STATE OF CONNECTICUT *v.* JOSEPH B.*
(AC 40847)

Alvord, Moll and Bear, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree, sexual assault in the third degree, and risk of injury to a child in connection with his alleged sexual abuse of the minor victim, the defendant appealed. On appeal, he claimed, inter alia, that the trial court erred by denying his motion for a bill of particulars because the substitute information was overly broad and vague, which deprived him of notice of the nature of the charges brought against him and his right to present a defense. *Held:*

1. The trial court did not abuse its discretion in denying the defendant's motion for a bill of particulars: the defendant was not prejudiced by the court's denial of his motion, as he had access to a copy of the victim's forensic interview, which contained statements of the victim that he claimed gave the state knowledge of more specific dates, the victim testified as to the specific instances at trial as well, and the defendant did not attempt to offer an alibi with regard to the specific instances identified by the victim or request a continuance to formulate an alibi; moreover, the defendant failed to demonstrate how he would have prepared his defense differently had the state charged him in accordance with the victim's statements made during her forensic interview.

2. The defendant could not prevail in his claim that the trial court improperly admitted evidence that the victim tested positive for a certain sexually transmitted disease: the fact that the victim was diagnosed with a sexually transmitted disease was relevant and probative as to the victim's having had sexual contact, and given the victim's testimony that the defendant had sexual contact with her when he assaulted her through penile-vaginal penetration and her medical records, which provided that she was not sexually active, her diagnosis logically tended to prove that she had sexual contact with an individual, and the evidence that she had the requisite contact only with the defendant made it more likely that the defendant engaged in the conduct with which he was charged; moreover, the evidence pertaining to the victim's diagnosis was not unduly prejudicial, as the victim testified that the defendant sexually assaulted her before the jury heard testimony regarding her diagnosis, the testimony of the victim's mother regarding the victim's change in

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

behavior corroborated the victim's report of the assault, the evidence pertaining to the victim's diagnosis was consistent with other evidence presented by the state, and the trial court gave the jury a specific instruction, which it was presumed to have followed, not to consider the evidence of the victim's diagnosis for the purpose of determining whether it was the defendant who infected the victim.

3. The trial court did not abuse its discretion in denying the defendant's motion to preclude evidence of certain text messages from the defendant to the victim's mother:

a. The defendant could not prevail in his claim that the text messages should have been precluded as untimely because the prosecutor knew or should have known of their existence prior to their disclosure at the start of trial; the prosecutor complied with discovery requirements by timely disclosing the evidence to the trial court and defense counsel on the same morning that the victim's mother informed her of the messages, and although the defendant relied on certain reports in support of his claim that the prosecutor should have been aware of the text messages, those reports did not specify the content of any text messages or contain information that there was text message evidence of the defendant's offerings of gifts or money.

b. The defendant's claim that the evidence of text messages should have been precluded as a sanction under the applicable rule of practice (§ 40-5) was unavailing; because the prosecutor timely disclosed evidence of the text messages, which the defendant conceded that he sent to the victim's mother, the prosecutor complied with discovery requirements and, therefore, it was unnecessary for the trial court to impose the sanctions provided by § 40-5.

Argued September 26, 2018—officially released January 15, 2019

Procedural History

Substitute information charging the defendant with two counts of the crime of sexual assault in the first degree, two counts of the crime of sexual assault in the third degree, and six counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kavanewsky, J*; verdict and judgment of guilty of one count of sexual assault in the first degree, one count of sexual assault in the third degree, and four counts of risk of injury to a child, from which the defendant appealed. *Affirmed.*

James B. Streeto, senior assistant public defender, with whom was *Zachary Peck*, former certified legal intern, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Ann P. Lawlor*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Joseph B., appeals from the judgment of conviction, rendered following a jury trial, of one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), one count of sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (2), two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), and two counts of risk of injury to a child in violation of § 53-21 (a) (2).[1] On appeal, the defendant claims that the trial court abused its discretion when it (1) denied his motion for a bill of particulars, (2) admitted evidence that the victim was diagnosed with trichomonas vaginalis, and (3) admitted evidence of text messages that were disclosed on the first day of trial. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. From 2010 to 2013, the defendant lived with his wife in the third floor apartment of a multi-family home on Jefferson Street in Bridgeport. The victim, A, who is the defendant's biological granddaughter, was five years old in 2010 and lived with her mother and her brother in the first floor apartment at that same address. A went upstairs to the defendant's apartment almost every day after she got home from school. On more than one occasion, when the defendant's wife was not

[1] The defendant was acquitted of one count of sexual assault in the first degree, one count of sexual assault in the third degree, and two counts of risk of injury to a child. See footnote 7 of this opinion.

home, the defendant touched A's chest, vagina, and lower back while A's clothes were off. A specifically remembered one instance in which she was lying on the defendant's bed and he was going to touch her when they heard her cousin coming up the stairs. In addition, on a different occasion, the defendant asked A if she could bring over her friend, who lived across the street, so that he could do the same to her friend.

In February, 2013, the defendant moved to Birch Drive in Stratford. A's mother brought A to the defendant's apartment two weekends per month, during which A stayed overnight, in order for the defendant and the defendant's wife to watch A while A's mother worked. While the defendant lived at this address, he repeatedly engaged in penile-vaginal and penile-anal intercourse with A. Some instances of penetration occurred during the summer between A's third and fourth grade school years. During that summer, the defendant also asked A to place her hand on his penis a few times, and although she refused at first, she eventually complied. When A started fourth grade, her behavior changed at school, and she became physically aggressive on two different occasions, which was out of character for A. A also experienced three incidents of bedwetting.[2]

In November, 2014, when A was nine, she was watching television at the defendant's apartment when she heard the defendant call her name. She went into his room, where he told her to take off her clothes and to lie on the bed. The defendant then engaged in penile-vaginal intercourse with A.[3] The defendant told A that

[2] Danielle Williams, a licensed professional counselor, testified at trial as to the symptoms experienced by children who have been sexually abused. She explained that children sometimes exhibit changes in behavior, including aggressive behavior, as well as bedwetting and difficulty sleeping.

[3] A testified that the defendant used "[h]is private area and his hands" to touch her and that his private area "entered . . . into [hers]." She described her "private area" as "[t]he place where [she uses] the bathroom" in "[t]he front of [her] body."

if she told anyone, he would go to jail, and asked, "do you want your grandfather to go to jail[?]"

A few weeks later, A wrote a note to her mother disclosing that the defendant had been sexually assaulting her.[4] A's mother immediately contacted the police, as well as A's doctor. On December 2, 2014, A was examined by Sarah Donahue, a nurse practitioner who worked at A's doctor's office. A told Donahue that the defendant sexually assaulted her through penile-vaginal penetration in excess of twenty-five times. During the physical examination, Donahue did not observe any signs of trauma,[5] but she immediately referred A to the Yale Child Sexual Abuse Clinic at Yale-New Haven Hospital.

At the Yale Child Sexual Abuse Clinic, A was examined by Rebecca Moles, a pediatrician specializing in issues of child abuse. Dr. Moles reported that A had "normal appearing genital anatomy" and that the anatomy, including her hymen and the tissue surrounding the outside of the vagina, appeared "normally formed."[6] During the examination, Dr. Moles also observed that A had vaginal discharge, which she recognized to be a symptom of trichomonas vaginalis, a sexually transmitted disease. After testing A, Dr. Moles confirmed that A was infected with trichomonas vaginalis.

[4] Immediately before A gave her mother this note, A's mother "had the conversation about perverts. And [she] explained that perverts come in shapes of your family members, friends, and that [A] needs to tell [her] if anything like that has ever happened to [A]." In the note, A wrote that the defendant "has been doing it to [her]."

[5] At trial, Donahue explained that, even though she "did not find anything out of the ordinary" during the examination, the examination did not confirm or refute that anything had happened as far as the report of touching and penetration.

[6] Despite Dr. Moles' report that A had "normal appearing genital anatomy," Dr. Moles testified at trial that, with "suspected victims of sexual abuse [who] have had penetration into the vagina, in the overwhelming majority of cases, 95 percent of the time or more, there is a normal examination . . . there's no medical evidence . . . of loss of tissue or injury."

In the beginning of December, 2014, after A's mother reported the sexual abuse to the police, the defendant sent several text messages to A's mother. In these text messages, the defendant told A's mother that he had money for her, A, and A's brother. The defendant also sent a text message to A's mother stating that he would buy her a gift if she would accept it.

On December 10, 2014, Detective William Perillo of the Stratford Police Department interviewed the defendant at the defendant's home. When Detective Perillo began to question the defendant, he asked whether Detective Perillo had any DNA evidence. In addition, he told Detective Perillo that A was not a liar, but that he was not involved in what they were talking about. On January 2, 2015, Detective Perillo arrested the defendant.

A jury trial followed, at the conclusion of which the defendant was found guilty of one count of sexual assault in the first degree, one count of sexual assault in the third degree, and four counts of risk of injury to a child.[7] The court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of eighteen years imprisonment and lifetime sex offender registration. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant claims that the trial court abused its discretion when it denied his motion for a bill of particulars. Specifically, the defendant asserts that the substitute information was overly broad and vague, depriving

[7] The defendant was also charged with additional counts of sexual assault in the first degree, sexual assault in the third degree, and two counts of risk of injury to a child. The facts underlying the sexual assault counts were alleged to have occurred during 2010 to 2013 while the defendant lived at Jefferson Street in Bridgeport, and the facts underlying the risk of injury counts were alleged to have occurred in 2010 when the defendant lived at Holly Street in Bridgeport, before he moved to Jefferson Street. The jury acquitted the defendant of all of the offenses alleged to have occurred at

him of notice of the nature of the charges brought against him and his right to present a defense. He argues that the state should have narrowed the time periods in the information using A's forensic interview. He claims the court's denial of his motion for a bill of particulars prejudiced his defense. We disagree that the denial of the motion prejudiced the defendant.

The following additional facts and procedural history are relevant to our resolution of this claim. On December 5, 2014, A underwent a forensic interview at the Family Justice Center in Bridgeport.[8] During the interview, A described some of the incidents as having occurred (1) when she "just turned six," (2) "at the end of the [previous] school year," (3) "during [her] summer break between third and fourth grade," and (4) "the second Sunday of November of 2014."[9]

Holly Street. The jury also acquitted the defendant of both sexual assault offenses alleged to have occurred at Jefferson Street.

[8] A video recording of A's forensic interview was marked for identification the state's exhibit 7, but was not admitted into evidence.

[9] The defendant argues that the state should have narrowed the time periods in the information using these statements. Specifically, the defendant claims that the state could have narrowed the time frame for the conduct when A "just turned six," to reflect his granddaughter's actual date of birth and that A's report of the incidents "during her summer break between third and fourth grade" could have been narrowed to a period of three months rather than being contained within a two year time frame. The defendant also claims that, given A's report of the last incident being on the second Sunday in November, 2014, the state could have narrowed the time frame to "November of 2014" rather than "on or about 2013 through 2014." The defendant claims that A's recollection of the incident that occurred "at the end of the [previous] school year" should have led to a more specific date through follow-up questions by the state.

Because we find that the defendant's failure to demonstrate prejudice is dispositive of this claim, we decline to determine whether the state should have included more specific time frames in its charges based on these statements or whether the trial court abused its discretion in denying the defendant's motion for a bill of particulars. See *State* v. *Madagoski*, 59 Conn. App. 394, 404, 757 A.2d 47 (2000), cert. denied, 255 Conn. 924, 767 A.2d 100 (2001).

The state filed a long form information on February 4, 2015, charging the defendant with sexual assault in the first degree, sexual assault in the third degree, and risk of injury to a child, arising out of conduct that occurred in June, 2012, at Birch Drive in Stratford.

On April 12, 2016, the state filed a ten count substitute information. The information charged the defendant with sexual assault in the first degree, sexual assault in the third degree, and two different counts of risk of injury to a child for conduct that occurred "on diverse dates from approximately 2010 to 2012, at or near Jefferson Street" in Bridgeport. In addition, the substitute information charged the defendant with two different counts of risk of injury to a child for conduct that occurred "on diverse dates, from approximately 2010 to 2012, at or near Hollister Avenue"[10] in Bridgeport. The defendant was also charged with sexual assault in the first degree, sexual assault in the third degree, and two different counts of risk of injury to a child for conduct occurring "on diverse dates during 2013 and 2014, at or near . . . Birch Drive" in Stratford.

On April 18, 2016, the defendant filed a motion for a bill of particulars, requesting that the court order the state to include the date, time, particular location, and manner of the commission of each alleged count. In his motion, the defendant argued that (1) it was impossible to determine if the offenses charged in the substitute information stemmed from a minimum of three incidents or a maximum of ten incidents, (2) alleging "diverse dates" in each count "incorrectly allows the [s]tate to combine incidents from different dates to make up elements of the crime," and (3) "[e]ach count

[10] The state originally charged these offenses as having occurred at Hollister Avenue, rather than Holly Street. A mistakenly referred to the defendant's address as being at Hollister Avenue during her forensic interview. The state subsequently corrected the address to Holly Street in its operative substitute information.

has a time period of approximately [two] years during which time the [s]tate alleges each crime occurred." The defendant argued that the substitute information was insufficient to enable him to prepare a defense. The court scheduled a hearing on this motion for April 19, 2016.

On April 19, 2016, before the hearing on the motion for a bill of particulars, the state filed the operative substitute information. The first two counts of the ten count substitute information charged the defendant with risk of injury to a child for conduct that occurred "during 2010, at or near . . . Holly Street" in Bridgeport. Counts three through six charged the defendant with two different counts of risk of injury to a child, sexual assault in the first degree, and sexual assault in the third degree for conduct that occurred "on or about 2010 through 2013, at or near . . . Jefferson Street" in Bridgeport. Counts seven through ten charged the defendant with sexual assault in the first degree, two different counts of risk of injury to a child, and sexual assault in the third degree for conduct occurring "on or about 2013 through 2014, at or near . . . Birch Drive" in Stratford.

At the hearing, the defendant acknowledged that the state's substitute information filed earlier that day resolved some of his issues with the previous substitute information, particularly with the deletion of the "diverse dates" language from each count. The defendant maintained, however, that he still did not know the number of alleged incidents, which, he argued, "puts the defense at a disadvantage because the [s]tate can then basically form their closing argument and form their evidence to the pleadings in various ways." In addition, the defendant argued that the 2010 through 2013 time frame, alleged in counts seven through ten, made it difficult to "fashion any kind of alibi defense or recollection defense in terms of factual inconsistencies

that [the defendant] could provide pertaining to those incidents . . . .'' At the conclusion of the hearing, the court determined that the substitute information filed that day was legally sufficient and denied the defendant's motion for a bill of particulars. Specifically, the court concluded that the substitute information narrowed the time periods of the offenses and ''clearly track[ed]'' the defendant's residences where the offenses were alleged to have occurred. In addition, the court noted that the defendant had the benefit of the full disclosure to which he was entitled, including police reports and statements. Lastly, the court concluded that it did not know how A would testify and that her testimony might eliminate some of the defendant's concerns.

At trial, after the state presented its case, the defendant renewed his motion for a bill of particulars. He again argued that he did not know how many incidents were alleged to have occurred based on the state's charges. In response, the state argued that A ''testified very clearly about multiple incidents of sexual abuse at the hands of her grandfather.'' The court denied the defendant's motion.

The defendant's wife subsequently testified on the defendant's behalf. She initially testified that A was never left at home alone with the defendant. She later testified, however, that she had been away from the home for about two months in 2014. In addition, the defendant's wife stated that there were a few days during the summer of 2014, in between A's third and fourth grade school years, when the defendant watched A by himself. The defendant's wife also testified that A was left home alone with the defendant on the morning of November 2, 2014, when she went to church without A.[11]

[11] At trial, A testified that the defendant sexually abused her when the defendant's wife was at church on Sundays.

The defendant took the witness stand and denied that he touched and sexually assaulted A. The defendant testified that he was unemployed from 2010 to 2013 and spent his time playing pool and gambling at a club in Bridgeport. He explained that he would "miss two, three days some week[s]" because he sometimes "wouldn't go on a Tuesday or some days [he] wouldn't go on a Wednesday, but every Thursday, Friday and Saturday, [he] would be there." In 2013, the defendant became a bookkeeper for the club. He testified that he worked every day of the week from 8 a.m. to 10 p.m. The defendant also testified, however, that he did not work on Sundays during the summer of 2014, which was the summer in between A's third and fourth grade school years. In addition, the defendant explained that, although A went to church with his wife on most Sundays, there were occasions that A stayed home with the defendant by himself. He specifically recalled that there was a Sunday in the beginning of November, 2014, the last time that A went to his apartment, when his wife went to church and A stayed at the apartment alone with the defendant. When asked whether he touched A in any way on that Sunday, the defendant responded, "No, I did not. I never did really have any problem. We had a good relationship."

In its final charge to the jury, the court instructed: "[T]here may have been testimony from [A] that the defendant committed these crimes against her more than once during the time periods stated in these counts, although she could not specify exact dates. The [s]tate is not required to prove the exact date of any offense so long as it proves beyond a reasonable doubt that a crime, that is, all the elements of the crime, did occur at least once on the same single occasion during the time period covered in a particular count."

We begin by setting forth the standard of review and the legal principles that guide our analysis of this claim.

"[T]he denial of a motion for a bill of particulars is within the sound discretion of the trial court and will be overturned only upon a clear showing of prejudice to the defendant. . . . A defendant can gain nothing from [the claim that the pleadings are insufficient] without showing that he was in fact prejudiced in his defense on the merits and that substantial injustice was done to him because of the language of the information." (Citations omitted; internal quotation marks omitted.) *State* v. *McDougal*, 241 Conn. 502, 521–22, 699 A.2d 872 (1997); see also *State* v. *Spigarolo*, 210 Conn. 359, 385, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989). "The defendant has the burden of showing why the additional particulars were necessary to the preparation of his defense." (Internal quotation marks omitted.) *State* v. *Vumback*, 263 Conn. 215, 221, 819 A.2d 250 (2003).

"The sixth amendment to the United States constitution and article first, § 8, of the Connecticut constitution guarantee a criminal defendant the right to be informed of the nature and cause of the charges against him with sufficient precision to enable him to meet them at trial. . . . [That] the offense should be described with sufficient definiteness and particularity to apprise the accused of the nature of the charge so he can prepare to meet it at his trial . . . are principles of constitutional law [that] are inveterate and sacrosanct." (Citations omitted; internal quotation marks omitted.) *State* v. *Laracuente*, 205 Conn. 515, 518, 534 A.2d 882 (1987), cert. denied, 485 U.S. 1036, 108 S. Ct. 1598, 99 L. Ed. 2d 913 (1988). Moreover, "[t]he state has a duty to inform a defendant, within reasonable limits, of the time when the offense charged was alleged to have been committed. The state does not have a duty, however, to disclose information which the state does not have. Neither the sixth amendment of the United States constitution nor article first, § 8, of the Connecticut constitution requires that the state choose a particular

moment as the time of an offense when the best information available to the state is imprecise." *State* v. *Stepney*, 191 Conn. 233, 242, 464 A.2d 758 (1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1455, 79 L. Ed. 2d 772 (1984).

The defendant claims that he was prejudiced by the court's denial of his motion for a bill of particulars. It is undisputed, however, that, at the time of the hearing on the motion, the defendant had access to a copy of A's forensic interview. "[T]his court has on numerous occasions adverted to sources extrinsic to the specific count or information to determine whether the defendant was sufficiently apprised of the offense charged. See, e.g., *State* v. *Frazier*, [194 Conn. 233, 237, 478 A.2d 1013 (1984)] (defendant sufficiently apprised where he had access to state's file, police reports and demonstrative evidence); *State* v. *Beaulieu*, 164 Conn. 620, 626, 325 A.2d 263 (1973) (information supplied by another count, state's attorney and court); see also *State* v. *Moffett*, 38 Conn. Supp. 301, 310, 444 A.2d 239 (1981) (defendant's access to prosecution file)." *State* v. *Spigarolo*, supra, 210 Conn. 384.

In *State* v. *Vumback*, supra, 263 Conn. 216–17, our Supreme Court concluded that the defendant had failed to demonstrate prejudice from the trial court's denial of his motion for a bill of particulars. The defendant was charged with repeatedly sexually abusing and attempting to sexually abuse a child victim on "[diverse] dates between approximately June, 1990 and July, 1996 . . . ." (Internal quotation marks omitted.) Id., 219. Although the operative information alleged that the offenses occurred over a six year period, the state had previously filed four informations alleging more specific time frames, such as between July 1 and July 10, 1996, between July 5 and July 10, 1996, and between July 5 and July 15, 1996. Id. In addition, the victim had reported that two instances of sexual abuse occurred two weeks

before, and two days before, her physician appointments. Id., 224. The victim testified at trial that no one ever had asked her to pinpoint the specific dates on which the sexual assaults by the defendant occurred. Id. For these reasons, the court concluded that the state did not use its best efforts to provide a more narrow time frame to the defendant. Id., 224–25. Accordingly, the court determined that the trial court abused its discretion by denying the defendant's motion for a bill of particulars. Id., 227.

The court in *Vumback* concluded, however, that although the trial court abused its discretion by denying the defendant's motion for a bill of particulars, the defendant had failed to demonstrate prejudice from the court's decision. Id. In reaching its conclusion, the court found that the defendant did not demonstrate that the more specific dates that the state possessed were necessary to his defense. Id., 228–29. Specifically, the court noted that, although the defendant introduced general alibi evidence that he was often working or taking classes, after the victim testified about two specific dates of abuse, the defendant did not attempt to offer an alibi with regard to them or request a continuance to formulate an alibi. Id., 229–30. Most significantly, the defendant was aware of the state's prior informations and had access to the state's file before trial, which included the reports containing the dates he claimed were missing from the information. Id., 228–29.

Although we recognize that the state could have provided a more specific time frame with respect to the final incident that occurred in November, 2014, we need not decide whether the court abused its discretion in failing to grant the defendant's motion on that basis. Even if we assume that the court abused its discretion, the defendant in the present case failed to demonstrate prejudice for the same reasons as the defendant in *Vumback*. Just as the defendant in *Vumback* had access

to the prior informations and reports, the defendant in the present case had a recording of A's forensic interview. The forensic interview contained A's statements that the defendant claims gave the state knowledge of more specific dates. A testified as to these specific instances at trial as well. Yet, like the defendant in *Vumback*, the defendant here did not attempt to offer an alibi with regard to the specific instances identified by A or request a continuance to formulate an alibi. For example, with regard to the penile-vaginal intercourse in November, 2014, the defendant did not present alibi evidence. Instead, the defendant admitted that he had been alone with A while his wife went to church but denied the allegations of sexual abuse. In addition, with regard to the summer between A's third and fourth grade school years, the defendant offered general alibi evidence that he worked "every day," but he admitted that he did not work on Sundays. This evidence is consistent with A's testimony that the defendant sexually assaulted her when the defendant's wife was at church and A was left alone with the defendant. The defendant did not attempt to offer alibi evidence for a single Sunday of that summer.

Furthermore, the defendant in the present case failed to demonstrate how he would have prepared his defense differently had the state charged him in accordance with A's statements during her forensic interview. "A defendant can gain nothing from [the claim that the pleadings are insufficient] without showing that he was in fact prejudiced in his defense on the merits and that substantial injustice was done to him because of the language of the information. . . . To establish prejudice, the defendant must show that the information was necessary to his defense, and not merely that the preparation of his defense was made more burdensome or difficult by the failure to provide the information." (Internal quotation marks omitted.) *State* v.

Vlahos, 138 Conn. App. 379, 396–97, 51 A.3d 1173 (2012), cert. denied, 308 Conn. 913, 61 A.3d 1101 (2013). Under the circumstances, the defendant has failed to establish that the denial of his motion for a bill of particulars prejudiced his defense on the merits.

II

The defendant next claims that the trial court improperly admitted evidence that A tested positive for trichomonas vaginalis. Specifically, the defendant argues that the evidence was irrelevant, or, alternatively, that the evidence was unfairly prejudicial. We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. In November, 2014, A complained to her mother of vaginal itching. During Dr. Moles' examination of A, Dr. Moles administered tests for sexually transmitted diseases such as gonorrhea, chlamydia, HIV, syphilis, and hepatitis. Upon observing irritation, tenderness, and discharge during her examination of A's vagina, Dr. Moles also tested A for trichomonas vaginalis. The tests came back positive for trichomonas vaginalis. The defendant was never tested to determine whether he had trichomonas.

On April 20, 2016, the defendant filed a motion in limine, requesting the court to exclude any testimony and evidence regarding A's medical diagnosis of trichomonas vaginalis. In his motion, the defendant argued that evidence of the sexually transmitted disease was not relevant and that "any value that exists is outweighed by the potential prejudice, confusion and litigation of events that are unrelated to the information as charged."

The court heard arguments regarding the defendant's motion in limine on April 26, 2016, the second day of trial. The defendant argued that there was "no evidence . . . to show that [the defendant] was the individual

who was responsible for A contracting this sexually transmitted disease," and that, therefore, "the link in making that relevant is missing . . . ." In addition, he argued that the evidence was prejudicial.

The court denied the defendant's motion in limine. The court concluded that evidence of A's medical diagnosis of trichomonas vaginalis was "highly probative" and "very relevant to establish that the child had sexual contact . . . or was engaged in sexual penetration with another person. And that's part of the state's burden of proof, to prove that that fact did occur." The court further explained that it "[a]greed that there's nothing about [the defendant] in terms of absolute linkage there," but that the jury could make inferences from the testimony, because A testified that it was the defendant who sexually abused her. The court also indicated that it would give a limiting instruction regarding the medical diagnosis of A's trichomonas vaginalis to inform the jury that the evidence was not being admitted to prove that the defendant gave A the disease, and that it, as the finder of fact, could make reasonable inferences from the medical finding and from A's testimony.

Dr. Moles subsequently testified about A's diagnosis of trichomonas vaginalis. She stated that "trichomonas is a sexually transmitted infection . . . that is transmitted sexually" and that trichomonas vaginalis is most commonly transmitted through penile-vaginal penetration. She testified that there have been reports about trichomonas vaginalis being transmitted when mothers give birth to children; however, she explained that even if a child is initially infected in such a manner, the infection clears within the first year of the child's life.[12] She further testified that trichomonas vaginalis is uncommon in children, "so uncommon . . . that it is

[12] A was five years old at the time the years of sexual abuse by her grandfather started.

listed in the guidelines from the American Academy of Pediatrics . . . as a reportable condition. So, meaning, if it's diagnosed in a child, it is recommended . . . that the pediatrician then report concerns of sexual abuse based on that infection, report those concerns to Department of Children [and] Families, to police, depending on the jurisdiction."

Immediately following Dr. Moles' testimony, the court gave the following limiting instruction to the jury: "[T]he trichomonas diagnosis . . . is being admitted only for the purpose—if you find it credible, only for the purpose of your consideration of whether or not [A] had sexual contact with another person. It's not being admitted for the purpose of the conclusory determination of whether or not it was [the defendant] who was responsible for the trichomonas. I'm admitting it only for the purpose of your consideration of whether or not the child had sexual contact, period. And you can draw any reasonable inferences [from] that as you would . . . ." In addition, in its final charge to the jury, the court instructed: "I said that evidence that [A] was diagnosed with a sexually transmitted disease was admitted for your consideration as to whether [A] had sexual contact with another person. That evidence itself was not admitted to establish that it showed the identity of the person who infected [A]."

We begin by setting forth the standard of review and legal principles that guide our analysis of this claim. It is well established that "[t]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . Moreover, evidentiary rulings will be overturned on appeal only where there was an

abuse of discretion and a showing by the defendant of substantial prejudice or injustice." (Internal quotation marks omitted.) *State* v. *Anwar S.*, 141 Conn. App. 355, 374–75, 61 A.3d 1129, cert. denied, 308 Conn. 936, 66 A.3d 499 (2013).

This claim is controlled by this court's decision in *Anwar S.*[13] In *Anwar S.*, a child victim of sexual assault was diagnosed with chlamydia. Id., 359. The defendant claimed that evidence of the victim's chlamydia diagnosis was irrelevant because no evidence was offered to connect him to the transmission of the disease. Id., 374. This court held that the evidence was relevant and probative as to the victim's having had sexual contact. Id., 375. This court determined that whether the defendant sexually assaulted the victim was a disputed, material issue of fact. Id. It further explained that expert testimony at trial provided that chlamydia is most commonly transmitted through sexual contact, and that the victim testified that the defendant had sexual contact

[13] The defendant argues that this court should overrule *State* v. *Anwar S.*, supra, 141 Conn. App. 355. It is this court's policy that we cannot overrule a decision made by another panel of this court absent en banc consideration. *In re Zoey H.*, 183 Conn. App. 327, 340 n.5, 192 A.3d 522, cert. denied, 330 Conn. 906, 192 A.3d 425 (2018). Although the defendant filed a motion for en banc consideration of this appeal, it was denied on April 18, 2018. Therefore, we decline the defendant's request to revisit our precedent.

In addition, we note that the defendant failed to alert the court to the subsequent procedural history of *Anwar S.* His brief omitted reference to our Supreme Court's denial of certification. When asked at oral argument, the defendant stated that the Manual of Style for the Connecticut Courts is silent on the issue, and, therefore, he follows the Bluebook system of citation. He then stated that the Bluebook system of citation permits a litigant to omit denials of certiorari for decisions that are over two years old. The defendant is incorrect. First, our Manual of Style for the Connecticut Courts requires that the subsequent history of an opinion be provided in a case's initial citation. In addition, Bluebook Rule 10.7 permits authors to "omit denials of certiorari or denials of similar discretionary appeals, unless the decision is less than two years old *or the denial is particularly relevant.*" (Emphasis added.) In a claim requesting the court to revisit its precedent, a prior denial of certification by our Supreme Court is indisputably particularly relevant and, therefore, should have been included in the citation.

with her when he assaulted her. Id. Therefore, this court concluded that the victim's diagnosis "logically tended to prove that she had sexual contact with an individual . . . [and] evidence that she had the requisite contact only with the defendant made it more likely that the defendant engaged in the conduct with which he was charged." Id. Our Supreme Court declined to review this court's decision.

Here, A, like the victim in *Anwar S.*, was diagnosed with a sexually transmitted disease.[14] This evidence was relevant and probative as to A's having had sexual contact. See id.; see also Conn. Code Evid. § 4-1. "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue." (Internal quotation marks omitted.) *Raybeck* v. *Danbury Orthopedic Associates, P.C.*, 72 Conn. App. 359, 378, 805 A.2d 130 (2002). Here, like in *Anwar S.*, whether the defendant sexually assaulted A was a disputed, material issue of fact. A was diagnosed with trichomonas vaginalis, which, according to Dr. Moles' testimony, is

[14] In both *Anwar S.* and the present case, expert witnesses testified that the diseases were most commonly transmitted through sexual contact. The defendant attempts to distinguish his case from *Anwar S.* He argues that, "[u]nlike chlamydia, which is almost exclusively passed through sexual contact, [trichomonas vaginalis] has been shown to pass through nonsexual means, although uncommonly, rendering its relevance much lower." However, in *Anwar S.*, this court noted that chlamydia can be transmitted through nonsexual means as well. Yet, this court still determined that evidence of the diagnosis was relevant. This court acknowledged that the expert witness testified that "chlamydia can be contracted in utero as well as through sexual contact, but that [the victim's] infection was unlikely to have resulted from the birth process, as those infections are usually discovered within the first three years of the child's life and [the victim] was twelve years old at the time of her examination." *State* v. *Anwar S.*, supra, 141 Conn. App. 359 n.3. Similarly, in the present case, Dr. Moles addressed the possibility of transmitting trichomonas vaginalis through nonsexual means. She testified that there have been reports about trichomonas vaginalis being transmitted when mothers give birth to their children, but that even if a child is initially infected, the infection clears within the first year of the child's life. Therefore, we fail to discern any meaningful factual distinction between these cases.

transmitted most commonly through sexual contact. A testified that the defendant had sexual contact with her when he assaulted her through penile-vaginal penetration. Furthermore, A's medical records provided that she was not sexually active.[15] Like in *Anwar S.*, A's diagnosis logically tended to prove that she had sexual contact with an individual, and the evidence that she had the requisite contact only with the defendant made it more likely that the defendant engaged in the conduct with which he was charged.

The defendant alternatively asserts that evidence pertaining to A's trichomonas vaginalis diagnosis was unfairly prejudicial, as it had an adverse effect on him beyond tending to prove that A had sexual contact. See *State* v. *James G.*, 268 Conn. 382, 399, 844 A.2d 810 (2004) ("evidence is excluded as unduly prejudicial when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence" [internal quotation marks omitted]). Specifically, the defendant claims that the evidence "unduly aroused the emotions, hostility, and sympathy" of the jury by compelling it to speculate that the defendant infected A with trichomonas vaginalis. We are not persuaded.

This court addressed a similar claim in *Anwar S.* In *Anwar S.*, this court concluded that by the time the jury heard testimony regarding the victim's chlamydia diagnosis, the victim had already testified specifically that she was sexually assaulted by the defendant and, therefore, the evidence of chlamydia was not unduly prejudicial because it was consistent with other evidence presented by the state at trial. *State* v. *Anwar S.*, supra, 141 Conn. App. 376. Similarly, in the present case, A testified specifically that the defendant sexually assaulted her before the jury heard testimony regarding

[15] A reported that "no one else had ever touched her like this."

her trichomonas vaginalis diagnosis. See *State* v. *James G.*, supra, 268 Conn. 400 (evidence less likely to unduly arouse jurors' emotions when similar evidence has already been presented to jury). Moreover, A's mother's testimony regarding A's change in behavior corroborated A's report of the assault. Therefore, evidence pertaining to trichomonas vaginalis was consistent with other evidence presented by the state at trial, and we cannot conclude that its admission was unfairly prejudicial to the defendant.

