CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ACKEEM RILEY
(AC 40073)

Keller, Elgo and Bright, Js.

Syllabus

The defendant, who had been convicted of murder and several other crimes when he was seventeen years old, appealed to this court from the judgment of the trial court after it resentenced him to seventy years of imprisonment. The trial court initially had sentenced the defendant to 100 years of imprisonment in connection with a shooting incident. This court affirmed the judgment of the trial court, and the defendant appealed to our Supreme Court, which reversed this court's judgment as to the sentence. The Supreme Court directed that this court remand the case to the trial court for a new sentencing proceeding that conformed to the dictates of *Miller* v. *Alabama* (567 U.S. 460), which requires that the trial court give mitigating weight to the defendant's youth and its hallmark features when considering whether to impose the functional equivalent of life imprisonment without parole. After this court remanded the case to the trial court, but before the defendant's resentencing hearing, the legislature enacted amendments (P.A. 15-84) to the statutes applicable to the sentencing of children convicted of certain felonies (§ 54-91g) and parole eligibility (§ 54-125a) to ensure that juveniles sentenced to more than ten years of imprisonment are eligible for parole, and to require that sentencing judges consider a juvenile's age and youth related mitigating factors before imposing sentence. At the defendant's resentencing hearing, the defendant was sentenced by the same judge who had presided over his trial and imposed the original sentence. On appeal to this court, the defendant claimed that the resentencing court improperly relied on the parole eligibility provisions of P.A. 15-84, and failed to disqualify itself in violation of statute (§ 51-183c), the rule of practice (§ 1-22 [a]) that requires disqualification when

the judicial authority previously tried the same matter and the judgment was reversed on appeal, the Code of Judicial Conduct (rule 2.11 [a] [1]), and the due process clauses of the fifth and fourteenth amendments to the United States constitution. *Held*:

1. The resentencing court did not abuse its discretion in denying the defendant's motion for recusal:

   a. Recusal was not required under § 51-183c, our Supreme Court previously having concluded that the legislature did not intend for § 51-183c to apply to a sentencing proceeding, and because the rules promulgated by the judges of the Superior Court cannot abridge, enlarge or modify any substantive right, Practice Book § 1-22 does not apply to a sentencing procedure, as that rule was intended to give effect to the mandate in § 51-183c, rather than provide for an independent ground for recusal.

   b. The defendant failed to satisfy his burden to show that disqualification of the judicial authority was required under rule 2.11 (a) (1) of the Code of Judicial Conduct, which was based on his claim that the resentencing court was biased in favor of justifying its initial 100 year sentence: the defendant's claim that the 100 year sentence had an anchoring effect that prevented the court from approaching the resentencing hearing with a fully open mind that would allow it to fully consider the factors required under *Miller* was based on speculation and conjecture, as the defendant did not explain why only the original sentencing judge would be susceptible to any anchoring effect, any judge who imposed the new sentence would know of the prior sentence, and the fact that a trial judge previously sentenced a defendant in a particular case where resentencing was ordered did not establish an appearance of bias or partiality; moreover, it was not apparent that the court's statements during the resentencing hearing indicated an interest in justifying the appropriateness of the original sentence, as the court repeatedly stated that it would consider the appropriate factors and impose sentence accordingly, it never expressed that it would not or could not consider the defendant's age as a mitigating factor, nor did it ever express an unwillingness to consider new information at resentencing, as required by *Miller*, and the defendant failed to demonstrate how the court's willingness to consider new information constituted actual bias or would lead a reasonable person to question the judge's impartiality on the basis of all the circumstances.

2. The resentencing court properly sentenced the defendant in accordance with the Supreme Court's remand order, the applicable statutory authorities and the constitutional principles contemplated in those authorities: the resentencing court was not required under the Supreme Court's remand order to find that the defendant was incorrigible, irreparably corrupt or irretrievably depraved before resentencing him, as the Supreme Court's discussion about a presumption against a life sentence without parole that must be overcome by evidence of unusual circumstances was rendered inapplicable by the enactment of P.A. 15-84, which

provided the defendant with the possibility of parole, and although the defendant claimed that pursuant to *Miller*, the Supreme Court's decision in his appeal and P.A. 15-84, there was a presumption against the imposition of a life sentence that could be imposed only after a finding that the juvenile was permanently incorrigible, irreparably corrupt or irretrievable depraved, the resentencing court was required to consider only how the scientific and psychological evidence described in § 54-91g (a) (1) counseled against such a sentence; moreover, there was no indication in the record that the resentencing court considered the seventy year sentence to be inappropriate but nevertheless imposed it because the defendant would be eligible for parole, as the court referred to the defendant's eligibility for parole, as was required pursuant to § 54-91g (c), it fully considered and made clear its duty and intention to apply the *Miller* factors, and to comply with § 54-91g and the Supreme Court's decision in the defendant's appeal, it considered the defendant's presentence investigation report, aspects of his upbringing and testimony from the defendant and his family members, and it discussed the defendant's age, the hallmark features of adolescence, the relevant science that distinguishes a child's development from that of an adult's and other mitigating factors, and balanced them with the circumstances of the crime at issue, and noted that the defendant had been involved in other incidents that resulted in the deaths and wounding of other persons.

Argued December 12, 2018—officially released May 14, 2019

Procedural History

Substitute information charging the defendant with two counts each of the crimes of attempt to commit murder and assault in the first degree, and with one count each of the crimes of murder and conspiracy to commit murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *O'Keefe*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court, which affirmed the trial court's judgment; thereafter, the defendant, on the granting of certification, appealed to the Supreme Court, which reversed this court's judgment and remanded the case to this court with direction to reverse the trial court's judgment as to the defendant's sentence and to remand the case to the trial court for a new sentencing proceeding; subsequently, the court, *O'Keefe*, *J.*, denied the defendant's motion for recusal and, following a hearing, rendered judgment imposing

sentence, from which the defendant appealed to this court. *Affirmed.*

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

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy* state's attorney, and *John F. Fahey*, supervisory assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Ackeem Riley, appeals from the judgment of the trial court resentencing him following the decision of our Supreme Court, which reversed the judgment of this court and remanded the case to this court with direction to reverse the judgment of the trial court with respect to the defendant's original sentence and to remand the case to the trial court for a new sentencing proceeding. See *State* v. *Riley*, 315 Conn. 637, 663, 110 A.3d 1205 (2015), cert. denied, U.S. , 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016). The defendant claims that the trial court (1) failed to disqualify itself from presiding over the resentencing proceeding, and (2) violated the rescript of *Riley*, ignored important constitutional principles, and failed to comply with applicable mandatory statutory requirements when it resentenced him to seventy years of incarceration. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as set forth by our Supreme Court, are relevant to this appeal. "In November, 2006, when the defendant was seventeen years old, he participated in a drive-by shooting into a crowd that left an innocent sixteen year old dead and two other innocent bystanders, ages thirteen and twenty-one, seriously injured. The defendant and his accomplice thought that someone responsible for a gang related shooting the

previous week was at the scene. The defendant's identity as one of the perpetrators was corroborated by his involvement in an incident two months after the crimes at issue in which a firearm was discharged that matched the weapon used in the 2006 shootings. A jury convicted the defendant of one count of murder in violation of General Statutes §§ 53a-54a (a) and 53a-8, two counts of attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a (a), two counts of assault in the first degree in violation of General Statutes §§ 53a-59 (a) (5) and 53a-8, and one count of conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a (a). The murder conviction exposed the defendant to a potential sentence of twenty-five to sixty years imprisonment, with no possibility of parole. See General Statutes §§ 53a-35a (2), 53a-35b and 54-125a (b) (1) (E). The other convictions exposed him to sentences ranging from one year imprisonment to twenty years imprisonment." *State* v. *Riley*, supra, 315 Conn. 641–42. The trial court imposed a total effective sentence of 100 years of incarceration. Id., 642.

In his initial appeal to this court; *State* v. *Riley*, 140 Conn. App. 1, 58 A.3d 304 (2013), rev'd, 315 Conn. 637, 110 A.3d 1205 (2015), cert. denied, U.S. , 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016); the defendant argued that his sentence and the procedure under which it was imposed violated his rights under the eighth and fourteenth amendments to the federal constitution. Id., 4, 10 and n.7. In particular, the defendant argued that the United States Supreme Court's decision in *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), which held that the eighth amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders, rendered the manner in which his sentence was

imposed unconstitutional.[1] *State* v. *Riley*, supra, 9. This court rejected the defendant's contentions and affirmed the judgment of the trial court. Id., 21.

On appeal to our Supreme Court, the defendant argued that this court's decision was incorrect as a matter of law and fact. *State* v. *Riley*, supra, 315 Conn. 643–44. For reasons set forth in greater detail in part II of this opinion, our Supreme Court agreed with the defendant and reversed this court's judgment and remanded the case to this court with direction to reverse the judgment of the trial court only with respect to the defendant's sentence, and to remand the case to the trial court for a new sentencing proceeding consistent with its opinion. Id., 663.

On remand to the trial court, the defendant filed a motion for recusal dated June 24, 2016. The basis for most of his arguments stemmed primarily from the fact that the resentencing judge, *O'Keefe*, *J.*, was the same judge who had presided over his trial and had imposed

[1] In *Miller*, the Supreme Court made clear that "[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." *Miller* v. *Alabama*, supra, 567 U.S. 477–78.

Our Supreme Court has characterized *Miller* as standing for two propositions: "(1) that a lesser sentence than life without parole must be available for a juvenile offender; and (2) that the sentencer must consider age related evidence as mitigation when deciding whether to irrevocably sentence juvenile offenders to a [term of life imprisonment, or its equivalent, without parole]." *State* v. *Riley*, supra, 315 Conn. 653. These age related considerations, as described in this footnote, have been colloquially referred to as the "*Miller* factors."

the original sentence. The defendant argued, for various reasons, that Practice Book § 1-22, General Statutes § 51-183c, rule 2.11 of the Code of Judicial Conduct, and the due process clause of the fourteenth amendment required recusal. On August 11, 2016, the court held a hearing on the motion for recusal and ultimately denied the motion after hearing the parties' arguments.

On November 2, 2016, the defendant appeared before the court for resentencing. At the hearing, the court addressed, among other things, the considerations set forth in our Supreme Court's decision in *Riley* and the relevant statutory provisions applicable to the defendant's sentencing. After a lengthy colloquy, the court resentenced the defendant to a total effective term of seventy years of incarceration, noting that he was eligible for parole. This appeal followed. Additional facts will be set forth as necessary.

I

On appeal, the defendant first claims that the trial court erred by not granting his motion for recusal. In his view, the court was required to recuse itself pursuant to § 51-183c, Practice Book § 1-22, rule 2.11 of the Code of Judicial Conduct, and the due process clauses of the fifth and fourteenth amendments to the United States constitution. The state argues, inter alia, that neither our rules of practice nor our statutes prohibited the court from presiding over the defendant's resentencing proceeding. For the reasons discussed herein, we agree with the state.

A

We begin by first addressing whether § 51-183c and Practice Book § 1-22 required the court to recuse itself on remand following the reversal of the defendant's original sentence.

As a preliminary matter, we set forth the applicable standard of review. Although our review of whether a court properly denied a motion for recusal is based on the abuse of discretion standard; see *State* v. *Milner*, 325 Conn. 1, 12, 155 A.3d 730 (2017); the claims in the present case require us to determine whether § 51-183c and Practice Book § 1-22 required recusal in this situation, which presents a question of statutory interpretation. Therefore, our review is plenary. See *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 688, 41 A.3d 1013 (2012).

To begin, the defendant's argument that § 51-183c[2] required the court to recuse itself in this case is unpersuasive because it is easily foreclosed by our Supreme Court's decision in *State* v. *Miranda*, 260 Conn. 93, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002). In *Miranda*, our Supreme Court addressed a similar situation in which a defendant claimed that § 51-183c required that his case be "assigned to another trial judge for resentencing." Id., 131. After our Supreme Court analyzed the statute in relation to other pertinent authorities, it concluded that "the legislature did not intend for § 51-183c to apply to a sentencing procedure." Id., 132; see also *Daley* v. *J.B. Hunt Transport, Inc.*, 187 Conn. App. 587, 601 n.17, 203 A.3d 635 (2019) (explaining that sentencing hearing is proceeding "to which § 51-183c does not apply"). Although the defendant attempts to distinguish *Miranda* in various ways, none is persuasive.[3] To say more on the matter would be supererogatory.

