JEAN-PIERRE BOLAT *v.* YUMI S. BOLAT
(AC 40767)

Lavine, Elgo and Harper, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court resolving certain postjudgment motions. Following the dissolution of their marriage, the parties entered into a stipulation governing various parenting matters and child support, which was approved by and made an order of the court. On appeal, the plaintiff claimed that the trial court improperly granted certain motions for contempt filed by the defendant, denied his motion for contempt, and denied his motion to modify his child support obligation. *Held*:

1. The trial court did not abuse its discretion when it granted the defendant's May, 2017 motion for contempt and held the plaintiff in contempt for violating the stipulation by failing to make arrangements for the parties' minor children when he could not be with them during his scheduled parenting time as the "custodial parent": although "custodial parent" was not defined in the stipulation, the relevant paragraph, when read within the context of the other provisions, made it clear that it refered to the parent who was meant to have the children at a given time according to the stipulation, and, thus, the stipulation was sufficiently clear and unambiguous so as to support a judgment of contempt; moreover, the trial court reasonably could have found that the plaintiff had wilfully violated the stipulation, as a review of the canvass that occurred before the court accepted the parties' stipulation and made it an order plainly indicated that the plaintiff attributed the same meaning to the term "custodial parent" as the defendant, and demonstrated that the plaintiff knew he had to make alternate arrangements for the children during his parenting time if he was unavailable.
2. This court declined to review the plaintiff's claim that the trial court improperly denied his September, 2017 motion for contempt, as that claim was inadequately briefed, the plaintiff having failed to provide any analysis or to demonstrate, aside from unsupported assertions, how the court's ruling that his motion was barred by the doctrine of res judicata was improper.
3. The trial court did not abuse its discretion when it granted the defendant's August, 2017 motion for contempt and found the plaintiff in contempt for violating the stipulation by failing to contribute toward the purchase of a vehicle for the parties' children: the stipulation was sufficiently clear and unambiguous so as to support a judgment of contempt, as although the plaintiff correctly pointed out that the stipulation did not specify who would purchase the vehicle or when it would be purchased, he failed to explain or provide any legal authority to show that the absence of such details made the stipulation ambiguous, and this court could not conclude that the language of the stipulation was reasonably susceptible to more than one interpretation; moreover, the trial court reasonably could have found that the plaintiff had wilfully violated the stipulation, as the plaintiff's claims that he had offered two free vehicles, that he was not timely given the proof of purchase that he had asked for, and that the defendant acted unilaterally despite the stipulation provision that provided that the plaintiff had final decision-making authority, did not demonstrate how his failure to contribute the sum that he had contractually agreed to provide was not wilful, and the court's conclusions were supported by the evidence.
4. The trial court did not abuse its discretion in denying the plaintiff's motion to modify his child support obligation due to a substantial change in circumstances; the plaintiff bore the burden of persuading the court that his circumstances had changed substantially, and although the

plaintiff introduced testimony and documentary evidence to show that his income had declined since the parties entered into the stipulation, the court, as the fact finder, was free to discredit his testimony, and in the absence of any credible evidence that the plaintiff's income had declined, the court reasonably could have found that the plaintiff had failed to prove a substantial change in his circumstances.

Argued March 13—officially released July 23, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Abery-Wetstone, J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Shluger, J.*, granted the defendant's motion for contempt; subsequently, the court, *Klatt, J.*, denied the plaintiff's motion for contempt; thereafter, the court, *Klatt, J.*, granted the defendant's motion for contempt; subsequently, the court, *Klatt, J.*, denied the plaintiff's motion to modify child support, and the plaintiff appealed to this court; thereafter, the court, *Klatt, J.*, granted the plaintiff's motion for articulation. *Affirmed.*

Jean-Pierre Bolat, self-represented, the appellant (plaintiff).

Richard W. Callahan, for the appellee (defendant).

Opinion

ELGO, J. In this contentious postdissolution case, the self-represented plaintiff, Jean-Pierre Bolat, appeals from various postdissolution judgments rendered by the trial court in favor of the defendant, Yumi S. Bolat. On appeal, the plaintiff claims that the court improperly (1) granted the defendant's May 9, 2017 motion for contempt, denied his September 19, 2017 motion for contempt, and granted the defendant's August 23, 2017 motion for contempt; and (2) denied his motion to modify his child support obligation. We affirm the judgments of the trial court.

The following facts and procedural history are relevant to this appeal. The parties' marriage was dissolved

on June 21, 2011. They have three children together. On April 11, 2017, the parties entered into a stipulation governing various parenting matters and child support, which was approved by and made an order of the court (stipulation). Pursuant to the stipulation, the parties shared joint legal custody, and the children primarily resided with the defendant. It also provided for the two elder children to use the plaintiff's residence in Wallingford as their residence for school purposes and to finish high school at Sheehan High School in Wallingford. The stipulation further provided that "the [plaintiff] shall have parenting time to include every other weekend from Friday after school until Monday when school commences or [9 a.m.]." It also stated that "[i]f the custodial parent cannot be with the children, it is the custodial parent's responsibility to make arrangements for the children unless the noncustodial parent agrees in writing to take the children."

Subsequent to entering into the stipulation, both parties filed various motions with the court. On August 8, 2017, the court granted the defendant's May 9, 2017 motion for contempt and found the plaintiff in contempt for failing to make arrangements for the children when he could not take them during his scheduled parenting time. On October 4, 2017, the court denied the plaintiff's September 19, 2017 motion for contempt when it determined that the issues raised by the plaintiff's motion were barred by the doctrine of res judicata. On October 19, 2017, the court granted the defendant's August 23, 2017 motion for contempt and found the plaintiff in contempt for failing to pay $3000 toward the purchase of a vehicle for their children. On November 21, 2017, the court denied the plaintiff's July 31, 2017 motion to modify his child support obligation, concluding that the plaintiff had "failed to meet his burden of showing a significant change in his financial circumstances . . . ." From these judgments the plaintiff now appeals.