In addition, the court specifically instructed the jury not to consider evidence of the trichomonas vaginalis diagnosis for the purpose of determining whether it was the defendant who was responsible for infecting A. Without evidence to the contrary, we presume that the jury followed these instructions. See *State* v. *Parrott*, 262 Conn. 276, 294, 811 A.2d 705 (2003) ("[b]arring contrary evidence, we must presume that juries follow the instructions given them by the trial judge" [internal quotation marks omitted]). For the foregoing reasons, we conclude that the trial court did not abuse its discretion by admitting evidence that A tested positive for trichomonas vaginalis.

III

The defendant's last claim is that the trial court improperly admitted evidence of text messages from the defendant to A's mother. Specifically, the defendant argues that the court should have precluded this evidence as untimely because the prosecutor who was in charge of the trial knew or should have known of the text messages prior to their disclosure at the start of trial. We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. On the morning of April 25, 2016, the first day of trial, A's mother presented the prosecutor with screenshots of

text messages sent December 1, 2, and 5, 2014, from the defendant to her. In these text messages, the defendant stated that he had $110 for A, $65 for A's mother, and $25 for A's brother. The defendant also stated that "[s]omeone text me said they can not stop u from calling the cop? Let me know." A few days later, the defendant stated, "I'm buying [you a] gift if [you] [accept]," and "I'm not upset with you . . . . [H]ad to do what [you] did." A's mother responded with a text message to the defendant stating that he had no reason to be upset with her. The defendant replied that he understood and that "[either] way all [our] life is messed up."

The prosecutor informed the court and defense counsel about these text messages on the same morning that A's mother brought the messages to her attention. Although the prosecutor planned to call A's mother as its second witness, the court ordered A's mother's testimony to be delayed until the next day "in fairness . . . so everybody could digest the content" of the text messages.

The next day, before A's mother testified, the defendant moved to preclude the admission of these text messages into evidence. The defendant argued that, even if the prosecutor did not actually know about the text messages until the day they were disclosed to the defendant, she should have known about the text messages earlier because text messages, according to counsel, were mentioned in A's medical report and gifts were mentioned in records from the Department of Children and Families. The defendant argued that the late disclosure by the prosecutor disadvantaged him in preparing his defense. He claimed that the text messages should have been disclosed at the earliest stages of the case and that their late disclosure violated his federal and state constitutional rights to due process.

The court denied the defendant's motion to preclude the evidence. It concluded that the prosecutor was not

aware of the text messages at an earlier stage and there was nothing in the reports cited by the defendant to indicate that there were text messages of the defendant's offers of gifts. The court determined that the text messages were relevant and probative, and that, even though the text messages were not discovered by the prosecutor nor disclosed to the defendant until the first day of trial, the defendant would not need additional time to prepare and develop a defense to this evidence.

A's mother subsequently testified about the text messages. A's mother stated: "[H]e's never offered me money . . . it was like he wanted to give us money after the incident came out." When the defendant testified, he attempted to explain the text messages by stating that he wanted to give A's mother money to buy gifts for Christmas.

We begin by setting forth the standard of review and legal principles that guide our analysis of this claim. As noted in part II of this opinion, the trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. Practice Book § 40-11 discusses the disclosure of information and materials discoverable by the defendant as of right from the prosecuting authority. Specifically, Practice Book § 40-11 (a) (1) requires, in relevant part, that the state disclose any "papers, photographs, or documents within the possession, custody or control of any governmental agency, which the prosecuting authority intends to offer in evidence in chief at trial or which are material to the preparation of the defense or which were obtained from or purportedly belong to the defendant . . . ."

We conclude that the trial court did not abuse its discretion in admitting evidence of the text messages sent from the defendant to A's mother because the prosecutor complied with discovery requirements by

timely disclosing the evidence shortly after she was told about it. The prosecutor informed the court and defense counsel of the text messages on the same morning that A's mother brought the messages to her attention.

The defendant argues that the prosecutor's disclosure of the text messages was untimely because the state should have known of the text messages prior to the first day of trial. He claims that "the record clearly indicates that the state should have been aware of the [text] messages" because of reports within the state's possession. We disagree. According to counsel at oral argument on the defendant's motion to preclude, during A's appointment with Donahue on December 2, 2014, A's mother informed A's doctor that the defendant was texting her almost daily. Donahue noted this information in her report. The report, however, did not indicate the content of the text messages. In addition, according to counsel, A's mother reported to the Department of Children and Families that the defendant had been offering to buy gifts for A and herself. A's mother stated that this offer was out of character for the defendant and that she felt it was the defendant's way of swaying her to stop the police investigation. However, the prosecutor asserted that the report did not state that the offers of gifts and money were contained in text messages. Consequently, there was no evidence that the prosecutor should have known of the text messages because, as the trial court concluded, neither report contained the information that there was text message evidence of the defendant's offerings of gifts or money. Therefore, the prosecutor's disclosure of the text messages authored by the defendant, made on the same morning she discovered the evidence, was timely.

The defendant argues that evidence of the text messages should have been precluded as a sanction under

Practice Book § 40-5.[16] Section 40-5[17] gives "broad discretion to the trial judge to grant an appropriate remedy for failure to comply with discovery requirements." *State* v. *Wilson F.*, 77 Conn. App. 405, 417, 823 A.2d

[16] The defendant, in support of his argument that the court should have precluded evidence of the text messages under Practice Book § 40-5, cites several alibi witness cases. See *State* v. *Tutson*, 278 Conn. 715, 722, 899 A.2d 598 (2006); *State* v. *Sanchez*, 200 Conn. 721, 513 A.2d 653 (1986); *State* v. *Boucino*, 199 Conn. 207, 506 A.2d 125 (1986); *State* v. *Salters*, 89 Conn. App. 221, 872 A.2d 933, cert. denied, 274 Conn. 914, 879 A.2d 893 (2005). For a number of reasons, these cases are unpersuasive. Most significantly, an undisclosed alibi witness raises more concern regarding prejudice to the opposing party, resulting from the late disclosure, than the text message evidence in the present case. Late disclosure of an alibi witness prejudices the opposing party—namely, the state—by preventing it from interviewing and investigating the witness, his or her testimony, and any other potential witnesses who might have knowledge to corroborate the alibi witness' testimony. See *State* v. *Tutson*, supra, 278 Conn. 745.

Concerns of such prejudice do not exist in the present case. The defendant conceded that he sent the text messages to A's mother. Therefore, he knew that his text messages existed. In addition, unlike with evidence of an alibi witness, there is no apparent reason that the defendant would have needed to investigate or interview anyone else regarding the text messages that he personally had sent. Any explanation about the purpose or meaning of the text messages necessarily would have come from the defendant, the author and sender of the text messages. The defendant had the opportunity to testify as to his reason for sending the text messages. When the defendant testified, he attempted to explain the early December text messages by stating that he wanted to give A's mother money to buy gifts for Christmas. Moreover, the court delayed A's mother's testimony until the next day "in fairness . . . so everybody could digest the content" of the text messages. This delay prevented prejudice to the defendant because the additional time enabled the defendant to prepare to cross-examine A's mother regarding the text messages. Thus, the concerns underlying the court's exclusion of the alibi witnesses in the cases cited by the defendant, under Practice Book § 40-5, were not present in this case.

[17] Practice Book § 40-5 provides in relevant part: "If a party fails to comply with disclosure as required under these rules, the opposing party may move the judicial authority for an appropriate order. The judicial authority hearing such a motion may enter such orders and time limitations as it deems appropriate, including, without limitation, one or more of the following . . . (2) Granting the moving party additional time or a continuance . . . [or] (4) Prohibiting the noncomplying party from introducing specified evidence . . . ." In determining what sanction is appropriate under Practice Book § 40-5, a trial court should "consider the reason why disclosure was not made, the extent of prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances." (Internal quotation marks omitted.) *State* v. *Cooke*, 134 Conn. App. 573, 578–79, 39 A.3d 1178, cert. denied, 305 Conn. 903, 43 A.3d 662 (2012).

406, cert. denied, 265 Conn. 905, 831 A.2d 254 (2003). Because the prosecutor timely disclosed evidence of the text messages, which the defendant concedes that he sent, the prosecutor complied with discovery requirements and, therefore, it was unnecessary for the trial court to impose any of the sanctions provided by Practice Book § 40-5. Therefore, we conclude that the court did not abuse its discretion in admitting evidence of the text messages sent from the defendant to A's mother relating to the defendant's offering gifts and money to her, A, and A's brother.

The judgment is affirmed.

In this opinion the other judges concurred.

VILLAGES, LLC *v.* LORI LONGHI
(AC 40263)

Keller, Elgo and Eveleigh, Js.

Syllabus

The plaintiff commenced the present action against the defendant, a member of the Enfield Planning and Zoning Commission, for intentional fraudulent misrepresentation and intentional tortious interference with a business expectancy after the commission had denied zoning applications filed by the plaintiff. The defendant had had a prior falling out with one of the plaintiff's owners, T, and the trial court found that the defendant was biased against T's husband, who represented the plaintiff at the hearing before the zoning commission, and that the defendant had engaged in an ex parte communication regarding the plaintiffs zoning applications, took part in the hearing on the applications and played a significant role in the deliberations. After the commission denied the plaintiff's applications, the plaintiff appealed to the Superior Court, which sustained the appeals. That court determined that the defendant's ex parte communication was not harmless, that the defendant had dominated the commission's meeting in order to have a major effect on the deliberations and subsequent votes, and that the defendant had been clearly and egregiously biased. Thereafter, the plaintiff filed the present action alleging that the defendant improperly had engaged in ex parte communications with respect to the plaintiff's zoning applications and improperly had participated in the public hearing in which the applications were denied. The plaintiff filed a motion for partial summary

judgment, arguing that the defendant was collaterally estopped from relitigating the issue of whether she was impermissibly biased against the plaintiff during the commission hearings. The defendant filed a separate motion for summary judgment, arguing that there was no genuine issue of material fact and that she was entitled to judgment as a matter of law because the plaintiff could not satisfy the elements of its causes of action. The trial court denied the plaintiff's motion for partial summary judgment and granted the defendant's motion for summary judgment and rendered judgment thereon in favor of the defendant, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly denied the plaintiff's motion for partial summary judgment and concluded that the defendant was not collaterally estopped from disputing liability: the defendant was not a party to the prior action in either her individual or official capacity, and although the commission and the defendant shared a similar interest in disproving the same facts in the prior action, namely, that the defendant had participated in the zoning appeal proceedings while impermissibly biased, they were not parties in privity because they did not have an identity of interest so as to share the same legal right, as the first cause of action was a zoning appeal wherein the commission's legal rights derived from its status as a quasi-judicial body whose decisions were reviewed on appeal, and the present tort action was brought against the defendant as a private individual; moreover, the defendant did not have a full and fair opportunity to litigate the issue during the zoning appeal because even though she retained private counsel for the purposes of a deposition and testified at the trial, she was not actually a party to that action such that collateral estoppel did not preclude her from disputing liability.
2. The plaintiff could not prevail on its claim that the trial court improperly granted the defendant's motion for summary judgment with respect to its fraudulent misrepresentation claim: the trial court properly determined that the plaintiff failed to present evidence that would sufficiently support the essential elements of the claim for fraudulent misrepresentation, because even if the plaintiff had established that the defendant's participation in the zoning proceedings while biased constituted a false representation, the plaintiff did not offer any evidence as to how the defendant's participation in the proceedings while biased against the plaintiff was intended to or in fact induced the plaintiff to act on that purportedly false representation.
3. The trial court properly granted the defendant's motion for summary judgment with respect to the plaintiff's claim of tortious interference with business expectancies, as no business relationship existed between the plaintiff and the commission: the plaintiff's claim that, as an applicant, it had a business relationship with the commission, as an honest legal forum, was unavailing and was not supported by any legal authority, and in the absence of any allegation that the defendant interfered with a contractual relationship or a relationship involving the reasonable

probability that it would have entered into a contract or made a profit, the defendant met her burden of showing the absence of any genuine issue of material fact and that she was entitled to judgment as a matter of law.

Argued September 25, 2018–officially released January 15, 2019

Procedural History

Action to recover damages for, inter alia, fraud, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Wiese*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court, which reversed the judgment of the trial court and remanded the case for further proceedings; thereafter, the court, *Hon. A. Susan Peck*, judge trial referee, denied the plaintiff's motion for partial summary judgment and granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Gwendolyn S. Bishop, for the appellant (plaintiff).

Kristan M. Maccini, for the appellee (defendant).

Opinion

ELGO, J. The plaintiff, Villages, LLC, appeals from the summary judgment rendered by the trial court in favor of the defendant, Lori Longhi, who at all relevant times was a member of the Enfield Planning and Zoning Commission (commission). The plaintiff claims on appeal that the court improperly concluded that (1) the defendant was not collaterally estopped from disputing liability, and (2) the defendant was entitled to summary judgment on the plaintiff's claims for fraudulent misrepresentation and intentional interference with a business expectancy. We affirm the judgment of the trial court.

The parties appear before this court for the third time. The underlying facts previously were set out in

Villages, LLC v. *Longhi*, 166 Conn. App. 685, 142 A.3d 1162, cert. denied, 323 Conn. 915, 149 A.3d 498 (2016). "In May, 2009, the plaintiff filed an application for a special use permit and an application to develop an open space subdivision for residential housing on property it owned in Enfield. . . . The commission held a public hearing on the plaintiff's applications on July 9, 2009, July 23, 2009, September 3, 2009, and October 1, 2009, and closed the public hearing on October 1, 2009. . . . On October 15, 2009, the commission met and voted to deny both applications. . . .

"The plaintiff filed an appeal with respect to each application (zoning appeals). In its appeals, the plaintiff alleged that the commission illegally and arbitrarily predetermined the outcome of each of its applications prior to the public hearing and was motivated by improper notions of bias and personal animus when it denied each of the applications. . . .

"Following a trial, the court, *Hon. Richard M. Rittenband*, judge trial referee, found that the plaintiff's allegations of bias and ex parte communication arose from the actions of [the defendant], a member of the commission. More specifically, the court found that [the defendant] took part in the hearing on the plaintiff's applications, played a significant role in the deliberations, and voted to deny the plaintiff's applications. [The defendant] had been a social friend of one of the plaintiff's owners, Jeannette Tallarita, and her husband, Patrick Tallarita. . . . There was a falling out among the friends, and the court found that [the defendant] was biased against Patrick Tallarita, who represented the plaintiff at the hearing before the commission. *The court also found that [the defendant] engaged in an ex parte communication regarding the applications.* . . .

"The court found two instances of conduct by the defendant that gave rise to the plaintiff's claim of bias

against her, only one of which was relevant to the zoning appeals. . . . In the incident described by the court, the defendant had stated that she wanted [Patrick Tallarita] to suffer the same fate of denial by the commission that she had suffered. . . . At trial, Anthony DiPace testified that [the defendant] had stated to him that the commission, when it previously considered an application that she had submitted, had screwed her and treated her unfairly when it denied that application. She was unhappy with [Patrick] Tallarita, who was then mayor, because he did not intervene on her behalf. She stated in the presence of DiPace that she wanted [Patrick] Tallarita to suffer the same fate, i.e., that the commission deny the plaintiff's applications. [Patrick] Tallarita did not become aware of [the defendant's] statement regarding the fate of the plaintiff's applications until after the commission had closed the public hearing [on the plaintiff's applications]. The court found that [the defendant's] comments were blatantly biased [against Patrick] Tallarita and should not be tolerated. The court also found that it had not been possible for the plaintiff to bring [the defendant's] comments regarding [Patrick] Tallarita to the attention of the commission because he learned of them after the hearing had closed and the commission had denied the plaintiff's applications.

"Credibility was a deciding factor in the court's decision regarding [the defendant's] ex parte communication. [Patrick] Tallarita, DiPace, and Bryon Meade testified during the trial. The court found that each of the men was a credible witness. [The defendant] also testified at trial, but the court found that her testimony was filled with denials of the allegations and concluded that her comments did not ring true. The court found that Meade, a representative of the Hazardville Water Authority, testified with confidence that [the defendant] had met with him in person regarding the plaintiff's

applications during the first week of October, 2009. [The defendant] testified, however, that Meade must have been confused because she met with him regarding another property. The court stated that [the defendant's] testimony was just not credible.

"In addressing the plaintiff's claim that [the defendant] improperly engaged in ex parte communications with Meade, the court noted that [o]ur law clearly prohibits the use of information by a municipal agency that has been supplied to it by *a party* to a contested hearing on an ex parte basis. . . . The court found that it was clear that [the defendant] had an ex parte communication with Meade. Once the plaintiff had proven that the ex parte communication had occurred, the burden shifted to the commission to demonstrate that such communication was harmless. . . . The court found that the commission had not met its burden to prove that [the defendant's] ex parte communication was harmless. . . .

"The court reviewed the transcript of the commission's October 15, 2009 meeting when it considered the plaintiff's applications. It found that the transcript was twenty-three pages long and that [the defendant's] comments appeared on every page but one, and that on most pages, [the defendant's] comments were the most lengthy. Her comments raised many negative questions about the plaintiff's applications. Moreover, in offering her comments, she cited her experience as an appraiser. The court found that [the defendant] dominated the meeting and that she intended to have a major effect on the commission's deliberations and subsequent votes. The court found clear and egregious bias on [the defendant's] part, and that her impact on the commission's deliberations and votes alone were reason to sustain the plaintiff's appeals. . . .

"Judge Rittenband concluded that, on the basis of the bias [the defendant] demonstrated against the plaintiff and *her ex parte communication with Meade*, along with her biased, aggressive, and vociferous arguments against the applications on October 15, 2009, the commission's action was not honest, legal, and fair. The court therefore sustained the plaintiff's appeals and remanded the matter to the commission for further public hearings . . . . The commission appealed, and this court affirmed the judgments of the trial court. . . . The commission's appeals to our Supreme Court were dismissed. . . .

"The plaintiff commenced the present action on October 1, 2012. The two count complaint against the defendant alleged intentional fraudulent misrepresentation and intentional tortious interference with [a] business expectancy. The plaintiff alleged that it owns land in Enfield and that it had filed certain applications with the commission, seeking to develop the land. At all times relevant, the defendant was a member of the commission and *engaged in ex parte communication with respect to the plaintiff's applications*, yet participated in the public hearing in which the commission denied the plaintiff's applications.

"The defendant denied the material allegations of the complaint and alleged three special defenses as to each count, including that the action was barred by the doctrines of governmental immunity and absolute immunity. The plaintiff denied each of the special defenses.

"In December, 2013, the defendant filed a motion that the court either dismiss the plaintiff's cause of action or render summary judgment in her favor." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) Id., 688–93. In January, 2014, the plaintiff filed a motion for partial summary judgment as to liability only, arguing that the defendant

was collaterally estopped from relitigating the issue of whether she was impermissibly biased against the plaintiff or whether she gathered ex parte evidence. As such, the plaintiff argued, there was no genuine issue of material fact as to the defendant's liability for its claims of tortious interference with a business expectancy and fraudulent misrepresentation.

In its May 7, 2014 memorandum of decision, the court granted the defendant's motion to dismiss, but declined to address either the plaintiff's motion for partial summary judgment or the defendant's motion for summary judgment on the ground that it lacked subject matter jurisdiction. "The court concluded that the commission was acting in a quasi-judicial capacity when it considered the plaintiff's applications and, therefore, its members were protected by the litigation privilege, a subset of absolute immunity." Id., 695–96.

"The plaintiff appealed, claiming that the court erred in determining that it lacked subject matter jurisdiction . . . ." Id., 696. This court reversed the decision of the trial court, holding that qualified immunity, rather than absolute immunity, applied to the defendant, and remanded the case for further proceedings. Id., 707. On remand, in its March 6, 2017 memorandum of decision, the trial court denied the plaintiff's motion for partial summary judgment and granted the defendant's motion for summary judgment. From that judgment, the plaintiff now appeals.

I

The plaintiff's first claim on appeal is that the court erroneously denied its motion for partial summary judgment because the court improperly determined that the defendant was not collaterally estopped from disputing liability. Specifically, the plaintiff argues that the court erroneously concluded that the doctrine of collateral estoppel does not apply because it wrongly determined

that the defendant and the commission were not in privity.[1] We disagree.

We begin by setting forth the applicable standard of review. "Application of the doctrine of collateral estoppel is a question of law over which we exercise plenary review." *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 345, 15 A.3d 601 (2011).

"The fundamental principles underlying the doctrine of collateral estoppel are well established. The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality. . . . Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . ." (Citation omitted; internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 739, 183 A.3d 611 (2018).

It is well settled that "[c]ollateral estoppel may be invoked against a party to a prior adverse proceeding or against those in privity with that party. . . . While it is commonly recognized that privity is difficult to define, the concept exists to ensure that the interests of the party against whom collateral estoppel is being asserted have been adequately represented because of

[1] The plaintiff also argues that the court erroneously concluded that the defendant was not collaterally estopped from disputing liability because it wrongly determined that the issues in the present case were substantially different from the issues in the zoning appeals. Because we agree with the trial court that no privity existed between the commission and the defendant, we need not address this issue.

his purported privity with a party at the initial proceeding. . . . A key consideration in determining the existence of privity is the sharing of the same legal right by the parties allegedly in privity." (Citations omitted; internal quotation marks omitted.) *Aetna Casualty & Surety Co.* v. *Jones*, 220 Conn. 285, 303–304, 596 A.2d 414 (1991).

In the present case, the court determined that the defendant and the commission were not in privity, relying on the fact that "[t]he defendant herein is being sued in her individual capacity rather than in her official capacity as a member of the [c]ommission." The trial court cited to this court's decision in *C & H Management, LLC* v. *Shelton*, 140 Conn. App. 608, 59 A.3d 851 (2013), in which the issue was whether the parties were in privity for res judicata to apply. In that case, the first action was commenced by the plaintiff, C & H Management, LLC, seeking a writ of mandamus to compel the city of Shelton and Robert Kulacz, the city's engineer, to approve the plaintiff's application for the construction of a single-family house. Id., 610. The plaintiff then brought the second action against the city and Kulacz in his individual capacity. Id. This court determined "that Kulacz, having been sued in his individual capacity . . . is not the same as Kulacz the municipal official who was sued in the mandamus action, nor is the individual defendant Kulacz in privity with Kulacz the municipal official." Id., 614.

Given our decision in *C & H Management, LLC*, we conclude that the defendant in the present action is not bound by the prior action in which she was not a party in her individual or official capacity. Further, our Supreme Court has stated that "[i]n determining whether privity exists, we employ an analysis that focuses on the functional relationship between the parties. Privity is not established by the mere fact that persons may be interested in the same question or in proving or disproving

the same set of facts. Rather, it is, in essence, a shorthand statement for the principle that collateral estoppel should be applied only when there exists such an identification in interest of one person with another as to represent the same legal rights so as to justify preclusion." *Mazziotti* v. *Allstate Ins. Co.*, 240 Conn. 799, 814, 695 A.2d 1010 (1997).

In *Aetna Casualty & Surety Co.* v. *Jones*, supra, 220 Conn 305, our Supreme Court determined that the parties were in privity where they shared the same legal right to recover damages under a single contract. In *Mazziotti* v. *Allstate Ins. Co.*, supra, 240 Conn. 817, our Supreme Court determined that the parties did not share the same legal right and thus were not in privity where the first cause of action was an action in tort for the negligent operation of a motor vehicle and the second cause of action was an action in contract and involved the obligations of an insurance carrier. Our Supreme Court reasoned that "although [the insurer's] contractual liability is premised in part on the contingency of the tortfeasor's liability, they do not share the same legal right. The commonality of interest in proving or disproving the same facts is not enough to establish privity." (Internal quotation marks omitted.) Id. Like the parties in *Mazziotti*, although the commission and the defendant have a similar interest in disproving the same facts, they do not have an identity of interest so as to share the same legal right. The first cause of action in which the commission was a party was a zoning appeal. As such, the commission's legal rights derived from its status as a quasi-judicial body whose decisions were reviewed on appeal. In the present action, the defendant is being sued in tort as a private individual.

Additionally, our Supreme Court has recognized that "[w]henever collateral estoppel is asserted, but especially in those cases where . . . the doctrine of privity is raised, the court must make certain that there was

a full and fair opportunity to litigate. The requirement of full and fair litigation ensures fairness, which is a 'crowning consideration' in collateral estoppel cases." *Aetna Casualty & Surety Co.* v. *Jones*, supra, 220 Conn. 306. The plaintiff relies on *Doran* v. *First Connecticut Capital, LLC*, 143 Conn. App. 318, 70 A.3d 1081, cert. denied, 310 Conn. 917, 76 A.3d 632 (2013), to support the proposition that the defendant had a "full and fair opportunity to litigate the question of whether or not she was impermissibly biased against the [plaintiff] during the [zoning] proceedings [and] whether or not she collected evidence outside the record *ex parte*." The plaintiff's reliance on *Doran*, however, is misplaced.

In *Doran*, this court concluded that "[t]he plaintiff had a full and fair opportunity to litigate the question of whether the mortgage and note were in default . . . during the foreclosure action" *where the defendant was a party* and filed a disclosure of no defense to the complaint. Id., 322. The plaintiff argues that just as the plaintiff in *Doran* had the opportunity to litigate the first foreclosure and chose not to, in the present case, the defendant "not only had the opportunity to defend the allegations concerning her actions as a commission member, [but] she did vigorously defend the allegations concerning her conduct during the prior action." The plaintiff contends that the defendant was able to defend against the allegations in the zoning appeal in which she was not a party because she hired private counsel when her deposition was taken, she testified at trial, and the commission objected to the taking of additional evidence on the issue of bias. We are not persuaded. The defendant's ability to defend against the allegations in the zoning appeal where she was not a party plainly differs from that of the plaintiff in *Doran* who was a party in both actions and chose to file a disclosure of no defense in the first action. Accordingly, we conclude that the defendant is not barred by the doctrine of

collateral estoppel from disputing liability because the defendant in the present case was not in privity with the commission and the defendant did not have a full and fair opportunity to litigate during the zoning appeal in which she was not a party.

II

The plaintiff next claims that the court improperly granted the defendant's motion for summary judgment. We disagree.

"The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Cefaratti* v. *Aranow*, 321 Conn. 637, 645, 138 A.3d 837 (2016).

In its complaint, the plaintiff presented two claims. First, it alleged that the defendant "continuously intentionally misrepresented to the plaintiff that she was a neutral, honest, fair and unbiased member of the [c]ommission." Second, it alleged that the defendant

"intentionally and tortiously interfered with the relationship between the plaintiff and the [c]ommission and tortiously interfered with the plaintiff's expectation that it was investing time money and effort into proceedings that were fair, honest and legal proceedings." We address each of the plaintiff's claims in turn.

A

The first claim in the plaintiff's complaint is fraudulent misrepresentation.[2] "The essential elements of an action in common law fraud, as we have repeatedly held, are that: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury. . . . Under a fraud claim of this type, the party to whom the false representation was made claims to have relied on that representation and to have suffered harm as a result of the reliance." (Internal quotation marks omitted.) *Sturm* v. *Harb Development, LLC*, 298 Conn. 124, 142, 2 A.3d 859 (2010). In its memorandum of decision, the court concluded that the plaintiff "failed to present evidence that would sufficiently support the essential elements of the claim for fraudulent misrepresentation that the defendant knowingly made misrepresentations to the plaintiff with the intention of inducing the plaintiff to rely on such misrepresentations." We agree.

[2] In her brief, without citing to any legal authority, the defendant asserts that the plaintiff appears to be trying to advance a claim for fraudulent nondisclosure instead of fraudulent misrepresentation and that the "[p]laintiff has never alleged such a claim and same is a distinct cause of action . . . ." Because the defendant fails to set forth any law, legal analysis, or legal argument to support that assertion, it will not be addressed. See, e.g., *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 444 n.40, 35 A.3d 188 (2012) ("Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority . . . ." [Citations omitted; internal quotation marks omitted.]).

The plaintiff argues that the defendant made a false representation "by continuously representing to the plaintiff that she was an honest, unbiased decision maker by sitting in judgment on the commission concerning the applications . . . ." Assuming, arguendo, that the plaintiff has presented sufficient evidence to support the first two elements of fraud, i.e., that her participation in the proceedings while biased constituted a false representation, the plaintiff has not established how the defendant's participation in the proceedings while biased against the plaintiff was intended to induce the plaintiff to act on that representation or caused the plaintiff to act on that representation.

In its brief, the plaintiff asserts that "the fraudulent misrepresentation perpetrated by [the defendant led] the plaintiff to expend monies on application fees, engineering fees, interest on mortgages and [attorney's] fees all related to the process before the [c]ommission . . . ." The plaintiff went before the commission to seek the approval of two applications on its own initiative. Again, even if we were to assume that the defendant's participation in the proceedings while biased constituted a false representation, the plaintiff has proffered no evidence demonstrating that the defendant's false representation intended to induce, or, in fact, caused the plaintiff to pursue approval of its applications before the commission. Accordingly, we agree with the trial court that the plaintiff has failed to present evidence that would sufficiently support the essential elements of the claim for fraudulent misrepresentation.

B

The second claim in the plaintiff's complaint is tortious interference with a business expectancy. "It is well established that the elements of a claim for tortious interference with business expectancies are: (1) a business relationship between the plaintiff and another party; (2) the defendant's intentional interference with

the business relationship while knowing of the relationship; and (3) as a result of the interference, the plaintiff suffers actual loss." *Hi-Ho Tower, Inc.* v. *Com-Tronics, Inc.*, 255 Conn. 20, 27, 761 A.2d 1268 (2000). "It is not essential to such a cause of action that the tort have resulted in an actual breach of contract, since even unenforceable promises, which the parties might voluntarily have performed, are entitled to be sheltered from wrongful interference." *Jones* v. *O'Connell*, 189 Conn. 648, 660, 458 A.2d 355 (1983). "It does not follow from this, however, that a plaintiff may recover for an interference with a mere possibility of his making a profit. On the contrary, wherever such a cause of action as this is recognized, it is held that the tort is not complete unless there has been actual damage suffered. . . . To put the same thing another way, it is essential to a cause of action for unlawful interference with business that it appear that, except for the tortious interference of the defendant, there was a reasonable probability that the plaintiff would have entered into a contract or made a profit." (Citations omitted.) *Goldman* v. *Feinberg*, 130 Conn. 671, 675, 37 A.2d 355 (1944).

The plaintiff argues that the business relationship with which the defendant interfered was the relationship between the plaintiff and the commission as applicant and "honest legal forum." The plaintiff further argues that it "had reasonable expectations of the [c]ommission that it was what it appeared to be, an honest and legal forum, and in reliance on those expectations [the plaintiff] spent resources including substantial application fees and engineering fees to come before it." In its memorandum of decision, the court concluded that the plaintiff presented no evidence that a business relationship existed between the commission and the plaintiff.[3] We agree.

[3] The court also concluded that, "assuming, arguendo, that the court did find that there was a business relationship between the plaintiff and the [c]ommission, the plaintiff has still failed to show that but for the defendant's

The plaintiff does not cite to any legal authority, and we are aware of none, indicating that a business relationship exists between an applicant and a zoning commission. Our review of Connecticut case law indicates that a business expectation arises out of a contract or an ongoing business relationship between parties and a business relationship, therefore, involves prospective profits. See, e.g., *Hi-Ho Tower, Inc.* v. *Com-Tronics, Inc.*, supra, 255 Conn. 31–35 (business expectation amounted to existing or prospective contractual or business relationships between customers and defendant). The plaintiff does not argue that the defendant interfered with a contractual relationship or a relationship involving the reasonable probability that it would have entered into a contract or made a profit. Instead, it argues that the defendant interfered with the relationship between it and the commission, and the business expectation interfered with was the expectation that the commission was an honest legal forum.

The plaintiff relies exclusively on dicta from *Kelley Property Development, Inc.* v. *Lebanon*, 226 Conn. 314, 627 A.2d 909 (1993), to support its assertion that a business relationship existed between the plaintiff and the commission. In *Kelley*, where a real estate developer brought a civil rights action against town officials after his application for subdivision approval was denied, "[t]he principal issue [was] whether the Connecticut constitution affords a monetary remedy for damages to persons whose state due process rights have allegedly been violated by local zoning officials." Id., 315. In that case, our Supreme Court concluded that it "should not construe our state constitution to provide a basis for the recognition of a private damages action

actions, the plaintiff would have succeeded in its applications before the [c]ommission." Because we agree with the court that the plaintiff failed to establish that a business relationship existed between the plaintiff and the commission, we need not address this issue.

for injuries for which the legislature has provided a reasonably adequate statutory remedy" by enacting General Statutes § 8-8, which provides for appellate appeal of zoning board decisions. Id., 339. The court added, "even if such administrative relief were deemed to be inadequate, a proposition to which we do not subscribe, [the plaintiff] might have pursued other actions to protect his interests. He might, for example, have brought an action for intentional interference with [a] business expectancy, or for equitable relief, such as an action for an injunction against the defendants' allegedly wrongful conduct." (Footnote omitted.) Id., 340–41. By citing to nothing other than *Kelley* to support its position, the plaintiff is essentially asking us to conclude, without the support of existing authority, that an element of the cause of action is satisfied because our Supreme Court, in dicta,[4] mentioned that the defendant in that case "might . . . have brought an action for intentional interference with [a] business expectancy . . . ." Id., 340. We are not willing to so hold. Accordingly, we conclude that no business, relationship existed between the defendant and the commission and, therefore, we agree with the trial court that the defendant has met her burden of showing the absence of any genuine issue of material fact and that she is entitled to judgment as a matter of law.

The judgment is affirmed.

In this opinion the other judges concurred.