[2] General Statutes § 51-183c provides: "No judge of any court who tried a case without a jury in which a new trial is granted, or in which the judgment is reversed by the Supreme Court, may again try the case. No judge of any court who presided over any jury trial, either in a civil or criminal case, in which a new trial is granted, may again preside at the trial of the case."

[3] We note that the defendant acknowledges in his appellate brief that the "Connecticut Supreme Court has previously held that [§ 51-183c] is not applicable to sentencing proceedings that are the result of a case being remanded for a new sentencing consistent with a reversal by a reviewing tribunal." Despite this, he argues tenuously that *Miranda* is distinguishable because that case was remanded to the trial court for resentencing pursuant

With that in mind, though, the defendant argues that Practice Book § 1-22 provides an independent basis for recusal separate from § 51-183c. In particular, he focuses on the specific language of the rule that provides that "[a] judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein . . . because the judicial authority previously tried the same matter and . . . *the judgment was reversed on appeal*." (Emphasis added.) Practice Book § 1-22 (a). He argues that because a sentence imposed in a criminal case constitutes the judgment of conviction, and because the defendant's sentence was in fact reversed, the trial court that originally tried and sentenced him was required, on remand, to recuse itself for the resentencing hearing.

Despite the defendant's contention, our decision in *Barlow* v. *Commissioner of Correction*, 166 Conn. App. 408, 422, 142 A.3d 290 (2016), appeal dismissed, 328 Conn. 610, 182 A.3d 78 (2018), undermines the defendant's claim. In *Barlow*, we addressed briefly the interplay between the two provisions. The petitioner in that case claimed that the habeas court improperly denied his motion for recusal, in which he relied on § 51-183c, Practice Book § 1-22 (a), and rule 2.11 (a) of the Code of Judicial Conduct. Id., 421. With respect to that claim, we stated that "[t]he mandate of § 51-183c, a subject of prior judicial interpretation, is plain and unambiguous. It provides in relevant part: 'No judge of any court who tried a case without a jury . . . in which the judgment is reversed by the Supreme Court, may again try

to the aggregate package theory, whereas the present case was remanded pursuant to *Miller*. He also appears to argue that because the defendant in *Miranda* "essentially sought an advisory opinion" from our Supreme Court, the rationale in *Miranda* should not be followed in the present case. These arguments lack merit.

the case. . . .' General Statutes § 51-183c." *Barlow* v. *Commissioner of Correction*, supra, 422. Significant to the present case, we explained that "[o]ur rules of practice *give effect* to this statutory right [in § 51-183c] by providing in relevant part: 'A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein . . . because the judicial authority previously tried the same matter and . . . the judgment was reversed on appeal. . . .' Practice Book § 1-22 (a)." (Emphasis added.) *Barlow* v. *Commissioner of Correction*, supra, 422.

Although the facts of *Barlow* differ from those in the present case, our discussion in that case makes clear that the specific language in Practice Book § 1-22 on which the defendant now relies is intended to "give effect" to the mandate in § 51-183c, rather than provide for an independent ground for recusal. See id. To adopt the defendant's position would yield a peculiar result where the judge would be required under the rules of practice to recuse himself from resentencing a defendant after the initial sentence he imposed was reversed, but he would not be required to do so under the statute that the rule was intended to effectuate. As we noted previously, our Supreme Court has concluded that "the legislature did not intend for § 51-183c to apply to a sentencing procedure." *State* v. *Miranda*, supra, 260 Conn. 132. Furthermore, because the rules promulgated by the judges of the Superior Court cannot "abridge, enlarge or modify any substantive right"; General Statutes § 51-14 (a); we conclude that the language in Practice Book § 1-22 (a), which requires disqualification when the "judicial authority previously tried the same matter and . . . the judgment was reversed on appeal," also does not apply to a sentencing procedure.

Accordingly, we conclude that recusal was not required under § 51-183c or Practice Book § 1-22. Thus, the defendant has not demonstrated an abuse of discretion on these grounds.

B

The defendant similarly argues that pursuant to rule 2.11 of the Code of Judicial Conduct, as referenced in Practice Book § 1-22, disqualification was required because the trial court's impartiality reasonably could be questioned. The defendant makes clear that his "claim is not that [the] sentencing court was specifically biased *against* the defendant. Rather, the defendant's claim is that the sentencing court was biased in favor of justifying its initial imposition of a harsh sentence against the defendant." (Emphasis in original.) In support of this contention, he argues, inter alia, that the court's original imposition of a 100 year sentence "had an 'anchoring effect' that prevented the sentencing court from approaching the resentencing hearing with a fully open mind that would allow the court to fully consider the factors required by the rescript from our Supreme Court," and that the court "had an apparent interest in justifying the appropriateness of the original sentence that the court imposed."

Pursuant to rule 2.11 (a) of the Code of Judicial Conduct, "[a] judge shall disqualify himself . . . in any proceeding in which the judge's impartiality might reasonably be questioned . . . ." In applying this rule, our Supreme Court has indicated that "[t]he reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances. . . . Moreover, it is well established that [e]ven in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority. . . . Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially

. . . the burden rests with the party urging disqualification to show that it is warranted. . . . Our review of the trial court's denial of a motion for disqualification is governed by an abuse of discretion standard." (Citation omitted; internal quotation marks omitted.) *State* v. *Milner*, supra, 325 Conn. 12.

We conclude that the defendant has not satisfied his burden. The defendant's contention that the so-called "anchoring effect" prevented the sentencing court from approaching resentencing with a fully open mind in order to fully consider the *Miller* factors is nothing more than the product of speculation and conjecture.[4] See *State* v. *Montini*, 52 Conn. App. 682, 695, 730 A.2d 76 (explaining that "[v]ague and unverified assertions of opinion, speculation and conjecture cannot support a motion to recuse" [internal quotation marks omitted]), cert. denied, 249 Conn. 909, 733 A.2d 227 (1999). Although a few federal cases, as cited in the defendant's

[4] In support of his argument, the defendant relies on *United States* v. *Navarro*, 817 F.3d 494, 501–502 (7th Cir. 2016), which cites to *United States* v. *Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J., concurring) (discussing how "anchoring effects" influence judgments and noting that court "cannot be confident that judges who begin" at a higher guidelines range "would end up reaching the same 'appropriate' sentence they would have reached" if they started from lower guidelines range), and multiple articles about the so-called "anchoring effect." One of the cited articles explains that "[a]nchoring is a cognitive bias that describes the human tendency to adjust judgments or assessments higher or lower based on previously disclosed external information—the 'anchor.' Studies demonstrate 'that decisionmakers tend to focus their attention on the anchor value and to adjust insufficiently to account for new information.' Cognitive psychology teaches that the anchoring effect potentially impacts a huge range of judgments people make. . . . [R]epeated studies show that the 'anchor' produces an effect on judgment or assessment even when the anchor is incomplete, inaccurate, irrelevant, implausible, or random. When it comes to numbers, '[o]verwhelming psychological research demonstrates that people estimate or evaluate numbers by 'anchoring' on a preliminary number and then adjusting, usually inadequately, from the initial anchor." (Footnotes omitted.) M. Bennett, "Confronting Cognitive 'Anchoring Effect' and 'Blind Spot' Biases in Federal Sentencing: A Modest Solution for Reforming A Fundamental Flaw," 104 J. Crim. L. & Criminology 489, 495 (2014).

appellate brief, have given a cursory look at the social science on how human tendencies and biases may influence sentencing under the federal sentencing guidelines, this alone, without more, is insufficient to show that disqualification was warranted in the present case. Furthermore, the defendant does not explain why only the original sentencing judge would be susceptible to any anchoring effect. Any judge who imposed the new sentence would know of the same prior sentence, or "anchor."

The defendant also argues that a "reasonable person knowing the circumstances under which the case returned to the Superior Court for the resentencing might reasonably question the ability of the original sentencing judge to act impartially when he had already pronounced a 100 year sentence, [and] had already adjudged the defendant's culpability and lack of prospect for rehabilitation." This contention must also be rejected. As the state points out, the defendant's argument, if accepted, ultimately would prevent any original sentencing judge from conducting a resentencing hearing, regardless of whether resentencing occurs pursuant to *Miller*. The mere fact that a trial judge previously had sentenced a defendant in a particular case where resentencing is ordered does not in and of itself establish an appearance of bias or partiality. See *State* v. *Milner*, supra, 325 Conn. 12 ("law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially" [internal quotation marks omitted]).

Furthermore, the underpinnings for the defendant's argument that the "court had an apparent interest in justifying the appropriateness of the original sentence that the court imposed," which is based on, among other things, the various statements he made during the resentencing hearing, is not so apparent to us. In support of his argument, the defendant cites to *State*

v. *Solis-Diaz*, 187 Wn. 2d 535, 387 P.3d 703 (2017), in which the Supreme Court of Washington granted review of an intermediate appellate court decision that vacated the defendant's sentence for a second time but declined to disqualify the sentencing judge in that case from resentencing the defendant. Id., 536–37. The Supreme Court of Washington explained that the sixteen year old defendant was tried as an adult in connection with a drive-by shooting and was sentenced to "1,111 months, or 92.6 years, of imprisonment." Id., 537. After the original sentence was vacated by the intermediate court, the trial judge in the case resentenced the defendant to the same sentence of 92.6 years of incarceration. On appeal following the first resentencing, the intermediate court again vacated the sentence and remanded the case for resentencing, "holding that [the judge] erred in not considering an exceptional sentence below the standard range on the basis of [the defendant's] youth and to mitigate the consecutive sentences required under [Washington law]." Id., 539. The court "directed the trial court on resentencing to conduct a meaningful, individualized inquiry into whether either factor should mitigate the defendant's sentence in light of recent case law." Id. The intermediate court, however, declined to disqualify the judge from presiding over resentencing, noting that the defendant could move to disqualify the judge on remand. Id.

In addressing whether the trial judge should have been disqualified, the Supreme Court of Washington indicated that the record reflected that the judge exhibited "frustration and unhappiness at the [intermediate court's] requiring him to address anew whether [the defendant] should be considered for an exceptional downward sentence on the basis of his age or the multiple offense policy." Id., 541. The court further noted that the "judge's remarks at the first resentencing strongly suggest that, regardless of the information presented

in mitigation, he is committed to the original standard range sentence of 1,111 months. Concern about whether on remand [the judge] could exercise discretion and consider mitigating evidence with an open mind is heightened by the judge's statement that the length of the sentence he imposed has had a deterrent effect on incidents of gang-related gun violence in" the area where the crimes at issue had been committed. Id. The Supreme Court of Washington reversed the intermediate court's decision to the extent that it declined to disqualify the judge in the case. Id.

Although the defendant acknowledges that the facts of *Solis-Diaz* vary from the facts in the present case, he asserts that the logic underlying that decision applies here with similar force. We find this case to be readily distinguishable. On the basis of our review of the record, the trial court in this case never expressed that it would not or could not consider the defendant's age as a mitigating factor, nor did it ever express its unwillingness to consider the *Miller* factors or those required by statute during the resentencing. To the contrary, the court repeatedly stated that it would consider the appropriate factors and impose sentence accordingly.[5] The defendant has failed to sufficiently demonstrate how the court's willingness to consider new information at resentencing—i.e., the *Miller* factors—which were not required by law for consideration at the time of the

[5] For example, the court indicated that it was "going to resentence [the defendant] in accordance with the instructions of the state of Connecticut Supreme Court. I'm going to apply the *Miller* factors." During its colloquy, the court also indicated that it was "not here to argue the correctness of the wisdom of the cases that got us all here, [*Roper* v. *Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), *Graham* v. *Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), *Miller* v. *Alabama*, supra, 567 U.S. 460, *Montgomery* v. *Louisiana*, U.S. , 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016)], and the state of Connecticut versus [the defendant]. I mean, those courts have spoken." The judge made clear that he was "a servant of the law" and accepted "the rulings from the next level."

original sentence (nor requested by the defendant to be considered at the original sentencing), constituted actual bias or would lead a reasonable person to question the judge's impartiality on the basis of all the circumstances.[6]

Accordingly, we conclude that court did not abuse its discretion in denying the defendant's motion for recusal pursuant to rule 2.11 (a) (1) of the Code of Judicial Conduct.

II

The defendant next claims that the trial court violated the rescript of our Supreme Court's decision in *Riley*,

[6] The defendant also argues in his appellate brief that the due process clauses of the fifth and fourteenth amendments to the United States constitution are another basis for recusal, but does not provide a separate analysis of this distinct aspect of his claim. Instead, he states: "Because the Code of Judicial Conduct's language related to the possibility of partiality is substantially similar to the United States Supreme Court's articulation of the test for whether recusal is required by the due process clauses of the United States Constitution, the defendant analyzes these two bases for recusal simultaneously . . . ."