I

CONTEMPT CLAIMS

The plaintiff first claims that the court improperly (1) granted the defendant's May 9, 2017 motion for contempt, (2) denied his September 19, 2017 motion for contempt, and (3) granted the defendant's August 23, 2017 motion for contempt. We disagree.

We begin by setting forth our standard of review and relevant legal principles. "[O]ur analysis of a judgment of contempt consists of two levels of inquiry. First, we must resolve 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, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding." (Citations omitted.) *In re Leah S.*, 284 Conn. 685, 693–94, 935 A.2d 1021 (2007).

"Civil contempt is committed when a person violates an order of court which requires that person in specific and definite language to do or refrain from doing an act or series of acts. . . . Whether an order is sufficiently clear and unambiguous is a necessary prerequisite for a finding of contempt because [t]he contempt remedy is particularly harsh . . . and may be founded solely upon some clear and express direction of the court. . . . One cannot be placed in contempt for failure to read the court's mind. . . . It is also logically sound that a person must not be found in contempt of a court order when ambiguity either renders compliance with the order impossible, because it is not clear enough to put a reasonable person on notice of what

is required for compliance, or makes the order susceptible to a court's arbitrary interpretation of whether a party is in compliance with the order." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 695.

The order at issue is the stipulation, entered into by the parties, which was made an order of the court. "In domestic relations cases, [a] judgment rendered in accordance with . . . a stipulation of the parties is to be regarded and construed as a contract. . . . It is well established that [a] contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . Contract language is unambiguous when it has a definite and precise meaning . . . concerning which there is no reasonable basis for a difference of opinion . . . . In contrast, an agreement is ambiguous when its language is reasonably susceptible of more than one interpretation. . . . Nevertheless, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Citations omitted; internal quotation marks omitted.) *Mettler* v. *Mettler*, 165 Conn. App. 829, 836–37, 140 A.3d 370 (2016).

A

The plaintiff claims that the court improperly granted the defendant's May 9, 2017 motion for contempt when it held him in contempt for violating the stipulation by failing to make arrangements for the children when he could not be with them during his scheduled parenting time. Specifically, the plaintiff argues that the court's holding was improper because the stipulation is ambiguous and there was no evidence that his violation was wilful. We disagree.

The following facts and procedural history are relevant to this claim on appeal. Before approving the stipulation and making it an order, the court canvassed the parties about what they meant in paragraph 4.2, which states: "If the custodial parent cannot be with the children, it is the custodial parent's responsibility to make arrangements for the children unless the noncustodial parent agrees in writing to take the children." The court stated: "So, when I read this paragraph, I read [it] to be [that] if the custodial parent cannot be with the children—let's say . . . the custodial parent is going to be absent for one night or however many nights, it is the custodial parent's responsibility to make arrangements for the children unless the noncustodial parent agrees in writing to take the children. If the noncustodial parent agrees to take the children, that's terrific. . . . [I]f [the plaintiff] is traveling and [the defendant] says of course they can stay overnight and that's acceptable, I have no problem with that . . . and likewise, on the other side, if that is not an option, the children must stay with an adult. The custodial parent's responsibility is to find an adult to take care of those kids."

Additionally, the following colloquy occurred between the court and the plaintiff about paragraph 4.2:

"The Court: I think that given the context, if you and your wife want to take an overnight somewhere and it

would be your night to have the kids, you know, I'm sure [the defendant] would take them. If they're not about to do that, you've got to find—

"[The Plaintiff]: Right.

"The Court: And vice versa.

"[The Plaintiff]: Mm-hmm.

"The Court: Okay.

"[The Plaintiff]: Yes, Your Honor."

On May 1, 2017, the plaintiff filed a motion for articulation in which he asked the court to articulate several paragraphs of the stipulation, including paragraph 4.2. In that motion, he argued that "there appears to be a discrepancy in [the] definition of custody, parenting time, visitation, responsibilities of the parties, and agreements made during negotiations. Said agreements that were made during settlement discussions and during the court hearing are now confused." The court denied that motion on May 3, 2017. On that same date, the plaintiff filed a motion to open and modify the stipulation, arguing that the "disingenuous and deceitful nature of the defendant and her attorney during the settlement discussions" necessitated that the stipulation be opened and modified. On May 9, 2017, the defendant filed a motion alleging that the plaintiff violated terms in the parties' stipulation and that he was therefore in contempt of the court's order. Specifically, she asserted that the plaintiff wilfully violated terms in the parties' stipulation when he "refused to take the children, and further refused to make arrangements for the children when he learned that the defendant and her husband had alternate plans." On May 25, 2017, the plaintiff filed an objection to that motion in which he argued that he had not "wilfully violated any clear and unambiguous order of the court."

A hearing on the defendant's motion for contempt and the plaintiff's motion to open and modify the stipulation was held on July 31, 2017. In its August 8, 2017 memorandum of decision, the court determined that, because "the term 'custodial parent' was never defined in the agreement, [the court] must determine its meaning based on the intent of the parties. The [c]ourt [found] that the canvass makes crystal clear that the parties intended paragraph 4.2 to apply to both parents and that if either parent was unable to care for the children during 'their assigned time,' they must make alternative arrangements." The court concluded that the colloquy between the plaintiff and the court that occurred during the canvass "makes clear that the parties intended paragraph 4.2 to apply to both parents and when they used the phrase 'custodial parent' they intended it to mean 'the parent with custody of the children at that time.' " The court, therefore, found by clear and convincing evidence that the plaintiff was in contempt. At the same time, the court concluded that it had not been "presented with sufficient evidence upon which to fashion a sanction. The [c]ourt did not receive evidence as to exact dates or any monetary costs which the [d]efendant was forced to incur as a result of having to care for the children during the [plaintiff's] parenting time." For that reason, the court did not impose a sanction against the plaintiff.

On appeal, the plaintiff argues that he is not the custodial parent and, therefore, paragraph 4.2 does not apply to him. As such, he contends that the court improperly found him in contempt for violating that provision. We disagree.