[4] "[D]ictum is an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination . . . . Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case . . . are obiter dicta, and lack the force of an adjudication." (Internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 421 n.16, 35 A.3d 188 (2012).

DON TRUSKAUSKAS *v.* ZONING BOARD OF APPEALS OF THE TOWN OF HARWINTON
(AC 39999)

Alvord, Elgo and Bright, Js.

Syllabus

The plaintiff appealed to the trial court from two decisions by the defendant, the Zoning Board of Appeals of the Town of Harwinton, ordering him to cease and desist from the use of his residential property for commercial purposes in violation of the town's zoning regulations. Two owners of property that abuts that of the plaintiff then intervened in both of the plaintiff's appeals, which were thereafter consolidated by the trial court. The plaintiff, the intervenors and the zoning board then entered into a stipulation, which became the judgment in each case and provided, inter alia, that the plaintiff could not conduct commercial activities at his residential property or use his dump truck there as part of his contracting business or for other commercial purposes. The intervenors thereafter moved for an order of contempt, claiming, inter alia, that the plaintiff had violated certain provisions of the stipulated judgments by continuing to conduct commercial activities at his residence and by failing to remove certain commercial equipment from the property. The trial court granted the motion for contempt, and the plaintiff appealed to this court, claiming that the trial court erroneously interpreted the stipulation to encompass a total prohibition against the use of his dump truck for any commercial purposes, including those that occurred off of his property and, thus, improperly found him in contempt. *Held* that the trial court's finding that the plaintiff was in contempt was not clearly erroneous, as the record supported the court's determination that the plaintiff wilfully violated certain provisions of the stipulation that prohibited him from conducting commercial activities at his residential property and using his dump truck there as part of his contracting business or for other commercial purposes: the plaintiff's admission under oath that he used the dump truck to haul heavy equipment at his residence to job sites was a clear violation of the stipulation and was consistent with evidence that included a log book, photographs and videos of the plaintiff's activities, which had been compiled by the intervenors, that showed his use of the dump truck to move equipment on and off of his property principally for commercial purposes, the plaintiff did not dispute the court's references to how many times the dump truck came to and went from his property as evidence that it was being used commercially, and the court found that he used his home address as his business address in tax and secretary of the state filings, that he owned no other property on which to store his commercial property, and that he had not removed permanently from his property certain heavy equipment that he used

there; moreover, even if the court interpreted the stipulation too broadly, the plaintiff agreed that it clearly prohibited him from using the dump truck on the subject premises for his contracting business or for other commercial purposes.

Argued October 23, 2018—officially released January 15, 2019

Procedural History

Appeals from the decisions by the defendant ordering the plaintiff to cease and desist certain activities on certain of his real property, brought to the Superior Court in the judicial district of Litchfield, where the court, *Pickard*, *J.*, granted the motions filed by Jessica Genovese et al. to intervene in both appeals; thereafter, the appeals were consolidated, and the court, *Danaher*, *J.*, approved the parties' stipulations for judgments in both appeals and rendered judgments thereon; subsequently, the court, *J. Moore*, *J.*, granted in part the motion for contempt filed by the intervenors, and the plaintiff filed a consolidated appeal with this court. *Affirmed.*

Don Truskauskas, self-represented, the appellant (plaintiff).

Thomas W. Mott, for the appellees (intervenors).

Opinion

BRIGHT, J. The plaintiff, Don Truskauskas, appeals from the judgments of the trial court finding him in contempt[1] for violating the terms of a stipulated judgment involving himself, the defendant, the Zoning Board

[1] The judgments of contempt were rendered in two companion cases, Docket Nos. CV-14-6011019-S and CV-14-6011527-S, both bearing the same case title and relating to the same parties. These cases were consolidated by the Superior Court on May 4, 2015. Each case relates to a different decision of the Zoning Board of Appeals of the Town of Harwinton, from which the plaintiff appealed to the Superior Court. The same March 30, 2016 stipulated judgment was rendered in each case. This appeal is taken from the court's judgments of contempt for the plaintiff's violation of the stipulated judgments that had been rendered in each case. In this appeal, because the cases were consolidated, for convenience and to avoid confusion, we generally will refer to the stipulated judgments and the contempt judgments in the singular.

of Appeals of the Town of Harwinton (board), and the intervenors, Ronald Genovese and Jessica Genovese, who own property abutting that of the plaintiff.[2] On appeal, the plaintiff claims that the court improperly interpreted the March 30, 2016 stipulated judgment and found that he wilfully had violated the stipulated judgment.[3] We affirm the judgments of the trial court.

The following facts and procedural history, which are ascertained from the record and the trial court's memorandum of decision, inform our review. The court found: "[These cases] arose as [appeals] from orders issued against the plaintiff by the [board]. On appeal, the [board] confirmed that [the] plaintiff was using his

[2] Although all parties have appeared for purposes of this appeal, the board notified this court that it would not file an appellate brief because it concluded that the appeal did not pertain directly to it.

[3] The plaintiff also claims that the court (1) improperly limited the use of his dump truck, which the board had recognized as a nonconforming use, and (2) improperly "coached" the intervenors at trial.

As to the first claim, the plaintiff argues that the board's decision "clearly state[d] [that] the [dump] truck [was a] legal nonconforming use. . . . The court's insistence that the [dump truck] not be used for commercial use off the property constitutes an illegal taking from the plaintiff!" The plaintiff, however, fails to set forth any law, legal analysis, or legal argument beyond this bald assertion regarding a constitutional taking. Accordingly, this claim is briefed inadequately and will not be addressed. See, e.g., *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 444 n.40, 35 A.3d 188 (2012) (claims not mentioned or briefed beyond bare assertion, or that consist of conclusory assertions with no mention of relevant authority, are inadequately briefed).

As to the second claim, the entirety of the plaintiff's briefing of this issue is one paragraph long, containing a mere six lines of text, which fails to set forth any law, legal analysis, or legal argument. Accordingly, we conclude that this claim also is briefed inadequately. See id.

Additionally, the plaintiff raises, for the first time on appeal, a claim that the notice of violation and the cease and desist order that had been issued by the board or the town zoning enforcement officer were invalid because they did not list his wife, who jointly owns the property and the business. Because the plaintiff entered into a stipulated judgment resolving the notice of violation and the cease and desist order, the fact that his wife was not listed on those documents is irrelevant to the plaintiff's own violation of the stipulated judgment to which he was a party.

residential property for commercial use in violation of the Harwinton Zoning Regulations [regulations]. To resolve [these cases after the plaintiff appealed from the board's decisions to the Superior Court], the parties entered into a joint stipulation. After [the court] conducted a canvass of, inter alia, the plaintiff, the joint stipulation was entered as a judgment of the court on March 30, 2016.

"The joint stipulation, now the judgment, provide[s], in [relevant] part . . .

"1. The plaintiff could not conduct any commercial activities at his residential property, including activities related to his contracting business, Autumn Contracting, LLC. This provision, however, did not 'apply to . . . other activities as permitted by the [regulations]' [as set forth in paragraph 2 of the judgment].

"2. The plaintiff's 2000 Mack Dump Truck [(dump truck)] could be parked overnight at his residence in accordance with a previous [board] decision, and could be used for farm or personal use, but this dump truck could not be used for the plaintiff's contracting business or other commercial purposes [as set forth in paragraph 5 of the stipulated judgment].

"3. The plaintiff was required permanently to remove from his residential property all 'equipment, tools, and/or materials used for [the] plaintiff's contracting business or any other commercial activity . . . within seven (7) calendar days after [the] stipulated judgment is fully executed, and shall be maintained by [the] plaintiff off the subject premises.' This provision did not apply 'to tools kept in the plaintiff's pickup truck that are used for his contracting business or other tools or equipment as allowed by the [r]egulations' [as set forth in paragraph 3 of the stipulated judgment].

"4. The plaintiff shall be able to use his residential property as he wishes as long as he complies with the

stipulated judgment, 'the [regulations], and other applicable law' [as set forth in paragraph 8 of the stipulated judgment].

"The judgment also permitted the plaintiff to conduct farming operations on, and to maintain the farm equipment specified in exhibit A at, his residential property. This farm equipment was further depicted in photographs appended to the stipulated judgment.

"The [intervenors] moved for an order of contempt, arguing that the plaintiff has violated several aspects of the [stipulated] judgment. Specifically, they claimed that the plaintiff has violated (1) paragraph 2 by continuing to conduct commercial activities at his residence, (2) paragraph 3 by failing to remove commercial, nonexempted equipment from the residential property, and (3) paragraphs 2 and 5 by regularly moving heavy equipment in and out of his residential property.

"The plaintiff denied that he had conducted, after the judgment, commercial activities at his residence. Moreover, the plaintiff claimed that he maintained certain heavy equipment at his residence so that he could conduct permitted activities, namely, building a large storage barn and a pool there. Specifically, the plaintiff claimed that he, after the date of judgment, used heavy equipment to bring fill to his residential property and to smooth the fill to level the ground so that he could construct the storage barn. Finally, the plaintiff argued that some of the allegedly contemptuous activity was otherwise allowed by the town [of Harwinton] (1) by means of prior zoning rulings, or (2) because he undertook such activity for his personal use."

Following a hearing, the court found that the plaintiff wilfully had violated the stipulated judgment "by continuing to conduct his commercial enterprise out of his residential property and by using his [dump truck] for commercial purposes." Specifically, the court found

that the plaintiff was in contempt for violations of paragraphs 2 and 5 of the stipulated judgment. This appeal followed.

On appeal, the plaintiff claims in relevant part that the court improperly interpreted paragraph 5 of the March 30, 2016 stipulated judgment and improperly found that he wilfully had violated the stipulated judgment. We are not persuaded.

"The court has an array of tools available to it to enforce its orders, the most prominent being its contempt power. Our law recognizes two broad types of contempt: criminal and civil. . . . The two are distinguished by the type of penalty imposed. . . . A finding of criminal contempt permits the trial court to punish the violating party, usually by imposing an unconditional fine or a fixed term of imprisonment. . . . Criminal contempt penalties are punitive in nature and employed against completed actions that defy the dignity and authority of the court. . . . Civil contempt, by contrast, is not punitive in nature but intended to coerce future compliance with a court order, and the contemnor should be able to obtain release from the sanction imposed by the court by compliance with the judicial decree. . . . A civil contempt finding thus permits the court to coerce compliance by imposing a conditional penalty, often in the form of a fine or period of imprisonment, to be lifted if the noncompliant party chooses to obey the court. . . .

"To impose contempt penalties, whether criminal or civil, the trial court must make a contempt finding, and this requires the court to find that the offending party wilfully violated the court's order; failure to comply with an order, alone, will not support a finding of contempt. . . . Rather, to constitute contempt, a party's conduct must be wilful. . . . A good faith dispute or legitimate misunderstanding about the mandates of an

order may well preclude a finding of wilfulness. . . . Whether a party's violation was wilful depends on the circumstances of the particular case and, ultimately, is a factual question committed to the sound discretion of the trial court." (Citations omitted; footnote omitted; internal quotation marks omitted.) *O'Brien* v. *O'Brien*, 326 Conn. 81, 97–98, 161 A.3d 1236 (2017).

"Consistent with the foregoing, when we review such a judgment, we first consider the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing . . . a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful . . . ." (Citations omitted; internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 330–31, 152 A.3d 1230 (2016).

The plaintiff claims that the court misinterpreted paragraph 5 of the stipulated judgment and improperly found that he wilfully had violated paragraphs 2 and 5 of the stipulated judgment. The plaintiff argues that paragraph 5 prohibits him from using his dump truck for commercial purposes *only on the premises*, but contains no prohibition against him using the dump truck for commercial purposes off the premises. He contends that the court erroneously interpreted paragraph 5 to encompass a total prohibition against the plaintiff's use of the dump truck for any commercial purposes, even those that occur off-site, and that this misinterpretation is what led the court to find a violation of both paragraphs 2 and 5 of the stipulated judgment. We are not persuaded by this argument.

In this case, although the board held that *the overnight parking* of the plaintiff's dump truck was a non-

conforming use,[4] it also found that the plaintiff was operating a commercial business from his residential property in violation of §§ 1.3.1[5] and 4.1[6] of the regulations.[7]

[4] Section 6.20 of the regulations prohibits, with certain exceptions, the overnight parking of commercial vehicles weighing in excess of 19,500 pounds. In his appeals to the Superior Court, the plaintiff acknowledged that his dump truck weighed in excess of 19,500 pounds.

Specifically, § 6.20 of the regulations provides: "Commercially operated or commercially registered vehicles having a gross vehicle weight in excess of 19,500 pounds or greater than two axles are not allowed to park or be stored on private property in a residential zone overnight except when:

"They are providing a service related to the property where they are parked or kept overnight.

"They are in conjunction with the need for an emergency repair, but only on an occasional basis.

"On-call vehicles (Municipal, Water Co., CL&P, Gas Co., Service Vans, etc.) shall be exempt from this regulation. Farm vehicles, as listed as Code 4 with the Harwinton Assessor's office, in conjunction with a farm are also exempt.

"In accordance with the above three exceptions the following shall apply:

"One commercial vehicle shall be permitted per property.

"The commercial vehicle must be operated only by owner of the vehicle who derives his livelihood from the operation of the vehicle and not family members or employees.

"The number of trips permitted in a 24-hour period is six (6) which means no more than three (3) round trips to the residential home where the vehicle is permitted to be parked onsite.

"Commercial vehicles cannot idle for more than 15 minutes."

[5] Section 1.3.1 of the regulations provides in relevant part: "Any use which is not specifically permitted in a zone is prohibited and any use that is not specifically permitted in any zone is prohibited in the entire Town."

[6] Section 4.1 of the regulations sets forth the permitted uses in residential zones, and §§ 4.2 and 4.3 set forth the uses that are allowed by special permit.

Specifically, § 4.1 of the regulations provides in relevant part: "In the residential zones (CR, TR, LH, LHA) buildings and land may be used and buildings may be erected, altered or moved, to be used for the following permitted uses:

"a. Single family dwellings.

"b. Agricultural and horticultural uses, provided only the slaughtering of livestock and poultry raised on the premises shall be permitted.

"c. Roadside stand for sale of farm produce provided that the produce offered for sale is produced on the farm on which the stand is located.

"d. Family Day Care Home where such use shall not change the residential character of the lot or the neighborhood."

Sections 4.2 and 4.3 set forth the uses that are permitted by special permits, which are not alleged to be applicable to the plaintiff's situation.

[7] The regulations also allow the use of residential property for conducting personal business, but only if such use would not be noticed by others.

After the plaintiff appealed to the Superior Court from two separate but related decisions of the board, the parties entered into the joint stipulation, which became a judgment of the court. Paragraph 2 of that judgment provides in relevant part: "The plaintiff will not conduct any commercial activities at the subject premises, including, but without limitation, and specifically any and all activities related to the plaintiff's contracting business . . . . The plaintiff will not conduct, or allow to be conducted, any commercial activities whatsoever, especially those related to his contracting business on the subject premises." Paragraph 5 of that judgment provides: "The plaintiff's 2000 [dump truck] may be parked overnight at the subject premises as a legal, nonconforming use in accordance with the [board's] decision and in compliance with the [regulations] pertaining to nonconforming uses and restrictions on nonconforming uses; provided, however, said vehicle shall not be utilized on the subject premises for the plaintiff's contracting business or other commercial purposes, but may be used for farm or personal use on the subject premises or elsewhere."

The court found that the plaintiff wilfully violated these paragraphs of the stipulated judgment. In particular, on the basis of a log book, photographs and videos of the plaintiff's activities compiled by the intervenors, the court found that the plaintiff was using his dump truck to move equipment on and off of his property principally for commercial, as opposed to personal or farming, purposes. The court further relied on the plaintiff's admission that he attached a trailer to the dump truck to haul his pickup truck to various job sites, confirming that he was using the dump truck for commercial purposes. Finally, the court found that the plaintiff

Specifically, § 6.19 of the regulations provides: "Nothing in these regulations shall restrict the use of a private home for personal business by the owner or occupant where there are no employees other than the occupants, no signs indicating a non-residential use, no clients coming to the house and a reasonable neighbor would not know that such an operation is taking place."

used his home address as his business address in tax and secretary of the state filings, owned no other property on which to store his commercial property and had not removed permanently from his property various pieces of heavy equipment, including the commercial trailer he regularly attached to the dump truck to haul his pickup truck or heavy equipment to and from the property.

The court concluded that the previously discussed facts proved that the plaintiff wilfully violated paragraph 2 of the stipulated judgment because he "was wilfully conducting commercial activities at his residential property . . . ." The court concluded that the plaintiff violated paragraph 5 of the stipulated judgment because he "admitted under oath that he would attach the trailer *at his home* to the [dump truck] and place the white pickup truck on the trailer to drive to job sites . . . ." (Emphasis added.) The court noted that this admission was confirmed by the evidence submitted by the intervenors.

The plaintiff claims that the court misinterpreted paragraph 5 as prohibiting any commercial use of the dump truck, even off-site, and that this misinterpretation led the court to conclude that he had violated the two provisions of the stipulated judgment. We conclude that even if we were to agree that the court interpreted paragraph 5 too broadly, that paragraph, nonetheless, clearly prohibits the plaintiff from using his dump truck on the subject premises for his contracting business or for other commercial purposes. The plaintiff, in fact, agrees that paragraphs 2 and 5 prohibit him from engaging in such activity at his residence. Considering that explicit prohibition in the stipulated judgment, namely, using the dump truck for his contracting business or for other commercial purposes on his residential property, we conclude that the court's finding of contempt was not clearly erroneous.

The court found in relevant part, and the record supports, that the plaintiff was using his dump truck for his contracting business at his residence. In fact, the plaintiff states in his brief that "[t]he court [made] several references as to how many times the [dump] truck is coming and going from the property as evidence that it [is] being used commercially; the plaintiff did not and does not dispute this fact."[8] During oral argument before this court, the plaintiff also admitted that, while at his residential property, he repeatedly attached a trailer to the dump truck, placed heavy equipment on that trailer, and used the dump truck to haul that heavy equipment to various job sites for use in his contracting business. This, in and of itself, evinces use of the dump truck, while on the plaintiff's residential property, for the plaintiff's contracting business, which is a clear violation of the stipulated judgment. The plaintiff's admission also is consistent with the evidence relied on by the court. Accordingly, we conclude that the court properly found the plaintiff in contempt.

The judgments are affirmed.

In this opinion the other judges concurred.

ERIC HAM *v.* COMMISSIONER OF CORRECTION (AC 37998)

Alvord, Keller and Flynn, Js.

Syllabus

The petitioner, who had been convicted of murder and several other crimes in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming, inter alia, that he was deprived of his right to

[8] This admission alone supports the court's conclusion that the plaintiff violated paragraph 2 of the stipulated judgment. Paragraph 2 prohibits the plaintiff from conducting "any commercial activities whatsoever" on the subject premises. Clearly, moving equipment from the premises to commercial job sites constitutes conducting commercial activities on the premises. The plaintiff has not argued otherwise. In fact, his brief is devoid of any mention of the language of paragraph 2.

due process because the prosecutor at his criminal trial failed to disclose material exculpatory evidence. The state's theory of the case was premised on the shooting having occurred at 2:20 a.m. Hospital records showed that the petitioner had been admitted at 2:49 a.m. seeking treatment for a gunshot wound that he claimed to have received when he was accosted on a street in an attempted robbery. L, a police sergeant, testified for the state that she had been dispatched at 2:05 a.m. to meet with the petitioner in the hospital. The prosecutor thereafter recalled L, who testified that after her initial testimony, she checked her daily notebook and the police department's activity log, and realized that her previous testimony was inaccurate and that she had been dispatched at 2:48 a.m. to meet the petitioner in the hospital. In his habeas petition, the petitioner alleged, inter alia, that after L's initial testimony, the state asked her to produce evidence that contradicted her prior testimony that she had been dispatched at 2:05 a.m. to meet with the petitioner in the hospital, and that the prosecutor knew that L's corrected testimony was false. The petitioner also claimed that the prosecutor was aware of and did not disclose to the defense that L had been involved in an incident five years earlier in which she fatally shot a suspect during an arrest and that she was subject to prosecution for it at the time that she testified at the petitioner's criminal trial. The petitioner further alleged that H, one of his prior habeas counsel, had rendered ineffective assistance because, inter alia, she failed to pursue a claim that D, the petitioner's criminal trial counsel, had rendered ineffective assistance by failing to adequately challenge L's testimony about what time she was dispatched to meet with the petitioner in the hospital and L's motivation to testify falsely against him. The habeas court rejected the petitioner's claims and rendered judgment denying the habeas petition. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1.The habeas court properly denied the petition for certification to appeal with respect to the petitioner's claim that the prosecutor failed to disclose material exculpatory evidence concerning L, the petitioner having failed to demonstrate that the issues he raised were debatable among jurists of reason, that a court could have resolved them in a different manner or that they deserved encouragement to proceed further: the petitioner's ability to confront L at trial was not undermined to any significant degree by the prosecutor's failure to disclose the information at issue, which lacked an appreciable potential to have altered the jury's assessment of L's credibility, none of the facts surrounding L's role in the fatal shooting of the suspect five years earlier supported a reasonable inference that she was under a threat of prosecution at the time of the petitioner's criminal trial, a police internal affairs report that stated that L had been directed to undergo counseling after the fatal shooting did not reasonably support an inference that her reputation in the police department was tarnished or that her job was in jeopardy at the time

of the petitioner's criminal trial, and there was no merit to the petitioner's claim that L had a motive to commit perjury and to fabricate evidence to support her corrected trial testimony; moreover, even if the prosecutor suppressed evidence that was favorable to the defense, the petitioner did not demonstrate that it was material, as the materiality of the evidence was inextricably linked to the petitioner's theory, which relied on inferences that were not at all reasonable, that L committed perjury and fabricated evidence to support the state's case and to curry favor with the Office of the State's Attorney.

2. The habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to the petitioner's claim that H rendered ineffective assistance: because the petitioner failed to prove that he was prejudiced by D's performance, he was unable to demonstrate that he was prejudiced by H's failure to pursue claims that were related to D's performance, as the petitioner relied on facts that were not explored during D's cross-examination of L, the inferences on which the petitioner relied were unreasonable in that they were not logically drawn from the facts in evidence, and his claim of prejudice as to D was unsubstantiated to the extent that it was based on D's failure to cross-examine L about her testimony that she had not referred to additional resources for her corrected testimony other than her personal notebook and the police daily activity log; moreover, the petitioner did not dispute that L's corrected testimony was consistent with police department records and corroborated by hospital records, and the avenues of inquiry that the petitioner claimed that D should have pursued were not likely to have been persuasive to the jury, as they were not logically related to the evidence and the reasonable inferences to be drawn therefrom.

Argued September 18, 2018—officially released January 15, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Fuger*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

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

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Rebecca A. Barry*, assistant state's attorney, for the appellee (respondent).

Opinion

KELLER, J. The petitioner, Eric Ham, appeals from the judgment of the habeas court denying his petition for certification to appeal from the court's denial of his third amended petition for a writ of habeas corpus. The petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal with respect to his claims that (1) the prosecutor at his criminal trial violated his right to due process by failing to disclose material exculpatory evidence and (2) counsel in a prior habeas action deprived him of his right to the effective assistance of counsel by failing to pursue a claim of ineffective assistance on the part of his criminal trial counsel. Because we conclude that the court properly exercised its discretion in denying the petition for certification to appeal, we dismiss the appeal.

The following facts and procedural history are relevant to the present appeal. In 1996, following a jury trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a (a), assault in the first degree in violation of General Statutes § 53a-59, larceny in the third degree in violation of General Statutes § 53a-124 (a) (1), conspiracy to commit larceny in the third degree in violation of General Statutes §§ 53a-48 (a) and 53a-124 (a) (1), and falsely reporting an incident in violation of General Statutes (Rev. to 1993) § 53a-180 (a) (3) (A). The court, *Hon. William L. Hadden, Jr.*, judge trial referee, sentenced the petitioner to a fifty-year term of imprisonment.

The petitioner brought a direct appeal, during which he was represented by Attorney William S. Palmieri. This court affirmed the judgment of conviction, and our Supreme Court denied the petitioner's petition for

certification to appeal from this court's judgment. *State* v. *Ham*, 55 Conn. App. 281, 739 A.2d 1268, cert. denied, 252 Conn. 916, 743 A.2d 1128 (1999).[1] This court summarized the facts that reasonably could have been found by the jury: "[I]n March, 1993, the [petitioner], accompanied by four masked men, approached Alex Santana and asked him where to find his cousin, George Flores. When Santana replied that he had not seen Flores, the [petitioner] punched Santana in the face, causing him to be thrown against a store window. The owner of the store came outside and the [petitioner] and his companions departed.

"On May 5, 1993, at approximately 11 p.m., the [petitioner] agreed to pay Ronaldo Rivera $40 if he would steal a large, fast, four door automobile and deliver it to the [petitioner]. Rivera found such a vehicle on Frank Street in New Haven and, with the help of a friend, stole a four door Buick and brought the car to the [petitioner] and another man on Ward Street at approximately 2 a.m.

"Santana had been riding that night in the car of his friend, Butch Console, with three other persons, Marilyn Torres, Melissa Dawson and Dimiris Vega. When the car stopped on Button Street, the occupants got out. As they were standing by the car, a man approached and offered to paint Console's initials on the driver's door. Console agreed and then stood next to a red station wagon parked on the opposite side of the street. Meanwhile, his friends stood on the street side of Console's car watching the man paint. Console noticed a car approaching slowly on Button Street. He

[1] In his direct appeal, the petitioner claimed: "(1) except for the larceny charges, there was insufficient evidence to establish his guilt beyond a reasonable doubt with respect to the other crimes, (2) he was denied his right to confront his accusers and (3) the trial court gave incorrect jury instructions concerning proof beyond a reasonable doubt and consciousness of guilt." *State* v. *Ham*, supra, 55 Conn. App. 283.

saw what he first thought were firecrackers coming from the rear seat of the car. When he realized it was gunfire, Console ran around the front of the station wagon to the sidewalk and knelt to avoid the bullets. The approaching car was the stolen Buick and contained the [petitioner] and three companions. Gunfire erupted from the area of the rear seat of the Buick. One bullet hit Santana in the stomach, resulting in his hospitalization. Another bullet struck Torres in the back, causing her death. The evidence indicated that at least five shots were fired from close range.

"A few minutes later, the [petitioner] and his companions crashed the Buick on Howard Avenue and abandoned it with the motor running, the rear door open, a bullet casing on the floor behind the driver's seat, and a sheet covering the rear seat wet with blood. The rear window had been blown out. A second shell was found on the roof of the car, and a third was found on Button Street at the shooting scene. The [petitioner] went to the Hospital of [Saint] Raphael (hospital) at 2:49 a.m. to seek treatment for a gunshot wound. He spoke with a New Haven police officer at 3:05 a.m. He gave a statement to Sergeant Diane Langston declaring that he and his friend had been accosted and shot on the street in an attempted robbery by two masked men. The [petitioner] stated that he and his friend then ran directly to the hospital.

"A ballistics expert testified that the bullet obtained from Torres' body matched the .45 caliber shell casing found on the floor of the Buick. The other casings found on the roof of the Buick and on Button Street came from a nine millimeter gun. A fingerprint expert identified fingerprints found on the interior of the driver's door as those of the [petitioner]. Experts from the state forensic laboratory testified that the blood on the sheet covering the backseat was consistent with the [petitioner's] blood type." Id., 283–85.

In 2012, the petitioner filed an initial petition for a writ of habeas corpus and, in December, 2014, he filed the operative, third amended petition.[2] In his petition, the petitioner raised six claims. The claims raised in the present appeal relate to the court's denial of portions of the first and sixth counts of the petition.

In the first count, the petitioner claimed that he was deprived of his right to due process because the prosecutor at his criminal trial, John Waddock, failed to disclose "material exculpatory evidence." The petitioner alleged that this included evidence that the defense could have used to impeach two of the state's witnesses, namely, Langston and Santana. Langston is a retired sergeant of the New Haven Police Department who, as a patrol officer in 1993, met with the petitioner during the early morning of May 6, 1993, and was a witness for

[2] The petitioner alleged in relevant part that, prior to filing the present petition for a writ of habeas corpus, he filed seven other petitions for a writ of habeas corpus. The petitioner alleged that, in 2001, he withdrew the first petition, brought under docket number CV-01-0341487, without prejudice.

He alleged that, in 2002, the habeas court, *Carroll*, *J.*, dismissed the second petition that he brought under docket number CV-02-0344847.

He alleged that, in 2002, the habeas court, *Carroll*, *J.*, dismissed the third petition that he brought under docket number CV-02-0345701.

He alleged that, in 2003, the habeas court, *White*, *J.*, dismissed the fourth petition that he brought under docket number CV-02-0349430.

He alleged that, in 2004, the habeas court, *White*, *J.*, dismissed the fifth petition, which had not been assigned a docket number.

He alleged that, in 2008, following a trial, the habeas court, *dos Santos*, *J.*, denied the sixth petition, which was brought under docket number CV-05-4000598. In this action, the petitioner was represented by Attorney Frank Cannatelli. Subsequently, our Supreme Court affirmed the judgment of the habeas court. *Ham* v. *Commissioner of Correction*, 301 Conn. 697, 23 A.3d 682 (2011).

The petitioner further alleged that, in 2012, following a trial, the habeas court, *Newson*, *J.*, denied his seventh petition for a writ of habeas corpus that was brought under docket number CV-09-4003016. In this action, the petitioner was represented by Attorney Hilary Carpenter. Subsequently, this court affirmed the judgment of the habeas court. *Ham* v. *Commissioner of Correction*, 152 Conn. App. 212, 98 A.3d 81, cert. denied, 314 Conn. 932, 102 A.3d 83 (2014).

the state at his criminal trial. Central to the petitioner's claims concerning Langston is the fact that, on January 8, 1997, she testified, consistent with her police report in this matter, that, on May 6, 1993, she was dispatched to meet with the petitioner at the hospital at 2:05 a.m. On January 13, 1997, the prosecutor recalled Langston as a witness for the state, and Langston testified that, following her initial testimony in this case, and on her own initiative, she checked her personal daily notebook as well as the police activity log maintained by her department. Relying on these records, Langston realized that, with respect to the specific time at which she had been dispatched to meet with the petitioner, her previous testimony was inaccurate. During her later testimony, she stated that, on May 6, 1993, she had been dispatched to meet with the petitioner at 2:48 a.m. It is undisputed that the time at which Langston had been dispatched to meet with the petitioner was significant in light of the fact that the state's theory of the case was premised on the shooting having occurred at 2:20 a.m.

Pertinent to the claims raised in the present appeal, the petitioner alleged that the prosecutor was aware of, but did not disclose information that the defense could have used to challenge Langston's credibility, particularly with respect to her testimony concerning the time at which she had been dispatched to meet with him at the hospital on May 6, 1993. Specifically, the petitioner alleged that the prosecutor failed to disclose that "Langston was involved in a previous incident for which she was subject to prosecution at the time she testified at the petitioner's criminal trial," and that, "[o]n January 8, 1997, [following her initial testimony at the petitioner's criminal trial] the prosecuting authority asked . . . Langston to obtain and produce evidence contradicting her prior testimony that she had been dispatched to speak with the [petitioner] at 2:05 a.m. on May 6, 1993." The petitioner alleged that there is a

reasonable probability that, had the evidence at issue been disclosed to the defense in a timely manner, the outcome of the trial would have been more favorable to him.

In the second count, the petitioner claimed that he was deprived of his right to due process because the prosecutor presented testimony from Langston and Santana that the prosecutor knew or should have known to be false, and that the prosecutor failed to correct their testimony. As relevant to the claims raised in the present appeal, the petitioner alleged that, during her trial testimony after she was recalled as witness by the prosecutor, Langston falsely testified "that she was dispatched to meet with [the petitioner] at 2:48 a.m. on May 6, 1993, and . . . that she checked her personal notebook and daily activity logs on January 8, 1997, of her own volition." The petitioner alleged that, but for the false testimony, the outcome of the trial would have been more favorable to him.

In the third count, the petitioner claimed that he was deprived of his right to the effective assistance of counsel because his trial counsel, William F. Dow, was deficient in several respects. As relevant to the claims raised in the present appeal, the petitioner alleged that Dow "failed to adequately cross-examine, impeach, or otherwise challenge the testimony of Diane Langston concerning the time she was dispatched to meet with the petitioner and her motivation to testify falsely against the petitioner . . . ." The petitioner alleged that there was a reasonable probability that, absent Dow's deficient performance, the outcome of the trial would have been more favorable to him.

In the fourth count, the petitioner claimed that he was deprived of his right to the effective assistance of counsel because his appellate counsel, William S. Palmieri, failed to raise certain claims of error. The

petitioner alleged that there was a reasonable probability that, absent Palmieri's deficient performance, the outcome of his direct appeal would have been more favorable to him.

In the fifth count, the petitioner claimed that he was deprived of his right to the effective assistance of counsel because prior habeas counsel, Frank Cannatelli, failed to raise or failed adequately to pursue the four claims that he previously raised in the present petition. The petitioner alleged that there was a reasonable probability that, absent Cannatelli's deficient performance, the outcome of his prior habeas action would have been more favorable to him.

In the sixth count, the petitioner claimed that he was deprived of his right to the effective assistance of counsel because his prior habeas counsel, Hilary Carpenter, was deficient in a number of ways. Specifically, the petitioner argued that Carpenter failed to raise or failed adequately to pursue the five claims that he previously raised in the present petition. One aspect of his claim concerning Carpenter's representation was that she failed to pursue a claim of ineffective assistance arising from Dow's failure "to adequately cross-examine, impeach, or otherwise challenge the testimony of . . . Langston concerning the time she was dispatched to meet with the petitioner and her motivation to testify falsely against the petitioner . . . ." The petitioner alleged that there was a reasonable probability that, absent Carpenter's deficient performance, the outcome of his prior habeas action would have been more favorable to him.

