. The trial court rendered judgment dismissing the appeal, from which the plaintiff appealed to this court. On appeal, he claimed, inter alia, that the trial court improperly declined to equate a certain provision (§ 22-12-4) of the Policy Manual of the Department of Children and Families, as derived from a department regulation (§ 17a-101k-7), with the doctrine of collateral estoppel. *Held*:

1. The plaintiff could not prevail on his claim that the trial court improperly decided his administrative appeal on a basis not decided by the defendant's administrative hearing officer, which was based on his claim that

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

because the hearing officer dismissed his request for a substantiation hearing only on the basis of collateral estoppel, the court was not permitted to consider the applicability of § 22-12-4 of the policy manual: the issue of whether § 22-12-4 of the policy manual and the department regulation precluded the plaintiff from a hearing was clearly in the administrative record, the court, which questioned, at oral argument, as a matter of law, the applicability of collateral estoppel in light of the existence of the department regulation and policy manual provision that were applicable to the case, did not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, there was no support for the proposition that the trial court was limited to considering the same conclusions of law that the administrative body reached, and it was evident from the record that the court determined that the application of collateral estoppel by the hearing officer constituted legal error, not on the basis that the hearing officer's collateral estoppel analysis was erroneous, but because the hearing officer applied the common-law doctrine to the case instead of the relevant department regulation and policy manual provision; moreover, the court properly determined that the department regulation and the policy manual provision were not substantively identical to the common-law doctrine of collateral estoppel and that it was proper to apply them, and, under the facts of this case, pursuant thereto the court was permitted to dismiss the appeal.

2. The trial court having properly determined that the department regulation and the policy manual provision were not substantively identical to the common-law doctrine of collateral estoppel, it properly applied the applicable regulation rather than the common-law doctrine in evaluating the plaintiff's request for a hearing.

3. The plaintiff could not prevail on his claim that the trial court improperly dismissed his request for a substantiation hearing; although a judgment adjudicating neglect of a child in and of itself concerns only the status of the child, the subordinate facts found by the juvenile court, which were clearly articulated by the hearing officer, demonstrated that the juvenile court made a factual determination that the plaintiff was responsible for the neglect of his children, which precluded him from being afforded a substantiation hearing under the department regulation and policy manual.

4. The dismissal of the plaintiff's request for a substantiation hearing pursuant to the department regulation did not violate the plaintiff's right to fundamental fairness; through the course of the hearing before the juvenile court on both an order for temporary custody and the neglect petitions regarding the plaintiff's children, the plaintiff was provided with the protections that fundamental fairness dictate, as he was on notice that the factual allegations in support of both the applications for orders of temporary custody and neglect petitions were premised almost exclusively on his conduct, the record demonstrated that the

plaintiff was represented by counsel, who defended his position at a two day hearing, and the plaintiff testified at the hearing, called witnesses, presented his own evidence and had his counsel cross-examine other witnesses.

Argued November 27, 2018—officially released March 26, 2019

Procedural History

Administrative appeal from the decision by the defendant denying the plaintiff's request for a hearing regarding the decision by the defendant to substantiate allegations that the plaintiff neglected his two minor children, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Hon. Henry S. Cohn*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Campbell D. Barrett, with whom were *Johanna S. Katz* and, on the brief, *Jon T. Kukucka*, for the appellant (plaintiff).

Daniel M. Salton, assistant attorney general, with whom, on the brief, were *Benjamin Zivyon*, assistant attorney general, and *George Jepsen*, former attorney general, for the appellee (defendant).

Opinion

KELLER, J. The plaintiff, Matthew C., appeals from the judgment of the trial court dismissing his administrative appeal following a decision by the defendant, the Commissioner of Children and Families, denying him a hearing to challenge the defendant's decision to substantiate allegations that he neglected his two minor children. The plaintiff avers that the trial court erred by (1) deciding the plaintiff's appeal on a basis not decided by the defendant's administrative hearing officer, (2) declining to equate § 22-12-4 of the policy manual (policy manual) of the Department of Children and

Families (department),[1] as derived from § 17a-101k-7 of the department's regulations,[2] with the doctrine of collateral estoppel, (3) dismissing his appeal from the denial of his request for a substantiation hearing irrespective of whether § 22-12-4 of the policy manual and collateral estoppel are equivalent, and (4) violating his right to fundamental fairness by dismissing his appeal after denying him a substantiation hearing. We affirm the judgment of the trial court.

The facts and procedural history of the case are as follows. The plaintiff is the father of two minor children, B and E. He became legally involved with the department on September 16, 2015, when neglect petitions

[1] We note that § 22-12-4 of the policy manual was the applicable subsection when this matter was before the department. The department's policy manual has since been changed, and the contents of that subsection transferred, effective January 2, 2019. For the sake of clarity, each reference to § 22-12-4 in this opinion is to the version of the subsection in use while the plaintiff's request for an administrative hearing was before the department.

[2] The language of § 22-12-4 of the policy manual largely mirrored the language of the department regulation from which it was derived. Section 17a-101k-7 of the Regulations of Connecticut State Agencies provides in relevant part: "(i) A request for an administrative hearing shall be denied by the department when a civil court proceeding has been finally disposed with a factual determination by the court that the identified person committed the act of child abuse or neglect that is the subject of the substantiation." Section 22-12-4 of the policy manual provided: "A request for a substantiation hearing shall be denied by the Department when a criminal, civil, probate court or administrative proceeding has resulted in a finding that the perpetrator has committed the act of child abuse or neglect that is the subject of the substantiation."

We note that in the present matter, the parties and the adjudicatory bodies occasionally referred to the department policy manual provision and regulation interchangeably. The trial court, however, made clear that dismissal of the plaintiff's request for a hearing was proper pursuant to both the department regulation and the policy manual provision. Although the plaintiff almost exclusively refers to the policy manual in crafting his arguments on appeal, we are mindful that the language of the regulation controls. See *Amaral Bros., Inc.* v. *Dept. of Labor*, 325 Conn. 72, 85, 155 A.3d 1255 (2017) (regulations issued by administrative agency have same force and effect as statute).

were filed by the defendant pursuant to General Statutes § 46b-129, alleging that B and E, who were twelve and ten years of age at the time, had been neglected pursuant to General Statutes (Rev. to 2015) § 46b-120.[3] On the same date, the Superior Court for Juvenile Matters granted applications filed by the defendant seeking ex parte temporary custody orders and vested temporary custody of the children ex parte in their mother, pending a further hearing, after finding that the children were in immediate physical danger from their surroundings, and that continuation in those surroundings was contrary to their welfare.[4]

The summary of facts accompanying the neglect petitions alleged, inter alia, that the plaintiff had demonstrated a pattern of coercive, controlling, and abusive behavior toward the children's mother, to which the children were exposed; that the children had witnessed

[3] The petitions alleged as grounds for neglect that each child was being denied proper care and attention, physically, educationally, emotionally or morally, and being permitted to live under conditions, circumstances or associations injurious to the well-being of the child or youth. See General Statutes (Rev. to 2015) § 46b-120 (6) (B) and (C).

[4] General Statutes § 46b-129 (b) provides in relevant part: "If it appears from the specific allegations of the petition and other verified affirmations of fact accompanying the petition and application, or subsequent thereto, that there is reasonable cause to believe that (1) the child or youth is suffering from serious physical illness or serious physical injury or is in immediate physical danger from the child's or youth's surroundings, and (2) as a result of said conditions, the child's or youth's safety is endangered and immediate removal from such surroundings is necessary to ensure the child's or youth's safety, the court shall either (A) issue an order to the parents or other person having responsibility for the care of the child or youth to appear at such time as the court may designate to determine whether the court should vest the child's or youth's temporary care and custody in a person related to the child or youth by blood or marriage or in some other person or suitable agency pending disposition of the petition, or (B) issue an order ex parte vesting the child's or youth's temporary care and custody in a person related to the child or youth by blood or marriage or in some other person or suitable agency. A preliminary hearing on any ex parte custody order or order to appear issued by the court shall be held not later than ten days after the issuance of such order. . . ."

their mother being screamed at, demeaned, and threatened by the plaintiff; that B had mimicked the plaintiff's behavior in that he engaged in verbally and physically aggressive behavior toward his mother and sister; that B was hospitalized after he damaged his mother's car with a hammer or ax, broke a window, and set four small fires outside the home; that the plaintiff was unwilling to accept voluntary services in order to help B with his mood disorder diagnosis; and that E was directly affected by the plaintiff's actions in that she was fearful in the home, had emotional outbursts, and had become dysregulated with her emotions.

The juvenile court, *Hon. Barbara M. Quinn*, judge trial referee, held a consolidated hearing on October 2 and 19, 2015, on the applications for orders of temporary custody and on the adjudicatory phase of each of the neglect petitions, which the plaintiff, through his counsel, contested.[5] On November 3, 2015, the juvenile court rendered its decision concluding that the allegations of the affidavit seeking the orders of temporary custody and the grounds for the neglect alleged in the neglect petitions had been proven. The court sustained the orders of temporary custody and adjudicated both of the children neglected on the basis that they were being denied proper care and attention, physically, educationally, emotionally or morally, and were being permitted to live under conditions, circumstances or associations injurious to their well-being.

[5] Practice Book § 33a-7 (e) provides in relevant part: "Subject to the requirements of Section 33a-7 (a) (6), upon motion of any party or on its own motion, the judicial authority may consolidate the hearing, on the order of temporary custody or order to appear with the adjudicatory phase of the trial on the underlying petition. At a consolidated order of temporary custody and neglect adjudication hearing, the judicial authority shall determine the outcome of the order of temporary custody based upon whether or not continued removal is necessary to ensure the child's or youth's safety, irrespective of its findings on whether there is sufficient evidence to support an adjudication of neglect or uncared for. . . ."

After being notified that the defendant substantiated allegations that the plaintiff was responsible for the neglect of his children, the plaintiff filed a request for an administrative hearing on February 18, 2016.[6] On April 4, 2016, the department moved to dismiss the plaintiff's appeal from the substantiation pursuant to the department regulation and § 22-12-4 of the policy manual because the juvenile court already had factually

[6] General Statutes § 17a-101g (b) provides the criteria for when the commissioner should substantiate a reported case of child abuse or neglect and whether the offender's name should be placed on the child abuse and neglect registry. General Statutes (Rev. to 2015) § 17a-101g (b) provides in relevant part: "After an investigation into a report of abuse or neglect has been completed, the commissioner shall determine, based upon a standard of reasonable cause, whether a child has been abused or neglected, as defined in section 46b-120. If the commissioner determines that abuse or neglect has occurred, the commissioner shall also determine whether: (1) There is an identifiable person responsible for such abuse or neglect; and (2) such identifiable person poses a risk to the health, safety or well-being of children and should be recommended by the commissioner for placement on the child abuse and neglect registry established pursuant to section 17a-101k. . . ." See *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 396–97 n.3, 94 A.3d 588 (2014). The commissioner's determination that an individual is responsible for the abuse or neglect of a child is referred to as a substantiation. See Regs., Conn. State Agencies § 17a-101k-7 (h) and (i).

General Statutes § 17a-101k (b) provides: "Upon the issuance of a recommended finding that an individual is responsible for abuse or neglect of a child pursuant to subsection (b) of section 17a-101g, the commissioner shall provide notice of the finding, by first class mail, not later than five business days after the issuance of such finding, to the individual who is alleged to be responsible for the abuse or neglect. The notice shall: (1) Contain a short and plain description of the finding that the individual is responsible for the abuse or neglect of a child; (2) Inform the individual of the existence of the registry and of the commissioner's intention to place the individual's name on the registry unless such individual exercises his or her right to appeal the recommended finding as provided in this section; (3) Inform the individual of the potential adverse consequences of being listed on the registry, including, but not limited to, the potential effect on the individual obtaining or retaining employment, licensure or engaging in activities involving direct contact with children and inform the individual of the individual's right to administrative procedures as provided in this section to appeal the finding; and (4) Include a written form for the individual to sign and return, indicating if the individual will invoke the appeal procedures provided in this section."

We note that in the present case, the plaintiff was not recommended for entry on the child abuse and neglect registry.

determined that the plaintiff was the perpetrator of the neglect. On April 19, 2016, the plaintiff filed an objection to the motion to dismiss arguing that § 22-12-4 did not apply because there was no determination by the juvenile court that the plaintiff was responsible for the abuse or neglect of his children. He went on to argue that the motion "should also be denied because the policy behind the denial [of hearing] clause of § 22-12-4 does not apply to the facts of the present case." In particular, he argued that § 22-12-4 was based on the common-law doctrine of collateral estoppel and that "the doctrine of collateral estoppel, or the [department] equivalent, § 22-12-4, does not apply because," inter alia, the issue of whether the plaintiff was the perpetrator of the neglect was not actually litigated.

After receiving the motion to dismiss and the objection to the motion, the hearing officer required that the department "submit the [s]ummary of [f]acts submitted to the [j]uvenile [c]ourt in the neglect proceedings" and ordered the parties to "submit a brief on the issue of whether the [plaintiff] is collaterally estopped from proceeding with his substantiation hearing if the issue was actually litigated and necessarily determined in the prior action."[7] On September 26, 2016, the hearing officer issued a written decision granting the department's

[7] The defendant's brief to the hearing officer cited to the regulation and policy manual language and argued that "[w]hile the court need not identify parental fault in order to adjudicate a child as a neglected child, in this case the court did." The defendant argued that "[t]he [juvenile] court attributed the neglect of the children to the out of control and coercive behaviors of [the plaintiff], including his undermining . . . disregard . . . and . . . uncontrolled anger towards [his wife]." The defendant then went on to address the hearing officer's request of whether collateral estoppel applied in the case. The defendant concluded her argument by stating: "The findings of the court in the [November 3, 2015] decision are directly on point with respect to the factors required of the [defendant] to substantiate [the plaintiff] as a perpetrator of physical and emotional neglect of the children. [The plaintiff] had the opportunity to fully and fairly litigate the issue, and as such, [he] should be precluded from relitigating the same issue in a second proceeding pursuant to [§] 17a-101k-7 (i) of the [d]epartment's [a]gency [r]egulations and [§] 22-12-4 of the [d]epartment's policy."

motion to dismiss, denying the plaintiff's request for a substantiation hearing on the basis of collateral estoppel. In her decision, the hearing officer indicated that the "issue of whether the [plaintiff] has emotionally or physically neglected [his] children has been actually decided . . . in the juvenile court proceedings, and, therefore is subject to collateral estoppel."

On November 9, 2016, the plaintiff filed an administrative appeal pursuant to General Statutes § 4-183. The parties submitted briefs to the court and, on August 1, 2017, the court, *Hon. Henry S. Cohn*, judge trial referee, held oral argument on the merits. During argument, the court expressed some skepticism about whether collateral estoppel and § 22-12-4 of the policy manual were substantively identical and whether it was proper for the hearing officer to have applied collateral estoppel instead of the policy manual provision directly related to this matter. Accordingly, with the consent of the parties, the court ordered the parties to provide supplemental briefs pursuant to General Statutes § 4-183 (g) on the issue of whether § 22-12-4 of the policy manual was identical to collateral estoppel and whether § 22-12-4 provided an independent administrative basis for dismissal of the request for a substantiation hearing. On October 2, 2017, the court issued a memorandum of decision in which it concluded that although the policy manual provision and the doctrine of collateral estoppel were similar in some respects, "the two concepts are not identical." On the basis of the department regulation and § 22-12-4 of the policy manual, the court concluded that the dismissal of the administrative

In the plaintiff's brief, he set forth an analysis of why the doctrine of collateral estoppel did not apply in this matter and requested that the hearing officer "find that the doctrine of collateral estoppel does not apply to the issue of whether [he] committed the act of child neglect as that issue is not identical to the issue of whether the children were neglected, was not actually litigated in the trial court and was not necessarily determined in the trial court."

appeal was proper. This appeal followed. Additional facts will be set forth as necessary.

We commence our discussion by setting forth the standard of review. Judicial review of an administrative decision is governed by statute. See *Celentano* v. *Rocque*, 282 Conn. 645, 652, 923 A.2d 709 (2007). When reviewing the trial court's decision, we seek to determine whether that decision is in harmony with the Uniform Administrative Procedure Act (act), General Statutes § 4-166 et seq. See *Dickman* v. *Office of State Ethics, Citizen's Ethics Advisory Board*, 140 Conn. App. 754, 766, 60 A.3d 297, cert. denied, 308 Conn. 934, 66 A.3d 497 (2013). With regard to questions of fact, our cases have made clear that review of administrative agency decisions is limited and "requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact." (Internal quotation marks omitted.) *Matthew M.* v. *Dept. of Children & Families*, 143 Conn. App. 813, 824, 71 A.3d 603 (2013).

Our Supreme Court also has noted that "[j]udicial review of the conclusions of law reached administratively is also limited. The court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Internal quotation marks omitted.) *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 800, 955 A.2d 15

(2008). "Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference." (Internal quotation marks omitted.) *Palomba-Bourke* v. *Commissioner of Social Services*, 312 Conn. 196, 203, 92 A.3d 932 (2014). Thus, when an agency's interpretation has not been "subjected to judicial scrutiny or consistently applied by the agency over a long period of time, our review is de novo." (Internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, 310 Conn. 276, 283, 77 A.3d 121 (2013).

I

We first address the plaintiff's claim that the trial court erred by deciding the plaintiff's appeal on a basis not decided by the hearing officer. In his view, because judicial review under the act " 'is very restricted' " and because the hearing officer dismissed his request for a substantiation hearing only on the basis of collateral estoppel, the court was not permitted to determine whether § 22-12-4 of the policy manual was the applicable law to govern the present matter. In other words, the plaintiff claims that the trial court was not permitted to consider the applicability of the policy manual and could only evaluate the correctness of the collateral estoppel analysis undertaken by the hearing officer. We disagree.

To support his argument, the plaintiff contends that *Dortenzio* v. *Freedom of Information Commission*, 42 Conn. App. 402, 679 A.2d 978 (1996), is determinative.

In *Dortenzio*, this court addressed a claim of whether the trial court improperly substituted its judgment for that of the Freedom of Information Commission (commission). Id., 407. The commission argued that the trial court "failed to confine its review of the [commission's] decision to the issues raised and the findings in the administrative record." Id. In reversing the trial court's judgment, this court concluded that the trial court "needlessly enlarged the issue on appeal . . . by examining . . . an argument not found in the administrative record . . . [that was] neither raised before nor addressed by the [commission]." (Citations omitted; internal quotation marks omitted.) Id., 409.

The present case is easily distinguishable. The issue of whether § 22-12-4 of the policy manual and the department regulation precluded the plaintiff from a hearing was clearly in the administrative record—the department's sole argument for its motion to dismiss was that § 22-12-4 of the policy manual and the regulation precluded the plaintiff from obtaining a substantiation hearing. The plaintiff then argued in his opposition motion that § 22-12-4 of the policy manual did not apply and, by relying on Superior Court authority, equated it to the doctrine of collateral estoppel. After receiving the motion to dismiss and the opposition to the motion, the hearing officer appears also to have equated § 22-12-4 of the policy manual and the doctrine of collateral estoppel because she requested briefing solely on whether the plaintiff was collaterally estopped from receiving a substantiation hearing. The hearing officer ultimately dismissed the appeal on the basis of collateral estoppel. On appeal in the Superior Court, the court, rather than addressing whether the hearing officer's analysis of collateral estoppel was correct, determined that the applicable department policy manual provision, as authorized by the department regulation,

was the proper basis for denying the plaintiff's request for a substantiation hearing.

We recognize and agree with the plaintiff that the act limits judicial review of agency decisions but disagree with him as to the extent it does so with respect to questions of law. The plaintiff avers that the trial court's decision dismissing his appeal pursuant to the policy manual provision and its failure to consider the issue under the doctrine of collateral estoppel "was error in light of the clear precedent that a trial court may not retry the case or substitute its own judgment for that of the agency." We reject this argument for several reasons.

First, the act makes clear that a "court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." General Statutes § 4-183 (j). On the basis of our review of the record, it is clear that the court did not do so. The court did not attempt to substitute or retry the case with respect to any questions of fact found by the hearing officer. Instead, it questioned at oral argument, as a matter of law, the applicability of collateral estoppel in light of the existence of a department regulation and policy manual provision that were applicable to the case. The court also went as far as to note in its memorandum of decision that the court had "raised a legal argument, the effect of the policy manual, and is not seeking to overturn a factual finding made by the hearing officer."

Second, our case law provides that "[c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Internal quotation marks omitted.) *Commissioner of Emergency Services & Public Protection* v. *Freedom of*

Information Commission, 330 Conn. 372, 379, 194 A.3d 759 (2018); *Freedom of Information Officer*, *Dept. of Mental Health & Addiction Services* v. *Freedom of Information Commission*, 318 Conn. 769, 781, 122 A.3d 1217 (2015). These cases, however, do not stand for the proposition that incorrect conclusions of law must stand. As the defendant aptly points out in her appellate brief, the plaintiff has not cited to any authority for his contention that, as part of the limited nature of administrative review, the trial court is always limited to considering the same conclusions of law that the administrative body reached. Contrary to that position, § 4-183 (j) allows for a court to modify the agency decision or remand the case for further proceedings if "the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) *affected by other error of law*; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." (Emphasis added.)

It is evident from the record that the court determined that the application of collateral estoppel by the hearing officer constituted legal error, not on the basis that the hearing officer's collateral estoppel analysis was erroneous, but because the hearing officer applied the common-law doctrine to the case instead of the relevant department regulation and policy manual provision. During a colloquy with counsel at oral argument, the court stated: "You've got a policy manual. You enforce the policy manual." The court also made clear that it agreed with the defendant's description that the regulation is "an administrative rule about an administrative

designation and the administrative body of law applies." It indicated that "the law is clear that if a case is . . . an administrative appeal; I'm not bound by the legal reasoning of the hearing officer. I can decide whether or not, as a matter of law whether this was the right outcome or not." The court then gave the parties an opportunity to brief the issue. After reviewing those briefs, the court set forth in its memorandum of decision that the doctrine of collateral estoppel and § 22-12-4 of the policy manual were not identical. Although the court ultimately agreed with the hearing officer's conclusion that the appeal should be dismissed, it determined dismissal was proper because the department regulation and policy manual did not entitle the plaintiff to a hearing. We agree with the court that the department regulation and the policy manual provision are not substantively identical to the common-law doctrine of collateral estoppel, and that it was proper to apply the regulation and policy manual provision. See part II of this opinion. On the basis of our review of the record and the relevant authorities, we conclude that the facts of this case permitted the court to dismiss the appeal pursuant to the department regulation and the policy manual.

II

The plaintiff next avers that even if this court finds that the trial court correctly considered the policy manual when it dismissed his appeal, that this court should reverse the trial court's decision because it erred when it held that § 22-12-4 of the policy manual and the doctrine of collateral estoppel were not substantively the same. The defendant argues, however, that if we were to conclude that the regulation and the common-law doctrine of collateral estoppel are the same, we would ultimately be impugning common-law principles into the regulation and would be stepping far beyond the constraints of General Statutes § 1-2z. We agree with the defendant.

The plaintiff's argument primarily relies on the unpublished Superior Court decision of *Lang* v. *Dept. of Children & Families*, Superior Court, judicial district of New Britain, Docket No. CV-07-4014311-S (July 18, 2008), which, prior to the underlying proceeding, was authored by the trial court judge in this case. By grasping upon language in *Lang* where the court stated that the facts of the case "hardly justif[y] the conclusion that applying collateral estoppel, or the [department] equivalent, § 22-12-4, is warranted," the plaintiff appears to argue that this language is a binding conclusion that the two concepts are substantively identical.[8] It is unclear, however, how this trial level decision binds us to conclude the same. Because we do not have the benefit of either a prior judicial or time-tested agency construction of whether the policy manual and regulation are substantively the same as the doctrine of collateral estoppel, we construe in a plenary fashion whether § 22-12-4 of the policy manual and its regulatory counterpart, § 17a-101k-7, are substantively the same as the common-law doctrine of collateral estoppel. See *Williams* v. *General Nutrition Centers, Inc.*, 326 Conn. 651, 657, 166 A.3d 625 (2017).

We begin our interpretation of the regulation by looking to its plain meaning. Id. ("because regulations have

[8] We note that there is nothing to suggest that the use of the word "equivalent" is anything other than loose language, not intended to mean that the standards are identical. We also note that after the court concluded in its memorandum of decision that the two concepts were not identical, the court took time to explain its earlier decision in *Lang* and distinguished it from the present case. The court indicated that "[o]f course there must be a full hearing with the opportunity for the respondent to testify in the Superior Court proceeding. In this, the policy manual is identical to common-law issue preclusion; this is what the case of *Lang* . . . recognized. Respondent Lang had admitted in [the] Superior Court . . . to [the] criminal charge [of] risk of injury to a child. The [criminal] court took no evidence on the plea, and Lang had merely been canvassed as to his acceptance of the plea. Under either collateral estoppel or the [department] regulation or the [department] policy manual, in *Lang* a substantiation hearing was warranted."

the same force and effect as statutes, we interpret both using the plain meaning rule''); see General Statutes § 1-2z. Section 17a-101k-7 (i) of the Regulations of Connecticut State Agencies provides: ''A request for an administrative hearing shall be denied by the department when a civil court proceeding has been finally disposed with a factual determination by the court that the identified person committed the act of child abuse or neglect that is the subject of the substantiation.'' A plain reading of the regulation clearly delineates the circumstances in which the agency may deny an individual's request for an administrative hearing. We have not found, nor has the plaintiff demonstrated, how the regulation can be susceptible to more than one reasonable interpretation. Accordingly, we conclude that the regulation is plain and unambiguous, which means we need not look to extratextual evidence to discern its meaning. See General Statutes § 1-2z; *McCoy* v. *Commissioner of Public Safety*, 300 Conn. 144, 150–51, 12 A.3d 948 (2011) (''The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .'' [Internal quotation marks omitted.]).

Although the plaintiff contends that the regulation, which was promulgated by the defendant, and the common-law doctrine of collateral estoppel are substantively identical, the regulation is conspicuously devoid of the requirements of common-law collateral estoppel.[9]

[9] ''[C]ollateral estoppel precludes a party from relitigating issues and facts actually and necessarily determined in an earlier proceeding between the same parties or those in privity with them upon a different claim. . . . Furthermore, [t]o invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior

For example, there is no language in the regulation that indicates that the factual issues presented by both cases must be identical, or that they must have been necessary for the outcome of the prior civil case, or even that the identified person must have been a party to the prior proceeding. Additionally, the regulation does not indicate that the provision was intended to track the common-law doctrine of collateral estoppel.

While it appears that the two principles are similar in that they determine the preclusive effect that a prior proceeding has on a subsequent action, they are by no means identical. Nonetheless, we agree with the trial court that the regulation, like the doctrine of collateral estoppel, requires that there be a full opportunity for the respondent to be heard. This requirement ensures fairness. See part IV of this opinion. But to conclude that the regulation and the doctrine of collateral estoppel are substantively identical would require us to read language into the regulation that does not exist. We decline to do so. We, therefore, conclude that the court properly determined that the department regulation and the policy manual are not substantively identical to the common-law doctrine of collateral estoppel, and that the trial court properly applied the applicable regulation rather than the common-law doctrine in evaluating the plaintiff's request for a hearing.

III

The plaintiff next argues that, irrespective of whether § 22-12-4 of the policy manual and collateral estoppel are substantively identical, the court erred by dismissing his request for a substantiation hearing. In particular, he argues that, on the basis of this court's precedents, a trial court's finding of neglect is not directed against the parents but rather goes to the status

proceeding." (Internal quotation marks omitted.) *In re Kyllan V.*, 180 Conn. App. 132, 138, 181 A.3d 606, cert. denied, 328 Conn. 929, 182 A.3d 1192 (2018).

of the children. For the reasons set forth herein, we disagree with the plaintiff.

We briefly set forth additional facts necessary for the disposition of this claim. After temporary custody was vested ex parte with the mother, the juvenile court held a consolidated hearing on the orders of temporary custody and the neglect petitions. On November 3, 2015, the juvenile court rendered its decision concluding that the allegations of the affidavit seeking the orders of temporary custody and the grounds for neglect that were alleged in the neglect petitions had been proven. The juvenile court sustained the order of temporary custody and adjudicated both of the children neglected on the basis of the grounds alleged.

The defendant substantiated the allegations that the plaintiff was responsible for the neglect of both his children and, on February 18, 2016, the plaintiff requested that the defendant provide him with a substantiation hearing. On September 26, 2016, the hearing officer rendered her final decision on whether the request for a substantiation hearing should be dismissed and concluded that the plaintiff, who was represented by counsel and had a full opportunity to be heard, was precluded from a hearing because the juvenile court had already ruled on the issue of the plaintiff's neglect. The hearing officer set forth the following facts: "The [juvenile court] rendered [its] decision on November 3, 2015. In the bench order, [the juvenile court] noted that the children were removed on September 16, 2015, after the [plaintiff] refused voluntary [department] services on [B's] behalf, and the mother indicated that she feared for her safety and that of the children. A temporary ex parte [order of] custody of both children was vested in the mother by the court on September 16.

"In [the juvenile court's] order, [it] concluded that 'the allegations in the affidavit seeking the order[s] of

[temporary] custody [and] the neglect petition[s] have been proven. Specifically, the court finds that both children appear to have significant emotional disturbances, and at the time of their removal were being permitted to live under conditions injurious to their health and well-being; each was being denied the proper care and attention they required.'

"[The juvenile court] further concluded that 'the relationship between their parents had deteriorated to the point where the atmosphere was toxic for the children and their mother. [The plaintiff] exerted control over the minutia of their home lives while expecting their mother to carry out the routine and daily duties with constant second guessing, criticism and much anger and yelling.'

"The [juvenile] court commented on the [plaintiff's] 'hostile and out of control behavior' noting that a video in evidence showing the [plaintiff] 'completely out of control' would lead 'any rational person' to be 'afraid under these circumstances, regardless of the provocation.' [The juvenile court] also noted that the text exchanges indicate that the [plaintiff] is 'unwilling to cede any respect to his wife and believes he is justified in the many small and major ways his coercive and threatening behavior inhibits her life and that of his children.'

"In [its] decision, [the juvenile court] noted that [B] has 'picked up [the plaintiff's] utter disregard of wife and mother, and so he yells at her and refuses to obey normal parental strictures' and that [E] 'is clearly suffering under this male regimen of terror.' [The juvenile court] noted that the [plaintiff] blocked the [In-Home Child and Adolescent Psychiatric Services (IICAPS)[10]]

[10] "IICAPS provides home-based treatment to children, youth and families in their homes and communities. Services are provided by a clinical team which includes a Master's-level clinician and a Bachelor's-level mental health counselor. The clinical team is supported by a clinical supervisor and a child & adolescent psychiatrist. IICAPS Services are typically delivered for

. . . for [B] in any way he could because 'such an intrusion into the family of which he believes himself to be the sovereign head was completely unacceptable to [the plaintiff].'

"[The juvenile court] concluded that '[b]ased on all the detailed and probative, credible evidence adduced at trial, only a small portion of which the court has just reviewed, the court finds at the time of the [order of temporary custody] the children were in immediate physical danger from their surroundings.' [The juvenile court] further adjudicated [B] and [E] 'as neglected under the [grounds] set forth in the petition.' [The juvenile court] also set forth that the [plaintiff's] access to the children shall be 'therapeutic access only until such time as the psychological evaluation ordered in this case shall be completed and further orders entered.' " (Footnotes added and omitted.)

The hearing officer also noted in her decision that the reasons for the neglect petitions, which were set forth in the summary of facts attached to each of the petitions, were based solely on the plaintiff's actions. The hearing officer set forth the summary of facts in her final decision and concluded that the plaintiff was collaterally estopped from receiving a substantiation hearing. The plaintiff appealed the decision to the Superior Court.

After proceedings before the trial court, *Hon. Henry S. Cohn*, judge trial referee, the court set forth its decision in an October 2, 2017 memorandum of decision. Therein, the court summarized the record, highlighted the summary of facts that accompanied the neglect

an average of 6 months. IICAPS staff also provide 24-hour/7-day emergency crisis response." State of Connecticut Department of Children and Families, "Intensive Home Based Services," available at https://portal.ct.gov/DCF/Behavioral-Health-Partnership/Intensive-Home-Based-Services#Intensive_In-Home_Child_and_Adolescent_Psychiatric_Services_(IICAPS) (last visited March 21, 2019).

petitions, and quoted the hearing officer's final decision. The court concluded, inter alia, that "[s]ince the civil proceeding was held and concluded that the plaintiff was a perpetrator of child neglect, the question becomes whether he had the opportunity to state his position before [the juvenile court]. Since as the record . . . clearly shows, the [plaintiff] was present at the [juvenile court] trial that took place over two days, had an opportunity to testify fully, and to summarize his position, the exception to a hearing provided in the [department] regulation and policy manual apply in this matter. The hearing officer was correct in dismissing the plaintiff's request."[11]

The question before us is whether, under the unique circumstances of this case and pursuant to the department regulation, the plaintiff is precluded from receiving a substantiation hearing. To begin, § 17a-101k-7 (i) of the Regulations of Connecticut State Agencies provides: "A request for an administrative hearing shall be denied by the department when a civil court proceeding has been finally disposed with a factual determination by the court that the identified person committed the act of child abuse or neglect that is the subject of the substantiation."

The parties do not dispute that that the proceeding before the juvenile court was a "civil court proceeding." To be sure, this court has made clear that "[c]hild protection proceedings are civil matters." *In re Natalie J.*, 148 Conn. App. 193, 207, 83 A.3d 1278, cert. denied, 311 Conn. 930, 86 A.3d 1056 (2014); see Practice Book § 32a-2 (a). Nor do the parties dispute that the decision

[11] Only the transcript of the juvenile court's oral decision was included in the record before the hearing officer. On August 1, 2017, the parties agreed during oral argument before the trial court to supplement the record with a full transcript of the proceedings that took place before the juvenile court on October 2 and 19, 2015.

"finally disposed" of the matter.[12] The plaintiff contends only that our decisions in *In re Alba P.-V.*, 135 Conn. App. 744, 42 A.3d 393, cert. denied, 305 Conn. 917, 46 A.3d 170 (2012), and *In re Claudia F.*, 93 Conn. App. 343, 888 A.2d 1138, cert. denied, 277 Conn. 924, 895 A.2d 796 (2006), are determinative in that they hold that "a trial court's adjudication of a child as neglected does not foreclose a parent from proceeding with a substantiation hearing to determine that parent's culpability." He argues that these cases have concluded that adjudications of neglect are not findings about a particular individual's responsibility for the neglect but, rather, are directed to the status of the children.

In *In re Alba P.-V.*, the respondent mother appealed from the judgments of the trial court adjudicating two of her children neglected and ordering a six month period of protective supervision. *In re Alba P.-V.*, supra, 135 Conn. App. 745. This court dismissed the appeal as moot because the period of protective supervision had already passed. Id., 746–47. The mother argued that as a collateral consequence, dismissal of her case would foreclose her from challenging her placement on the central registry and the substantiations through the administrative process because, in her view, § 22-12-4 of the policy manual would preclude her from doing so. Id., 752–54. The court ultimately rejected this argument by noting "that the court's adjudications of neglect challenged on appeal are not findings about the respondent, but are directed at the status of her children." Id., 754–55. In reaching this conclusion, the court cited to, inter alia, the following language in *In re Zamora S.*, 123 Conn. App. 103, 108, 998 A.2d 1279 (2010): "[A]n adjudication of neglect relates to the status of the child and is not necessarily premised on parental fault. A

[12] We also note that the plaintiff did not pursue any challenge to the juvenile court's decision sustaining the orders of temporary custody and adjudicating his children neglected.

finding that the child is neglected is different from finding who is responsible for the child's condition of neglect." (Internal quotation marks omitted.) *In re Alba P.-V.*, supra, 749 n.4.

Additionally, in *In re Alba P.-V.*, this court noted that the respondent mother did not argue that there were subordinate factual findings in the record concerning her culpable conduct. Id., 755 n.14. To the contrary, the court determined that the respondent argued only "that the court's finding of neglect was improper because it reached only 'two factual conclusions—that there were prior substantiations and that [her daughter] was pregnant.' " Id.

In *In re Claudia F.*, the respondent mother appealed from the judgments of the trial court adjudicating three of her children neglected and committing them to the care, custody, and guardianship of the commissioner. *In re Claudia F.*, supra, 93 Conn. App. 344. The commissioner argued that the mother voluntarily terminated her parental rights, which rendered the appeal moot. Id., 346. The mother claimed specifically that her appeal was not moot because, as a result of the underlying finding of neglect, it was reasonably likely that she would be listed on the child abuse registry and that her appeal was "the only recourse for having her name expunged from that registry." Id., 347. The court noted that "[a] judgment of neglect is not directed at the [mother] as a parent, but rather is directed at the condition of the children, namely, that they are neglected." Id. The court further stated that "any concern [by the mother] about the dissemination of the records . . . will not be remedied by a reversal of the finding of neglect because the department's record of its concerns regarding medical neglect, domestic violence and unresolved mental health issues will still be in the records because the [mother] did not appeal from the order of

temporary custody." Id. The applicability of the department regulation and policy manual was not an issue in the case.

The plaintiff appears to rely on these cases primarily for the proposition that "[a]n adjudication of neglect relates to the status of the child and is not *necessarily* premised on parental fault." (Emphasis added; internal quotation marks omitted.) *In re Zamora S.*, supra, 123 Conn. App. 108. While the plaintiff is correct in that a judgment adjudicating neglect of a child in and of itself speaks only to the status of the child, the plaintiff seems to conflate an adjudication of neglect with the subordinate facts found by a court that give rise to that adjudication. Although a court is not required to determine who was responsible for the neglect in adjudicating neglect of a child; see General Statutes § 46b-129; that is not to say that a court's subordinate factual findings cannot clearly identify who is responsible.