Although there may be similarities between the two standards, a review of Supreme Court precedent suggests that they differ. See *Rippo* v. *Baker*, U.S. , 137 S. Ct. 905, 907, 197 L. Ed. 2d 167 (2017) ("[u]nder our precedents, the Due Process Clause may sometimes demand recusal even when a judge ha[s] no actual bias" [internal quotation marks omitted]); *Williams* v. *Pennsylvania*, U.S. , 136 S. Ct. 1899, 1905, 195 L. Ed. 2d 132 (2016) ("[T]he Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." [Internal quotation marks omitted.]); *Withrow* v. *Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) (recusal required when "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable").

We similarly conclude that the circumstances of this case, as we view them, simply do not rise to a due process violation under the Supreme Court's precedents because, objectively considered, they do not pose "such a risk of actual bias or prejudgment" as to require disqualification. (Internal quotation marks omitted.) *Caperton* v. *A. T. Massey Coal Co.*, 556 U.S. 868, 884, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009).

ignored important constitutional principles, and failed to comply with applicable mandatory statutory requirements when it resentenced him to a new effective life sentence of seventy years of incarceration. In particular, he contends that the trial court was required to find specifically that he was "incorrigible, irreparably corrupt, or irretrievably depraved" in order to overcome a presumption against life sentences for juveniles before it imposed its seventy year sentence. Additionally, he argues that the court failed to craft an appropriate new sentence for him because it improperly relied on the parole eligibility provisions of No. 15-84 of the 2015 Public Acts (P.A. 15-84), codified in relevant part at § 54-125a. We disagree.

We briefly set forth additional facts and procedural history necessary for the disposition of this claim. At the conclusion of the defendant's trial in 2009, the trial court imposed a total effective sentence of 100 years imprisonment. *State* v. *Riley*, supra, 315 Conn. 642. It was undisputed that the sentence imposed was the functional equivalent to life without the possibility of parole. Id. After the trial court first sentenced the defendant in this case, the United States Supreme Court issued its decision in *Miller*. Id., 643. On appeal to this court; *State* v. *Riley*, supra, 140 Conn. App. 1; the defendant argued that his sentence and the procedure under which it was imposed violated his rights under the eighth and fourteenth amendments to the federal constitution. Id., 4, 10 and n.7. This court rejected these contentions and concluded that *Miller* required only that a defendant be afforded the opportunity to present mitigating evidence, including evidence relating to his age, and that the court be permitted to impose a lesser sentence than life without parole after considering any such evidence. Id., 10, 14–16. This court also concluded that the trial court, in fact, had considered many of the factors identified

as relevant in *Miller* before it imposed the defendant's sentence.[7] Id., 19–20.

On appeal to our Supreme Court, the defendant argued that our decision was incorrect as a matter of law and fact. *State* v. *Riley*, supra, 315 Conn. 643–44. In particular, he argued that the sentencing procedure and the sentence itself failed to conform to the dictates of *Miller* and *Graham* v. *Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). See *State* v. *Riley*, supra, 644.[8] In addressing his claim, our Supreme Court first summarized the United States Supreme Court's decisions in *Roper* v. *Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), *Graham*, and *Miller*, which fundamentally altered the legal landscape for the sentencing of juvenile offenders to comport with the ban on cruel and unusual punishment under the eighth amendment to the federal constitution. See *State* v. *Riley*, supra, 645–52.

Our Supreme Court then discussed the import that *Miller* had on discretionary schemes like the one in Connecticut, and it characterized *Miller* as standing for two propositions: "(1) that a lesser sentence than life without parole must be available for a juvenile offender; and (2) that the sentencer must consider age related

[7] Justice Borden dissented in the case. *State* v. *Riley*, supra, 140 Conn. App. 21 (*Borden*, *J.*, dissenting). He disagreed with each of the majority's determinations and concluded that the defendant was entitled to a new sentencing proceeding. Id., 23–40.

[8] We note that our Supreme Court declined to address the defendant's *Graham* claim. It noted that the "legislature has received a sentencing commission's recommendations for reforms to our juvenile sentencing scheme to respond to the dictates of *Graham* and *Miller*. Therefore, in deference to the legislature's authority over such matters and in light of the uncertainty of the defendant's sentence upon due consideration of the *Miller* factors, we conclude that it is premature to determine whether it would violate the eighth amendment to preclude any possibility of release when a juvenile offender receives a life sentence." *State* v. *Riley*, supra, 315 Conn. 641.

evidence as mitigation when deciding whether to irrevocably sentence juvenile offenders to a [term of life imprisonment, or its equivalent, without parole]." Id., 653; see *State* v. *Delgado*, 323 Conn. 801, 806, 151 A.3d 345 (2016). The court determined that "the dictates set forth in *Miller* may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that *Miller* deemed constitutionally significant before determining that such a severe punishment is appropriate." *State* v. *Riley*, supra, 315 Conn. 653.

The court in *Riley* went on to recognize that *Miller* held that a sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (Internal quotation marks omitted.) Id., 654, quoting *Miller* v. *Alabama*, supra, 567 U.S. 480. The court then concluded that this mandate logically would extend to a discretionary sentencing scheme. Id., 654. Additionally, our Supreme Court noted that the court in *Miller* "expressed its confidence that, once the sentencing authority considers the mitigating factors of the offender's youth and its attendant circumstances, 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.' . . . This language suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances. This presumption logically would extend to discretionary schemes that authorize such a sentence." (Citation omitted.) *State* v. *Riley*, supra, 315 Conn. 654–55.

Our Supreme Court further explained that "*Miller* does not stand solely for the proposition that the eighth amendment demands that the sentencer have discretion to impose a lesser punishment than life without parole

on a juvenile homicide offender. Rather, *Miller* logically indicates that, if a sentencing scheme permits the imposition of that punishment on a juvenile homicide offender, the trial court must consider the offender's 'chronological age and its hallmark features' as mitigating against such a severe sentence. *Miller* v. *Alabama*, supra, 567 U.S. 477. As the court in *Miller* explained, those features include: 'immaturity, impetuosity, and failure to appreciate risks and consequences'; the offender's 'family and home environment' and the offender's inability to extricate himself from that environment; 'the circumstances of the homicide offense, including the extent of [the offender's] participation in the conduct and the way familial and peer pressures may have affected him'; the offender's 'inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys'; and 'the possibility of rehabilitation . . . .'" (Emphasis omitted.) *State* v. *Riley*, supra, 315 Conn. 658.

Our Supreme Court then applied the dictates of *Miller* to the defendant's case. It concluded that "the record [did] not clearly reflect that the court considered and gave mitigating weight to the defendant's youth and its hallmark features when considering whether to impose the functional equivalent to life imprisonment without parole." Id., 660. Accordingly, the court concluded that "the defendant [was] entitled to a new sentencing proceeding that conforms to the dictates of *Miller*. Both the defendant and the state are free to present additional evidence at this new proceeding." Id., 661. The rescript by the court stated: "The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court only with respect to the defendant's sentence and to remand the case to that court for a new sentencing proceeding consistent with this opinion." Id., 663.

Several months after this court remanded the case to the trial court for resentencing, but before the defendant's resentencing hearing, the legislature enacted P.A. 15-84. Section 1 of P.A. 15-84, codified at § 54-125a, ensures that all juveniles who are sentenced to more than ten years imprisonment are eligible for parole. Section 2 of P.A. 15-84, codified as amended at General Statutes § 54-91g, requires a sentencing judge to consider a juvenile's age and any youth related mitigating factors before imposing a sentence following a juvenile's conviction of any class A or class B felony.

On November 2, 2016, the defendant appeared before the trial court for a resentencing hearing pursuant to the rescript of our Supreme Court. During the hearing, the prosecutor argued, inter alia, that the defendant's actions were not the type of youthful impulsivity contemplated in the decisions by the United States Supreme Court or our Supreme Court that deserve leniency. The prosecutor, in describing the defendant's crimes, stated: "That's not impulsivity. That's just pure violence on the part of [the defendant]." The prosecutor proceeded to ask the court to sentence the defendant to 120 years of incarceration, which was also the request made at the defendant's original sentencing.

Defense counsel then addressed the court and highlighted the troubled upbringing the defendant faced. In particular, she described, inter alia, how the defendant, at a young age, was raised in and exposed to a community of violence. Defense counsel stated: "It was not a choice that [the defendant] made at age twelve to be taken by his mother, who was hiding from immigration and exposed to violence against her, violence on the street." In explaining that the defendant was seventeen years of age at the time he committed the crime in this case, defense counsel stated that it was an "unfortunately narrow understanding of the juvenile brain science to characterize impulsivity, failure to appreciate

consequences . . . in the way that it's been represented by the state." Counsel went on to state: "I think we've made an adequate presentation of what the brain science really shows in our submissions to the court and, of course, Your Honor read [the] materials [provided to the court by the court support services division of the Judicial Branch]."[9] Counsel then had the defendant, his aunt, and his cousin address the court.

After the parties concluded their arguments, the court went on to indicate, inter alia, that it was "going to resentence [the defendant] in accordance with the instructions of the state of Connecticut Supreme Court. I'm going to apply the *Miller* factors." From there, the court went on to discuss its awareness of the science that was discussed by the defendant's counsel. In particular, it recognized that "there are changes over time that make a difference in who we are when we're seventeen and who we are when we might be fifty or sixty-nine. So, because of his age, I will assume that [the defendant] was immature and impetuous, and had a diminished capacity to appreciate the risks and consequences of his actions when he was seventeen years old." The court also went on to address, inter alia, the defendant's family and home environment, his presentence investigation report, and the circumstances surrounding the crime. At the conclusion of its remarks, the court sentenced the defendant to a total effective term of seventy years of incarceration and made clear that, pursuant to the recently enacted P.A. 15-84, the defendant was eligible for parole before he reaches the age of fifty. This appeal followed.

[9] The defendant filed a sentencing memorandum to the court dated October 31, 2016, which provided, among other things, a section addressing the "The Mitigating Characteristics of the Juvenile Brain." In addition, attached to his memorandum, the defendant provided the court with a copy of the court support services division's compilation of reference materials relating to adolescent psychological and brain development, which are intended to assist courts in sentencing children. See General Statutes § 54-91g (d).

The defendant argues that the court violated the rescript of *Riley*, ignored important constitutional principles, and failed to comply with applicable mandatory statutory requirements when it resentenced him. He contends that the trial court was required to explicitly find that he was "incorrigible, irreparably corrupt, or irretrievably depraved" in order to overcome a presumption against life sentences for juveniles before it imposed its seventy year sentence. In particular, he argues that *Riley* interpreted *Miller* to include a presumption against the imposition of a life sentence on a juvenile defendant and argues that this presumption would need to be "overcome by evidence of unusual circumstances" in order for a sentencing court to impose a life sentence. (Internal quotation marks omitted.) He further argues that even if the presumption in *Riley* no longer applies due to a change in the legal landscape in this state, he posits that the language and legislative history of P.A. 15-84 clearly establish that a presumption against the imposition of a functional life sentence has been adopted by our legislature.

In response, the state argues that the defendant's claim fails because nothing in our law creates a presumption against a lengthy sentence with the possibility of parole or requires the trial court to find that a defendant is incorrigible, irreparably corrupt, or irretrievably depraved before imposing a seventy year sentence with the possibility of parole after thirty years. We agree with the state.

Addressing the defendant's claim necessarily requires us to interpret both the remand order in *Riley* and § 54-91g to determine whether the sentencing court properly resentenced the defendant. As such, our review is plenary. See *State* v. *Brundage*, 320 Conn. 740, 747, 135 A.3d 697 (2016) ("[d]etermining the scope of a remand is a matter of law because it requires the trial court to undertake a legal interpretation of the higher court's

mandate in light of that court's analysis" [internal quotation marks omitted]); *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 355, 63 A.3d 940 (2013) ("[t]he interpretation of a statute presents a question of law over which our review is plenary").

The defendant's argument that the sentencing court's seventy year sentence was improper because *Riley* created a presumption against a life sentence and could be overcome only if the court found that the defendant was "incorrigible, irreparably corrupt, or irretrievably depraved" is flawed in several respects.