The respondent, the Commissioner of Correction, denied the substantive allegations in the petition. By way of defenses, the respondent alleged that, to the extent that the petitioner was raising claims that could have been raised in his direct appeal, in prior habeas

actions, or in prior appeals in habeas actions, he was procedurally defaulted from doing so because "[he] has deliberately bypassed the opportunity to contest said issues," and has not shown cause and prejudice as to why such claims were not raised previously. Additionally, the respondent alleged that, to the extent that the petitioner was attempting to relitigate issues that had been raised and decided in his direct appeal, his prior petitions, or in prior appeals in habeas actions, he was barred from doing so under the doctrine of res judicata. Finally, relying on the petitioner's history of filing habeas petitions, the respondent raised the defense of abuse of the writ. In the petitioner's reply to the return, he alleged that none of the defenses relied on by the respondent applied to his claims.

During the course of three days in January, 2015, the court, *Fuger*, *J.*, held a hearing concerning the petition. With respect to the claims set forth in the petition, the petitioner presented the testimony of nine witnesses. These included himself; Dow; Waddock; Palmieri; Cannatelli; Carpenter; Langston; Jason Minardi, a lieutenant with the New Haven Police Department who previously had been the officer in charge of its internal affairs division; and Roy Olson, a retired captain of the New Haven Police Department who supervised its internal affairs division for seven years. The court received several exhibits and, at the conclusion of the trial, both parties filed posttrial briefs.

In its lengthy memorandum of decision filed April 24, 2015, the court addressed all of the claims raised in the petition. In parts I and II of this opinion, we discuss in greater detail those portions of the habeas court's decision that are relevant to the claims raised in the present appeal. At this juncture, it suffices to discuss generally the parameters of the court's decision. In counts one and two of the petition, the petitioner alleged violations of his right to due process resulting

from the prosecutor's failure to disclose exculpatory evidence concerning Langston and Santana. Insofar as these claims related to Langston, the court rejected them on their merits. Insofar as these claims were related to Santana, the court deemed the claims to be abandoned.

The court also rejected the claims raised in counts three, four, and five of the petition. The court, relying on the petitioner's history of filing habeas petitions, concluded that the respondent properly invoked the defense of res judicata and that it barred litigation of the claims of ineffective assistance on the part of Dow, Palmieri, and Cannatelli.

Furthermore, the court rejected the claim raised in count six, in which the petitioner alleged ineffective assistance on the part of Carpenter for failure to pursue claims of ineffectiveness on the part of Dow, Palmieri, and Cannatelli. The court rejected each aspect of this claim on its merits.

Finally, the court addressed the respondent's defense of abuse of the writ. In a comprehensive analysis of the issue, the court concluded that the petitioner had abused the writ. Particularly troubling in the court's view were the claims of impropriety directed at the prosecutor, concerning whom the court found "no evidence whatsoever showing any misconduct or impropriety." The court concluded that, although it believed that the petitioner had abused the writ, it declined to dismiss the petition in light of the fact that the petitioner's claim of ineffective assistance on the part of Carpenter had not previously been raised and adjudicated.

Following the court's denial of the petition for a writ of habeas corpus, the petitioner filed a petition for certification to appeal. See General Statutes § 52-470. The petition encompassed the rulings which are the subject of the present appeal. The court denied the petition.

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

Before we reach the merits of the petitioner's claims, we discuss his burden in demonstrating that he is entitled to relief. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. . . .

"In evaluating the merits of the underlying claims on which the petitioner relies in the present appeal, we observe that [when] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are

challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 174 Conn. App. 776, 785–86, 166 A.3d 815, cert. denied, 327 Conn. 957, 172 A.3d 204 (2017).

I

First, we address the petitioner's claim that the court improperly denied his petition for certification to appeal with respect to his claim that the prosecutor violated his right to due process[3] by failing to disclose material exculpatory evidence. We disagree with the petitioner.

As we previously stated, in count one of his amended petition for a writ of habeas corpus, the petitioner alleged in relevant part that the prosecutor was aware that (1) "Langston was involved in a previous incident for which she was subject to prosecution at the time she testified at [his] criminal trial," and (2) "[o]n January 8, 1997, the prosecuting authority asked . . . Langston to obtain and produce evidence contradicting her prior testimony that she had been dispatched to speak with [the petitioner] at 2:05 a.m. on May 6, 1993." The petitioner alleged that the prosecutor failed to disclose this information to the defense, this information was "exculpatory or otherwise favorable evidence that should have been disclosed to [him] or his counsel prior

[3] The petitioner alleges a violation of his right to due process under the federal and state constitutions. Because the petitioner has not provided this court with an independent analysis of his claim under the state constitution, we deem his state constitutional claim to be abandoned and limit our analysis to the federal constitution. See *State* v. *Hearl*, 182 Conn. App. 237, 271 n.28, 190 A.3d 42, cert. denied, 330 Conn. 903, 192 A.3d 425 (2018).

to his criminal trial," and the evidence was "material because there is a reasonable probability that—had it been disclosed in time to be used by the defense during [his] criminal trial—the result of [his] trial would have been different and more favorable to [him]." As we discussed previously, in count two, the petitioner alleged in relevant part that the prosecutor presented false testimony from Langston, specifically, her testimony that (1) she was dispatched to meet with the petitioner at 2:48 a.m., on May 6, 1993, and (2) on January 8, 1997, following her initial trial testimony, she voluntarily checked her daily activity notebook in an effort to verify the accuracy of her testimony concerning the time at which she had been dispatched to meet with the petitioner.

In rejecting this claim concerning the prosecutor's conduct, the court set forth detailed factual findings. The court stated in relevant part: "The court will begin its discussion with the direct appeal from the criminal conviction, where the [petitioner's] second claim . . . [was] based on the admission into evidence of hospital records relating to the [petitioner's] visit to the hospital for treatment of the gunshot wound that he claimed to have received in the attempted robbery. The following additional facts [were] necessary for [the Appellate Court's] resolution of this claim. The hospital records indicated that the [petitioner] was admitted at 2:49 a.m. on the morning of the crimes. [During the petitioner's criminal trial on January 8, 1997] Sergeant Langston . . . testified that she had taken a statement from the [petitioner] at the hospital shortly after 2:05 a.m. Because the state claimed that the shooting occurred at 2:20 a.m., Langston's testimony would have provided the [petitioner] with an alibi if it were correct. [On January 13, 1997] [t]he state called Langston to testify once again after the introduction of the hospital

records. It also introduced into evidence, over the [petitioner's] objection, two previously undisclosed statements by Langston, both of which indicated that she had not been dispatched to the hospital until 2:48 a.m. She testified that her earlier testimony was the result of human error. *State* v. *Ham*, supra, 55 Conn. App. 287. The Appellate Court concluded that the hospital records were properly admitted into evidence because the only purpose for introducing the hospital records was to explain the basis for Langston's correction of her previous testimony concerning the time of the [petitioner's] hospital visit . . . . Id., 289.

"This court finds the following additional facts. It is uncontroverted that Langston testified about the times of certain events when she first testified during the criminal trial on January 8, 1997. Attorney Dow cross-examined Langston about the times to which she testified on direct examination and offered her report, which corroborated her direct testimony, into evidence as a business record. . . . Dow argued [that the report was critical to establishing the petitioner's whereabouts in the hours following the shooting and that the report was not so cumulative so as to prejudice the state's case]. . . .

"Judge Hadden [acknowledged that the timing of events described by Langston was undoubtedly relevant with respect to the issues in the case, but] sustained the state's objection to portions of Langston's report becoming full exhibits because the report was cumulative to her testimony. . . .

"Attorney Dow then continued his cross-examination of Langston with a series of questions that sought to accentuate the times she had testified to. . . . The prosecutor began his redirect examination by asking Langston about the accuracy she strives for in her reports and other recorded information. Langston

acknowledged that she at times made mistakes in her reports. . . . The prosecutor then sought to question Langston about when she heard a radio broadcast concerning another incident on Button Street that occurred during the time that Langston had testified she was writing her report, to which defense counsel objected and the jury was excused. . . . The exchange between Judge Hadden and the prosecutor about the objection shows that [during his examination on January 8, 1997] the prosecutor was attempting to somehow show that the times testified to by Langston were incorrect. . . . [The prosecutor] ultimately withdrew his question." (Citations omitted; internal quotation marks omitted.)

The habeas court observed that, at the criminal trial and outside of the presence of the jury, the prosecutor and Judge Hadden engaged in a colloquy concerning Langston's testimony that, on the morning of the shooting, she spoke to the petitioner at the hospital at 2:05 a.m., as well as the evidence that the shooting occurred at 2:20 a.m. The habeas court observed that, during that colloquy, the prosecutor acknowledged that this discrepancy in the state's case could amount to "serious trouble" for the state.

The habeas court continued: "The jury then returned to the courtroom, and redirect examination continued with [the prosecutor] asking Langston about her having made, during the course of her career, mistakes in police reports as to times of events. . . . Dow then questioned Langston on recross-examination to emphasize the times that Langston had testified to and that she strives for accuracy in her reports. . . . Court then adjourned and resumed on January 13, 1997." (Citation omitted.)

The habeas court observed that, on January 13, 1997, Langston was recalled as a witness by the state and questioned about the accuracy of her prior testimony,

on January 8, 1997, concerning the time at which she had been dispatched to meet with the petitioner at the hospital on May 6, 1993. The prosecutor asked Langston if she had referred to a police activity log as well as her daily notebook, neither of which she had with her during her testimony on January 8, 1997. Langston testified that she had occasion to review these materials. The prosecutor offered a page from Langston's daily notebook covering May 6, 1993, and Dow objected to its admission on the ground that the document had not been disclosed to the defense previously. Dow argued that the state, having been aware of the discrepancy in Langston's testimony concerning the time at which she had been dispatched to meet with the petitioner, should have disclosed the document to the defense on January 8, 1997, or, at the very latest, on the morning of January 13, 1997. Nonetheless, the court admitted the document from Langston's daily notebook as a full exhibit. Over Dow's objection, the court also admitted the daily activity log that was maintained by the police department. The court denied Dow's motion to strike Langston's testimony of January 13, 1997, observing that the state "[had] . . . a right to bring out through the offering of these exhibits and the testimony of this witness what, from the state's perspective, is the accurate [time] that this sergeant went to the hospital and when she interviewed the [petitioner]. The defense has full and ample opportunity to cross-examine her with respect to the contents of both of these exhibits. . . .

"The jury then returned to the courtroom and the direct examination of Langston continued, with the prosecutor asking a series of questions related to the notebook excerpt and the daily activity log that supported Langston's testimony that her prior testimony about when she was at [the hospital] was incorrect. . . . Langston acknowledged that the times she put in her report and testified to in her initial testimony [on

January 8, 1997] were incorrect due to human error. . . .

"Dow used his cross-examination to emphasize [that] Langston's original testimony was correct and [to] undermine the credibility of her subsequent corrections. . . . Dow also questioned Langston as to how she came to realize that her initial testimony was incorrect . . . ." (Citations omitted; internal quotation marks omitted.)

The habeas court referred to the transcript of Dow's extensive cross-examination of Langston during the criminal trial on January 13, 1997, during which Dow elicited from Langston that, shortly after she left the courthouse after testifying on January 8, 1997, she reported for duty at the police department. Upon her arrival, she reviewed her personal notebook as well as the police daily activity logs. She testified that, with respect to the timing of when she had been dispatched to meet with the petitioner, she had " 'conducted [her] own investigation as to times' " and immediately noted her mistake concerning her testimony and the time that appeared in her report, the document on which she relied during her testimony on January 8, 1997. Thereafter, Dow elicited from Langston that she had not attempted to contact the prosecutor's office immediately, but spoke to an inspector in the prosecutor's office, whom she identified as "Ortiz," about the matter by telephone on Saturday, January 11, 1997. During Dow's examination, Langston acknowledged that it was important for a police officer who was testifying in a murder prosecution to be as accurate and complete as possible with respect to key facts. She testified that, during her initial testimony, she merely had relied on the time set forth in her police report. At that time, Langston testified, she believed her report to be accurate.

The habeas court stated: "Dow then questioned Langston about whether she had spoken with any of the police detectives involved in the investigation of the petitioner's offenses, as well as whether she was aware that all police reports are signed under penalty for making a false statement." The court set forth a portion of Dow's cross-examination of Langston in which she testified that, on Saturday, January 11, 1997, she discussed with Ortiz the fact that her January 8, 1997 testimony was erroneous with respect to the time at which she had been dispatched to meet with the petitioner and that Ortiz instructed her to bring any relevant documents to court with her on Monday, January 13, 1997. As the court observed, Dow explored the times in Langston's report, the accuracy of the report at the time it was prepared, and the fact that she had reviewed the report three times prior to her initial testimony.

The court continued: "In the present matter . . . Langston testified on direct examination [during the habeas trial] that she spoke with [the prosecutor] about the times in her report after completing her initial testimony. According to Langston, she told [the prosecutor] that if there were any time errors in her report, those errors could be rectified by receiving other records maintained by the police department (e.g., the daily activity log). Langston again acknowledged, consistent with her testimony the second time she testified during the criminal trial, that she put incorrect times in her report, but that her personal notebook and the police activity log contained the correct times. Langston indicated that the likely source of the incorrect time in her report was the petitioner himself, because the report pertained to the incident in which the petitioner claimed that he and a friend had been the victims of a shooting and robbery.

"As to her history with internal affairs . . . Langston testified that she was unaware of having such a history

prior to testifying in the petitioner's criminal trial. The officer-involved shooting [of Ronald Carney in 1992] in which Langston used deadly force to protect a fellow police officer occurred approximately five years prior to the petitioner's criminal trial and, as mandated by department policy, was investigated by internal affairs. . . . Langston acknowledged that she sought out counseling to help her deal with the trauma she experienced after the shooting. Langston was not charged with any offenses after the state's attorney's office also investigated the shooting.[4]

"[At the habeas trial, the prosecutor] presented brief testimony. Although he could not recall many of the details surrounding the underlying criminal case he prosecuted, [he] recalled that Langston testified twice and that the times she testified to the first time were incorrect. [The prosecutor] could neither recall whether he asked Langston to find evidence showing her times were incorrect, nor if Langston told him that she could obtain documents that demonstrated the correct times, nor what he disclosed to the defense, nor whether he was aware of any internal affairs investigations into Langston. [The prosecutor] acknowledged that the timing of when Langston spoke with the petitioner at the hospital was in contention and that Langston corrected, with supporting documentation, her initially incorrect testimony during her second appearance.

"The petitioner's former defense counsel, Attorney Dow, testified [at the habeas trial] that part of the defense strategy evolved in tandem with Langston's report and initial testimony, which essentially would

[4] The court observed that there was evidence that Langston had two previous internal affairs files, each involving off-duty conduct in Bridgeport, but that there was no evidence that Langston was aware of these files. Additionally, the court observed that there was evidence that Langston had "several memoranda in her internal affairs files which were issued while she was in the training academy." See footnote 6 of this opinion.

have made her the petitioner's alibi witness. Langston's initial testimony undeniably was helpful to the petitioner because he could not have been in the hospital giving a statement to Langston at the time the shooting occurred on Button Street. Thus, Dow strove to enhance her credibility when Langston first testified. Attorney Dow was not surprised by, and even anticipated, that the state would attempt to correct Langston's incorrect testimony. Knowing that such correction was forthcoming, Dow used that temporary advantage to the petitioner's benefit by engaging in plea negotiations with the state. The petitioner was not interested in accepting a plea agreement. When Langston returned to testify for the second time, Dow rigorously cross-examined her about her efforts to correct her testimony while also continuing to underscore the credibility of her initial testimony. However, Langston's corrected testimony was consistent not only with police department records, but was also corroborated by hospital records that showed the petitioner's admission time to be later than what was contained in Langston's [inaccurate] report.

"[At the habeas trial] Lt. Jason Minardi, who previously was the officer in charge of internal affairs for the New Haven Police Department . . . could not locate any disciplinary records pertaining to Langston. According to Minardi, a finding that there was no disciplinary violation would result in the purging of the internal affairs file three years after the investigation into the incident was completed. When wrongdoing is found, however, the files are retained for thirty years after someone is terminated or retires.[5] Counseling is not a form of discipline. Captain Olson, who prepared the memorandum regarding the 1992 officer-involved shooting, testified that he did not know if Langston was ever disciplined for the two off-duty incidents mentioned in his memorandum, nor did he know any other

[5] The court credited Langston's testimony that she retired on June 30, 2011.

information about either disciplinary actions, if any, or whether Langston was charged with offenses. According to Olson, internal affairs reports were kept indefinitely until 1994, when the department's policy changed, at which point the purging [of files], including retroactively purging of files where no misconduct was found, described by Lt. Minardi, began.

"Given the foregoing testimonies (which the court finds credible both individually and collectively), the court concludes that the petitioner has failed to show that the prosecutor was aware of Langston's prior officer-involved shooting, let alone that she was subject to prosecution for her action during that incident. The petitioner has also presented no credible evidence that the prosecutor asked Langston to obtain and produce evidence contradicting her initial testimony. The due process claims in count one as to Langston are without merit.

"As to the due process claim in count two as to Langston, the examination by the prosecutor and defense counsel during the first day she testified itself demonstrated to Langston that she needed to look into whether the times in her report were correct or whether she had erred when producing her report. If anything, both the state and Langston had an obligation to correct testimony that was incorrect. . . . Consequently, the claim in count two as it pertains to Langston, which alleges that the prosecutor knew or should have known Langston's initial testimony was false and failed to correct it, is incongruous." (Citations omitted; footnote in original; footnote added.)

Additionally, in rejecting the petitioner's argument that the nondisclosed evidence concerning Langston was material, the court stated: "The petitioner's post-trial brief makes the outlandish argument that 'the fact that Langston was potentially subject to prosecution

for the shooting death of Ronald Carney [in 1992] provided her with a motive to fabricate evidence to comply with the prosecuting authority's request that she obtain evidence showing that her January 8, 1997 testimony was false, in order to avoid being prosecuted for the shooting of Carney.' Such argument has no basis in fact. It is the petitioner's argument that contains grandiose and fantastical reasons or motives for Langston fabricating evidence so that she could avoid being prosecuted for the shooting that occurred five years prior to the petitioner's trial." (Citation omitted.)

On appeal, the petitioner argues that the court improperly rejected his claim that the prosecutor failed to disclose (1) that Langston was involved in the shooting incident in 1992 "and that she had a lengthy internal affairs history that was described in an internal affairs report concerning that shooting,"[6] and (2) "that the prosecuting authority had requested that Langston obtain evidence contradicting her initial testimony

[6] The internal affairs report was introduced into evidence at the habeas trial. The lengthy report, prepared by Olson, addressed to the chief of the New Haven Police Department, and dated March 13, 1992, detailed the activities of Langston and two other police officers in the shooting death of Carney on January 6, 1992. The report detailed, among other things, a physical struggle between Carney and three police officers, including Langston, following a complaint of criminal trespass. During this struggle, Carney gained possession of one of the officer's pistols and caused it to discharge. After Langston attempted to restrain Carney, Carney attempted to point the weapon at Langston while pulling at the trigger. After she took cover, Langston observed that Carney was gaining the upper hand in his struggle with one of the officers. She discharged her service weapon once, fatally shooting Carney. The report does not conclude that Langston's conduct in this incident was improper in any way.

The report also includes the following: "Officer Diane Langston was employed by this department on July 31, 1989. She has two previous internal affairs files, each involving off-duty conduct in Bridgeport. One of the files was turned over to Major Thomas Muller and the second resulted in you causing her to . . . [obtain counseling]. She does have several memoranda in her internal affairs files which were issued while she was in the training academy. These memoranda and the latter incident in Bridgeport were the reason she was directed by you to see [a counselor]."

about the time she was dispatched to meet with the petitioner." The petitioner argues that the court improperly determined that the prosecutor lacked knowledge of Langston's internal affairs history. In this regard, the petitioner argues that the habeas court ignored well settled authority in support of the proposition that knowledge of any information known to the police department is imputed to the prosecutor, and that the prosecutor is under a duty to learn of and to disclose to the defense any information contained in police personnel files that is relevant to an officer's credibility. Moreover, the petitioner argues that the court improperly concluded that no credible evidence supported his claim that the prosecutor had asked Langston to obtain evidence contradicting her initial trial testimony. In this regard, the petitioner argues that the court found credible the prosecutor's testimony at the present habeas trial, but the court "apparently overlooked" evidence that, at a prior habeas trial, the prosecutor testified that, at the time of the criminal trial, he had, in fact, asked Langston to investigate in an effort to determine whether there was any evidence to support her corrected testimony.

"Whether the petitioner was deprived of his due process rights due to a . . . violation [under *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)] is a question of law, to which we grant plenary review. . . . The conclusions reached by the [habeas] court in its decision to [deny] the habeas petition are matters of law, subject to plenary review. . . . Thus, [w]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . Also, [t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous." (Citation omitted;

internal quotation marks omitted.) *Stevenson* v. *Commissioner of Correction*, 165 Conn. App. 355, 363, 139 A.3d 718, cert. denied, 322 Conn. 903, 138 A.3d 933 (2016).

"It is well established that suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . . To establish a *Brady* violation the defendant bears the burden of demonstrating: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that it was material." (Citations omitted; internal quotation marks omitted.) *Demers* v. *State*, 209 Conn. 143, 149–50, 547 A.2d 28 (1988). "If . . . the petitioner has failed to meet his burden as to one of the three prongs of the *Brady* test, then we must conclude that a *Brady* violation has not occurred." *Morant* v. *Commissioner of Correction*, 117 Conn. App. 279, 296, 979 A.2d 507, cert. denied, 294 Conn. 906, 982 A.2d 1080 (2009).

"Under the last *Brady* prong, the prejudice that the defendant suffered as a result of the impropriety must have been material to the case . . . . [T]he evidence will be deemed material only if there would be a reasonable probability of a different result if the evidence had been disclosed. . . . This standard is met if the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (Citations omitted; internal quotation marks omitted.) *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 262–63, 112 A.3d 1 (2015); see also *Greene* v. *Commissioner of Correction*, 330 Conn. 1, 29, 190 A.3d 851 (2018) (discussing *Brady*'s materiality prong).

"It is well established that impeachment evidence may be crucial to a defense, especially when the state's

case hinges entirely upon the credibility of certain key witnesses. . . . The rule laid out in *Brady* requiring disclosure of exculpatory evidence applies to materials that might well alter . . . the credibility of a crucial prosecution witness." (Internal quotation marks omitted.) *State* v. *Esposito*, 235 Conn. 802, 815–16, 670 A.2d 301 (1996).

Before the habeas court, the petitioner articulated an argument with respect to the materiality of the undisclosed information concerning Langston. The petitioner argued: "Langston had previously been involved in the shooting death of Ronald Carney. As a result of that incident, Lieutenant Roy Olson of the New Haven Police Department produced a memorandum regarding the shooting of Ronald Carney and the involvement of Diane Langston and other officers in that shooting. The memorandum outlined Langston's prior internal affairs history. The memorandum stated that Langston had two previous internal affairs files, each involving off-duty conduct. Langston also had several memoranda in her internal affairs files that were issued while she was in the training academy. Langston had accumulated all of these files in just over three years of service as a police officer. As a result of one of the internal affairs investigations and the memoranda from the training academy, Langston was told to see a doctor for counseling. Under New Haven Police Department policy, Langston would have been told to undergo counseling as a result of a pattern of behavior that was detrimental to the department. Had the prosecuting authority turned over the fact that Langston had been involved in the shooting death of Ronald Carney and the internal affairs reports of the local police department concerning the shooting, the defense would have been aware of all of the foregoing facts.

"The evidence concerning the shooting death of Ronald Carney and the fact that the prosecuting authority

requested that Langston obtain a specific piece of evidence [related to the timing of when she had been dispatched to meet with the petitioner] . . . would have been relevant to the credibility of . . . Langston because it tended to show that she had a motive to testify falsely in order to secure a conviction. First, the fact that Langston was potentially subject to prosecution for the shooting death of Ronald Carney provided her with a motive to fabricate evidence to comply with the prosecuting authority's request that she obtain evidence showing that her January 8, 1997 testimony was false, in order to avoid being prosecuted for the shooting of Carney. Additionally, Langston's lengthy internal affairs history and the fact that she specifically had been required to undergo counseling were all facts showing that she had engaged in conduct that was harmful to her reputation in the police department. It would have been reasonable for the jury to infer that Langston's reputation within the police department would have been further harmed had she provided the key piece of evidence that led to an acquittal in a high profile case and that she would fabricate evidence to avoid harming her reputation." (Footnotes omitted.) The petitioner continued his argument concerning materiality by emphasizing the importance of Langston's trial testimony. The petitioner raises similar materiality arguments before this court.[7]

We need not resolve the issue of whether the prosecution suppressed evidence concerning Langston that was

[7] The petitioner argues, as well, that, during the habeas trial, Langston was less than forthcoming about whether she had an "internal affairs history" and that she falsely testified at the habeas trial that she had not been asked to see a counselor as a result of her off-duty conduct. Accordingly, the petitioner argues that, had Langston testified in a similar manner at his criminal trial, he would have had the ability to challenge her credibility by means of the internal affairs report. This aspect of the claim, which is based merely on speculation as to how Langston might have testified at the criminal trial, is not persuasive.

favorable to the defense because, in our plenary review of the constitutional issue presented, we agree with the habeas court's assessment that the evidence, if admissible in whole or in part, was not material. The touchstone of a materiality analysis under *Brady* concerns the overall fairness of the trial and whether the prosecutor's failure to disclose undermines our confidence in the verdict. *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 263. We must consider "if the withheld evidence is of sufficient import or significance in relation to the original trial evidence that it reasonably might give rise to a reasonable doubt about the petitioner's guilt." Id. The prosecutor's failure to disclose information concerning Langston's internal affairs history and her involvement in the shooting death of Carney five years prior to the petitioner's criminal trial does not undermine our confidence in the verdict.

Langston's initial direct examination was brief; the substance of the testimony elicited from Langston by the prosecutor may be summarized as follows. Langston testified that she was dispatched to meet with the petitioner at the hospital at 2:05 a.m. on May 6, 1993. Thereafter, she spoke with the petitioner while he was in the emergency room, and he told her that he and a friend were leaving a store in New Haven when they were accosted by two black males. According to Langston, the petitioner told her that he sustained a gunshot injury when the men attempted to rob them and that he and his friend proceeded directly to the hospital. Certainly, Langston's testimony with respect to when she was dispatched to meet with the petitioner was an important part of the state's case. It was not, however, the only evidence of when the petitioner was present at the hospital.[8]

[8] As we explain in greater detail in part II of this opinion, the state presented hospital records that corroborated Langston's testimony that, after the police were notified that the petitioner had been shot, she had been dispatched to meet with the petitioner at the hospital after 2:20 a.m.

The petitioner's ability to confront Langston was not undermined to any significant degree by the prosecutor's failure to disclose the information at issue because the information at issue lacked an appreciable potential to have altered the jury's assessment of Langston's credibility. The internal affairs report at issue refers extensively to the conduct of the three police officers who were involved in the incident during which Langston shot Carney, yet it does not suggest that Langston acted wrongfully or unlawfully during that incident. The report states, among other things, that Carney resisted when Officer Richard Pelletier attempted to handcuff him following a criminal trespass complaint. During the struggle, Carney struck another officer, Joseph Boyd, and gained possession of his service weapon. A struggle ensued between Carney and Pelletier, during which time Carney discharged Boyd's weapon into the air. Langston sought to assist Pelletier when Carney "attempted to train the weapon at her while pulling at the trigger." Langston, after taking cover, watched from a safe distance as Carney continued to struggle with Pelletier while Pelletier held Carney's hands and arms upward so that he was unable to use Boyd's weapon. Langston summoned additional police assistance, but became concerned when it appeared that Pelletier was losing ground in the struggle and there was a serious threat to officer safety. Langston fired a single fatal gunshot at Carney, striking him in the back of the head. Likewise, the internal affairs report refers to the fact that Langston was directed to receive counseling as a result of "off-duty conduct in Bridgeport" and that "[s]he does have several memoranda in her internal affairs files which were issued while she was in the training academy."

None of the facts surrounding Langston's role in Carney's death supports a reasonable inference that, at the time of the petitioner's criminal trial, she was living

under a realistic or imminent threat of prosecution for her role in Carney's death. Moreover, the scant information in the report concerning counseling does not reasonably support an inference that, at the time of the petitioner's criminal trial, Langston's reputation in the police department was tarnished or that her job was in jeopardy. The further and critical inference on which the petitioner relies to demonstrate materiality is, as the court aptly characterized it, "outlandish . . . ." In an attempt to link the Carney shooting and the internal affairs report to the testimony at issue in this case, the petitioner argues that it would have been reasonable for the jury to infer that Langston had not merely a motive *to commit perjury* in an effort to convict an innocent person, but a motive *to fabricate evidence*, namely, the evidence that supported her corrected trial testimony concerning the time at which she had been dispatched to meet with him. This reasoning strains credulity.

The petitioner also argues that a *Brady* violation occurred because the prosecutor failed to disclose that, at the time of the criminal trial, he asked Langston to obtain and produce evidence that contradicted her initial trial testimony.[9] Consistent with our previous

[9] As part of this claim, the petitioner challenges the habeas court's finding that he "presented no credible evidence that the prosecutor asked Langston to obtain and produce evidence contradicting her initial testimony" at the petitioner's criminal trial. The petitioner accurately refers to the fact that he presented evidence that, at a prior habeas trial, the prosecutor acknowledged that, prior to Langston's subsequent testimony on April 13, 1997, he had "requested . . . Langston to conduct some investigation to see whether . . . information [concerning the fact that her initial trial testimony was inaccurate] would be available and [whether that information was] something I would be able to put before the jury." When he was presented with this testimony during the present habeas trial, the prosecutor stated that although it did not refresh his recollection of the relevant events, on the basis of his prior testimony he agreed with the respondent's counsel when she asked him if he would "accept" that the version of events described in his prior testimony was accurate.

The petitioner argues that the habeas court "apparently overlooked" this testimony of the prosecutor and that, on the basis of this testimony, this

analysis, even if we were to assume that, in this regard, the prosecutor suppressed evidence that was favorable to the defense, the petitioner has not demonstrated that this evidence was material. The materiality of this evidence is inextricably linked to the petitioner's theory that, because Langston either feared prosecution related to Carney's death or because she was concerned for her standing in the New Haven Police Department, Langston committed perjury and fabricated evidence in an attempt to lend support to the state's case and, thus, curry favor with the Office of the State's Attorney. As we have explained previously, the inferences on which this theory relies are not at all reasonable.

For the foregoing reasons, we are not persuaded that the resolution of the petitioner's *Brady* claim involves issues that are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions involved deserve encouragement to proceed further. Accordingly, we conclude that the petitioner has failed to demonstrate that the habeas court improperly denied his petition for certification to appeal with respect to this claim.

II

Next, the petitioner claims that the habeas court improperly denied his petition for certification to appeal with respect to his claim that counsel in a prior habeas action, Carpenter, deprived him of his right to the effective assistance of counsel by abandoning the claim that trial counsel, Dow, deprived him of his right to the effective assistance of counsel by failing to adequately examine, impeach, and challenge the testimony that

court should be left with the definite and firm conviction that the habeas court's factual finding is clearly erroneous. In light of our conclusion that the evidence at issue was not material for purposes of *Brady*, we conclude that any error in the court's factual finding was harmless.

Langston provided after she was recalled as a witness by the state.[10] We disagree with the petitioner.

As we discussed previously in this opinion, in count six of his third amended petition for a writ of habeas corpus, the petitioner claimed in relevant part that, in a prior habeas action, Carpenter rendered ineffective assistance in that she failed to plead, argue, and prove the claim set forth in count three of his petition. In claim three, the petitioner alleged that Dow had rendered ineffective assistance during the criminal trial by failing adequately to "cross-examine, impeach, or otherwise challenge the testimony of . . . Langston concerning the time she was dispatched to meet with the petitioner and her motivation to testify falsely against the petitioner . . . ."

In rejecting this aspect of the petitioner's claim of ineffective representation by Carpenter, the habeas court essentially determined that the petitioner could not prevail because there was no evidence that Dow performed deficiently as trial counsel. The court stated: "This court's review of the criminal trial transcripts demonstrates that Attorney Dow vigorously questioned Langston, whether to support her initial testimony or challenge her ensuing corrections, and the petitioner has not presented any evidence as to how Attorney Dow could have any better challenged Sergeant Langston on the dispatch times or her purported motivations for presenting false testimony."