In the present case, the defendant's summary of facts in each of the neglect petitions were based almost exclusively on allegations that the plaintiff was responsible for the children's neglect. The hearing officer made clear, and we agree, that the defendant "placed squarely before the court the issue of the [plaintiff's] conduct and findings on this issue were therefore necessary to the judgment." The hearing officer stated: "The court found specifically that the [plaintiff] 'exerted control over the minutia of their home lives while expecting their mother to carry out the routine and daily duties with constant second guessing, criticism and much anger and yelling' and 'hostile and out of control behavior' noting that a video in evidence showing the [plaintiff] 'completely out of control' would lead 'any rational person' to be 'afraid under these circumstances, regardless of the provocation.' . . . [The juvenile court] also noted that the text exchanges indicate that the [plaintiff] is 'unwilling to cede any respect to his wife and believes

he is justified in the many small and major ways his coercive and threatening behavior inhibits her life and that of his children.' . . . [The juvenile court] found that the mother's 'attempt to set what are standard forms of discipline have consistently been undercut and countermanded by [the plaintiff].' . . . [The juvenile court] noted that it 'is apparent that [B] has picked up his father's utter disregard of wife and mother, and so yells at her and refused to obey normal parental strictures,' and that [E] is 'clearly suffering under this male regimen of terror.' . . . When the mother made efforts to secure voluntary services for [B's] mental health needs, the [plaintiff] felt that '[s]uch an intrusion into the family of which he believes himself to be the sovereign head was completely unacceptable to [the plaintiff].' . . . The [juvenile court's] decision and order clearly made the causal connection between the [plaintiff's] actions and how the children's emotional disturbance related to his actions." (Citations omitted.)

On the basis of our review of the findings by the juvenile court, which were clearly articulated by the hearing officer in her final decision, we conclude that the juvenile court made a factual determination that the plaintiff was responsible for the neglect of his children, which precluded him from being afforded a substantiation hearing under the department regulation and policy manual.

IV

The plaintiff, however, has one final arrow in his quiver. He argues that a denial of a substantiation hearing would violate his right to fundamental fairness. He argues that he was unable "to prepare knowingly and intelligently for a hearing on the issue of whether he [was] a perpetrator of neglect" because the issue of who was responsible for the neglect was not before the juvenile court. We disagree.

The question of whether the right to fundamental fairness has been violated in administrative proceedings is a question of law over which our review is plenary. *Recycling, Inc.* v. *Commissioner of Energy & Environmental Protection*, 179 Conn. App. 127, 149, 178 A.3d 1043 (2018). Although the parties in their appellate briefs direct us to cases that address the fundamental fairness of actual hearings held by various administrative agencies, no administrative evidentiary hearing was in fact held in the present case. Nevertheless, we review the hearing officer's decision to deny the plaintiff's request for a substantiation hearing to determine whether the action taken was fundamentally fair. See *Altholtz* v. *Dental Commission*, 4 Conn. App. 307, 310, 493 A.2d 917 (1985) ("[j]udicial review of administrative process is intended to assure that the evidence upon which an administrative agency acts is probative and reliable and that the action taken is fundamentally fair"); see also *Unistar Properties, LLC* v. *Conservation & Inland Wetlands Commission*, 293 Conn. 93, 124, 977 A.2d 127 (2009) (administrative proceedings must be conducted so as not to violate fundamental rules of natural justice).

The plaintiff's contention that his right to fundamental fairness was violated is belied by the record. The department regulation puts an individual on notice that he or she will be denied a substantiation hearing when a civil court proceeding that has been finally disposed of makes a factual determination identifying that individual as the person responsible for the neglect at issue. See Regs., Conn. State Agencies § 17a-101k-7 (i). Our review of the record clearly indicates that, through the course of the hearing before the juvenile court on both the order of temporary custody and the neglect petitions regarding his children, the plaintiff was provided the protections that fundamental fairness mandate. First, he was on notice that the factual allegations in support

of both the applications for orders of temporary custody and neglect petitions were premised almost exclusively on his conduct. Second, the record clearly demonstrates that the plaintiff was represented by counsel who defended his position at a two day consolidated hearing on the orders of temporary custody and the neglect petitions. Last, the record makes manifest that he testified at the hearing, called witnesses, presented his own evidence, and had his counsel cross-examine other witnesses. See *Grimes* v. *Conservation Commission*, 243 Conn. 266, 274, 703 A.2d 101 (1997) ("[f]undamentals of natural justice require that 'there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary' "). On the basis of the facts of this case, we have little difficulty concluding that the dismissal of the plaintiff's request for a substantiation hearing pursuant to the department regulation was not fundamentally unfair.

The judgment is affirmed.

In this opinion the other judges concurred.

A1Z7, LLC *v.* KIMBERLY DOMBEK
(AC 41198)

Sheldon, Keller and Flynn, Js.

Syllabus

The defendant, the previous owner of certain real property that was purchased by the plaintiff in a tax sale, appealed to this court from the judgment of the trial court granting the plaintiff's application for a prejudgment remedy, which was filed in connection with an action brought by the plaintiff for unjust enrichment against the defendant. After the plaintiff had purchased the premises, it brought a summary process action in which it sought to dispossess the defendant from the premises, and to recover use and occupancy payments. The trial court ordered prospective use and occupancy payments commencing in October, 2017, which did not cover the time period that had elapsed from

the time the plaintiff took title to the premises until the date the defendant was required to make payments in accordance with the court's order. In its application for a prejudgment remedy, the plaintiff claimed that the defendant had been unjustly enriched because she had used the premises from January to October, 2017, without making use and occupancy payments. The defendant claimed that the statute (§ 47a-26b) governing orders for use and occupancy payments in summary process actions was the exclusive remedy by which the plaintiff could seek such payments and that use and occupancy payments are obtainable only through a summary process action. *Held*:

1. The trial court properly concluded that § 47a-26b did not prohibit the plaintiff from recovering retroactive use and occupancy payments in the present action; § 47a-26b does not contain an exclusivity provision, nor did the defendant point to any language in that statute stating that it provides an exclusive remedy, and because the plaintiff sought to recover the reasonable value of the premises occupied for a past time period for which § 47a-26b, which awards use and occupancy payments prospectively from the date of a court order, would not permit an award, permitting the plaintiff to recover for the fair value of the occupancy not covered by the statute that has unjustly enriched the party occupying the premises in a separate action and to obtain security for any judgment obtained in the form of an attachment or garnishment did not in any way frustrate the purpose of the summary process statute to provide an expeditious process for the recovery of possession of a premises.
2. The defendant could not prevail on her claim that the prior pending action doctrine warranted dismissal of the plaintiff's unjust enrichment action; in this unjust enrichment action, the plaintiff sought security and a judgment for use and occupancy from the date of taking title to the premises to the date that the court ordered use and occupancy payments under the summary process statute, which was a different claim from the one brought in the summary process action, in which the plaintiff could not recover the amount sought between January and October, 2017, and, therefore, there was a necessity for bringing this second action.
3. The trial court properly rejected the defendant's claim that the doctrines of res judicata and collateral estoppel barred the court from granting the plaintiff's application for a prejudgment remedy; given that the claims the plaintiff made in this unjust enrichment action were not litigated in the summary process action because the summary process statute did not permit them to be brought for retroactive use and occupancy payments, and that the hearing on an application for a prejudgment remedy did not require the court to conduct a full scale trial on the merits of the plaintiff's claim, the doctrine of res judicata, which prevents a litigant from reasserting a claim that has already been decided on the merits, did not bar litigation of the plaintiff's claim, nor did the doctrine of

collateral estoppel, which cannot be invoked to bar a claim unless the same issue was fully and finally litigated to a final judgment.

Argued January 7—officially released March 26, 2019

Procedural History

Action to recover damages for unjust enrichment, and for other relief, brought to the Superior Court in the judicial district of Hartford, Housing Session, where the court, *Moukawsher*, *J.*, granted the plaintiff's application for a prejudgment remedy, and the defendant appealed to this court. *Affirmed.*

Robert J. Williams, Jr., for the appellant (defendant).

David L. Weiss, for the appellee (plaintiff).

Opinion

FLYNN, J. General Statutes § 47a-26b permits a property owner in a summary process action to seek the fair rental value of the premises occupied by a defendant during the pendency of a summary process action. The central issue in this case is whether § 47a-26b provides the exclusive remedy and, therefore, preempts an owner's ability to seek payment from the occupier for unjust enrichment for the reasonable value of the premises occupied for a time period for which § 47a-26b would not permit an order of use and occupancy payments. Because the language of the statute does not plainly and unambiguously foreclose other common-law remedies such as unjust enrichment and an exercise of that common-law remedy would not conflict with the purpose of the statute, we conclude that it is not foreclosed.

The defendant, Kimberly Dombek, appeals from the judgment of the trial court granting a prejudgment remedy in favor of the plaintiff, A1Z7, LLC. On appeal, the defendant claims that the court erred in granting the plaintiff's application for a prejudgment remedy

because (1) § 47a-26b prohibits the recovery of use and occupancy payments in this action, (2) the prior pending action doctrine is a bar, and (3) res judicata and collateral estoppel warranted dismissal of the application. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts are undisputed. The plaintiff purchased real property located at 802 Meadowview Drive in East Windsor (premises), which previously had been owned by the defendant, in a tax sale conducted by the tax collector of East Windsor.[1] The plaintiff filed a summary process action in which it sought to dispossess the defendant from the premises due to the defendant's failure to vacate the premises following service of a notice to quit. In that action, the plaintiff filed a motion for use and occupancy payments on March 3, 2017, but the motion was not scheduled for a hearing by the Housing Court until October 4, 2017. On October 4, 2017, the court then ordered prospective use and occupancy payments commencing on October 10, 2017, which did not cover the time period that had elapsed from the time the plaintiff took title to the premises on January 24, 2017, until the date the defendant was required to make use and occupancy payments in accordance with the court's October 4, 2017 order.

On October 23, 2017, in a separate action, the plaintiff filed this application for a prejudgment remedy. The plaintiff claimed that the defendant had been unjustly enriched because she had used the premises from January 24, 2017, when the tax collector's deed for the premises was recorded, through October 9, 2017, without making use and occupancy payments.

The court granted the plaintiff's application, reasoning that probable cause had been established for payments for the use and occupancy of the plaintiff's

[1] The defendant challenges the deed issued as a result of the tax sale in a separate legal action pending in the Hartford Superior Court.

premises by the defendant from the date the plaintiff acquired the property in January, 2017, through October, 2017, when the defendant began making use and occupancy payments in response to a summary process action. The court rejected the defendant's arguments that § 47a-26b was the exclusive remedy for use and occupancy, as well as her additional contentions that this action was barred by the pending action doctrine, res judicata and collateral estoppel. The court granted the plaintiff a prejudgment remedy in the amount of $13,500. This appeal followed.

I

The defendant first claims that the court improperly granted the plaintiff's application for a prejudgment remedy for use and occupancy payments because the present action is not a summary process action and use and occupancy payments are only obtainable through a summary process action. The defendant's claim necessarily raises the question of whether the legislature, by providing a use and occupancy remedy in a summary process action, manifested an intention to occupy the field by providing an exclusive remedy for such actions, and whether recognition of a common-law remedy for unjust enrichment would conflict with or frustrate the purpose of the statute. We conclude that the defendant cannot prevail on her claim.

"Ordinarily, we review a trial court's actions with respect to an application for a prejudgment remedy for abuse of discretion." *Feldmann* v. *Sebastian*, 261 Conn. 721, 724, 805 A.2d 713 (2002). In this case, however, the issue raised by the defendant presents a question of statutory interpretation requiring plenary review. See *Caciopoli* v. *Lebowitz*, 309 Conn. 62, 69, 68 A.3d 1150 (2013). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek

to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) Id.

In *Caciopoli* v. *Lebowitz*, supra, 309 Conn. 62, which concerned whether the tree cutting statute, General Statutes § 52-560, abrogated common-law remedies, Justice Eveleigh, writing for a unanimous Supreme Court, cogently set forth principles of statutory interpretation that guide our review. As our Supreme Court did in *Caciopoli*, we will examine the language of the relevant statute to determine whether it provides an exclusive remedy and determine if the purpose of the statute is frustrated by or conflicts with the recognition of a common-law remedy. Id., 69.

Section 47a-26b (a) provides in relevant part: "If the defendant appears, the court shall, upon motion and without hearing, unless the defendant files an objection within five days of the filing of the motion, order the defendant to deposit with the court within ten days of the filing of the motion payments for use and occupancy in an amount equal to the last agreed-upon rent or, in the absence of a prior agreed-upon rent, in an amount equal to the fair rental value of the premises during the pendency of such action *accruing from the date of such order*. . . ." (Emphasis added.)

Section 47a-26b does not contain an exclusivity provision. The defendant does not point us to any language

in that section or in Title 47a of the General Statutes that states that § 47a-26b provides an exclusive remedy. "Although the legislature may eliminate a common-law right by statute, the presumption that the legislature does not have such a purpose can be overcome only if the legislative intent is clearly and plainly expressed. . . . We recognize only those alterations of the common law that are clearly expressed in the language of the statute because the traditional principles of justice upon which the common law is founded should be perpetuated. The rule that statutes in derogation of the common law are strictly construed can be seen to serve the same policy of continuity and stability in the legal system as the doctrine of stare decisis in relation to case law. . . . In the absence of explicit language indicating that the statute is the exclusive remedy, we will not presume that the legislature intended to occupy the field and preempt a common-law cause of action." (Citations omitted; internal quotation marks omitted.) *Caciopoli* v. *Lebowitz*, supra, 309 Conn. 70–72.

We must next consider whether the purpose of the summary process statute would be frustrated by the application of the common-law remedy of unjust enrichment. The plaintiff seeks to recover the reasonable value of the premises occupied for a past time period for which § 47a-26b would not permit an award of use and occupancy payments. That statute's purpose is designed to provide a quick and effective remedy to dispossess a tenant, and for that reason does not permit a plaintiff landowner to claim money damages in that action except for use and occupancy within the time limits set within § 47a-26b. Section 47a-26b permits use and occupancy payments to be awarded only from the date of the order prospectively and not retroactively. Permitting a plaintiff to recover for the fair value of the occupancy not covered by § 47a-26b that has unjustly enriched the party occupying the premises in a separate

action and to obtain security for any judgment obtained in the form of an attachment or garnishment does not in any way frustrate the purposes of the summary process statute to provide an expeditious process for the recovery of possession of a premises. We, therefore, conclude that the court properly concluded that § 47a-26b did not prohibit the plaintiff from recovering in the present action retroactive use and occupancy payments.

II

The defendant next claims that the court improperly concluded that the prior pending action doctrine did not require dismissal of the action. We disagree.

"It has long been the rule that when two separate lawsuits are 'virtually alike' the second action is amenable to dismissal by the court." *Solomon* v. *Aberman*, 196 Conn. 359, 382, 493 A.2d 193 (1985). "[T]he prior pending action doctrine permits the court to dismiss a second case that raises issues currently pending before the court. The pendency of a prior suit of the same character, between the same parties, brought to obtain the same end or object, is, at common law, good cause for abatement. It is so, because there cannot be any reason or necessity for bringing the second, and, therefore, it must be oppressive and vexatious. This is a rule of justice and equity, generally applicable, and always, where the two suits are virtually alike, and in the same jurisdiction. . . . The policy behind the doctrine is to prevent unnecessary litigation that places a burden on crowded court dockets. . . .

"[T]he trial court must determine in the first instance whether the two actions are: (1) exactly alike, i.e., for the same matter, cause and thing, or seeking the same remedy, and in the same jurisdiction; (2) virtually alike, i.e., brought to adjudicate the same underlying rights of the parties, but perhaps seeking different remedies; or (3) insufficiently similar to warrant the doctrine's

application. In order to determine whether the actions are virtually alike, we must examine the pleadings . . . to ascertain whether the actions are brought to adjudicate the same underlying rights of the parties. . . . The trial court's conclusion on the similarities between the cases is subject to our plenary review." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Kleinman* v. *Chapnick*, 140 Conn. App. 500, 505, 59 A.3d 373 (2013).

In her objection to the plaintiff's motion for a prejudgment remedy, the defendant claimed that the present case and the pending summary process case involved the same parties and concerned the same issue, that of use and occupancy payments.[2] The court rejected her claim and determined that "[t]he prior pending action doctrine might apply if the defendant conceded that the purchaser could collect the amounts covering January through October in that case. But . . . § 46a-27b prohibits the plaintiff from ordering retroactive use and occupancy payments, so it can't be done there."

In this unjust enrichment action, the plaintiff sought security for and ultimately a judgment for use and occupancy from the date of taking title to the premises to the date that the court ordered use and occupancy payments under the summary process statute. In short, these are two different claims. The plaintiff could not recover the amount sought between January and October, 2017, in the summary process action. There was, therefore, a necessity for bringing this second action. This action and the summary process action are not virtually alike. We, therefore, reject the defendant's claim that the prior pending action doctrine warranted dismissal.

[2] We note that "a motion to dismiss is the proper vehicle to raise the issue of a prior pending action . . . ." *Bayer* v. *Showmotion, Inc.*, 292 Conn. 381, 403, 973 A.2d 1229 (2009).

III

The defendant last claims that the court improperly failed to conclude that the doctrines of res judicata and collateral estoppel barred the court from granting the plaintiff's application for a prejudgment remedy. We reject this claim.

"The applicability of the doctrines of res judicata and collateral estoppel presents a question of law over which our review . . . is plenary. . . . Claim preclusion (res judicata) and issue preclusion (collateral estoppel) have been described as related ideas on a continuum. . . . The doctrine of res judicata holds that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. . . . Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim." (Citations omitted; internal quotation marks omitted.) *State* v. *Bacon Construction Co.*, 160 Conn. App. 75, 85–86, 124 A.3d 941, cert. denied, 319 Conn. 953, 125 A.3d 532 (2015).

In this case, the court determined that "it is undisputed that there is no final judgment in the summary process case and . . . the doctrines of res judicata and collateral estoppel only spring from a final judgment." As the court stated and as we have previously pointed out in part I of this opinion, the claims the plaintiff made in this lawsuit were not litigated in the summary process action because the summary process statute did not permit them to be brought for retroactive use and occupancy payments.

The hearing on an application for a prejudgment remedy requires the court to determine whether there is probable cause to sustain the validity of the plaintiff's claim, not to conduct a full scale trial on the merits of the plaintiff's claim.[3] See *New England Land Co., Ltd.* v. *DeMarkey*, 213 Conn. 612, 619–20, 569 A.2d 1098 (1990). Res judicata bars relitigation of such judgments or matters that could have been litigated in the prior action. "[C]laim preclusion prevents a litigant from reasserting a claim that has already been decided on the merits." (Internal quotation marks omitted.) *LaSalla* v. *Doctor's Associates, Inc.*, 278 Conn. 578, 590, 898 A.2d 803 (2006). Collateral estoppel also cannot be invoked to bar a claim unless the same issue was fully and finally litigated to a final judgment. See *State* v. *Bacon Construction Co.*, 300 Conn. 476, 484–85, 15 A.3d 147 (2011) (ruling precluding collateral estoppel defense to application of prejudgment remedy not appealable prior to final ruling on application itself). Accordingly, we conclude that the court properly rejected the defendant's claim that the doctrines of res judicata and collateral estoppel require dismissal of the plaintiff's application for a prejudgment remedy.

The judgment is affirmed.

In this opinion the other judges concurred.

OLIVIA ANNA FIRSTENBERG *v.* MATTHEW C. MADIGAN (AC 39771)

Alvord, Bright and Norcott, Js.

Syllabus

The proposed intervenor, F, appealed to this court from the judgment of the trial court denying his motion to intervene in a custody action

[3] We note, however, that "[p]ursuant to General Statutes § 52-278*l* (a), the granting of a prejudgment remedy is a final judgment for purposes of appeal." *Kendall* v. *Amster*, 108 Conn. App. 319, 324 n.8, 948 A.2d 1041 (2008).

brought by the plaintiff mother against the defendant father with respect to the parties' minor child. After the trial court rendered judgment granting the parties joint legal custody of the minor child in accordance with their parenting access agreement, F, who is the minor child's maternal grandfather, filed a motion to intervene in which he allegedly sought third-party visitation pursuant to the applicable statute (§ 46b-59 [b]). The trial court denied the motion to intervene, from which F appealed to this court, claiming, inter alia, that the trial court incorrectly construed his motion to intervene as seeking custody pursuant to the applicable statute (§ 46b-57), when the motion sought visitation with the minor child pursuant to § 46b-59 (b). *Held* that, even if F's motion to intervene was in fact a petition for visitation, the trial court lacked subject matter jurisdiction over the petition because it failed to meet the threshold jurisdictional requirements of § 46b-59 (b) for a third party seeking visitation, as it did not sufficiently allege that F had a parent-like relationship with the minor child or that the denial of visitation would result in real and significant harm to the minor child: although F generally alleged that he had a loving relationship with the minor child, the petition focused almost entirely on the defendant's conduct and fitness as a parent and was devoid of any specific, good faith allegations that F acted in a parental type of capacity to the minor child or that the denial of visitation would cause real and significant harm akin to neglect of the minor child; accordingly, because the trial court did not have jurisdiction over the purported petition for visitation, it should have rendered judgment dismissing the petition instead of denying it.

Argued December 3, 2018—officially released March 26, 2019

Procedural History

Action for custody of the parties' minor child, brought to the Superior Court in the judicial district of Fairfield, where the court, *Sommer*, *J.*, rendered judgment granting the parties joint legal custody of the minor child in accordance with the parties' agreement; thereafter, the court denied the motion to intervene filed by the minor child's maternal grandfather, and the maternal grandfather appealed to this court. *Improper form of judgment; judgment directed.*

Eric Firstenberg, self-represented, the appellant (maternal grandfather).

David A. McGrath, with whom was *Carla Zahner*, for the appellee (defendant).

Opinion

NORCOTT, J. This appeal stems from a custody action between the plaintiff, Olivia Anna Firstenberg, and the defendant, Matthew C. Madigan, regarding their minor child. The appellant, Eric Firstenberg (appellant), the child's maternal grandfather, appeals from the judgment of the trial court denying his motion to intervene in the custody action under General Statutes § 46b-57.[1] On appeal, the appellant raises a number of claims, including that the court improperly interpreted his motion seeking visitation pursuant to General Statutes § 46b-59[2] as a motion to intervene seeking custody. We conclude that even if we assume, arguendo, that the appellant's motion to intervene was in fact a petition for visitation, as the appellant contends, he has failed to satisfy the threshold jurisdictional requirements under § 46b-59. Accordingly, we reverse the judgment of the court and remand the case with direction to dismiss the petition for visitation for lack of subject matter jurisdiction.

[1] General Statutes § 46b-57 provides: "In any controversy before the Superior Court as to the custody of minor children, and on any complaint under this chapter or section 46b-1 or 51-348a, if there is any minor child of either or both parties, the court, if it has jurisdiction under the provisions of chapter 815p, may allow any interested third party or parties to intervene upon motion. The court may award full or partial custody, care, education and visitation rights of such child to any such third party upon such conditions and limitations as it deems equitable. Before allowing any such intervention, the court may appoint counsel for the minor child or children pursuant to the provisions of sections 46b-12 and 46b-54. In making any order under this section, the court shall be guided by the best interests of the child, giving consideration to the wishes of the child if the child is of sufficient age and capable of forming an intelligent preference."

[2] General Statutes § 46b-59 (b) provides: "Any person may submit a verified petition to the Superior Court for the right of visitation with any minor child. Such petition shall include specific and good-faith allegations that (1) a parent-like relationship exists between the person and the minor child, and (2) denial of visitation would cause real and significant harm. Subject to subsection (e) of this section, the court shall grant the right of visitation with any minor child to any person if the court finds after hearing and by clear and convincing evidence that a parent-like relationship exists between

The following facts are relevant on appeal. The plaintiff and the defendant are the unmarried parents of a child born in July, 2011. The plaintiff filed a custody application in October, 2013. Throughout the pendency of the litigation the appellant filed numerous motions to intervene. On June 24, 2015, the plaintiff and the defendant, at the time the only parties to the custody action, entered into a parenting access agreement regarding the custody of their minor child. After this agreement was reached, the appellant, on August 27, 2015, filed the operative motion to intervene wherein he allegedly sought visitation pursuant to § 46b-59.[3]

The August 27, 2015 motion focused largely on the past conduct of the defendant, as the appellant sought to put the fitness of the defendant as a parent at issue. Of the appellant's eleven page motion, only three sentences mention the nature of the appellant's relationship with the minor child. First, when recounting an outburst of the minor child toward the appellant after

the person and the minor child and denial of visitation would cause real and significant harm."

[3] Section 46b-57 "assigns the court discretionary power to permit intervention upon motion by any interested third party or parties. . . . A prerequisite to that intervention, however, is the existence of a controversy. . . . Intervention is a device which enables one who was not originally a party to an action to become such a party on his own initiative. . . . The intervenor's posture is derivative; he assumes his role only by virtue of an action already shaped by the original parties. He must, therefore, take his controversy as he finds it and may not use his own claims to restyle or resuscitate their action." (Citation omitted; footnote omitted; internal quotation marks omitted). *Manter* v. *Manter*, 185 Conn. 502, 505–506, 441 A.2d 146 (1981). In the present case, the appellant filed his motion to intervene after the plaintiff and defendant reached an agreement that specifically addressed custody. It appears that there was no controversy for the appellant to insert himself into. Nevertheless, when reviewing the timeliness of an intervention as it relates to the status of the original parties' dispute, the standard of review is abuse of discretion. See id., 507. Furthermore, the court did not make a determination on the timeliness of the motion, and, therefore, in light of our conclusion that the court lacked jurisdiction to consider the appellant's motion, we need not consider whether a controversy existed when the appellant filed his motion to intervene.

the minor child returned from a visit with the defendant, the appellant stated, "I have a loving relationship with my grandson—his behavior toward me was out of character and alarming." The only other references in the appellant's motion pertaining to his relationship with his grandson were the statements, "I am the proud father of [the plaintiff] and the adoring, maternal grandfather of [the minor child]," and "I love my daughter and grandson to infinity and beyond." The motion contained not a single allegation regarding any harm the minor child would suffer if the appellant's request for visitation was denied. Additionally, the relief requested in the motion focused solely on the defendant. Specifically, the appellant requested that "(1) [his] motion to intervene be granted as it is in the best interest of the minor child . . . (2) [the] defendant be held in contempt for deliberately and wilfully committing fraud on the court in connection with the ex parte hearing; (3) as ordered by Judge Sommer, the parties' June 24, 2015 agreement be nullified as it is not in the best interest of the minor child . . . (4) [the defendant's attorney] be held in contempt for his failure to inform the court of the material misrepresentations he made to the court in connection with the ex parte proceeding; (5) further fact-finding take place to determine if [the] defendant tampered with the e-mail dated April 22, 2015; [and] (6) [the] defendant be ordered to receive ongoing psychiatric treatment with report backs to the court." Nowhere in the appellant's request for relief was visitation mentioned.

The court heard argument on the appellant's motion at a hearing held on October 15, 2015, at which the plaintiff, the defendant, their respective attorneys, and the appellant were present. At the hearing, the court questioned the appellant as to why intervention should be granted when both parents were represented by counsel and had actively participated in the case. The

gravamen of the appellant's argument was simply that "the Connecticut Supreme Court said if there [was] a claim that one of the parents [was] unfit, the standard of review would be different [than articulated in *Roth* v. *Weston*, 259 Conn. 202, 789 A.2d 431 (2002).]" No evidence was presented at the hearing.

On February 26, 2016, the appellant filed a motion seeking to have his motion to intervene reassigned to another judge because the court had not issued a decision on the underlying matter within 120 days as required by Practice Book § 11-19 (b) and the parties had not agreed to waive the time limit. The court, on March 1, 2016, issued an order granting the appellant's motion to intervene, finding that he had "satisfied the requirements of [§] 46b-59 (b) by clear and convincing evidence that a parent-like relationship exists and denial of visitation would cause harm to the child."

The defendant subsequently filed a motion to reargue in which he claimed that the court had not applied § 46b-59 properly because the order contained a finding of "harm" instead of "real and significant harm" as required under the statute. The court granted the motion to reargue and issued a memorandum of decision in which it vacated its prior order and denied the appellant's motion to intervene. Although the basis for the defendant's motion to reargue was that the court had applied the wrong standard for harm under § 46b-59, the court denied the motion to intervene under a custody analysis pursuant to § 46b-57.[4]

[4] The fact that the court engaged in a custody analysis was likely due, at least in part, to what the appellant set forth in his motion to intervene. As previously noted, the appellant's motion focused solely on the past conduct of the defendant. Although the motion cited to § 46b-59, the third party visitation statute, the motion made no further reference to visitation. In fact, the motion's request for relief did not mention visitation; instead, it sought nullification of the parties' parenting access agreement, sanctions against the defendant and his counsel, and an order requiring the defendant to undergo psychiatric treatment.

On appeal the appellant raises numerous arguments pertaining to the court's granting of the defendant's motion to reargue and its resultant denial of the appellant's motion to intervene. Of particular relevance to our analysis, the appellant argues that the court incorrectly considered his motion to intervene as seeking custody pursuant to § 46b-57, when he was actually seeking visitation under § 46b-59. In response, the defendant argues that if the appellant's motion is treated as a petition for visitation, then it should have been dismissed for lack of subject matter jurisdiction, as it failed to meet the jurisdictional requirements imposed by § 46b-59. We agree with the defendant.

We begin by setting forth the applicable law and standard of review. "At the outset, we note our well settled standard of review for jurisdictional matters. A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted). *Clements* v. *Jones*, 71 Conn. App. 688, 690, 803 A.2d 378 (2002). To determine whether the court had jurisdiction over a petition for visitation, we compare the allegations of the petition to the statutorily prescribed jurisdictional requirements. See *Roth* v. *Weston*, supra, 259 Conn. 235

Viewing the appellant's motion as a petition for visitation, § 46b-59 is the controlling statute.[5] Section 46b-59

[5] Section 46b-59 was amended in 2012 to essentially codify the judicial gloss the Supreme Court put on the then existing version of § 46b-59 in *Roth*. In *Roth*, the court concluded that, without the proper gloss, § 46b-59, as enacted at that time, would be subject to application in a manner that would be unconstitutional. *Roth* v. *Weston*, supra, 259 Conn. 233–34. The court concluded that implicit in the statute was a rebuttable presumption that visitation that is opposed by a fit parent is not in the child's best interests. Id., 234. Additionally, the court concluded that in order to avoid constitutional infirmity, a petition for visitation must include specific, good

(b) allows any person to "submit a verified petition to the Superior Court for the right of visitation with any minor child." In order for the court to have jurisdiction, the petition must include "specific and good-faith allegations that (1) a parent-like relationship exists between the person and the minor child, and (2) denial of visitation would cause real and significant harm." General Statutes § 46b-59 (b). Once these jurisdictional requirements are met, the petitioner must then prove these allegations by clear and convincing evidence. General Statutes § 46b-59 (b).

The defendant argues that the appellant failed to allege specific facts supporting either of the required elements. The appellant argues that his motion to intervene contained specific and good faith allegations that he had a parent-like relationship with his grandson and that denial of visitation would cause real and substantial harm. We agree with the defendant.[6]

We conclude that viewed as a petition for visitation, the appellant's August 27, 2015 motion to intervene failed to meet the jurisdictional requirements of § 46b-59 (b). First, the appellant's motion did not contain specific allegations that he has a parent-like relationship with his grandson. Section 46b-59 (c) enumerates nine nonexclusive factors that the court may consider in determining whether a petitioner has a parent-like relationship with a minor child. Such factors include "(1) [t]he existence and length of a relationship between the person and the minor child prior to the submission of a petition pursuant to this section; (2) [t]he length of time that the relationship between the person and

faith allegations both that the petitioner has a parent-like relationship with the child and that the denial of visitation would cause real and significant harm to the child. Id., 234–35.

[6] We note that the § 46b-59 (b) also requires that the petition be verified. The appellant's petition was not verified. This failure alone would also require dismissal of the appellant's petition.

the minor has been disrupted; (3) [t]he specific parent-like activities of the person seeking visitation toward the minor child; (4) [a]ny evidence that the person seeking visitation has unreasonably undermined the authority and discretion of the custodial parent; (5) [t]he significant absence of a parent from the life of a minor child; (6) [t]he death of one of the minor child's parents; (7) [t]he physical separation of the parents of the minor child; (8) [t]he fitness of the person seeking visitation; and (9) [t]he fitness of the custodial parent." General Statutes § 46b-59 (c).

As noted previously in this opinion, the appellant's motion focused almost entirely on the defendant's conduct and his fitness as a parent. It was substantially devoid of any specific and good faith allegations that would give rise to a parent-like relationship between the appellant and the minor child. As we have noted, the motion merely alleged that the appellant has a loving relationship with his grandson and loves his daughter and grandson "to infinity and beyond." These broad statements regarding a loving relationship fail to satisfy the statutory requirements of § 46b-59 (b) and (c), which require specific, good faith allegations that the appellant and minor child share a parent-child relationship. See *Crockett* v. *Pastore*, 259 Conn. 240, 248, 789 A.2d 453 (2002). Our Supreme Court in *Crockett*, when considering allegations substantially similar to the appellant's, concluded that "it is the nature of the relationship, not the nomenclature, that satisfies the constitutional mandate." Id. Therefore, the appellant was required to plead that his relationship with the child was such that he "acted in a parental type of capacity for an extended period of time." Id; see also General Statutes § 46b-59 (c) (1). The appellant's motion did not contain specific factual allegations that he has acted in a parental type of capacity with respect to his grandson.

The appellant argues that it was not necessary for him to meet the requirements of § 46b-59 (c) because he alleged that he previously had established a parent-like relationship under § 46b-59 (d). Section 46b-59 (d) states that "[i]n determining whether a parent-like relationship exists between a grandparent seeking visitation pursuant to this section and a minor child, the Superior Court may consider, in addition to the factors enumerated in subsection (c) of this section, the history of regular contact and *proof* of a close and substantial relationship between the grandparent and the minor child." (Emphasis added). The appellant's argument fails for two reasons. First, the plain language of this subsection reveals that subsection (d) is not to be read in isolation. Rather, the regular contact and close relationship factors in subsection (d) must be considered in addition to those factors enumerated in subsection (c), which include, inter alia, the specific parent-like activities of the person seeking visitation toward the minor child. The appellant's conclusory allegation that he previously had established a parent-like relationship with his grandson is, alone, insufficient to establish a close and substantial relationship. Second, § 46b-59 (d) requires that the petitioner prove the close and substantial relationship. Section 46b-59 (b) makes clear that the issue of sufficient proof is reached only if the petition contains specific and good faith allegations that a parent-like relationship exists in the first place. See also *Roth v. Weston*, supra, 259 Conn. 235. In other words, the court may reach whether a petitioner has proven § 46b-59 (d), if and only if, the petitioner made specific and good faith allegations that a parent-like relationship exists.

The appellant further argues that the court should have looked beyond his motion and reviewed the entire record to determine whether he had a parent-like relationship with his grandson. Specifically, the appellant,

referring to a previous motion to intervene that the court denied, argues that the "court noted the close and nurturing relationship that [he had] maintained with [his] grandson since birth." The passing observations of a court made in connection with a prior motion are irrelevant to whether the current motion meets the statutorily prescribed requirements for the court to have jurisdiction over the motion. The law is clear that whether the petitioner alleged the required jurisdictional elements is determined by "examin[ing] the allegations *of the petition* and compar[ing] them to the [statutorily prescribed] jurisdictional requirements . . . ." (Emphasis added.) *Roth* v. *Weston*, supra, 259 Conn. 235; see also *Fennelly* v. *Norton*, 103 Conn. App. 125, 139, 931 A.2d 269 ("[b]ecause the defendant's motion to dismiss for lack of jurisdiction was predicated on the insufficiency of the application for visitation, it was inappropriate for the court to look beyond that pleading and permit the plaintiffs to augment the application with additional allegations at the evidentiary hearing"), cert. denied, 284 Conn. 918, 931 A.2d 936 (2007); *Fuller* v. *Baldino*, 176 Conn. App. 451, 456 n.4, 168 A.3d 665 (2017) (noting that case law suggests that "courts determining whether the jurisdictional requirements of *Roth* have been satisfied cannot look beyond the four corners of the application itself"). In light of the appellant's failure to allege a parent-like relationship in his motion, he has failed to satisfy the first jurisdictional requirement under § 46b-59 (b).

Moreover, the defendant argues that the motion to intervene failed to sufficiently allege that the denial of visitation will cause real and significant harm to the minor child. In order to succeed on this requirement, the appellant must have alleged that the "*denial of visitation* would cause real and significant harm." (Emphasis added.) General Statutes § 46b-59 (b); see

also *Crockett* v. *Pastore*, supra, 259 Conn. 249–50. Section 46b-59 (a) (2) defines "[r]eal and significant harm" to mean "that the minor child is neglected, as defined in [General Statutes §] 46b-120, or uncared for, as defined in said section."[7]

The appellant's motion failed to allege that the minor child will suffer real and significant harm if his petition for visitation is denied. In his motion, the appellant made several unsubstantiated allegations about the defendant and his attorney. None of these allegations, however, directly addresses the type of real and substantial harm contemplated by §§ 46b-59 and 46b-120. Nor did the appellant's motion allege that these harms would be reduced if visitation were granted. The statute is clear and unambiguous that a petition for visitation must make specific, good faith allegations that the minor child will suffer real and significant harm akin to neglect if visitation were denied. Because the appellant's motion made no reference to the type of harm the minor child would endure if visitation were denied, his motion lacked the necessary allegations for the court to have subject matter jurisdiction.

This conclusion is further supported by the appellant's concession before this court that his grandson would not be harmed were he not permitted visitation. The appellant, in his reply brief, stated, "I am certainly not claiming that I am being denied visitation with my grandson or that my grandson would suffer immensely were he not permitted to see me."

[7] Under § 46b-120 (4), "[a] child may be found 'neglected' who, for reasons other than being impoverished, (A) has been abandoned, (B) is being denied proper care and attention, physically, educationally, emotionally or morally, or (C) is being permitted to live under conditions, circumstances or associations injurious to the well-being of the child." Under § 46b-120 (6), "[a] child may be found 'uncared for' (A) who is homeless, (B) whose home cannot provide the specialized care that the physical, emotional or mental condition of the child requires, or (C) who has been identified as a victim of trafficking, as defined in [General Statutes §] 46a-170."

Because the appellant's motion failed to include "specific and good-faith allegations that (1) a parent-like relationship exists between [the appellant] and the minor child, and (2) denial of visitation would cause real and significant harm," it did not meet the jurisdictional thresholds of § 46b-59 (b). Consequently, we conclude that the trial court did not have jurisdiction over the appellant's petition for visitation.