Although "custodial parent" is not defined in the stipulation, paragraph 4.2, when read within the context of the other provisions, makes clear that "custodial parent" refers to the parent who is meant to have the children at a given time according to the stipulation.

See *Isham* v. *Isham*, 292 Conn. 170, 184, 972 A.2d 228 (2009) (construing term in agreement in context of other provisions). The stipulation provides that the parties share joint legal custody. It further provides that the minor children primarily shall reside with the mother, but also that the father shall have parenting time every other weekend. In light of the fact that the parties had a shared custody arrangement that included scheduled parenting time with the father, the sensible and ordinary meaning of "custodial parent" is the parent scheduled to have physical custody of the children at a given time according to the terms of the stipulation.[1] In the context of the custody arrangement agreed on by the parties, the intent of the parties, "ascertained by a fair and reasonable construction of the written words"; (internal quotation marks omitted) *Mettler* v. *Mettler*, supra, 165 Conn. App. 836; was for the provision to apply to both the plaintiff and the defendant. "Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Parisi* v. *Parisi*, 315 Conn. 370, 383, 107 A.3d 920 (2015). Accordingly, we conclude that the stipulation was sufficiently clear and unambiguous so as to support a judgment of contempt.

The plaintiff also argues that the court incorrectly determined that he wilfully violated the stipulation because his actions in requesting an articulation and a modification of the stipulation show that there was "a good faith misunderstanding of the definitions of the

[1] The plaintiff also asserts that it is impossible for him to be in contempt under this definition because, at the time of the alleged contempt, he "was forty miles away at a meeting." What we understand the plaintiff to mean is that custody is triggered when a party actually receives physical custody of the children. That interpretation, however, obviates the terms of the stipulation because the obligation to make other arrangements for the children would never attach for either parent during his or her scheduled parenting time.

terms used and of the overall intent of the parties."[2] In response, the defendant contends that the canvass of the parties clearly indicates that the plaintiff knew that the paragraph applied to him. We agree with the defendant.

Our review of the canvass that occurred on April 11, 2017, prior to the court accepting the parties' stipulation and making it an order, plainly indicates that the plaintiff attributed the same meaning to the term "custodial parent" as the defendant. It further establishes that the plaintiff knew he had to make alternate arrangements for the children during his parenting time if he was unavailable.

Moreover, to the extent the plaintiff argues that the court's decision to grant his motion for modification and modify paragraph 2.2, which pertains to visitation, makes the court's contempt judgment improper, we disagree. While we acknowledge that the court, on August 8, 2017, granted the plaintiff's motion to open and modify the stipulation,[3] those new terms are irrelevant as to whether the plaintiff was in contempt of the prior order. Our Supreme Court consistently has held that "[a]n order of the court must be obeyed *until* it has been modified or successfully challenged." (Emphasis added; internal quotation marks omitted.) *Sablosky* v.

[2] The plaintiff also asserts that "[i]n order to find [him] in wilful contempt, the trial court was required to find that the defendant proved, by clear and convincing evidence, that the plaintiff was required and mandated by law or case law to exercise his visitation rights." In so doing, the plaintiff fails to recognize that he was found in contempt for failing to make arrangements for the children during his scheduled parenting time when he realized he could not exercise that time. He was not found in contempt for simply failing to visit his children.

[3] In its August 8, 2017 memorandum of decision, the court ordered "that the [plaintiff's] parenting time will be every other weekend and additional time as agreed upon if and only if both children and the father wish to have that visitation occur. There shall be no penalty or sanction if he fails to exercise said access."

Sablosky, 258 Conn. 713, 719, 784 A.2d 890 (2001). Accordingly, the timing in which the plaintiff filed his motions for articulation and modification and the defendant filed her motion for contempt is immaterial. In finding the plaintiff in contempt, the court properly considered the plaintiff's actions that took place *before* paragraph 2.2 was modified.

Because the stipulation was sufficiently clear and unambiguous so as to support a judgment of contempt and the court reasonably could have found that the plaintiff had wilfully violated the stipulation, the court did not abuse its discretion in granting the defendant's motion for contempt. The August 8, 2017 judgment of contempt is affirmed.

B

The plaintiff next claims the court improperly denied his September 19, 2017 motion for contempt when it concluded that the issues raised by his motion were barred by the doctrine of res judicata. We conclude that the plaintiff's claim is inadequately briefed, and we, therefore, decline to review it.

"It is well settled that [w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . [A]ssignments of error which are merely mentioned but not briefed beyond a statement

of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.) *Nowacki* v. *Nowacki*, 129 Conn. App. 157, 163–64, 20 A.3d 702 (2011).

We have carefully reviewed the plaintiff's appellate briefs. The plaintiff has failed to demonstrate, aside from unsupported assertions, how the court's ruling that his motion was barred by the doctrine of res judicata was improper. The plaintiff merely quotes the claim raised in another case and states that the court in this case abused its discretion "[i]n the exact same way" without providing any analysis.[4] Moreover, in his appellate reply brief, the plaintiff responds to the defendant's argument that there is an inadequate record for our review by arguing why the court should have found the defendant in contempt instead of explaining why the court improperly determined that the doctrine of res judicata barred his motion. For the foregoing reasons, we decline to review the plaintiff's claim.

C

The plaintiff also claims that the court improperly granted the defendant's August 23, 2017 motion for contempt when it held him in contempt for violating the stipulation by failing to contribute $3000 toward the purchase of a vehicle for their children. Specifically, the plaintiff argues that the court's finding was improper because the stipulation is ambiguous and his violation was not wilful. We disagree.

The following additional facts and procedural history are relevant to this claim. On August 23, 2017, the defendant filed a motion for contempt that alleged that the

[4] Specifically, the plaintiff cites to *Brochard* v. *Brochard*, 165 Conn. App. 626, 637, 140 A.3d 254 (2016), and quotes the following: "The defendant claims that Judge Gould abused his discretion when he determined that the authorization issue raised by the defendant's motion for contempt was already decided, and when he purported to decide the issue in his September 28, 2015 memorandum of decision. We agree."

plaintiff violated paragraph 5.1 of the stipulation, which provides in relevant part: "The parties shall share 50/50 in the purchase of a motor vehicle at $6000. Until the youngest child graduates high school, the vehicle shall be placed into the name of the [defendant], and the parties shall share 50/50 all costs related to the motor vehicle except gas, which shall be paid by the [defendant]."