Presently, the petitioner focuses on what he believes to be Carpenter's failure in the prior habeas action to substantiate adequately his claim that Dow's second

[10] Although the petitioner claims that he was deprived of his right to the effective assistance of prior habeas counsel under the federal and state constitutions, he has not provided this court with an independent analysis of his claim under the state constitution. Accordingly, we deem his claim under the state constitution to be abandoned and limit our review to the federal constitution. See *State* v. *Hearl*, supra, 182 Conn. App. 271 n.28.

cross-examination of Langston, after she was recalled as a witness by the state, was deficient. In his appellate brief, the petitioner argues that in the prior habeas action, Carpenter raised a claim concerning Dow's deficient performance as it related to his cross-examination of Langston and that Carpenter "was aware that the claim could be supported by impeachment evidence contained in Langston's internal affairs file." He argues that Carpenter's performance as habeas counsel "was deficient because she entirely failed to investigate the claim and abandoned it at the petitioner's habeas trial."[11]

Previously, we discussed Langston's initial trial testimony as well as her later trial testimony, which was presented after she was recalled as a witness by the state. The petitioner accurately observes that Langston's initial trial testimony tended to undermine the state's theory of the case and that her later testimony was unfavorable to the defense. He argues that Dow "did nothing to prepare to impeach [Langston's] later testimony. [Dow's] failure to prepare to do so was wholly deficient. There is a reasonable probability that—had [Dow] properly impeached Langston's recall testimony in a way that preserved the reliability of her initial testimony, the petitioner would have been acquitted." According to the petitioner, Dow was deficient for failing to learn of Langston's role in the shooting death of Carney in 1992 and her "internal affairs history," and that these failures prejudiced the petitioner because such facts would have supported his theory, which we explored in part I of this opinion, that Langston "had a motive to testify falsely against [him]." Once more, the petitioner asserts that it would have been reasonable for the jury to infer that Langston's "history of impropriety" motivated her to testify untruthfully

[11] At the present habeas trial, Carpenter acknowledged that she "abandoned" the claim related to Dow's cross-examination of Langston.

in the state's favor in order to avoid prosecution for shooting Carney, to protect her standing in the police department generally, and to protect her job. The petitioner asserts that he was prejudiced by Dow's failure because, had he challenged Langston in the manner described, he would have cast serious doubt on the credibility of her later testimony.

Moreover, the petitioner argues, Dow "failed to elicit testimony from Langston showing that she was aware that sources existed that could accurately state the time she was dispatched [to meet with the petitioner], but that she elected not to investigate or to obtain those in preparation for her recall testimony." Specifically, the petitioner argues that "Dow never inquired about Langston's reasons for believing that her notepad and police logbook were more accurate than her sworn police report. He also failed to inquire about whether other materials existed that would indicate the time she was dispatched to meet with petitioner, and whether she confirmed the accuracy of her notepad and police logbook with those materials."

With respect to these materials, the petitioner draws our attention to Langston's testimony at the habeas trial that computer generated dispatch records on the police department's computers as well as "reel-to-reel tapes" would have provided a record of the time at which she was dispatched to meet with the petitioner on May 6, 1993, and that such records were immune to human error. At the habeas trial, Langston testified, however, that she did not feel a need to refer to these records, but, in determining the accuracy of her later testimony, relied on her personal notebook and the police activity log. Although the petitioner refers to Langston's testimony in this regard, he does not refer to the content of these other materials, and it does not appear that they were part of the evidence presented at the habeas trial. Nonetheless, the petitioner argues that Dow prejudiced the

petitioner by failing to explore this avenue of cross-examination because "had Dow . . . elicit[ed] the fact that she was aware of the computer generated dispatch records and reel-to-reel tapes, there is a reasonable probability that the jury would have acquitted the petitioner. Specifically, such testimony would have shown that both the prosecuting authority and Langston were aware that there was a record of the dispatch time that was not subject to human error, but that the prosecuting authority elected not to present that record to the jury. This would have raised reasonable questions as to why that evidence had not been presented and cast doubt on the reliability of Langston's recall testimony. There is a reasonable probability that the jury would have concluded that those records were not presented because they corroborated Langston's initial testimony that the petitioner was in the hospital at the time of the shooting and, accordingly, acquitted the petitioner." In this aspect of his claim, the petitioner argues that Dow was deficient simply for not drawing attention to the fact that the state failed to present these additional records, not that these additional records actually undermined the substance of Langston's later testimony.

Before addressing the merits of the petitioner's claim, we set forth basic governing principles. "The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition. . . . In *Lozada*, the court explained that [t]o succeed in his bid for a writ of habeas corpus, the petitioner

must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. *Lozada* v. *Warden*, supra, 842. As to each of those inquiries, the petitioner is required to satisfy the familiar two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . *Lozada* v. *Warden*, supra, 842–43. In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy *Strickland* twice . . . .

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential and courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . With respect to the prejudice prong, the petitioner must establish that if he had received effective representation by habeas counsel, there is a reasonable probability that the

habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . .

"It is well settled that in reviewing the denial of a habeas petition alleging the ineffective assistance of counsel, [t]his court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Citations omitted; internal quotation marks omitted.) *Gerald W.* v. *Commissioner of Correction*, 169 Conn. App. 456, 463–65, 150 A.3d 729 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017). This court has described a petitioner's burden in this regard as a " 'herculean task.' " *Toccaline* v. *Commissioner of Correction*, 177 Conn. App. 480, 499, 172 A.3d 821, cert. denied, 327 Conn. 986, 175 A.3d 45 (2017).

The petitioner's claim that Carpenter's representation deprived him of his right to the effective assistance of counsel in that she failed to investigate and pursue the claim that Dow's cross-examination of Langston deprived the petitioner of his right to adequate representation at the criminal trial depends on his proving, under the principles enunciated in *Strickland*, that Dow performed deficiently and that his deficient representation was prejudicial. We need not consider whether Dow performed deficiently because the petitioner has failed to satisfy his burden of proving under *Strickland*'s second prong that Dow's performance prejudiced him.

To the extent that the petitioner's claim is based on Dow's failure to pursue cross-examination related to Langston's role in the shooting death of Carney in 1992 or to any of the information contained in the internal affairs report authored by Olson in 1992, the claim of prejudice is wholly unpersuasive. As we have discussed at length in part I of this opinion, the petitioner relies

on facts that were not explored during Dow's cross-examination of Langston, including the fact that she fatally shot Carney in 1992 in the course of her duty as a police officer. Also, the internal affairs report that was filed following the shooting referred to the fact that she "[had] two previous internal affairs files, each involving off-duty conduct in Bridgeport"; several memoranda in her files were issued while she was in the training academy; and she had been directed to see a counselor. From these scant facts, the petitioner invites us to presume that a jury reasonably could have inferred that Langston had engaged in egregious wrongdoing such that she not only feared for her reputation and her career as a police officer, but that she feared prosecution. Furthermore, the petitioner invites us to presume that a jury reasonably could have inferred that, in an attempt to curry favor with the Office of the State's Attorney and to enhance her reputation as a police officer, Langston decided to correct her initial testimony, which was accurate, so that the state could successfully prosecute the petitioner for a crime that he did not commit. According to the petitioner, a jury reasonably could have inferred that this effort to assist the state did not merely consist of Langston fabricating her testimony after she was recalled as a witness by the state, but her fabrication of evidence to support her testimony. The inferences on which the petitioner relies are unreasonable because they are not logically drawn from the facts in evidence.

To the extent that the petitioner's claim is based on Dow's failure to cross-examine Langston with respect to the fact that her recall testimony was based on her review of her personal notebook and police daily activity logs, but that she had not referred to additional resources including computer generated dispatch records and reel-to-reel tapes, the claim of prejudice is unsubstantiated. The petitioner relies on Langston's

testimony that she did not deem it necessary to conduct further research into these additional resources as well as his belief that, unlike the documents on which Langston relied, these resources would have been immune to human error. The petitioner argues that if Dow had brought these facts to the jury's attention during his cross-examination of Langston, the jury surely would have found Langston's recall testimony to be untrue and that a finding of not guilty would have followed.

During her testimony at the habeas trial, Langston testified with respect to her belief that her police report was inaccurate because, therein, she had written as her dispatch time a time provided to her by the petitioner when she spoke with him at the hospital. She testified that her recall testimony was based on her personal notebook and the police activity log, which she believed to be accurate, and that she did believe it was necessary for her to refer to computer generated dispatch records in the custody of the police department. Langston did not appear to deflect the petitioner from conducting a further inquiry into the accuracy of her testimony. She testified that she believed that a record of her dispatch time was stored by the police department on "reel-to-reel tapes" and was "sure those tapes are still available." The petitioner has not presented any evidence to demonstrate that the computer generated records on which his claim heavily depends actually demonstrate that Langston's recall testimony, her personal notebook, or the police activity log were, in fact, inaccurate.

The evidence that is most damaging to the petitioner's claim of prejudice comes in the form of the petitioner's hospital records, which were introduced into evidence at his criminal trial and, thus, were fodder for the jury's consideration. It is undisputed that the hospital records reflect that, on May 6, 1993, emergency medical registration occurred at 2:49 a.m., an initial nursing assessment of the petitioner in the emergency department occurred

at 2:55 a.m., the petitioner was examined by a doctor at 2:55 a.m., the petitioner was observed by a nurse at 3 a.m., and the petitioner was interviewed by the police at 3:05 a.m. The state's theory of the case was that the shooting of the victim occurred in New Haven at 2:20 a.m. The habeas court found, and the petitioner does not dispute, that "Langston's corrected testimony was consistent not only with police department records, but also was corroborated by hospital records that showed the petitioner's admission time to be later than what was contained in Langston's report."[12]

The petitioner has failed to demonstrate that the alleged deficiencies in Dow's cross-examination of Langston prejudiced him. As the habeas court found, "Dow rigorously cross-examined [Langston] about her efforts to correct her testimony while also continuing to underscore the credibility of her initial testimony." We observe that not only did the petitioner's hospital records corroborate Langston's recall testimony, but the avenues of inquiry that the petitioner argues Dow should have pursued were not logically related to the evidence and the reasonable inferences to be drawn

[12] Rather than challenging the accuracy of the hospital records, the petitioner argues that, in evaluating prejudice, this court should discount the importance of the records because, during its deliberations, the jury requested to rehear Langston's testimony in its entirety. From this fact, the petitioner argues that this court must conclude that Langston's testimony was "among the most important parts of the case." There is absolutely no indication in the trial court record with respect to why the jury wanted to rehear Langston's testimony, nor any reason to infer that, in resolving the factual issues in this case, the jury improperly focused solely on Langston's testimony rather than the evidence in its entirety. The petitioner has not referred this court to any relevant authority to support the proposition that, in our evaluation of whether Carpenter's representation caused him prejudice, we should not consider all of the matters in the trial court record that are relevant to an evaluation of Dow's performance and the prejudice, if any, that it caused the petitioner. The fact that the jury asked to rehear the entirety of Langston's testimony does not in any way undermine the significance of the hospital records in our evaluation of prejudice.

therefrom, and, thus, were not likely to have been persuasive to the jury. Because the petitioner has failed to prove that Dow's performance prejudiced him, he is likewise unable to demonstrate that, in the prior habeas action, Carpenter's failure to pursue the claim related to Dow's performance caused him prejudice.

For the foregoing reasons, we are not persuaded that the resolution of the petitioner's claim concerning ineffective representation by Carpenter involves issues that are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions involved are adequate to deserve encouragement to proceed further. Accordingly, the petitioner has failed to demonstrate that the court abused its discretion in denying the petition for certification to appeal with respect to this claim.

The appeal is dismissed.

In this opinion the other judges concurred.

ASHLEY NORRIS ET AL. *v.* TOWN OF TRUMBULL ET AL.
(AC 40094)

Alvord, Prescott and Eveleigh, Js.

Syllabus

The plaintiffs, B and her daughter A, sought to recover damages for personal injuries from the defendant regional educational service center, which was established pursuant to statute (§ 10-66a et seq.), in connection with an incident in which A, a special needs student, was injured while attending a school operated and managed by the defendant. The defendant filed a motion to dismiss the only count of the complaint that was directed against it, which alleged negligence, claiming that, as a regional educational service center, under § 10-66c it was an agent of the state and, therefore, had sovereign immunity in an action for money damages absent a proper waiver of sovereign immunity. The trial court denied the defendant's motion to dismiss, and the defendant appealed to this court. The defendant claimed that the trial court improperly determined that the defendant's role in supervising students committed to its care

and custody was a municipal function that was not shielded by the doctrine of sovereign immunity. *Held* the trial court properly denied the defendant's motion to dismiss, as the defendant acted as an agent of its constituent municipal boards of education, and not the state, when overseeing the care and safety of children enrolled in its schools and programs, and, thus, it could not invoke the doctrine of sovereign immunity in this negligence action: the criteria set forth by our Supreme Court in *Gordon* v. *H.N.S. Management Co.* (272 Conn. 81) for determining when an entity properly can assert a sovereign immunity defense weighed against concluding that the defendant acted as an arm of the state with respect to any duty it may have had to supervise A, as a careful reading of the enabling legislation revealed that the defendant was not created by statute and that the legislature merely authorized boards of education in interested municipalities to join together to create a regional educational service center, the statutory language did not support a conclusion that the legislature intended for entities like the defendant to be treated like a state agent for all purposes, the fact that the legislation authorized the defendant's board to act on behalf of the state was not itself dispositive of whether the legislature also intended to treat the defendant as a state agency, entitled to all the rights and privileges of the state, including sovereign immunity, and nothing in the enabling legislation expressly states or of necessity implies that regional educational service centers such as the defendant stand in any different position than the municipalities that formed them and entrusted their students to them; moreover, indirect state funding did not make regional educational service centers, like the defendant, financially dependent on the state, as it was clear from the record presented and the defendant's admissions that the local municipal board, not the state, was directly responsible for much of the funding provided to the defendant for its services, and the defendant's constitution and bylaws made clear that it was governed by a representative council made up of members from its constituent local boards of education, and that no one from the state Board of Education or any other state functionaries were officers, directors, or trustees of the defendant, or were involved in the operation of the defendant's programs and services; furthermore, nothing in the record indicated that the state had any direct oversight or control over the defendant, its property or its operations other than to conduct an annual audit of finances and evaluation of programs and services, there was no requirement in the defendant's bylaws that budgets, expenditures or appropriations be reported to the state Board of Education for approval or that the state closely monitor its day-to-day operations at regional educational service centers, and a judgment against the defendant would not have a direct adverse effect on the state.

Argued October 18, 2018—officially released January 15, 2019

Procedural History

Action to recover damages for personal injuries sustained as a result of, inter alia, the defendants' negligence, and for other relief, brought to the Superior Court in the judicial district of Fairfield; thereafter, the action was withdrawn as against the defendant town of Trumbull et al.; subsequently, the court, *Radcliffe, J.*, granted the motion for summary judgment filed by the defendant city of Bridgeport et al.; thereafter, the court denied the motion to dismiss filed by the defendant Cooperative Educational Services, and the defendant Cooperative Educational Services appealed to this court. *Affirmed.*

Ashley A. Noel, with whom, on the brief, was *Timothy R. Scannell*, for the appellant (defendant Cooperative Educational Services).

Kenneth J. Bartschi, with whom were *Brendon P. Levesque* and, on the brief, *Jeffrey D. Lynch*, for the appellees (plaintiffs).

Opinion

PRESCOTT, J. The sole issue raised in this appeal is whether a regional educational service center established, pursuant to General Statutes § 10-66a et seq., by four or more municipal boards of education is entitled to invoke sovereign immunity in a negligence action brought by a special needs student injured while attending a school operated and managed by the regional educational service center. The defendant Cooperative Educational Services[1] appeals from the

[1] In addition to the defendant, the operative revised complaint named as additional defendants the town of Trumbull; the Trumbull Board of Education; Timothy M. Herbst, the first selectman of Trumbull; Ralph Iassogna, Trumbull's superintendent of schools; Cooperative Educational Services Foundation, Inc.; the city of Bridgeport; Bill Finch, the mayor of Bridgeport; the Bridgeport Board of Education; and Paul Vallas, Bridgeport's superintendent of schools. The plaintiffs withdrew the action as to Herbst, Iassogna, the town of Trumbull, the Trumbull Board of Education, and Cooperative Educational Services Foundation, Inc. The court later granted summary

trial court's denial of its motion to dismiss on sovereign immunity grounds that portion of the operative complaint filed against it by the plaintiffs, Ashley Norris, a minor child acting through her mother and next friend, Bonita Wiggins, and Bonita Wiggins individually.[2] The defendant claims that the court improperly determined that the defendant's role in supervising students committed to its care and custody is a municipal function that is not shielded by the doctrine of sovereign immunity. We disagree and conclude that the court properly denied the defendant's motion to dismiss. Accordingly, we affirm the judgment of the trial court.

The following facts, as alleged in or necessarily implied from the plaintiffs' complaint, and procedural history are relevant to our resolution of the defendant's claim. On April 25, 2013, the minor plaintiff was enrolled at a school for children with special needs located in Trumbull and operated by the defendant, a regional educational service center established pursuant to § 10-66a. The school's staff was aware that, for her safety, the minor plaintiff needed to wear a gait belt at all times.[3] That day, however, the minor plaintiff, who was participating in an activity being run and monitored by

judgment in favor of Finch, Vallas, the city of Bridgeport, and the Bridgeport Board of Education. Thus, Cooperative Educational Services is the sole remaining defendant in this action and, accordingly, we refer to it as the defendant throughout this opinion.

[2] Although, ordinarily, the denial of a motion to dismiss is not an immediately appealable final judgment, the denial of a motion to dismiss that raises a colorable claim of sovereign immunity is a final judgment. See *Shay* v. *Rossi*, 253 Conn. 134, 165, 749 A.2d 1147 (2000) ("unless the state is permitted to appeal a trial court's denial of its motion to dismiss, filed on the basis of a colorable claim of sovereign immunity, the state's right not to be required to litigate the claim filed against it would be irretrievably lost"), overruled in part on other grounds by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003).

[3] A gait belt is a device used by caregivers to prevent falls when assisting the movement of persons who have mobility issues, problems with balance, or other medical conditions.

the school, was walking with a staff member in the school's parking lot without her gait belt on when she suffered a seizure and fell to the ground, striking her face.

On February 20, 2015, the plaintiffs commenced the underlying action. The operative revised complaint was filed on August 17, 2015. Count three was the sole count directed against the defendant and sounded in negligence. According to the plaintiffs, the minor plaintiff fell due to the carelessness and negligence of the defendant, which allegedly had failed to take necessary precautions to properly supervise and ensure the safety of students in its care.[4] The plaintiffs alleged that, as a result of the defendant's negligence, the minor plaintiff suffered physical and emotional injuries, and that Wiggins was required to expend personal funds for her child's medical care. The defendant filed an answer denying all of the allegations of negligence.

[4] The defendant argues in its brief before this court that the gravamen of the plaintiffs' negligence allegations against the defendant do not actually involve a failure by itself or its agents to supervise the minor plaintiff, but rather concern "a failure to comply with [her] individualized needs as a special education student." By making this argument, the defendant seeks to differentiate between inadequate supervision of school children, which is decidedly a municipal function; see *Purzycki* v. *Fairfield*, 244 Conn. 101, 112, 708 A.2d 937 (1998), overruled on other grounds by *Haynes* v. *Middletown*, 314 Conn. 303, 323, 101 A.3d 249 (2014); and the development or furnishing of special education services generally, which arguably has a closer nexus to a state function. See *M.H.* v. *Bristol Board of Education*, 169 F. Supp. 2d. 21, 38 (D. Conn. 2001). A reading of the specifications of negligence in the operative complaint, however, belies the defendant's argument.

In particular, the plaintiffs alleged that the defendant had failed (1) to hire and train properly its staff tasked with supervising minor children, (2) to supervise properly persons they assigned to escort students who required the use of gait belts, (3) to implement safety guidelines with respect to students requiring the use of specialized equipment, (4) to implement proper training for employees or agents assigned to children who needed to use specialized equipment, (5) to have adequate numbers of employees or agents in place to monitor student activities in the parking lot, and (6) to require as a condition of funding that their agents assured any persons charged with providing services were trained and supervised properly.

On September 13, 2016, the defendant filed a motion to dismiss count three of the complaint on the ground that the court lacked subject matter jurisdiction over the claims against it. Specifically, the defendant argued that, as a regional educational service center created pursuant to § 10-66a, it is a state agent and, therefore, has sovereign immunity in an action for money damages absent a proper waiver of sovereign immunity.[5] Attached to the motion to dismiss was an affidavit from the defendant's executive director averring that the defendant was one of six regional education service centers established in this state in accordance with the provisions of § 10-66a. Also attached were copies of the defendant's constitution and governing bylaws.[6]

The plaintiffs filed an objection to the motion to dismiss on November 10, 2016, arguing that sovereign immunity did not apply to the defendant under the circumstances alleged. According to the plaintiffs, a review of the statutory scheme governing regional education service centers shows that those entities are not state agencies and do not act as agents for the state when overseeing children entrusted to their care. They instead, according to the plaintiffs, are separate and independent corporations formed by municipalities. Furthermore, the plaintiffs noted that amongst the enumerated powers given to the regional educational service centers by § 10-66c is the power "to sue and be sued," which evinces a legislative intent that they are not state agencies shielded by sovereign immunity.

[5] A waiver of sovereign immunity in a suit seeking money damages requires either a clear legislative intent to waive sovereign immunity; see *Miller* v. *Egan*, supra, 265 Conn. 314; or a granting of waiver by the claims commissioner pursuant to General Statutes § 4-160.

[6] According to the defendant's website, the defendant consists of school board members from the following municipalities: Bridgeport, Darien, Easton/Region #9, Fairfield, Greenwich, Monroe, New Canaan, Norwalk, Ridgefield, Redding, Shelton, Stamford, Stratford, Trumbull, Weston, Westport, and Wilton. Cooperative Educational Services, About C.E.S., "Representative Council," available at https://www.ces.k12.ct.us/page.cfm?p=3393 (last vis-

The court, *Radcliffe*, *J.*, issued a memorandum of decision on January 30, 2017, denying the defendant's motion to dismiss. The court reasoned that after a regional education service center is formed by its constituent municipal or regional boards of education, it exists pursuant to § 10-66c (a) as a " 'body corporate and politic,' rather than as an agency of state government." More particularly, the court explained that "[b]ecause [the defendant] is governed by a board of directors chosen by the member boards of education, and accepts students from the boards of education, its actions regarding enrolled students are in lieu of the municipality in which the affected student resides. [The defendant] performs functions, and assumes responsibilities as to a given student, which would otherwise be those of the local or regional board of education."

The court acknowledged that sovereign immunity protections have been extended to entities that act on behalf of the state, and that the furnishing of public education is a state function. It noted, however, that municipal boards of education, despite being entrusted to perform a state function with respect to education, nevertheless act as an agent of its municipality, not the state, when performing that function and, thus, are not protected by sovereign immunity. Because the court concluded that a regional educational service center's role in the care and supervision of students entrusted to it is directly analogous to the role performed by local or regional boards of education, the court concluded that regional educational service centers similarly cannot invoke sovereign immunity.[7] Although the court

ited November 29, 2018). It is not clear from the current record which of these municipalities was involved in the formation of the defendant.

[7] Although discussed at the hearing before the trial court, nothing in this opinion should be read as addressing whether the defendant might be entitled to invoke qualified governmental immunity pursuant to General Statutes § 52-557n (a) (2) (B) or whether the "identifiable person-imminent harm" exception to governmental immunity is implicated and applicable under the facts of this case. See *Edgerton* v. *Clinton*, 311 Conn. 217, 229–31, 86 A.3d 437 (2014).

acknowledged that at least one other Superior Court considering the same issue had reached a contrary conclusion, it nonetheless held that "[i]n the absence of any appellate authority, sovereign immunity will not be permitted to bar an action against a 'body corporate and politic,' charged with the care and custody of students by local boards of education, under circumstances in which the General Assembly has explicitly provided for the ability of the regional educational center to 'sue and be sued.' " This appeal followed.

The defendant claims on appeal that the trial court improperly determined that the defendant was not entitled to invoke sovereign immunity. According to the defendant, express language exists in § 10-66c that demonstrates that the defendant operates as an agent of the state in fulfilling a state-mandated duty to provided special education services to the minor plaintiff and, therefore, sovereign immunity applies. We disagree. Like the trial court, we conclude that, for the purposes of this type of negligence action, the defendant was not acting as a state agent and, therefore, is not entitled to the protections of sovereign immunity.

We begin with our standard of review and other applicable principles of law. A motion to dismiss is the proper vehicle to assert lack of jurisdiction over the subject matter. Practice Book § 10-30 (a) (1). "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Internal quotation marks omitted.) *Bacon Construction Co.* v. *Dept. of Public Works*, 294 Conn. 695, 706, 987 A.2d 348 (2010). "[O]ur review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss [is] de novo." (Internal quotation marks omitted.) Id. Furthermore, to the extent that we are called upon to engage in statutory interpretation,

such review is also plenary.[8] See *Gonzalez* v. *O & G Industries, Inc.*, 322 Conn. 291, 302, 140 A.3d 950 (2016).

"When [deciding] a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, [a court] must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . .

"In contrast, if the complaint is supplemented by undisputed facts established by [1] affidavits submitted in support of the motion to dismiss . . . [2] other types of undisputed evidence . . . and/or [3] public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other

[8] It is axiomatic that our objective in construing statutory language "is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . [If] a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Gonzalez* v. *O & G Industries, Inc.*, 322 Conn. 291, 302–303, 140 A.3d 950 (2016).

evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein."

"Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 651–54, 974 A.2d 669 (2009).

In the present appeal, in addition to the factual allegations in the complaint, the following documents were appended to the defendant's motion to dismiss: (1) a copy of the defendant's constitution, (2) a copy of the defendant's governing bylaws and (3) an affidavit from the defendant's executive director. The plaintiffs never challenged the authenticity of these submissions in their opposition to the motion to dismiss or at the hearing on the motion, nor did they attach any counteraffidavit or other evidentiary submissions of their own. Neither party asked the trial court to conduct an evidentiary

hearing in order to establish additional jurisdictional facts, nor do they claim on appeal that an evidentiary hearing was necessary in this case. Thus, in conducting our de novo review, we limit ourselves to the factual record as it existed before the trial court, supplemented by any additional records of which we may take judicial notice. See *Conboy* v. *State*, supra, 292 Conn. 653–54.

Turning to the substance of the issue before us, "[i]n Connecticut, [w]e have long recognized the common-law principle that the state cannot be sued without its consent. . . . The doctrine of sovereign immunity protects the state, not only from ultimate liability for alleged wrongs, but also from being required to litigate whether it is so liable. . . . The protection afforded by this doctrine has been extended to agents of the state acting in its behalf." (Citation omitted; internal quotation marks omitted.) *Palosz* v. *Greenwich*, 184 Conn. App. 201, 207, 194 A.3d 885, cert. denied, 330 Conn. 930, 194 A.3d 778 (2018).

It is possible, however, that an entity may be deemed an agent of the state for some purposes, but not others. For example, "[t]own boards of education, although they are agents of the state responsible for education in the towns, are also agents of the towns and subject to the laws governing municipalities. . . . [O]ur jurisprudence has created a dichotomy in which local boards of education are agents of the state for some purposes and agents of the municipality for others." (Citation omitted; internal quotation marks omitted.) Id, 207–208. An entity is entitled to invoke sovereign immunity only if it is acting in its capacity as an agent of the state. See *Purzycki* v. *Fairfield*, 244 Conn. 101, 112, 708 A.2d 937 (1998) (duty of local boards of education to supervise students performed for benefit of municipality and thus sovereign immunity not implicated in action brought by student alleging injury caused by negligent

supervision), overruled on other grounds by *Haynes* v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014).

In *Dolnack* v. *Metro-North Commuter Railroad Co.*, 33 Conn. App. 832, 639 A.2d 530 (1994), this court was faced with a similar question to the one raised in the present appeal, namely, whether, in the context of a personal injury action, the court should treat the defendant, a "public benefits corporation" created by New York state statute, as an arm of the state and, thus, whether the defendant was entitled to raise sovereign immunity as a defense. Id., 834. This court first extrapolated from decisional law of other jurisdictions a set of "characteristics" that courts should consider in determining whether an entity is entitled to raise the bar of sovereign immunity.[9] Id., 835–37. After setting forth a list of relevant factors to consider, the court cautioned: "The fact that an entity was created by a state statute does not alone establish that it is an arm of the state. Indeed, all of the [previously stated] characteristics must be examined before a trial court can conclude that a governmental body is entitled to sovereign immunity." Id., 837. Because the trial court in that case had granted a motion for summary judgment on

[9] Specifically, the court in *Dolnack* stated: "Several factors for consideration have evolved in determining whether a given entity is an arm of the government entitled to be clothed in the tort immunity of the state. These inquiries include whether the entity was created by the state and to whose control the entity is subject, an analysis of the issues involved and the relief sought, whether the state itself has a pecuniary interest or a substantive right in need of protection, whether the governmental body functions statewide, does the state's work, was created by the state legislature and is subject to local control, and to what extent the entity depends financially on state coffers, and whether the instrumentality was created as a state agency and empowered to accomplish a public purpose. Some other considerations are the character of power delegated to the governmental body by a legislative enactment, the relation of the entity to the state, whether the entity is a public corporation separate from the state, and whether the instrumentality uses state owned land or owns the land independently." (Footnotes omitted; internal quotation marks omitted.) *Dolnack* v. *Metro-North Commuter Railroad Co.*, supra, 33 Conn. App. 836–37.

sovereign immunity grounds without a sufficient evidentiary basis for determining whether, as a threshold matter, the defendant was entitled to sovereign immunity, this court reversed the trial court's decision and remanded the case for further proceedings. Id., 38–39.

Our Supreme Court, relying in part on our decision in *Dolnack*, later established the following analytical framework to employ when deciding whether an entity properly could assert a sovereign immunity defense. "[T]he criteria for determining whether a corporate entity is an arm of the state entitled to assert sovereign immunity as a defense are whether: (1) the state created the entity and expressed an intention in the enabling legislation that the entity be treated as a state agency; (2) the entity was created for a public purpose or to carry out a function integral to state government; (3) the entity is financially dependent on the state; (4) the entity's officers, directors or trustees are state functionaries; (5) the entity is operated by state employees; (6) the state has the right to control the entity; (7) the entity's budget, expenditures and appropriations are closely monitored by the state; and (8) a judgment against the entity would have the same effect as a judgment against the state. To establish that an entity is an arm of the state, an entity need not satisfy every criteria. Rather, [a]ll relevant factors are to be considered cumulatively, with no single factor being essential or conclusive. . . . We recognize that these criteria are somewhat interrelated and overlapping. For example, a determination that an entity is completely financially dependent on the state could lead to an inference that the entity is controlled by the state. Similarly, a determination that the state has the right to control the entity could lend support to a determination that a judgment against the entity would affect the state." (Citation omitted; footnotes omitted; internal quotation marks omitted.) *Gordon* v. *H.N.S. Management Co.*, 272 Conn. 81,

98–100, 861 A.2d 1160 (2004). By indicating that an entity "need not satisfy every criteria," the *Gordon* court implicitly placed the burden on the entity attempting to establish its entitlement to sovereign immunity.[10] Id., 100.

In *Rocky Hill* v. *SecureCare Realty, LLC*, 315 Conn. 265, 105 A.3d 857 (2015), our Supreme Court indicated that "[w]hen applying the various factors under *Gordon*, courts must remain cognizant of the rationale underlying the doctrine of sovereign immunity. Although, in the past, we have explained that doctrine in theoretical terms, namely, that there can be no legal right as against the authority that makes the law on which the right depends . . . [t]he modern rationale for the doctrine . . . rests on the more practical ground that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property. . . . Pursuant to this rationale, the doctrine protects the state from unconsented to litigation, as well as unconsented to liability. . . .

"Additionally, as . . . explained in the analogous context of eleventh amendment immunity, when a corporate entity attempts to assert a state's sovereignty without clear legislative support for that position, there is great reason for caution . . . *due to the broader consequences that potentially could result from conferring*

[10] In the present appeal, neither the trial court nor the parties have cited to *Gordon* or utilized the criteria set forth in that case and its progeny. Nevertheless, the analytical framework used by our Supreme Court in *Gordon* is binding upon us and many of the parties' arguments in the present case fall sufficiently within one or more of the *Gordon* criteria. See also *Turner* v. *Eastconn Regional Educational Service Center*, United States District Court, Docket No. 3:12-CV-788 (VLB) (D. Conn. Mar. 15, 2013) (analyzing *Gordon* criteria in determining that regional education service center not state agent for purposes of sovereign immunity); *Bogle-Assegai* v. *Bigelow*, United States District Court, Docket No. 3:01-CV-2366, Docket No. 3:01-CV-2367 (EBB) (D. Conn. Oct. 25, 2007) (same).

immunity." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) Id., 282–83. As an example of potential unwanted consequences, the court in *Rocky Hill* v. *SecureCare Realty, LLC*, after turning to the facts of the case before it, indicated that "a holding that the defendants essentially are state actors might not just relieve them from the obligation of complying with zoning regulations, but also could shield them from municipal taxation and *from various future lawsuits such as tort actions brought by their employees or patients or others harmed by their negligent acts . . .* [which] *could create a disincentive to safe practices. . . .* In short, sovereign immunity is strong medicine that should not be granted lightly to private actors." (Citation omitted; emphasis added; internal quotation marks omitted.) Id.

We turn then to the defendant's claim that it is a state agent entitled to sovereign immunity in the present action and, therefore, the trial court incorrectly denied the defendant's motion to dismiss. For the reasons that follow, we conclude that the criteria set forth by our Supreme Court in *Gordon* v. *H.N.S. Management Co.*, supra, 272 Conn. 98–100, on balance, weigh against concluding that the defendant was acting as an arm of the state with respect to any duty it may have to supervise the minor plaintiff, and, thus, we also conclude that the defendant cannot properly invoke the doctrine of sovereign immunity in this negligence action.

We first consider whether "the state created the entity and expressed an intention in the enabling legislation that the entity be treated as a state agency . . . ." *Gordon* v. *H.N.S. Management Co.*, supra, 272 Conn. 98. This criterion essentially has two subparts, namely, (1) whether the defendant was created by legislation and (2) whether such legislation included language indicating that the defendant be treated as a state agency. Our

review of the relevant statutes leads us to answer both questions in the negative.

The formation of a regional educational service center unquestionably is authorized by state statute. See General Statutes §§ 10-66a through 10-66t. Section 10-66a provides in relevant part: "A regional educational service center *may be established* in any regional state planning area designated in accordance with section 16a-4a upon approval by the State Board of Education of a plan of organization and operation submitted by four or more boards of education for the purpose of cooperative action to furnish programs and services. . . ." (Emphasis added.)