First, at the time of the defendant's appeal before our Supreme Court, it was undisputed that with this original sentence, the "defendant ha[d] no possibility of parole before his natural life expire[d]." *State* v. *Riley*, supra, 315 Conn. 640. In addressing the import of *Miller* for discretionary sentencing schemes, our Supreme Court in *Riley* interpreted certain language in *Miller* to suggest "that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence *without parole* on a juvenile offender that must be overcome by evidence of unusual circumstances. This presumption logically would extend to discretionary schemes that authorize such a sentence." (Emphasis added.) Id., 655. Importantly, though, our Supreme Court's discussion referred to mandatory or discretionary *life without parole* sentences, not simply "life sentences" as the defendant asserts in this appeal.

The distinction between a sentence of life without parole and a sentence of life with the possibility of parole is an important one. Between the time at which our Supreme Court reversed the defendant's initial sentence and the time at which his new sentencing hearing was held, the legal landscape in Connecticut, once again, had changed with respect to juvenile sentencing. See General Statutes §§ 54-91g and 54-125a; see also

Montgomery v. *Louisiana*, U.S. , 136 S. Ct. 718, 732, 736, 193 L. Ed. 2d 599 (2016) (giving *Miller* retroactive effect and permitting state to remedy *Miller* violation by permitting juvenile homicide offenders to be considered for parole). Although the defendant did not have a possibility of parole when our Supreme Court rendered its decision in *Riley*, the legislature's enactment of P.A. 15-84 provided him, and those similarly situated, with that possibility.[10] Because *Riley*'s discussion about overcoming presumptions referred only to mandatory or discretionary life without parole sentences, the fact that the defendant no longer faced a life sentence without the opportunity of parole at the time of his resentencing rendered this aspect of *Riley* inapplicable to the defendant at the time of resentencing.

Our Supreme Court's decision in *State* v. *Delgado*, supra, 323 Conn. 801, sheds light on the effect that the enactment of P.A. 15-84 had post-*Riley*. In *Delgado*, the court was tasked with determining how the changes in juvenile sentencing law impacted individuals who were sentenced before the changes in juvenile sentencing occurred. Id., 802. The defendant in that case was sentenced in 1996 to sixty-five years of imprisonment without parole for crimes that he committed when he was

[10] General Statutes § 54-125a (f) (1) provides: "Notwithstanding the provisions of subsections (a) to (e), inclusive, of this section, a person convicted of one or more crimes committed while such person was under eighteen years of age, who is incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which such person is confined, provided (A) if such person is serving a sentence of fifty years or less, such person shall be eligible for parole after serving sixty per cent of the sentence or twelve years, whichever is greater, or (B) if such person is serving a sentence of more than fifty years, such person shall be eligible for parole after serving thirty years. Nothing in this subsection shall limit a person's eligibility for parole release under the provisions of subsections (a) to (e), inclusive, of this section if such person would be eligible for parole release at an earlier date under any of such provisions."

sixteen years old. Id. Although he had become eligible for parole following the passage of P.A. 15-84, he filed a motion to correct his allegedly illegal sentence, claiming, inter alia, that he was entitled to be resentenced because the judge who sentenced him failed to consider youth related mitigating factors. Id., 805. After discussing its decisions in *Riley*, *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, U.S. , 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016), and the United States Supreme Court's decision in *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 718, our Supreme Court concluded that "[b]ecause *Miller* and *Riley* do not require a trial court to consider any particular mitigating factors associated with a juvenile's young age before imposing a sentence that includes an opportunity for parole, the defendant can no longer allege, after the passage of P.A. 15-84, that his sentence was imposed in an illegal manner on the ground that the trial court failed to take these factors into account." *State* v. *Delgado*, supra, 812. Accordingly, the resentencing court in the present case was not required under *Riley* to make any particular finding that the defendant was "incorrigible, irreparably corrupt, or irretrievably depraved" before resentencing him to a seventy year term of imprisonment when he was eligible for parole after thirty years.

The defendant next argues that even if the enactment of § 54-125a, which created a possibility of parole for him, made certain principles in *Riley* inapplicable to him, the language and legislative history of P.A. 15-84 clearly establish a presumption against the imposition of a functional life sentence. He avers that the practical effect of *Miller*, *Riley*, and our legislature's enactment of P.A. 15-84 was to "significantly limit a sentencing court's discretion when imposing a sentence on a juvenile." He again asserts that this "limitation creates a presumption against the imposition of a life sentence

on a juvenile defendant, and such exceedingly rare sentences can only be imposed after a specific finding that the juvenile being sentenced is permanently incorrigible, irreparably corrupt, or irretrievable depraved."

We turn our attention to the language of § 2 of P.A. 15-84, codified at § 54-91g,[11] which requires the trial court to consider certain factors before sentencing a juvenile convicted of a class A or B felony. Section 54-91g (a) provides in relevant part that a court shall "(1) [c]onsider, in addition to any other information relevant to sentencing, the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development," and shall "(2) [c]onsider,

[11] General Statutes § 54-91g provides: "(a) If the case of a child, as defined in section 46b-120, is transferred to the regular criminal docket of the Superior Court pursuant to section 46b-127 and the child is convicted of a class A or B felony pursuant to such transfer, at the time of sentencing, the court shall: (1) Consider, in addition to any other information relevant to sentencing, the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development; and (2) Consider, if the court proposes to sentence the child to a lengthy sentence under which it is likely that the child will die while incarcerated, how the scientific and psychological evidence described in subdivision (1) of this subsection counsels against such a sentence.

"(b) Notwithstanding the provisions of section 54-91a, no presentence investigation or report may be waived with respect to a child convicted of a class A or B felony. Any presentence report prepared with respect to a child convicted of a class A or B felony shall address the factors set forth in subparagraphs (A) to (D), inclusive, of subdivision (1) of subsection (a) of this section.

"(c) Whenever a child is sentenced pursuant to subsection (a) of this section, the court shall indicate the maximum period of incarceration that may apply to the child and whether the child may be eligible to apply for release on parole pursuant to subdivision (1) of subsection (f) of section 54-125a.

"(d) The Court Support Services Division of the Judicial Branch shall compile reference materials relating to adolescent psychological and brain development to assist courts in sentencing children pursuant to this section."

if the court proposes to sentence the child to a lengthy sentence under which it is likely that the child will die while incarcerated, how the scientific and psychological evidence described in subdivision (1) of this subsection counsels against such a sentence."

The plain and unambiguous language of the statute makes clear what a court must consider when sentencing a child convicted of an A or B felony. Although the defendant asserts that the statute creates a presumption against the imposition of a life sentence and requires a finding that the juvenile being sentenced is "permanently incorrigible, irreparably corrupt, or irretrievable depraved" in order to overcome that presumption, our review of the statute reveals no language to support the defendant's contention. Even if we assume, as do the parties, that the defendant's seventy year sentence in this case constitutes a "lengthy sentence under which it is likely [he] will die while incarcerated"; General Statutes § 54-91g (a) (2); the sentencing court was required to *consider* only "how the scientific and psychological evidence described in subdivision (1) of [§ 54-91g (a)] counsels against such a sentence." General Statutes § 54-91g (a) (2). The express language of the statute makes no reference to a presumption or a specific finding that the court was required to make in order to overcome that purported presumption.

Last, the defendant argues that the trial court also failed to craft an appropriate new sentence for him because it improperly relied on the parole eligibility provisions of § 1 of P.A. 15-84, codified at § 54-125a. In particular, he argues that the court failed to consider sufficiently the "*Miller* factors" in crafting a new sentence and, instead, relied "heavily upon the availability of a future parole opportunity for the defendant to lessen the sentencing court's responsibility to fully weigh the factors relevant to the defendant's youth at

the time of the crimes."[12] In essence, the defendant argues that the trial court imposed a sentence that it knew to be disproportionate because it knew that the defendant would be eligible for parole. We disagree.

A careful review of the record reveals that the court properly complied with our Supreme Court's decision in *Riley* and the requirements of § 54-91g. To begin, the court made clear at various times during the sentencing hearing its duty and intention to comply with our Supreme Court's decision in *Riley*. In particular, the court indicated that it was "going to resentence [the defendant] in accordance with the instructions of the State of Connecticut Supreme Court. I'm going to apply the *Miller* factors." During its colloquy, the court also indicated that it was "not here to argue the correctness or the wisdom of the cases that got us all here, *Roper*, *Graham*, *Miller*, *Montgomery* and the state of Connecticut versus [the defendant]. I mean, those courts have spoken." The court stated: "I'm a trial judge. I'm a servant of the law. I accept the rulings from the next level. I will note that *Graham*, *Miller* and *Montgomery*, I believe, all were decided after this case. There was no way that trial Judge O'Keefe here on Lafayette Street in [the geographical area number fourteen court in Hartford in] . . . 2009, had access to the logic and the reasoning of those cases."

The court went on to consider, among other things, the defendant's presentence investigation report, testi-

[12] In his appellate brief, the defendant often uses the phrase, "*Miller* factors," when discussing both the requirements pursuant to § 54-91g and our Supreme Court's holding in *Riley*. See footnote 1 of this opinion. Section 54-91g (a) (1), however, only requires consideration of "the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development." The state makes clear that it does not concede that the statute requires consideration of every factor set forth in *Miller*. We need not decide, however, that issue in this case because, as we explain subsequently, it is clear from the record that the court considered each of the "*Miller* factors."

mony from the defendant and his family members, and other aspects of the defendant's upbringing. Particularly important to the present appeal, the court fully considered, despite the defendant's arguments to the contrary, the *Miller* factors and those factors required under § 54-91g. The court recognized that "because of [the defendant's] age at the time of the crime that he committed, [he] was different than [an] adult." The court went on to state: "I am aware of the science that now supports that view. That there are changes over time that make a difference in who we are when we're seventeen and who we are when we might be fifty or sixty-nine. So, because of his age, I will assume that he was immature and impetuous and had a diminished capacity to appreciate the risks and consequences of his actions when he was seventeen years old."

The court then went on to state, inter alia, that "[t]here's no evidence to the contrary that he wasn't immature, impetuous or did not have a diminished capacity to appreciate the risks and the consequences of his actions. None of this activity that he was engaged in over a long period of time makes sense at all. There really was no good motive for this."

In addition to recognizing and discussing the defendant's age, the hallmark features of adolescence, the relevant science distinguishing a child's development from that of an adult's, and other mitigating factors, the court also balanced them with the "horrific circumstances of the crime." The court made note that it was significant that the defendant had "been involved in the death of two people and the wounding of three or four others over a period of time, not just on a single day." The court noted that the crimes took place "over a period of months where [the defendant] had time to contemplate what he was doing, and the effect that it

would have on other people and other people's lives."[13] The court indicated that it had "no way to see into the future" or whether the defendant was "ever going to be rehabilitated."

As the defendant points out in his appellate brief, the court at various times did refer to his eligibility for parole. For instance, the court noted that "[o]ur legislature has addressed this, and no matter what sentence I give, as we all agree, as long as it's longer than fifty years, will result in a parole hearing, approximately thirty years." But the defendant's argument that the court's discussion of parole eligibility during the hearing was the "main focal point" of the court's sentencing decision and that the court failed to fully weigh the factors relevant to the defendant's youth at the time of the crimes, finds little support in the record and is contradicted by the express statements of the court. For example, at one point during the hearing, the court stated: "I get why I'm sentencing him. And I agree that

[13] The court's reference to these crimes that took place "over a period of months" was based, in part, on new information presented to the court by the prosecution. During the resentencing hearing, the prosecutor made clear to the court that there was new information before it that was not previously available to it at the time of the defendant's original sentencing. Namely, the prosecutor discussed other crimes, aside from the crimes in the present case, to which the defendant had pleaded guilty, to wit, a drive-by shooting that left a fifteen year old boy dead and, on a separate occasion, an incident where the defendant and others "proceeded to unload twenty-four rounds at close range," resulting in one man's "permanent paralyzation." The prosecutor stated: "Your Honor didn't have the benefit of knowing [this information] at the time you sentenced him to 100 years in this case. You do have the benefit now. Not only do you know that [the] other murder happened before this killing and was pending thereafter, but he subsequently pleaded guilty to that murder and to the assault."

During the court's colloquy, it went on to address, inter alia, the significance of the defendant's actions on these separate occasions. It stated: "The most significant factor in this sentencing is his involvement in the murder of Tray Davis on Garden Street on November 17, 2006. Other significant factors are his wounding of two other innocent people on a different day. Another factor is his murder on a third occasion. These events can't be ignored."

it's necessary. I'm not going to say I'm not going to sentence him because he has a chance for a parole hearing. I'm going to sentence him in accordance with *Miller* as instructed by [our Supreme Court]." Additionally, as previously discussed, the court thoroughly went through the factors relevant to the defendant's youth. It discussed, inter alia, the defendant's age, the hallmark features of adolescence as they pertained to the defendant, and noted that it had reviewed the science discussed in *Riley* and § 54-91g.