On October 19, 2017, the third day of the hearing before the court on this motion, the court ruled from the bench. The court found, amongst other things, that "[w]hile there was no time limit in place, there was testimony that the defendant had to take action regarding the children within a reasonable time so that they could attend school. [The] [d]efendant did take action in a timely manner. By April 27, 2017, she had added [the eldest child] to her insurance policy. By May 11, 2017, she had . . . made arrangements to purchase the vehicle and the purchase was finalized in . . . July, 2017.

"There appear[s] to be limited discussion between the parties regarding the purchase of a specific vehicle. Evidence did establish that the defendant communicated almost immediately her intention to give her current vehicle to the children and obtain another vehicle for herself to the plaintiff. [The] [d]efendant purchased the vehicle she was currently leasing, a 2014 Jeep Patriot, at a purchase price of $14,000 and has indicated that this is the vehicle that the minor child will be driving. Testimony also established that the defendant requested the plaintiff reimburse her only $3000 towards the cost of the vehicle. The defendant also paid $160 to register the motor vehicle.

"Evidence further established that the plaintiff originally agreed to pay the defendant the $3000 with the

understanding that that amount would be his only financial contribution towards the purchase. Then his concern became . . . whether the Jeep would be used by other members of the defendant's family. After the defendant provided [the] plaintiff with additional information, [the] plaintiff still did not pay his share according to the agreement. After several e-mails between the parties or their spouses, [the] plaintiff simply refused to pay.

"Evidence offered by the plaintiff that the reason he did not pay the $3000 [was] because the defendant did not provide him with the information he requested regarding the Jeep or her own vehicle is not relevant . . . to his argument that he did not wilfully violate this order. . . . [The plaintiff] placed requirements on the defendant to provide information such as proof of purchase for the Jeep and the vehicle for herself, information that was not required by the agreement. [The] [p]laintiff cannot claim that his obligation is relieved because of his arbitrary demands, nor can [the] plaintiff raise any good faith claim that the steps taken by the defendant were not in accordance with the agreement. As the defendant was not asking him to contribute any more than [the] $3000 that the agreement required, the plaintiff had no justification to demand any additional information. His obligation regarding the purchase of the vehicle would have been completed with a simple payment.

"[The] [p]laintiff's suggestion, and it was nothing more than that, that the children could use . . . one of his grandfather's vehicles that he had inherited as of June, 2017, was proposed only after the defendant had begun the purchase agreement for the Jeep. . . .

"[The] [p]laintiff further suggests that [the] defendant had some kind of ulterior motive for the purchase of the Jeep. This court does not credit this testimony. The

fact that the defendant rather quickly chose to purchase a vehicle that was known to her, was known to be reliable and safe, bears no negative implications." The court also found that "[t]here was no testimony regarding the plaintiff's inability to pay."

Accordingly, the court found that the order was clear and unambiguous and that the plaintiff wilfully refused to comply with the order. The court therefore ordered the plaintiff to pay the $3000 toward the purchase of the vehicle.[5]

On appeal, the plaintiff contends that paragraph 5.1 of the stipulation "seems straightforward" but that it lacks key details, which makes it ambiguous. We disagree.

Although the plaintiff correctly points out that the stipulation did not specify who would purchase the vehicle or when it would be purchased, the plaintiff fails to explain or provide any legal authority to show that the absence of such details makes the stipulation ambiguous. "A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) *Mettler* v. *Mettler*, supra, 165 Conn. App. 836–37. We simply cannot conclude that the language of paragraph 5.1 that

[5] The court also awarded the defendant $1799.50 and an additional hour's worth of court time in attorney's fees to cover the cost of defending against the plaintiff's contempt motion. The court further concluded "that the actions and behavior of the [plaintiff] throughout this entire process requiring the defendant to have to go to court to get some type of contribution, particularly [the] actions and behaviors of the [plaintiff] throughout the pendency [of this action], are what indicate to this court that an award of attorney's fees . . . is appropriate. We are not here because of an appropriate debate. We are here because [the] plaintiff deliberately attempted to obfuscate issues to avoid what was his . . . own agreement and his obligation to pay."

"[t]he parties shall share 50/50 in the purchase of a motor vehicle at $6000" is "reasonably susceptible to more than one interpretation." Id., 837. Accordingly, we conclude that the stipulation was sufficiently clear and unambiguous so as to support a judgment of contempt.

The plaintiff also contends that the court improperly found that he wilfully had violated the stipulation provision. He argues that his violation of the provision was not wilful because he had offered two free vehicles, he was not timely given the proof of purchase that he had asked for, and the defendant acted unilaterally despite the stipulation provision that provides that he shall have final decision-making authority. We disagree.

The plaintiff's excuses do not demonstrate how his failure to contribute the $3000 that he contractually agreed to provide was not wilful. Further, to the extent the plaintiff argues that the court's "decision is erroneous and not substantiated by any evidence," on the basis of our review of the record, we conclude that the court's conclusions are supported by the evidence.

Because the stipulation was sufficiently clear and unambiguous so as to support a judgment of contempt and the court reasonably could have found that the plaintiff had wilfully violated the stipulation, the court did not abuse its discretion in granting the defendant's motion for contempt. The October 19, 2017 judgment of contempt is affirmed.

II

MOTION FOR MODIFICATION CLAIM

The plaintiff next claims that the court improperly denied his motion to modify his child support obligation due to a substantial change in circumstances. Specifically, he argues that a substantial change in circumstances had occurred on the basis of his "nearly . . . 50 [percent] reduction" in gross income.[6] We disagree.