A careful reading of this enabling legislation, thus, reveals that the defendant was not "created" by statute. To "create" generally means to "bring into existence." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003).[11] Here, the legislature, through its enactment, did not bring into existence the defendant or any other regional educational service centers. It merely authorized boards of educations in interested municipalities to join together to create such entities, albeit with approval by the State Board of Education. If no municipalities exercise this statutory grant of authority, however, no regional educational service center would be created. Thus, it is patently incongruent with the plain language of the statute to conclude that the state "created" the defendant.

Furthermore, we can find no statutory language from which to conclude that the legislature intended entities like the defendant to be treated like a state agent for

[11] There is no statutory definition of "create" to consult and, therefore, General Statutes § 1-1 (a) directs us to use the "commonly approved usage" of that word. In so doing, courts frequently look to the dictionary definition of a term. See, e.g., *Kuchta* v. *Arisian*, 329 Conn. 530, 537, 187 A.3d 408 (2018) ("[i]n the absence of a statutory definition . . . our starting point must be the common meaning of the term, as reflected in the dictionary").

all purposes, and we reject the defendant's argument to the contrary. Section 10-66c (a) provides in relevant part: "A regional educational service center shall be a body corporate and politic. The board of a regional educational service center shall be a public educational authority acting on behalf of the state of Connecticut and shall have the power to sue and be sued, to receive and disburse private funds and such prepaid and reimbursed federal, state and local funds as each member board of education may authorize on its own behalf, to employ personnel, to enter into contracts, to purchase, receive, hold and convey real and personal property and otherwise to provide the programs, services and activities agreed upon by the member boards of education. . . ."

The defendant argues that "the express language of . . . § 10-66c demonstrates that [it] is an agent of the state . . . ." The defendant focuses the thrust of its argument on the language in subsection (a) of § 10-66c that states that "[t]he board of a regional educational service center shall be a public educational authority *acting on behalf of the state of Connecticut*." (Emphasis added.) The defendant asserts that "acting on behalf of the state" can only mean acting as an agent of the state and, thus, entitling it to assert the state's sovereign immunity.

The defendant, however, places far more weight on this language than it will bear. Rather, as our Supreme Court has made clear, an entity might act on behalf of the state for some purpose and not others, and, thus, the existence of this language does little to advance the argument that the language could only have been intended to convey a blanket grant of sovereign immunity. Here, a plain reading of the language reveals only that a regional educational service center acts on behalf of the state when it exercises its duties as a "public educational authority." This undefined language simply

begs the question because local boards of education also "are agents of the state responsible for education in the towns . . . ." *Palosz* v. *Greenwich*, supra, 184 Conn. App. 207. Nevertheless, local boards of education are not acting as agents of the state when they supervise children. See *Purzycki* v. *Fairfield*, supra, 244 Conn. 112. The fact that the legislation authorizes the defendant's board to act on behalf of the state, therefore, is not itself dispositive of whether the legislature also intended to treat the defendant as a state agency, entitled to all the rights and privileges of the state, including sovereign immunity.

The plaintiff offers a reasonable justification as to why the legislature included the "acting on behalf of the state of Connecticut" language in the statute that has nothing to do with cloaking entities like the defendant in sovereign immunity. The "acting on behalf of the state" language was not in the statute when it initially was enacted in 1972. Rather, that language was added to subsection (a) as a technical change to the statute in 1987, at the same time the legislature added subsections (b) through (d), granting the regional educational service centers the power to issue bonds, notes or other obligations. Public Acts 1987, No. 87-460, § 1. The language "acting on behalf of the state" is best construed in light of those contemporaneous additions. Because the Internal Revenue Code excludes from gross income interest made on any state issued bonds; see 26 U.S.C. § 103 (a) (2012); it is reasonable to assume that the legislature intended to designate regional educational service centers as "acting on behalf of the state" in order to allow them to reap the benefit of selling tax-free bonds.

The defendant's argument also fails to account for the language in the statute that immediately precedes the language authorizing a regional educational service center to act "on behalf of the state," namely, the language designating such entities as a "body corporate

and politic." We do not read statutory language in isolation, but rather must consider it within the context of the statute as a whole and in harmony with surrounding text. Rather than creating either a state or municipal agency, we construe the legislature's use of the language describing a regional educational service center as a "body corporate and politic" as intending to create an independent corporate entity that is separate and distinct from state government. See *Gordon* v. *Bridgeport Housing Authority*, 208 Conn. 161, 173, 544 A.2d 1185 (1988) (construing statute describing municipal housing authorities as "body corporate and politic"; General Statutes § 8-40; as creating independent corporate entity that is not agent of municipality in which it resides).

We turn next to the language that follows the "acting on behalf of the state" language, namely, that regional educational service centers have the "power to sue and be sued." We agree with the trial court that this language supports a conclusion that the legislature intended that a regional educational service center would not enjoy sovereign immunity but, instead, would be subject to suit in the same manner as other entities that do not enjoy sovereign immunity. The language is not the type that the legislature typically would use if it intended that an entity be protected by sovereign immunity, which protects the state not only from liability but from being sued in the first instance.[12]

[12] The defendant also argues in its brief that the legislature, in enacting § 10-66c, did not waive the state's sovereign immunity by providing that the defendant has the "power to sue and be sued." Although the trial court referred to the "sue and be sued" language as supporting its conclusion that the defendant was not entitled to invoke sovereign immunity, the court did not base its denial of the motion to dismiss on a finding of waiver. Because we conclude that the defendant is not an entity entitled to the protection of sovereign immunity under the circumstances before us, we do not consider whether sovereign immunity was waived. Instead, we construe this language as evincing an intent that the defendant is not to be treated as an agent of the state for all purposes.

Arguably, the defendant, like a local board of education, is authorized to act for the state in its role as a provider of educational services to the citizens of the state. "[T]he *furnishing of education* for the general public, required by article eighth, § 1, of the Connecticut constitution, is by its very nature a state function and duty. . . . This responsibility has been delegated to local boards which, as agencies of the state in charge of education in the town . . . possess only such powers as are granted to them by the General Statutes expressly or by necessary implication." (Citation omitted; emphasis added; internal quotation marks omitted.) *Campbell* v. *Board of Education*, 193 Conn. 93, 96–97, 475 A.2d 289 (1984). Nevertheless, when it comes to overseeing the day to day care of students enrolled in one of its schools or other facilities, nothing in the enabling legislation expressly states or of necessity implies that regional educational service centers like the defendant stand in any different position than the municipalities that formed them and entrusted their students to them. Although municipal boards of education have been described as "agencies of the state in charge of education in the town"; (internal quotation marks omitted) id., 97; municipalities are not entitled to invoke sovereign immunity in a negligence action brought by a student injured at a school under their control. See *Purzycki* v. *Fairfield*, supra, 244 Conn. 111–12. We find unpersuasive the defendant's reliance on the "acting on behalf of the state of Connecticut" language as definitive proof that the legislature intended the defendant to be treated as a state agent in all circumstances.

The enabling legislation does contain some express language that strongly suggests that the legislature did *not* intend "the entity be treated as a state agency" *for all purposes*. Subsection (i) of § 10-66c provides: "A regional educational service center shall be considered

an agency of the state for purposes of subdivision (14) of subsection (d) of section 42a-9-109." The defendant ignores this language, however, likely because its existence undermines rather than bolsters the defendant's position.

In subsection (i), the legislature expressly states that the defendant should be "considered an agency of the state" for purposes of applying an exclusion in the Uniform Commercial Code with respect to secured transactions, further details of which are not relevant to this discussion. "[I]t is a basic tenet of statutory construction that [w]e construe a statute as a whole and read its subsections concurrently in order to reach a reasonable overall interpretation." (Internal quotation marks omitted.) *Planning & Zoning Commission* v. *Freedom of Information Commission*, 316 Conn. 1, 12–13, 110 A.3d 419 (2015). Moreover, as we have already indicated, "the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous." (Internal quotation marks omitted.) *Connecticut Podiatric Medical Assn.* v. *Health Net of Connecticut, Inc.*, 302 Conn. 464, 474, 28 A.3d 958 (2011).

If the language in subsection (a) of § 10-66c indicating that the defendant was "acting on behalf of the state of Connecticut" was intended by the legislature to convey that the defendant generally was an agent of the state, as opposed to merely acting with state authority in certain instances or, as the plaintiffs suggest, permitting favorable tax treatment with respect to bonds, there would have been no need to mandate in subsection (i) that the defendant be treated as a state agency for purposes of the UCC secured transaction exclusion. Construing the enabling legislation as a whole, we conclude with respect to the first of the *Gordon* criteria

that the defendant has not demonstrated that it was created by the state or that the legislature intended that it be treated as a state agency with respect to its supervision of children attending its schools or programs.

We turn next to the second criterion which asks whether the defendant "was created for a public purpose or to carry out a function integral to state government . . . ." *Gordon* v. *H.N.S. Management Co.*, supra, 272 Conn. 98. As we have already indicated, it is a constitutionally mandated core function of the state to ensure that all students in the state are provided with a minimally adequate education, which includes providing special education services.[13] Authorizing the formation of regional educational service centers undoubtedly was intended to provide local school boards with a tool to more effectively and efficiently fulfill this function. This second criterion, therefore, seems to favor the position of the defendant.

The third factor to be considered is whether the defendant "is financially dependent on the state . . . ." Id., 98–99. To answer this question, we look to our statutes, the defendant's constitution and bylaws, and the factual admissions of the defendant at the hearing on the motion to dismiss. Article III of the defendant's constitution provides that the defendant consists of the member boards of education that pay dues to the defendant in accordance with Article IX. Article IX, titled "Dues and Administration Expenses," provides

[13] The constitution of Connecticut, article eighth, § 1, provides: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." General Statutes § 10-4 (a) provides in relevant part that the state's Board of Education "shall have general supervision and control of the educational interests of the state, which interests shall include preschool, elementary and secondary education, special education, vocational education and adult education . . . ."

that the amount of dues are set every year by the defendant's representative council and that "[a]ny necessary administrative and overhead expenditures as determined by the [r]epresentative council shall be shared jointly by the participating [b]oards of [e]ducation." At the hearing on the motion to dismiss, the court asked the defendant's counsel about the manner in which the defendant was funded, and counsel agreed with the court that the regional educational service centers are funded by the municipalities.

There is no dispute that, as a result of block grants, each municipality receives funds from the state for the purpose of discharging the educational requirements of its residents and that some of this money flows to the regional educational service centers. See General Statutes § 10-262h and General Statutes § 10-66j (b).[14] We do not view such indirect state funding, however, as making regional educational service centers "financially dependent" on the state. The defendant made no effort to demonstrate to what extent it relies on state funding and the record before us is silent as to what percentage, if any, of the regional educational service centers funding comes directly through block grants as opposed to funding through dues and tuition payments

[14] General Statutes § 10-262h provides in relevant part that "each town maintaining public schools according to law shall be entitled to an equalization aid grant" and sets forth in detail how the amount of the grant is to be calculated.

General Statutes § 10-66j (b) provides: "Each regional educational service center shall receive an annual grant equal to the sum of the following:

"(1) An amount equal to fifty per cent of the total amount appropriated for purposes of this section divided by six;

"(2) An amount equal to twenty-five per cent of such appropriation multiplied by the ratio of the number of its member boards of education to the total number of member boards of education state-wide; and

"(3) An amount equal to twenty-five per cent of such appropriation multiplied by the ratio of the sum of state aid pursuant to section 10-262h for all of its member boards of education to the total amount of state aid pursuant to section 10-262h state-wide."

by municipalities. Nevertheless, on the basis of the record presented and the defendant's own admissions, it is clear that the local board, and not the state, is directly responsible for much of the funding provided to the defendant for its services.[15] On balance, the third criterion weighs in favor of the plaintiffs.

We address together the fourth and fifth factors, namely, whether the defendant's "officers, directors, or trustees are state functionaries" and whether the defendant "is operated by state employees . . . ." *Gordon* v. *H.N.S. Management Co.*, supra, 272 Conn. 99. We answer both questions in the negative.

Section 10-66b provides in relevant part: "The operation and management of any regional educational service center shall be the responsibility of the board of such center to be composed of at least one member from each participating board of education, selected by such board of education. The board of the regional educational service center may designate from its membership an executive board which shall have such powers as the board of the regional educational service center may delegate and which are consistent with this part. . . . The director of the regional educational service center shall serve as the executive agent of the board of the regional educational service center."

The defendant's constitution and bylaws, articles II and III, make clear that it is governed by a representative council that is made up of members from its constituent

[15] In considering this factor and whether the defendant is financially dependent on the state, we note that municipalities also receive directly significant funding from the state for the purposes of fulfilling their state-mandated obligation to provide educational services. See General Statutes § 10-262h. Accordingly, the mere fact that regional educational service centers also receive state funds does not compel a conclusion that they are state agents for all purposes because, if that were true, the municipal boards of education also would be state agencies simply because they receive significant educational funding from the state to educate all students.

local boards of education. Under article VI of the defendant's constitution, officers are chosen annually from among the members of the representative council. These requirements are statutorily mandated. See § 10-66b ("[t]he operation and management of any regional educational service center shall be the responsibility of the board of such center to be composed of at least one member from each participating board of education, selected by such board of education"). No one from the state Board of Education or any other "state functionaries" or state employees are "officers, directors, or trustees" of the defendant or are involved in the operation of the defendant's programs or services. The fourth and fifth criteria accordingly weigh against a finding that the defendant is an agent of the state.

Pursuant to the sixth and seventh *Gordon* factors, we consider whether "the state has the right to control the [defendant]" or whether the defendant's "budget, expenditures, and appropriations are closely monitored by the state . . . ." *Gordon* v. *H.N.S. Management Co.*, supra, 272 Conn. 99–100. As we already have indicated, the defendant is under the managerial control of the participating municipal boards of education that formed it. There is nothing in the record before us suggesting that the state has any direct oversight or control over the defendant, its property or its operations other than to conduct an annual audit of finances and evaluation of programs and services. General Statutes §§ 10-66g and 10-66h. There is no requirement in the defendant's bylaws requiring that budgets, expenditures, or appropriations be reported to the state Board of Education for approval or that the state "closely" monitor its day-to-day operations at regional educational service centers. The lack of state involvement in the regular management of the regional education service centers leads us to conclude that the sixth and seventh criteria also weigh strongly against the defendant's position that it

is entitled to sovereign immunity because litigation could not seriously be expected to interfere with the performance of any important state function or its control over state instrumentalities, funds or property.

Finally, we must consider whether "a judgment against the [defendant] would have the same effect as a judgment against the state." *Gordon* v. *H.N.S. Management Co.*, supra, 272 Conn. 100. A finding of liability against the defendant in favor of the plaintiffs likely would result in an award of monetary damages. Such damages would be assessed against the defendant and would become an operating expense of the defendant that ultimately would be paid by the municipalities in accordance with article IX of the defendant's constitution. A judgment against the defendant would not have a direct adverse effect on the state. In contrast, a judgment against the state would mean that the state itself would be responsible for paying damages, presumably out of the state's coffers. This eighth criterion thus seems to weigh against concluding that the defendant is an agent of the state.

In sum, the majority of the *Gordon* criteria weigh against a finding that the defendant is an entity entitled to the protections of sovereign immunity. Having considered and weighed the various *Gordon* criteria, and considering them in light of the circumstances presented in this case, we conclude that the defendant acts as an agent of its constituent municipal boards of education, not the state, when overseeing the care and safety of children enrolled in its schools and programs. It truly would be a bizarre result to construe the relevant statutes as conferring sovereign immunity to the defendant, if, under identical facts, a municipality would not be so entitled.

The present litigation simply cannot reasonably be viewed as representing the type of serious interference

with a state's function or control that justifies the "strong medicine" of sovereign immunity. (Internal quotation marks omitted.) See *Rocky Hill* v. *SecureCare Realty, LLC*, supra, 315 Conn. 283. Conferring such immunity could also have unintentional and unwanted consequences. Recognizing a blanket shield protecting regional educational service centers in all tort actions, for instance, could disincentivize them from engaging in the types of oversight and control necessary to protect students with special needs, a particularly vulnerable class of persons. Because the defendant is not entitled to the protection of sovereign immunity in this negligence action, the court properly denied the defendant's motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

KEVIN L. HOFFKINS *v.* DIANNE HART-D'AMATO (AC 39910)

Alvord, Moll and Eveleigh, Js.

Syllabus

The plaintiff brought this action against the defendant to collect unpaid legal fees in connection with his representation of the defendant in her previous marital dissolution proceeding. During trial, the defendant sought to introduce as evidence a transcript from a hearing on a motion to strike that contained statements made by the plaintiff that were allegedly relevant to the defendant's theory of defense. The trial court did not admit the transcript as a full exhibit and required the defendant to redact those portions of the transcript comprising legal argument. Thereafter, the trial court denied the defendant's motion to disqualify the trial judge, in which she alleged, inter alia, that the trial judge was hiding facts from the jury by excluding the transcript and by excessively sequestering the jury during the presentation of evidence. Subsequently, the jury found in favor of the plaintiff on the complaint and a counterclaim filed by the defendant. From the judgment rendered thereon, the defendant appealed to this court. *Held*:

1. The trial court did not abuse its discretion when it denied the defendant's motion for disqualification of the trial judge, the defendant having failed

to meet her burden of showing the reasonable appearance of impropriety: the portions of the record cited by the defendant suggested that her claim was based simply on the fact that the court ruled against her, which did not demonstrate personal bias, and the trial court was well within its discretion to deny the motion for disqualification for the reasons stated in its written order, including that excusing the jury during argument over evidentiary objections was reasonable, as argument and comments by the hearing judge were not admissible evidence; moreover, this court was unable to ascertain any instances of impropriety or bias from the record as a whole, which showed that the trial court consistently labored to assist the defendant throughout the trial process.

2. The trial court did not abuse its discretion in refusing to admit the unredacted transcript as a full exhibit; that court properly restricted the evidence to its proper scope, as the transcript at issue did not contain sworn testimony but, rather, contained legal argument between the parties and statements of law made by the presiding judge, and, thus, the court was well within its discretion to require the redaction of the transcript to preclude those excerpts that reflected legal argument.

Argued September 13, 2018—officially released January 15, 2019

Procedural History

Action to collect unpaid legal fees, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant filed a counterclaim; thereafter, the court, *Radcliffe, J.*, granted the plaintiff's motion for summary judgment as to the defendant's counterclaim; subsequently, the defendant filed an amended counterclaim; thereafter, the matter was tried to the jury before *Krumeich, J.*; subsequently, the court, *Krumeich, J.*, denied the defendant's motion for disqualification; verdict and judgment for the plaintiff on the complaint and counterclaim, from which the defendant appealed to this court. *Affirmed.*

Dianne Hart, self-represented, the appellant (defendant).

Anthony B. Corleto, with whom, on the brief, was *James E. C. Siewert*, for the appellee (plaintiff).

Opinion

EVELEIGH, J. In this action for the collection of unpaid legal fees, the named defendant, Dianne Hart-D'Amato, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the plaintiff, Kevin L. Hoffkins. On appeal, the defendant claims that the trial court abused its discretion when it (1) denied her motion for disqualification of the trial judge, and (2) precluded relevant evidence offered by the defendant.[1] We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The defendant was a party to a marital dissolution action filed in 2011. During the summer of 2012, the defendant retained the plaintiff to represent her. The plaintiff served as the defendant's counsel for more than one year; the defendant, however, failed to make any payments to the plaintiff beyond the initial retainer. Over the course of the representation, the attorney-client relationship broke down, and the plaintiff filed a motion to withdraw his appearance, which the court granted on September 14, 2013.

[1] The defendant also claims that the court improperly allowed evidence that was beyond the relevant time frame established by the court. With respect to this claim, we note that the defendant has not articulated any discernable time frame to assist our analysis or directed our attention to any portion of the record where the court firmly established a time frame. Although the defendant is a self-represented litigant, "the [General] [S]tatutes and rules of practice cannot be ignored completely. . . . We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of [relevant] authorities, it is deemed to be abandoned." (Citations omitted; internal quotation marks omitted.) *Lareau* v. *Burrows*, 90 Conn. App. 779, 780, 881 A.2d 411 (2005). Accordingly, we deem this claim abandoned and decline to review it.

On October 30, 2013, the plaintiff commenced the underlying action against the defendant. In the operative one count complaint, filed on December 4, 2013, the plaintiff alleged that the defendant failed to pay approximately $60,000 in legal fees stemming from his representation of the defendant in the dissolution proceeding. In the defendant's amended answer, she asserted a number of special defenses, along with a six count counterclaim alleging, inter alia, professional negligence and negligent infliction of emotional distress.

During an eleven day jury trial, the defendant sought to introduce as evidence a transcript from an August 25, 2014 hearing on a motion to strike that contained statements made by the plaintiff that were relevant to her theory of defense. For the reasons discussed in part I of this opinion, the trial court did not admit the transcript as a full trial exhibit. Throughout trial, the defendant continued to argue that the entire transcript should be admitted as a full exhibit because it contained relevant facts. When the court refused to admit the transcript as a full trial exhibit, the defendant filed a written motion to disqualify the trial judge, alleging, inter alia, that he was hiding facts from the jury by excluding the August 25, 2014 transcript and by excessively sequestering the jury during the presentation of evidence. The court issued a written order denying the motion, stating in part that legal argument between parties is not evidence and, therefore, excusing the jury during evidentiary colloquies regarding admissibility was reasonable. The jury found for the plaintiff with respect to his breach of contract claim and the defendant's counterclaims. The court accepted the verdict and rendered judgment in accordance therewith. This appeal followed. Additional facts will be provided as necessary.

I

The defendant's first claim on appeal is that the trial court erred when it denied her motion for disqualification of a judicial authority.[2] Specifically, the defendant argues that the court demonstrated openly biased behavior when it excessively sequestered the jury, made adverse evidentiary rulings against her, and coached the plaintiff with respect to his testimony.[3] We disagree.

We first set forth the relevant standard of review. "Pursuant to our rules of practice; see Practice Book § 1-22; a judge should disqualify himself from acting in a matter if it is required by rule 2.11 of the Code of Judicial Conduct, which provides in relevant part that [a] judge shall disqualify himself . . . in any proceeding in which the judge's impartiality might reasonably be questioned . . . . In applying this rule, [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 author-

[2] The defendant also claims that the trial court erred by failing to conduct an evidentiary hearing prior to ruling on the motion for disqualification. Because the defendant failed to provide any analysis as to why a hearing was required in connection with her motion for disqualification, we limit our analysis to her claim that the court erred when it denied the motion. See *Lareau* v. *Burrows*, 90 Conn. App. 779, 780, 881 A.2d 411 (2005).

[3] The defendant also argues that, subsequent to her filing the motion for disqualification, the court ignored certain pretrial court orders and refused to clarify its rulings in retaliation against her for filing the motion. Because our review of the defendant's claim is restricted to whether the court abused its discretion when it denied her motion for disqualification, we limit our analysis to the conduct that was alleged in the motion. See *Lareau* v. *Burrows*, 90 Conn. App. 779, 780, 881 A.2d 411 (2005).

ity. . . . Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially . . . and that they are able to put aside personal impressions regarding a party . . . the burden rests with the party urging disqualification to show that it is warranted." (Internal quotation marks omitted.) *Doe* v. *West Hartford*, 168 Conn. App. 354, 382–83, 147 A.3d 1083 (2016), aff'd, 328 Conn. 172, 177 A.3d 1128 (2018). "A trial court's ruling on a motion for disqualification is reviewed for abuse of discretion. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *D'Amato* v. *Hart-D'Amato*, 169 Conn. App. 669, 686, 152 A.3d 546 (2016).

The following facts are relevant to our analysis. At trial, the defendant sought to introduce two transcripts claiming that they contained sworn testimony from the plaintiff: a prejudgment remedy hearing transcript from April 3, 2014, which did, in fact, contain sworn testimony from the plaintiff; and a transcript from an August 25, 2014 hearing on a motion to strike filed by the defendant, which contained legal argument relating to the pleadings. The defendant argued that the contents of these transcripts would be sufficient to impeach the plaintiff. After excusing the jury, the court canvassed the defendant with respect to the exhibit and asked the defendant whether the August 25, 2014 transcript contained sworn testimony of the plaintiff. The defendant answered in the affirmative.[4] On that basis, the

[4] The following exchange occurred on the record:

"[The Defendant]: Along with a transcript from August 25, 2014 . . . . The two go together. . . . [T]hat's the impeachment.

"The Court: Okay. And [the transcript from August 25, 2014], that was also testimony by [the plaintiff]?

"[The Defendant]: Yes."

court, without objection from the plaintiff, admitted the August 25, 2014 transcript as a full trial exhibit. Some moments later, while the court was still reviewing the exhibit, the court attempted to clarify whether the August 25, 2014 transcript, in fact, contained sworn testimony.[5] The court examined the exhibit and observed that the transcript did not contain party statements exclusively, but also, legal argument with respect to the pleadings. The court, sua sponte, revised its initial ruling and admitted the August 25, 2014 transcript for identification purposes only. The court stated that if the defendant wanted to offer certain statements made by the plaintiff, she could do so, but explained that the entire transcript would not be admitted as a full trial exhibit because it contained legal argument. On October 20, 2016, after numerous colloquies relating to the August 25, 2014 transcript, the court allowed a redacted version to be entered into evidence as an admission of a party opponent. Despite this ruling, the defendant continued to claim that the court was hiding facts from the jury, which she argued constituted overt judicial bias.

In her motion for disqualification, the defendant's primary claim was that the trial judge excessively

[5] The following exchange occurred on the record:
"The Court: Wait a minute, ma'am. Ma'am, I
just—just timeout.
"[The Defendant]: Why?
"The Court: This is not a transcript of testimony—
"[The Defendant]: Yes, it is.
"The Court: It sounds to me like it's an argument—
"[The defendant]: No, it is not.
"The Court: —on a motion . . . to strike—
"[The Defendant]: No, it is not. . . .
"[The Plaintiff]: It was oral argument.
"[The Defendant]: No, it is not. 'Cause—'cause
the—the last line—
"The Court: Timeout. . . . Timeout. This is oral argument. It's not a transcript. It's just— . . . It's just the judge discussing a motion to strike . . . ."

sequestered the jury during the evidentiary colloquies regarding the August 25, 2014 transcript and, therefore, prevented the jury from hearing all material facts relating to her claim that the plaintiff perjured himself.[6] The court denied the motion in a written order, stating in relevant part: "Excusing the jury when the parties are arguing evidentiary objections was reasonable. Argument is not evidence. The transcript of the [motion to strike] hearing offered by [the] defendant included extensive comments by [the hearing judge] during argument . . . that was inadmissible at trial."

Here, the portions of the record cited by the defendant suggest that her claim is based simply on the fact that the court ruled against her with respect to the August 25, 2014 transcript. "[T]he fact that a trial court rules adversely to a litigant . . . does not demonstrate personal bias." (Internal quotation marks omitted.) *Burns* v. *Quinnipiac University*, 120 Conn. App. 311,

[6] The defendant also claims that the court provided "legal advice" and "coached" the plaintiff with respect to his testimony. In support of this claim she refers to the following exchange:

"The Court: I will—I will allow you to ask a question based on lines twenty-five through twenty-seven, and line one on page three. Is that the information you wanted to get out of this transcript?

"[The Defendant]: Yes. . . .

"The Court: So the question I will allow is . . . [a]t . . . an argument before the court on August 25, 2014, did you say—you were asked—did you say—and then you can read lines twenty-five, twenty-six, twenty-seven and the first line on page three. . . . And then he can say yes or no. . . .

"[The Plaintiff]: Excuse [me], Your Honor, may I ask, this document is not being admitted still, is that right?

"The Court: That document is not in evidence. And if you have no recollection of saying that than that—you answer however you will. I don't dictate how people answer. However that is—that's what she's going to ask you about. All right."

The defendant's claim, however, mischaracterizes the exchange between the court and the plaintiff and fails to take into account that the court was attempting to assist her by providing her with a permissible form of the question to conduct her direct examination of the plaintiff. Accordingly, this claim is without merit.

317, 991 A.2d 666, cert. denied, 297 Conn. 906, 995 A.2d 634 (2010).

After a careful review of the record, including the court's order and the portions of the record to which the defendant has directed our attention, we conclude that the defendant has failed to meet her burden of showing the reasonable appearance of impropriety. Moreover, we are unable to ascertain any instances of impropriety or bias from the record as a whole. Rather, our review of the record indicates that the trial court consistently labored to assist the defendant throughout the trial process. The court was well within its discretion to deny the motion for disqualification for the reasons stated in its written order. Accordingly, we conclude that the trial court did not abuse its discretion when it denied the defendant's motion.

II

The defendant next argues that the court erred by precluding relevant evidence. Specifically, the defendant claims that the court erred by refusing to admit the unredacted August 25, 2014 transcript as a full trial exhibit. The defendant further argues that the court's decision to vacate its initial ruling, admitting the unredacted transcript to be admitted as a full exhibit, was an abuse of discretion because this subsequent ruling prevented the jury from considering relevant facts, resulting in a violation of her right to due process.[7] We disagree.

We first set forth the relevant standard of review. "To the extent [that] a trial court's admission of evidence is based on an interpretation of [our law of evidence], our standard of review is plenary. . . . We review the trial court's decision to admit [or exclude] evidence, if

[7] Neither during the trial nor on appeal has the defendant identified the relevant facts that she claims were excluded in the redacted version of the August 25, 2014 transcript.

premised on a correct view of the law, however, for an abuse of discretion. . . . The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. . . . Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling[s] [on these bases] . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did." (Internal quotation marks omitted.) *Weaver* v. *McKnight*, 313 Conn. 393, 426, 97 A.3d 920 (2014).

We acknowledge that the defendant claims that the trial court violated her right to due process by vacating its initial ruling, allowing the unredacted transcript as a full exhibit, but "the defendant . . . cannot clothe an ordinary evidentiary issue in constitutional garb to obtain [a more favorable standard of] review." (Internal quotation marks omitted.) *State* v. *Warren*, 83 Conn. App. 446, 452, 850 A.2d 1086, cert. denied, 271 Conn. 907, 859 A.2d 567 (2004). "[R]obing garden variety claims [of an evidentiary nature] in the majestic garb of constitutional claims does not make such claims constitutional in nature. . . . Putting a constitutional tag on a nonconstitutional claim will no more change its essential character than calling a bull a cow will change its gender." (Internal quotation marks omitted.) *State* v. *Rosario*, 99 Conn. App. 92, 99 n.6, 912 A.2d 1064, cert. denied, 281 Conn. 925, 918 A.2d 276 (2007). Accordingly, we conclude that the defendant's evidentiary claim does not implicate due process concerns and is, instead, strictly evidentiary in nature; therefore, we review the defendant's claim under an abuse of discretion standard.

The issue of whether the court abused its discretion by admitting a redacted version of the August 25, 2014 transcript hinges on whether the court correctly restricted the evidence to its proper scope. With that

in mind, the following legal principles are relevant to the disposition of the defendant's claim. When "[a]n exhibit [is] offered and received as a full exhibit [it] is in the case for all purposes . . . and is usable as proof to the extent of the rational persuasive power it may have." (Citation omitted; internal quotation marks omitted.) *Gagliano* v. *Advanced Specialty Care, P.C.*, 329 Conn. 745, 759, 189 A.3d 587 (2018). Furthermore, § 1-4 of the Connecticut Code of Evidence provides in relevant part: "The court may, and upon request shall, restrict . . . evidence to its proper scope."

Here, the August 25, 2014 transcript did not contain sworn testimony as the court initially was led to believe by the defendant; rather, as discussed in part I of this opinion, it contained legal argument between the parties and statements of law made by the presiding judge at the motion to strike hearing. The court was well within its discretion to require the redaction of the August 25, 2014 transcript, precluding those excerpts reflecting legal argument. We conclude, therefore, that the court did not abuse its discretion in refusing to admit the unredacted August 25, 2014 transcript as a full exhibit.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* STEPHEN HANISKO
(AC 40831)

Prescott, Elgo and Moll, Js.

Syllabus

Convicted of the crime of possession of child pornography in the second degree, the defendant appealed to this court. In November, 2008, the state police had received from a Wyoming special agent a spreadsheet, which indicated that a certain computer associated with a particular Internet Protocol address was identified as a download candidate for

twenty-five files of suspected child pornography. In September, 2009, detectives A and C obtained a warrant to search the property where both the defendant and the holder of the Internet services account associated with the identified computer resided and to seize certain described categories of evidence. A and C executed the search and seizure warrant and, while they were at the property, the defendant stated that he had used a certain peer-to-peer network to download pornography. In 2014, after A and C had examined the evidence that had been seized from the property and uncovered videos depicting child pornography, the trial court issued a warrant for the defendant's arrest. On the morning of the first day of trial, the defendant filed a motion to suppress the evidence seized from the property, which the trial court denied. On appeal, the defendant claimed, inter alia, that the trial court improperly denied his motion to suppress, in which he claimed that the information in the search warrant affidavit was stale at the time that the search warrant was issued because that affidavit referenced an isolated occurrence from approximately one year earlier and, as a result of the lapse of time and the absence of any similar recurrences, there was no probable cause to believe that the materials identified in the search warrant would be in his possession when the warrant was issued. *Held*:

1. The trial court properly denied the defendant's motion to suppress evidence seized pursuant to the search and seizure warrant and determined that probable cause existed to support the issuance of that warrant; the search warrant affidavit, which alleged that the user of the identified computer distributed or attempted to distribute suspected child pornography, including at least one file of known child pornography, on a peer-to-peer network over the course of several days, suggested that the user of the identified computer wilfully and deliberately accumulated and sought to disseminate such video files over the Internet, and the passage of approximately ten months between the receipt of information from the Wyoming special agent and the issuance of the search warrant did not render the information in the search warrant affidavit stale, as that affidavit included certain statements from A and C that individuals who possess child pornography often will store such material indefinitely if they believe that their illegal activities have gone undetected, and that information contained within a computer, or other media, remains electronically stored unless the information is deleted and subsequently overwritten, which permitted an inference by the issuing judge that, if the user had child pornography files on the identified computer, the user would still have those files in his or her possession at the time that the search warrant was executed, even though the such warrant was not issued until approximately ten months after the state police received the information from the Wyoming special agent.
2. The defendant's claim that he was entitled to a judgment of acquittal on the ground that the trial court's evidentiary rulings were incorrect, which

was based on his claim that the court's failure to recognize that the oppressive delay between the execution of the search and seizure warrant in 2009 and the issuance of the arrest warrant in 2014 resulted in a violation of his right to due process, was not reviewable, the defendant having failed to timely raise that claim in a pretrial motion to dismiss; the defendant could have raised his due process claim by way of a pretrial motion, as that claim could have been determined without a trial of the general issue and, by failing to do so, he had waived his right to raise that claim.