In addition, as the state points out, the court in fact was required by statute to inform the defendant of his parole eligibility. See General Statutes § 54-91g (c). Section 54-91g (c) provides: "Whenever a child is sentenced pursuant to subsection (a) of this section, the court shall indicate the maximum period of incarceration that may apply to the child and whether the child may be eligible to apply for release on parole pursuant to subdivision (1) of subsection (f) of section 54-125a." Although the trial court did reference the defendant's eligibility of parole multiple times during its lengthy colloquy, we have found no indication in the record that the trial court considered the seventy year sentence to be inappropriate but nevertheless imposed it because the defendant would be eligible for parole.

On the basis of our review of the record, we conclude that the defendant properly was resentenced by the trial court in accordance with our Supreme Court's remand order in *Riley*, the applicable statutory authorities, and the constitutional principles contemplated in those authorities.

The judgment is affirmed.

In this opinion the other judges concurred.

KIERAN DAY ET AL. *v.* PERKINS PROPERTIES, LLC, ET AL.
(AC 41357)

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

Syllabus

The plaintiffs, owners of real property in the town of Ledyard, sought to recover damages for private nuisance from the defendant P Co. and its sole member, the defendant P. P Co. owned certain real property consisting of two contiguous parcels, one located in North Stonington and the other in Ledyard, that abut the plaintiffs' property. Both of the defendants' parcels are located in areas zoned for residential use that prohibit the commercial use of the property. In a prior action, P Co. had entered into a stipulated judgment with the town of Ledyard by which it was enjoined from operating a landscaping business or a similar commercial operation at its Ledyard property. The stipulated judgment further provided that pursuant to the town's zoning regulations, no commercial activity was permitted in areas zoned for residential use unless the activity constituted a permissible farming activity pursuant to the town's zoning regulations. Thereafter, the trial court in that action held P Co. in contempt for its noncompliance with the stipulated judgment. The plaintiffs subsequently commenced this action, alleging, in count two of their complaint, that the defendants' operation of a landscaping business on its Ledyard property constituted a nuisance per se because it violated the town's zoning regulations by reason of noise, safety, fumes and odors, and because the property was not zoned for commercial activity. Following a trial to the court, the trial court rendered judgment for the plaintiffs on count two, from which the defendants appealed to this court. *Held* that the trial court improperly concluded as a matter of law that the defendants' operation of a landscaping business on its Ledyard property constituted a nuisance per se; the defendants' operation of a landscaping business did not constitute a nuisance per se because it was not a use of land that, by its very nature, constitutes a nuisance at all times regardless of locality or circumstance, and the defendants' violation of a local ordinance, which formed the basis of the stipulated judgment and the court's finding of nuisance per se, was not, as a matter of law, sufficient in itself to constitute a nuisance per se, which exists where there is a condition that is a nuisance in any locality and under any circumstances, as local zoning regulations apply only to a specific locality, what constitutes a nuisance in one locality may not in another, and the allegations of the complaint limited the nuisance to the landscaping business on the defendants' property in Ledyard that was being operated in a residential zone.

Argued February 13–officially released May 14, 2019

Procedural History

Action to recover damages for, inter alia, private nuisance, and for other relief, brought to the Superior Court in the judicial district of New London, where the matter was tried to the court, *Hon. Joseph Q. Koletsky*, judge trial referee; judgment in part for the plaintiffs; thereafter, the court granted the plaintiffs' motion for clarification and issued a certain order, and the defendants appealed to this court. *Reversed*; *judgment directed.*

Matthew G. Berger, for the appellants (defendants).

Michael S. Bonnano, for the appellees (plaintiffs).

Opinion

FLYNN, J. The defendants, Perkins Properties, LLC, and Mark J. Perkins, Jr., appeal from the judgment of the trial court rendered in favor of the plaintiffs, Kieran Day and Jennifer Day. The defendants claim that the court improperly determined that a nuisance per se existed solely on the basis of violations of local zoning regulations.[1] We agree that a violation of a local zoning ordinance in one town cannot be said to constitute a nuisance everywhere in the state of Connecticut as the nuisance per se doctrine requires and, accordingly, we reverse the judgment of the trial court.

The following undisputed facts and procedural history are relevant. The plaintiffs own real property located at 572 Lantern Hill Road in Ledyard. Perkins is the sole member of Perkins Properties, LLC, the owner of real property abutting the plaintiffs' property located at 576 Lantern Hill Road in Ledyard. The defendants'

[1] The defendants also claim that the court erred in enjoining them from direct vehicular access, including off road conveyances, between the defendants' adjoining Ledyard and North Stonington properties. The court found that the plaintiffs only proved the second count of their complaint alleging nuisance per se, and we reverse that judgment including any remedies awarded therein. Accordingly, we need not address the merits of this claim.

property is a contiguous parcel that also encompasses 586Z Lantern Hill Road in North Stonington. The defendants' Ledyard and North Stonington properties are separated by Whitford Brook, and both are located in residential R-80 zones that prohibit commercial use of real property.

In a separate action brought by the town of Ledyard and Joseph Larkin in his capacity as Ledyard's zoning enforcement officer against Perkins Properties, LLC, those parties entered into a stipulation on October 27, 2016. The written stipulation provided that Perkins Properties, LLC, was enjoined from operating a landscaping business, lawn care business, snow removal business, or other similar commercial operations at 576 Lantern Hill Road in Ledyard. It further provided that commercial activity and uses accessory to commercial activity were not permitted in residential zones pursuant to § 3.4 of the Ledyard Zoning Regulations, and that no building, structure, or any portion of the property shall be used for commercial activity or any purpose subordinate or incidental to commercial activity, including, but not limited to: vehicular or pedestrian access to commercial activity; employee parking for commercial activity; storage, maintenance, or repair of vehicles, equipment or machinery used in whole or in part in conducting commercial activity, except as permitted by paragraph 2 of the stipulation; assembly of employees of commercial activities other than farming or uses accessory to farming; storage of materials or products used in the course of the business of commercial activity, except as permitted by paragraph 2; and the storage of materials, products or by products generated in the course of business or commercial activity. The stipulation provided in paragraph 2 that activities that may constitute farming or a use accessory to farming under § 2.2 of the Ledyard Zoning Regulations may

be permitted. The stipulation provided that these exceptions are to be strictly and narrowly construed. The court, *Cosgrove J.*, entered judgment in accordance with the stipulation on December 1, 2016. Ledyard and Larkin moved for contempt because of noncompliance by Perkins Properties, LLC, with the December 1, 2016 judgment, and the court, *Cole-Chu*, *J.*, granted the motion.

The plaintiffs commenced the present action in 2015, and served their seven count fourth amended complaint in December, 2017. In the second count of that complaint, the plaintiffs alleged that the defendants' use of the Ledyard property for a landscaping business violated the Ledyard Zoning Regulations by reason of noise, safety, fumes and odors, and because commercial activity is prohibited in an R-80 zone. The plaintiffs sought injunctive relief and monetary damages.

Following a trial, the court found that the plaintiffs proved only the allegations in the second count of the complaint.[2] The court determined that there was a nuisance per se pursuant to the defendants' deliberate violation of the terms of the stipulated judgment, which enjoined the defendants, on the basis of the Ledyard Zoning Regulations, from conducting commercial activity and related accessory uses on the Ledyard property. The court determined that, although the defendants claimed to operate a nonconforming farm, the only agricultural activity that took place on the property was Perkins' ownership of an uncertain number of cows that were kept in various grazing spots. The court concluded that the activity at issue did not fall under the farming exception in the stipulated judgment, which permitted farming activity pursuant to the Ledyard Zoning Regulations. The court ordered that no nonfarming activity

[2] The court clarified its judgment to note that the second count, as opposed to the third count which alleged nuisance per se as to the North Stonington property, had been proven.

take place on the Ledyard property and that no direct vehicular access, including off road conveyances, be had between the defendants' adjoining Ledyard and North Stonington properties. This appeal followed.

The issue before us is whether the trial court properly determined that a certain use of land constituted a nuisance per se. "Although the existence of a [public or private] nuisance generally is a question of fact, for which we invoke a clearly erroneous standard of review . . . where the court makes legal conclusions or we are presented with questions of mixed law and fact, we employ a plenary standard of review . . . ." (Internal quotation marks omitted.) *Sinotte* v. *Waterbury*, 121 Conn. App. 420, 438, 995 A.2d 131, cert. denied, 297 Conn. 921, 996 A.2d 1192 (2010). Under our case law, the question as to what constitutes a nuisance per se is one of law for the court. See *Warren* v. *Bridgeport*, 129 Conn. 355, 360, 28 A.2d 1 (1942); *Beckwith* v. *Stratford*, 129 Conn. 506, 510, 29 A.2d 775 (1942). Accordingly, our review is plenary. See *Sinotte* v. *Waterbury*, supra, 438.

"A nuisance not originating in negligence is sometimes characterized as an absolute nuisance [or a nuisance per se]." (Internal quotation marks omitted.) *Warren* v. *Bridgeport*, supra, 129 Conn. 360. Significantly for the decision to be made in this appeal, a "nuisance per se . . . exists where there is a condition which is a nuisance in any locality and under any circumstances. . . . Such a nuisance as regards the use of land seldom, if ever, occurs; the same conditions may constitute a nuisance in one locality or under certain circumstances, and not in another locality or under other circumstances. To constitute a nuisance in the use of land, it must appear not only that a certain condition by its very nature is likely to cause injury but also

that the use is unreasonable or unlawful."[3] (Citation omitted.) *Beckwith* v. *Stratford*, supra, 129 Conn. 508. "Some things are unlawful or nuisances per se; others become so, only in respect to the time, place or manner of their performance." *Whitney* v. *Bartholomew*, 21 Conn. 213, 217 (1851).

A landscaping business is not a use of land that, by its very nature, constitutes a nuisance at all times regardless of locality or circumstance. First, we note that our case law most often has dealt with what is not a nuisance per se. See *Wood* v. *Wilton*, 156 Conn. 304, 310, 240 A.2d 904 (1968) (refuse disposal operation not nuisance per se but may be nuisance in fact as result of manner of operation); *Jack* v. *Torrant*, 136 Conn. 414, 421, 71 A.2d 705 (1950) (undertaking establishment not nuisance per se); *Murphy* v. *Ossola*, 124 Conn. 366, 371, 199 A. 648 (1938) (mere possession or use of dynamite caps not nuisance per se); *Udkin* v. *New Haven*, 80 Conn. 291, 294, 68 A. 253 (1907) (accumulated snow on walkway did not constitute nuisances per se); *Parker* v. *Union Woolen Co.*, 42 Conn. 399, 402 (1875) (use of steam whistle not nuisance per se); *Whitney* v. *Bartholomew*, supra, 21 Conn. 217 ("[t]he trade and occupation of carriage-making, or of a blacksmith, is a lawful and useful one; and a shop or building, erected for its exercise, is not a nuisance per se").

Second, the nature of the complaint and the court's findings limit any unreasonable use of the land to a specific locality and manner of performance. The allegations in the complaint limited the nuisance to a particular locality and stated, in essence, that the landscaping

[3] "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. . . . The law of private nuisance springs from the general principle that [i]t is the duty of every person to make a reasonable use of his own property so as to occasion no unnecessary damage or annoyance to his neighbor. . . . The essence of a private nuisance is an interference with the use and enjoyment of land." (Citations omitted; internal quotation marks omitted.) *Pestey* v. *Cushman*, 259 Conn. 345, 352, 788 A.2d 496 (2002).

business was pursued in an improper place, namely, in an R-80 zone in Ledyard. The Ledyard Zoning Regulations, by their very nature, applied only to property located in Ledyard. Furthermore, the terms of the stipulated judgment applied *only* to 576 Lantern Hill Road in Ledyard and specified that certain activities were prohibited to the extent the activities constituted commercial activity and not farming. The court noted these limitations in its decision, stating that "the Ledyard injunction applies to the Ledyard property, of course," and on that basis did not find a nuisance per se for the same commercial landscaping activity occurring on the North Stonington property. The court found for the defendants on count one of the complaint, which alleged that the landscaping business constituted a private nuisance on the basis of employee mustering, aggressive and threatening behavior by employees, and noise.