The form of the judgment is improper, the judgment denying the appellant's petition for visitation is reversed and the case is remanded with direction to render judgment dismissing the petition for visitation.

In this opinion the other judges concurred.

IN RE AVIA M.*
(AC 41709)

Alvord, Elgo and Norcott, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor child. She claimed, inter alia, that the trial court improperly concluded that the petitioner, the Commissioner of Children and Families, proved by clear and convincing evidence that the Department of Children and Families had made reasonable efforts to reunify her with her child, that she was unable or unwilling to achieve the requisite degree of personal rehabilitation, and that it was in the child's best interest to terminate her parental rights. *Held* that the judgment of the trial court was affirmed; the trial court having thoroughly addressed the arguments raised in this appeal, this court adopted the court's well reasoned decision as a statement of the applicable law on the issues.

Argued January 31—officially released March 22, 2019**

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

** March 22, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Amended petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, where the respondent father was defaulted for failure to appear; thereafter, the matter was tried to the court, *Hon. Stephen F. Frazzini*, judge trial referee; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Agnieszka G., self-represented, the appellant (respondent mother).

Stephen G. Vitelli, assistant attorney general, with whom, on the brief, were *George Jepsen*, former attorney general, *Benjamin Zivyon*, assistant attorney general, and *Hannah Kalichman*, certified legal intern, for the appellee (petitioner).

Opinion

PER CURIAM. The respondent mother appeals from the judgment of the trial court terminating her parental rights with respect to her daughter, Avia M. (child).[1] On appeal, the respondent claims that the trial court improperly concluded that the petitioner, the Commissioner of Children and Families, proved by clear and convincing evidence that (1) the Department of Children and Families made reasonable efforts to reunify her, (2) she was unable or unwilling to achieve the requisite degree of personal rehabilitation, and (3) it was in the child's best interest to terminate her parental rights.[2] We affirm the judgment of the trial court.

[1] The parental rights of the child's father were terminated in the same proceeding after he was defaulted for his failure to appear. He did not participate in this appeal. Our references in this opinion to the respondent are to the respondent mother.

[2] The respondent's statement of issues, contained within her brief, also includes: "Whether the burden of persuasion of clear and convincing evidence in Connecticut meets the requirements of the constitutional due

The record discloses that the child first entered the petitioner's care on April 6, 2016. The child was reunified with the respondent, on July 28, 2016, under an order of protective supervision and again was removed from the respondent's care on November 28, 2016. The child has been in the care and custody of the petitioner since November 28, 2016.

On May 2, 2017, the petitioner filed a petition to terminate the respondent's parental rights, alleging, pursuant to General Statutes § 17a-112 (j) (3) (B) (i), that the child previously was adjudicated neglected and that the respondent had failed to rehabilitate such that she could assume a responsible position in the child's life in a reasonable time. The petitioner further alleged that termination of the respondent's parental rights was in the child's best interest.

To prevail in a nonconsensual termination of parental rights case, the petitioner must prove by clear and convincing evidence that one of the statutory grounds for termination exists. General Statutes § 17a-112 (j) (3). If the trial court determines that failure to rehabilitate has been proven by the appropriate standard, then it must determine whether termination of parental rights is in the best interest of the child. General Statutes § 17a-112 (j) (2). Our standard of review on appeal is twofold. *In re Shane M.*, 318 Conn. 569, 587–88, 122 A.3d 1247 (2015). First, the court's ultimate conclusion of whether a parent has failed to rehabilitate is "[reviewed under an evidentiary sufficiency standard], that is, whether the trial court could have reasonably

process clause of the fourteenth amendment of the United States." The respondent does not discuss this matter further; therefore, it is not adequately briefed and does not merit our review. See *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016) ("[c]laims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion" [internal quotation marks omitted]).

concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Internal quotation marks omitted.) Id. Second, the standard of review for the court's determination of the best interest of the child is clearly erroneous. *In re Brayden E.-H.*, 309 Conn. 642, 657, 72 A.3d 1083 (2013).

Our examination of the record and our consideration of the arguments of the parties persuades us that the judgment of the trial court should be affirmed. In a thoughtful and comprehensive memorandum of decision, the trial court analyzed the law in a manner consistent with our statutes and case precedents. Because that memorandum addresses the arguments raised in this appeal, we adopt the trial court's well reasoned decision as a statement of the applicable law on the issues. *In re Avia M.*, Superior Court, judicial district of New Britain, Juvenile Matters, Docket No. H14-CP16-011696-A (April 3, 2018) (reprinted at 188 Conn. App. 740, A.3d). It would serve no useful purpose for us to repeat the discussion contained therein. See *In re Michael R.*, 49 Conn. App. 510, 512, 714 A.2d 1279, cert. denied, 247 Conn. 919, 722 A.2d 807 (1998).

The judgment is affirmed.

APPENDIX
IN RE AVIA M.*

Superior Court, Juvenile Matters at New Britain
File No. H14-CP16-011696-A
Memorandum filed April 3, 2018

Proceedings

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

Christopher N. Oakley, for the respondent mother.

Amy Collins, assistant attorney general, for the petitioner.

Lizabeth Mindera, for the minor child.

Opinion

HON. STEPHEN F. FRAZZINI, JUDGE TRIAL REFEREE. Avia M., the child named above, is two years old,[1] and she needs a sober, competent caretaker and a safe and stable home. Claiming that her parents can provide her with neither, on May 2, 2017, the Commissioner of Children and Families (commissioner) filed the pending petition to terminate their parental rights (TPR) under General Statutes § 17a-112. As statutory grounds for termination, the petition alleges, pursuant to § 17a-112 (j) (3) (B) (i), that the child was previously found neglected and that both parents have failed to rehabilitate such that they can assume a responsible position in the child's life in a reasonable time. The petition also alleges, pursuant to § 17a-112 (j) (3) (E), that the child is less than seven years of age and neglected, and that the father has both failed to rehabilitate and has lost parental rights as a consequence of another TPR petition for a different child. The petition

* Affirmed. *In re Avia M.*, 188 Conn. App. 736, A.3d (2019).

[1] At the close of trial, Avia was twenty-one months old.

further claims that termination is in the child's best interest. Both parents appeared on the initial hearing date for the petition and, after being appointed counsel and advised of their rights, denied the allegations of the petition. Trial was then scheduled for two days in January, 2018. For the reasons discussed below, the petition is granted and the commissioner is appointed statutory parent for the child.

Trial began on January 8, 2018, and evidence continued for two more days. When the father, Antonio M., failed to appear on the first day of trial, a default was entered against him pursuant to Practice Book § 35a-8 (a).[2] The petitioner's motion to amend the petition to include additional factual allegations was thereafter granted without objection. Before evidence began, the mother, Agnieszka G., was advised in accordance with *In re Yasiel R.*, 317 Conn. 773, 794, 120 A.3d 1188 (2015). The court also granted the petitioner's motion for judicial notice and notified the parties that, pursuant to § 2-1 of the Connecticut Code of Evidence, it would take judicial notice of the contents of the court files, including memoranda of hearings and court orders, involving this child and her maternal and paternal half-siblings, except that factual assertions contained in pleadings, motions, or other documents filed by the parties would be taken as substantively true only if independent evidence thereof was introduced and found credible in this proceeding or was subject to the finality principles of res judicata or collateral estoppel.

During trial, the court heard testimony from the following witnesses:[3]

[2] Practice Book § 35a-8 (a) provides in pertinent part that "[a]ll parties except the child or youth shall be present at trial unless excused for good cause shown. Failure of any party to appear in person or by their statutorily permitted designee may result in a default or nonsuit for failure to appear for trial, as the case may be, and evidence may be introduced and judgment rendered."

[3] The lists of witnesses and exhibits in the text following this note summarizes and discusses some, but not all, of the portions of that evidence

- Amber Orvis, a social worker employed by the Department of Children and Families (DCF or department) who was assigned to a child protection investigation in 2014 when the New Britain Police Department notified DCF about domestic violence between these parents in the presence of Aaliya, Avia's older maternal half-sibling who was then nine years old, and again in 2016, when The Hospital of Central Connecticut notified DCF that Ms. G. had tested positive for cocaine and marijuana[4] at the time of Avia's birth, and who is the author of the TPR social study;
- Kristi Shooner, a DCF social worker who has supervised some of the mother's visits with the child;
- Kara Fazzolari, a DCF social worker previously assigned to the cases for Avia and Aaliya and who is the author of the addendum to the TPR social study;
- Alison Sroka, the DCF social worker currently assigned to Avia's case;
- Samantha Larkin, a residential counselor at the New Life Center (NLC), which is an inpatient mother-child substance abuse treatment program of Community Health Resources (CHR) and where Ms. G. resided between April and November of 2016;
- Lori Bergeron, a counselor at CHR's Milestone Program, an inpatient substance abuse treatment program at which Ms. G. was a patient from November

that was found credible and was relied upon by the court in its findings and conclusions.

[4] Testimony from social worker Orvis about the mother's positive results for cocaine and marijuana at Avia's birth was not admitted for truth but to explain the reasons for the ensuing DCF investigation that led to the removal of the child and her maternal sibling on orders of temporary custody (OTC) and the filing of neglect petitions. Such evidence was admitted without limitation or qualification, however, in other exhibits.

28, 2017, until she was successfully discharged from that program approximately thirty days later;[5]

- Diane Gediman, a case manager for the Supportive Housing for Families program, which is funded by DCF through a contract with The Connection and a subcontract with Wheeler Clinic and who provided housing assistance and case management services to Ms. G.;

- Daniel Millstein, a licensed clinical social worker employed by the Farrell Treatment Center (FTC), which provides treatment for substance abuse and "co-occurring disorders" and at which the mother has been a client during three periods relevant to these proceedings;

- Officer Matthew Morczko, of the New Britain Police Department, who concluded there was no probable cause for an arrest after investigating a report made by Ms. G. on August 22, 2017, that Mr. M. had accosted and injured her in her own dwelling;

- Officer Timothy Bradle of the Berlin Police Department, who arrested the mother on November 5, 2017, after finding her intoxicated and sitting in the driver's seat of a motor vehicle that had a key in the ignition and "was in someone's yard next to a basketball court"; Transcript of testimony on January 8, 2018, p. 21;

[5] It was not clear from the evidence exactly when Ms. G. completed the Milestone Program. Her treatment counselor there testified that she was at Milestone until approximately December 27, 2016, and her case manager from The Connection testified that she was released from the facility on December 26, 2017. See transcript of testimony of Lori Bergeron on January 9, 2018, p. 78; transcript of testimony of Diane Gediman on January 8, 2018, p. 113. Records from the CHR Milestone facility, however, describe the "end date" for her treatment there as January 3, 2018. Respondent mother's exhibit C, first page. These differences have no evidentiary significance.

- Tina Schaffer, the director of admissions at the American Institute, a school offering vocational medical programs and at which Ms. G. has enrolled in a program to become a Certified Nurse's Assistant.

In addition, the parties introduced the following exhibits into evidence:

- The specific steps ordered on numerous occasions for the father and mother to take in order to reunite with Avia;
- The TPR social study dated April 24, 2017, and an addendum dated December 13, 2017;
- Copy of a Memorandum of Decision in *In re Antonio S.*, Superior Court, judicial district of Hartford, Juvenile Matters, Docket No. H12-CP97-004596-A (January 16, 2009), terminating the parental rights of this respondent father with respect to the minor child in that petition brought by the Commissioner of Children and Families;
- The DCF "Investigation Protocol," with certain redactions, narrating the department's response, investigations, findings and conclusions upon being notified that the toxicology screens after Ms. G. gave birth to Avia were positive for cocaine and marijuana;
- The following records from Community Health Resources:
    - The Adult Clinical Assessment form done at the mother's admission to CHR's New Life Center on April 29, 2016;
    - A CHR "Drug/Breathalyzer Results" form dated April 30, 2016, and showing positive breathalyzer tests for cocaine and tetrahydrocannabinol

(THC) for the mother upon her admission to the New Life Center on that date;

- Excerpts from the treatment records for the mother while she attended the New Life Center;
- The Discharge Form completed when she left the NLC on November 14, 2016;
- The Adult Clinical Assessment form done at the mother's admission to CHR's inpatient Milestone Program on November 29, 2017;
- Excerpts from Ms. G.'s treatment notes while she was at the Milestone Program;
- Excerpts from the Discharge Form completed upon Ms. G.'s successful discharge from the Milestone Program;

- A copy of the DCF Form 136, Report of Suspected Child Abuse or Neglect, submitted to the department on November 7, 2016, by a residential aide at the New Life Center after the mother returned there from a day pass on that date and "admitted to relapsing and driving under the influence with her infant daughter in the car." Petitioner's exhibit 12;
- The following records from Community Mental Health Affiliates (CMHA):
  - The Intake Assessment Form prepared when the mother entered the Adult Intensive Outpatient Program there on March 9, 2017; and
  - The Discharge Referral and Recommendations form prepared when she was discharged from that facility on May 8, 2017, "due to needing a higher level of care at this time." Petitioner's exhibit 30, p. 1;

- Excerpts from the DCF Running Narrative for January 20, 23, and 25, 2017; May 8 and 9, 2017; and June 12 and 16, 2017;
- The following records from the Farrell Treatment Center:
  - The Recovery and Treatment Plan, dated September 19, 2017, for the mother at the Farrell Treatment Center;
  - Results of drug tests performed on the mother at Quest Diagnostics on various dates in 2017 when she was a patient at the Farrell Treatment Center;
- The résumé of Daniel J. Millstein;
- The following records from The Connection, the agency that contracts with Wheeler Clinic to administer the Supportive Housing Program:
  - DCF Monthly Client Contact Reports regarding the mother's interactions in particular months with her case manager for the program between October, 2016, and February, 2017;[6] and
  - Excerpts from Client Chronological Notes between September 1, 2017, and December 2, 2018;

[6] Petitioner's exhibit 18 contains five documents from The Connection entitled "DCF Monthly Client Contact Report," for the period from October, 2016 through February, 2017, and electronically signed by Diane Gediman, the case manager for The Connection's Supportive Housing Program. When introducing this exhibit into evidence, the assistant attorney general erroneously referred to it as "the CMHA reports from October, 2016, to March, 2017." Transcript, January 17, 2018. (Petitioner's exhibit 7 contains these same reports for the period from March, 2017 through December, 2017). No documents from CMHA for the period from October, 2016 through February, 2017, were ever introduced into evidence.

- Treatment records for the mother from Hartford HealthCare (HHC) when she went to HHC's Plainville facility on various occasions in 2017 and when she went to The Hospital of Central Connecticut on August 27, 2017, complaining that she had been assaulted earlier that day by the father;
- A 21 page document titled "Participant Profile" from the Prudence Crandall Center dated January 8, 2018, regarding Ms. G.'s contacts with that program on various dates between October 1, 2013, and October 12, 2017;
- The following records prepared by the mother's therapist, Ronald Klemba, from the Healing House of CT: "Mental Health Care Plan" dated April 12, 2017; a letter regarding her treatment there and diagnosis dated October 4, 2017; and "Psychotherapy Treatment Records" of individual therapy sessions between January, 2017, and January, 2018;
- Copies of police reports, some of which contained redactions, from the New Britain Police Department for incidents occurring on the following dates:
    - February 16, 2015 (when the father was taken to a hospital for observation after he sent photos to the mother suggesting that he intended to hurt himself and he then admitted making statements to the mother and police that he was intoxicated, depressed and might harm himself);
    - February 20, 2015 (when the father was arrested for disorderly conduct, unlawful restraint and risk of injury after he held the mother down on her bed and then caused property damage in the presence of then ten year old Aaliya);
    - March 30, 2015 (when police went to the mother's home after receiving an anonymous call about a

possibly physical domestic incident there, spoke to the mother, who denied that the father was present and said that her daughter Aaliya was yelling in her sleep, but the father was found hiding under a blanket and then arrested for violation of a "no contact," "stay away" protective order[7]);

- May 18, 2015 (when the father was arrested on five counts of violation of a protective order after the mother reported that he had been at her home and police confirmed that there were five active protective orders prohibiting him from contact with her or being at her residence);

- June 11, 2015 (when the police responded to an anonymous complaint of a protective order violation, went to the mother's apartment, and searched for the father inside her residence without finding him);

- June 15, 2015 (when the police went to the mother's home in the early morning hours after receiving an anonymous telephone call "stating they observed a male and female at the residence arguing" but the mother denied that the father was present or that any argument had occurred and would not allow police to enter her residence);

[7] The police report regarding that incident states, in pertinent part, as follows: "SUMMARY: ANTONIO was arrested for violating [General Statutes §] 53a-223 Violation of Protection Order. [M] was found hiding under a blanket at the above location where his girlfriend AGNIESZKA [G.] resides. There is an active protective order between AGNIESZKA and [M]. [G] is listed as the protectee on the order . . . which states that there is to be no contact between them and [M] is not to enter the home of AGNIESZKA." Case/Incident Report # 15-7389, dated March 30, 2015, contained in petitioner's exhibit 8.

- July 20, 2015 (when the police were unable to return a phone call made by the mother because her voice mailbox was full);

- August 5, 2015 (when the mother reported that the father had taken a vehicle belonging to the maternal grandmother without permission);

- August 16, 2015 (when the mother reported that Mr. M. had punched her in the face several times, a week earlier, and had threatened her earlier that day but the investigating police officer concluded that the remarks she was reporting did not constitute a threat and, after speaking to a third person, that the father had not caused any injury);

- December 5, 2015 (when the mother reported to the police that the respondent father had entered her room in the early morning hours while she was sleeping, yelled at her, pushed her in the face, cut her upper lip and slammed a phone on a dresser, then took her vehicle without her permission, and the police concluded that the father had violated a protective order[8] but, unable to find him, decided to seek a warrant for his arrest on charges of assault in the third degree, disorderly conduct, violation of a protective order, and taking a motor vehicle without the owner's permission);

- December 9, 2015 (reporting the father's arrest on a warrant for assault in the third degree and

[8] The police report regarding that incident states, in pertinent part, as follows: "An NCIC check showed Antonio having an active Protective Order with Victim 1 [Ms. G.] as the protectee. The Protective Order stipulation is CT 01. CT 01 states do not assault, threaten, harass, interfere with. Antonio violated this order by striking Victim 1." Case/Incident Report # 15-26709, dated December 6, 2015, contained in petitioner's exhibit 8.

another charge that was redacted by agreement of the parties);

- June 29, 2017 (when the father was arrested for breach of peace, criminal mischief in the third degree, and violation of a protective order after the mother complained that he had damaged the door to her residence); and

- August 27, 2017 (when the police responded to a report by the mother that the father had assaulted her in her home but police officers found no probable cause because they did not find her report credible);[9]

- A Berlin Police Department case incident report regarding an arrest of the mother for operating under the influence and interfering with a police officer on November 5, 2017, after she was found under the influence of drugs or alcohol in her vehicle and then did not cooperate with the investigating officers; still photographs taken at the scene of the arrest; and a video recording from the "dash cam video" from one of the police cruisers on the scene showing Ms. G. outside her vehicle and then in the back seat of the police cruiser;

- Copies of the criminal history conviction records for the mother and father, dated September 6, 2017, from the Department of Emergency Services and Public Protection that showed the following:

  - The father was arrested on March 30, 2015, for violation of a protective order and on May 18, 2015, for five additional counts of that same offense, and was convicted on all of those charges

[9] The quotations are all from the New Britain Police Department case incident report for the dates specified and were contained in petitioner's exhibit 8.

on July 15, 2015, for which he received concurrent sentences of three years of incarceration, execution suspended, and three years of probation;

- The father was convicted for violations of those probations on May 4, 2016, and received concurrent sentences of 18 months incarceration;

- The father was arrested on December 9, 2015, for the assault on the mother that had occurred on December 5, 2015, and was convicted of this charge on May 4, 2016, and received a sentence of one year in jail, concurrent with the 18 month sentence for the violations of probation;

- The father was arrested on June 29, 2017, as described above; and

- The mother was arrested on November 5, 2017, as described above;

- A log from the Department of Correction listing the father's telephone calls between December 18, 2015, and December 6, 2016, and a DVD disk containing recordings of those calls (only four of which were introduced into evidence); and

- A copy of the Protection Order Registry dated January 2, 2018, showing the following active and expired family violence protective orders, all with Ms. G. as the protected person:

  - An unexpired 2005 family violence protective order against the mother's ex-husband (and Aaliya's father), Marciej W.;

  - Nine expired family violence protective orders against Mr. M. in criminal prosecutions brought against him in 2013 (two orders), 2014 (one order), and 2015 (six orders);

- A standing criminal protective order entered against him on September 20, 2016, and not expiring until 2099; and

- A full, no contact protective order that had been entered on June 30, 2017, in the criminal prosecution pending against father at the close of evidence in this proceeding and was in effect until the next hearing date scheduled after the close of evidence.

After the close of evidence and the receipt of transcripts, the parties submitted trial briefs, the last one being filed on March 1, 2018, and then waived oral closing argument that had originally been requested. The court is not aware of proceedings pending in any other court regarding the custody of the child and has jurisdiction. As neither parent has claimed Native American heritage, the requirements of the Indian Child Welfare Act are not pertinent to these proceedings. The court has carefully considered the petition, the evidence presented, and the information or materials judicially noticed according to the standards required by law. The matter is now ready for decision, and the facts found herein were established by clear and convincing evidence.

I

PRELIMINARY FINDINGS OF FACT

A

Effect of Default

The respondent father, Anthony M., has been defaulted. Practice Book § 32a-2 (a) provides that child protection proceedings, including this petition for termination of parental rights, are civil matters. See also *In re Samantha C.*, 268 Conn. 614, 634, 847 A.2d 883 (2004), and *In re Shonna K.*, 77 Conn. App. 246, 253,

822 A.2d 1009 (2003). As in other civil matters, the entry of a default establishes admission of the material facts constituting the petitioner's cause of action and conclusively determines that the petitioner has prevailed on each of the elements at issue in the adjudicatory phase of this proceeding. *Commissioner of Social Services* v. *Smith*, 265 Conn. 723, 732–33, 830 A.2d 228 (2003) (respondent in child support proceeding who fails to respond to pleadings "is deemed to have judicially admitted the underlying facts of the support petition"); see also *Bank of America, FSB* v. *Franco*, 57 Conn. App. 688, 693, 751 A.2d 394 (2000). When the respondent father failed to appear for trial and was defaulted, "the court was permitted to take the facts contained in the pleadings to be true [as to him] and to rely on those facts in making its decision as to adjudication." *In re Pedro J. C.*, 154 Conn. App. 517, 521 n.3, 105 A.3d 943 (2014), overruled on other grounds by *In re Henrry P. B.-P.*, 327 Conn. 312, 173 A.3d 928 (2017), citing *In re Natalie J.*, 148 Conn. App. 193, 207, 83 A.3d 1278, cert. denied, 311 Conn. 930, 86 A.3d 1056 (2014). In an abundance of caution, appropriate to the gravity of the TPR issues at hand, however, the court has further considered the petitioner's evidence addressing the adjudicatory issues.

B

The Mother, Agnieszka G.

The respondent mother has a long history of mental health, domestic violence, and substance abuse issues that have negatively affected both her and her two children. In a telephone conversation she had on November 19, 2016, with the respondent father, she admitted that she has been an addict for more than 20 years. See recording 461, on petitioner's exhibit 29. In April, 2016, and again in November, 2017, she told treatment providers that she was using $40 to $100 worth of cocaine on a daily basis. Petitioner's exhibit 17, CHR Intake Form

dated April 19, 2016, p. 1;[10] respondent mother's exhibit C, p. 12 of Intake Form;[11] and testimony of Lori Bergeron, her counselor at Milestone.[12] On numerous occasions between 2005 and the present,[13] the mother's substance abuse substantially impaired her ability to care for her children, including the occasion in November, 2016, when she drove while intoxicated with Avia in the car.

Aaliya, who is Ms. G.'s older child, has been a witness to extensive domestic violence involving Ms. G. Between 2005 and 2016, there were numerous such incidents between Ms. G. and Aaliya's father, Ms. G.'s mother (the children's maternal grandmother), and

[10] "Client presented with cocaine use disorder, severe and cannabis use disorder, mild at time of admission. She reported she uses cocaine by method of inhalation and that she would typically use daily in the amount of $40-$100 worth." Petitioner's exhibit 17, p. 1.

[11] "Client first began using substances with alcohol at age 15. It was a problem before her cocaine use but it decreased after she began using cocaine. . . . Client began using cocaine by inhalation at age 28. She uses $40-100 worth daily." Respondent mother's exhibit C, p. 12.

[12] "Q. . . . And she reported using forty to a hundred dollars worth of cocaine daily?

"A. That's correct." Testimony of L. Bergeron, transcript of proceedings, January 9, 2018, p. 83.

[13] The TPR social study and the Investigation Protocol introduced into evidence credibly recounted that history. On January 31, 2005, when Aaliya was less than seven months old, the mother and Aaliya's father returned home intoxicated and engaged in a physical altercation in front of Aaliya. Six months later, on June 29, 2005, Ms. G. came home intoxicated and then punched and bit the maternal grandmother. On June 27, 2007, the maternal grandmother "picked the daughter up at daycare without mother's permission because mother was intoxicated. . . . Mother and grandmother argued and mother tried to grab her daughter from grandmother's arms. Mother scratched daughter on her left arm and left cheek. Caller [Farmington Police Department] stated they are very small." Petitioner's exhibit 22, p. 5. On May 26, 2010, the child reported that Ms. G. "drank wine all the time, and that she never washed clothes nor cooked food. Aaliya reported the house was a mess, and she wished it would be clean." Petitioner's exhibit 1, TPR social study dated April 24, 2017. In July, 2012, Aaliya called 911 to report that her mother was " 'stumbling and fainted to the ground' and could not be roused." Id., 2–3. The mother was then tested positive for marijuana, cocaine, and PCP.

Avia's father, Mr. M., the respondent father in the present proceeding. Many of these incidents occurred when Ms. G. was intoxicated or under the influence of drugs. The evidence also showed that in 2014 and 2015 there were numerous incidents of domestic violence between these two respondents, and at least two of those incidents occurred in front of Aaliya, who was nine years old at the time of the 2014 incident and ten years old during the 2015 incident.[14] After the 2014 domestic violence incident, DCF social workers "tried to ensure the safety and well-being of Aaliya." Transcript of testimony of Amber Orvis on January 8, 2018, p. 128. Ms. G. would not cooperate with the department, however, or let the DCF social worker into her home. A vivid example of her unwillingness to cooperate is provided by an incident, recounted credibly at trial by DCF social worker Orvis, when that social worker went to the mother's home in an effort to ensure that Aalyia was safe, and after she had made several attempts to gain entry, Ms. G. leaned out of her window and said "Nice try. Try again." Id., 129.[15]

[14] In March, 2014, Ms. G. reported to the New Britain Police Department that Mr. M. assaulted her in Aaliya's presence. On February 20, 2015, the respondent parents had an argument at the mother's home in which Mr. M. "accused her of cheating on him." New Britain Case/Incident Report dated February 20, 2015, p. 2, contained in petitioner's exhibit 8. Mr. M. pushed Ms. G. onto her bed and wrapped his hands around her neck. Aaliya heard them arguing and Mr. M. calling her mother "bad names." Id. The child went into the bedroom and saw Mr. M. "[o]n top of her mother pinning her down on the bed." Id. The child yelled for him to stop and he then kicked a lamp and punched a hole in the wall.

[15] A fuller recital of the direct examination of social worker Orvis portrays this incident even more vividly:

"Q. Okay. You said that you were never able to get into the home, did you ever have face-to-face contact with her?

"A. There—there was a time where I was pretty adamant on ensuring the safety of the child and I arrived when Aaliya would be getting home from school and I did try my very best to get Ms. [G.'s] attention at which point I ran up the stairs and she closed the door on me and I went back to my car. And I kept leaving notes. I would talk to her outside the door and I went back to my car. Ms. [G.] lifted up the window and said, nice try, try

In July, 2015, Mr. M. was convicted on six counts of violating a protective order that had been entered by the criminal court with Ms. G. as the intended protected person. He received suspended sentences of three years on each of those counts and three years of probation. In December, 2015, Mr. M. was arrested again, this time for assault in the third degree after assaulting Ms. G. in her home and trying to choke her, and in May, 2016, he was convicted of that charge and two counts of violation of probation, for which he received a total effective sentence of 18 months of incarceration. The call log from the Connecticut Department of Correction (DOC) entered into evidence shows that Mr. M. and Ms. G. were in constant telephone contact during that period of incarceration.

The mother's older child, Aaliya, was also the subject of a neglect petition brought in August, 2007, after DCF received the report of domestic violence two months earlier between Ms. G. and the maternal grandmother that had resulted in minor injuries to Aaliya, as described in footnote 13 of this opinion. That case resulted in an adjudication of neglect and a period of protective supervision. Ms. G.'s unaddressed mental health and substance abuse issues and the repeating cycle of domestic violence resulted in another neglect petition being filed on Aaliya's behalf in August, 2015, on the ground that the child was living under conditions injurious to her well-being. The summary of facts alleged that Ms. G. had "not taken the proper steps to protect Aaliya from exposure to domestic violence." An addendum to the petition further alleged that the mother had "neglected Aaliya by exposing her to the verbal and physical abuse" between the parties and "puts the child at further risk as she demonstrates no insight into the risk [that] relationship . . . poses to

again. So she clearly did not, you know, want to speak with me." Transcript of testimony, January 8, 2018, p. 129.

Aaliya." Neither parent appeared at the initial hearing on September 17, 2015, and after finding that the mother had been properly served, the child's father had been notified of the petition by publication and neither parent was in the military services of the United States, the court, *Cohn*, *J.*, entered defaults against both parents, adjudicated the child to be neglected, and ordered a period of six months of protective supervision with the mother.[16] Although DCF again offered her services, Ms. G. still had no interest in cooperating, and she refused to sign any releases of information (which would have been necessary so that DCF could refer her to a service provider, for otherwise statutory confidentiality laws would have prevented the department from discussing her with any third party[17]).

On March 31, 2016, two weeks after the expiration of protective supervision in the 2015 neglect proceeding, the department received a report from The Hospital of Central Connecticut that Ms. G. had tested positive for cocaine and marijuana at the time of Avia's birth. Although the baby's urine tested negative for drugs, the meconium was later determined to be positive for cocaine. A DCF investigator spoke to hospital workers, one of whom told the investigator that the mother had acted erratically when told about the positive drug test and had "presented manic at times in the hospital." Petitioner's exhibit 22, DCF Investigation Protocol, p.

[16] The mother appeared at a subsequent hearing and was appointed an attorney, who did not seek to open the default judgment. See Memorandum of Hearing dated October 21, 2015, in *In re Aaliya S.*, Docket No. H14-CP15-011525-A.

[17] Under General Statutes § 17a-28, all records maintained by DCF are confidential and may only be disclosed with the consent of the individual who is the subject of the records or as authorized by the statute. That statute provides, in pertinent part, as follows: "(b) . . . [R]ecords maintained by the department shall be confidential and shall not be disclosed, unless the department receives written consent from the person or as provided in this section, section 17a-101g or section 17a-101k. . . ."

6. When the investigator initially met with Ms. G., the mother denied having used cocaine while pregnant, but "appeared sluggish, delayed in her responses . . . [and] combative at times . . . . She did not appear to be remorseful or apologetic. She did not appear to understand the concerns concerning the drug exposure and impact to her newborn infant." Id., 7. A few hours later, however, the mother "admitted to continuous marijuana, cocaine and alcohol use throughout her pregnancy with Avia [and that] . . . she is addicted to drugs and needs help." Id. (her admission to continuous drug use during the pregnancy signifies that she had been using drugs throughout the period of protective supervision on the 2015 neglect case, and her lack of cooperation had prevented the department from learning about that substance abuse). The department offered to refer her to an inpatient substance abuse program at which her newborn child might also be placed with her, and although originally appearing receptive to that suggestion, within a few days the mother "was refusing to enter into substance abuse treatment." Id.

At the hospital, the mother agreed to a DCF safety plan that the maternal grandmother would take care of Aaliya and Avia and not permit Ms. G. to have unsupervised contact with the baby. On April 4, 2016, Avia was released from the hospital, but two days later the maternal grandmother asked DCF to take the child, and Ms. G., who had also been released from the hospital, admitted that "she got really drunk last night and smoked marijuana." Id., 8. She also told the social worker: "If I had money, I would have bought cocaine and did that too." She told the social worker that "she does not care anymore and that she wants DCF to take her kids." Id. The department invoked a 96 hour hold on Avia and removed her from the maternal grandmother's care, sought and obtained orders of temporary custody

(OTCs) for both children,[18] and filed neglect petitions on behalf of both.

On April 15, 2016, Avia's parents both appeared at the preliminary hearing on the OTC, were appointed counsel and advised of their rights, entered denials to the allegations of neglect, but agreed for the OTC to be sustained. On April 28, 2016, Ms. G. entered an inpatient substance abuse treatment program at the New Life Center. Having continued to use drugs until then, she tested positive for cocaine and marijuana upon intake. According to the testimony of Samantha Larkin, a residential counselor at NLC, and certain written exhibits prepared by NLC about the mother's treatment there, Ms. G. initially appeared to do well there. She worked on her mental health issues (her counselor there testified that she had diagnoses of bipolar disorder and attention deficit hyperactivity disorder), her substance abuse history, and her "history of abusive relationships,"[19] particularly with Avia's father, Mr. M. On July

[18] The fathers of the two children were not available to assume care of the children. Aaliya's father had returned to his native country of Poland in 2005, and Avia's father was incarcerated.

[19] The following was elicited by the assistant attorney general on direct examination of Ms. Larkin:

"Q. With respect to Ms. G. . . . her initial assessment, what did that reveal about the issues that brought her to New Life?

"A. So it was obvious that she had an addiction history and she was struggling with substances at that—at time of admission. There was also mental health issues that, you know, we wanted to make sure were addressed. I think those were probably the two biggest issues. But she had also voiced wanting to work on, you know, healthy relationships as well, which was something that we worked on throughout the program, as well as parenting and working to reunify her with her daughter when she was in the program.

"Q. Okay. So the program included mental health, substance abuse, domestic violence or intimate partner violence and parenting components?

"A. Yeah. . . .

* * *

"Q. And you mentioned domestic violence, why was that an issue?

"A. [Agnieszka G.] had mentioned a lot during our treatment that she had a history of some abusive relationships and that, you know, she wanted to work on having healthier relationships in the future." Transcript of testimony, January 17, 2018, pp. 41–43.

28, 2016, the mother entered a plea of nolo contendere to the neglect petition, and the child was placed with her at NLC under an order of protective supervision for nine months (without prejudice to Mr. M., who was allowed to stand silent as a noncustodial parent a month later).

On November 7, 2016, Ms. G. returned to the facility from a pass in an intoxicated state, and she admitted to having driven Avia in her vehicle while in that condition.[20] NLC notified the department, which removed the child from her mother's care on a 96 hour hold, sought and obtained another OTC for the child, and filed a motion to modify the disposition (from protective supervision to commitment). After initially contesting that motion and the OTC, on November 28, 2016, both parents subsequently agreed to the motion for modification, the OTC was withdrawn, and Avia was committed to the commissioner. She has been placed in nonrelative foster care since then, in the same household where she had lived during the three months between the original OTC and her placement with Ms. G. under protective supervision at NLC.

Ms. G. stayed at the NLC for only another week after Avia's removal and left the facility on November 14, 2016, against the advice of her counselor there. That counselor, Samantha Larkin, testified that "I definitely wanted her to stay,"[21] and the NLC Discharge Form reports that "[c]lient presented irrational and impulsive

[20] Within a few days after this incident, Ms. G. had a telephone conversation, recorded by DOC, with the respondent father about what had happened. The briefs filed by both the petitioner and the minor child correctly note her failure in those conversations to acknowledge that she had endangered her child's life and safety.

[21] Samantha Larkin's fuller description of NLC's position after Ms. G.'s relapse is described below:

"She had admitted to drinking while she was out on pass. We had discussed the situation that happened. We kind of processed her thoughts, you know, the events, her actions, the choices, and kind of just processed the whole situation as part of her treatment.

* * *

at time [of] discharge. Expectations for future function are poor due to [client's] inability to remain in treatment and collaborate on discharge and aftercare in order to facilitate a smooth transition back into the community.'' Petitioner's exhibit 5, CHR Discharge Form dated November 15, 2016, p. 1. The DCF social worker recommended to Ms. G. that she enter another inpatient mother-daughter treatment program at Amethyst House, but she refused. NLC referred her to the intensive outpatient program at Wheeler Clinic, and DCF then adopted that recommendation.

While the mother was attending the inpatient mother-child treatment program at the New Life Center between April and November of 2016, DCF had referred her to The Connection for case management and subsidized housing through the Supportive Housing Program. After leaving NLC, Ms. G. found a three bedroom apartment that The Connection agreed would satisfy the subsidy requirements, and Ms. G. moved into that apartment later in November. The Supportive Housing program provided her with "basic furniture" for the

"So we had to subsequently file the [form] 136 with DCF. We were fully intending on planning on working with her. She remained in the program following that. And like I said, we wanted to work to kind of process that relapse and, you know, get her back on track where she needed to be.

"As a result of the 136, DCF did come and remove the child from her care at New Life Center on a 96 hour hold and I believe that was the 8th of November and she remained in the program. And we, you know, like I said, we wanted to continue to work with her. We didn't want her to discharge from the program and end up in the community unsafe.

* * *

"I mean, I definitely wanted her to stay. I wanted her to stay and make sure that she was stable because the choice to leave, in my opinion, was impulsive. She had told me that she had thought the process through, but she didn't have housing at that point. She was working on a discharge plan.

"I just wanted to make sure that she had a secure aftercare plan in place prior to her leaving the program, especially considering the removal of her child recently and there was some obvious events that had taken place that I wanted to make sure that she was in a stable place before she left the program." Transcript of testimony, January 8, 2018, pp. 52–55.

apartment, paid off an outstanding electric bill of $1600, and paid the gas company $100 to activate gas service. (The Connection program also helped her in other ways, such as assisting with immigration issues and providing transportation to an inpatient program.) Ms. G. has lived at that apartment ever since, although at the end of evidence she was behind in her rent, out of compliance with Supportive Housing requirements, and did not yet have employment or legal income to pay for her rent and other expenses.