Argued September 21, 2018—officially released January 15, 2019

Procedural History

Substitute information charging the defendant with the crime of possession of child pornography in the second degree, brought to the Superior Court in the judicial district of New Haven at Meriden, geographical area number seven, where the court, *Hon. John F. Cronan*, judge trial referee, denied the defendant's motion to suppress certain evidence; thereafter, the matter was tried to the court; subsequently, the court denied the defendant's motion for a judgment of acquittal; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Howard I. Gemeiner, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *James Dinnan*, senior assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Stephen Hanisko, appeals from the judgment of conviction, rendered after a court trial, of possession of child pornography in the second degree in violation of General Statutes (Rev. to 2009) § 53a-196e.[1] On appeal, the defendant claims that (1)

[1] General Statutes (Rev. to 2009) § 53a-196e provides in relevant part: "(a) A person is guilty of possessing child pornography in the second degree when such person knowingly possesses twenty or more but fewer than fifty visual depictions of child pornography. . . ." Hereinafter, all references to § 53a-196e in this opinion are to the 2009 revision of the statute.

the trial court improperly denied his motion to suppress evidence seized pursuant to a search and seizure warrant (search warrant) because the information contained in the search warrant affidavit was stale at the time that the search warrant was issued, and (2) the trial court's "evidentiary rulings" were incorrect because the court failed to recognize the oppressive delay between the execution of the search warrant and the issuance of the warrant for his arrest, resulting in a violation of his right to due process. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, which the trial court reasonably could have found, and procedural history are relevant to our resolution of the defendant's claims. On November 14, 2008, the Connecticut State Police Computer Crimes and Electronic Evidence Laboratory (computer crimes laboratory) received a spreadsheet and a DVD from a special agent of the Wyoming Internet Crimes Against Children Task Force (Wyoming special agent). The spreadsheet contained Internet Protocol (IP) addresses that had been captured during an investigation into electronic file sharing of child pornography. Specifically, the spreadsheet indicated that, between November 7 and 14, 2008, the computer associated with a particular IP address (identified computer) was identified as a "download candidate"[2] for, what appeared to be, twenty-five files of child pornography. The DVD contained files of known child pornography, which the computer crimes laboratory used for comparison against the twenty-five files that were available for download from the identified computer.

While reviewing the data provided by the Wyoming special agent, the Connecticut state police uncovered

[2] According to the search warrant affidavit, a download candidate is a computer that has a certain type of software installed that makes electronic files with specific digital signatures available for download by other computers.

a match between one of the twenty-five files listed on the spreadsheet and one file on the DVD. The matching files contained two separate clips of two different sets of male and female children, who appeared to be between twelve and fourteen years old, engaging in various sexual acts.

The state police later determined that the holder of the Internet services account associated with the identified computer resided at 50 Carpenter Lane in Wallingford (property). On August 13, 2009, Jonathan Carreiro and David Aresco, detectives with the Connecticut State Police Computer Crimes Unit (computer crimes unit), conducted a surveillance of the property. Detective Carreiro observed, among other things, a black sign labeled with the name "Hanisko" to the left of the driveway. On August 14, 2009, the Connecticut State Police Central Criminal Intelligence Unit confirmed that the Internet services account holder lived at the property and informed Detective Carreiro that several other individuals resided there as well, including the defendant. On August 18, 2009, Detectives Carreiro and Aresco conducted a second surveillance of the property. This time, Detective Carreiro observed a white pickup truck in the driveway, which he later determined was registered to the defendant.

On September 10, 2009, Detectives Carreiro and Aresco obtained a warrant to search the property and to seize certain described categories of evidence of violations of General Statutes §§ 53a-194[3] and 53a-196b.[4] In

[3] General Statutes § 53a-194 provides in relevant part: "(a) A person is guilty of obscenity when, knowing its content and character, he promotes, or possesses with intent to promote, any obscene material or performance. . . ."

[4] General Statutes § 53a-196b provides in relevant part: "(a) A person is guilty of promoting a minor in an obscene performance when he knowingly promotes any material or performance in which a minor is employed, whether or not such minor receives any consideration, and such material or performance is obscene as to minors notwithstanding that such material or performance is intended for an adult audience.

the search warrant affidavit, Detectives Carreiro and Aresco provided the foregoing details of their investigation and averred to the following additional information. Both detectives are assigned to the computer crimes laboratory and have received training relating to the investigation of Internet related crimes, child pornography crimes, and computer data analysis. The detectives know from their training and experience that so-called peer-to-peer networks are frequently used in the trading of child pornography; individuals using peer-to-peer file sharing networks can choose to install publicly available software that facilitates the trading of images, and such software allows those individuals to search for pictures, movies, and other digital files. The detectives know that information contained within a computer or other media, even if deleted, often remains electronically stored until the computer overwrites the space previously allocated to the deleted file. On the basis of their training and experience, and the training and experience of other law enforcement personnel, the detectives know that individuals who possess child pornography often will store such material for future viewing and will maintain these materials indefinitely if they believe that their illegal activities have gone undetected. In light of the foregoing information, the detectives averred that they had probable cause to believe that evidence of violations of §§ 53a-194 and 53a-196b would be located on the property.

On September 11, 2009, Detectives Carreiro and Aresco, along with other state and local police officers, executed the search warrant at the property. While there, Detective Carreiro explained the purpose of the

"(b) For purposes of this section, 'knowingly' means having general knowledge of or reason to know or a belief or ground for belief which warrants further inspection or inquiry as to (1) the character and content of any material or performance which is reasonably susceptible of examination by such person and (2) the age of the minor employed. . . ."

search warrant to the defendant and asked him several questions. During their conversation, the defendant expressed that he had used Limewire, a peer-to-peer network, to download pornography. Ultimately, the state police seized fifty-six pieces of evidence, including eight hard drives and optical disks containing forty-eight video files. Shortly thereafter, the seized evidence was transported to the computer crimes laboratory for a forensic examination.

Eventually, the state police learned that, as a result of a backlog, the computer crimes laboratory was unable to process evidence that had been seized in multiple cases, including the evidence seized from the property. Consequently, the computer crimes unit began removing the seized items from the computer crimes laboratory in order to conduct its own forensic examination. Between April and August, 2013, Detectives Carreiro and Aresco examined the evidence that had been seized from the property. Their examination uncovered hours of videos depicting child pornography.

On January 21, 2014, the state applied for a warrant to arrest the defendant for possession of child pornography in the second degree in violation of § 53a-196e (arrest warrant). On January 28, 2014, the trial court issued the arrest warrant, and, on March 27, 2014, the defendant was arrested. The matter proceeded to trial approximately three years later.

On the morning of March 22, 2017, the first day of trial, the defendant filed a motion to suppress the evidence seized from the property. The defendant claimed that the evidence was seized in violation of his rights under the United States and Connecticut constitutions and that the information contained in the search warrant affidavit was stale and did not give rise to a finding of probable cause. The trial court heard oral argument

with regard to the motion to suppress and issued an oral ruling denying the motion.

A trial to the court commenced immediately thereafter,[5] and the state called Detectives Carreiro and Aresco to testify. Both detectives testified, among other things, that the delay between when the evidence seized from the property was brought to the computer crimes laboratory and when they began their own forensic examination resulted from the inability of the computer crimes laboratory to process voluminous evidence in many cases in a more timely manner. The state rested at the end of the first day of trial.

On March 23, 2017, the second and final day of the trial, the defendant moved for a judgment of acquittal, reserving argument upon the completion of evidence. The defendant testified in his own defense and did not mention any prejudice that he experienced as a consequence of any delay. After the defense rested, the court heard oral argument on the defendant's motion for a judgment of acquittal. Defense counsel argued that the "totality of the delays"—namely, the delays between the receipt of the information from the Wyoming special agent in November, 2008, the issuance of the search warrant in September, 2009, and the issuance of the arrest warrant in January, 2014—violated the defendant's right to due process. Additionally, defense counsel argued that the "totality of the circumstances" or "cumulative nature of the delays" was "inherently prejudicial." The state argued to the contrary, and the trial court denied the motion.

That same day, the trial court found the defendant guilty of possession of child pornography in the second degree in violation of § 53a-196e and rendered a judgment of conviction for the same. On August 25, 2017, the trial court sentenced the defendant to six years of

[5] On March 1, 2017, the defendant elected a court trial.

incarceration, execution suspended after thirty months of incarceration, twenty-four of which are mandatory, followed by ten years of probation. This appeal followed.

I

We first turn to the defendant's claim that the trial court improperly denied his motion to suppress because the information in the search warrant affidavit was stale at the time that the search warrant was issued. The defendant contends that the information was stale because the search warrant affidavit referenced an isolated occurrence from one year earlier. According to the defendant, as a result of the lapse of time and the absence of any similar recurrences, there was no probable cause to believe that the materials identified in the search warrant would be in his possession when the warrant was issued. We disagree.

We begin by setting forth the applicable standard of review. When reviewing the trial court's denial of a motion to suppress, the standard of review to be applied depends on whether the challenge asserted on appeal is to the factual basis of the trial court's decision or to its legal conclusions. *State* v. *DiMeco*, 128 Conn. App. 198, 202, 15 A.3d 1204, cert. denied, 301 Conn. 928, 22 A.3d 1275, cert. denied, 565 U.S. 1015, 132 S. Ct. 559, 181 L. Ed. 2d 398 (2011). "[T]o the extent that the trial court has made findings of fact, our review is limited to deciding whether those findings were clearly erroneous. Where, however, the trial court has drawn conclusions of law, our review is plenary, and we must decide whether those conclusions are legally and logically correct in light of the findings of fact." (Internal quotation marks omitted.) Id., 202–203. "Whether the trial court properly found that the facts submitted were enough to support a finding of probable cause is a question of

law." (Internal quotation marks omitted.) *State* v. *Holley*, 324 Conn. 344, 351, 152 A.3d 532 (2017). Accordingly, "[o]ur review of the question of whether an affidavit in support of an application for a search [and seizure] warrant provides probable cause for the issuance of the warrant is plenary." *State* v. *Rodriguez*, 163 Conn. App. 262, 266, 135 A.3d 740, cert. denied, 320 Conn. 934, 134 A.3d 622, cert. denied, U.S. , 137 S. Ct. 167, 196 L. Ed. 2d 140 (2016).

We next discuss the legal principles relevant to the defendant's claim. "Both the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution prescribe that a search warrant shall issue only upon a showing of probable cause. Probable cause to search exists if . . . (1) there is probable cause to believe that the particular items sought to be seized are connected with criminal activity or will assist in a particular apprehension or conviction . . . and (2) there is probable cause to believe that the items sought to be seized will be found in the place to be searched. . . . Although [p]roof of probable cause requires less than proof by a preponderance of the evidence . . . [f]indings of probable cause do not lend themselves to any uniform formula because probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. . . . Consequently, [i]n determining the existence of probable cause to search, the issuing [judge] assesses all of the information set forth in the warrant affidavit and should make a practical, nontechnical decision whether . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. . . . The determination of probable cause is reached by applying a totality of the circumstances test. . . .

"The role of an appellate court reviewing the validity of a warrant is to determine whether the affidavit at

issue presented a substantial factual basis for the [issuing judge's] conclusion that probable cause existed. . . . [Our Supreme Court] has recognized that because of our constitutional preference for a judicial determination of probable cause, and mindful of the fact that [r]easonable minds may disagree as to whether a particular [set of facts] establishes probable cause . . . *we evaluate the information contained in the affidavit in the light most favorable to upholding the issuing judge's probable cause finding*. . . . We therefore review the issuance of a warrant with deference to the reasonable inferences that the issuing judge could have and did draw . . . . In evaluating whether the warrant was predicated on probable cause, a reviewing court may consider only the information set forth in the four corners of the affidavit that was presented to the issuing judge and the reasonable inferences to be drawn therefrom." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Holley*, supra, 324 Conn. 351–53.

Of course, "[t]he determination of probable cause to conduct a search depends in part on the finding of facts so closely related to the time of the issuance of the warrant as to justify a belief in the continued existence of probable cause at that time. . . . Although it is reasonable to infer that probable cause dwindles as time passes, no single rule can be applied to determine when information has become too old to be reliable. . . . Consequently, whether a reasonable likelihood exists that evidence identified in the warrant affidavit will be found on the subject premises is a determination that must be made on a case-by-case basis. Accordingly, we have refused to adopt an arbitrary cutoff date, expressed either in days, weeks or months, beyond which probable cause ceases to exist. . . . The likelihood that the evidence sought is still in place depends on a number of variables, such as the nature of the

crime, of the criminal, of the thing to be seized, and of the place to be searched. . . . [W]hen an activity is of a protracted and continuous nature the passage of time becomes less significant."[6] (Citation omitted; internal quotation marks omitted.) *State* v. *Buddhu*, 264 Conn. 449, 465–66, 825 A.2d 48 (2003), cert. denied, 541 U.S. 1030, 124 S. Ct. 2106, 158 L. Ed. 2d 712 (2004).

In *United States* v. *Raymonda*, 780 F.3d 105, 114 (2d Cir.), cert. denied, U.S. , 136 S. Ct. 433, 193 L. Ed. 2d 337 (2015), the United States Court of Appeals for the Second Circuit recognized that "[t]he determination of staleness in investigations involving child pornography is unique. . . . Because it is well known that images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes, evidence that such persons possessed child pornography in the past supports a reasonable inference that they retain those images—or have obtained new ones—in the present. . . . Crucially, however, the value of that inference in any given case depends on the preliminary finding that the suspect is a person interested in images of child pornography. The alleged proclivities of collectors of child pornography, that is, are only relevant if there is probable cause to believe that [a given defendant] *is* such a collector." (Citations omitted; emphasis in original; internal quotation marks omitted.) The Second Circuit went on to explain that, in cases where courts have inferred that a suspect was a collector of child pornography on the basis of a single incident of possession or receipt, that inference "did not proceed merely from evidence of his access to child pornography at a single time in the past. Rather, it proceeded from circumstances suggesting that he had accessed those images willfully and deliberately, actively seeking them out to satisfy a preexisting

[6] We note that, in the context of a search of property, except for the installation and use of a tracking device, our General Statutes require that a search warrant be executed within ten days of its issuance. General Statutes § 54-33c (b).

predilection. Such circumstances tend to negate the possibility that a suspect's brush with child pornography was a purely negligent or inadvertent encounter, the residue of which was long ago expunged. They suggest that the suspect accessed those images because he was specifically interested in child pornography, and thus—as is common among persons interested in child pornography—likely hoarded the images he found." Id., 115.

In addition to the Second Circuit, other United States Circuit Courts of Appeal and our Superior Court have recognized that collectors of child pornography tend to retain such images and videos, and, thus, the passage of time between the alleged criminal activity and the issuance of a search and seizure warrant does not, in itself, render information contained in the warrant affidavit stale. See *United States* v. *Morgan*, 842 F.3d 1070, 1074 (8th Cir. 2016) (recognizing that five month lapse did not render warrant affidavit information stale and concluding information was not stale where seventy-five days had passed because affiants attested that child pornography collectors tend to retain images and that computer programs that download these images often leave files, logs, or remnants that show exchange, transfer, distribution, possession, or origin of such files), cert. denied, U.S. , 137 S. Ct. 2176, 198 L. Ed. 2d 244 (2017); *United States* v. *Elbe*, 774 F.3d 885, 891 (6th Cir. 2014) (recognizing crime of child pornography is not fleeting and generally carried out in secrecy of home over long time period and concluding warrant affidavit information was not stale), cert. denied, U.S. , 135 S. Ct. 1573, 191 L. Ed. 2d 656 (2015); *United States* v. *Burkhart*, 602 F.3d 1202, 1206 (10th Cir. 2010) (recognizing passage of time alone cannot demonstrate staleness and determining warrant affidavit information was not stale even though warrant was executed two years and four months after defendant's alleged last contact with child pornography distributor); *United*

States v. *Watzman*, 486 F.3d 1004, 1008–1009 (7th Cir.) (recognizing one year old warrant affidavit information was not necessarily stale as matter of law and concluding information was not stale where only three months had passed and agent attested that possessors of child pornography save their materials), cert. denied, 552 U.S. 1052, 128 S. Ct. 682, 169 L. Ed. 2d 533 (2007); see, e.g., *State* v. *Roesing*, Superior Court, judicial district of Litchfield, Docket No. CR-00-103351, 2001 WL 951287, *5 (July 19, 2001) (*DiPentima*, *J.*) (stating nature of crimes of attempted possession and possession of child pornography is such that evidence sought can reasonably be expected to be kept for long periods of time and concluding search warrant affidavit information was not stale as to attempted possession charge where approximately three months had passed because computer related devices used were likely to be kept at defendant's home for long period of time).

Mindful of the foregoing principles, we now evaluate the defendant's claim. The defendant argues that there was no information presented in the search warrant affidavit to suggest that (1) he intentionally downloaded the suspected files in question or kept them for future reference, (2) he collected this type of material, or (3) this kind of peer-to-peer file retrieval from the identified computer had ever occurred, either before or after the computer crimes laboratory received the spreadsheet and DVD from the Wyoming special agent. He contends that the allegations in the search warrant affidavit in the present case are akin to those in *United States* v. *Raymonda*, supra, 780 F.3d 105, in which the Second Circuit concluded that the search warrant at issue was not supported by probable cause, because, according to the defendant, in the present case "there was only one incident reported with no other traces to suspect any additional discoveries would be made." We disagree.

In *Raymonda*, the warrant affidavit "alleged only that, on a single afternoon more than nine months earlier, a user with an IP address associated with [the defendant's] home opened between one and three pages of a website housing thumbnail links to images of child pornography, but did not click on any thumbnails to view the full-sized files. The [warrant] affidavit contained no evidence suggesting that the user had deliberately sought to view those thumbnails or that he discovered [the website] while searching for child pornography—especially considering that [the agent] himself only uncovered the website through an innocuous link on the message board of another site not explicitly associated with child pornography. Nor was there any evidence that the user subsequently saved the illicit thumbnails to his hard drive, or that he even saw all of the images, many of which may have downloaded in his browser outside immediate view. Far from suggesting a knowing and intentional search for child pornography, in short, the information in [the warrant] affidavit was at least equally consistent with an innocent user inadvertently stumbling upon a child pornography website, being horrified at what he saw, and promptly closing the window." (Footnote omitted.) *United States* v. *Raymonda*, supra, 780 F.3d 117. Thereupon, the Second Circuit held that the search warrant that was issued was not supported by probable cause because, "[u]nder those circumstances, absent any indicia that the suspect was a collector of child pornography likely to hoard pornographic files . . . a single incident of access does not create a fair probability that child pornography will still be found on a suspect's computer months after all temporary traces of that incident have likely cleared." Id.

The present case is readily distinguishable from *Raymonda*. Here, Detectives Carreiro and Aresco averred, in the search warrant affidavit, that the identified computer was recognized twenty-five times over the course

of several days as a download candidate for, what appeared to be, child pornography and that the state police was able to confirm a match between one of the twenty-five child pornography files listed on the spreadsheet and one child pornography file on the DVD provided by the Wyoming special agent. In other words, according to the search warrant affidavit, the user of the identified computer did not simply visit a webpage containing links to images of child pornography on one occasion, as in *Raymonda*; rather, the user had file sharing software installed on his or her computer and was using that software to share multiple files of suspected child pornography by way of a peer-to-peer network on more than one occasion, and at least one of those files was confirmed as being known child pornography. This alleged distribution of, or attempt to distribute, child pornography on a peer-to-peer network over the course of several days suggests that the user wilfully and deliberately accumulated and sought to disseminate such video files over the Internet.

Moreover, on the basis of their training and experience, Detectives Carreiro and Aresco averred that individuals who possess child pornography often will store such material for future viewing and will maintain these materials indefinitely if they believe that their illegal activities have gone undetected. Both detectives also attested that peer-to-peer networks are used frequently to trade child pornography and that information contained within a computer, or other media, remains electronically stored unless the information is deleted and subsequently overwritten. Such statements permitted an inference by the issuing judge that, if the user had child pornography files on the identified computer, the user would still have those files in his or her possession at the time that the search warrant was executed, even though such warrant was not issued until September, 2009, approximately ten months after the state police

received the information from the Wyoming special agent. See, e.g., *State* v. *Shields*, 308 Conn. 678, 693, 69 A.3d 293 (2013) (issuing judge may rely on affiant's statements concerning individuals who possess child pornography where affiant has relevant training and experience with such matters), cert. denied, 571 U.S. 1176, 134 S. Ct. 1040, 188 L. Ed. 2d 123 (2014).

In consideration of the foregoing, we conclude that the passage of ten months between the receipt of information from the Wyoming special agent and the issuance of the search warrant did not render the information in the search warrant affidavit stale. Rather, it was reasonable for the issuing judge to believe, on the basis of that information, that the items sought to be seized would be found at the time that the search warrant was executed. Therefore, the trial court correctly reaffirmed that probable cause existed to support the issuance of the search warrant and, accordingly, properly denied the defendant's motion to suppress.

II

The defendant next claims that he is entitled to a judgment of acquittal because the trial court's "evidentiary rulings"[7] were incorrect as a result of the court's failure to recognize that the delay between the execution of the search warrant in 2009 and the issuance of the arrest warrant in 2014 (preaccusation delay) resulted in a violation of his right to due process.[8] The

[7] Because the defendant does not complain of any particular evidentiary ruling during the trial, we construe the defendant's argument as a reframed challenge to the court's denial of his motion to suppress.

[8] On appeal, the defendant has not provided a separate analysis of his due process claim pursuant to article first, § 8, of the Connecticut constitution or asserted that our state constitution affords him greater protection than the United States constitution. Rather, the defendant relies upon the right to due process guaranteed by the fifth amendment to the United States constitution, as applied to the states through the fourteenth amendment to the United States constitution. Accordingly, we limit our analysis to the defendant's federal constitutional claim. See *State* v. *Roger B.*, 297 Conn. 607, 611 n.7, 999 A.2d 752 (2010); *State* v. *Miller*, 83 Conn. App. 789, 806 n.5, 851 A.2d 367, cert. denied, 271 Conn. 911, 859 A.2d 573 (2004).

defendant further argues that the state did not present any good reason for the preaccusation delay and that such delay was never justified, was oppressive, and ultimately worked to the benefit of the state. The state argues that the defendant's due process claim is not reviewable because it was not raised in a pretrial motion to dismiss. We agree with the state.

Because the defendant's due process claim could have been determined without a trial of the general issue, the defendant could have raised the claim by way of a pretrial motion. Practice Book § 41-2 provides: "Any defense, objection or request capable of determination without a trial of the general issue may be raised only by a pretrial motion made in conformity with this chapter." Practice Book § 41-4 provides in relevant part: "Failure by a party, at or within the time provided by [our rules of practice], to raise defenses or objections or to make requests that must be made prior to trial *shall constitute a waiver thereof*, but a judicial authority, for good cause shown, may grant relief from such waiver . . . ." (Emphasis added.) By failing to file a pretrial motion to dismiss on due process grounds, the defendant has waived such claim. See *State* v. *Pickles*, 28 Conn. App. 283, 288, 610 A.2d 716 (1992) ("[b]y failing to raise the due process defense by a timely pretrial motion, the defendant waived her right to raise such a defense later"); see also *State* v. *LaMothe*, 57 Conn. App. 736, 740, 751 A.2d 831 (2000) ("Failure by the defendant to utilize these pretrial motions constituted a waiver. Practice Book § 41-4.").[9]

The judgment is affirmed.

In this opinion the other judges concurred.

[9] The defendant also cursorily claims that the delays leading up to his arrest, to trial, and to his sentencing date violated his sixth amendment right to a speedy trial. Specifically, he argues, without citation to the record, that these delays caused him to suffer mentally, emotionally, and physically. Furthermore, although he identifies the interests that the right to a speedy trial was designed to protect, he fails to articulate how those interests are implicated in the present case and, instead, sets forth various unsupported,

DAVID DUBINSKY *v.* VERONICA REICH
(AC 40432)

Alvord, Bright and Beach, Js.

Syllabus

The plaintiff sought to recover damages from the defendant attorney, R, and R's law firm, for legal malpractice and intentional and negligent infliction of emotional distress in connection with R's service as the statutory (§ 46b-54) court-appointed guardian ad litem for the plaintiff's minor child in a marital dissolution action involving the plaintiff and his former wife. In his complaint, the plaintiff alleged, inter alia, that during the dissolution proceedings, R wrongfully recommended to the trial court supervised visitation between the plaintiff and his minor child and recommended against the use of coparenting counseling, and that he suffered emotional distress as a result of R's actions. The trial court granted the defendants' motion to dismiss the complaint for lack of subject matter jurisdiction and rendered judgment thereon, concluding that the defendants were entitled to absolute immunity and that the plaintiff lacked standing as to his legal malpractice claims. On the plaintiff's appeal to this court, *held* that the trial court properly granted the defendants' motion to dismiss and determined that it lacked subject matter jurisdiction: that court properly concluded that the defendants were entitled to absolute immunity, as the plaintiff's complaint was not grounded on any conduct by R in which she acted outside the role of a court-appointed guardian ad litem, and the conduct that formed the basis of the plaintiff's claims was R's recommendation to the trial court of supervised visitation between the plaintiff and his minor child, as well as her recommendation against the use of coparenting counseling, which were made while R was fulfilling her statutorily prescribed duties as guardian ad litem to the plaintiff's minor child, thereby entitling R to absolute immunity; moreover, contrary to the plaintiff's assertion, granting absolute immunity to guardians ad litem is not contrary to public policy, as there are sufficient procedural safeguards to protect

conclusory statements. Accordingly, we decline to consider the defendant's sixth amendment claim because it is inadequately briefed. See *Artiaco* v. *Commissioner of Correction*, 180 Conn. App. 243, 248–49, 182 A.3d 1208 ("Ordinarily, [c]laims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . . [T]he dispositive question in determining whether a claim is adequately briefed is whether the claim is reasonably discernible [from] the record . . . ." [Internal quotation marks omitted.]), cert. denied, 328 Conn. 931, 184 A.3d 758 (2018).

against improper conduct by a guardian ad litem, namely, a guardian ad litem is subject to the trial court's oversight and discretion and may be removed by the court at any time, either sua sponte or upon motion of a party, and a guardian ad litem, just as any other attorney, is subject to discipline for violations of the Code of Professional Conduct.

Argued October 24, 2018—officially released January 15, 2019

Procedural History

Action to recover damages for, inter alia, legal malpractice, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Radcliffe*, *J.*, granted the plaintiff's motion to cite in Bai, Pollack, Blueweiss & Mulcahey, P.C., as a party defendant; thereafter, the court, *Arnold*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

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

Michael R. Keller, with whom were *Eva M. Kolstad* and, on the brief, *James L. Brawley*, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff, David Dubinsky, appeals from the judgment of the trial court granting the motion to dismiss filed by the defendants, Veronica Reich and Bai, Pollack, Blueweiss & Mulcahey, P.C. On appeal, the plaintiff claims that the court improperly concluded that the defendants were entitled to absolute immunity. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the plaintiff's claim. Reich is an attorney with the law firm of Bai, Pollack, Blueweiss & Mulcahey, P.C. In the prior marital dissolution action between the plaintiff and his former wife; see *Dubinsky*

v. *Dubinsky*, Superior Court, judicial district of Fairfield, Docket No. FA-12-4040496-S; Reich served as a court-appointed guardian ad litem for the plaintiff's minor child.

In his operative complaint,[1] dated September 9, 2016, the plaintiff alleged that, on June 23, 2012, shortly before the dissolution proceedings commenced, he was arrested and charged with risk of injury to a child in violation of General Statutes § 53-21, assault in the third degree in violation of General Statutes § 53a-61, and disorderly conduct in violation of General Statutes § 53a-182. The plaintiff alleged that, as a result, criminal protective orders were issued by the court, which prevented him from seeing his minor child and required him to stay away from his marital home. The plaintiff alleged that, on August 30, 2012, the criminal protective orders were dismissed. The plaintiff further alleged that, on January 28, 2013, the Department of Children and Families concluded that the charges against him were not substantiated and that there was no basis for a finding of abuse or neglect of his minor child.

The plaintiff alleged claims of legal malpractice, intentional infliction of emotional distress, and negligent infliction of emotional distress against the defendants. The plaintiff alleged that Reich "continued to hold [the criminal charges and protective orders] against the [p]laintiff, despite clear resolution in his favor." The plaintiff alleged that, in doing so, Reich "vindictively, intentionally and . . . recklessly" limited the plaintiff's access to his minor child, which was contrary to the best interests of the child. Specifically, the

[1] The plaintiff filed his original complaint on April 20, 2016, in which he named Reich as the sole defendant. The plaintiff later filed a motion to cite in Bai, Pollack, Blueweiss & Mulcahey, P.C., as an additional defendant, which the court granted on August 29, 2016. On September 26, 2016, the plaintiff filed his amended complaint, which serves as the operative complaint, in which he alleged additional claims against Bai, Pollack, Blueweiss & Mulcahey, P.C., in its capacity as Reich's employer.

plaintiff alleged that Reich wrongfully recommended to the court supervised visitation between the plaintiff and his minor child and recommended against the use of coparenting counseling.[2] The plaintiff claimed that Reich's actions "caused [him] to suffer severe emotional distress and anxiety in being separated from his minor son and stepdaughter, the humiliation of supervised visitation with his minor son, the emotional distress of not being able to return to [his] marital home, and the loss of reputation in the community."

On November 4, 2016, the defendants filed a motion to dismiss the plaintiff's complaint for lack of subject matter jurisdiction on the grounds that they were entitled to absolute immunity and that the plaintiff lacked standing to assert claims of legal malpractice. On January 12, 2017, the plaintiff filed a memorandum of law in opposition to the defendants' motion to dismiss in which he contended that the defendants were not entitled to absolute immunity and that, even if they were, they still would be liable "for the intentional actions undertaken by [Reich] that were outside the scope of her duty as a [guardian ad litem]." The plaintiff also asserted that he had standing because he had a relationship with the defendants as a result of a retainer agreement.[3] On January 17, 2017, the court held a hearing on the motion. The court issued its memorandum of decision on April 27, 2017, granting the defendants' motion to dismiss. The court ruled that the defendants

[2] We note that, although Reich made these recommendations, it was indisputably the role of the court to make the final determinations as to custody, visitation, and parenting issues.

[3] "The court may order either party to pay the fees for [a] guardian ad litem pursuant to General Statutes § 46b-62, and how such expenses will be paid is within the court's discretion." (Footnote omitted.) *Ruggiero* v. *Ruggiero*, 76 Conn. App. 338, 347–48, 819 A.2d 864 (2003). In its memorandum of decision, the trial court found that "[t]here was no retainer agreement, as the court ordered the plaintiff to pay fees incurred by Reich for the execution of her duties in her role as the guardian ad litem for the minor child."

were entitled to absolute immunity and that the plaintiff lacked standing with respect to his claims of legal malpractice.[4] This appeal followed.

The standard of review for a court's decision on a motion to dismiss is well settled. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Villages, LLC* v. *Longhi*, 166 Conn. App. 685, 698, 142 A.3d 1162, cert. denied, 323 Conn. 915, 149 A.3d 498 (2016). "[A]bsolute immunity protects a party from suit and implicates the trial court's subject matter jurisdiction . . . ." *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 729, 161 A.3d 630 (2017).

On appeal, the plaintiff claims that the defendants were not entitled to absolute immunity.[5] Specifically,

[4] On appeal, the plaintiff does not challenge the trial court's finding that he lacked standing to bring the legal malpractice claims. Therefore, this appeal relates solely to the issue of whether the defendants were entitled to absolute immunity with respect to the plaintiff's claims of intentional infliction of emotional distress and negligent infliction of emotional distress.

[5] In his reply brief, the plaintiff claims, for the first time, that "[i]t was error for the court to dismiss the [plaintiff's] cause of action on the sufficiency of the pleadings rather than treating the motion to dismiss as a motion to strike." We decline to review this claim. See *Medeiros* v. *Medeiros*, 175 Conn. App. 174, 190 n.12, 167 A.3d 967 (2017) ("[i]t is well established . . . that [c]laims . . . are unreviewable when raised for the first time in a reply brief" [internal quotation marks omitted]).

he argues that absolute immunity does not apply when a guardian ad litem performs acts outside of the scope of her jurisdiction and that "the jurisdiction of a [guardian ad litem] in a marital dissolution [action] is limited to taking action in the best interests of the minor child." The plaintiff argues that Reich "went well beyond the best interests of the minor child and fell outside her jurisdiction as [guardian ad litem]." We disagree.