The violation of a local ordinance, which formed the basis of the stipulated judgment and the court's finding of nuisance per se, is not, as a matter of law, sufficient in itself to constitute a nuisance per se.[4] In certain cases, a court may interpret local zoning regulations along with other factors to determine whether a private nuisance exists. See *Cummings* v. *Tripp*, 204 Conn. 67, 79, 527 A.2d 230 (1987). It is axiomatic that local zoning regulations apply only to a specific locality, and "[w]hat constitutes a nuisance in one locality may not in another." *Jack* v. *Torrant*, supra, 136 Conn. 423. "[T]he mere violation of a municipal ordinance does not make the act in question a nuisance per se." 58 Am. Jur. 2d 581, Nuisances § 14 (2012). For the foregoing reasons,

[4] Additionally, we note that count two of the complaint was not an action to enforce a zoning regulation. See e.g., *Cummings* v. *Tripp*, 204 Conn. 67, 78–80, 527 A.2d 230 (1987) (right of property owners to seek injunction and damages for nuisance affecting enjoyment of their property is supplemental to right to seek injunctive relief from zoning authorities for violation of zoning ordinance).

we conclude that the court's finding of a nuisance per se on the basis of violations of a local zoning ordinance, which the defendants were enjoined from violating under the terms of a stipulated judgment, was improper as a matter of law.

The judgment is reversed and the case is remanded with direction to render judgment in favor of the defendants.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* FELIX A. IRIZARRY (AC 39394)

Alvord, Sheldon and Pellegrino, Js.

Syllabus

Convicted of the crimes of assault in the second degree and breach of the peace in the second degree in connection with his conduct in striking the victim several times with a golf club, causing the victim to suffer injuries that included a fractured jaw, the defendant appealed to this court. He claimed, inter alia, that the evidence was insufficient to support his conviction of assault in the second degree in violation of statute (§ 53a-60 [a] [1]) because the state did not establish that he caused the victim serious physical injury, as defined by statute (§ 53a-3 [4]). *Held*:

1. The defendant's claim that the evidence was insufficient to support his conviction of assault in the second degree was unavailing, as the jury reasonably could have concluded that the victim suffered physical injury that caused serious impairment of his health such that he suffered serious physical injury within the meaning of §§ 53a-3 (4) and 53a-60 (a) (1); the defendant struck the victim with a golf club at least three times, which caused the fracture of the victim's jaw and affected his consciousness, the victim testified that his jaw was still fractured almost two years after the attack, and the testimony at trial and the victim's medical records established that his injuries had a lasting effect on the functioning of his jaw and resulted in a material modification to his diet after the attack.
2. The defendant could not prevail on his claim that he was deprived of his constitutional right to a fair trial as a result of an improper statement made by the prosecutor during closing argument to the jury: although the prosecutor improperly argued that the victim's treating physician, R, had testified that the kind of blunt force trauma that the victim experienced could cause a serious brain injury, as the court had sustained the defendant's objection to R's testimony as to whether the blunt

force trauma experienced by the victim could lead to a concussion or brain damage, that impropriety was not so egregious that it deprived the defendant of a fair trial, as the prosecutor's comment was too remote to be harmful, it was not germane to whether the victim's broken jaw constituted a serious physical injury, and the court's instructions to the jury focused on the charge as presented in the information and reoriented the jury's focus to whether the broken jaw constituted a serious physical injury; moreover, the prosecutor's reference to the physician's testimony was an isolated comment that did not conform to a pattern of conduct that was repeated throughout the trial, and the court's instruction to the jury that argument and statements by attorneys during closing argument are not to be considered as evidence was sufficiently curative, and eliminated any danger that the prosecutor's comment might have misled the jury.

Argued January 17—officially released May 14, 2019

Procedural History

Two part substitute information charging the defendant, in the first part, with two counts each of the crimes of assault in the second degree and breach of the peace in the second degree, and, in the second part, with being a persistent serious felony offender, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, where the first part of the information was tried to the jury before *D'Addabbo*, *J.*; verdict of guilty; thereafter, the second part of the information was tried to the court; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Peter G. Billings, assigned counsel, with whom, on the brief, was *Zachary E. Reiland*, assigned counsel, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Evelyn Rojas*, assistant state's attorney, for the appellee (state).

Opinion

PELLEGRINO, J. The defendant, Felix A. Irizarry, appeals from the judgment of conviction, rendered

against him following a jury trial on one count each of assault in the second degree in violation of General Statutes § 53a-60 (a) (1) and (2), and one count each of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (1) and (2). On appeal, the defendant claims that (1) the evidence was insufficient to support his conviction of second degree assault in violation of § 53a-60 (a) (1), and (2) prosecutorial improprieties during closing argument resulted in the violation of his right to a fair trial. We disagree and, accordingly, affirm the judgment of the trial court.

The jury was presented with the following evidence on which to base its verdict. On March 22, 2014, the victim, David Bennett, was standing in front of a neighborhood market in New Britain when he encountered the defendant exiting the market. After a short verbal exchange between them, the defendant retrieved a golf club from a vehicle parked on the opposite side of the street and began to chase the victim. During the course of his pursuit, the defendant struck the victim several times with the golf club, including once in the arm and once in the face, which resulted in the victim being knocked to the ground. While the victim was on the ground, the defendant continued to strike him with the club, hitting him at least once in the chest. An eyewitness called 911 and reported the incident. The defendant was later arrested when a truck matching the description of the vehicle that fled the scene of the assault was stopped by New Britain police. The defendant was found crouching in the rear cargo hold of the vehicle. A golf club was also found in the vehicle.

In a four count information, the defendant was charged with assault in the second degree in violation of § 53a-60 (a) (1),[1] assault in the second degree in

[1] General Statutes § 53a-60 (a) (1) provides that a person is guilty of assault in the second degree when, "[w]ith intent to cause serious physical injury to another person, the actor causes such injury to such person or to a third person . . . ."

violation of § 53a-60 (a) (2),[2] breach of the peace in the second degree in violation of § 53a-181 (a) (1), and breach of the peace in the second degree in violation of § 53a-181 (a) (2).[3] During the five day trial, the jury heard testimony with respect to the assault and the victim's injuries, which included an admission by the defendant that he struck the victim with a golf club. As a result of the assault, the victim experienced a momentary loss of consciousness and suffered a fractured jaw. Emergency medical responders found that the victim was bleeding from his left ear when they arrived at the scene.

The victim's treating physician, Paul Edward Russo, Jr., testified at trial that the victim sustained injuries to his left cheek, left jaw, right forearm and chest wall. Russo further testified that when the victim presented at the hospital emergency department, his arm was tender and swollen, with a visible contusion and skin avulsion, in addition to a contusion on the left side of the face. A computerized axial tomography scan revealed a nondisplaced fracture of the victim's lower jaw. Three sutures were necessary to close the wound on the victim's face. The victim was discharged from the hospital

Count one of the substitute long form information provides: "[The defendant], with intent to cause serious physical injury to another person, caused such injury to such person (to wit: fractured the mandible of [the victim]) in violation of [§] 53a-60 (a) (1) . . . ."

[2] General Statutes § 53a-60 (a) (2) provides that a person is guilty of assault in the second degree when, "with intent to cause physical injury to another person, the actor causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm . . . ."

Count two of the substitute long form information provides: "[The defendant], with intent to cause physical injury to another person, caused such injury to such person by means of a dangerous instrument (to wit: [the defendant] struck [the victim] with a golf club) in violation of [§] 53a-60 (a) (2) . . . ."

[3] On appeal, the defendant does not challenge his conviction under § 53a-60 (a) (2) or under § 53a-181 (a) (1) or (2).

after he was treated with antibiotics and analgesics, with instructions that he restrict his diet to liquid puree. He was further instructed to follow-up at a maxillofacial clinic regarding his jaw injury. The victim testified that, as of the date of trial, his jaw still was not fully healed.

As part of his trial strategy, the defendant chose to testify in his own defense. Specifically, he testified that, although he did, in fact, strike the defendant, he did so in self-defense. Despite the defendant's testimony, the jury found the defendant guilty on all charges. On May 26, 2016, the defendant was sentenced to seven years of incarceration, followed by three years of special parole.[4] This appeal followed.

The defendant raises two claims on appeal. The defendant first claims that there was insufficient evidence to convict him of assault in the second degree under § 53a-60 (a) (1), in that the state did not establish that he caused "serious physical injury" to the victim, as defined by General Statutes § 53a-3 (4).[5] Second, the defendant claims that he was deprived of a fair trial because of prosecutorial improprieties during closing argument, in particular, the prosecutor's reference to and reliance on facts not in the record. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the evidence presented at trial was insufficient to establish, beyond a reasonable doubt, that he caused "serious physical injury" to the victim, as defined by § 53a-3 (4). We disagree.

[4] As to count one, the defendant was sentenced to seven years of incarceration, followed by three years of special parole. As to count two, the defendant was sentenced to seven years of incarceration, followed by three years of special parole, to run concurrent with the sentence imposed on count one.

[5] General Statutes § 53a-3 (4) provides: " 'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ."

"A person can be found guilty of assault in the second degree under . . . § 53a-60 [(a) (1)] only if he causes serious physical injury to another person." (Emphasis omitted.) *State* v. *McCulley*, 5 Conn. App. 612, 615, 501 A.2d 392 (1985). Section 53a-3 (4) defines "serious physical injury" as any "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ." "[S]erious physical injury" does not require a showing of permanency; *State* v. *Barretta*, 82 Conn. App. 684, 689, 846 A.2d 946, cert. denied, 270 Conn. 905, 853 A.2d 522 (2004); or "require expert medical testimony," so long as "there [is] . . . sufficient direct or circumstantial evidence or a combination of both presented to the jury from which it may find such injury." *State* v. *Rumore*, 28 Conn. App. 402, 414, 613 A.2d 1328, cert. denied, 224 Conn. 906, 615 A.2d 1049 (1992). Whether an injury constitutes a "serious physical injury," for the purpose of § 53a-60 (a) (1), is a fact intensive inquiry and, therefore, is a question for the jury to determine. *State* v. *Ovechka*, 292 Conn. 533, 545–47, 975 A.2d 1 (2009).[6]

"In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict.

[6] In *Ovechka*, our Supreme Court considered what constituted a "serious physical injury" and concluded that, in the case before it, "temporary blindness, chemical conjunctivitis and chemical burns suffered by [the victim] constituted sufficient evidence of [s]erious physical injury under § 53a-3 (4) . . . ." (Internal quotation marks omitted.) *State* v. *Ovechka*, supra, 292 Conn. 547. In its discussion of the issue, the court noted that "[despite] the difficulty of drawing a precise line as to where physical injury leaves off and serious physical injury begins . . . we remain mindful that [w]e do not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record . . . and that we must construe the evidence in the light most favorable to sustaining the verdict." (Citations omitted; internal quotation marks omitted.) Id., 546–47.

Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Stephen J. R.*, 309 Conn. 586, 593–94, 72 A.3d 379 (2013).

At trial, the emergency medical services responder, the victim's emergency department treating physician, and the victim all testified as to the injuries sustained by the victim.[7] During the state's direct examination of the victim, the victim testified: "[The defendant] hit me in the jaw and it fractured my jaw. My whole jaw [was] dislocated." The victim further testified: "I stepped back in defense . . . trying to avoid being hit. He swung several times . . . [and] hit me several times. . . . [O]nce in the jaw, once in the rib cage, took a divot out of my wrist. I still have the mark there and *I still have the fractured jaw* . . . ." (Emphasis added.) The following exchange between the state and the victim took place:

"[The Prosecutor]: After he hit you in the jaw . . . [w]as that the point where you fell down?

"[The Witness]: That's when I fell to the ground.

* * *

[7] The emergency medical services responder who attended to the victim at the scene of the incident testified that "[the victim] sustained injury to his right forearm and injuries to the left side of his face," and that the victim "had a laceration to his right arm . . . and he had some blood coming from his left ear."

"[The Prosecutor]: When you fell down on the ground, did you lose consciousness . . . .

"[The Witness]: For a quick second . . . . When I got struck I fell to my knees . . . . I can say that I was . . . dazed, really dazed. . . .

"[The Prosecutor]: So, you weren't fully conscious but you were dazed.

"[The Witness]: I was dizzy . . . ."

On the last day of evidence, during the state's direct examination of Dr. Russo, the following exchange also occurred:

"[The Prosecutor]: [The victim] suffered a head contusion, correct?

"[The Witness]: Correct.

"[The Prosecutor]: Where in the head did he receive a head contusion?

"[The Witness]: The left face.

"[The Prosecutor]: The left face, and based on your training and your experience in your examination of [the victim], what, if anything, is a head contusion indicative of?