Over the course of the next few months after leaving the NLC facility, Ms. G. entered and was discharged unsuccessfully from a number of substance abuse treatment programs. She began attending LifeLine, Wheeler Clinic's Adult Intensive Outpatient Program (IOP), but by mid-January, 2017, however, she had relapsed on cocaine and stopped going to treatment there, and Wheeler Clinic then discharged her for noncompliance. She told The Connection case manager that she had stopped going to Wheeler Clinic because "LifeLine [IOP] was not helping her." Petitioner's exhibit 18, DCF Monthly Client Contact Reports from The Connection, report dated February 3, 2017. She told a DCF social worker on January 23, 2017, that she "wanted to go inpatient"; petitioner's exhibit 23, Running Narrative Document, p. 15 of 138; but two days later she said that she no longer wanted to go inpatient "and felt she could maintain her sobriety doing Intensive Outpatient Treatment." Id. Next, she went to the Intensive Outpatient Program at the Farrell Treatment Center, but by the end of February, 2017, she had also been discharged from that program unsuccessfully, with Farrell recommending that she engage in a higher level of care in an inpatient program.

Instead, Ms. G. went to another Intensive Outpatient Program, this one at Community Mental Health Affiliates, beginning on March 9, 2017. From the court's perspective, however, that treatment did not begin on an

auspicious note, as she lied to program staff at her initial intake when she claimed that "she had been sober 8 years until she recently (Dec. 2016) relapsed on intermittent cocaine and marijuana use when her abusive husband was released from jail." Petitioner's exhibit 31, CMHA Intake Assessment, dated March 9, 2017, p. 1. She participated in that IOP program for two months, but missed seventeen of her scheduled thirty-one appointments. After she continued to relapse, CMHA discharged her in May, 2017, as unsuccessful for noncompliance with its treatment and poor attendance and recommended a higher level of treatment for her in an inpatient program.

Over the next few months, the mother procrastinated about entering the inpatient treatment that had been recommended after her unsuccessful discharges from the IOP programs at Farrell Treatment Center and CMHA. For example, she told her The Connection case manager that she "planned to go into rehab on May 22," at the New Life Center in Putnam. Respondent mother's exhibit B, The Connection Client Chronological Notes, unspecified date, p. 27. But her next formal treatment was another IOP program, when she returned to Farrell Treatment Center in August, 2017. Her attendance there was sporadic, and after she admitted more relapses and had some positive drug screens, FTC discharged her in September, 2017, with another recommendation that she enter inpatient treatment. She was on a waiting list for an inpatient treatment program at Rushford when, after another relapse in November, 2017, and operating a motor vehicle while under the influence, she entered CMR's 30 day inpatient Milestone substance abuse treatment facility, from which she was successfully discharged after approximately thirty days of treatment. At of the end of evidence, she had returned for outpatient treatment at FTC. Throughout the course of these proceedings, DCF social workers have asked

her to submit to hair tests to assess her drug usage. The specific steps directed her to "submit to random drug testing; the time and method of testing will be up to DCF to decide." Ms. G. has refused to comply with that request, except for one occasion, when she agreed to provide a hair sample but then never actually did so.

A recurring theme of the mother's statements about her substance abuse has been that her drug and alcohol relapses are the result of two triggering motivations—to relieve distress at violence from Mr. M. or to cope with her emotions.[22] The specific steps ordered when

[22] Examples include the following:

- "I got drunk and relapsed. . . . I felt alone and vulnerable and so mad. . . . I'm so tired of being alone." Telephone call with respondent father on November 9, 2016, contained on petitioner's exhibit 29, DVD recording of father's telephone calls while incarcerated.
- She told a DCF social worker on January 20, 2017 that "she relapsed on cocaine . . . . Mo stated that she messed up and it's because of Mr. M. on facebook. Mo is blaming fa for her relapsing. Mo reported seeing fa on facebook and being upset with his posts." Petitioner's exhibit 23, Running Narrative for January 20, 2017.
- At the IOP Intake at CMHA on March 9, 2017, she "shared that she usually engages in substance abuse due to inability to cope with emotional pain from trauma hx, as well as struggling to cope with chronic back pain." Petitioner's exhibit 31, p. 1.
- "Client . . . disclosed that she has been using and has decided to go into rehab. Client stated that her abusive husband has been her trigger and she has had some contact with him. Client stated ever since he got out of jail, she has been relapsing in response to his emotional and verbal abuse of client." Respondent mother's exhibit B, The Connection Client Chronological Notes, unspecified date, p. 27.
- "Client's Presenting Problem . . . . 'My drug of choice is cocaine and I first started using it when I was 28. I was going through a break up and it filled that void. It escalated in 2014. I had just gotten married and my husband started using too. When my husband became abusive, I started drowning myself into it.' " Petitioner's exhibit 27, CHR Intake, November 29, 2017, p. 1.
- "Substance Abuse Summary . . . . 'When I feel depressed or anxious or have low energy it makes me want to use. . . . Relapsed because stress from husband's abuse. Has had shorter periods of sobriety and

Avia was committed to the commissioner on November 28, 2016, directed Ms. G. to engage in individual counseling, with goals that included for her to "[l]earn triggers for substance abuse and alternative coping mechanism[s]," "understand impact of domestic violence and substance abuse on children," "[a]ddress mental health needs in individual counseling in order to maintain emotional stability [and] continue in care for mental health needs." Petitioner's exhibit 14, specific steps for mother, Addendum. The specific steps also ordered her to "[a]ttend and create an appropriate domestic violence program," and one of the goals of her individual counseling was to "[c]reate and maintain [a] safe, stable, and nurturing home environment free from domestic violence and substance abuse." Id., p. 1 and Addendum.

Consistent with the specific steps, DCF referred the mother for mental health treatment at Wheeler Clinic after her discharge from the New Life Center program in November, 2016, but Ms. G. instead chose to select

states she relapsed due to loneliness, isolation, husband's abuse.' " Id., p. 6.

- "Client said she will often use when people verbally abuse her or she feels alone. . . . Client spoke about her husband's verbal abuse and it often making her want to use. We began discussing her getting back with her x husband after he got out of jail for domestic abuse. She said she left New Life in November and started talking to him again in December. She said he told her things would be different and she was hoping he had changed. Client said she owed it to herself to give him another chance. Client said he pretty quickly became verbally and emotionally abusive with her again. He also used and she used with him. Client said he would call her names and she lost her self esteem again when she was with him. She said she felt ugly and hopeless and he would call her a whore and tell her she was worthless and that nobody would want her. Client said she didn't know how to climb out and felt alone again like when she was a kid. She said she was always the bad egg, the loser and never good enough. Client said the only friend she had was cocaine." Respondent mother's exhibit C, CHR records, Counseling on December 10, 2017, p. 1.

her own mental health clinician,[23] and since January of 2017, she has been attending weekly therapy with Ronald Klemba, a licensed marriage and family therapist at Healing House of CT in New Britain. Social worker Fazzolari testified that he "specializes in domestic violence." Transcript of testimony, January 9, 2018, p. 111. In a letter dated October 4, 2017, Klemba wrote that her treatment with him was intended "to address symptoms impairing her ability to function on certain levels" and that she "has proven to be a reliable, engaged client." Respondent mother's exhibit F. His treatment records for June, 2017 through January of 2018, however, show that any progress she may have made has been slow and, even when construed most favorably for her, that she has just begun taking steps toward consistent sobriety.[24] It is significant, however, that even though Klemba's most recent treatment record introduced into

[23] The court draws no adverse inference against the mother for selecting her own therapist rather than attending the counseling service recommended by DCF. What is important is whether she attended therapy, which the evidence shows she did, and whether she made progress toward the goals for therapy set by the specific steps, a subject discussed in the text.

[24] The notes maintained by the mother's therapist, Ronald Klemba, contain the following annotations regarding their treatment sessions:

"2/22/[17] Client very tearful upset and reporting sobriety too painful to feel."

"3/7/[17] Client admits to back and forth continued drug use. Cannot see life without getting high."

"4/4/17 . . . . Suppresses a need for help while dictating type of help acceptable. Refuses to be redirected at this point."

"6/6/[17] Demanding this be over and kids returned. Client in a very demanding mood not looking at her own decisions that made the current state nec."

"6/13/17 Client promising to go inpatient once achieving CNA certificate. A pattern of procrastination affecting the outcome of case."

"6/27/17 Client ask for excuse support now using mental health as excuse for inconsistent with programs."

"7/18/17 Still trying to dictate programs + progress. Refusing redirection as she gets 'too down.' "

"8/8/17 Client unwilling to address concerns related to [children's] commitment to DCF as she claims to have it covered."

"9/12/17 Convinced if she does well in rehab she will regain her children. Does not want reality check as addiction takes lots of time."

evidence commented that Ms. G. presented herself on January 11, 2018, as "committed to sobriety," therapist Klemba's own conclusion about her "progress" was that she was "unchanged." See Psychotherapy Treatment Records for January 11, 2018, contained in respondent mother's exhibit F.

After the 2014 report of domestic violence in front of Aaliya, DCF referred Ms. G. to the Prudence Crandall Center, a New Britain domestic violence shelter and service provider. Records from that agency introduced into evidence by the mother[25] show that Prudence Crandall staff twice called her home in 2014 but were unable to reach her.[26] The current DCF social worker, Alison Sroka, was also then assigned to the mother's case and she testified that, "to my knowledge," Ms. G. did not seek any services from Prudence Crandall at that time. Transcript of testimony, January 17, 2018, pp. 48–49. The evidence shows that, in fact, the mother had approximately ten contacts with Prudence Crandall between 2014 and 2017 in which she received counseling and support. But, at least until recently,[27] she continued her relationship with Mr. M. and incidents of

"9/19/17 Client cannot accept the possibilities and prefers to live in denial. Re committing to beating addiction."

"11/1/17 Many loose ends to take care of before the inpatient program. Client seems motivated to stay with current plan instead of historic flips."

"1/11/2018 . . . . Client calm fresh out of rehab committed to sobriety . . . . New goals being generated new commitment towards them . . . . Progress [check mark on line next to 'Unchanged']." Excerpts from Psychotherapy Treatment Records, contained in respondent mother's exhibit F.

[25] Ms. G. introduced a 21 page exhibit into evidence that was entitled "Participant Profile" from the Prudence Crandall Center. Since there was no witness testimony explaining that exhibit, however, some of the entries were difficult to understand fully.

[26] The Prudence Crandall [Center] Participant Profile contains entries dated July 15, 2014, stating "Phone attempt 11:18am . . . person unavailable" and September 9, 2014, stating "Attempt phone contac [sic] with victim. Person unavailable and the v/m [which the court construes as an abbreviation for 'voice mail'] is not set up." Respondent mother's exhibit E, pp. 8 and 9.

[27] A "contact note" regarding "counseling" that she received in person on October 12, 2017, states as follows: "Still involved with her husband, but

domestic violence continued to occur during most of that time. The department social worker also provided an opportunity for Ms. G. to meet for a consultation with a domestic violence specialist at DCF, who suggested various referrals to her. One of those was a domestic violence program at The Hospital of Central Connecticut, but the mother declined that service, telling her social worker that she did not feel comfortable addressing these issues in a group setting. She instead agreed to a referral offered by DCF to Harold Fischer and Associates, a private therapist offering individualized domestic violence services. Unfortunately, she did not follow up on that referral or begin services there.

C

The Father, Antonio M.

In 2009, the father's parental rights were terminated to his then 12 year old son, Antonio S., after Mr. M. submitted his written consent in a TPR proceeding brought in 2006 by the Commissioner of Children and Families to terminate the parental rights of the child's natural mother and father. He is the father of eight other children, including Avia, all of whom have had involvement with DCF because of parental neglect.

Mr. M. married the respondent mother in January, 2014. As has been previously discussed and is shown by the police reports and his criminal conviction and protective order history introduced into evidence, their relationship has been marred by numerous incidents of domestic violence on his part toward Ms. G. He was incarcerated and serving the sentences imposed in December, 2015, when the commissioner brought the

states she has filed for divorce." Respondent mother's exhibit E, p. 7. This most recent entry in that exhibit does not provide any explanation for the apparent contradiction between "still involved" and "filed for divorce" and suggests that the filing for a dissolution did not signify an end to their relationship.

neglect petition on Avia's behalf in April, 2016, and there has been at least one more incident of domestic violence between the parents since then.

After Mr. M.'s release from incarceration in December, 2016, he spent three months at a halfway house in New Britain, where he received anger management and mental health services. The department also provided him weekly visits with Avia while he was there. In March, 2017, DCF social worker Orvis was developing a discharge plan for him, when he abruptly left the halfway house, and his whereabouts were then unknown to DCF until he appeared at the initial hearing on the TPR petition on June 2, 2017. He missed three of the five scheduled visits with his daughter between then and the end of trial.

After that court hearing, DCF requested that Mr. M. submit to a substance abuse evaluation and urine screen, and he attended Wheeler Clinic for that purpose in August, 2017. The toxicology report was negative and there were no recommendations for treatment or services. DCF also referred him to Radiance Innovative Services for domestic violence services but, after attending a few sessions, he stopped doing so. Although the subject of a standing criminal protective order that he not assault, threaten, abuse, or harass Ms. G., he went to her home on June 29, 2017, and struck the door to her premises "so hard that the trim on the inside broke away and some wood split near the bottom hinge." Petitioner's exhibit 9A, New Britain Police Department Incident Report dated June 29, 2017, p. 2.[28]

[28] The petitioner introduced evidence showing that on August 17, 2017, the mother complained to police that the father had snuck into her home late at night, attacked and started hitting her, held her down by the hair, dragged her out of bed by the hair, and punched and kicked her repeatedly. The police officer assigned to investigate the alleged incident determined that the mother's report was improbable and not credible; and his testimony as to his reasons for that conclusion was credible. Hospital records of her visit to the emergency room do not undermine the officer's conclusion. The court accordingly does not find it proven that Mr. M. engaged in any act of

He was arrested on charges of criminal mischief, breach of the peace and violation of a protective order, which remained pending at the close of evidence.

II

ADJUDICATORY PHASE OF TPR PROCEEDING

In the adjudicatory phase of a proceeding under § 17a-112 (j), the court must determine whether the commissioner has proven by clear and convincing evidence[29] both a statutory ground for termination of

violence against Ms. G. that evening. It is more likely that she fabricated her account.

[29] The trial brief of the respondent mother argues that the "highly probably true" articulation of the clear and convincing standard often expressed by Connecticut courts does not comport with the due process clause of the fourteenth amendment of the United States constitution. See Trial Brief for Respondent Mother, pp. 18–19. It is true that Connecticut cases often describe the clear and convincing standard in the following way: "The burden of persuasion, therefore, in those cases requiring a showing of clear and convincing proof is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." *Dacey* v. *Connecticut Bar Assn.*, 170 Conn. 520, 537, 368 A.2d 125 (1976); see also *Lopinto* v. *Haines*, 185 Conn. 527, 534, 441 A.2d 151 (1981) (same). Her brief is also correct that the clear and convincing standard of proof is constitutionally required under the due process clause of the fourteenth amendment in TPR cases. See *Santosky* v. *Kramer*, 455 U.S. 745, 756, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Finally, her brief is correct that the United States Supreme Court has approvingly quoted a New Jersey case describing that standard as evidence which "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the fact finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." (Internal quotation marks omitted.) *Cruzan* v. *Director, Missouri Dept. of Health*, 497 U.S. 261, 285 n.11, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990), citing *In re Jobes*, 108 N.J. 394, 407–408, 529 A.2d 434 (1987). In that same case, however, the Supreme Court also approvingly quoted a New York case formulating a different description of clear and convincing evidence: "The clear and convincing standard of proof has been variously defined in this context as 'proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented' . . . ." (Citation omitted.) *Cruzan* v. *Director, Missouri Dept. of Health*, supra, 285 n.11,

parental rights and that the department complied with its reasonable efforts obligations. See *In re William R. III*, 65 Conn. App. 538, 546, 782 A.2d 1262 (2001); *In re Michael R.*, 49 Conn. App. 510, 512, 714 A.2d 1279, cert. denied, 247 Conn. 919, 722 A.2d 807 (1998). Reasonable efforts need not be proven, however, if the petitioner proves by clear and convincing evidence that a parent was unwilling or unable to benefit from reunification efforts. *In re Jorden R.*, 293 Conn. 539, 552–53, 979 A.2d 469 (2009).

Under Practice Book § 35a-7 (a), in the adjudicatory phase of the proceeding, "the judicial authority is limited to evidence of events preceding the filing of the petition or the latest amendment, except where the judicial authority must consider subsequent events as part of its determination as to the existence of a ground for termination of parental rights." See also *In re Anthony H.*, 104 Conn. App. 744, 757, 936 A.2d 638 (2007), cert. denied, 285 Conn. 920, 943 A.2d 1100 (2008). "In the adjudicatory phase, the court may rely on events occurring after the date of the filing of the petition to terminate parental rights when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Emphasis omitted; internal quotation marks omitted.) *In re Jennifer W.*, 75 Conn. App. 485, 495, 816 A.2d 697, cert. denied, 263 Conn. 917, 821 A.2d 770 (2003).[30] On the first day of trial, after the father had been defaulted, the petition

citing *In re Westchester County Medical Center*, 72 N.Y.2d 517, 531, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988).

In this case, the evidence sustaining the petitioner's case with regard to reasonable efforts, the adjudicatory grounds for termination, and the best interest of the child satisfies all three of these formulations of the clear and convincing standard.

[30] The court in that case also noted that "the court was not under an obligation to consider events after the filing of the termination petitions in the adjudicatory phase of the proceedings . . . ." *In re Jennifer W.*, supra, 75 Conn. App. 496–97.

was amended with regard to the factual allegations supporting the petitioner's claims for termination of the respondents' parental rights. That date has therefore become the adjudicatory date on which the allegations of the petition must be assessed.

A

Reasonable Efforts Findings

In TPR proceedings brought under § 17a-112 (j), the court must determine whether there is clear and convincing evidence that the department made reasonable efforts to locate the parent and to reunify the child with him or her, unless the court finds that the parent was unable or unwilling to benefit from reunification efforts. "When making its reasonable efforts determination during the adjudicatory phase, the court is limited to considering only those facts preceding the filing of the termination petition or the most recent amendment to the petition . . . ." *In re Paul O.*, 141 Conn. App. 477, 483, 62 A.3d 637, cert. denied, 308 Conn. 933, 64 A.3d 332 (2013). But see *In re Oreoluwa O.*, 321 Conn. 523, 543–44, 139 A.3d 674 (2016), holding that the reasonable efforts obligation was properly measured in that case by considering events after the TPR petition had been filed.[31]

[31] The court in that case also noted that "[o]ur rules of practice and the relevant statutory provisions do not . . . address whether the trial court should consider evidence of events following the filing of the petition for termination of parental rights when determining whether the department has made reasonable efforts." *In re Oreoluwa O.*, supra, 321 Conn. 543. Although the facts of all TPR cases are different, those in *In re Oreoluwa O.* were highly unusual. The respondent father lived in Nigeria and "was having difficulty traveling to this country to be with Oreoluwa . . . ." Id. In addition, "a review of the department's efforts to reunify the respondent with Oreoluwa demonstrates that all of those efforts were based on the department's presumption that the respondent would have to be present in this country to engage in reunification efforts and that Oreoluwa could not travel to Nigeria." Id., 542. When the TPR petition had been filed, "there was uncertainty as to when Oreoluwa would be cleared to travel and his medical status was in a state of flux." Id., 543–44. In determining that the department had made reasonable efforts to reunify, the trial court had relied

Although requiring DCF to make "reasonable efforts" to reunify the child with the parent, neither the statute nor the federal act from which the reasonable efforts requirement is drawn defines either the term "reasonable" or the term "efforts." See, e.g., *In re Eden F.*, 48 Conn. App. 290, 311, 710 A.2d 771 (1998), rev'd on other grounds, 250 Conn. 674, 741 A.2d 873 (1999). Absent any statutory definition, our courts have instead used the commonly understood meanings of both terms. Id., 311–12. As Judge Foley has aptly observed, "providing services to rehabilitate the deficient parent is the crucial ingredient to reasonable efforts." (Emphasis omitted.) *In re Jessica H.*, Superior Court, judicial district of Middlesex, Juvenile Matters, Child Protection Session

on departmental assertions that "[t]here is also uncertainty regarding the medical care [Oreoluwa] would be able to receive in Nigeria and if his ongoing medical needs would be able to be met" without any evidence that the department had actually "attempted to investigate what type of medical care Oreoluwa would receive in Nigeria." (Internal quotation marks omitted.) Id., 544. The Supreme Court concluded that "[w]ithout updated medical information regarding Oreoluwa's ability to travel and medical needs . . . we conclude that the commissioner did not meet the burden of demonstrating that the department did 'everything reasonable' under the circumstances to reunite the respondent with Oreoluwa." Id., 546. The Supreme Court thus held that "[u]nder the facts of the present case, however, we conclude that it was not improper for the trial court to consider events subsequent to the filing of the petition for termination of parental rights." Id., 543.

Since then, however, two appellate opinions have reaffirmed that the reasonable efforts determination is part of the adjudicatory phase of the proceeding; *In re Elijah G.-R.*, 167 Conn. App. 1, 32, 142 A.3d 482 (2016), and *In re Elijah C.*, 326 Conn. 480, 500, 165 A.3d 1149 (2017); and, hence, would be appropriately measured as of the adjudicatory date. The authors of the annotated practice book may therefore be correct that *In re Oreoluwa O.* is "limit[ed] . . . to the facts of the case," which they describe as "unique." B. Levesque & D. Hrelic, 1A Connecticut Practice Series: Juvenile Law (2017–2018 Ed.) § 35a-7, commentary.

From this case and *In re Jennifer W.*, supra, 75 Conn. App. 495, however, it thus appears that a court may, in appropriate circumstances, measure various adjudicatory findings, including rehabilitative status and reasonable efforts, by events occurring after the adjudicatory date. In this case, since the petition was amended to add more factual allegations, the first day of trial is the adjudicatory date, and any change in law occasioned by *In re Oreoluwa O.* is of no import here.

at Middletown (April 21, 1998) (*Foley*, *J.*). Moreover, "[t]he reasonableness of the department's efforts must be assessed in the context of each case. The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. . . . [R]easonable efforts means doing everything reasonable, not everything possible. . . . [R]easonableness is an objective standard . . . and whether reasonable efforts have been proven depends on the careful consideration of the circumstances of each individual case." (Internal quotation marks omitted.) *In re Gabriella A.*, 154 Conn. App. 177, 182–83, 104 A.3d 805 (2014), aff'd, 319 Conn. 775, 127 A.3d 948 (2015). The evidence in this case proved clearly and convincingly that as of the adjudicatory date for the petition, the department had made reasonable efforts to locate both parents and reasonable efforts to reunify both parents with the child.

1

Reasonable Efforts to Locate

The department has had ongoing contact with the mother throughout the underlying neglect and TPR proceedings, and properly caused her to be served with both petitions. The father was incarcerated and serving an eighteen month sentence when the commissioner brought the underlying neglect petition, and the department caused him to be served in-hand with that petition. On April 15, 2016, he appeared at the preliminary hearing on the order of temporary custody (OTC) entered ex parte seven days earlier. The father was advised of his rights that day and appointed counsel, and along with the mother agreed for the OTC to be sustained. He was also specifically advised that day to keep his address current with the department, his attorney, and

the clerk's office, but after his release from incarceration in March, 2017, he did not initially do so. While he was in parts unknown, DCF attempted to locate him by asking his mother, other relatives, and former associates if they knew his location, and also did a Lexis search for him, but was unable to ascertain his whereabouts. After DCF submitted an affidavit to that effect, the court authorized notice to him of the TPR petition by publication. When he appeared at the initial hearing on the TPR petition held on June 1, 2017, he provided a New Britain address. Trial on the petition was scheduled that day, in father's presence, for January 8 and 9 of 2018, at which time he did not appear. After his appearance at the TPR plea, the department had ongoing contact with him and provided visitation with the child. Under these circumstances, and the others proven at trial, it is found by clear and convincing evidence that the department made reasonable efforts to locate both the mother and the father.

2

Reasonable Efforts to Reunify

a

Mother, Agnieszka G.

The evidence shows that the issues leading to the initial and subsequent removals of Avia from Ms. G.'s custody were her ongoing substance abuse and mental health problems; in addition, her continuing involvement with violent and abusive intimate partners has been a barrier to reunification. This court has noted several times that "[e]fforts to reunify a parent with a child should begin with identifying any barriers to the parent being willing or able to meet the child's needs and to provide the child with stable and competent care appropriate for the child's age and needs, identifying culturally competent services or programs that are

appropriate for addressing those barriers and helping the parent assume a responsible position in the child's life, informing the parent of the steps they need to take to get their child back, and then referring a parent to those services and programs while at the same time providing the parent ongoing visitation with the child to help maintain their relationship." *In re Samantha A.*, Superior Court, judicial district of New Britain, Juvenile Matters, Docket No. H14-CP14-011171-A (May 20, 2016). The department here met all those obligations: it identified the barriers to reunification and appropriate services to address those barriers, informed Ms. G. of the need to engage in these services in order for Avia to be returned to her care, referred the mother to the various services and programs as recounted above, and offered her ongoing visitation. The evidence proved clearly and convincingly that the department made reasonable efforts to reunify Avia with Ms. G. by referring her on multiple occasions to services and treatment providers to help her address these problems.

In her trial brief, Ms. G. argues that the department's failure to offer her another "mother-daughter" program prevents a finding of reasonable efforts to reunify, but the court disagrees. Since the department and Ms. G.'s service providers have all repeatedly asked her to reenter inpatient treatment, her only complaint can be that the department did not offer her another inpatient treatment program that offered the prospect of the child residing with her. The premise of the mother's argument on this point, however, is not correct. The department did offer her another opportunity to participate in a mother-daughter treatment program. First, it must be noted that Ms. G. left the New Life Center's mother-daughter program on November 14, 2016, after her child was removed, but New Life Center was then still willing to provide her with ongoing treatment. Second, two weeks later, the department did offer her another

opportunity to attend a mother-daughter program, this time at Amethyst House. See petitioner's exhibit 1, p. 9. Ms. G. refused. That was the second time the department had offered and the mother had refused a referral there. After that, she attended and was discharged from several different inpatient treatment programs for noncompliance, with a recommendation after two of these discharges for inpatient treatment that she refused. For example, in June, 2017, she acknowledged to the DCF social worker that Farrell Treatment Center had recommended inpatient treatment but said she was going to instead attend the program to obtain her CNA certificate.

Our courts have repeatedly emphasized, however, that "reasonable efforts" does not mean "doing everything possible," only "doing everything reasonable." The courts have said that "reasonableness" is an objective standard, but have also repeatedly emphasized that "whether reasonable efforts have been proven depends on the careful consideration of the circumstances of each individual case." *In re Eden F.*, supra, 48 Conn. App. 312 (holding that statutory requirement for reasonable efforts to reunify not in effect at time that the TPR petition was filed in that case). To the extent that Ms. G.'s argument is that the department should have offered a fourth referral to a mother-daughter program, after she had left one before its conclusion and twice rejected referral to another such program and after her repeated relapses in 2017 during numerous courses of treatment, it would not have been "reasonable" to remove Avia from the safe and secure foster placement where she has done so well while the mother participated in additional treatment whose prospects, based on the mother's long history of relapses after treatment, would appear dismal. It would only have been "reasonable" to place the child back with the mother in an

inpatient mother-daughter setting if there were reasonable prospects for success, both during and after that treatment.

The commissioner argues in her trial brief that the respondent mother has been unwilling or unable to benefit from reunification efforts. The evidence contained exhibits regarding the mother's treatment at the New Life Center, CMHA, Farrell Treatment Center, and CHR's Milestone Program. These four programs encompass the bulk of Ms. G.'s substance abuse treatment during the period covered by this case. The court also heard testimony from individual treatment providers from three of these four programs: Samantha Larkin from the New Life Center, Daniel Millstein from Farrell Treatment Center and Lori Bergeron from Milestone. The evidence also contains evidence from three other service providers who engaged with Ms. G. during this period: The Connection, Prudence Crandall Center, and the Healing House of CT. Together, this evidence, along with the testimony of DCF employees and the contents of DCF-created exhibits, portrays Ms. G. in two different lights.

On the one hand, the testimony and exhibits demonstrate that, at times, Ms. G. appears sincere in her desire to overcome her addiction and end her abusive relationship with Mr. M. and also sometimes seems to be making progress toward those goals. The evidence is also permeated, however, by examples of her lack of sincerity and candor in her treatment efforts. When the TPR petition was filed on May 2, 2017, it may well have been said that the mother, as of that time, had been unwilling or unable to benefit from reunification efforts. As of that date, she had left the New Life Center in November, 2016, against its recommendation after relapsing, refused DCF's offer that same month for another

inpatient program, stopped attending the intensive outpatient program at Wheeler Clinic that had been recommended by NLC and DCF after her discharge from NLC, been discharged from the Farrell Treatment Center intensive outpatient program for noncompliance and with a recommendation, which she rejected, for inpatient treatment, and was one day away from being discharged from the CMHA intensive outpatient program after relapsing during that treatment and missing many treatment sessions, again with a recommendation for more intensive inpatient treatment. At that time in her life, she was not yet willing or able to overcome the grip of addiction on her life, as shown by her statements to her therapist that "sobriety was too painful to feel" (on February 7, 2017) and that she "cannot see life without getting high" (on March 7, 2017). Petitioner's exhibit F. Although she had identified the stress of a violent and "toxic" relationship with her husband as one trigger for her substance abuse,[32] she had voluntarily maintained her relationship with him while he was incarcerated for violating protective orders for her benefit. And, as of that time, she was not yet willing to be honest with her treatment providers; for example, at her intake at CMHA on March 9, 2017, she falsely reported that "she had been sober 8 years until she recently (Dec. 2016) relapsed on intermittent cocaine and marijuana use . . . ." Petitioner's exhibit 31, p. 1 of 12.

The petitioner chose, at the time of trial, however, to amend the petition to add allegations, thereby amending

[32] She told staff at the New Life Center about "her history of abusive relationships and her [domestic violence] history with her husband, whom she identified as toxic." Petitioner's exhibit 5, p. 8 of 17. She reported "physical and emotional abuse from her husband" to NLC and "identified that the abuse escalated her cocaine use, as she was attempting to self-medicate and numb herself emotionally." Petitioner's exhibit 17, p. 8. She told DCF social worker Orvis on January 20, 2017, that she was "blaming fa for her relapsing." Petitioner's exhibit 23.

the adjudicatory date, and the mother's willingness and ability to benefit from reunification efforts must thus be assessed as of that later juncture. By early January, 2018, the evidence does not portray such an unqualified pattern. The records of the mother's therapist, for example, show recent signs of a desire and willingness on Ms. G.'s part to change, although not without some contrary indication of calculation on her part. Ms. G. appeared to be more honest with her treatment providers. And she had filed for divorce from her husband. On the other hand, her intoxication that led to her arrest in November, 2017, shows that sobriety remains an elusive goal. Her actions displayed on the DVD recording of her arrest and conduct later at the local jail show not only that she was inebriated but also suggest an element of cunning and calculation on her part. Her report to the police in August, 2017, that the father had entered her home was probably false and suggests that she was trying to convince others that she was no longer emotionally attached to him, thereby calling into question the sincerity of her actions. The evidence as of the amended adjudicatory date is thus decidedly mixed, but, containing some indications of a desire on Ms. G.'s part to change, does not prove clearly and convincingly that, as of that date, she was still unwilling or unable to benefit from reunification efforts.

b

Father, Antonio M.

The evidence proved clearly and convincingly that DCF made reasonable efforts to reunify Avia with her father as of the date when the petitions were filed and also at the time of trial. It offered him visitation with her to allow them to develop a bond. His proclivity for violence and aggression in his relationships with intimate partners has been a barrier to his reunification, not just with Avia, but with other children of his as

well and upon his release from incarceration, DCF referred him for domestic violence treatment services to address this problem. Earlier cases that he had with the department involving other children also led DCF to believe that he also had substance abuse and mental health issues, and the department appropriately referred him for an Advanced Behavioral Health (ABH) evaluation of treatment needs in these areas upon his release from incarceration.

B

Statutory Grounds for Termination

As statutory grounds for terminating parental rights, the TPR petition alleges: Failure to rehabilitate against both parents, pursuant to § 17a-112 (j) (3) (B) (i), and neglect of a child under the age of seven and failure to rehabilitate by a parent whose parental rights to another child have been terminated in a proceeding brought by DCF, against the respondent father, pursuant to § 17a-112 (j) (3) (E).[33]

To prevail on the petition as to either parent, the commissioner must prove at least one of the statutory

[33] General Statutes § 17a-112 provides in pertinent part as follows: "(j) The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . [or] (E) the parent of a child under the age of seven years who is neglected, abused or uncared for, has failed, is unable or is unwilling to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child and such parent's parental rights of another child were previously terminated pursuant to a petition filed by the Commissioner of Children and Families . . . ."

grounds for terminating that person's parental rights by clear and convincing evidence. See *In re Juvenile Appeal (84–BC)*, 194 Conn. 252, 258, 479 A.2d 1204 (1984); *In re Michael R.*, supra, 49 Conn. App. 512. As is more thoroughly discussed below, the statutory ground pursuant to § 17a-112 (j) (3) (B) (i) was proven by clear and convincing evidence with regard to both respondent parents, and the statutory ground pursuant to § 17a-112 (j) (3) (E) was proven by clear and convincing evidence against the respondent father.

1

Prior Adjudication and Provision of Specific Steps

The failure to rehabilitate ground for termination of parental rights under § 17a-112 (j) (3) (B) (i) requires that the child was previously found to have been neglected or uncared for, and that requirement is satisfied by Avia's adjudication as neglected on July 28, 2016.

In *In re Elvin G.*, 310 Conn. 485, 503, 78 A.3d 797 (2013), the court held that this clause in the TPR statute requires proof that a parent had been provided with specific steps to take to facilitate the return of the child in question to that parent, and the evidence proved here that this requirement was met here. The required specific steps were ordered on an ex parte basis upon the granting of the OTC on April 8, 2016, and those ex parte orders were served four days later on the parents by a marshal, who made in-hand service on the father and abode service on the mother. At the preliminary hearing on the OTC on April 15, 2016, this judge entered preliminary specific steps in the presence of both parents; that same day both parents signed the specific steps that had been ordered and affirmatively waived any formal reading of the steps by the court. When the order of protective supervision was entered on July 28, 2016, final specific steps were ordered in the mother's presence for both parents. A month later, on August

31, 2016, the father was allowed to stand silent to the neglect adjudication, and the Memorandum of Hearing for the court proceeding that day shows that he waived a formal reading of the steps. When the second OTC was entered on November 10, 2016, the required orders of specific steps were served four days later on the parents by a marshal, and when the child was committed to DCF on November 28, 2016, final specific steps were again ordered and the parents waived a formal reading of the steps. The mother was physically present in court that day and signed the steps. The incarcerated father had participated in the proceeding by video, and he signed his copy of the steps on December 1, 2016.[34]

2

Neglect of a Child under the Age of Seven

Subparagraph (E) of § 17a-112 (j) (3) requires proof, not of a prior neglect adjudication, but that a child under the age of seven years is neglected or uncared for as of the petition's adjudicatory date. Avia is certainly under the age of seven, but on the adjudicatory date she had been in DCF care for more than a year, and there could thus be no evidence here of actual neglect on or near the adjudicatory date. The department's proof of neglect to satisfy subparagraph (E) must therefore rely instead on the doctrine of predictive neglect. As our courts have noted, this doctrine "is grounded in the state's responsibility to avoid harm to the well-being of a child . . . ." *In re T.K.*, 105 Conn. App. 502, 513, 939 A.2d 9 (finding child was permitted to live under circumstances injurious to her health because mother had mental health problems resulting

[34] The court need not consider whether the logic of *In re Elvin G.*, supra, 310 Conn. 503, requiring the prior issuance of specific steps for TPR petitions brought under subparagraph (B) (i) of § 17a-112 (j) (3) also applies to petitions brought under subparagraph (E) since the evidence proved clearly and convincingly here that the respondent father was issued such orders.

in obsessive thoughts about harming herself and her child), cert. denied, 286 Conn. 914, 945 A.2d 976 (2008). Under this doctrine, DCF and the juvenile court do not have to wait until a child is actually neglected, and it explicitly recognizes the state's authority and responsibility to act before harm occurs. See *In re Francisco R.*, 111 Conn. App. 529, 535–38, 959 A.2d 1079 (2008); *In re Michael D.*, 58 Conn. App. 119, 123–25, 752 A.2d 1135, cert. denied, 254 Conn. 911, 759 A.2d 505 (2000). As explained by our Supreme Court in *In re Joseph W.*, 305 Conn. 633, 646, 46 A.3d 59 (2012), in cases involving predictive neglect the court must find that "if the child remained in the current situation, the child would be denied proper care and attention, physically, educationally, emotionally or morally . . . or would be permitted to live under conditions, circumstances or associations injurious to the well-being of the child or youth . . . ." (Citation omitted; internal quotation marks omitted.) Although that case referred to the fair preponderance of the evidence standard applicable to neglect proceedings, since the present case is a TPR proceeding, such proof would have to meet the more exacting standard of clear and convincing evidence.

The evidence proved here clearly and convincingly that at the time the TPR petition was filed and on the amended adjudicatory date Avia would be neglected in the care of either parent. The evidence discussed above shows that Avia would be neglected if left in the mother's care. The father has neither developed nor attempted to maintain a parent-child relationship with her, even forgetting or cancelling visits that DCF offered. Mr. M. was present in court on June 1, 2017, when the court scheduled trial on the TPR petition for January 8 and 9 of 2018, and his failure to attend the trial shows his lack of interest in or concern for the child. His arrest for another domestic violence incident in June, 2017, shows that he has yet to benefit from

any treatment or services while incarcerated, at the halfway house or in the community that would help him learn how to control his anger and aggression in his relationships with intimate partners. Without such knowledge or the ability to provide a safe home, he would not be able to meet Avia's need for a safe and secure environment. As shown by the incident between Mr. M. and Ms. G. in which Aaliya attempted to intervene (and which is described more thoroughly elsewhere, in footnote 14 and in part II B 4 of this opinion), children themselves can be placed at physical risk during domestic violence between adults, and such a setting thus not only damages their sense of safety and provides a negative behavioral role model, but also jeopardizes their actual safety. The neglect of his many other children would only be repeated if Avia were placed with him.