[6] We note that within his appellate reply brief, the plaintiff replies to the defendant's arguments on earning capacity and attacks the court's judgment

The following additional facts and procedural history are relevant to this claim. Pursuant to the parties' April 11, 2017 stipulation, the plaintiff agreed to pay the defendant $375 per week in child support. The plaintiff filed a motion for modification on July 31, 2017, in which he sought to modify his child support obligation on the basis of a substantial change in circumstances, namely, because he lost his primary source of income on June 30, 2017.

A hearing was held on the plaintiff's motion for modification on October 17, 2017. In its November 21, 2017 memorandum of decision, the court found that the "[p]laintiff testified that he was laid off from his primary source of income as a consultant with Sovereign Intelligence, LLC, and that his private consultant firm [(the Bolat Group, LLC)] was operating at a net loss. [The] [p]laintiff testified that he had been employed by Sovereign Intelligence, [LLC] at a salary of $50,000 per year and had been laid off as of June 30, 2017. He further claimed that the contracts for [the Bolat Group, LLC]

in various ways that do not appear in his principal appellate brief. Amongst these new contentions raised for the first time in his reply brief, the plaintiff asserts that the court "completely disregarded" certain testimony and evidence, "misunderstood key elements of [his] testimony and evidence," made "factually erroneous" assertions, and "fabricate[d] conclusions." The plaintiff further asserts that the court's "erroneous conclusions were not based on expert analysis of the evidence, and the [c]ourt's hostility and bias are evident." The plaintiff's contentions are wholly unfounded. To the extent that the plaintiff argues that the court made erroneous factual findings, on the basis of our review of the record we cannot conclude that the court's findings were clearly erroneous. To the extent that the plaintiff argues that the court disregarded certain testimony and evidence, it is well founded that "[i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence." (Internal quotation marks omitted.) *Cimino* v. *Cimino*, 174 Conn. App. 1, 11, 164 A.3d 787, cert. denied, 327 Conn 929, 171 A.3d 455 (2017). Moreover, not only did the court not display hostility or bias toward the plaintiff, but our review of the transcript shows that, if anything, the court was accommodating of the plaintiff as a self-represented party.

had decreased and he was left with a net operating loss of $29,147."

The court found that only the first two exhibits offered by the plaintiff were relevant to his change in financial circumstances. The plaintiff's first exhibit was an "internet printout entitled 'Termination Detail Report' . . . prepared by the TriNet company . . . ." The court found that although that exhibit specified that he was laid off due to company reorganization, "[t]he report nonetheless fell short of being reliable evidence, as it appears it was not a document from Sovereign Intelligence itself, nor was there testimony explaining the exhibit and what it purported to detail. There was not sufficient reliable evidence for the court to determine what actual changes had been made in the plaintiff's compensation or that no income could be assigned as compensation to the plaintiff."

The plaintiff's second exhibit was a document prepared by the plaintiff listing the profit and losses of the Bolat Group, LLC. "[The] [p]laintiff claimed [that] the [the Bolat Group, LLC] had only gross income of $21,900 from January to October, 2017, and the 'expenses' of running the business put the company in the red for $29,147.[7] As Bolat Group LLC, prospective clients hired the plaintiff to consult on different financial and computer related matters. [The] [p]laintiff testified that the contracts to hire him had simply 'dried up' and there

[7] The court also explained that the "defendant challenged [the] plaintiff's claims regarding the loss of income for the Bolat Group, LLC. [The] [d]efendant offered [the] plaintiff's personal tax returns for 2015 and 2016, including the U.S. Return of Partnership Income for the Bolat Group, LLC, for both years. The 2015 return showed [that] the Bolat Group, [LLC] earned $163,290 in gross income with ordinary business income of $74,958. The 2016 return reports gross income of $147,715 and ordinary business income of $90,545." The court found that "[o]ther than [the] plaintiff's assertions that the income no longer exists, there was no offer of documentation to substantiate his claims." Accordingly, the court found "it difficult to accept as true that this level of income simply disappeared in this short time frame."

were no new clients. If true, then logically there would be no explanation or need for travel expenses of $4761, office expenses of $3170, maintenance expenses of $6202, and subcontractor expenses of $8250 as claimed in his profit and loss [in the plaintiff's second exhibit]." (Footnote added.) The court found that the plaintiff's second exhibit was "lacking in credibility in that it was not documented by any means but [the] plaintiff's preparation of the document for court proceedings."

The court also noted that "[t]he plaintiff has demonstrated a concerted effort to move assets into his current wife's name. He admitted that he had transferred 49 percent ownership of the Bolat Group, LLC, to his wife. Testimony established [that] the subcontractor expense for $8250 listed on the [plaintiff's second exhibit] was actually moneys paid to the wife. [The] [p]laintiff used his father's address (59 Jodi [Drive], Wallingford) as the primary location of the business. When [the] plaintiff's father passed away on June 8, 2017, [the plaintiff] quit-claimed the property to his current wife on June 10, 2017. While he indicated that he spent about [fifty] hours per week on the business and the wife ten hours per week, she was paid [two and one-half] times the amount of compensation he received."

The court found as to the plaintiff's financial affidavits that he "ha[d] not listed any home as an asset on the financial affidavits filed with the court since 2015. Yet, his 2015 and 2016 tax returns record home mortgage interest deductions. It would appear that many of the expenses deducted as business expenses, thereby reducing income, were also listed on the financial affidavits as expenses."[8]

[8] The court also found that "[f]inancial records offered as exhibits did not indicate that [the] plaintiff has made any lifestyle changes in his expenses. He has not reduced his weekly ordinary expenses, and continues to meet all his financial obligations. The plaintiff had taken little action to seek new employment; he appears to have applied for a few positions for which he was not qualified."

Moreover, "[t]he court found many inconsistencies in [the] plaintiff's testimony and [found] that the actions taken by [the] plaintiff were frankly not reasonable and logical if his financial assertions were true. There simply was not sufficient credible testimony and evidence regarding [the] plaintiff's claim of loss of income. [The] [p]laintiff . . . failed to meet his burden of proof proving a substantial change in financial circumstances." Accordingly, the court denied the plaintiff's motion for modification.