In *Carrubba* v. *Moskowitz*, 274 Conn. 533, 537, 877 A.2d 773 (2005), our Supreme Court recognized that attorneys appointed by the court pursuant to General Statutes § 46b-54 are entitled to absolute, quasi-judicial immunity for actions taken during, or activities necessary to, the performance of functions that are integral to the judicial process. Reich, as a guardian ad litem, was an attorney appointed by the court pursuant to § 46b-54.[6] Therefore, under *Carrubba*, Reich is entitled

[6] General Statutes § 46b-54 (a) provides: "The court may appoint counsel or a guardian ad litem for any minor child or children of either or both parties at any time after the return day of a complaint under section 46b-45, if the court deems it to be in the best interests of the child or children. The court may appoint counsel or a guardian ad litem on its own motion, or at the request of either of the parties or of the legal guardian of any child or at the request of any child who is of sufficient age and capable of making an intelligent request."

The plaintiff argues that *Carrubba* is distinguishable from the present case because *Carrubba* involved an attorney for the minor child rather than a guardian ad litem. We find this argument unpersuasive. In *Carrubba*, our Supreme Court granted attorneys for the minor child the same level of immunity as guardians ad litem. The court stated: "[F]or the purposes of an immunity analysis, the court-appointed attorney for the minor child most closely resembles a guardian ad litem," and "we see no reason to accord appointed attorneys for minor children a lesser level of immunity than that traditionally accorded to guardians ad litem, at least in the performance of those functions that are integral to the judicial process." *Carrubba* v. *Moskowitz*, supra, 274 Conn. 546–47. Further, the court acknowledged that "[c]ourts in other jurisdictions have almost unanimously accorded guardians ad litem absolute immunity for their actions that are integral to the judicial process. . . . Courts have reasoned that the duty of a guardian ad litem to secure the best interests of the minor children places the guardian squarely within the judicial process to accomplish that goal . . . and, therefore, that a grant of absolute immunity is both appropriate and necessary in order to ensure that the guardian will be able to function without the worry of possible later harassment and intimidation from dissatisfied parents. . . .

to absolute immunity for any actions taken within her role as guardian ad litem.[7]

The conduct that forms the basis of the plaintiff's underlying claims is Reich's recommendation to the court of supervised visitation between the plaintiff and his minor child, as well as her recommendation against the use of coparenting counseling. Reich made these recommendations to the court while fulfilling her statutorily prescribed duties as guardian ad litem to the plaintiff's minor child.[8] The plaintiff has not pointed to any actions taken by Reich outside of her role as guardian ad litem.[9] Therefore, Reich is entitled to absolute immunity.

These same reasons support the extension of the same scope of immunity to attorneys appointed pursuant to § 46b-54." (Citations omitted; internal quotation marks omitted.) Id., 547–48. Thus, in granting attorneys for the minor child absolute immunity, the court recognized that guardians ad litem had traditionally possessed such immunity.

[7] Because the plaintiff did not allege any claims against Bai, Pollack, Blueweiss & Mulcahey, P.C., outside of its role as Reich's employer, it is similarly entitled to absolute immunity for any actions taken by Reich within her role as guardian ad litem.

[8] General Statutes § 46b-54 (e) provides in relevant part: "[A] guardian ad litem for the minor child or children shall be heard on all matters pertaining to the interests of any child, including the custody, care, support, education and visitation of the child, so long as the court deems such representation to be in the best interests of the child. . . ."

General Statutes § 46b-54 (f) provides in relevant part: "[A] guardian ad litem for the minor child shall consider the best interests of the child, and in doing so shall consider, but not be limited to, one or more of the following factors . . . the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child . . . the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders . . . the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child . . . [and] whether the child or a sibling of the child has been abused or neglected . . . ."

[9] To the extent that the plaintiff argues that Reich's conduct fell outside the scope of her role as guardian ad litem because it was intentional, the plaintiff's claim fails. See *Carrubba* v. *Moskowitz*, supra, 274 Conn. 548–49 ("the fact that some of the allegations of the complaint claim that she did so in an intentional, rather than a merely negligent manner, does not defeat absolute immunity").

The plaintiff further argues that "[p]ublic policy requires that the trial court recognize that there is a limitation to the actions of a [guardian ad litem]" and that "[t]he grant of immunity allows unchecked abuses of power by a [guardian ad litem]." We disagree. Granting absolute immunity to guardians ad litem is not contrary to public policy.[10] There are sufficient procedural safeguards to protect against improper conduct by a guardian ad litem. Because a guardian ad litem is appointed by the court, the guardian ad litem is subject to the court's oversight and discretion and may be removed by the court at any time, either sua sponte or upon motion of a party. See *Carrubba* v. *Moskowitz*, supra, 274 Conn. 543; see, e.g., Connecticut Judicial Branch, Code of Conduct for Counsel for the Minor Child and Guardian Ad Litem, available at https://www.jud.ct.gov/family/GAL_code.pdf. (last visited January 9, 2019). Additionally, the guardian ad litem, just as any other attorney, is subject to discipline for violations of the Code of Professional Conduct. See *Carrubba* v. *Moskowitz*, supra, 543. Therefore, because the complaint was not grounded on any conduct by Reich in which she acted outside the role of a court-appointed

In addition, we reject the plaintiff's argument that Reich should not be afforded absolute immunity because, in his view, she did not act in the best interests of the child. This is precisely the type of claim that the court in *Carrubba* sought to protect against in affording absolute immunity to attorneys appointed pursuant to § 46b-54. See id., 543 ("the threat of litigation from a disgruntled parent, unhappy with the position advocated by the attorney for the minor child in a custody action, would be likely not only to interfere with the independent decision making required by this position, but may very well deter qualified individuals from accepting the appointment in the first instance").

[10] The court in *Carrubba* similarly analyzed public policy considerations. First, the court examined the policy reasons underlying judicial immunity. *Carrubba* v. *Moskowitz*, supra, 274 Conn. 539–40. In addition, the court considered whether procedural safeguards existed to protect against improper conduct by an attorney for the minor child. Id., 543. Although not specifically framed as a public policy analysis, the court's discussion addresses the same concerns that the plaintiff raises regarding guardians ad litem.

guardian ad litem, the defendants are entitled to absolute immunity and the trial court lacked subject matter jurisdiction.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JEMAL E. BETHEA (AC 40429)

Lavine, Sheldon and Bright, Js.

Syllabus

Convicted of the crime of falsely reporting an incident in the second degree in connection with the alleged theft of his vehicle, which had been involved in an automobile accident, the defendant appealed to this court. P, a bystander to the accident, had witnessed a white Chrysler 300 drive through an intersection in Hamden and crash with another vehicle before fleeing the scene. P reported the accident, gave a description of the driver and provided the license plate number of the Chrysler to the authorities. Later that day, the defendant reported to the police that his white Chrysler 300 had been stolen from outside the residence of his girlfriend, M, in Wallingford while he was sleeping, and that M had been the last person to use the vehicle when she drove it to a store earlier that day. The next day, the police recovered the defendant's damaged vehicle from a roadside in Wallingford approximately three miles from M's residence. The license plate number of the defendant's recovered vehicle was one digit different from the license plate number P had reported to authorities. Thereafter, the defendant filed an affidavit of vehicle theft with his insurance company, O Co., stating that his vehicle had been stolen while he was sleeping from outside his own residence in North Branford after he and M had returned from the store. The defendant then gave a recorded statement to O Co. in which he stated that his vehicle had been stolen from outside M's residence after he and M had returned from the store together, and he made a number of inconsistent statements to the police. The police obtained a search warrant for M's cell phone records, which revealed that M's cell phone had been in the vicinity of the evading incident on the date and time of that incident, and in the vicinity of the defendant's car the morning it was recovered. *Held:*

1. The evidence was sufficient to sustain the defendant's conviction of falsely reporting an incident in the second degree, as the jury reasonably could have found that the defendant knew that his car had not been stolen

at the time he made the theft report to the police; the jury was entitled to conclude that the defendant's inconsistent and evolving statements surrounding the alleged theft of his vehicle, rather than being mere corrections to his story, demonstrated a consciousness of guilt and that the story of the theft was false, as P's description of the driver of the evading vehicle matched the description of M, whose cell phone records placed her at that location at the time of the evading incident and, thus, gave the defendant a motive to fabricate the theft story, and the allegedly stolen car was discovered near M's home and M's cell phone records placed M in the vicinity of the car the morning it was recovered, which supported an inference that the defendant and M staged the abandonment of the allegedly stolen vehicle to support their false report.

2. The defendant's claim that the verdict returned by the jury finding him guilty of falsely reporting an incident in the second degree but not guilty of insurance fraud was legally inconsistent was not reviewable, our Supreme Court having determined previously that claims of legal inconsistency between a conviction and an acquittal are not reviewable.

3. The record was inadequate to review the defendant's unpreserved claim that the search warrant for M's cell phone records and the warrant for his arrest were obtained without probable cause because the police included false information in the affidavits in support of the issuance of those warrants, as the defendant did not challenge the sufficiency of the affidavits to support the warrants at trial, neither affidavit was entered into evidence or placed on the record, and, thus, there was no way to determine what information was included in the challenged affidavits or to evaluate the defendant's claim; moreover, even if the record was adequate to review the claim, it nevertheless failed and lacked merit, as the defendant had no standing to assert his claim because he did not have a reasonable expectation of privacy in M's cell phone records, and an illegal arrest does not void a subsequent conviction.

4. This court declined to review the defendant's unpreserved claim that the court improperly permitted P to make an in-court identification of M as the driver of the evading vehicle in the absence of a prior nonsuggestive out-of-court identification, as P did not make an in-court identification but merely gave a description of the driver of the vehicle involved in the evading incident, and the defendant's claim, therefore, was not reviewable pursuant to *State* v. *Golding* (213 Conn. 233) because it was not one of constitutional magnitude alleging the violation of a fundamental right; moreover, the defendant's unpreserved claims that that the trial court erred by admitting P's testimony, which he claimed constituted hearsay and was prejudicial, and by admitting his out-of-court statements were also not reviewable under *Golding*, the claims being evidentiary in nature.

5. The defendant could not prevail on his unpreserved claim that the prosecutor improperly withheld the testimony of an alleged eyewitness to the

evading incident in violation of *Brady* v. *Maryland* (373 U.S. 83); the evidence at issue was not suppressed within the meaning of *Brady*, as the defendant was aware of the alleged eyewitness, who did not make any statement to the police regarding the evading incident, and had equal access to the alleged eyewitness, as demonstrated by the fact that the defendant independently was able to obtain a statement from that witness at some point after the time of his trial.

Argued October 22, 2018–officially released January 15, 2019

Procedural History

Substitute information charging the defendant with the crimes of attempt to commit larceny in the second degree, insurance fraud, and falsely reporting an incident in the second degree, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, and tried to the jury before *B. Fischer*, *J.*; verdict and judgment of guilty of falsely reporting an incident in the second degree, from which the defendant appealed to this court. *Affirmed.*

Jemal E. Bethea, self-represented, the appellant (defendant).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Kelly Davis*, deputy assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The self-represented defendant, Jemal E. Bethea, appeals from the judgment of conviction that was rendered against him, upon the verdict of a jury, on the charge of falsely reporting an incident in the second degree in violation of General Statutes § 53a-180c (a) (1). The defendant was tried under an amended information dated March 2, 2017, in which the state alleged, inter alia,[1] that on or about April 8, 2014, in

[1] The defendant was also charged with, but was acquitted of, attempt to commit larceny in the second degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-123 (a) (2), and insurance fraud in violation of General Statutes § 53a-215 (a) (1).

Wallingford, while knowing the information he reported was false or baseless, he reported to law enforcement an incident that did not in fact occur involving the alleged theft of his motor vehicle, and then, with the intent to injure, defraud or deceive Omni Insurance Group, Inc. (Omni), presented a statement of material fact in support of an insurance claim knowing that the statement contained false or misleading information. Although the defendant's appellate brief is not a model of clarity, we construe his claims on appeal to be (1) that the evidence at trial was insufficient to support his conviction of falsely reporting an incident, (2) that the verdicts in his case, finding him guilty of falsely reporting an incident but not guilty of insurance fraud, were legally inconsistent, (3) that neither the warrant to search and seize the cell phone records of the defendant's girlfriend, who was allegedly driving the defendant's vehicle at the time it was reportedly stolen, nor the warrant for the defendant's arrest in this case was supported by probable cause, (4) that the trial court erred in admitting a first time in-court identification of his girlfriend by an eyewitness, Jacqueline Pecora, (5) that the trial court erred in admitting impermissible hearsay testimony by Pecora that was more prejudicial than probative, (6) that the trial court erred in admitting the defendant's out-of-court statements to the police that were impermissible hearsay, and (7) that the prosecutor committed a *Brady*[2] violation by withholding the exculpatory testimony of an eyewitness, Allen Murchie. We affirm the judgment of the trial court.[3]

[2] In *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

[3] With the exception of the defendant's claim that insufficient evidence was presented to sustain his conviction for falsely reporting an incident, the state argues that he has failed to adequately brief each of these claims and, thus, has abandoned them. We recognize that the defendant's brief lacks precision and fails to provide a thorough analysis of the relevant legal

The jury was presented with the following evidence upon which to base its verdict. On April 8, 2014, at approximately 6 p.m., Pecora was jogging near the intersection of Hartford Turnpike and Ridge Road in Hamden when she witnessed a white Chrysler 300 drive through the intersection and crash into a "silver blue" Subaru wagon. The driver of the Chrysler, a Caucasian female with blonde hair, who was approximately forty-five to fifty-five years old, pulled over to the shoulder of the road momentarily before leaving the scene. As the Chrysler drove away, Pecora was able to get the number of its license plate. Pecora then ran to get help at a nearby fire station, where she relayed a description of the vehicle that had left the scene and its license plate number to authorities.

Hamden Police Officer Mark Gery subsequently responded to a dispatch concerning the automobile accident at the intersection of Hartford Turnpike and Ridge Road, where he arrived at approximately 6:10 p.m. Upon his arrival, he observed a single vehicle, a Subaru, which was heavily damaged on its passenger side, stopped in the middle of the intersection. He noted that there appeared to be white paint transfer on the right side of the vehicle. While at the scene, Gery spoke

authorities, however, "it is our policy to give leeway to [self-represented] litigants regarding their adherence to the rules of this court." *In re Brittany J.*, 100 Conn. App. 329, 330, 917 A.2d 1024 (2007). "The modern trend . . . is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . The courts adhere to this rule to ensure that [self-represented] litigants receive a full and fair opportunity to be heard, regardless of their lack of legal education and experience." (Internal quotation marks omitted.) *Mourning* v. *Commissioner of Correction*, 120 Conn. App. 612, 624–25, 992 A.2d 1169, cert. denied, 297 Conn. 919, 996 A.2d 1192 (2010). However, "while courts should not construe pleadings narrowly and technically, courts also cannot contort pleadings in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) Id., 625. To the extent the defendant raises additional claims, they are inadequately briefed and we decline to "strain the bounds of rational comprehension" to reach them. Id.

to witnesses who reported to him the license plate number of a second vehicle that had been involved in the accident, but had left the scene. When he traced the license plate number, it came back to a pickup truck registered to the state of Connecticut. Realizing that the license plate number he had been given for the evading vehicle was not correct, he attempted to trace permutations of the reported number in a futile attempt to identify the evading vehicle.

Later that evening, at approximately 9 p.m., the defendant contacted the Wallingford Police Department to report that his vehicle, a white Chrysler 300, had been stolen. He spoke with Officer Coleman Turner, who immediately went to a residence on Wharton Brook Drive in Wallingford to take the defendant's report. There, the defendant told Turner that when he went outside at approximately 9 p.m. to drive to the store to purchase lottery tickets, he found that his vehicle was missing. The officer also spoke with the defendant's girlfriend, Amy McVey, a Caucasian middle-aged female with blonde hair who resided at the Wharton Brook residence outside of which the car was reportedly stolen. The defendant told the officer that McVey was the last person to use his car before it was stolen. She reportedly had driven the vehicle to Walgreens earlier that evening.

The following day, at approximately 1:37 p.m., Officer Abel Gonzalez of the Wallingford Police Department was dispatched to recover a stolen motor vehicle that had been found on Quigley Road in Wallingford, approximately three miles from McVey's residence on Wharton Brook Drive. When he arrived on Quigley Road, Gonzalez discovered the defendant's white Chrysler 300 parked on the roadside with damage to its front end. The officer also noted what appeared to be black paint transfer on the front right corner of the vehicle. Inside the vehicle, which he found to be unlocked, Gonzalez

found a wallet containing credit cards and identifying information that matched the name of the registered owner of the vehicle, defendant Jemal Bethea. He found the keys to the vehicle on the back seat. The license plate number of the defendant's vehicle was one digit different from the number Pecora had reported to authorities as the license plate number of the car involved in the evading incident on April 8.

On April 9, 2014, the defendant returned a phone call from Officer Gery. He told the officer that on the previous night he had been sleeping from 6 p.m. to 9 p.m. before he went outside and discovered that his vehicle was missing. He added that he might have dropped the keys to the vehicle without knowing it while he was bringing packages into his girlfriend's home.

The following day, April 10, 2014, the defendant filed an affidavit of vehicle theft with his insurance company, Omni. In his affidavit, the defendant indicated that the "exact location of the theft" was his residence at 57 Chidsey Drive in North Branford. He then explained the circumstances of the theft, however, as follows: "After coming back from Walgreens [and] picking up meds, at about 6:10 p.m. we went into my girlfriend's house with many bags from [the] store. Put everything away [and] I went upstairs [and] I took a nap. Waking up at about 9 p.m. I decided to go to the store [and] play my numbers. When I went outside I noticed the car was gone. I immediately called 911."

Later that same day, a claims representative from Omni took a recorded statement from the defendant regarding the theft over the telephone. In that statement, the defendant stated that the last time that he had driven his vehicle was at approximately 5:45 p.m. on April 8, when he and his girlfriend had gone to pick up a prescription. He noted that he had a receipt for

the prescription and that it was time stamped at 6 p.m. The defendant stated that they came home, unloaded the vehicle, then went into the house, where McVey began to do laundry. The defendant continued: "I went upstairs . . . about an hour and [a] half or even later . . . I got up. I don't know what time, but looked at my phone calls and noticed, you know, what time I was up and everything. And that's when I decided like at 9:30 to go out to the store and play my lottery numbers. And when I went to go look outside, the vehicle was gone . . . ." He reiterated that the car was stolen from in front of his girlfriend's home.

On April 15, 2014, Officer Turner contacted the defendant with follow-up questions regarding the reported theft. The defendant told Turner that on the day his vehicle was stolen, he went to sleep at approximately 6:15 p.m. and woke up at 8:30 p.m. He said that McVey had taken the vehicle to Walgreens shortly before his nap to pick up a prescription and that he had a receipt from that errand, although he did not provide the receipt to Turner. Several days later, the defendant returned to the police station to meet with Turner. During that meeting, the defendant first stated that he alone was responsible for the vehicle and that he was the only one who ever drove it. Then he asked the officer to delete his previous report. The defendant further stated that he was mistaken about the visit to Walgreens, as McVey had used the car to run that particular errand on a different day.

On April 16, 2014, Officer Gery again spoke to the defendant in furtherance of the evading investigation. This time the defendant told the officer that his girlfriend had not been driving his car at the time of the evading incident and neither had he. In fact, he said, his girlfriend was at home taking a phone call on the date and time in question.

On September 11, 2014, the defendant was deposed by an attorney representing Omni. During the deposition, the defendant agreed that his affidavit of vehicle theft had been completed by an insurance agent in his presence and that he had had the opportunity to review the document for its accuracy before signing it. During the deposition, however, he noted that there were inaccuracies in the affidavit. Specifically, he stated that McVey did not go to Walgreens on the day his car was stolen. He explained that he had completed the affidavit three or four days after the incident occurred when his memory was becoming "vague" and, in the time since, he had found the Walgreens receipt, which indicated that McVey had been to the store on April 7, not April 8. When asked if the vehicle had been stolen from his residence in North Branford, as reflected in the affidavit, the defendant replied that the agent had incorrectly completed that portion of the affidavit, for the vehicle was actually taken from McVey's address in Wallingford, as reflected in the narrative portion of the affidavit.

The defendant also noted in the deposition that he had since reviewed his phone records, which showed that he was making phone calls on the day in question from approximately 5:30 p.m. through 9 p.m. He told the attorney for Omni that McVey had been with him that entire time. He was then asked by the attorney whether he recalled telling the police that McVey had parked the vehicle directly in front of her residence on the night in question. He denied that he had ever said that. He was also asked by the attorney whether there were any other individuals whom he allowed to use his vehicle. He first answered that he might allow a friend to use it to go to the store. When the attorney asked him to name specific individuals who had driven the vehicle while he had owned it, he answered that he might let his cousin use it to go to the store. When

asked for his cousin's name, he responded: "I'm saying in general. I mean, I mean, I had the car for a year, maybe one or two people ever drove my vehicle." When asked again to clarify if anyone other than the defendant had ever driven the vehicle, he replied: "I mean, like I said, if somebody needed a ride somewhere, a friend or a family member, you know, I mean, nobody used my car. I mean, what are you saying?" The exchange continued with the defendant saying that his cousin had used the car to go to the store once while he was visiting him. When asked for his cousin's name, however, the defendant responded that he "can't think of his name offhand." When asked to confirm that he did not know his cousin's name, he responded that he had been speaking in general terms. Finally, he declared that the only person who had driven his vehicle was his girlfriend.

Detective Sean Houlihan of the Wallingford Police Department was assigned to investigate the defendant on suspicion that his car had been involved in an evading incident and that he had subsequently committed insurance fraud by making a claim for benefits in connection with that incident. Houlihan applied for a search warrant for cell phone records for a number registered to Bob McVey in Florida that was believed to have been used by the defendant's girlfriend, Amy McVey, in an attempt to discover the movements of that phone on the dates in question. Agent James Wines from the Federal Bureau of Investigation's Cellular Analysis Survey Team analyzed the records obtained by Houlihan. His analysis indicated that on April 8, 2014, between 5:45 p.m. and 6:15 p.m., the McVey cell phone was in the southern Hamden and New Haven areas, not in Wallingford as suggested by the defendant. Further, he opined that at 9:08 a.m. on April 9, the phone had been located just northeast of the location where the defendant's car was recovered later that day.

In closing argument, the prosecutor highlighted the inconsistencies among the defendant's various statements, arguing that they indicated that he was lying about the car theft. He also argued that the eyewitness description of the evading driver and McVey's cell phone records proved that she was the individual involved in the evading incident, and thus that the defendant had falsely reported the car theft to the police and his insurance company in order to ensure that he received money for the vehicle damage that had resulted from that incident. After concluding its deliberations, the jury returned a guilty verdict on the charge of falsely reporting an incident in the second degree and acquitted the defendant of the other two charges. The defendant later was sentenced to a term of one year incarceration, with the execution of that sentence fully suspended, a $750 fine, and two years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the evidence was insufficient to support his conviction of falsely reporting an incident in the second degree because the state failed to prove that he knew the information that he reported to police was false at the time he made such report. We disagree.

Section 53a-180c provides in relevant part: "(a) A person is guilty of falsely reporting an incident in the second degree when, knowing the information reported, conveyed or circulated to be false or baseless, such person gratuitously reports to a law enforcement officer or agency (1) the alleged occurrence of an offense or incident which did not in fact occur . . . ."

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

Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . [An appellate] court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict." (Internal quotation marks omitted.) *State* v. *Allan*, 311 Conn. 1, 25, 83 A.3d 326 (2014). In applying that test, "we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Stephen J. R.*, 309 Conn. 586, 594, 72 A.3d 379 (2013). Further, it is well established that "[t]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Citation omitted; internal quotation marks omitted.) *State* v. *McClam*, 44 Conn. App. 198, 208, 689 A.2d 475, cert. denied, 240 Conn. 912, 690 A.2d 400 (1997).

On the basis of the evidence it heard, the jury reasonably could have found that the defendant's inconsistent statements surrounding the events of April 8, 2014, were sufficient to establish that he knew that his car had not in fact been stolen at the time he made the theft report to the police. The defendant argues that the inconsistencies in his statements are easily explained and that he merely corrected himself regarding the date on which he went to Walgreens. The determination of whether the changes in his story were mere corrections or inconsistencies demonstrating a consciousness of guilt was well within the province of the jury to make. It was reasonable for the jury to conclude that the defendant's

evolving story was strong evidence of its falsehood, especially considering that the reason he gave for the change in his story—that his memory began to fade—is particularly questionable because he gave the police that version of events on the same day the alleged incident occurred. Moreover, the jury reasonably could have found that the evidence of McVey's location gleaned from her cell phone records not only undermined the veracity of the defendant's version of the events of April 8, 2014, but also put McVey at the intersection of Hartford Turnpike and Ridge Road at the time of the evading incident, thus giving the defendant a motive to fabricate. Pecora's testimony identifying a middle-aged Caucasian woman with blonde hair as the driver of the car involved in the evading incident—a description that matched McVey's appearance—also bolstered this cell tower location evidence. Further, the facts that the defendant's car was discovered near McVey's home and that the cell tower location evidence placed McVey's cell phone in that vicinity on the morning that the car was recovered, could reasonably have been found by the jury to support the state's claim that the defendant and McVey staged the abandonment of the allegedly stolen vehicle to support their false report. For these reasons, the evidence presented, construed in the light most favorable to sustaining the jury's verdict, was sufficient for the jury to find the defendant guilty of falsely reporting an incident. We therefore reject the defendant's first claim.

II

The defendant next claims that the verdicts returned by the jury were legally inconsistent. Specifically, he argues that the elements of insurance fraud and falsely reporting an incident are overlapping, in that they both require proof that he knowingly made a false statement. He therefore claims that his acquittal on the charge of insurance fraud requires his acquittal on the charge of

falsely reporting an incident, as well. We are unpersuaded.

In *State* v. *Arroyo*, 292 Conn. 558, 585, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010), our Supreme Court held that claims of inconsistency between convictions and acquittals are not reviewable on appeal, regardless of whether the alleged inconsistencies are legal, factual, or logical in nature. It reasoned that "an individualized assessment of the reason for the inconsistency would be based either upon pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake. . . . [A] criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." (Citation omitted; internal quotation marks omitted.) Id. Under this authority, the defendant's claim of inconsistency between his acquittal of attempted larceny and insurance fraud and his conviction of falsely reporting an incident in the second degree is not reviewable.

III

The defendant's third claim is that the search warrant for McVey's cell phone records and the warrant for the defendant's own arrest in this case were obtained without probable cause because the investigating officers included false information in their affidavits in support of the issuance of those warrants. As a result, he claims that the challenged search and arrest were unlawful, and, thus, that the fruits of the challenged search should have been suppressed and the conviction, which ultimately resulted from the challenged arrest, should be set aside. For the following reasons, we conclude that both aspects of this claim are unreviewable and devoid of legal merit.

As an initial matter, neither aspect of this claim is preserved, and so the defendant asks that the claim be reviewed under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis omitted; footnote omitted.) *State* v. *Golding*, supra, 239–40.

This unpreserved claim is not reviewable because the record is inadequate. Because the defendant did not challenge the sufficiency of the affidavits to support these warrants at trial, neither affidavit was entered into evidence or otherwise placed on the record. Thus, we have no way to determine what information was included in the challenged affidavits or to evaluate either of the defendant's claims.

Even, however, if we had a record upon which to review these claims, we would conclude that both claims are without merit for the following reasons. First, as to the defendant's challenge to the warrant for the seizure of McVey's cell phone records, the defendant has no standing to assert such a claim. See *Rawlings* v. *Kentucky*, 448 U.S. 98, 105, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980) (holding that defendant had no reasonable expectation of privacy in property of another). Second, as to the defendant's challenge to the allegedly fraudulent basis for the issuance of the warrant for his own

arrest, it has long been established that "the fact that [a] person has been illegally arrested or detained [does] not void a subsequent conviction." *State* v. *Haskins*, 188 Conn. 432, 442, 450 A.2d 828 (1982); see also *Frisbie* v. *Collins*, 342 U.S. 519, 522, 72 S. Ct. 509, 96 L. Ed. 541 (1952). For the foregoing reasons, neither aspect of this claim states a valid legal basis upon which relief could be granted in this case even if it were supported by an adequate record.

IV

The defendant next claims that the court improperly permitted Pecora to make an in-court identification of his girlfriend as the driver of the evading vehicle in the absence of a showing that she previously had made a nonsuggestive out-of-court identification of McVey. The defendant, however, did not take exception to Pecora's testimony on this basis, and so he requests review of this claim under *Golding*. We conclude that, although the record is adequate for review, this claim is not reviewable under the second prong of *Golding* because Pecora never made an in-court identification of McVey.

Whether a first time in-court eyewitness identification of the defendant is permissible would typically be a claim of constitutional magnitude because it implicates the defendant's fundamental right of due process. See *State* v. *Dickson*, 322 Conn. 410, 426, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017). In this case, however, Pecora did not make a first time in-court identification of anyone, but merely gave a description of the driver of the other vehicle involved in the evading incident that matched the appearance of the defendant's girlfriend. Because no identification was made, this is not a claim of constitutional magnitude alleging the violation of a fundamental right, and thus is not reviewable under *Golding*.

V

The defendant next claims that the trial court erred in admitting the testimony of Pecora, an eyewitness to the evading incident. Specifically, he claims that Pecora's in-court testimony was inadmissible both because it constituted hearsay and because it was more prejudicial than probative. No objection was made to the challenged testimony at the time of trial, however, so this claim is also unpreserved. The defendant, therefore, requests that we review the claim pursuant to *Golding*. However, unpreserved evidentiary issues are not afforded such review. See *State* v. *Golding*, supra, 213 Conn. 241 ("once identified, unpreserved evidentiary claims masquerading as constitutional claims will be summarily dismissed"). Thus, this unpreserved claim is not reviewable.

VI

The defendant next claims that the court erred in admitting his many out-of-court statements to investigating officers because they are impermissible hearsay evidence. This evidentiary claim is also unpreserved and, therefore, for the reasons stated in part V of this opinion, it is also not reviewable. Even so, there is no question that a defendant's out-of-court statements, when introduced by the state, are admissible as statements by a party opponent under a well established exception to the hearsay rule. See Conn. Code Evid. § 8-3 (1).

VII

Finally, the defendant claims that the prosecutor committed a *Brady* violation by withholding the testimony of Murchie, an alleged eyewitness. See *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Specifically, he claims that the state withheld material evidence of an alleged eyewitness whom the

investigating officers failed to pursue and who, allegedly, would have testified that the other vehicle involved in the evading incident was of a different color than his vehicle. We disagree.

The following additional facts are necessary to our review of this claim. On October 26, 2016, this case was listed on a trial management docket when a discussion took place between the defendant, who was then self-represented, the prosecutor, and the court regarding outstanding discovery. The defendant requested that the state turn over an eyewitness statement from an individual named Allen Murchie, whose name appeared in one of the police reports for the case. In response, the prosecutor explained to the court: "[The defendant's] case is an insurance fraud case. There was an accompanying motor vehicle accident, which we chose not to prosecute, that stems from this. There was a witness named Allen Murchie. We've made multiple attempts to contact him. Mr. Bethea has the same information that I have as regards to that witness. . . . There was never a written statement." The defendant stated that the information was material, arguing that Murchie's statement would contain information that negated evidence that his girlfriend was involved in the evading incident while driving his car. The prosecutor responded by representing that she would not be calling Murchie as a witness, that none of the police witnesses would base their testimony on any information received from Murchie, and that he was "not relevant to this case at all." The court, *Klatt*, *J.*, informed the defendant that the state had the burden of going forward, that the prosecutor was representing that she did not need the eyewitness to prove her case, and, thus, that she was not required to call him as a witness. Therefore, the court ruled, the defendant would have to subpoena the witness himself if he considered the witness necessary for his defense.

Again, this claim is unpreserved and the defendant requests that it be reviewed under *Golding*. In this instance, the record is adequate for review and the issue is of constitutional magnitude, alleging the violation of a fundamental right to due process. See *Gaskin* v. *Commissioner of Correction*, 183 Conn. App. 496, 530, 193 A.3d 625 (2018) ("[t]he *Brady* rule is based on the requirement of due process" [internal quotation marks omitted]). We, therefore, consider whether the alleged constitutional violation exists and deprived the defendant of a fair trial.

The three essential components of a *Brady* claim, all of which must be established to warrant a new trial, are as follows: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the [s]tate, either willfully or inadvertently; and prejudice must have ensued. . . . Under the last *Brady* prong, the prejudice that the defendant suffered as a result of the impropriety must have been material to the case, such that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (Internal quotation marks omitted.) Id., 531–32. "It is well established that [e]vidence known to the defendant or his counsel, or that is disclosed, even if during trial, is not considered suppressed as that term is used in *Brady*." (Internal quotation marks omitted.) *State* v. *Williams*, 93 Conn. App. 844, 850, 890 A.2d 630 (2006). "Whether the petitioner was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review." (Internal quotation marks omitted.) *Morant* v. *Commissioner of Correction*, 117 Conn. App. 279, 284, 979 A.2d 507, cert. denied, 294 Conn 906, 982 A.2d 1080 (2009).

The evidence at issue was potentially favorable, as argued by the defendant, to impeach the testimony of

Pecora regarding the evading incident. However, even if we assume arguendo that the evidence was favorable to the defendant, there is no evidence that the prosecutor suppressed such evidence. The defendant had equal access to the witness, as noted by the state and as evidenced by the fact that the defendant appears from his brief to have obtained a statement from that witness independently, albeit after the time of his trial. Because the evidence was not suppressed, we cannot conclude that the prosecutor committed a *Brady* violation.

The judgment is affirmed.

In this opinion the other judges concurred.