"[The Witness]: Blunt force injury to the head."

Russo further testified that, as a result of the blunt force injury, the victim suffered a nondisplaced fracture to the lower jaw and a facial laceration requiring three sutures. Medical records admitted into evidence indicated that the victim was directed to maintain a liquid puree diet after his discharge due to the injury to his lower jaw. See *State* v. *Lewis*, 146 Conn. App. 589, 608–609, 79 A.3d 102 (2013), cert. denied, 311 Conn. 904, 83 A.3d 605 (2014).

As discussed in *Ovechka*, "serious physical injury" may include a range of injuries and is a fact based inquiry for the jury to decide. In reaching its conclusion that "temporary blindness, chemical conjunctivitis and chemical burns suffered by [the victim] constituted sufficient evidence of [s]erious physical injury under § 53a-3 (4)"; (internal quotation marks omitted) *State* v. *Ovechka*, supra, 292 Conn. 547; our Supreme Court considered a number of its prior decisions in which it had upheld jury findings that "serious physical injury" had been inflicted. Compare *State* v. *Barretta*, supra, 82 Conn. App. 690 (upholding judgment of conviction where victim suffered extensive bruises and abrasions), with *State* v. *Sawicki*, 173 Conn. 389, 395, 377 A.2d 1103 (1977) (upholding judgment of conviction where victim suffered significant facial fractures). We believe that these cases are instructive with respect to the present case.

Here, the defendant struck the victim with the head of a golf club at least three times: once in the arm; once in the face, causing the fracture of the lower jaw and thereby affecting his consciousness; and once in the chest, after he had fallen to the ground. These blows caused the victim to suffer contusions, abrasions, and bleeding from his ear. Furthermore, almost two years after the attack, the victim testified that his jaw was still fractured. Although permanency is not a requirement of "serious physical injury," under the present circumstances, the lasting effects of the injuries on the victim are certainly relevant when considering the defendant's claim. Moreover, testimony and medical records admitted into evidence also established that the victim's injuries had a lasting effect on the functioning of his jaw and resulted in a material modification to his diet for a period after the attack. On the basis of the evidence in the record and the inferences that reasonably could

be drawn therefrom, construed in the light most favorable to sustaining the verdict, the jury reasonably could have concluded that victim suffered physical injury that caused "serious impairment of health," such that he suffered "serious physical injury" under §§ 53a-3 (4) and 53a-60 (a) (1). See *State* v. *Lewis*, supra, 146 Conn. App. 609. Accordingly, the defendant's claim must fail.

II

Next, the defendant claims that he was deprived of his constitutional right to a fair trial because the prosecutor committed certain acts of impropriety during closing argument by arguing facts not in evidence. Specifically, the defendant claims that the prosecutor's argument regarding Russo's testimony, which addressed whether the kind of blunt force trauma experienced by the victim *could* cause a serious brain injury, was improper.[8] We agree with the defendant that the prosecutor's argument with respect to Russo's testimony was improper. We agree with the state, however, that it did not deprive the defendant of his constitutional right to a fair trial.

The following standard of review informs our resolution of the defendant's claim. "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

[8] The defendant also claims that the prosecutor was guilty of certain improprieties during her rebuttal argument. Specifically, the defendant claims that the prosecutor argued that the victim had a permanent scar on his arm, as a result of being struck with the golf club, a fact that he claims was not in evidence. The record indicates that the victim testified at trial to the following: "[The defendant] hit me several times. . . . [O]nce in the jaw, once in the rib cage, took a divot out of my wrist. *I still have the mark there* and I still have the fractured jaw . . . ." (Emphasis added.) Given the nature of the foregoing testimony, namely, that the victim had a lasting mark on his arm almost two years after the altercation, we conclude that this statement during rebuttal argument was within the bounds of reasonable conduct. See *State* v. *Miller*, 128 Conn. App. 528, 535, 16 A.3d 1272, cert. denied, 301 Conn. 924, 22 A.3d 1279 (2011).

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."[9] (Citations omitted.) *State* v. *Fauci*, 282 Conn. 23, 32, 917 A.2d 978 (2007). "[If] a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . ." (Internal quotation marks omitted.) *State* v. *Taft*, 306 Conn. 749, 762, 51 A.3d 988 (2012).

Moreover, because the claimed prosecutorial improprieties occurred during closing arguments, we look to the following legal principles. "In determining whether such [an impropriety] has occurred, the reviewing court must give due deference to the fact that [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

[9] "The question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties. . . . This assessment is made through application of the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)] . . . . These factors include: 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." (Internal quotation marks omitted.) *State* v. *Daniel W.*, 180 Conn. App. 76, 111–12, 182 A.3d 665, cert. denied, 328 Conn. 929, 182 A.3d 638 (2018).

the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom." (Internal quotation marks omitted.) *State* v. *Miller*, 128 Conn. App. 528, 535, 16 A.3d 1272, cert. denied, 301 Conn. 924, 22 A.3d 1279 (2011). "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." (Internal quotation marks omitted.) *State* v. *Maguire*, 310 Conn. 535, 553–54, 78 A.3d 828 (2013). "In fulfilling his duties, a prosecutor must confine the arguments to the evidence in the record. . . . Statements as to facts that have not been proven amount to unsworn testimony that is not the subject of proper closing argument." (Citation omitted.) *State* v. *Copas*, 252 Conn. 318, 349, 746 A.2d 761 (2000).

At trial, during Russo's direct testimony, the state asked whether the type of injury sustained by the victim "*could* . . . lead to a concussion" or "could lead to a brain injury?" (Emphasis added.) Russo answered in the affirmative. Thereafter, defense counsel objected: "[Y]our Honor, this is based on speculation. The question was, *could it*—the previous question was *could it*. . . . [M]edical testimony has to be more certain than that." (Emphasis added.) The court sustained the objection, stating: "The area of examination is appropriate. The form of the question is not." After additional unsuccessful attempts at properly framing the question, the state ceased the line of inquiry.

Despite the foregoing, during the state's closing argument as to count two, the prosecutor argued: "Now, ask yourself, is a golf club a dangerous instrument? . . . [Is it] capable of causing death or serious physical injury? . . . The state submits to you that when you look at all the evidence, the injuries that the defendant caused [the victim] when he struck him with the golf club; [t]he fact that [the victim] had to get stitches to

his jaw, and the testimony of Dr. Russo that a force blunt blow to the head like the one that [the victim] received with the golf club *could cause a concussion or brain damage* . . . you could find beyond a reasonable doubt that . . . the defendant used . . . *a dangerous instrument* . . . .''[10] (Emphasis added.)

In response to the prosecutor's argument, defense counsel emphasized in his closing argument that ''[t]he evidence that the state referred to is not in this case. The evidence that this injury could have led to a concussion or brain damage, I suggest to you . . . [is] not in this case. I suggest to you that Dr. Russo gave you *no evidence* from which you could find *serious physical injury* in this case.''[11] (Emphasis added.)

After the conclusion of closing argument and after the jury had been excused for a short recess, defense counsel raised the following objection with the court: ''[T]he state's argument that . . . the jaw fracture could have led to a concussion and then brain damage, [which] was the subject of my objections during the case . . . I do not believe . . . is evidence in [the record].'' The court explained that it would address defense counsel's objection in the following way: ''In my instructions, I stress in the first part that the . . .

[10] When addressing the issue of whether the victim suffered a ''serious physical injury,'' as to count one, the prosecutor did not argue the excluded testimony. Rather, the prosecutor made the following statement to the jury: ''Now, what evidence do you have that the defendant caused [the victim] a serious impairment to his health? You have the testimony of Dr. Russo, who testified that [the victim's] jaw was fractured and that it required stitches. You also heard [the victim's] testimony that when he was struck in the face, he was in a lot of pain, and he was dazed, and he almost lost consciousness.''

[11] Defense counsel further advanced his theory of the case as to ''serious physical injury'' by arguing: ''Remember what the [emergency medical technician] said . . . . He said these injuries were minor, and Dr. Russo never said anything to contrary. . . . [I]f you've ever had a broken bone, you sort of know what the difference is between a nondisplaced and a displaced fracture.''

arguments of the attorneys are not evidence. If the evidence is different from what they believe the evidence is, they are to follow their own [recollection]. . . . So, your comments are noted, but you will see that I've addressed that situation." Thereafter, during the jury charge, the court provided a general charge explaining that argument is not evidence.[12]

The state contends that the prosecutor's argument simply urged the jury, on the basis of Russo's testimony, to draw a reasonable inference that a golf club, when swung at a person's head, could be considered a dangerous instrument that could cause serious injury. We find this claim unpersuasive under the present circumstances. It is true that, ordinarily or absent some compelling reason to the contrary, this may be a reasonable inference to draw. It is also true that, "[w]hile 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 [on], or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *Maguire*, supra, 310 Conn. 553–54.

Here, the state's argument went beyond merely encouraging the jury to draw an inference—it argued the very evidence that the court had excluded from the record. Although a prosecutor is free to advance conclusions reasonably supported by the evidence, he or she may not use closing argument to argue evidence that has been excluded by the court. See id., 554.

[12] The court instructed the jury: "In reaching your verdict, you should consider all the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. These include (1) the arguments and statements by the lawyers. The lawyers are not witnesses. What they have said in their closing arguments is intended to help you interpret the evidence, but it is not evidence."

Because the court sustained defense counsel's objection to Russo's testimony as to whether the blunt force trauma experienced by the victim *could* lead to a concussion or brain damage, we agree with the defendant that the argument was improper. See *State* v. *Ross*, 151 Conn. App. 687, 698–99, 95 A.3d 1208, cert. denied, 314 Conn. 926, 101 A.3d 271, 272 (2014). We conclude, however, that the improper argument was harmless.

In considering the defendant's claim that the prosecutor's improper argument deprived him of the constitutional right to a fair trial, we begin by noting that, during the court's charge to the jury, the court made the following statement: "[T]he defendant has been charged in an information. The information has been read to you at the beginning of the trial and will be with you during your deliberations. . . . Each count alleges a separate crime. It will be your duty to consider each count separately in deciding the guilt or not guilty of the defendant." The court continued by providing the jury with a description of each charge, as provided in the amended long form information. The court stated in relevant part: "Count one, assault in the [second] degree . . . [the defendant], with intent to cause serious physical injury to another person, caused such injury to such person, to wit, *fractured the mandible of* [the victim], in violation of § 53a-60 (a) (1) of the Connecticut General Statutes." (Emphasis added.)

We further note that the court, by focusing its instruction as to count one on the specific conduct alleged in the long form information, namely, that the defendant had violated § 53a-60 (a) (1) because he "fractured the mandible of [the victim]," in effect, isolated and, rendered irrelevant, the prosecutor's improper argument.[13] Although an alternative theory of "serious physical injury" relating to the victim's consciousness was advanced by the prosecutor, the subsequent instruction

[13] See footnote 1 of this opinion.

focusing on the charge as presented in the long form information was material with respect to the defendant's claim. As discussed previously in this opinion, our review of the record indicates that there was sufficient evidence presented at trial to support the conclusion that, as a result of the fractured mandible, the victim suffered a "serious physical injury." Here, because the court's instruction re-oriented the jury's focus to the issue of whether the victim's broken jaw constituted a "serious physical injury," and because the prosecutor's reference to the excluded testimony did not relate to whether the victim's broken jaw constituted a "serious physical injury," the state's improper argument was too remote, in the context of the present appeal, to be considered harmful.