3

Prior Termination of Parental Rights

Section 17a-112 (j) (3) (E) also requires proof that a parent had previously lost parental rights pursuant to a petition filed by the Commissioner of Children and Families, and the evidence here proved clearly and convincingly that on January 20, 2009, Mr. M.'s parental rights to another child were terminated in a TPR proceeding brought by the commissioner.

4

The Parents' "Rehabilitative Status"

Both of these subparagraphs of § 17a-112 (j) (3) have one statutory element in common, each requiring proof that a parent has failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of the child, the parent could assume a responsible position in the life of the child. "Personal rehabilitation

as used in [§ 17a-112] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . [The statute] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . . [The statute] requires the court to find, by clear and convincing evidence, that the level of rehabilitation [he] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he] can assume a responsible position in [his] child's life." (Citations omitted; internal quotation marks omitted.) *In re Eden F.*, 250 Conn. 674, 706, 741 A.2d 873 (1999). "[I]n assessing rehabilitation, the critical issue is . . . whether the parent . . . has gained the ability to care for the particular needs of the child at issue." *In re Danuael D.*, 51 Conn. App. 829, 840, 724 A.2d 546 (1999). As this court has observed elsewhere, the crux of the adjudicatory ground of failure to rehabilitate is whether a parent has sufficiently addressed the problems and deficiencies in parenting that led to state intervention so that the parent can, considering the age and needs of the child, assume a responsible position in the child's life, or will be able to do so within a reasonable time in the future. *In re Zachary W.*, Superior Court, judicial district of Hartford, Juvenile Matters, Docket No. HP12-CP06-011133-A (May 18, 2011). "What is a reasonable time is a factual determination that must be made on a case-by-case basis"; *In re Michael L.*, 56 Conn. App. 688, 694, 745 A.2d 847 (2000); depending on the age and needs of the particular child. *In re Shannon S.*, 41 Conn. Supp. 145, 154, 562 A.2d 79, aff'd, 19 Conn. App. 20, 560 A.2d 993 (1989). The failure to rehabilitate ground for termination of parental rights, under either § 17a-112 (j) (3) (B) (i) or (E), thus requires the court to assess the rehabilitative status of a parent in relationship to the

age and needs of a particular child, i.e., their readiness to meet those needs as of the adjudicatory date or in a reasonable time thereafter. Here, the court has also considered the parents' rehabilitative status as of the end of trial. That evidence includes the information recited below in the dispositional portion of this decision about the parents' compliance before the adjudicatory date with the specific steps.

When the TPR petition was filed on May 2, 2017, Avia was barely 13 months old. On the amended adjudicatory date of January 8, 2018, she was only 21 months old. Her first and most obvious need, both when the petition was filed and on the amended adjudicatory date, was for a sober, responsible adult caretaker who will keep her safe and provide stable, competent care for her; but the two parents' histories show their inabilities at any of the relevant times to meet this need. Keeping a child safe is a paramount need for a child of Avia's age. Toddlers of her age at the end of trial are mobile and can be active, but they lack common sense and any judgment and are at constant risk of doing something dangerous to themselves—climbing onto an object from which she can fall, leaving the safety of her home and opening a door to the outside and venturing into the street, or exposing herself to other dangers are just some of the hazardous activities that any child her age may undertake if left unsupervised. Dangerous situations can occur quickly for a toddler and Avia is completely depending on having a vigilant, alert and competent caretaker to keep her safe. A parent under the influence of drugs or alcohol cannot be counted on to be alert, ready and able to recognize and respond to dangerous situations, and keep such a child safe. The person that the court viewed, when the video was played at trial of Ms. G.'s behavior at the time of her arrest last November for operating under the influence,

would not be competent or capable in that condition of keeping a child of Avia's age safe.

Ms. G. has been unable, both during Avia's life and, if her own account to her husband is to be believed, for many years before, to demonstrate that she can maintain sobriety or serve as a competent parent. The mother has repeatedly relapsed on drugs or alcohol despite participating in numerous drug treatment programs since the child's original removal from her custody. The evidence also demonstrates her inability to use good judgment, to accept responsibility for her conduct, and to remain sober over time. Although Ms. G. appeared alert and sober at trial and, according to her substance abuse counselor at the 30-day inpatient program that the mother completed just before trial began, had done well there, her history of continuing relapses after substance abuse treatment offers little hope or confidence today that she will not again relapse. The evidence, according to her counselors and the treatment records from the New Life Center and Milestone, shows that Ms. G. apparently was able to maintain sobriety while within the confines of those two inpatient treatment programs—although when given a day pass from the New Life Center after six months there, she relapsed. The evidence also shows utter lack of success in maintaining sobriety in the community after inpatient treatment, even if she were attending three times per week intensive outpatient substance abuse treatment. After her discharge from Milestone, she had attended only one treatment session at the Farrell Treatment Center as of the time of trial and had already missed one session, and a 50 percent attendance record would hardly suggest successful treatment.

In addition, she refused to comply with the court order for her to submit to a hair test before an in-court review in January, 2017, and has repeatedly refused to comply with numerous requests by DCF to submit to

hair tests, as was ordered in the specific steps. (See petitioner's exhibit 14.) In October, 2017, she did agree to participate in a hair test, but then did not do so. The logical inference from these repeated refusals is that Ms. G. was continuing to use illegal substances or abuse alcohol, an inference confirmed by her intoxication at the time of her November, 2017 arrest and vividly corroborated by her admission, upon intake to the CHR inpatient program on November 29, 2017, that she had used cocaine on twenty days in the last month. Such refusals to submit to hair tests prevent DCF from verifying any claims of sobriety and must be considered in light of the mother's statement to the father a year earlier that "she was going to put on a show for now," thereby suggesting an intent to try to deceive DCF about her ongoing substance abuse and demonstrating a legitimate need to verify any such claims.

Treatment counselor Daniel Millstein testified that the mother would need to demonstrate sobriety in the community for a period of at least six months "before you could say she's really affected a solid recovery"; transcript of testimony, January 9, 2018, p. 43; but Ms. G.'s history of repeated relapses after longer periods of sobriety show that Millstein's estimate is woefully short for her. Ms. G. claimed to have been sober for four years, between 2010 and 2014, for example, but by the year 2015 and into early 2016 she was continuously using marijuana and cocaine up to the time of Avia's birth, and after that until she entered the NLC facility. She has continued to test positive for illegal substances throughout Avia's life, and short periods of sobriety during this period have not proven indicative that Ms. G. would continue to refrain from substance abuse. Her repeated refusals to submit to hair follicle substance abuse testing show a desire on her part to conceal the extent of her substance abuse. A few weeks of sobriety and abstinence at the time of trial do not show her to

be ready then or in the reasonable future to assume responsibility for Avia's safety and well-being.

In addition, domestic violence has continued between the parents, and neither one has shown himself or herself ready to end such a cycle of violence. Despite the fact that the father served 18 months in jail for violence against the mother, Ms. G. steadfastly maintained her relationship with him until, perhaps, recently. Although Ms. G. recently filed for divorce from Mr. M., she has done nothing to show that she is ready to end her pattern of involvement with violent intimate partners. Inventing a false story about him assaulting her and slashing the tires on his motor vehicle when she found him at another woman's house, as the evidence showed that Ms. G. has done, both suggest that she continues to be emotionally invested in her relationship with Mr. M. The fathers of both of her children have been violent to her, and the end to the violent relationship with the father of her first child did not motivate or prompt Ms. G. to avoid a relationship or parenthood with another violent intimate partner. Mr. M. continues to commit acts of domestic violence and has shown no willingness to address the issues of intimate partner violence that have characterized his relationships with Ms. G. and the mothers of his other children and endangered the safety of Ms. G.'s older daughter at least once.

The violence of the incident that occurred in the presence of Avia's older sister in February, 2015, when Mr. M. stood over Ms. G., choking her (and is described more thoroughly in footnote 14 of this opinion), shows the risk to children when violence occurs between their parents: when Aaliya tried to intervene in that incident, Mr. M. continued to engage in violence and the child could have been hurt as a result. After years of exposure to domestic violence between her mother and other adults, 13 year old Aaliya is now reported by the TPR

social study to "become verbally aggressive" and to use profanities during arguments with her foster mother; and when she gets upset or angry at school "she becomes enraged (yells, screams, gets right in the faces of other students)." Petitioner's exhibit 1, pp. 6–7. It is to be hoped that Avia will not have the same exposure to domestic violence, as she needs the opportunity to live instead with caretakers and role models who will both keep her safe and also help her learn how to resolve disagreements without resort to threats or violence.

Thus, both parents need to learn how to engage in intimate relationships without resorting to violence or involving themselves with intimate partners who will be abusive, and neither of these respondents has yet shown that willingness or ability. DCF has referred the mother to several different services and treatment providers willing to support her in ending her relationship with Mr. M. and to help her learn how to avoid abusive relationships in the future, but she has completed none of them. When she told the department social worker that she did not feel comfortable in the group setting offered by one of those providers, DCF referred her for individualized services that she did not complete. While Mr. M. was at the Bishop House halfway facility for three months after his release from incarceration, he did receive domestic violence services, and after he was back in contact with DCF, the department referred him to Radiance Innovative Services for a domestic violence assessment. He went to the intake assessment, after which Radiance recommended that he attend group treatment. Mr. M. attended one group and then stopped doing so.

Beyond physical safety, Avia also needs love, affection and nurture, stability, and permanency. Her mother's interactions with her, as reported by the DCF social worker who has supervised their visitations,

show that Ms. G. can be warm, loving and responsive to her daughter. (The father has visited the child too little, so his ability to meet this need is unknown.) Despite these favorable observations about the mother's interactions with Avia, however, Ms. G.'s personal history is the source of serious reservations about her readiness to provide the child with safety, stability, permanency or to assume responsibility for this young child, in view of Avia's age and needs, when the petition was filed, on the adjudicatory date, at the end of trial or in the reasonable future. After the child had been returned to her at NLC, Ms. G. operated a motor vehicle while intoxicated and her daughter was a passenger. That incident occurred in November, 2016. After an additional year of substance abuse and mental health services, the mother again operated a motor vehicle while intoxicated or under the influence of illegal substances in November, 2017. Fortunately, the child was not in the vehicle on that latter occasion, since Avia had been removed from her mother's care and custody after the November, 2016 incident.

The record contains many examples of Ms. G. stating that she wanted to end her addiction to drugs and alcohol and that she entered numerous substance abuse treatment programs hoping to overcome her addiction. Similarly, the evidence contains examples of her stating that she recognized and wanted to eliminate the safety threat posed by her relationship with Mr. M. The evidence also, however, shows that she chose her own path toward such objectives and generally did not heed the advice or recommendations from DCF or her treatment providers. Choosing her own therapist rather than accepting DCF's referral to Wheeler Clinic has not been shown to have any negative consequences, and the evidence shows no reason to believe that her therapist is less skilled than clinicians she might have seen at Wheeler Clinic. Until recently, however, she had

rejected recommendations from her substance abuse counselors to reenter inpatient treatment and insisted that she "could maintain her sobriety doing Intensive Outpatient Treatment." Petitioner's exhibit 23, Running Narrative for January 25, 2017. Moreover, she has never been willing to engage in consistent treatment or services to help her end her relationship with Mr. M. and avoid future domestic violence. Despite the many times in which Ms. G. has asserted a desire to end drug addiction and domestic violence, she continued, at least until recently, to abuse drugs and/or alcohol and maintained her relationship with Mr. M. Because of this long history of substance abuse and domestic violence, statements she now makes about a desire to overcome her addiction or end her marriage cannot be credited until they have been corroborated by a substantial period demonstrating her success in achieving those goals.

The evidence therefore proves clearly and convincingly that, at the time the TPR petition was filed, on the amended adjudicatory date, and at the close of trial, neither parent had sufficiently rehabilitated themselves that they were ready, on any of those occasions or in the reasonable time thereafter, to assume a responsible position in Avia's life, in view of Avia's age and her needs.

In light of the mother's many relapses after treatment, any present sobriety or abstinence from drugs is too new and short-lived to offer confidence that they will continue. While several of the mother's treatment providers who testified said that relapses are a normal component of recovery from drug abuse, the court does not regard such testimony as meaning that relapses are signs of recovery. Instead, the court views such testimony as signifying that recovery from substance abuse is arduous, may not follow a steady path toward recovery, and may include setbacks. The mother's many relapses, after so many treatment opportunities, and

the November, 2017 relapse in particular, show that Ms. G. will need to demonstrate a substantial period of sobriety, without relapses, before one can be confident that she is, at last, in lasting recovery.

Even after the father was incarcerated, the parents maintained their relationship, and the domestic violence between them continued through at least June of 2017, and, in light of their inability to form and maintain healthy intimate partnerships, neither of them has shown any ability to teach their child about healthy relationships and respect for others or to model such relationships to Avia. One cannot be confident that either of them yet has the ability even to provide the child with a safe environment, and the recent past suggests that the risk is too great that the mother might again drive while under the influence or the parents might again engage in violence. The mother's last-minute filing for divorce does not signify that she has learned any of the skills necessary to provide Avia with a safe, secure, and stable home, and, at best, suggests that these two parents might no longer engage in violence with each other that could endanger a child in their care, but neither one has shown that an end to this relationship would mean an end to their mutual and long patterns of involvement in violent intimate relationships.

In sum, the petitioner proved both grounds for termination of the father's parental rights clearly and convincingly, and the sole ground alleged as to mother by that same standard of clear and convincing evidence.

III

DISPOSITIONAL PHASE OF TPR PROCEEDING

Having concluded that clear and convincing evidence proved the statutory grounds pleaded for termination of the respondents' parental rights to this young child,

the court must next proceed to the dispositional phase, in which "there must be a showing by clear and convincing evidence whether termination is in the best interests of the child." *In re Brian T.*, 134 Conn. App. 1, 11, 38 A.3d 114 (2012). On disposition, the court may consider information through the close of the evidentiary hearing.

A

Statutory Factors

In making the dispositional decision in a nonconsensual TPR proceeding, the court is mandated to consider and make written findings regarding seven factors specified in § 17a-112 (k). See, e.g., *In re Tabitha P.*, 39 Conn. App. 353, 362, 664 A.2d 1168 (1995). "The . . . factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Citation omitted.) *In re Victoria B.*, 79 Conn. App. 245, 261, 829 A.2d 855 (2003). As required by the statute, the court has considered the statutory factors and makes the following written findings with regard to the commissioner's petition to terminate the respondents' parental rights to this child, and the court has considered these findings in determining that terminating their parental rights is in Avia's best interest.

1

> "The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent"—§ 17a-112 (k) (1).

The department provided timely and appropriate services, as discussed above, to facilitate the reunion of the child with each parent by making referrals to service

providers to treat the mother's substance abuse and mental health issues and both parents' continuing involvement in abusive intimate relationships.

2

"[W]hether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time"—§ 17a-112 (k) (2).

As discussed above, DCF made reasonable efforts to reunite the family, as required by the federal Adoption and Safe Families Act of 1997, as amended.

3

"[T]he terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order"—§ 17a-112 (k) (3).

The following specific steps were ordered and agreed to by the mother and father:

Keep all appointments set by or with DCF, including for mother that she cooperate with at least two home visits a month. Mother: There was no evidence that Ms. G. missed any appointments to meet with one of the DCF social workers outside the home, but she has not complied with the request of the current DCF social worker for home visits. She also missed numerous appointments to visit with her children, did not keep at least one appointment to which she had agreed for a hair test, and did not keep all of her appointments with Harold Fischer and Associates, the domestic violence service provider to which the department referred her. *Father*: Mr. M. missed appointments to visit with Avia and at Radiance Innovative Services, the domestic violence provider to which the department referred him.

Cooperate with DCF home visits, announced or unannounced, and visits by the child(ren)'s court-appointed attorney and/or guardian ad litem. Ms. G. has not cooperated, as she has refused requests for home visits by DCF social workers. There was no evidence that the father has failed to comply with this step.

Keep whereabouts known to DCF, your attorney, and child's attorney. Mother: After her discharge from the NLC program in November, 2016, the mother did not inform DCF of her whereabouts for several months. *Father*: After his release from incarceration, he also failed to keep his whereabouts known to DCF for several months. There was no evidence whether either respondent also failed to keep their whereabouts known to their attorney or the child's lawyer.

Take part in counseling to and make progress toward the identified treatment goals: As discussed above, neither parent has complied with this step. Although Ms. G. has participated in substance abuse, mental health, and domestic violence counseling, the evidence shows no progress toward meeting the goals identified for that treatment, except that she does appear to be able to maintain a close and nurturing relationship with Avia during visits. Similarly, Mr. M. has shown no progress in learning how to avoid domestic violence despite his limited participation in domestic violence treatment services to which DCF referred him.

Cooperate with recommended service providers:[35] *Mother*: The testimony and exhibits presented at trial

[35] For the mother, the specific steps ordered on April 8, April 15, and July 28, 2016, identified the following service providers: "30 day inpatient program; women's and children's substance abuse program; VOCA services to address domestic violence concerns, mental health provider—[W]heeler [C]linic or an equivalent program." Although Ms. G. chose to seek treatment from Ron Klemba instead of attending Wheeler Clinic, nothing in the evidence suggests that he did not offer equivalent services.

For the father, the specific steps also stated, with respect to this step: "as provided in prison or equivalent program upon release from prison."

suggest that, when undergoing treatment, Ms. G. may sometimes present the appearance of making sincere and earnest effort to cooperate with her substance abuse and mental health service providers. For example, the exhibits from treatment providers sometimes (but not always) contain what appear to be candid admissions from her about her substance abuse history and her explanations for her repeated relapses. As noted in the text above, however, she is not always honest with her treatment providers, and some of those records indicate a tendency on her part to blame others for her problems rather than accepting personal responsibility for the choices she has made. Regardless of the apparent candor of her statements to her treatment providers and her sometimes ostensible cooperation with them, however, her cooperation has never extended to complying with the ultimate goals of treatment that she stop abusing drugs and alcohol and stop involving herself in violent relationships. Her decisions near the time of trial to reenter an inpatient treatment program and to file for divorce may signal a willingness now to cooperate more fully with the recommendations of treatment providers, but not enough time had elapsed at trial's end to determine whether any such willingness continues. She has also shown only limited cooperation with the service provider through The Connection that sponsors and provides her with Supportive Housing, and she has received three warnings for noncompliance with that program. *Father*: Mr. M. did not comply and stopped attending the domestic violence program.

Submit to substance abuse evaluation and follow treatment recommendations; submit to random drug testing; do not use illegal drugs or abuse alcohol or medicine. Until recently, Ms. G. had not followed treatment recommendations for a higher level of drug treatment. She still has not complied with the department's repeated requests for hair samples for drug testing, and

she has continued, at least until recently, to use illegal drugs and to abuse alcohol. Mr. M. did comply with DCF's referral for a substance abuse and mental health evaluation.

Sign releases allowing DCF to communicate with the parents' service providers and your child's attorney to review your child's records. Ms. G. has signed many but not all of the releases requested by the DCF social worker. There was no evidence that father failed to comply with this step.

Cooperate with court-ordered evaluations. No evaluations were ordered.

Get and/or maintain adequate housing and legal income. Ms. G. has partly complied. She has lived in adequate subsidized housing funded through The Connection, but has been at risk of losing the subsidy by not fully complying with the program's requirements. She has had no source of legal income, and has not yet completed the vocational training program for a CNA certificate that would probably provide a means by which she could support herself. There was no evidence about father's compliance with this step, other than his report of being employed.

Identify changes in household composition. There was no evidence that either parent failed to comply with this step.

Take care of children's various needs and make all necessary child care arrangements: While Avia was placed with her at the NLC program, Ms. G. satisfactorily took care of her various needs until she risked the child's life and safety by driving in an intoxicated condition while Avia was in the motor vehicle.

No involvement in the criminal justice system. Comply with probation or parole. Neither parent has complied, as both have been arrested for new offenses.

Visit child(ren) as often as DCF permits. Neither parent complied, as both have missed numerous visits.

Supply names and addresses of grandparents and of persons the parent would like DCF to consider as a placement resource. There was no evidence that either parent failed to comply with this step.

4

> "[T]he feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties"—§ 17a-112 (k) (4).

Avia spent the first three months of her life in foster care, then lived with her mother at the NLC mother-daughter program for approximately four months, and after that returned to the same foster home where she had lived earlier. She has remained in that foster home for more than 14 months since then. Avia is closely bonded and very affectionate with her foster mother and father, with whom she has spent most of her life. She looks to them for comfort and is also bonded with her foster siblings.

The evidence shows that Ms. G. and Avia have an affectionate relationship and that Avia has developed a bond with her. But Avia is confused about who her mother is, as she also calls her foster mother "mommy." When Ms. G. says, "Come to mommy," during those visits, Avia does not always respond.

Avia has seen her father, Mr. M., only a few times in her life. He refused any visits with her while he was incarcerated. After he was placed at the halfway house, he agreed to visitation and saw her four times before his release from Bishop House in March, 2017. He then had only two more visits with her, in October and

December, 2017. Under these circumstances, in view of her age, she could not have feelings or emotional ties for him other than a possible recognition of him as an occasional visitor.

5

"[T]he age of the child"—§ 17a-112 (k) (5).

Born on March 31, 2016, Avia was twenty-one months old at the end of trial. She has now just turned two years old.

6

"[T]he efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child"—§ 17a-112 (k) (6).

By repeatedly engaging in substance abuse treatment and entering mental health counseling, Ms. G. sometimes appeared to make sincere but unsuccessful efforts to "adjust [her] circumstances, conduct, or conditions to make it in the best interest of the child to return [the child to her] home in the foreseeable future . . . ." As discussed above, however, her actual sincerity or willingness to benefit from treatment is difficult to discern, as she has not always been honest with her treatment providers. She has not accepted all of the opportunities offered to her to maintain and develop her bond and relationship with Avia, however. She has missed almost one-quarter of the visits offered recently,

and has not kept in telephone contact with the child that had been offered by the foster mother.

The father, Antonio M., has only marginally taken actions to "adjust [his] circumstances, conduct, or conditions to make it in the best interest of the child to return [the child to his] home in the foreseeable future . . . ." He refused any visits with the child while he was incarcerated, did not contact the department for several months after his release from incarceration so that visits in the community could begin, and then did not attend some of the visits with the child offered by DCF after that. He has thus not visited with the child as often as he could have and not benefited from the services that are a prerequisite to reunification.

7

> "[T]he extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent"—§ 17a-112 (k) (7).

Other than the parents' participation in incidents of domestic violence and continuing their relationship, there is no evidence that any unreasonable act on the part of either parent or any other person prevented either one from maintaining a meaningful relationship with the child, or that the economic circumstances of either parent had such an effect.

B

Best Interest of the Child

The final element of the termination of the parental rights statute, § 17a-112 (j), requires that, before granting a petition for such termination, the court must find "by clear and convincing evidence that . . . (2) termination is in the best interest of the child . . . ." The

best interest standard is inherently flexible and fact-specific to each child, giving the court broad discretion to consider all the different and individualized factors that might affect a specific child's welfare. In determining that terminating the respondents' parental rights is in the best interest of this child, the court has considered various factors, including her interest "in sustained growth, development, well-being, and in the continuity and stability of [her] environment"; *Cappetta* v. *Cappetta*, 196 Conn. 10, 16, 490 A.2d 996 (1985); her age and needs; the length and nature of her stays in foster care; the contact Avia has had with her mother and father since removal; the potential benefit or detriment of her retaining a connection with her biological parents; her genetic bonds to her parents; *In re Savanna M.*, 55 Conn. App. 807, 816, 740 A.2d 484 (1999); and the seven statutory factors and the court's findings thereon. The court has also balanced Avia's intrinsic need for stability and permanency against the potential benefit of maintaining a connection with her biological parents. See *Pamela B.* v. *Ment*, 244 Conn. 296, 314, 709 A.2d 1089 (1998) (child's physical and emotional well-being must be weighed against the interest in preserving family integrity).

The evidence proved clearly and convincingly that terminating the parental rights of both respondents is in this child's best interest. The father has shown a distinct lack of interest in Avia or in addressing the problems of criminality and domestic violence that pose a threat to her safety. The mother has a long history of substance abuse that has jeopardized the safety and well-being of her children on more than one occasion and a similarly long history of exposing both of her children to the inherent dangers of adult intimate partner violence. She has used drugs or abused alcohol while under protective supervision, while pregnant, and while engaged in treatment. Since Avia was born, Ms.

G. has sought substance abuse treatment on at least six different occasions—residency at the New Life Center between April and November, 2016, intensive outpatient treatment at Wheeler Clinic, Community Mental Health Affiliates and, for two different periods, Farrell Treatment Center between January and November, 2017, at the Milestone inpatient treatment program from late November, 2011, to late December, 2017, and lastly, outpatient treatment once again at the Farrell Treatment Center. None of the previous substance abuse treatment before her recent stay at the Milestone facility had enabled her to overcome her addiction. Any recent success is too new and short in duration to provide any basis for assessing the likelihood of continued sobriety, and only a substantial period of sobriety from drugs or alcohol will provide any confidence that the cycle of relapses has ended. In addition, filing to dissolve her marriage to Mr. M. may signal a desire on Ms. G.'s part to end her relationship with him, but nothing has shown that she will not choose another partner with the same violent proclivities as the fathers of her two children.

As our Supreme Court has noted, "the best interests of the child are usually served by keeping the child in the home with his or her parents." *In re Juvenile Appeal (83-CD)*, 189 Conn. 276, 285, 455 A.2d 1313 (1983). It was necessary, however, to remove Avia from her mother's care, however, for her own safety, which that court has recognized as one of a child's two fundamental interests: "The child . . . has two distinct and often contradictory interests. The first is a basic interest in safety; the second is the important interest . . . in having a stable family environment." (Emphasis omitted.) Id., 287. Avia is young, vulnerable, and completely dependent on others to keep her safe. Neither this child's mother nor her father offers the prospect of being able to provide her a safe home today or in the foreseeable future. She also needs a stable

and permanent home with caretakers who will not only meet her basic needs for food, shelter, medical care, and the necessities of life, but whose nurture will guide her development as a child and adolescent so that she forms healthy values and grows into a well-adjusted member of our society. Unfortunately, the clear and convincing evidence proves that neither parent is ready to meet her needs for such a caretaker either today or in the reasonable and foreseeable future.

Our courts have "noted consistently the importance of permanency in children's lives." (Internal quotation marks omitted.) *In re Davonta V.*, 285 Conn. 483, 494, 940 A.2d 733 (2008), citing *In re Juvenile Appeal (Anonymous)*, 181 Conn. 638, 646, 436 A.2d 290 (1980). They have similarly observed that "[s]table and continuous care givers are important to normal child development. Children need secure and uninterrupted emotional relationships with the adults who are responsible for their care." (Internal quotation marks omitted.) *In re Davonta V.*, supra, 494–95. "[L]ong-term stability is critical to a child's future health and development . . . ." (Citation omitted.) *In re Eden F.*, supra, 250 Conn. 709. "Virtually all experts, from many different professional disciplines, agree that children need and benefit from continuous, stable home environments." (Internal quotation marks omitted.) *In re Juvenile Appeal (83-CD)*, supra, 189 Conn. 285.

This child's best interest lies in having a safe, stable and permanent home. Her mother requires much time to show that she has forsaken substance abuse and ended her long history of living in a violent home environment. Her father has shown no interest in providing her with the home she needs and addressing his history of violence in the home. Under these circumstances, the child's needs for safety, stability and permanency cannot wait for the uncertainty of her parents' rehabilitation. Thus it was proven clearly and convincingly that

it is in her best interest to terminate the parental rights of the two respondents in order to offer this child the prospect of stability and permanency in an adoptive home.

IV

ORDERS OF TERMINATION

The court having considered all the statutory criteria, having found by clear and convincing evidence that grounds exist for the termination of the parental rights of both respondents, and having further found by clear and convincing evidence, upon consideration of all of the facts and circumstances presented, that it is in the best interest of this child to terminate the parental rights of the two respondent parents, it is hereby ORDERED:

The commissioner's petition for termination of the parental rights of the respondent mother and father are granted, and judgment may enter terminating the parental rights of Agnieszka G. and Antonio M. to Avia.

Pursuant to § 17a-112 (m), it is ordered that the Commissioner of Children and Families is appointed statutory parent for the child so that she may be placed for adoption.

Pursuant to § 17a-112 (o) and Practice Book § 35a-14 (h), the statutory parent shall file a written report on the case plan, the permanency plans, and the status of the child with the clerk of the Superior Court for Juvenile Matters at New Britain on or before May 3, 2018, at 9:00 a.m., and every three months thereafter on implementation of the plans.

ZAIDA MELENDEZ *v.* SPIN CYCLE LAUNDROMAT, LLC
(AC 41410)

Lavine, Moll and Beach, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for negligence in connection with an incident in which she suffered a broken toe when a table on which she was folding clothes in the defendant's laundromat collapsed on her foot. The jury returned a verdict for the defendant. The plaintiff thereafter filed a motion to set aside the verdict, claiming, inter alia, that the trial court improperly allowed the defendant to present evidence of the condition of the table prior to the incident, and to question her regarding her disability and prior work history. The trial court denied the motion to set aside the verdict, determining that the evidence regarding the defendant's prior safety experience with laundry folding tables and the plaintiff's prior work history were relevant to issues of liability and damages, respectively, and were thus properly admitted into evidence. The trial court thereafter rendered judgment for the defendant, from which the plaintiff appealed to this court. *Held* that the trial court properly denied the plaintiff's motion to set aside the verdict and rendered judgment for the defendant; the claims raised by the plaintiff in this court essentially having been the same as those she raised before the trial court, which thoroughly addressed the arguments raised in this appeal, this court adopted the trial court's well reasoned memorandum of decision as a proper statement of the facts and applicable law on the issues.

Argued January 30—officially released March 26, 2019

Procedural History

Action to recover damages for the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the jury before *Wiese*, *J.*; verdict for the defendant; thereafter, the court denied the plaintiff's motion to set aside the verdict and for a new trial, and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Affirmed.*

Kevin C. Ferry, with whom was *Monique S. Foley*, for the appellant (plaintiff).

Andrew B. Ranks, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Zaida Melendez, appeals from the judgment of the trial court denying her motion to set aside the jury verdict rendered in favor of the defendant, Spin Cycle Laundromat, LLC. On appeal, the plaintiff claims that the trial court erred in (1) allowing the defendant to present evidence of the condition of the laundry folding table prior to its collapse, (2) allowing the defendant to question the plaintiff regarding her disability, and (3) denying the motion to set aside the verdict. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history underlie the appeal to this court. The defendant is a company that maintains a laundromat business in New Britain. On October 27, 2014, the plaintiff visited the defendant's business with her husband in order to do laundry. At approximately 9 p.m., while the plaintiff was folding clothes on a table in the defendant's laundromat, the table suddenly collapsed on the plaintiff's right foot. As a result, the plaintiff sustained a fracture to her right big toe. The plaintiff commenced an action against the defendant alleging that the collapse of the table and her injuries were a direct result of the defendant's negligence. The defendant denied the allegations and brought special defenses alleging negligence on the part of the plaintiff. The parties stipulated, among other things, that "the defendant [did] not blame the plaintiff in any way for her injuries." At trial, the jury returned a general verdict in favor of the defendant on November 30, 2017. On December 8, 2017, the plaintiff filed a motion to set aside the verdict. On February 26, 2018, the trial court denied the plaintiff's motion, and she appealed.

The claims the plaintiff makes in this court are essentially the same claims she raised in the trial court in her motion to set aside the verdict. The plaintiff first

raises two evidentiary claims: (1) the trial court erred in allowing the defendant to present evidence of the condition of the table prior to the incident; and (2) the trial court improperly allowed the defendant to question the plaintiff regarding her disability and prior work history. The trial court rejected these claims, concluding that evidence regarding the defendant's prior safety experience with laundry folding tables and the plaintiff's prior work history were relevant to issues of liability and damages, respectively, and were thus properly admitted into evidence. The trial court additionally rejected the plaintiff's claim that the verdict was against the weight of the evidence, shocked the sense of justice, or was based on partiality, prejudice, mistake, or corruption because it found no support in the record for such a claim. We have examined the record on appeal, the briefs and arguments of the parties, and conclude that the judgment of the trial court should be affirmed.

Because the trial court's memorandum of decision as to the plaintiff's motion to set aside the verdict thoroughly addresses the arguments raised in this appeal, we adopt that court's well reasoned decision as a proper statement of the applicable facts and law on the issues. *Melendez* v. *Spin Cycle Laundromat, LLC*, Superior Court, judicial district of New Britain, Docket No. CV-15-6031260-S (February 26, 2018) (reprinted at 188 Conn. App. 810, A.3d). It would serve no useful purpose for this court to engage in any further discussion. See, e.g., *D'Attilo* v. *Statewide Grievance Committee*, 329 Conn. 624, 632, 188 A.3d 727 (2018); *Fisk* v. *BL Cos.*, 185 Conn. App. 671, 673, 198 A.3d 160 (2018); *Smith* v. *BL Cos.*, 185 Conn. App. 656, 659, 198 A.3d 150 (2018).

The judgment is affirmed.

APPENDIX
ZAIDA MELENDEZ *v.* SPIN CYCLE LAUNDROMAT, LLC*

Superior Court, Judicial District of New Britain
File No. CV-15-6031260-S

Memorandum filed February 26, 2018

Proceedings

Memorandum of decision on motion to set aside verdict and for new trial. *Motion denied.*

Kevin C. Ferry and *Monique S. Foley*, for the plaintiff.

Andrew B. Ranks, for the defendant.

Opinion

WIESE, J.

I

PROCEDURAL HISTORY

This matter arises out of a premises liability-negligence case brought by the plaintiff, Zaida Melendez, against the defendant, Spin Cycle Laundromat, LLC. The case was tried to a jury. On November 30, 2017, the jury returned a verdict in favor of the defendant.

In a motion dated December 8, 2017, the plaintiff moved to set aside the verdict and order a new trial pursuant to Practice Book § 16-35. In a memorandum of law dated December 27, 2017, the defendant set forth its objection to the plaintiff's motion. The plaintiff filed a reply memorandum of law dated January 16, 2018. On February 23, 2018, the attorneys appeared in court and requested that the matter be taken on the papers.

* Affirmed. *Melendez* v. *Spin Cycle Laundromat, LLC*, 188 Conn. App. 807, A.3d (2019).

II

DISCUSSION

A

Standard of Review

"Litigants . . . have a constitutional right to have issues of fact determined by a jury." (Internal quotation marks omitted.) *Rejouis* v. *Greenwich Taxi, Inc.*, 57 Conn. App. 778, 783, 750 A.2d 501, cert. denied, 254 Conn. 906, 755 A.2d 882 (2000). "The trial court possesses inherent power to set aside a jury verdict which, in the court's opinion, is against the law or the evidence." (Internal quotation marks omitted.) Id., 782. "[A] trial court may set aside a verdict on a finding that the verdict is manifestly unjust because the jury, on the basis of the evidence presented, mistakenly applied a legal principle or because there is no evidence to which the legal principles of the case can be applied." (Internal quotation marks omitted.) *Sargis* v. *Donahue*, 142 Conn. App. 505, 511, 65 A.3d 20, cert. denied, 309 Conn. 914, 70 A.3d 38 (2013). Under the general verdict rule, the jury is presumed to have found all issues in favor of the defendants. *Gajewski* v. *Pavelo*, 229 Conn. 829, 835, 643 A.2d 1276 (1994). "[The trial court] should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they or some of them were influenced by prejudice, corruption or partiality." (Internal quotation marks omitted.) *Rejouis* v. *Greenwich Taxi, Inc.*, supra, 782. "Ultimately, [t]he decision to set aside a verdict entails the exercise of a broad legal discretion . . . ." (Internal quotation marks omitted.) *Jackson* v. *Water Pollution Control Authority*, 278 Conn. 692, 702, 900 A.2d 498 (2006).

B

Analysis

The plaintiff argues that the verdict should be set aside for the following reasons. First, the defendant should not have been allowed to ask questions regarding the defendant's prior safety experiences with laundry folding tables because of evidentiary rulings, such as *Zheutlin* v. *Sperry & Hutchinson Co.*, 149 Conn. 364, 179 A.2d 829 (1962). Second, the court should not have permitted evidence relating to the plaintiff's prior work history because it was irrelevant, highly prejudicial, and should not have been admitted as evidence. Third, the court improperly asked the plaintiff's counsel whether he claimed his question in response to an objection because it drew unnecessary attention to the plaintiff's objection and created an unfair presumption that the defendant's objections were more meritorious than the plaintiff's objections. Fourth, the verdict was against the weight of the evidence, shocked the sense of justice, or was based in partiality, prejudice, mistake, or corruption. Hence, the plaintiff argues the jury's verdict be set aside and the court should order a new trial.

In the present case, following its review of the record, the court finds that the evidence concerning the defendant's prior safety experiences with laundry folding tables and the plaintiff's prior work history were relevant to material issues in the case; in this instance, liability and damages. "Relevant evidence is evidence that has a logical tendency to aid the trier of fact in the determination of an issue." *Hall* v. *Burns*, 213 Conn. 446, 473, 569 A.2d 10 (1990). Such evidence, therefore, was properly admitted. The third basis for the plaintiff's motion lacks merit and doesn't warrant further discussion. Finally, the jury's general verdict was supported by the evidence and the reasonable inference that could be drawn from it.

A jury's verdict should not be set aside and a new trial ordered unless it is apparent that "injustice either was, or might have been, done [at] trial." *Brown* v. *Keach*, 24 Conn. 72, 76 (1855). The verdict's "manifest injustice [must be] so plain as to clearly indicate that the jury has disregarded the rules of law applicable to the case, or were influenced by prejudice, corruption, or partiality in reaching a decision." (Internal quotation marks omitted.) *Robinson* v. *Backes*, 91 Conn. 457, 459, 99 A. 1057 (1917). The record does not support a finding that the jurors were influenced by prejudice, corruption, or partiality in this case.

III

CONCLUSION

For the reasons stated, the plaintiff's motion to set aside the verdict and order a new trial is denied.

STATE OF CONNECTICUT *v.* KEVAN SIMMONS (AC 37826)

Sheldon, Prescott and Bear, Js.