We begin by noting that "[t]he well settled standard of review in domestic relations cases is that [appellate courts] will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citations omitted; internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 336, 152 A.3d 1230 (2016).

General Statutes § 46b-86[9] governs the modification of a child support order after the date of a dissolution judgment. "When presented with a motion to modify

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

child support orders on the basis of a substantial change in circumstances, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and . . . make an order for modification. . . . A party moving for a modification of a child support order must clearly and definitely establish the occurrence of a substantial change in circumstances of either party that makes the continuation of the prior order unfair and improper." (Internal quotation marks omitted.) *Budrawich* v. *Budrawich*, 156 Conn. App. 628, 639, 115 A.3d 39, cert. denied, 317 Conn. 921, 118 A.3d 63 (2015).

Furthermore, "[t]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . 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. . . . In pursuit of its fact-finding function, [i]t is within the province of the trial court . . . to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Citation omitted; internal quotation marks omitted.) *Blum* v. *Blum*, 109 Conn. App. 316, 328–29, 951 A.2d 587, cert. denied, 289 Conn. 929, 958 A.2d 157 (2008).

The plaintiff bore the burden of persuading the court that his circumstances had changed substantially. See id., 328 ("[t]he party seeking modification bears the burden of showing the existence of a substantial change in the circumstances" [internal quotation marks omitted]). As the court relayed in its memorandum of decision, the plaintiff introduced testimony and documentary evidence to show that his income had declined since the parties entered into the stipulation. The court, as the fact finder, was free to discredit his testimony. In the absence of any credible evidence that the plaintiff's income had declined, the court reasonably could have found that the plaintiff had failed to prove a substantial change in his circumstances. Accordingly, the court did not abuse its discretion in denying the plaintiff's motion.

The judgments are affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* EMMIT SCOTT
(AC 38035)

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

Syllabus

Convicted of the crime of robbery in the first degree in connection with his alleged conduct in robbing the victims, G and R, of money and cell phones, the defendant appealed to this court, claiming, inter alia, that the trial court deprived him of his federal and state rights to due process when it denied his motion to suppress R's out-of-court and subsequent in-court identifications of him. The defendant and an accomplice, H, had approached G and R in the early morning hours while they were in G's car in the driveway of R's home. The defendant went to the front passenger side of the vehicle and, at gunpoint, demanded money and drugs, struck R with the gun, forced him to get out of the car, and took money and his cell phone from him. The defendant and H then searched the car and took G's cell phone and cash from the vehicle. H fatally shot G as the defendant and H left the scene. The police later learned that the defendant and H were to be arraigned in court on unrelated charges. L, an inspector with the state's attorney's office, accompanied R to the courthouse, where R watched the arraignment proceeding and thereafter identified the defendant and H as the assailants. H thereafter

was convicted of several crimes after he was tried separately before the same trial judge who presided at the defendant's trial. The trial judge at H's trial also denied H's motion to suppress R's identifications, which involved the same identification procedure, and during H's sentencing indicated admiration for R for his conduct in cooperating with law enforcement and testifying. On H's appeal, the Supreme Court in *State* v. *Harris* (330 Conn. 91), modified the reliability standard under the federal constitution set out in *Neil* v. *Biggers* (409 U.S. 188) with respect to the admissibility of eyewitness identification testimony to provide broader protection under article first, § 8, of the Connecticut constitution. *Held*:

1. The defendant could not prevail on his claim that he was deprived of his right to due process under the federal and state constitutions when the trial court denied his motion to suppress the out-of-court and subsequent in-court identifications of him by R:

a. Even if R's identification of the defendant at the arraignment was unnecessarily suggestive, it was sufficiently reliable under the factors set forth in *Biggers*, as the trial court found, under the first two factors, that R was attentive during the encounter and had ample time to observe the assailant, who had nothing covering his face, that R was face to face with the assailant in a well lit area while the assailant went through R's pockets, and that R was next to the car while the defendant rummaged through it, and those findings were supported by the evidence, as the court was entitled to credit R's testimony that the assailants were at the car a little more than ten minutes and that the car's interior lights illuminated the defendant's face as he as rummaged through the car, R had a good view of the assailant for a considerable period of time, and R was not under the influence of drugs or alcohol at the time of the robbery and consciously tried to record a memory of the passenger side assailant so that he could later retaliate against him; moreover, under the third *Biggers* factor, R's detailed description of the defendant conformed with considerable accuracy to information in the record concerning the defendant's physical appearance, as the defendant did not dispute that he had a full beard, consistent with R's description of the assailant at the time of the robbery, any difference in appearance between R's description of the assailant's beard and the appearance of the defendant's beard two weeks later at the arraignment did not render R's identification of the defendant unreliable, the fourth *Biggers* factor, which pertained to R's level of certainty, strongly favored the reliability of the identification, as R stated that he was 100 percent certain immediately after he identified the defendant at the arraignment, and the fifth *Biggers* factor, the two week length of time between the crime and the arraignment, did not undermine the reliability of R's identification; furthermore, R's failure to identify the defendant in police photographic arrays prior to the arraignment did not undermine the reliability of his identification of the defendant at the arraignment, as a photograph of the defendant

in one of the arrays had been outdated, R testified that it was the defendant's whole body structure, demeanor and the way he walked that caused him to be 100 percent certain of his identification, the court was not required to credit the testimony of the defendant's eyewitness identification expert as to whether R's identification was undermined by certain factors and was entitled to afford weight to the factors on which it relied, and because R's pretrial identification of the defendant was sufficiently reliable, the court correctly denied the defendant's motion to suppress R's subsequent in-court identification of him.

b. The defendant's claim that R's identifications of him should have been suppressed under article first, § 8, of the Connecticut constitution was unavailing: the trial court's application of the *Biggers* framework was harmless, as it was not reasonably possible that the court would have reached a different conclusion under the modified reliability standard adopted in *Harris*, and the defendant's claim to the contrary notwithstanding, the variable of unconscious transference—the mistaken identity of a face seen in one context as a face seen in another context—was not fatal to the trial court's application of *Biggers*, as the factors in *Harris* were generally comparable to the *Biggers* factors and were intended to more precisely define the focus of the relevant inquiry; moreover, there was no indication in the record that the trial court declined to consider any portion of the testimony of the defendant's eyewitness identification expert because it believed that the evidence was not relevant under *Biggers*, and the defendant did not identify any evidence that he was prevented from presenting at the suppression hearing or at trial on the ground that it was not relevant under *Biggers*.