Furthermore, the prosecutor's reference to Russo's testimony was an isolated instance that did not conform to a pattern of conduct repeated throughout the trial. Although the court declined to provide the jury with a specific instruction addressing the improper argument, the court did provide a general instruction emphasizing that argument is not evidence and that statements made during closing argument by the attorneys are not to be considered as evidence. Given the underlying facts of this case, the isolated nature of the prosecutor's argument, and the fact that the improper argument was not germane to the issue of whether the victim's broken jaw constituted a "serious physical injury," we conclude that the court's general instruction was sufficiently curative and eliminated any danger that the prosecutor's improper comment might mislead the jury.[14] Accordingly, we conclude that, despite the prosecutor's

[14] We further note that, instead of objecting at the time the argument was made, defense counsel delayed his objection and waited until his closing argument to address the impropriety, and did so in such a way that was tactically beneficial to the defendant. Said differently, by reframing the prosecutor's statement so that it cast doubt on count one, rather than on count two—the context in which the statement originally was made—defense counsel was able to use the prosecutor's remark to bolster the

improper statement during closing argument, the impropriety was not so egregious that it deprived the defendant of his constitutional right to a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE PROBATE APPEAL OF ANDREW S. KNOTT, ADMINISTRATOR (ESTATE OF LUCILLE KIRSCH)
(AC 41980)

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

Syllabus

The substitute plaintiff, the administrator of the estate of L, appealed to this court from the judgment of the trial court dismissing his appeal from the orders of the Probate Court denying the application to terminate the conservatorship of the estate of L and request for a waiver of fees filed by M, the conservator of L's estate and the original plaintiff to the probate appeal. The Probate Court had mailed notice of its orders to the parties on October 20, 2016. Prior to filing this appeal with the Superior Court on December 9, 2016, M filed an application for a waiver of fees in that court on December 1, 2016, which the trial court granted on December 5, 2016. Thereafter, the trial court rendered judgment dismissing the appeal for lack of subject matter jurisdiction on the ground that it was untimely pursuant to the statute (§ 45a-186 [a]) that requires an appeal from a Probate Court order to be filed in the Superior Court within forty-five days of when the order was mailed to the parties. On the substitute plaintiff's appeal to this court, *held* that the trial court improperly dismissed the probate appeal for lack of subject matter jurisdiction on the ground that it was untimely; although § 45a-186 (a) requires an appeal from an order of the Probate Court denying an application to terminate a conservatorship to be filed within forty-five days of when the order was mailed to the parties, pursuant to the applicable statute (45a-186c [b]), the filing of the application for a waiver of fees on December 1, 2016, tolled the time in which to commence the probate appeal until the court rendered judgment on the fee waiver application on December 5, 2016, which extended the time within which to file the appeal to December 9, 2016, the date on which M timely filed the probate appeal with the Superior Court.

Argued January 28–officially released May 14, 2019

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defendant's claim that there was insufficient evidence of "serious physical injury."

Procedural History

Appeal from the orders of the Probate Court for the district of Hamden-Bethany denying the application to terminate the conservatorship and request for a waiver of fees filed by the plaintiff William P. Meyerjack as conservator of the estate of the decedent, brought to the Superior Court in the judicial district of New Haven, where the court, *Markle, J.*, granted the motion filed by Andrew S. Knott, administrator of the estate of the decedent, to be substituted as the plaintiff; thereafter, the matter was tried to the court; judgment dismissing the appeal, from which the substitute plaintiff appealed to this court. *Reversed*; *further proceedings*.

Andrew S. Knott, self-represented, with whom, on the brief, was *Robert J. Santoro*, for the appellant (substitute plaintiff).

Opinion

DiPENTIMA, C. J. The narrow question presented in this appeal asks us to determine whether the Superior Court improperly dismissed the probate appeal of the substitute plaintiff, Andrew S. Knott, administrator of the estate of Lucille S. Kirsch, as untimely. Specifically, the substitute plaintiff argues that his appeal was not untimely because an application for a waiver of fees (fee waiver) had been filed pursuant to General Statutes § 45a-186c,[1] which tolled the time limit set forth in Gen-

[1] General Statutes § 45a-186c (b) provides in relevant part: "If the appellant claims that such appellant cannot pay the costs of an appeal taken under section 45a-186, the appellant shall, within the time permitted for filing the appeal, file with the clerk of the court to which the appeal is to be taken an application for waiver of payment of such costs, including the requirement of bond, if any. . . . The filing of the application for the waiver of such costs shall toll the time limits for the filing of an appeal until such time as a judgment on such application is rendered. . . ."

eral Statutes § 45a-186 (a).[2] We agree with the substitute plaintiff and, therefore, reverse the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. On June 30, 2010, William P. Meyerjack was appointed conservator of the estate of Lucille S. Kirsch. On October 14, 2016, pursuant to General Statutes § 45a-660 (a) (2)[3] and § 33.17 of the Probate Court Rules,[4] William P. Meyerjack, conservator of the estate of Lucille S. Kirsch (Meyerjack),[5] filed an application to terminate the conservatorship of the estate of Lucille S. Kirsch and waive the requirement of a final financial account (application to terminate the conservatorship) with the Probate Court. On

[2] General Statutes § 45a-186 (a) provides in relevant part: "[A]ny person aggrieved by any order, denial or decree of a Probate Court in any matter, unless otherwise specially provided by law, may, not later than forty-five days after the mailing of an order, denial or decree for a matter heard under any provision of section 45a-593, 45a-594, 45a-595 or 45a-597, sections 45a-644 to 45a-677, inclusive, or sections 45a-690 to 45a-705, inclusive . . . appeal therefrom to the Superior Court. Such an appeal shall be commenced by filing a complaint in the superior court in the judicial district in which such Probate Court is located, or, if the Probate Court is located in a probate district that is in more than one judicial district, by filing a complaint in a superior court that is located in a judicial district in which any portion of the probate district is located . . . ."

[3] General Statutes § 45a-660 (a) (2) provides in relevant part: "If the court finds upon hearing and after notice which the court prescribes that a conserved person has no assets of any kind remaining except for that amount allowed by subsection (c) of section 17b-80, the court may order that the conservatorship of the estate be terminated. . . ."

[4] Section 33.17 (a) of the Probate Court Rules provides in relevant part: "A conservator of the estate may petition the court to terminate the conservatorship of the estate and waive the requirement of a final financial report or account if the Department of Social Services has determined that the person under conservatorship is eligible for Medicaid under Title 19 of the Social Security Act. . . ."

[5] Although Meyerjack is designated as a defendant, along with several other parties who did not appear, he was in fact the original plaintiff in this probate appeal. His status was changed in the court's docket at some point during those proceedings. Accordingly, as his interests are not adverse to those of the substitute plaintiff, we do not refer to him as the defendant.

the same date, Meyerjack filed a request for a waiver of fees. Meyerjack's application to terminate the conservatorship and request for a waiver of fees were denied by the Probate Court, and notice of those decisions was mailed on October 20, 2016.

On December 1, 2016, prior to filing his appeal with the Superior Court pursuant to § 45a-186 (a), Meyerjack filed a fee waiver. The fee waiver was granted by the Superior Court on December 5, 2016, and the complaint[6] was filed on December 9, 2016. Shortly thereafter, while his appeal was pending in the Superior Court, Meyerjack filed a motion to cite in Lucille S. Kirsch, the conservatee, as a new party to the appeal. Although the Superior Court appears not to have acted on Meyerjack's motion, Kirsch filed an appearance on December 13, 2016, and, on December 21, 2016, filed an amended complaint[7] and amended writ of summons. At some point, following these multiple filings, Kirsch was added to the case caption as the designated plaintiff. On September 30, 2017, Kirsch died, and she was replaced with the substitute plaintiff on February 27, 2018.

Following oral argument on April 3, 2018, the Superior Court sua sponte dismissed the substitute plaintiff's appeal as untimely. In its order, dated July 25, 2018, the court found that the appeal was filed on December 9, 2016, which was more than forty-five days after the Probate Court mailed notice of its denials of Meyerjack's application to terminate the conservatorship and request for a waiver of fees. Accordingly, because the appeal was not filed within the deadline set forth in § 45a-186 (a), the court concluded that it lacked subject

[6] Meyerjack's original complaint alleged, inter alia, that the Probate Court violated his due process rights when it denied his application to terminate the conservatorship and request for a waiver of fees without providing him notice and a hearing.

[7] The amended complaint alleges the same reasons for appeal and seeks the same relief as the original complaint.

matter jurisdiction over the substitute plaintiff's appeal. The substitute plaintiff now appeals that decision to this court.

On appeal, the substitute plaintiff claims that the Superior Court improperly dismissed his appeal as untimely because the filing of the fee waiver tolled the time limit set forth in § 45a-186 (a).[8] We agree with the substitute plaintiff and, accordingly, reverse the judgment of the trial court dismissing his appeal as untimely.

[8] During oral argument to this court, the substitute plaintiff requested that, in resolving the merits of this appeal, we also address the legal effect that a trial court's decision to grant a fee waiver has on the commencement of a probate appeal. Pursuant to § 45a-186 (a), any person aggrieved by a decree or denial from a Probate Court may appeal to the Superior Court by filing a copy of the complaint in the judicial district in which the Probate Court is located. The substitute plaintiff contends that this service procedure fails to accommodate appeals in which a party seeks a fee waiver because, in those cases, the complaint cannot be filed until the fee waiver is granted. Accordingly, because the fee waiver must include a copy of the complaint and all other documents necessary to commencing the probate appeal, the substitute plaintiff proposes that we should deem an appeal filed for the purpose of § 45a-186 (a) once a fee waiver is granted. We do not agree.

Contrary to the substitute plaintiff's claim, our review of the relevant law reveals that there is no requirement that a party include a copy of his complaint when seeking a fee waiver pursuant to § 45a-186c. Rather, § 45a-186c requires a party to comply with the provisions set forth in Practice Book § 8-2, which in turn states that "[t]he application shall set forth the facts which are the basis of the claim for waiver and for payment by the state of any costs of service of process; a statement of the applicant's current income, expenses, assets and liabilities; pertinent records of employment, gross earnings, gross wages and all other income; and the specific fees and costs of service of process sought to be waived or paid by the state and the amount of each. The application and any representations shall be supported by an affidavit of the applicant to the truth of the facts recited." Practice Book § 8-2 (a). Accordingly, if this court were to deem a probate appeal commenced once a fee waiver is granted, a party could arguably commence an appeal without satisfying the procedural requirements in § 45a-186 (a). The role of the courts is not to rewrite statutes or graft exceptions onto the language existing therein; that is a function of the legislature. See *Asia A.* v. *Geoffrey M.*, 182 Conn. App. 22, 33, 188 A.3d 762 (2018). We, therefore, decline to hold that when a party files a fee waiver in a probate appeal, the appeal should be deemed commenced on the date the fee waiver is granted.

We begin our analysis of the substitute plaintiff's claim by setting forth our relevant standard of review. "Our Supreme Court has long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Arriaga* v. *Commissioner of Correction*, 120 Conn. App. 258, 261–62, 990 A.2d 910 (2010), appeal dismissed, 303 Conn. 698, 36 A.3d 224 (2012).

"[W]e are . . . mindful of the familiar principle that a court [that] exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation. . . . Our courts of probate have a limited jurisdiction and can exercise only such powers as are conferred on them by statute. . . . They have jurisdiction only when the facts exist on which the legislature has conditioned the exercise of their power. . . . The Superior Court, in turn, in passing on an appeal, acts as a court of probate with the same powers and subject to the same limitations. . . . It is also well established that [t]he right to appeal from a decree of the Probate Court is purely statutory and the rights fixed by statute for taking and prosecuting the appeal must be met. . . . Thus, only [w]hen the right to appeal . . . exists and the right has been duly exercised in the manner prescribed by law [does] the Superior Court [have] full jurisdiction over

[it]. . . .'' (Internal quotation marks omitted.) *Burnell* v. *Chorches*, 173 Conn. App. 788, 793, 164 A.3d 806 (2017). Failure to comply with the relevant time limit set forth in § 45a-186 (a) ''deprives the Superior Court of subject matter jurisdiction and renders such an untimely appeal subject to dismissal.'' *Corneroli* v. *D'Amico*, 116 Conn. App. 59, 67, 975 A.2d 107, cert. denied, 293 Conn. 928, 980 A.2d 909 (2009).

Applying the foregoing principles to the present appeal, we conclude that the court improperly dismissed the substitute plaintiff's appeal as untimely. The time limit to appeal from a probate court's denial of an application to terminate a conservatorship brought pursuant to § 45a-660 is forty-five days from the date that notice of the denial is mailed. See General Statutes § 45a-186 (a). When an appellant files a fee waiver pursuant to § 45a-186c, the time limit set forth in § 45a-186 (a) is tolled until a judgment on the fee waiver is rendered. See General Statutes § 45a-186c (b). In the present matter, the trial court found that the notice was mailed by the Probate Court on October 20, 2016, and determined that the deadline to appeal expired on December 4, 2016. The court apparently did not consider the fact that prior to filing this appeal, Meyerjack filed a fee waiver on December 1, 2016, which was not granted until December 5, 2016. Pursuant to § 45a-186c, the time limit set forth in § 45a-186 (a) was tolled during this five day interim, and, Meyerjack had until December 9, 2016, in which to file his appeal. Therefore, because the time limit in which to file this appeal was tolled while Meyerjack's fee waiver was pending, the court wrongly concluded that this appeal was untimely and improperly dismissed the case for lack of subject matter jurisdiction.

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

In this opinion the other judges concurred.