Syllabus

Convicted of the crimes of assault in the first degree, criminal possession of a pistol or revolver and carrying a pistol without a permit in connection with the shooting of the victims, C and H, the defendant appealed to this court. He claimed, inter alia, that the state's grant of immunity to H, in which the state agreed not to prosecute H for any act of perjury he committed while testifying for the state, was plain error that constituted structural error and, thus, warranted a new trial because it violated the public policy reflected in the statutory (§ 54-47a [b]) prohibition against immunizing perjured testimony. The state had granted H immunity in exchange for his testimony after he invoked his fifth and fourteenth amendment privilege against self-incrimination and refused to answer any questions by the state. After the statutory (§ 1-25) oath for testifying witnesses was administered to H, he testified that he could not recall any details of the shooting and did not identify the defendant as the shooter. The state then attempted to impeach H's testimony with a

previous statement he had made to his mother during a telephone conversation in which he identified the defendant as the shooter. The trial court admitted H's statement to his mother as a prior inconsistent statement and ruled that the jury could use it only to evaluate H's credibility, but not for substantive purposes. During closing argument to the jury, the prosecutor argued H's statement to his mother should be treated as substantive evidence that the defendant was the shooter. *Held*:

1. The state's promise to H of immunity from prosecution for any perjury he might commit in his testimony plainly violated the strong public policy contained in § 54-47a (b) against immunizing perjured testimony and undermined the perception of and confidence in the system of justice; a fraud was perpetrated on the jurors because, unbeknownst to them, H was permitted to swear to a meaningless oath under § 1-25 that gave his testimony an indicium of reliability that was not present, as the immunity agreement meant he was free to lie without subjecting himself to legal jeopardy, and the record reflected that the trial court and the prosecutor either knew or should have known that the promise of immunity to H was improper.
2. The state's improper grant of immunity to H warranted the exercise of this court's supervisory authority over the due administration of justice, as the dearth of authority on the question of whether the improper grant of immunity constituted structural error, and this court's practice of not deciding thorny constitutional questions when possible, made it unnecessary to decide whether the defendant's constitutional rights were violated by the improper immunity agreement or whether the structural error doctrine was applicable.
3. This court's exercise of its supervisory powers over the administration of justice to remand this case for a new trial made it unnecessary to resolve the difficult and close question of whether the defendant was harmed by H's testimony; although the state's motive in promising H broad and unlawful immunity was unknown, because the state presumably deemed H's testimony necessary to the public interest, it was incongruous for the state to minimize the import of his testimony in order to argue that it was not harmful to the defendant, as the improper promise of immunity to H served as the mechanism to force him to testify, which thereafter presented the state with an opportunity to impeach him with his prior inconsistent statement to his mother and to improperly place that statement before the jury as substantive evidence that the defendant was the shooter.
4. The exercise of this court's supervisory powers over the administration of justice to remand this case for a new trial was warranted under the circumstances here; the state's improper immunity agreement with H gave him a license to commit perjury and, thus, directly implicated the perception of the integrity of the justice system, the existence of the sanction for perjury plays a critical role in the truth seeking process and helps to secure the defendant's right to confront the witnesses

against him, the reversal of the defendant's conviction will help to ensure that such an unlawful promise will not be made by prosecutors in the future, it was necessary to send a clear message to trial courts that they have an affirmative obligation to intercede in circumstances where it appears that the state has offered a witness a license to lie during the trial, and because only the state has the ability to grant immunity to a witness, it is important that courts confine the use of that significant prosecutorial power to appropriate instances that do not further and unfairly disadvantage a defendant.

5. The state's objection to this court's exercise of its supervisory authority to reverse the defendant's conviction was unavailing; it was not unclear that this court has supervisory power over the administration of justice, our Supreme Court having repeatedly stated that appellate courts possess that power, the state's contention that the defendant's inaction at trial regarding the unlawful immunity agreement prevented this court from exercising its supervisory power to remedy such an egregious error on appeal was unavailing, as nothing in the record suggested that the defendant's failure to challenge the propriety of the immunity agreement was due to a conscious trial strategy that amounted to a tactical waiver, and, after balancing all the interests involved, which included the extent of prejudice to the defendant, the emotional trauma to the victims or others likely to result from reliving their experiences at a new trial, the practical problems of memory loss and unavailability of witnesses after much time has elapsed, and the availability of other sanctions, this court was not convinced that it should not exercise its supervisory authority to reverse the defendant's conviction.

(*One judge concurring in part and concurring in the judgment*)

Argued March 20, 2018—officially released March 26, 2019

Procedural History

Substitute information charging the defendant with two counts of the crime of assault in the first degree, and with the crimes of criminal possession of a pistol or revolver and carrying a pistol without a permit, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Mullarkey*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court; thereafter, the court, *Hon. Edward J. Mullarkey*, judge trial referee, granted the defendant's motion for augmentation and rectification of the record. *Reversed; new trial.*

Laila M. G. Haswell, senior assistant public defender, with whom, on the brief, was *Lauren Weisfeld*, chief of legal services, for the appellant (defendant).

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

Opinion

PRESCOTT, J. In this criminal case, a witness for the state, George Harris, was promised that he would not be prosecuted for perjury even if he lied during his testimony. The trial court acquiesced to this agreement, despite recognizing that it "is probably against the public interest . . . ." This appeal requires us to decide, under the circumstances of this case, whether the defendant, Kevan Simmons, is entitled to a new trial because of this concededly unlawful promise. For the reasons that follow, we conclude that this error was so egregious in nature that it undermines public confidence in the due administration of justice and that, pursuant to our supervisory powers, the defendant should be granted a new trial.

The defendant appeals from the judgment of conviction, rendered after a jury trial, of two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5), criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c (a) (1), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). On appeal, the defendant claims, in his initial brief, that the prosecutor committed improprieties during closing argument that deprived him of his right to a fair trial, including, among other things, suggesting to the jury that it could consider as substantive evidence a prior statement of Harris that was admitted at trial only for impeachment purposes, in which he identified the defendant as his assailant. We later

granted the defendant permission to file a supplemental brief addressing an additional claim of prosecutorial impropriety, namely, whether the defendant's right to due process was violated by the state's failure to disclose to him, prior to trial, certain exculpatory evidence relevant to the veracity of the detective who took a statement from the defendant. See *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

After oral argument before this court, and on the basis of our review of the record, we ordered the parties, sua sponte, to file additional supplemental briefs addressing an unpreserved claim of error not raised by the parties, namely, "(1) whether the state's agreement not to prosecute George Harris for any future acts of perjury committed while testifying for the state at the defendant's trial constituted plain error because it violates the public policy of this state against immunizing perjured testimony; see General Statutes § 54-47a; see also *State* v. *Giraud*, 258 Conn. 631, 634–35, 783 A.2d 1019 (2001); and (2) if so, whether such error was structural error or subject to harmless error analysis." Each party filed a supplemental brief. In its brief, the state conceded that its grant of immunity to Harris was improper. We later asked the parties to submit additional supplemental briefs addressing whether this court should exercise its supervisory authority to reverse the conviction. Because we exercise our supervisory powers to order a new trial for the defendant on the basis of the improper grant of immunity to Harris, we do not reach the merits of the remaining claims raised by the defendant.[1]

[1] Although we ordinarily would not reverse a conviction on the basis of an unpreserved claim of error that was not raised by the parties on appeal, we have the discretionary authority to address, sua sponte, instances of error that are cognizable from the record and result in manifest injustice or constitutional error, provided that we give the parties an opportunity to be heard by way of supplemental briefing. See Practice Book § 60-5; *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 161–62, 162 n.33, 84 A.3d 840 (2014). The parties here were

The jury reasonably could have found the following facts. A shooting occurred on Bedford Street in Hartford on March 28, 2013, involving the defendant; Harris, his friend; and Joaquin Cedeno. Specifically, at approximately 9:22 p.m. that day, the defendant and Harris were walking through the Bedford mall, a term commonly used to describe a cluster of apartment buildings on either side of Bedford Street, when they encountered Cedeno standing on the front stoop of an apartment building.

Cedeno and the defendant began arguing. The argument quickly escalated into a physical fight. Harris tried to break up the fight but was unsuccessful. During the fight, the defendant pulled out a gun and pointed it at Cedeno. Cedeno attempted to push the gun away from himself, but the defendant fired several gunshots, hitting both Cedeno and Harris. Cedeno, Harris, and the defendant then all ran from the scene in different directions.

Officer Robert Fogg of the Hartford Police Department, who was working nearby, received a dispatch that gunshots had been fired at 137 Bedford Street. Fogg drove to the location. When he arrived, he found Harris, who had been shot in the leg, lying in an alleyway just south of 137 Bedford Street. Harris did not name his shooter and only told Fogg to relay a message to his mother that he loved her. Harris was taken to a hospital by ambulance.

At 9:36 p.m., Officer Bartosz Kubiak was dispatched to 378 Garden Street, a location close to the scene of

provided with an opportunity to address fully both the claim of error and the appropriate remedy. The state has not argued that this court abused its discretion by raising the claim sua sponte or that it has been unfairly prejudiced by this procedure, except if we were to reverse the defendant's conviction pursuant to our supervisory authority over the administration of justice. Cf. *State* v. *Connor*, 321 Conn. 350, 374, 138 A.3d 265 (2016). We will address that claim of prejudice in this opinion. See part IV of this opinion.

the shooting, after someone reported a serious assault with a firearm. When Kubiak arrived, Cedeno was sitting on the front steps of 378 Garden Street. Cedeno's pants, T-shirt, and sweatshirt were stained with blood, and it appeared to Kubiak that Cedeno had been shot several times on the right side of his body. Cedeno did not indicate to Kubiak who had shot him. Cedeno was also transported to a hospital. Kubiak searched the surrounding area for evidence relating to the shooting but did not find a weapon.

Approximately ten minutes after the shooting, the defendant returned to the scene of the shooting on Bedford Street. He approached Fogg, and the two began talking. Fogg knew that the defendant and Harris were friends, so Fogg relayed to the defendant the message Harris had asked Fogg to give to Harris' mother. Fogg also asked the defendant if he had seen anything with respect to the shooting, and the defendant replied that he had not.

On March 30, 2013, two days after the shooting, Detective Christopher Reeder spoke to Harris at the hospital. Harris told Reeder that, on the night of the shooting, he was walking through Bedford mall with a person nicknamed "Ghost" when he heard gunshots and realized he had been shot. He described the shooter as a black male wearing black clothing. Reeder told Harris that the police had video that captured the incident. Harris then rolled over in his hospital bed, sighed, and said, "You ain't even here; do what you gotta do." Harris also told Reeder that he might have seen "Boobie," the nickname of Cedeno, at the shooting.

That same day, Reeder also questioned Cedeno about the shooting. Cedeno described his shooter as a black male of average build, about five feet, eight inches tall, and between twenty and twenty-five years old. Cedeno also told Reeder that, on the night of the shooting, he

had been hanging out in Bedford mall when he was approached by the shooter. Cedeno recalled that the two got into an argument, during which the shooter took out a gun and fired it at Cedeno. Cedeno told Reeder that, after the gunfire broke out, he ran through an alleyway between 133 and 135 Bedford Street, and made it to Garden Street before he realized that he had been shot and collapsed.

On April 19, 2013, Harris was arrested on drug charges. After reading Harris his *Miranda*[2] rights, Reeder began to question Harris about the shooting incident on Bedford Street. Harris relayed to Reeder a version of events similar to that which he had given when he was questioned about the shooting in the hospital. Reeder then showed Harris a video comprised of footage recovered from security cameras attached to various apartments on Bedford Street (video) that depicted the shooting. Harris once again pointed out "Ghost" in the video, but did not offer any additional details about the shooting or identify himself on the video.

While incarcerated on the drug charges, Harris made a phone call to his mother, during which he implicated the defendant as his shooter. That call was recorded by the correctional facility.

On May 2, 2013, the defendant was arrested on charges unrelated to the shooting of Harris and Cedeno. That day, Reeder, Detective Renee LaMark-Muir, and Detective Reginald Early interviewed the defendant. Reeder showed the defendant the video of the shooting. Afterward, Early presented the defendant with a statement that he represented to the defendant had been given to the police by Harris. Early, however, had fabricated the entire statement in order to encourage the

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

defendant to confess that he was the shooter on the belief that Harris had already inculpated him. In the fabricated statement, Harris purportedly told the police that Cedeno had attempted to rob him and the defendant at gunpoint, and that the defendant had shot Cedeno in self-defense. The fabricated statement further provided that the defendant also had shot Harris by accident.[3]

After Early read the fabricated statement to the defendant, he became upset and began crying. Early then began questioning the defendant about the shooting, and the defendant gave a written statement in which he admitted that he had shot Cedeno and Harris. Specifically, the defendant stated that Cedeno had attempted to rob the defendant and Harris, and that the defendant was forced to shoot Cedeno in self-defense but hit Harris, too. The defendant also stated that he had found

[3] The fabricated statement provided, in relevant part: "My best friend [the defendant] shot me while he was defending us from another guy who was trying to rob us. He had a gun too. I do not know the other guy who had the gun but he was a Spanish guy. I heard his name was 'Boobie'. My best friend name is Kevan Simmons, but everybody knows him as 'Low'. Low and I were chilling on Bedford Street when the dude tried to rob us for our money. We all started fighting on the stairs and the Spanish guy pulled out a gun. Low and I had found the gun Low had earlier that day.

"Low normally doesn't carry a gun, but like I said he found the gun that day. So when the Spanish guy walked up on us he said "give me all your money". We told him we didn't have any money and Low managed to grab him and we started fighting.

"I grabbed him too and that's when we pulled out a gun. Low stepped back and pulled out the gun we found and started shooting. Low hit me by accident and the Spanish guy got hit too. Low is a good guy and doesn't carry guns. He was protecting us and I respect him for that. The police should arrest the Spanish guy for trying to rob us.

"The detectives showed me some photos and I picked out a guy I know as Low. I have known Low for years. Low came back to the scene after he shot me because that's my boy and he cares about me. Low went to the hospital too. I am not mad at Low for shooting me by accident. I respect him for protecting me because that Spanish guy could have killed us. We didn't even have no money like that for him to be robbing us.

"That is all I have to say about me being shot. Kevan Simmons is Low and they call 'Deep'."

the gun with which he shot Cedeno and Harris earlier that day near a dumpster and, after the shooting, ran and hid the gun before the police arrived. He stated that he returned to Bedford Street after shooting Cedeno and Harris to make sure that Harris was okay. Finally, the defendant admitted that he was the person depicted in the surveillance video speaking to Officer Fogg after the shooting.

On October 1, 2014, the state filed the operative substitute information, in which it charged the defendant with two counts of assault in the first degree in violation of § 53a-59 (a) (5), and one count each of criminal possession of a pistol or revolver in violation of § 53a-217c (a) (1) and carrying a pistol without a permit in violation of § 29-35 (a). On October 8, 2014, the jury trial began.

On the first day of trial, the state called Harris as a witness during its case-in-chief. Harris' attorney was present and advised Harris to invoke his fifth and fourteenth amendment privilege against self-incrimination. Harris did so and refused to answer any questions by the state. A colloquy then ensued between the court, the state, and defense counsel regarding a potential grant of immunity for Harris.

At that time, the state agreed not to prosecute Harris for any crimes stemming from his involvement in the March 28, 2013 shooting. His attorney rejected the state's offer of immunity as insufficient because if Harris were to testify he could expose himself to federal criminal liability with respect to the Bedford Street shooting incident and might implicate himself in an unrelated shooting in 2011 for which he had just recently been served a warrant. The state represented to the court that it would inquire as to whether it could obtain federal immunity for Harris with respect to his

testimony at the defendant's trial. The court then continued Harris' appearance until the next day.

On October 9, 2014, the state again called Harris as a witness. Before Harris testified, the court inquired as to whether the state and Harris had come to an agreement regarding the grant of immunity. Harris' counsel represented to the court that he believed an agreement had been reached. The following exchange then ensued between defense counsel, the court, and the prosecutor:

"[Harris' Counsel]: And so [the grant of immunity] includes transactional immunity to the events related to the—on the day of the shooting, directly and indirectly. It involves use immunity, so none of his words could be used directly against him in this or any other proceeding in state or federal court or anywhere else. It also includes derivative use so that his words can't be used to investigate and then come up with other evidence that can be used against him in any proceeding. There are other issues that we have talked about that I think need to be addressed.

"The Court: Go ahead.

"[Harris' Counsel]: *One is that the immunity statute does not immunize a witness from committing perjury at the time.*

"The Court: *It does not.*

"[Harris' Counsel]: And my understanding is that there is a tape recording or the prosecuting authority believes that it has a tape recording of my client saying something related to his testimony. So, I have concerns about exposure to perjury, and my understanding is that there has been an agreement that there wouldn't be *any perjury prosecution related to my client's testimony today.*

"[The Prosecutor]: *That's correct*, Your Honor.

"The Court: Okay. Well, [counsel], I must compliment you. I have been in the criminal justice system for forty-two and one-half years. I've never heard of anybody getting that agreement. But it's an agreement the state made. That's their decision. Now, are we ready to testify?"[4] (Emphasis added.)

Fully immunized, Harris was then administered the oath for testifying witnesses by the clerk in the presence of the jury. Although the oath taken by Harris was not transcribed, the required contents of the oath are set forth in General Statutes § 1-25, which provides that the oath administered to witnesses shall be: "You solemnly swear or solemnly and sincerely affirm, as the case may be, that the evidence you shall give concerning this case shall be the truth, the whole truth and nothing but the truth; so help you God or upon penalty of perjury."

Harris then testified that he had been on Bedford Street on the night in question, and had been shot in the leg and hospitalized. He indicated that he and the defendant had been friends for eight years, and that he also knew Cedeno, the other gunshot victim. The state asked Harris a series of additional questions about his recollections from the night he was shot, including who he was with that night, what he and others were wearing, and whether he knew the identity of the shooter. Harris testified that he could not recall any details of

[4] The state filed with the court a document, signed by Gail P. Hardy, the Hartford state's attorney, partially memorializing the grant of immunity. It states: "Under [§ 54-47a], the Hartford State's Attorney's Office grants immunity from prosecution for George Harris for any alleged conduct directly or indirectly related to Hartford Case # 13-9934 and *State* v. *Kev*[*a*]*n Simmons*, Docket No.: HHD-CR13-0666536-T. The immunity shall be transactional immunity for the events on March 28, 2013, and use immunity—direct and derivative—for all other proceedings."

This memorialization does not appear to include the state's promise to immunize Harris from prosecution for any perjury he might commit while testifying at the defendant's trial.

the night he was shot because he had been intoxicated. He also testified that he was unable to identify anyone, including himself, from the videotape of the incident, which the state played for him in court, stopping it at various points to ask questions.[5] He did not name the defendant as his shooter.

The state, however, attempted to impeach Harris' testimony that he did not know the identity of his shooter by questioning him about the May 6, 2013 telephone call he made to his mother while he was incarcerated, during which he identified the defendant as the person who shot him. After establishing that he had signed a consent form when he was incarcerated acknowledging that his telephone calls would be recorded, the state asked Harris if he had talked to his mother about this case. In particular, the prosecutor asked him if he had told his mother that he was not going to cooperate with the police because he believed that he could only receive a thirty day sentence for refusing to testify, the defendant was in a holding cell nearby, and the police had shown him a videotape of "this nigga shooting at me and this dude." He repeatedly responded that he could not remember what he had told his mother, including whether he had told her that he could identify both himself and the defendant in the surveillance videotape he was shown by the police. At this point, the jury was excused so that the state could play the recording of the telephone call for the witness in an attempt to refresh his recollection.

Outside the presence of the jury, the following colloquy between the court and the prosecutor about the immunity agreement ensued during a discussion of the admissibility of the call from Harris to his mother:

[5] Although the jury was not shown the video at that time, the video was later shown to the jury and admitted into evidence as a full exhibit.

"[The Prosecutor]: The state will be offering [the recording of the telephone call] as a prior inconsistent statement by Mr. Harris. Now, if Mr. Harris—

"The Court: Well, are you sure that he does not have early onset dementia? Because for a young man, his memory's shot.

"[The Prosecutor]: Well, this is the way you could refresh his memory, Your Honor.

"The Court: *Well, you're the one who agreed not to prosecute him for perjury.*

"[The Prosecutor]: I agree.

"The Court: *Which is probably against the public interest*, but I didn't step in.

"[The Prosecutor]: There's a lot of issue with public interest in this case.

"The Court: I must say *this amount of perjury* actually offends me." (Emphasis added.)

Harris was then questioned before the jury about what he had said to his mother during the prison phone call. After Harris denied having told his mother that he could identify himself and the defendant in the videotape he had been shown by the police and that he could not remember making such a statement, portions of the audiotaped recording of the phone call were played to the jury without objection.

After the state had completed its direct examination of Harris, the court gave the jury the following instruction: "Ladies and gentlemen, just as I gave you the instruction a few minutes ago on prior misconduct by a witness, evidence has been presented through this witness that statements made outside the court are inconsistent with some of his trial testimony. You should consider that out-of-court evidence only as it

relates to his credibility. It's not substantive evidence. In other words, you consider it evidence as you would any other evidence inconsistent with his conduct in determining the weight to give to his testimony in court."

Despite the court's instruction that the phone call between Harris and his mother could not be used for substantive purposes, the prosecutor, during closing argument, drew the jury's attention to specific portions of that phone call, arguing as follows: "One point *in his testimony* that he's talking to his mom: First, I think I am being charged with everything [the defendant] is. Cop told me the warrant is for not cooperating, and I'm like, yeah, I'll take that. Makes sense. If you woulda seen the video they showed me, I coulda got charged with the same thing he got charged with. They showed me the video. When they first showed me the video, I'm telling them: I don't know who that is. That's why they saying I won't cooperate. I'm like, that's me. That's Boobie. I don't know who that is. He like, who's that? That's Ghost. That's Ghost. They showed everything. When I sat down, when I couldn't move, they showed [the defendant] walked up to me. Then they showed him run off. Then they show this girl run out, tie my leg up. They showed the whole thing.

"They smacked him with the charges right there. He testified that they're arrested at the same time, that they were at [the] Hartford lockup at the police department, and they were placed in cells next to each other. They smacked him with the charges right there. They had us together. They really put us together and this 'n' shot me. They just got us together. They don't care. And then he laughs. I'm in a holding cell. I don't know how he seen me. I'm asleep. He seen me. They put him in a cell like two cells down. It's like, one, two in the morning. All I hear is: George. George. Come on, man. I know you hear me. I know you hear me. I just seen

you. I just seen you. I'm like, this 'n' really trying to talk to me? I'm in jail 'cause of him right now 'cause he shot me in the leg.

"*That's testimony, ladies and gentlemen.* That's not given to police or the state's attorney's office. Now, I'm going to—now, that's another factor, as I said. [The defendant]—*Mr. Harris places him at the scene as the shooter.*" (Emphasis added.) Thus, the state attempted to make substantive use of Harris' recorded phone call to his mother despite the fact that the court had admitted it only for impeachment purposes and not for the truth of any of Harris' statements made during the phone call.

On October 14, 2014, the jury returned a verdict of guilty on all counts of the operative substitute information. On January 6, 2015, the court sentenced the defendant to twenty-three years of incarceration followed by ten years of special parole. This appeal followed. Additional facts and procedural history will be set forth as necessary.

The defendant claims that the state's agreement not to prosecute Harris for any act of perjury he committed while testifying for the state during the defendant's trial constituted plain error because it clearly violated a public policy against immunizing perjured testimony. This improper grant of immunity, the defendant contends, constitutes structural error that obviates the need to engage in harmless error analysis and warrants a new trial. In the alternative, the defendant argues that, if harmless error analysis applies, the state has failed to meet its burden to show that the error was harmless beyond a reasonable doubt. Finally, the defendant argues that we should exercise our supervisory authority over the administration of justice to reverse his conviction and order a new trial.

The state contends that, although there was error, that error was not structural in nature and did not cause the defendant manifest injustice. Additionally, the state argues that this court should not exercise its supervisory powers over the administration of justice to reverse the conviction and order a new trial.

Although we ultimately decide to reverse the defendant's conviction and order a new trial pursuant to our supervisory authority, it is, in our view, helpful to discuss the question of structural error and harm to explain why we choose to resolve the case by resort to our supervisory powers rather than by employing the structural error doctrine or through an evaluation of harm to the defendant. See *State* v. *Rose*, 305 Conn. 594, 606–607, 46 A.3d 146 (2012).

I

We begin with a discussion of the plain error doctrine. It is axiomatic that an unpreserved claim of error, i.e., one that was neither distinctly raised before nor decided by the trial court, may be considered pursuant to 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 not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . 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. . . .

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record.

"Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . In *State* v. *Fagan*, [280 Conn. 69, 87, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007)], [our Supreme Court] described the two-pronged nature 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." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Sanchez*, 308 Conn. 64, 76–78, 60 A.3d 271 (2013).

The state concedes that its improper immunity agreement with Harris violated the first prong of the plain error doctrine because the error is discernible on the face of a factually adequate record. Perhaps more significantly, the record reflects that the trial court and the prosecutor either knew or should have known that

the promise of immunity to Harris by the state was improper[6] and yet, the court permitted Harris to testify pursuant to an unlawful agreement that he could not be prosecuted for perjury even if he lied during his testimony. Despite the state's concession, it is important for us to explicate fully the reasons why such an agreement violates public policy and undermines confidence in our judicial system.

"[A] primary function of a criminal trial is to search for the truth. . . . The trial court has a duty to preside at a trial and to take appropriate actions, when necessary, that promote truth at a trial." (Citation omitted.) *State* v. *Kirker*, 47 Conn. App. 612, 617, 707 A.2d 303, cert. denied, 244 Conn. 914, 713 A.2d 831 (1998); see also *State* v. *Mendoza*, 119 Conn. App. 304, 321, 988 A.2d 329 (court required "to balance the defendant's interest in a fair proceeding with a trial's fundamental and ever present search for the truth"), cert. denied, 295 Conn. 915, 990 A.2d 868 (2010); *Riley* v. *Goodman*, 315 F.2d 232, 234 (3d Cir. 1963) ("We have long abandoned the adversary system of litigation which regards opposing lawyers as players and the judge as a mere umpire whose only duty is to determine whether infractions of the rules of the game have been committed. . . . A trial is not a contest but a search for the truth so that justice may properly be administered." [Citation omitted.]).

"From ancient times it has ever been held essential that witnesses in court proceedings swear or affirm before giving evidence." (Internal quotation marks omitted.) *Cologne* v. *Westfarms Associates*, 197 Conn. 141, 153, 496 A.2d 476 (1985). Our statute criminalizing perjury plays a critical role in the search for the truth at trial because it significantly deters a witness who takes an oath or an affirmation from testifying falsely

[6] See footnote 17 of this opinion.

at a time when the witness' testimony will significantly impact the rights of a defendant. See General Statutes § 53a-156 (a); *Maryland* v. *Craig*, 497 U.S. 836, 845–46, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1989) (confrontation clause "insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury" [internal quotation marks omitted]);[7] *State* v. *Tye*, 248 Wis. 2d 530, 540–41, 636 N.W.2d 473 (2001) ("[t]he purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth . . . by creating liability for perjury" [footnotes omitted]); 58 Am. Jur. 2d 884–86, 888–89, Oath and Affirmation §§ 1, 5 and 6 (2012).

Section 54-47a sets forth the requirements regarding the grant of immunity to a witness who has refused to testify pursuant to his privilege against self-incrimination guaranteed by the fifth and fourteenth amendments to the United States constitution. Section 54-47a (a) provides in relevant part that "[w]henever in the judgment of the Chief State's Attorney, a state's attorney or the deputy chief state's attorney, the testimony of any witness . . . in any criminal proceeding involving . . . felonious crimes of violence . . . *is necessary to the public interest*, the Chief State's Attorney, the state's attorney, or the deputy chief state's attorney, may, with notice to the witness, after the witness has claimed his privilege against self-incrimination, make application to the court for an order directing the witness to testify or produce evidence subject to the provisions of this section." (Emphasis added.)

[7] General Statutes § 53a-156 (a) provides in relevant part: "A person is guilty of perjury if, in any official proceeding, such person intentionally, under oath . . . makes a false statement, swears, affirms or testifies falsely, to a material statement which such person does not believe to be true."

Section 54-47a (b) provides in relevant part that "[u]pon the issuance of the order such witness shall not be excused from testifying . . . on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence, and no testimony or evidence so compelled, and no evidence discovered as a result of or otherwise derived from testimony or evidence so compelled, may be used as evidence against him in any proceeding, *except that no witness shall be immune from prosecution for perjury or contempt committed while giving such testimony or producing such evidence* . . . ."[8] (Emphasis added.)

In *State* v. *Giraud*, supra, 258 Conn. 634–38, our Supreme Court considered a related immunity issue. Specifically, the defendant in *Giraud* claimed that the trial court improperly had failed to grant a defense witness immunity from prosecution. Id., 634. Prior to that witness being sworn, the defendant had moved that the state be compelled to grant the witness immunity with respect to his testimony, "with the exception [of] any perjury committed by him . . . ." (Internal quotation marks omitted.) Id. In rejecting the defendant's claim, our Supreme Court noted that "[t]he request did not distinguish between perjury committed before [the witness] was granted immunity and perjury committed by him when testifying after such a grant of immunity. *Immunity, of course, may not be a license to lie while giving immunized testimony*." (Emphasis

[8] The record is unclear as to whether the court made the predicated findings required by the statute in order to permit a grant of immunity to the witness. Certainly, the remarks made by the court implicitly sanctioned the state's arrangement with Harris, and Harris testified in accordance with his agreement with the state.

added; internal quotation marks omitted.) Id., 634–35. Similarly, the Supreme Court of the United States has consistently held that grants of immunity cannot extend to future perjurious testimony given by a witness—i.e., perjury committed during the course of the immunized testimony. See *United States* v. *Apfelbaum*, 445 U.S. 115, 127–30, 100 S. Ct. 948, 63 L. Ed. 2d 250 (1980); see also *Glickstein* v. *United States*, 222 U.S. 139, 143, 32 S. Ct. 71, 56 L. Ed. 128 (1911) (testimony given under a license to commit perjury is not "testimony in the true sense of the word").

In the present case, it is undisputed that the immunity obtained by Harris included immunity from prosecution for *any* perjury that Harris might commit while testifying as a witness for the state against the defendant. The state promised immunity to overcome Harris' invocation of his fifth and fourteenth amendment privilege against self-incrimination and to force him to testify. The promise plainly violated the strong public policy that is reflected in the statutory prohibition contained in § 54-47a (b).[9]

A jury is entitled to assume that the statements of a witness who testifies at trial "carr[y] the sanction of the oath which [he or] she ha[s] taken . . . ." *Ruocco* v. *Logiocco*, 104 Conn. 585, 591, 134 A. 73 (1926). In the present case, the transcript of the proceedings indicates that Harris was sworn in by the clerk in the presence

[9] It is unclear, on the basis of the record presented, whether Harris testified pursuant to an order issued directly under § 54-47a because the immunity agreement filed by the state with the court does not appear to be the byproduct of an application filed by the state with the court seeking an order compelling Harris to testify. Moreover, the court did not explicitly issue an order in the public interest or otherwise require Harris to testify pursuant to a particular grant of immunity. It would strain credulity, however, to imagine that the prosecutor could directly offer a witness immunity for perjury committed while providing immunized testimony if such a grant of immunity would be prohibited if ordered by the court pursuant to the procedures of § 54-47a.

of the jury. Without any knowledge of the improper immunity agreement, the jury presumably believed that Harris was testifying under the sanction of the oath that he took "upon the penalty of perjury." General Statutes § 1-25. Unbeknownst to the jury, however, his oath had no significance because Harris knew that the immunity agreement meant he was free to lie without subjecting himself to legal jeopardy. In other words, a fraud was perpetrated on the jurors by permitting Harris to swear to a meaningless oath that gave his testimony an indicium of reliability that was not in fact present. In sum, the improper grant of immunity violates public policy and undermines the perception of and confidence in our system of justice.

II

Having explained why the grant of immunity in this case violates public policy, we next turn to the question of whether this impropriety constitutes structural error that obviates the need to engage in harmless error analysis to determine whether the defendant suffered a manifest injustice. The state contends that the improper grant of immunity does not constitute a structural error that would excuse the defendant from establishing that it caused a manifest injustice to him because the harm suffered by the defendant, if any, is not "unquantifiable or indeterminate" and was not of "such pervasiveness or magnitude" to rise to the level of structural error.

This question appears to be a matter of first impression, as our research has not revealed any reported cases addressing it.[10] The United States Supreme Court recently set forth a comprehensive discussion of the structural error doctrine: "The purpose of the structural

[10] The Supreme Court of Delaware afforded an unlawful immunity agreement harmless error review in *Worthy* v. *State*, 120 A.3d 581, 586–87 (Del. 2015). In *Worthy*, the court concluded that the state failed to demonstrate that the error was harmless beyond a reasonable doubt. Id., 587.

error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it affect[s] the framework within which the trial proceeds, rather than being simply an error in the trial process itself. . . . For the same reason, a structural error def[ies] analysis by harmless error standards. . . .

"The precise reason why a particular error is not amenable to that kind of analysis—and thus the precise reason why the Court has deemed it structural—varies in a significant way from error to error. There appear to be at least three broad rationales.

"First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. This is true of the defendant's right to conduct his own defense, which, when exercised, usually increases the likelihood of a trial outcome unfavorable to the defendant. . . . That right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. . . . Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error. . . .

"Second, an error has been deemed structural if the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his or her own attorney, the precise effect of the violation cannot be ascertained. . . . Because the government will, as a result, find it almost impossible to show that the error was harmless beyond a reasonable doubt . . . the efficiency costs of letting the government try to make the showing are unjustified.

"Third, an error has been deemed structural if the error always results in fundamental unfairness. For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one. See *Gideon* v. *Wainwright*, 372 U.S. 335, [343–45], 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (right to an attorney); *Sullivan* v. *Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (right to a reasonable-doubt instruction). It therefore would be futile for the government to try to show harmlessness.

"These categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural. . . . For these purposes, however, one point is critical: An error can count as structural *even if the error does not lead to fundamental unfairness in every case.* See [*United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 149 n.4, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006)] (rejecting as inconsistent with the reasoning of our precedents the idea that structural errors always or necessarily render a trial fundamentally unfair and unreliable . . . [citations omitted; internal quotation marks omitted]).[11] *Weaver* v. *Massachusetts*, U.S. , 137 S. Ct. 1899, 1907–1908, 198 L. Ed. 2d 420 (2017); see also *State* v. *Latour*, 276 Conn. 399, 410–12, 886 A.2d 404 (2005); *State* v. *Lopez*, 271 Conn. 724, 733–34, 859 A.2d 898 (2004).

On one hand, the error in this case reasonably can be characterized as affecting the structural integrity of

[11] One example given by the court in *Gonzalez-Lopez* of structural error that may not necessarily result in demonstrable harm to a particular defendant but nevertheless warrants reversal are cases in which a defendant improperly is denied his right to self-representation, "a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant . . . ." (Internal quotation marks omitted.) *United States* v. *Gonzalez-Lopez*, supra, 548 U.S. 149 n.4.

the entire trial. Permitting the testimony at a criminal trial of even a single witness who does not face the sanction of a prosecution for perjury undermines the truth seeking purpose of a trial. On the other hand, the error in this case, while egregious in nature, was related directly to a single witness who testified during a distinct portion of the trial and did not necessarily affect the entire proceeding.

The error here does not fall within the first general category of structural errors because it does not implicate a right, similar to the defendant's right to conduct his own defense, that is separate and distinct from legal protections that are designed to protect against erroneous convictions. Moreover, the second category of structural error, i.e., those errors the effect of which are simply too difficult to measure, is not applicable because there may be instances in which the effect of the improper grant of immunity on the verdict is measurable and quantifiable. For purposes of illustration, imagine a case in which twenty-five witnesses identify the defendant as the perpetrator but one of the witnesses testifies after having been given immunity from a perjury prosecution for his testimony. In such a scenario, a reviewing court could reasonably conclude that, in light of the testimony of the twenty-four other witnesses, the testimony of the one improperly immunized witness was harmless beyond a reasonable doubt and did not cause the defendant to suffer a manifest injustice.

Indeed, we are aware that, at first blush, the unlawful immunity agreement in the present case appears analogous to instances in which a witness testifies at trial without properly having been sworn in through the administration of an oath. Under existing federal jurisprudence, testimony by an unsworn witness is not considered structural error and, in fact, courts have deemed such claims of error forfeited if not raised before the

trial court. See, e.g., *United States* v. *Watson*, 611 Fed. Appx. 647, 661–62 (11th Cir. 2015), cert. denied, U.S. , 136 S. Ct. 1212, 194 L. Ed. 2d 215 (2016). Although the two errors are similar because both involve testimony given by a witness unencumbered by the legal sanction of an oath, the situation in the present case involves a far more insidious error, warranting a different analysis. The failure to swear in a witness arising in these federal cases presumably is the product of inadvertence. Furthermore, the error typically occurs in the presence of the jury, which may be aware that the oath was not given and can evaluate the unsworn testimony accordingly. In the present case, by contrast, the jury was deceived into believing that Harris was testifying under the penalty of perjury.

The error in this case is more akin to those arising in the third category of structural errors, i.e., those errors, such as the failure to give a reasonable doubt instruction, that always result in fundamental unfairness to a defendant. The defendant's sixth and fourteenth amendment right to confront the witnesses against him is vitiated in circumstances in which a witness does not testify under the penalty of perjury.[12] As the United States Supreme Court stated in *Maryland* v. *Craig*, supra, 497 U.S. 836, "[t]he central concern of the [c]onfrontation [c]lause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of adversary proceeding before the trier of fact. . . . [T]he right

[12] Even if the error in this case implicated only a statutory as opposed to a constitutional right of the defendant, the deprivation of that statutory right may also be so significant as to constitute structural error. For example, our Supreme Court has suggested, without explicitly deciding, that a court's noncompliance with a statute mandating that the jury be instructed regarding the defendant's constitutional right not to testify is structural error and not subject to harmless error analysis. *State* v. *Sinclair*, 197 Conn. 574, 584–86, 500 A.2d 539 (1985); see also *State* v. *Ruocco*, 322 Conn. 796, 805, 144 A.3d 354 (2016).

guaranteed by the [c]onfrontation [c]lause includes not only a personal examination [of the witness], but also . . . insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury . . . .'' (Citations omitted; internal quotation marks omitted.) Id., 845–46.