2. The evidence was sufficient to support the defendant's conviction of robbery as against G:

a. The jury could have reasonably inferred that R knew that G had cash and his cell phone in the car prior to the defendant's and H's search of the vehicle, and that either the defendant, H or both had taken the property: R knew that G kept cash in the car's center console, the defendant and H searched the car until one of them said, "bingo, I got it," and then they exited the car and left, and R concluded that G's cash and cell phone were missing after checking the car to see if the defendant and H had taken G's cash; moreover, the defendant was not engaged in innocent, ordinary conduct when he approached the car with a gun, asked G and R where the drugs and money were, and struck R with the gun before searching the car, and there was no testimony regarding other possible explanations for the missing money and cell phone.

b. Notwithstanding the defendant's claim that he could have been convicted of robbery in the first degree only as an accessory, the evidence was sufficient to prove that he acted as a principal, as he and H approached G's car at the same time, both had guns, the defendant asked G and R where the drugs and money were, struck R with his gun, and forced G and R to exit the car, and both the defendant and H searched the car and left once G's cell phone and cash were found and taken.

3. The trial court did not abuse its discretion in denying the defendant's motion to disqualify the trial judge: there was no concern that the trial judge would have felt motivated, in ruling on the defendant's motion to suppress, to vindicate his conclusion at H's trial with respect to the identification of H, the trial judge was not confronted with the same question in considering the defendant's motion to suppress R's identification of him that he considered in H's motion to suppress, and heard different testimony and considered different evidence at the defendant's trial, which included the accuracy of R's description of the passenger side assailant and whether the other arraignees at the arraignment were similar in appearance to the defendant, and the judge's ruling on the defendant's motion to suppress involved considerations that were independent of R's credibility; moreover, the trial judge in the defendant's case did not make any statement to indicate that he prejudged the ultimate issues on which he was to rule, and his remarks about R at H's sentencing did not indicate that he prejudged the issues raised in the defendant's motion to suppress or reflect an opinion so extreme as to display clear inability to render fair judgment.

Argued January 5, 2017, and February 4, 2019—officially released July 23, 2019

Procedural History

Substitute information charging the defendant with two counts of the crime of robbery in the first degree, and with the crimes of murder and felony murder, brought to the Superior Court in the judicial district of New Haven, where the court, *B. Fischer*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the matter was tried to the jury; subsequently, the court, *Clifford*, *J.*, denied the defendant's motion to disqualify the judicial authority; verdict of guilty of two counts of robbery in the first degree; thereafter, the court, *B. Fischer*, *J.*, rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

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

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Michael Dearington*, former state's attorney, and *Brian K. Sibley, Sr.*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Emmit Scott, appeals from the judgment of conviction, rendered following a jury trial, of two counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4).[1] On appeal, the defendant claims that (1) the trial court deprived him of his right to due process under the federal and state constitutions when it denied his motion to suppress an out-of-court and subsequent in-court identification of him, (2) there was insufficient evidence to support his conviction of robbery as against one of the victims, and (3) the court, *Clifford*, *J.*, abused its discretion by denying the defendant's motion to disqualify Judge Brian Fischer. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On July 31, 2012, the victims, Ruben Gonzalez and Jose Rivera, had been working together during the night shift at a warehouse in the town of Newington. When their shift ended at about 2:30 a.m., Gonzalez drove Rivera back to Rivera's home located at 49 Atwater Street in the city of New Haven. The victims arrived at Rivera's home at about 3 a.m., at which point Gonzalez parked in the driveway. They remained in the car, and Rivera began rolling a blunt of marijuana for Gonzalez. Approximately five minutes later, Rivera noticed three individuals, whom he did not recognize, riding bicycles in the street and passing by his house at least twice. Rivera became concerned and suggested to Gonzalez that they go to his backyard, but Gonzalez told him that he felt comfortable remaining in his vehicle. Moments later, two of the individuals, the defendant and Ernest Harris, approached the car on foot, with the defendant on the passenger side and Harris on the

[1] The defendant was acquitted of one count of murder and one count of felony murder.

driver's side. The third individual remained in the street on a bicycle.[2]

The defendant and Harris each had a gun. The defendant asked where the drugs and money were and ordered the victims to open their doors. The victims initially refused to exit the car but did so after the defendant struck Rivera on the head with his gun. After the victims exited the vehicle, the defendant searched Rivera and took $10 and Rivera's cell phone from his pants pockets. The defendant and Harris then rummaged through the interior of the car for approximately five minutes before finding and taking Gonzalez' cash and cell phone.[3] As the defendant and Harris left the scene, Gonzalez was shot twice and subsequently died as a result of his injuries.[4] The entire incident lasted approximately ten minutes.

Jeffrey King, Jr., an officer with the New Haven Police Department, was dispatched to 49 Atwater Street in response to a call that a person had been shot. Officer

[2] At trial, Rivera explained that the third individual remained on his bicycle, riding back and forth in the middle of the street, while telling the defendant and Harris to "hurry it up."

[3] At this time, Rivera did not see what was taken or who, as between the defendant and Harris, if not both, took it. On the basis of the evidence presented at trial, however, the jury reasonably could have found that either the defendant or Harris, or both, took Gonzalez' cash and cell phone. See part II of this opinion.

[4] At trial, Rivera testified that the defendant was the individual who shot Gonzalez. Specifically, he testified that as the defendant and Harris began to leave, Gonzalez yelled to the defendant, "I'll remember your face," whereupon the defendant turned and shot Gonzalez twice. The jury, however, found the defendant not guilty of murder and felony murder.