In light of the dearth of authority on the question of whether the error in this case is structural in nature, and consistent with our practice of not deciding thorny constitutional questions when possible, we conclude that it is unnecessary to decide whether the defendant's constitutional rights were violated by the improper immunity agreement or whether the structural error doctrine applies in this case. Instead, for the reasons we will set forth in part IV of this opinion, we choose to exercise our supervisory powers over the administration of justice to order a new trial in this case.

Indeed, our Supreme Court has taken a similar approach in several cases. In *State* v. *Padua*, 273 Conn. 138, 178–79, 869 A.2d 192 (2005), our Supreme Court declined to decide whether principles of double jeopardy required an appellate court to adjudicate the defendant's insufficiency of the evidence claim before addressing the defendant's other claims on appeal. Instead, the court in *Padua*, exercising its supervisory powers, concluded that it was appropriate to impose a rule requiring review of insufficiency of the evidence claims first, even in the absence of a conclusion that the defendant's constitutional rights would be violated otherwise. Id.; see also *State* v. *Coleman*, 242 Conn. 523, 534, 700 A.2d 14 (1997) (exercising supervisory powers in lieu of deciding state constitutional claim).

In *State* v. *Rose*, supra, 305 Conn. 607–14, our Supreme Court exercised its supervisory powers to reverse the conviction of a defendant and order a new

trial because the trial court had compelled the defendant to wear identifiable prison clothing during his jury trial. In doing so, the Supreme Court eschewed the need to determine whether the trial court's actions constituted structural error or whether the defendant was prejudiced under the circumstances of the case. Similarly, for the reasons we will discuss in this opinion, we conclude that the error in the present case warrants an exercise of our supervisory authority over the due administration of justice, making it unnecessary to decide whether the error is structural in nature.

III

The question of whether the defendant suffered a manifest injustice as a result of the state's improper promise of immunity to Harris is equally as thorny as the question of structural error. Although the state readily concedes that the immunity agreement was improper, it contends that the defendant is not entitled to relief under the plain error doctrine because the defendant cannot establish that he was harmed by the agreement in light of the fact that Harris' testimony did not inculpate the defendant. Specifically, the state argues that Harris' testimony did not harm the defendant because "Harris did not testify that the defendant shot him or Cedeno," but instead "testified that he did not know who shot him because he had been intoxicated during the events and so did not remember them." Thus, in the state's view, the error did not cause grievous consequences to the defendant resulting in manifest injustice to him.

We first note that the state and the defendant disagree about which party bears the burden of persuasion with respect to the question of harm. Citing *State* v. *Fagan*, supra, 280 Conn. 87, and *State* v. *Johnson*, 178 Conn. App. 490, 496, 179 A.3d 780 (2017), cert. denied, 328 Conn. 905, 178 A.3d 390 (2018), the state contends that,

pursuant to the plain error doctrine, the defendant always maintains the burden of establishing that he suffered a manifest injustice because of the error. The defendant asserts that the unlawful immunity agreement violated his constitutional rights and thus the state bears the burden of establishing that the error was harmless beyond a reasonable doubt. According to the defendant, he is entitled to a new trial " 'if there is any likelihood' " that Harris' testimony could have affected the verdict. In support of this contention, the defendant relies on cases in which reviewing courts have imposed this high burden on the state because of a prosecutor's knowing use of perjured testimony in obtaining the conviction.[13] See, e.g., *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 371–73, 71 A.3d 512 (2013).

[13] Although we ultimately need not decide which party bears the burden of persuasion on this issue, we note that our Supreme Court has suggested that, although a party seeking to prevail pursuant to the plain error doctrine typically is obligated to demonstrate that it suffered a "manifest injustice," the state may still bear the burden of establishing harm if the underlying error was constitutional in nature. See *State* v. *Moore*, 293 Conn. 781, 823, 981 A.2d 1030 (2009), cert. denied, 560 U.S. 954, 130 S. Ct. 3386, 177 L. Ed. 2d 306 (2010). In *Moore*, the court concluded that the defendant could not prevail under the plain error doctrine in circumstances in which the trial court failed to caution the jury to scrutinize carefully the testimony of an alleged accomplice. Id., 827. In reaching that conclusion, the court noted that because an instructional error relating to general principles of witness credibility " 'is not constitutional in nature' " the burden rested on the defendant rather than the state to demonstrate harm. Id., 824. This language strongly suggests that if the underlying error had been constitutional in nature, then the state would bear its usual burden of demonstrating harm beyond a reasonable doubt.

Adhering to this typical allocation of burden in the context of deciding claims arising under the plain error doctrine makes perfect sense and is not, as the state contends, "doctrinally incongruent." With respect to unpreserved errors arising during a criminal trial, the defendant may seek appellate review and to prevail either under the plain error doctrine or pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). If the claim is not of a constitutional nature, the defendant will typically be confined to the plain error doctrine because a party may prevail under *Golding* only if the claim is of a constitutional nature. If the defendant establishes a violation

In addition to the difficulty of deciding which party bears the burden of persuasion on the question of harm; see footnote 13 of this opinion; we note that the issue of whether the defendant was in fact harmed by Harris' testimony is also a difficult one. Because Harris did not identify the defendant as the shooter at trial, his testimony, even if perjurious, should not have been used by the jury as evidence that the defendant was the shooter. It is well established that disbelief of a witness is not the equivalent of proof. *State* v. *Alfonso*, 195 Conn. 624, 634, 490 A.2d 75 (1985) ("[w]hile it is true that it is within the province of the jury to accept or reject a [witness'] testimony, a jury in rejecting such testimony cannot conclude that the opposite is true" [internal quotation marks omitted]). Thus, even if the jury found incredible Harris' testimony that he did not know who shot him, a conclusion that Harris was lying is not substantive evidence that the defendant was the shooter.[14]

On the other hand, if the state had been unsuccessful in forcing Harris to take the witness stand, it would never have had the opportunity to impeach him with his prior inconsistent statement to his mother, in which

of a constitutional right, then the state is obligated to demonstrate, pursuant to the fourth prong of *Golding*, "harmlessness of the . . . constitutional violation beyond a reasonable doubt." Id., 240. Thus, most claims of plain error historically have not implicated a defendant's constitutional rights because of the availability of *Golding* review, and thus a defendant would properly bear the burden of establishing harm.

[14] We also recognize that, in assessing whether the error harmed the defendant, his written statement to the police was admitted into evidence. In that statement, the defendant allegedly admitted to the police that he shot Cedeno and Harris, but did so in self-defense. Importantly, however, the defendant substantially challenged the credibility of Detective Early, who obtained the defendant's statement, because of Early's creation of the fabricated written statement of Harris. Moreover, the defendant has raised the additional claim on appeal that the state violated his rights by not disclosing, prior to trial, information regarding an internal affairs investigation of Early that would have yielded further evidence to undermine his credibility.

he identified the defendant as the shooter. Although this statement was admitted by the court only to assess the credibility of his testimony at trial that he did not know the identity of the shooter, the state, during closing argument, argued to the jury that it should treat his statement to his mother as substantive evidence that the defendant was the shooter. In other words, the state's improper promise of immunity served as the mechanism to force Harris to testify, which ultimately presented the state an opportunity to place before the jury, albeit improperly, Harris' statement that the defendant was the shooter.[15]

We do not know the state's precise motive in promising Harris such broad and unlawful immunity. It is conceivable that the state believed that if it could force Harris to testify, he simply would "change his tune" and identify the defendant as the person who shot him and Cedeno. It is also possible that the state was determined to force Harris to take the witness stand in the belief that he would testify, consistently with his prior statement to the police, that he could not identify the shooter or that he could not remember who shot him. This testimony would then permit the state to impeach Harris with his prior inconsistent statement to his mother that the defendant had shot him. Finally, the state simply may have wanted to call Harris to paint him as an obstructionist (as the state argued in closing argument) so that the jury (1) would not be left to speculate as to why the state had failed to call him—an obvious eyewitness to, and victim of, the shooting—at trial, or (2) would not infer that, as a missing witness, his testimony would have been unfavorable to the state. Regardless of the state's motive, however, forcing Harris onto the witness stand was important enough to the state's case against the defendant that the state made

[15] None of the other witnesses at trial testified that the defendant shot Harris and Cedeno.

considerable efforts to immunize Harris in exchange for his testimony, which it presumably deemed "necessary to the public interest . . . ." General Statutes § 54-47a. It is incongruous for the state now to minimize the import of Harris' testimony in order to argue that the defendant was not harmed by it.

Again, as with the question of structural error, we find it unnecessary to resolve the difficult and close question of prejudice because we conclude that it is appropriate to exercise our supervisory powers over the administration of justice and to remand the case for a new trial. See *State* v. *Rose*, supra, 305 Conn. 606–607.

IV

It is well settled that "[a]ppellate courts possess an inherent supervisory authority over the administration of justice." (Internal quotation marks omitted.) *State* v. *Lockhart*, 298 Conn. 537, 576, 4 A.3d 1176 (2010); see also *State* v. *Rose*, supra, 305 Conn. 607. "Generally, cases in which we have invoked our supervisory authority for rule making have fallen into two categories. . . . In the first category are cases wherein we have utilized our supervisory power to articulate a procedural rule as a matter of policy, either as [a] holding or dictum, but without reversing [the underlying judgment] or portions thereof. . . . In the second category are cases wherein we have utilized our supervisory powers to articulate a rule *or otherwise take measures necessary to remedy a perceived injustice* with respect to a preserved or unpreserved claim on appeal. . . . In other words, in the first category of cases we employ only the rule-making power of our supervisory authority; in the second category we employ our rule-making power *and* our power to reverse a judgment. . . .

"[T]he salient distinction between these two categories of cases is that in one category we afford a remedy and in the other we do not. . . . In the second category

of cases, where we exercise both powers under our supervisory authority, the party must establish that the invocation of our supervisory authority is truly necessary because [o]ur supervisory powers are not a last bastion of hope for every untenable appeal. . . . In almost all cases, [c]onstitutional, statutory and procedural limitations are generally adequate to protect the rights of the [appellant] and the integrity of the judicial system. . . . [O]nly in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts will we exercise our supervisory authority to reverse a judgment. . . . In such a circumstance, the issue at hand, while not rising to the level of a constitutional violation, *is nonetheless of* [*the*] *utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole.*" (Citations omitted; emphasis altered; internal quotation marks omitted.) *In re Daniel N.*, 323 Conn. 640, 646–48, 150 A.3d 657 (2016).

Furthermore, "[a]n appeals court may . . . raise the question of whether to use its supervisory powers sua sponte," and "concerns regarding unfair surprise and inadequate argumentation can be alleviated by an order requiring the parties to file supplemental briefs." *State* v. *Elson*, 311 Conn. 726, 766, 91 A.3d 862 (2014).

Although "we normally exercise this power with regard to the conduct of judicial actors"; *State* v. *Lockhart*, supra, 298 Conn. 576; and often have invoked our supervisory authority to mandate "rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process"; (internal quotation marks omitted) *State* v. *Rose*, supra, 305 Conn. 607; we have rejected any arbitrary and categorical limitations on our use of our supervisory authority. Id. We have also invoked this power to reverse criminal convictions

tainted by significant prosecutorial impropriety, particularly in instances when "the prosecutor deliberately engages in conduct that he or she knows, or ought to know, is improper." (Internal quotation marks omitted.) *State* v. *Thompson*, 266 Conn. 440, 485, 832 A.2d 626 (2003), quoting *State* v. *Reynolds*, 264 Conn. 1, 165, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). In such cases, our standards for invoking our supervisory powers "are flexible and are to be determined in the interests of justice." (Internal quotation marks omitted.) *State* v. *Payne*, 260 Conn. 446, 451, 797 A.2d 1088 (2002). Moreover, reversal of the conviction does not necessarily serve the purpose of remedying any particular harm to the defendant in the case before the court, but ensures that the improper behavior is not repeated in the future. Id.; *State* v. *Rose*, supra, 611–12.

Rose is a direct example of the use of supervisory authority to order a new trial even in the absence of a showing that the defendant was harmed by the error or that the error was structural in nature. In *Rose*, our Supreme Court granted the state's petition for certification to appeal from this court's decision to reverse a criminal conviction in which the trial court had compelled the defendant to appear for trial in identifiable prison clothing. Certification initially was granted as to the following questions: "Did the Appellate Court properly determine that harmless error analysis does not apply where the trial court has compelled the defendant to appear before a jury in identifiable prison garb? If not, was the defendant's appearance before the jury in identifiable prison garb harmless beyond a reasonable doubt?" *State* v. *Rose*, 290 Conn. 920, 966 A.2d 238 (2009).

After hearing argument, the court asked the parties to file supplemental briefs addressing "[w]hether this court should affirm the judgment of the Appellate Court

on the [alternative] ground that reversal of the defendant's conviction is warranted in the exercise of this court's inherent supervisory authority over the administration of justice." (Internal quotation marks omitted.) *State* v. *Rose*, supra, 305 Conn. 604–605. The state argued that, if the court exercised its supervisory authority, it should do so only to issue a prospective rule and that it should reinstate the defendant's conviction. Id., 605.

The Supreme Court, however, elected to exercise its supervisory authority to reverse the defendant's conviction and order a new trial, and declined to reach the issue of whether the defendant had suffered any prejudicial harm. The court stated: "Because we decide this case on the basis of our supervisory authority, we need not resolve the issue of whether a trial court's constitutionally erroneous decision to compel a defendant to stand trial before a jury in identifiable prison clothing is susceptible to harmless error analysis, as the state claims, or instead amounts to structural error, as the defendant contends and as the Appellate Court apparently concluded." Id., 606. Similar to the present case, the court chose to use its supervisory authority to order a new trial while avoiding the need to determine whether the error that occurred resulted in harm to the particular defendant. "Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also *for the perceived fairness of the judicial system as a whole*." (Emphasis added; internal quotation marks omitted.) Id., 607.[16]

[16] Likewise, in *State* v. *Payne*, supra, 260 Conn. 446, our Supreme Court reversed a criminal conviction, holding that a new trial was warranted because of the prosecutor's repeated and deliberate misconduct during closing argument, which included appealing to the jury's emotions and improperly vouching for a prosecution witness' credibility. Although the court concluded that the prosecutor's misconduct did not violate the defendant's right to a fair trial in that particular case, it nonetheless exercised

In the present case, we conclude that it is appropriate to exercise our supervisory powers over the administration of justice and to remand this case for a new trial for several reasons. First, the improper immunity agreement directly implicates the perception of the integrity of our justice system. The improper immunity agreement, which plainly violates our public policy, gave Harris a license to commit perjury. Historically, perjury has been characterized as a crime *against the due administration of justice*. In fact, § 53a-156 (a), which criminalizes perjury, is codified at part XI of chapter 952 in our Penal Code, which is titled: "Bribery, Offenses Against the Administration of Justice and Other Related Offenses." As one legal scholar has written: "In time perjury developed into a [crime] . . . including everything which has a tendency to injuriously affect the administration of justice by the introduction of falsehood and fraud. . . . [T]he gist of the offense is the abuse of public justice, and *not the injury to an individual*. It does not matter whether the false oath was believed or disbelieved, or *whether it caused any injury to the person against whom it was given*." (Emphasis added; footnotes omitted; internal quotation marks omitted.) H. Silving, "The Oath: I," 68 Yale L.J. 1329, 1388 (1959).

Second, as discussed previously, the existence of the sanction for perjury plays a critical role in the truth

its supervisory authority "in order to protect the rights of defendants and to maintain standards among prosecutors throughout the judicial system rather than to redress the unfairness of a particular trial" and "to send a strong message that such conduct will not be tolerated." (Internal quotation marks omitted.) Id., 452. Although the court in *Payne* identified a pattern of misconduct by the prosecutor spanning several cases, and stated that this pattern of misconduct was a significant factor in its decision to exercise its supervisory authority, it did not expressly hold that such a pattern of misconduct was a necessary requirement to the exercise of our supervisory powers. Moreover, any attempt to read such a requirement into its holding would thwart the standard it set forth, namely, that our supervisory powers must be flexible and that their application must be determined by the interest of justice. Id., 451; see also *State* v. *Rose*, supra, 305 Conn. 607.

seeking process and helps to secure the defendant's right to confront the witnesses against him. *Maryland* v. *Craig*, supra, 497 U.S. 845–46; *Cologne* v. *Westfarms Associates*, supra, 197 Conn. 153. It is difficult to imagine an error that strikes more directly at the truth seeking process that is at the core of our judicial system than an agreement, implicitly endorsed by the court, that permits a witness to testify with a license to lie.

Third, the reversal of the conviction will help to ensure that such an unlawful promise will not be made by prosecutors in the future. In this case, there can be no doubt that the prosecutor knew that such an immunity agreement was prohibited by § 54-47a because the statute is cited in the immunity agreement that was formally filed with the trial court.[17] That knowledge, by itself, was insufficient to deter the state from promising Harris a form of immunity plainly prohibited by the statute. The decision to offer such an unlawful promise was not made in the heat of battle, like a brief

[17] It is true, as the state contends, that there does not appear to be a record of repeated instances of impropriety by this prosecutor in other cases. Nevertheless, we reject the state's assertion that we should not exercise our supervisory powers because the impropriety in this case was not deliberate and the prosecutor in this case has not engaged in repeated instances of prosecutorial impropriety in other cases.

First, we are not exercising our supervisory powers in this case merely because of prosecutorial impropriety. Indeed, a large measure of our decision to do so is a result of the trial court's unwillingness to prohibit the arrangement entered into between the state and Harris. The trial court certainly appeared to recognize that the immunity agreement was improper when it stated on the record that the agreement was "probably against the public interest, but I didn't step in." Moreover, in our view, the prosecutor knew, or certainly should have known, that the agreement was unlawful. The need to obtain immunity for Harris was discussed during trial, and, in fact, a continuance was granted in order to allow the state to work out an immunity agreement. The prosecutor filed an immunity agreement with the court, which included a citation to § 54-47a, which he presumably had read. A review of that statute's plain language should have alerted the prosecutor that the scope of the immunity deal he offered to Harris at trial exceeded the authority provided for under the statute.

improper remark during closing argument, but was reached as part of an extensive negotiation between the state and Harris' attorney that occurred over parts of at least two days.

Fourth, the exercise of our supervisory authority is also necessary to send a clear message to our trial courts that they have an affirmative obligation to intercede in circumstances where it appears that the state has offered a witness a license to lie during the trial. Indeed, the trial court here realized that the agreement violated public policy and believed that the witness was committing perjury but did nothing to prevent it.

Finally, it is important to remember that the ability to grant immunity to a witness is a power that belongs only to the state and is not shared by the defendant. The defendant cannot compel witnesses who have concerns about exposing themselves to criminal liability to testify, even if the defendant believes that their testimony may be exculpatory to him. Thus, it is important that courts confine the state's use of this significant prosecutorial power to appropriate instances that do not further and unfairly disadvantage a defendant.

The state objects to this court exercising its supervisory authority to reverse the defendant's conviction for several reasons. The state contends that it is "unclear" whether the Appellate Court even has the authority to exercise supervisory powers over the administration of justice. The state also argues that this court should not exercise this power sua sponte because the defendant, in essence, through his inaction, waived any challenge to the improper immunity agreement. Finally, the state asserts that the balancing of all of the interests in this case militates against the use of our supervisory powers. We disagree with each of these assertions.

First, this court disagrees with the state that the Appellate Court lacks supervisory power over the

administration of justice. Our Supreme Court, in referring to the supervisory power over the administration of justice, has repeatedly stated that "[a]ppellate court*s*" possess that power, not just our Supreme Court itself. See, e.g., *State* v. *Elson*, supra, 311 Conn. 768; *State* v. *Lockhart*, supra, 298 Conn. 576. More significantly, this court has exercised such powers in the past. See *State* v. *Santiago*, 143 Conn. App. 26, 48–51, 66 A.3d 520 (2013) (exercising supervisory authority to reverse conviction).[18] Although our review of briefs filed by the state in recent appeals reveals that the state repeatedly has taken the position that this court should not exercise its supervisory powers when requested to do so for prudential reasons in a variety of contexts; see, e.g., *State* v. *Dijmarescu*, 182 Conn. App. 135, 158, 189 A.3d 111, cert. denied, 329 Conn. 912, 186 A.3d 707 (2018); *State* v. *Castillo*, 165 Conn. App. 703, 729, 140 A.3d 301, aff'd, 329 Conn. 311, 186 A.3d 672 (2018); *State* v. *Fuller*, 158 Conn. App. 378, 391, 119 A.3d 589 (2015); our research has not revealed any case in which our authority to do so has been challenged. We also reject the state's argument that our Supreme Court's recent decision in *State* v. *Castillo*, 329 Conn. 311, 334–35, 335 n.11, 186 A.3d 672 (2018), has raised doubt about this court's supervisory powers. In *Castillo*, the Supreme Court was never asked to address the existence or scope of the Appellate Court's supervisory authority, and any language employed by the court in a footnote explaining why it had reformulated the third certified question in that case is simply taken out of context.[19] See id., 335 n.11.

[18] The state in *Santiago* did not challenge our authority to exercise supervisory powers over the administration of justice. It also did not seek certification to appeal to our Supreme Court to challenge our decision on that basis.

[19] Footnote 11 of the majority opinion in *State* v. *Castillo*, supra, 329 Conn. 311, states: "A narrow and literal interpretation of the certified issue as limited to the question of whether the Appellate Court properly declined to exercise any authority it may have to issue the requested prophylactic rule would yield the bizarre result that if this court agreed with the defendant, it would remand the case to the Appellate Court with direction to exercise

Second, we are not persuaded by the state's assertion that it is improper to exercise our supervisory powers sua sponte because the defendant waived any challenge to the illegal immunity agreement by remaining silent during the colloquy among the court, the state, and Harris' attorney. Although the trial judge remarked during this initial colloquy that in his forty-two and one-half years of experience in the criminal justice system, he had "never heard of anybody getting that agreement," the defendant simply failed to object to Harris' testimony. We are not convinced, however, that the defendant's failure to challenge the propriety of the immunity agreement was due to a conscious trial strategy that amounts to a tactical waiver. Nothing in the record before us supports such a conclusion. Although, as indicated, defense counsel was present for the discussions about Harris' immunity agreement with the state, and voiced no objection to the agreement despite the court's skeptical response, we would have to resort to impermissible speculation to determine that defense counsel's inaction was the result of tactical calculation rather than inadvertence. Indeed, the defendant had no way to know with certainty that Harris' testimony would be favorable to him. Although the defendant may have hoped that Harris would not implicate him in the shooting and would disavow or explain away the recorded statement to his mother, it was also possible that, with the broad grant of immunity, Harris might feel free to implicate the defendant as the shooter. Furthermore, although the defendant cross-examined Harris about his inability to identify anyone on the surveillance videotape and relied to some degree on Harris' testimony during his closing argument, defense counsel did not go to such lengths to exploit Harris' testimony as to suggest a tactical waiver.

such supervisory authority. That narrow reading would constitute an improper abdication of this court's duty and authority over the administration of justice." Id., 335 n.11.

The state, moreover, seems to confound the issue of implied waiver with a mere failure to object. Ordinarily, some affirmative action on the part of a defendant is needed before an appellate court will conclude that a defendant waived his right to seek appellate review. For example, by voluntarily and knowingly entering a guilty plea, a defendant waives his right to raise any nonjurisdictional claims of error. See, e.g., *Savage* v. *Commissioner of Correction*, 122 Conn. App. 800, 802–803, 998 A.2d 1247 (2010). The court did not ask the defendant for input as to the propriety of the agreement, and the defendant took no affirmative position on the agreement that could be construed as an express or implied waiver of his right to challenge it. Except in the limited circumstances of challenges to jury instructions; see *State* v. *Kitchens*, 299 Conn. 447, 469–70, 10 A.3d 942 (2011); we have not treated a defendant's inaction or failure to object to constitute an implied waiver that precludes the opportunity for appellate review. Indeed, even in that context, the Supreme Court has indicated that a defendant still may be entitled to relief on an unpreserved claim of instructional error pursuant to the plain error doctrine. *State* v. *McClain*, 324 Conn. 802, 808, 155 A.3d 209 (2016).

Accordingly, we reject the state's contention that the defendant's inaction at trial regarding the unlawful immunity agreement prevents us from exercising our supervisory power to remedy such an egregious error on appeal.

Finally, we are mindful, of course, as the state notes, that "our supervisory authority is not a form of free-floating justice, untethered to legal principle." (Internal quotation marks omitted.) *State* v. *Pouncey*, 241 Conn. 802, 813, 699 A.2d 901 (1997). Our Supreme Court has cautioned that, before we exercise our supervisory powers to reverse a criminal conviction, we must consider and balance all interests involved, including "the

extent of prejudice to the defendant; the emotional trauma to the victims or others likely to result from reliving their experiences at a new trial; the practical problems of memory loss and unavailability of witnesses after much time has elapsed; and the availability of other sanctions for such misconduct." (Internal quotation marks omitted.) Id. Having considered these and other factors raised by the state, we are unconvinced that, on balance, they require us not to exercise our supervisory authority under the present circumstances.

First, as we already discussed in detail in part III of this opinion, there is a strong argument that the defendant was unfairly prejudiced by the illegal grant of immunity to Harris. The state's improper immunization of Harris served as the mechanism to force Harris to testify, which allowed the state to introduce to the jury Harris' prior statement identifying the defendant as the shooter. The impact on the defendant was then compounded by the state's improper use of the statement as substantive evidence during closing arguments.

Second, the potential that a new trial would result in significant "emotional trauma to the victims," as claimed by the state, seems unlikely. Certainly, both Harris and Cedeno suffered serious injuries in this case. Retrial of this case, however, will not involve the viewing of graphic and disturbing crime scene or autopsy photographs as one might expect in a more serious homicide case. Nor will a retrial require anyone to describe details of a highly personal nature, as in cases involving a sexual assault. It also does not involve a particularly sensitive victim such as a child. Further, Harris and Cedeno's claimed lack of memory of the events and their purported reluctance to aid authorities in bringing their assailant to justice undermines any assertion that a retrial would result in any grave emotional retraumatization to them.

Third, although practical problems like memory loss and the unavailability of witnesses can arise any time there is a new trial, such risks are not of particular concern in the present case. The assaults at issue occurred in 2013, not in the distant past. This case does not turn on the testimony of eyewitnesses whose memories are likely to have faded with the passage of time. Neither Cedeno nor Harris was able to provide useful details as to the night they were shot. Harris, in fact, claimed that he was unable to remember any of the events of that night due to intoxication. Such an utter lack of recollection is not likely to worsen over time. Additionally, although it certainly is possible that a witness might be unavailable for a retrial, there is nothing in the record to suggest that any witness has died or left the jurisdiction of the state.

Finally, as we have discussed in part I of this opinion, the state's impropriety in immunizing Harris for future perjury, which the trial court expressly recognized but failed to prevent, violated public policy and undermines confidence in our judicial system. Although we recognize that reversal of a conviction is a remedy that should be invoked sparingly, we do not believe another viable solution exists here. The state has not made us aware of the availability of any other sanction, short of reversal, that will ensure that the egregious error that occurred in this case will not be repeated in the future.

The judgment is reversed and the case is remanded for a new trial.

In this opinion SHELDON, J., concurred.

BEAR, J., concurring in part and concurring in the judgment. The defendant, Kevan Simmons, appeals from the judgment of conviction, rendered following a jury trial, of two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5), and

one count each of criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c (a) (1) and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). On appeal, the defendant claims that (1) the prosecutor violated his constitutional rights to due process and a fair trial by committing improprieties during closing argument; (2) his due process rights were violated when the state failed to disclose a police internal affairs report detailing the misconduct of a police detective who was a primary witness for the state; and (3) the state improperly entered into an agreement to immunize testimony from George Harris, a victim of the shooting and a key witness, including any lies and falsehoods that would constitute the crime of perjury, and that agreement constituted plain error that was either structural error or otherwise not subject to a harmless error analysis; and (4) the improper agreement to immunize Harris' testimony, which the state anticipated would include Harris' perjury in denying knowledge, inter alia, about who shot him, warrants the exercise of this court's supervisory authority to reverse the defendant's conviction and award him a new trial.[1]

I agree with the majority that the state's illegal and improper agreement with Harris to immunize all of his anticipated testimony, including any testimony that the state anticipated would constitute the crime of perjury,

[1] On December 14, 2017, prior to oral argument before this court, the defendant filed a motion requesting supplemental briefing as to his claim pursuant to *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), which this court granted on January 11, 2018. On May 31, 2018, after oral argument, this court ordered, sua sponte, that the parties file supplemental briefs addressing whether the state's agreement not to prosecute Harris for any perjury committed while testifying for the state constituted plain error. On October 5, 2018, this court again ordered, sua sponte, supplemental briefing to address whether this court should exercise its supervisory authority to reverse the defendant's conviction if the grant of immunity to Harris for any perjury while testifying for the state was improper.

and the trial court's knowing acceptance and implementation of that illegal and improper agreement, warrants a reversal of the defendant's conviction and a remand of this case for a new trial. I write separately, however, because I do not agree that the majority's invocation of this court's supervisory authority in its thorough, thoughtful, and well written opinion is necessary in this case. I would, instead, reverse the defendant's conviction on the ground that the trial court's acceptance and implementation of the agreement for the illegal and improper immunization of Harris' anticipated testimony, including any testimony that would constitute the crime of perjury, constituted plain error that was structural error in the context of the defendant's criminal trial.[2]

Before addressing the defendant's claim of plain error, I discuss the other claims raised by the defendant in support of his argument that the conviction should be reversed to determine whether reversal is warranted on a basis separate from plain error review.

I accept the facts as set forth in the majority opinion. Additional facts are set forth as relevant to the claims that are addressed in this concurring opinion.

I

PROSECUTORIAL IMPROPRIETY

The defendant first claims that the prosecutor violated his rights to due process and a fair trial when he committed several improprieties during closing argument. Specifically, the defendant claims that the prosecutor improperly (1) denigrated defense counsel; (2)

[2] The defendant focuses on the actions of the prosecutor in entering into the agreement with Harris that violated the public policy of Connecticut and General Statutes § 54-47a. Without the acceptance and implementation of that agreement by the court in allowing Harris to testify, the agreement would have had no effect. I thus interpret the claims of the defendant to include the actions of the court in allowing Harris to testify pursuant to the illegal and improper agreement.

asked the jury to use impeachment evidence substantively; (3) expressed his opinion about the credibility of two witnesses; (4) appealed to the jurors' emotions; and (5) injected extraneous matters into the trial. The state argues that the prosecutor did not commit any improprieties during closing argument and that, even if he did, they did not deprive the defendant of his rights to due process and a fair trial.

Although the defendant did not object to the purported improprieties he now challenges on appeal, "under settled law, a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 560, 34 A.3d 370 (2012).

"In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." (Internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 541–42, 180 A.3d 882 (2018).

"As we previously have recognized, prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however] [c]ounsel must be allowed a generous latitude in argument, as the limits

of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury [has] no right to consider." (Internal quotation marks omitted.) *State* v. *Reddick*, 174 Conn. App. 536, 559, 166 A.3d 754, cert. denied, 327 Conn. 921, 171 A.3d 58 (2017), cert. denied, U.S. , 138 S. Ct. 1027, 200 L. Ed. 2d 285 (2018).

With the foregoing in mind, I address each of the defendant's claims of prosecutorial impropriety in turn to determine whether any improprieties occurred.

A

The defendant first claims that the prosecutor improperly denigrated defense counsel during his closing argument. Specifically, he claims that the prosecutor's remarks improperly implied that defense counsel was employing standard tactics used in all trials. The state counters that the prosecutor's comments were proper because they challenged the theory of the defense.

"It has been held improper for the prosecutor to impugn the role of defense counsel. . . . In particular, [i]t is improper for a prosecutor to tell a jury, explicitly or implicitly, that defense counsel is employing standard tactics used in all trials, because such an argument relies on facts not in evidence and has no bearing on the issue before the jury, namely, the guilt or innocence of the defendant. . . . There is a distinction [however] between argument that disparages the integrity or role of defense counsel and argument that disparages a theory of defense. . . .

"Closing arguments of counsel . . . are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. . . . [S]ome leeway must be afforded to the advocates in offering arguments to the jury in final argument. . . . [C]ounsel must be allowed a generous latitude in argument . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Fasanelli*, 163 Conn. App. 170, 180, 133 A.3d 921 (2016).

In *Fasanelli*, the defendant argued "that the prosecutor improperly denigrated defense counsel by implying that defense counsel was being deceitful and using standard defense tactics" during his closing argument Id., 181. This court concluded, however, that the challenged comments, when read in context, "did not attack defense counsel; rather, each of the challenged comments attacked the theory of the defendant . . . ." Id., 182. Because the prosecutor's comments were based on evidence in the record and attacked only the theory of the defense, the court concluded that they were proper. Id.

In the present case, the prosecutor stated the following during his initial closing argument: "Now, [defense counsel's] going to get up here, I assume, [and say] that the Hartford police are lying, [Detective] Reggie Early

lied, you know, that was a deceitful tactic that he used, you know, that's—if he lies that way, why should you believe any of his testimony? Whatever. Completely predictable. When your back [is] up against the wall, that's what the defense is going to be. Always blame the police, all right."

Similarly to *Fasanelli*, when read in context these comments are clearly based on evidence in the record and attack the apparent theory of the defense, as shown during defense counsel's cross-examination. The prosecutor's comments were directed to defense counsel's attempts during trial to attack the credibility of the Hartford police, particularly, Detective Early's testimony regarding the manner in which he secured the defendant's confession. The defendant's apparent theory was that, because Early had secured the defendant's confession by using a fabricated confession from Harris, he must not have been truthful in the remainder of his testimony. In light of this defense theory, the prosecutor's comments in attacking it were not improper.

B

The defendant next claims that the prosecutor improperly made substantive use of Harris' tape-recorded phone conversation with his mother that was recorded by the Department of Correction in accordance with its usual policy. Some of Harris' statements were admitted by the court as prior inconsistent statements to impeach his trial testimony. Subsequently, during the prosecutor's initial closing argument, the prosecutor referenced the tape-recorded conversation, which had not been admitted as a full exhibit for all purposes, and then repeated to the jury what Harris had said to his mother during the phone call for the truth of the statements. In particular, the prosecutor stated:

"One point in [Harris'] testimony that he's talking to his mom: First, I think I am being charged with everything [the defendant] is. Cop told me the warrant is for

not cooperating, and I'm like, yeah, I'll take that. Makes sense. If you woulda seen the video they showed me, *I coulda got charged with the same thing* [*the defendant*] *got charged with*. They showed me the video. . . . They showed everything. *When I sat down*, *when I couldn't move*, *they showed* [*the defendant*] *walked up to me*. Then they showed him run off. Then they show this girl run out, tie my leg up. They showed the whole thing. . . .

"He testified that [he and the defendant were] arrested at the same time, that they were at [the] Hartford lockup at the police department, and they were placed in cells next to each other. They smacked [the defendant] with the charges right there. They had us together. *They really put us together and this 'n' shot me*. . . . And then [Harris] laughs. I'm in a holding cell. I don't know how [the defendant] seen me. I'm asleep. [The defendant] seen me. They put [the defendant] in a cell like two cells down. It's like, one, two in the morning. All I hear is: George. George. Come on, man. I know you hear me. I know you hear me. I just seen you. I just seen you. I'm like, this 'n' really trying to talk to me? *I'm in jail 'cause of him right now 'cause he shot me in the leg*.

"*That's testimony*, *ladies and gentlemen*. That's not given to police or the state's attorney's office." (Emphasis added.)

Our Supreme Court has adopted a rule "allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross examination." *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). In *Whelan*, the court also held that "[*p*]*rior oral statements of a witness*, *easily manufactured and often difficult*

to rebut, should not be used to prove an element of a crime essential to guilt." (Emphasis added.) Id., 754. In the years following *Whelan*, our Supreme Court has recognized that "the general rationale of *Whelan* concerning written statements also applies to tape-recorded statements . . . [and that] the requirement that such statements be signed is unnecessary because the recording of the witness' voice imparts the same measure of reliability as a signature." (Citation omitted.) *State* v. *Woodson*, 227 Conn. 1, 21, 629 A.2d 386 (1993). Additionally, this court has stated that a witness' identification of his or her own voice on tape is afforded "the same measure of reliability as a signature." (Internal quotation marks omitted.) *State* v. *Perry*, 48 Conn. App. 193, 199–200, 709 A.2d 564, cert. denied, 244 Conn. 931, 711 A.2d 729 (1998); see also E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 8.27.3 (b), p. 606. The *Whelan* rule and its subsequent developments and clarifications have been incorporated into § 8-5 (1) of the Connecticut Code of Evidence, which states that prior inconsistent statements are not excluded by the hearsay rule, "provided (A) the statement is in writing or otherwise recorded by audiotape, videotape or some other equally reliable medium, (B) the writing or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement." See also Conn. Code Evid. § 8-5 (1), commentary.

In *Woodson*, the state had played a tape recording of a witness' statement to police to show its inconsistency with the witness' in-court testimony, in which he had disavowed any knowledge of the tape-recorded statements. See *State* v. *Woodson*, supra, 227 Conn. 19. Subsequently, the trial court admitted the taped statement into evidence and had portions of it played for the jury. Id. Our Supreme Court ultimately concluded that the trial court properly admitted the prior inconsistent

statement for substantive purposes. Id., 23. In the present case, although the state similarly played the tape-recorded statement made by Harris to his mother to show its inconsistency with his in-court testimony that he did not remember who shot him, the state did not attempt to admit the tape recording into evidence as a full exhibit. Rather, the state made clear that the tape-recording was not being offered for its truth, but only to show its inconsistency with Harris' testimony. Moreover, the court made clear in its instructions to the jury, after the tape recording was played, that the jurors should consider it only as it related to his credibility and that it was not substantive evidence.

As such, the prosecutor's two references in closing argument to Harris' statements in the tape recording for their truth were improper because the statements had not been previously admitted as substantive evidence. The prosecutor, therefore, improperly utilized Harris' recorded statements in his closing argument.

C

The defendant next claims that the prosecutor improperly expressed his opinion about the credibility of two of the state's witnesses, Harris and Joaquin Cedeno, both of whom were victims of the shooting.

"[A] prosecutor may not express his [or her] own opinion, directly or indirectly, as to the credibility of the witnesses. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . However, [i]t is not improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in

the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand. . . . [W]e must look at the statement, including the use of the pronoun I, as a whole, in determining whether it was an expression of the state's attorney's personal opinion regarding the credibility of witnesses." (Citation omitted; internal quotation marks omitted.) *State* v. *Fasanelli*, supra, 163 Conn. App. 185–86.

During his initial closing argument, the prosecutor made the following comments: "You can listen back to George Harris' testimony. It was painful. He would listen to part of the tape. Is that you? Yes it is. And did you say that? And right after listening to the tape, he would say no, okay. He was an obstructionist." In addition, during his initial closing argument, the prosecutor stated: "But again, the problem is, [the police] are dealing with obstructionists like Joaquin Cedeno and George Harris. Complete obstructionists." During his rebuttal closing argument, the prosecutor stated: "I have to comment on Mr. Cedeno and Mr. Harris. The only thing that they're up here for, what I put them on for—because they are obstructionists—just to let you know that they got shot." Finally, during rebuttal the prosecutor stated: "If Harris and Cedeno want to be obstructionists to our criminal justice system, let it be. So be it."

The prosecutor's comments were not improper. The comments were based on Harris' and Cedeno's testimony adduced at trial and reflect an effort on the part of the prosecutor to invite the jury to draw the reasonable inference that their testimony regarding the incident lacked credibility. See *State* v. *Richard W.*, 115 Conn. App. 124, 135–36, 971 A.2d 810 ("[i]t is without question that a prosecutor may fairly comment on evidence and the reasonable inferences to be drawn therefrom that lead the jury to a conclusion as to the credibility of

witnesses" [internal quotation marks omitted]), cert. denied, 293 Conn. 917, 979 A.2d 493 (2009). Specifically, because the prosecutor had established during the trial that Harris and Cedeno were friends and that the defendant and Harris were friends, the jury could have drawn a reasonable inference from Harris' impeachment by his prior inconsistent statements to his mother that he was lying to obstruct the prosecution of the defendant and to protect himself, Cedeno, and the defendant. The prosecutor's comments that Harris and Cedeno were obstructionists, therefore, were not based solely on the prosecutor's personal opinion, but on the plausible motives that they may have had to protect themselves and the defendant. See *State* v. *Stevenson*, 269 Conn. 563, 584–85, 849 A.2d 626 (2004); id., 585 ("[i]t is not improper for a prosecutor to remark on the motives that a witness may have to lie" [internal quotation marks omitted]); see also *State* v. *Thompson*, 266 Conn. 440, 466, 832 A.2d 626 (2003) (same). The prosecutor, therefore, did not improperly express his personal opinion regarding the credibility of Harris and Cedeno.

D

The defendant next claims that the prosecutor improperly (1) appealed to the jurors' emotions and (2) injected extraneous matters into the trial.

"It is well established that [a] prosecutor may not appeal to the emotions, passions and prejudices of the jurors. . . . [S]uch appeals should be avoided because they have the effect of diverting the [jurors'] attention from their duty to decide the case on the evidence. . . . When the prosecutor appeals to emotions, he invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors which are likely to skew that appraisal. . . . [I]n deciding cases [however] . . .

[j]urors are not expected to lay aside matters of common knowledge or their own observations and experiences, but rather, to apply them to the facts as presented to arrive at an intelligent and correct conclusion. . . . Therefore, it is entirely proper for counsel to appeal to [the jurors'] common sense in closing remarks." (Citation omitted; internal quotation marks omitted.) *State* v. *Barry A.*, 145 Conn. App. 582, 601–602, 76 A.3d 211, cert. denied, 310 Conn. 936, 79 A.3d 889 (2013). "An improper appeal to the jurors' emotions can take the form of a personal attack on the defendant's character . . . or a plea for sympathy for the victim or [his or] her family." (Internal quotation marks omitted.) *State* v. *Santiago*, 143 Conn. App. 26, 34, 66 A.3d 520 (2013).

In addition, "[a] prosecutor, in fulfilling his duties, must confine himself to the evidence in the record. . . . [T]he privilege of counsel in addressing the jury . . . must never be used as a license to state, or to comment upon, or even to suggest an inference from, facts not in evidence, or to present matters which the jury [has] no right to consider." (Citation omitted; internal quotation marks omitted.) *State* v. *Barry A.*, supra, 145 Conn. App. 605.

In the present case, the defendant takes issue with the following statements made by the prosecutor during his rebuttal closing argument:

"If Harris and Cedeno want to be obstructionists to our criminal justice system, let it be. So be it. But the state is not going to sit back and let people like Cedeno and Harris dictate that if they don't want to come into the court, we're not going to prosecute. They don't decide the criminal justice system, okay. We're not going to sit back just because I don't care and I'm not saying who did it. The state's not going to sit back and say, okay, that's fine, move on. The state's going to press on by other means.

"Does the state have an interest in the case? You bet we do. Two people were critically injured, shot by this defendant who illegally possessed a firearm, who intentionally and with extreme indifference to human life fired it in a residential neighborhood. A community, regardless of a person's ethnic or economic background, has a right, a privilege, to not be subjected to this violent, criminal conduct."

The defendant argues that the statements improperly urged the jurors to find him guilty to ensure that Harris and Cedeno would not get away with manipulating the criminal justice system through their "deliberate obstructionism," and to protect the ethnically diverse and economically disadvantaged community in which they lived. As previously set forth in part I C of this concurring opinion, the prosecutor's comments referring to Harris and Cedeno as obstructionists were not improper because they were appropriately based on evidence adduced during trial. Moreover, the prosecutor's comments referencing the community were not directed at urging the jury to find the defendant guilty because of the location of the incident, but rather, urged the jury to remember that all communities have a general right to be free from the violence that occurred in this case. The prosecutor did not state that there was a greater reason to convict the defendant because of the particular location of the incident, nor did he urge the jury to have sympathy for the victims because of who they were or where they were from. Compare *State* v. *Payne*, 260 Conn. 446, 463, 797 A.2d 1088 (2002) (finding prosecutor's statement improper where he indicated that only guilty verdict would protect legal system), and *State* v. *Santiago*, supra, 143 Conn. App. 41–42 (prosecutor improperly appealed to emotions of jurors where he urged them to decide case on basis of sympathy for victim and victim's family), with *State* v. *Long*, 293 Conn. 31, 60, 975 A.2d 660 (2009) (prosecutor's

remark not improper where it neither disparaged defendant nor painted victim as particularly vulnerable or deserving of sympathy, but instead was based on evidence presented at trial). The prosecutor's statements, therefore, neither appealed to the jurors' emotions nor injected extraneous matters into the trial.

E

Because the prosecutor committed an impropriety by making substantive use of Harris' prior oral inconsistent statements during his closing argument, the question of whether that established impropriety "so infected the trial with unfairness as to make the resulting conviction a denial of due process" must be examined. (Internal quotation marks omitted.) *State* v. *Williams*, 204 Conn. 523, 539, 529 A.2d 653 (1987).

"In determining whether prosecutorial [impropriety] was so serious as to amount to a denial of due process, this court, in conformity with courts in other jurisdictions, has focused on several factors. Among them are the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citations omitted.) Id., 540. "[T]he burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process." *State* v. *Payne*, supra, 303 Conn. 563.

As to whether the prosecutor's improper references to Harris' prior inconsistent statements were invited by defense counsel, the record reflects that the references were made during the prosecution's initial closing argument and not in response to statements that defense

counsel made in his closing argument. Thus, these comments could not have been invited by the defendant. See *State* v. *Ceballos*, 266 Conn. 364, 409–10, 832 A.2d 14 (2003) ("[T]he state's attorney's improper comments during summation, were not invited by the arguments of defense counsel. . . . As the defendant correctly points out, the state's attorney made the challenged . . . comments during his initial summation, and *not* during the state's rebuttal to the defendant's closing argument." [Citation omitted; emphasis in original.]). As such, this factor favors the defendant.

Additionally, the factor regarding the centrality of the impropriety to the critical issues in the case also favors the defendant. The prosecutor's assertion during his closing argument that Harris' prior inconsistent statement placed the defendant at the scene of the shooting went to the defendant's identification as the shooter, which was a crucial issue in this case.

With respect to the frequency of the impropriety, the prosecutor's substantive references to Harris' prior inconsistent statements were not frequent. The prosecutor's references regarding the identification of the defendant in Harris' prior inconsistent statements occurred only during the prosecutor's initial summation. See *State* v. *Ross*, 151 Conn. App. 687, 701, 95 A.3d 1208 ("the claimed improprieties were not pervasive throughout the trial, but were confined to, and constituted only a small portion of, closing and rebuttal argument, a part of the trial where we typically allow some latitude" [internal quotation marks omitted]), cert. denied, 314 Conn. 926, 101 A.3d 271, 272 (2014). Accordingly, the frequency factor favors the state.

As to the sufficiency of curative measures taken by the court, the court provided jury instructions indicating that the prosecutor was not permitted to give an opinion as to the defendant's guilt, that it was the role

of the jury to find the facts, and that witness credibility was an issue solely for the jury. Additionally, the court instructed the jury during Harris' direct examination that it "should consider that out-of-court evidence only as it relates to [the witness'] credibility" and that "[i]t's not substantive evidence." The court later repeated these instructions, directing the jury that it "should consider this evidence only as it relates to the credibility of the witness' testimony, not as substantive evidence." Furthermore, there is no suggestion in the present case that the jury failed to follow the court's instructions. "In the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them." (Internal quotation marks omitted.) *State* v. *Thompson*, supra, 266 Conn. 485.

The defendant argues that the court's "general instructions were not sufficient to cure the prejudicial impact of the improper arguments." Even if the court's instructions were found to be insufficient, however, "the defendant, by failing to bring [specific curative instructions] to the attention of the trial court, bears much of the responsibility for the fact that these claimed improprieties went uncured." (Internal quotation marks omitted.) *State* v. *Thompson*, supra, 266 Conn. 483. As such, the defendant's failure to object to the prosecutor's reference to Harris' prior inconsistent statement creates a presumption that the defendant did not view the impropriety as prejudicial enough to affect his right to a fair trial. See id., 479–80 ("[W]e consider it highly significant that defense counsel failed to object to any of the improper remarks, request curative instructions, or move for a mistrial. Defense counsel, therefore, presumably [did] not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial. . . . Given the defendant's failure to object, *only instances of grossly egregious misconduct* will be severe enough to mandate reversal." [Citation

omitted; emphasis added; internal quotation marks omitted.]).

Although the defendant concedes that he failed to object to the prosecutor's allegedly improper statements when or after they were made, he argues that the resulting impropriety was so severe as to deprive him of a fair trial. Because the prosecutor's substantive references to Harris' prior inconsistent statements were not frequent, and the defendant failed to object to them, the prosecutor's substantive references to Harris' prior inconsistent statements were not grossly egregious enough to warrant reversal. See id., 480 ("[g]iven the defendant's failure to object, only instances of grossly egregious misconduct will be severe enough to mandate reversal"); see also *State* v. *Ross*, supra, 151 Conn. App. 700 (defendant not entitled to prevail if "the claimed [impropriety] *was not blatantly egregious and merely consisted of isolated and brief episodes that did not reveal a pattern of conduct repeated throughout the trial*" [emphasis added; internal quotation marks omitted]).

As to the strength of the state's case, the prosecutor conceded in his argument to the jury that the video of the shooting, which was shown to the jury and had been obtained from nearby security cameras, was not enough for the jury to return a verdict of guilty, but pointed to other ways the state could corroborate the defendant's identification, such as "clothes, Officer [Robert] Fogg [of the Hartford Police Department], the timing coincidence, George Harris, the video and the reasonable inferences you can draw from it, and Detective Reggie Early." Specifically, the record reveals that Officer Fogg's testimony placed the defendant at the scene ten minutes after the shooting, and the video footage showed the figure who committed the shooting in clothes similar to what the defendant was wearing

when he arrived on the scene. Furthermore, the prosecutor had properly impeached Harris' credibility by presenting his prior inconsistent statements through the tape-recorded phone conversation he had engaged in with his mother. Thus, the jury reasonably could have inferred that Harris was untruthful when he responded to the question about whether the defendant was at the scene of the shooting when it occurred, but, of course, the jury could not have concluded solely from those prior inconsistent statements that the facts supporting them were true. Additionally, the defendant admitted, albeit as a result of the confession allegedly made by Harris that had been fabricated by and read to the defendant by Early, that he was the shooter. See *State* v. *Camacho*, 282 Conn. 328, 383, 924 A.2d 99 (state's case strong where, among other evidence, defendant admitted he had shot woman), cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007). As such, this factor favors the state.

Because the *Williams* factors primarily favor the state, the defendant has failed to prove that the prosecutor's improper substantive use of Harris' prior inconsistent statement violated his rights to due process and a fair trial.

II

BRADY VIOLATION

The defendant next claims that the state withheld material evidence regarding Early's credibility in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Specifically, the defendant claims that the state deprived him of the right to cross-examine Early in regard to a Hartford Police Department internal affairs report detailing his misconduct, which was totally unrelated to the criminal incident involving the defendant and Harris, stemming from an encounter with a towing company. The state argues that

the report was neither favorable nor material because it was not probative of Early's untruthfulness, and it was not reasonably probable that use of the report would have changed the result of this case.

The following additional facts are relevant to the disposition of this claim. The defendant alleges that, subsequent to the parties' filing of their initial briefs, he became aware of an internal affairs report involving Early through a January 24, 2017 article published by the Journal Inquirer newspaper. The report detailed a 2007 investigation conducted by the Hartford Police Department to determine whether Early had abused his position as a police officer in attempting to convince a towing company to release his car without charging him a fee, and whether he intentionally misled the investigation by giving a false statement as to who drove him to the towing company. The report stated that an internal affairs sergeant sustained the charge of abuse of police powers as well as the allegation that Early intentionally made a false statement to investigators. The report further stated that Early was issued a written reprimand for abusing his position as a police officer but was not disciplined for making the false statements, as they did not appear aimed at misleading the investigation.

On February 10, 2017, after discovering the report, the defendant filed a motion for permission to file a late motion for augmentation and rectification of the record with this court in order to establish a *Brady* claim. Specifically, the defendant sought an evidentiary hearing to determine whether the state had failed to disclose an internal affairs investigation relating to Early at the time of trial and requested that the trial court mark the report as an exhibit. On February 27, 2017, the state filed a response to the defendant's motion, conceding the facts on which the defendant relied to establish his *Brady* claim and not opposing

rectification of the record. The state further conceded that the report had been in the possession of the Hartford Police Department but had not been disclosed by the state prior to or during trial. Accordingly, the state argued that because suppression of the report was not a contested factual issue, an evidentiary hearing was not necessary. On March 15, 2017, this court granted the defendant's motion for permission and ordered the defendant to formally file his motion. On March 21, 2017, the defendant filed a revised motion for augmentation and rectification of the record with the trial court, in which he agreed with the state that an evidentiary hearing was not necessary due to the state's concessions. On November 6, 2017, the court granted the defendant's motion and marked the report as an exhibit.

"It is the duty of the state voluntarily to disclose material in its exclusive possession which would be exonerative or helpful to the defense . . . . The prosecution's duty to disclose applies to all material and exculpatory evidence that is within its possession or available to it . . . and that the prosecution knew or should have known was exculpatory. . . . To prove a *Brady* violation, therefore, the [defendant] must establish: (1) that the state suppressed evidence (2) that was favorable to the defense and (3) material either to guilt or to punishment. . . . If the [defendant] fails to meet his burden as to one of the three prongs of the *Brady* test, then we must conclude that a *Brady* violation has not occurred." (Citations omitted; internal quotation marks omitted.) *Peeler* v. *Commissioner of Correction*, 170 Conn. App. 654, 687–88, 155 A.3d 772, cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017). Moreover, "[w]hether the [defendant] was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review." (Internal quotation marks omitted.) Id., 689.

In the present case, the state has conceded that the internal affairs report was "suppressed within the meaning of *Brady* and its progeny." (Internal quotation marks omitted.) As such, the inquiry becomes whether the report was favorable to the defendant and material to his guilt or his punishment. "The United States Supreme Court . . . has recognized that [t]he jury's estimate of the truthfulness and reliability of a . . . witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. . . . Accordingly, the *Brady* rule applies not just to exculpatory evidence, but also to impeachment evidence . . . which, broadly defined, is evidence having the potential to alter the jury's assessment of the credibility of a significant prosecution witness." (Citations omitted; internal quotation marks omitted.) *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 369–70, 71 A.3d 512 (2013).

The defendant argues that the false statements that Early made to investigators detailed in the report are specific acts of misconduct that were essential to the defense in order to impeach his credibility. The state argues that because the Hartford Police Department ultimately did not uphold the finding made by the investigating internal affairs sergeant that Early had intentionally made false statements, an inference of untruthfulness stemming from the statements "was at best very low."

Section 6-6 (b) (1) of the Connecticut Code of Evidence provides that "[a] witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness." Moreover, "[t]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand

observation of their conduct, demeanor and attitude." (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 the present case, the fact that Early was accused of intentionally lying and was initially found to have done so by the investigating internal affairs sergeant was impeachment evidence that was favorable to the defense. It would have been within the jury's province to assess Early's credibility on the basis of the accusations contained within the report. This court's acceptance of the state's argument would be tantamount to preventing a jury from conducting this assessment. Because the internal affairs report would likely bear on the credibility of Early, it was potential impeachment evidence and, therefore, favorable to the defendant's position.

Although the internal affairs report was suppressed within the meaning of *Brady* and was favorable to the defense, it was not material under *Brady*. "Not every failure by the state to disclose favorable evidence rises to the level of a *Brady* violation. Indeed, a prosecutor's failure to disclose favorable evidence will constitute a violation of *Brady* only if the evidence is found to be material. The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial . . . . *United States* v. *Bagley*, [473 U.S. 667, 675, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)]. In a classic *Brady* case, involving the state's inadvertent failure to disclose favorable evidence, the evidence will be deemed material only if there would be a reasonable probability of a different result if the evidence had been disclosed.

Bagley's touchstone of materiality is a reasonable probability of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." (Internal quotation marks omitted.) *Adams* v. *Commissioner of Correction*, supra, 309 Conn. 370–71.

In the present case, the defendant argues that the internal affairs report was material because Early's testimony was the state's most compelling evidence and, therefore, the defendant's ability to cross-examine Early with his own statements impacted the fairness of the trial. The state argues that the report was not material because it had little probative value for purposes of casting doubt on Early's investigation and the defendant's confession, the defendant had impeached Early by other means, including his fabrication of the purported Harris confession, and the state's evidence was strong.

The state's failure to disclose the report to allow the defendant yet another opportunity to impeach Early's credibility, viewed in the context of the entire trial, does not undermine confidence in the jury's verdict. As previously discussed in part I E of this concurring opinion, there was sufficient evidence in the record to support the defendant's conviction, namely, Officer Fogg's testimony that placed the defendant at the scene ten minutes after the shooting; video footage that showed the shooter in clothes similar to what the defendant was wearing when he arrived on the scene; Harris' prior inconsistent statements allowing the jury to infer his lack of credibility; and the defendant's confession

that he was the shooter. See *Elsey* v. *Commissioner of Correction*, supra, 126 Conn. App. 160 ("[T]here was ample evidence to support the petitioner's conviction. . . . Therefore, we cannot say that the fact that the state did not disclose the evidence . . . undermines our confidence in the jury's verdict." [Citation omitted.]). As previously set forth, Early's credibility had been impeached during his cross-examination when the defense questioned him regarding his admitted fabrication of Harris' purported confession, which, in turn, led to the defendant's confession. See *Morant* v. *Commissioner of Correction*, 117 Conn. App. 279, 299, 979 A.2d 507 ("[t]his evidence . . . taken in context is merely cumulative impeachment evidence and, therefore, not material under *Brady*"), cert. denied, 294 Conn. 906, 982 A.2d 1080 (2009).

Because the state's evidence was sufficient for the jury to find the defendant guilty, and because the evidence contained in the report was at best cumulative concerning Early's credibility, the internal affairs report was not material within the meaning of *Brady*. Accordingly, the defendant's *Brady* claim fails.

III

PLAIN ERROR

The defendant next claims that the state's agreement with Harris not to prosecute Harris for any future acts of perjury committed while testifying for the state at the defendant's trial constituted plain error because (1) it clearly violated the public policy of this state against immunizing perjured testimony and (2) it violated § 54-47a.[3] The defendant further argues that this improper

[3] In its August 15, 2018 supplemental brief, the defendant argued that "[t]he agreement to immunize Harris from prosecution for any perjury he might commit in testifying was plain error, both because it violated public policy, and because it violated [§] 54-47a. It is well established that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair. *Adams* v. *Commissioner of Correction*, supra, 309 Conn. 371–73; *United States* v. *Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342

grant of immunity constitutes structural error that obviates the need to engage in harmless error analysis. In the alternative, the defendant argues that, if harmless error analysis applies, the state has failed to meet its burden to show that the error was harmless beyond a reasonable doubt. The state concedes that its agreement not to prosecute Harris for perjury was a defective and improper grant of immunity, but argues that such error was not structural in nature, nor did it cause the defendant manifest injustice.

The state concedes that its promise not to prosecute Harris for perjury in connection with his upcoming testimony was a defective and improper grant of immunity that was inconsistent with Harris' duty to testify truthfully. The state articulates that plain error analysis requires a court not only to examine the nature of the error, but also to assess the grievousness of its consequences and whether it worked a serious and manifest

(1976). . . . By expressly prohibiting grants of immunity for the crime of perjury; [General Statutes] § 54-47a; the legislature safeguarded the fundamental rights to a fair trial and to confrontation. U.S. Const., amends. V, VI and XIV; Conn. Const., art. I, § 8. . . . Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings; *United States* v. *Mandujano*, 425 U.S. 564, 576–77, 96 S. Ct. 1768, 48 L. Ed. 2d 212 (1976); it goes to the very heart of the fair administration of justice. No legal system can long remain viable if lying under oath is treated as no more than a breach of etiquette. *United States* v. *Cornielle*, 171 F.3d 748, 753 (2d Cir. 1999). . . . In the constitutional process of granting immunity to secure witness testimony, perjury simply has no place whatever. *United States* v. *Mandujano*, supra, 576–77." (Citations omitted; internal quotation marks omitted.)

Although the primary focus of the defendant's argument is the agreement, it is evident from the defendant's August 15, 2018 supplemental brief that the structural harm alleged to be caused to the defendant occurred after the court allowed Harris to testify at trial with such an illegal and improper grant of immunity that was not disclosed to the jury, which had witnessed Harris take the usual oath to tell the truth: "You solemnly swear or solemnly and sincerely affirm, as the case may be, that the evidence you shall give concerning this case shall be the truth, the whole truth and nothing but the truth; so help you God or upon penalty of perjury." See General Statutes § 1-25.

injustice on the defendant. The state argues that the defendant was not harmed by the grant of immunity to Harris because Harris did not state during his testimony that the defendant had shot him or Cedeno. The state refers to the court's instructions to the jury that Harris' out-of-court statements, including those in which he said that the defendant shot him, could not be used substantively, but only on the issue of the credibility of his in-court testimony. The state also argues that there was other evidence to prove the defendant's guilt, and that the jury reasonably could have found, on the basis of evidence developed through a witness other than Harris, and through the state's impeachment of Harris, that Harris was lying when he testified that he did not know who shot him, and that everyone, including the jury, should have seen that. From those facts the state concludes that "the prosecutor's error did not inflict grievous harm causing manifest injustice upon the defendant . . . ." Although the state refers to Harris' immunized testimony before the jury that was permitted by the court, the state does not discuss the court's role and duty with respect to the truth seeking process that is inherent in any trial, and the constitutional, statutory, public policy and other institutional implications and ramifications of a representative of the state offering the testimony of a witness, and the court's permitting that testimony to be presented to the jury, which both was anticipated and expected to contain lies about a crucial issue in the trial, i.e., whether the defendant shot Harris and Cedeno. The state also does not discuss the contradiction between the grant of immunity that was not disclosed to the jury and the usual oath to tell the truth, which Harris took before the jury: "You solemnly swear or solemnly and sincerely affirm, as the case may be, that the evidence you shall give concerning this case shall be the truth, the whole truth and nothing but the truth; so help you God or upon penalty of perjury." General Statutes § 1-25.

The following additional facts are relevant to this claim. On October 9, 2014, the prosecutor and Harris entered into an immunity agreement by which Harris was granted transactional immunity for his testimony regarding the events on March 28, 2013, the date of the shooting, and use immunity, both direct and derivative, for all other proceedings. That same day, October 9, 2014, prior to Harris' testimony in the defendant's trial, the following exchange occurred between the court, Harris' counsel, and the prosecutor:

"[The Court]: All right. And this additional immunity agreement signed by the state's attorney . . . do you have any issues on that?

"[Harris' Counsel]: No. That was drafted—I was involved in the drafting of that document, Your Honor.

"[The Court]: All right.

"[Harris' Counsel]: And so it includes transactional immunity to the events related to the—on the day of the shooting, directly and indirectly. It involves use immunity, so none of his words could be used directly against him in this or any other proceeding in state or federal court or anywhere else. It also includes derivative use so that his words can't be used to investigate and then come up with other evidence that can be used against him in any proceeding. . . .

"[Harris' Counsel]: And my understanding is that there is a tape recording or the prosecuting authority believes that it has a tape recording of my client saying something related to his testimony. So, I have concerns about exposure to perjury, and my understanding is that there has been an agreement that there wouldn't be any perjury prosecution related to my client's testimony today.

"[The Prosecutor]: That's correct, Your Honor.

"[The Court]: Okay. Well, [counsel], I must compliment you. I have been in the criminal justice system for forty-two and one-half years. I've never heard of anybody getting that agreement. But it's an agreement the state made. That's their decision."

During Harris' direct testimony, when the state offered Harris' tape-recorded phone conversation with his mother as a prior inconsistent statement, the following exchange occurred:

"[The Prosecutor]: Well, this is the way you could refresh his memory, Your Honor.

"[The Court]: Well, you're the one who agreed not to prosecute him for perjury.

"[The Prosecutor]: I agree.

"[The Court]: Which is probably against the public interest, but I didn't step in.

"[The Prosecutor]: There's a lot of issues with public interest in this case.

"[The Court]: I must say this amount of perjury actually offends me."

"[The plain error] doctrine, codified at Practice Book § 60-5,[4] 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." (Footnote added; internal quotation marks omitted.) *State* v. *Sanchez*, 308 Conn. 64, 76–77, 60 A.3d 271 (2013).

[4] Practice Book § 60-5 provides in relevant part that "[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court. . . ."

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record. Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [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. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . [Previously], we described the two-pronged nature 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. . . .

"It is axiomatic that, [t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . Put another way, plain error review is reserved for only the most egregious errors. When an error of such a magnitude exists, it necessitates reversal."[5] (Citations

[5] The court in *State* v. *McClain*, 324 Conn. 802, 155 A.3d 209 (2017), recently discussed the plain error doctrine, citing numerous examples of

omitted; emphasis in original; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812–14, 155 A.3d 209 (2017).

In the present case, the defendant argues that the violation of § 54-47a (b) and the public policy against immunizing perjured testimony constitutes plain error that is structural in nature. The United States Supreme Court has recently articulated that "[t]he purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of structural error is that it affect[s] the framework within which the trial proceeds, rather than being simply an error in the trial process itself. . . . For the same reason, a structural error def[ies] analysis by harmless error standards." (Citation omitted; internal quotation marks omitted.) *Weaver* v. *Massachusetts*, U.S. , 137 S. Ct. 1899, 1907–1908, 198 L. Ed. 2d 420 (2017).[6] As such, a trial is affected by

its application by our Supreme Court and this court. See *State* v. *Ruocco*, 322 Conn. 796, 803, 144 A.3d 354 (2016) "(failure to give statutorily mandated instruction is plain error); see also, e.g., *Mueller* v. *Tepler*, 312 Conn. 631, 645–46, 95 A.3d 1011 (2014) (plain error for Appellate Court to affirm judgment of trial court granting motion to strike on alternative ground rather than remanding to afford party opportunity to amend pleading); *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 522–25, 911 A.2d 712 (2006) (failure of trial judge to remove himself from presiding over defendant's habeas petition plain error when judge had represented defendant at his guilty plea); *Belcher* v. *State*, 99 Conn. App. 353, 354–58, 913 A.2d 1117 (2007) (judge's failure to disqualify himself based on his appearance as counsel on brief filed on behalf of defendant on direct appeal was plain error); *State* v. *Cotton*, 69 Conn. App. 505, 506, 794 A.2d 1116 (2002) (complete failure to instruct jury as to meaning of term 'drug dependency' is plain error); *State* v. *Hair*, 68 Conn. App. 695, 706, 792 A.2d 179 (plain error for court to instruct jury on offense with which defendant was not charged and then accept jury's guilty verdict for offense on which jury had not been instructed), cert. denied, 260 Conn. 925, 797 A.2d 522 (2002); *State* v. *Thornton*, 55 Conn. App. 28, 33–34, 739 A.2d 271 (1999) (plain error to require defendant to pay money into fund for future treatment or counseling of victim, as special condition of probation)." *State* v. *McClain*, supra, 814.

[6] In *Weaver*, the court set forth what it referred to as "at least three broad rationales" for applying structural error analysis:

structural error when "the error always results in fundamental unfairness." (Internal quotation marks omitted.) *State* v. *Cushard*, 328 Conn. 558, 570, 181 A.3d 74 (2018).

Although structural error most commonly occurs in the violation of a constitutional right; see *Weaver* v. *Massachusetts*, supra, 137 S. Ct. 1908 ("violation of the right to a public trial is a structural error"); see also *State* v. *Lopez*, 271 Conn. 724, 733–34, 859 A.2d 898 (2004) (violation of constitutional right to be present during in-chambers inquiry regarding defense counsel's potential conflict of interest was structural error); our Supreme Court has also found structural error in the form of a statutory violation. See *State* v. *Murray*, 254 Conn. 472, 496–98, 757 A.2d 578 (2000) (substitution during jury deliberations of alternate juror who previously had been dismissed violated General Statutes

"First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. This is true of the defendant's right to conduct his own defense, which, when exercised, usually increases the likelihood of a trial outcome unfavorable to the defendant. . . . That right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. . . . Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error. . . .

"Second, an error has been deemed structural if the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his or her own attorney, the precise effect of the violation cannot be ascertained. . . . Because the government will, as a result, find it almost impossible to show that the error was harmless beyond a reasonable doubt . . . the efficiency costs of letting the government try to make the showing are unjustified.

"Third, an error has been deemed structural if the error always results in fundamental unfairness. For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one. See *Gideon* v. *Wainwright*, 372 U.S. 335, [343–45], 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (right to an attorney); *Sullivan* v. *Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (right to a reasonable-doubt instruction). It therefore would be futile for the government to try to show harmlessness." (Citations omitted; internal quotation marks omitted.) *Weaver* v. *Massachusetts*, supra, 137 S. Ct. 1908.

§ 54-82h [c]). In *Murray*, our Supreme Court overruled in part its previous decision in *State* v. *Williams*, 231 Conn. 235, 645 A.2d 999 (1994), which had determined that violation of § 54-82 (c) was subject to harmless error analysis and concluded "that the inclusion of a nonjuror among the ultimate arbiters of innocence or guilt [in violation of § 54-82h (c)] necessarily amount[ed] to *a* [*defect*] *in the structure of the trial mechanism that defie*[*d*] *harmless error review*." (Emphasis added; internal quotation marks omitted.) *State* v. *Murray*, supra, 498. Accordingly, the court endorsed the position that certain statutory violations that pervade the entirety of the trial may be subject to structural error analysis. "These so-called structural errors tend to by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." (Internal quotation marks omitted.) *State* v. *Cushard*, supra, 328 Conn. 570.

Because structural error may occur in the form of a statutory violation, structural error analysis is warranted in the present case. "[T]o determine if the error in the present case was structural, we must perform an initial review of the record to determine whether the [violation] had any impact on the subsequent trial that *irretrievably eroded its fundamental fairness*." (Emphasis added.) Id., 578. Under both § 54-47a (b)[7] and our Supreme Court case law, immunity for perjured or false testimony in a criminal trial is improper. See

[7] General Statutes § 54-47a (b) provides in relevant part: "No such witness may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence, and no testimony or evidence so compelled, and no evidence discovered as a result of or otherwise derived from testimony or evidence so compelled, may be used as evidence against him in any proceeding, *except that no witness shall be immune from prosecution for perjury or contempt committed while giving such testimony or producing such evidence* . . . ." (Emphasis added.)

State v. *Giraud*, 258 Conn. 631, 634–35, 783 A.2d 1019 (2001) ("[i]mmunity . . . may not be a license to lie while giving immunized testimony" [internal quotation marks omitted]). As previously set forth, the state concedes that its agreement not to prosecute Harris for his perjured testimony at the defendant's trial was an improper and defective grant of immunity. Indeed, the record reflects that both the very experienced trial court judge and the prosecutor recognized that the breadth of the immunity agreement was improper, and probably unique, in Connecticut criminal proceedings. As such, the issue is whether this improper grant of immunity was so fundamentally unfair that it affected the entire framework of the defendant's trial.

It is axiomatic that "a primary function of a criminal trial is to search for the truth. . . . The trial court has a duty to preside at a trial and to take appropriate actions, when necessary, that promote truth at the trial." (Citation omitted.) *State* v. *Kirker*, 47 Conn. App. 612, 617, 707 A.2d 303, cert. denied, 244 Conn. 914, 713 A.2d 831 (1998). "Although . . . an important function of a trial is a search for facts and truth . . . a trial must also be fair. *State* v. *Corchado*, 200 Conn. 453, 459, 512 A.2d 183 (1986) (discretion to be exercised must be informed and guided by considerations of fundamental fairness that are ingrained in the concept of due process of law)." (Internal quotation marks omitted.) *State* v. *Allen*, 205 Conn. 370, 379, 533 A.2d 559 (1987). Moreover, a jury is "entitled to assume . . . that [a witness'] statements carried the sanction of the oath which [the witness] had taken . . . ." *Ruocco* v. *Logiocco*, 104 Conn. 585, 591, 134 A. 73 (1926). Additionally, the trial court's unwaivable duty to prohibit knowingly perjured testimony by a witness in a trial, and the jury's entitlement to assume that each witness is providing testimony under the penalty of perjury, are embodied in the

language of § 54-47a (b), which explicitly forbids the immunization of perjured testimony.

In the present case, the court knowingly abdicated its duty to reject any agreement that facilitated Harris' perjured testimony, and it undermined the truth seeking purpose of the defendant's trial by permitting Harris to testify without fear of prosecution for perjury.[8] The defendant's attorney did not make any objection on the record to the immunity agreement between the state and Harris. The court, however, appears immediately to have accepted the agreement without asking the defendant to comment on its validity. The court, as it expressed on the record, was fully aware of the impropriety of, and other problematic issues raised by the agreement, and it was also aware of and commented on Harris' obviously perjurious testimony after at least some of it had occurred. In light of the clear statutory invalidity of the agreement, and the other obvious issues that were raised by the agreement, the court had a clear and unwaivable duty to act to prohibit Harris' testimony, even in the absence of any objection by the defendant to it, and its failure to do so was plain error.

Additionally, it is reasonable to conclude, on the basis of the record of the trial, that the state provided Harris

[8] The fact that Harris did not testify under the penalty of perjury, despite the oath that he took in front of the jury, may also implicate the defendant's constitutional right to confront witnesses against him, as provided under the sixth amendment. See *Maryland* v. *Craig*, 497 U.S. 836, 845–46, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. . . . [T]he right guaranteed by the Confrontation Clause includes not only a personal examination . . . but also . . . insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury . . . ." [Citations omitted; internal quotation marks omitted.]).

with immunity from perjury in order to use his testimony as a basis to put Harris' prior inconsistent statements in front of the jury, initially to impeach his credibility. The state, however, subsequently and in violation of its representation to the court that it offered the evidence solely for the purpose of impeachment and not for the truth of the statements therein, improperly utilized those statements for their truth in its closing argument. The court's abdication of its duty to take appropriate actions, when necessary, that promoted truth finding at the trial by allowing the immunization of Harris' testimony so that he could not be charged with and convicted of perjury undermined the fundamental fairness of the defendant's trial.

If the court, as it should have done pursuant to § 54-47a (b) and Connecticut public policy, had rejected the agreement for Harris' testimony, there presumably would have been no testimony by Harris before the jury about the incident because Harris would have exercised his fifth amendment privilege against self-incrimination, and there would have been no structural error despite the existence of the agreement. Although plain error in this case exists solely because of the court's acceptance and implementation of the agreement, which allowed the improper, overbroad, and seemingly unprecedented immunization of Harris' testimony that the state anticipated would include perjury; see footnote 2 of this concurring opinion; the collateral consequences of that testimony enhance the egregiousness of the improper grant of immunity. Had the state not provided Harris with immunity for his intentional lies that it anticipated were to occur during his testimony, Harris would not have testified and, thus, the state would not have improperly been able to utilize in its closing argument Harris' prior inconsistent statements against the defendant in a way that substantively corroborated the statements made by the defendant in his confession.

The court's acceptance and implementation of the agreement, which allowed the improper, overbroad immunization of Harris' testimony that was anticipated to include lies that amounted to perjury thus constituted plain error that was structural in nature. As previously set forth, 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. See *State* v. *McClain*, supra, 324 Conn. 812–14. Giving a witness a free pass to lie in his sworn testimony satisfies that plain error requirement. The defendant has demonstrated that the actions of the court and the prosecutor resulted in manifest injustice to him; perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings, as it goes to the very heart of the fair administration of justice. *United States* v. *Mandujano*, 425 U.S. 564, 576–77, 96 S. Ct. 1768, 48 L. Ed. 2d 212 (1976). Accordingly, I concur with the majority's reversal of the defendant's conviction and remand of the case for a new trial, but, because of the existence of such structural error, conclude that we do not need to exercise our supervisory authority to do so.[9]

[9] Because I conclude that the trial court committed structural error by permitting the state to grant Harris immunity from any perjury prosecution related to his testimony, I need not reach the issue of whether this court should also exercise its supervisory authority to reverse the defendant's conviction and to remand the case for a new trial, or instead to set rules only for the future.