On appeal, in arguing that the trial court's admission of the identification evidence amounts to harmful error, the defendant mentions that "the jurors returned a mixed verdict [that] was most likely the result of compromise . . . ." Because we conclude that the trial court's admission of the identification evidence was not improper; see part I of this opinion; we need not address the defendant's argument that the admission of such evidence amounts to harmful error.

King arrived to the scene at approximately 3:30 a.m.[5] Rivera told Officer King that three males had been there, and that the passenger side assailant[6] was a black male, approximately five feet, five inches tall and 160 pounds, and had been wearing a white hat, backwards, and a black T-shirt. Francis Melendez, a detective with the New Haven Police Department, recovered two spent cartridge casings, as well as a ten dollar bill and coins from the ground next to Gonzalez' car. Inside the car, Detective Melendez located a few small, translucent "Ziploc type" bags containing a powder like substance,[7] as well as coins inside the center console. Detective Melendez was able to lift several fingerprints from Gonzalez' car, which he sent to the West Haven Police Department for processing.

At approximately 4 a.m., Rivera met with Nicole Natale and David Zaweski, detectives with the New Haven Police Department, and again provided descriptions of the assailants. He described the passenger side assailant as having a "Rick Ross"[8] type beard, which had been neatly groomed and was about one to two inches off of his face. The next day, on August 1, 2012, Detective Natale brought Rivera to meet with a sketch artist. Rivera was able to provide the sketch artist with a description of the passenger side assailant, and in that description, noted that the passenger side assailant had a full beard. That same day, Detective Natale presented Rivera with two separate photographic arrays.

[5] Despite the early morning hour, Officer King noted that the scene was well lit due to the streetlights.

[6] Although Rivera had been providing a description of "the shooter," Rivera interchangeably referred to this single individual as the individual who had been on the passenger side of the car, as well as the individual who shot Gonzalez. Because the jury found the defendant not guilty of murder and felony murder, we refer to this individual as the passenger side assailant.

[7] The powder like substance was not tested.

[8] Rivera testified that Rick Ross is a rapper who has a distinctive beard. The state introduced a photograph of Rick Ross into evidence.

Neither photographic array included the defendant. Rivera did not identify anyone in the photographic arrays as either the driver's side assailant or the passenger side assailant.

During the course of her investigation, Detective Natale received information that an individual with the nickname Semi might have been involved in the July 31, 2012 incident, and later learned that the defendant had the nickname Semi. Thereafter, on August 8, 2012, Detective Natale presented Rivera with a third photographic array,[9] which included a photograph of the defendant that had been taken in March, 2011, one and one-half years earlier. Rivera did not make an identification during this photographic array procedure.[10]

On August 10, 2012, Detective Natale and Detective Zaweski interviewed the defendant.[11] The defendant initially denied that he was at 49 Atwater Street on the night of July 31, 2012. Eventually, the defendant admitted that he had been at that location, with Harris and a third individual with the nickname Do.[12] He maintained,

[9] Unlike the first two photographic arrays, which the police referred to as "photo boards" and included the presentation of eight photographs on a single page, this third photographic array consisted of eight separate photographs. Rivera looked at these photographs for approximately four to five minutes.

[10] Although Rivera initially commented on one of the individuals having a nose and eyes similar to those of one of the assailants, he did not ultimately identify anyone during this procedure.

[11] On August 10, 2012, the police also interviewed Harris, but Harris did not provide the police with any information.

[12] During the course of her investigation, Detective Natale learned that a man named Dana Pettaway went by the nickname of Do. Although Detective Natale attempted to speak to Pettaway, he was not cooperative. Pettaway was not arrested in connection with this incident.

At trial, the state entered into evidence a photograph of Pettaway that had been obtained by Detective Zaweski. This photograph, however, was not presented to the defendant and, therefore, the defendant did not identify Dana Pettaway as the third individual who had been present at 49 Atwater Street at the time of the shooting. On the basis of this evidence, and upon the defendant's request, the court instructed the jury as to third-party culpability.

however, that he had not been there when Gonzalez was shot. Rather, he told the police that, earlier that morning, he had purchased marijuana from Gonzalez from the passenger side of his car. The defendant stated that he, Harris, and Do then rode their bicycles down the street, but that Do and Harris turned around to return toward the direction of 49 Atwater Street. The defendant told the police that he ultimately decided to return to 49 Atwater Street "[t]o see what [was] . . . taking them so long" and saw that everyone was outside of the car. He saw that Do had his gun out, and he heard Gonzalez say something to the effect of, "I know who you are," or, "I know y'all faces." The defendant maintained that, at this point, he turned around and started riding his bicycle toward Pine Street, which was adjacent to Atwater Street, when he heard gunshots.[13] He denied knowing who shot Gonzalez. That same day, after the police had interviewed the defendant, a fingerprint found on the front passenger side door of Gonzalez' car was identified as belonging to the defendant.[14]

Thereafter, the police learned that both the defendant and Harris were due to be arraigned on unrelated charges in New Haven on August 13, 2012. Robert F. Lawlor, an inspector with the state's attorney's office in the judicial district of New Haven, accompanied Rivera to the courthouse on that day so that Rivera could observe the arraignments and possibly identify the driver's side and passenger side assailants. Although

[13] At trial, Detective Natale testified that she obtained video surveillance footage from a nearby nursing home facility located on Pine Street. This video footage appeared to show three individuals riding back and forth on Pine Street on bicycles. At approximately 3:27 a.m., the video shows a single individual on a bicycle ride west on Pine Street, toward Atwater Street, then two minutes later, travel east on Pine Street, away from Atwater Street. Seconds later, two additional individuals travel in the same direction, away from Atwater Street. The individuals in the footage could not be identified.

[14] In addition, a fingerprint found on the driver's side door of Gonzalez' car was identified as belonging to Harris.

Inspector Lawlor knew that the defendant and Harris were to be arraigned, he did not inform Rivera of that fact, and he never made Rivera aware of the defendant's name. The defendant and Harris were among fourteen arraignees who were in custody awaiting arraignment. Lawlor and Rivera sat in the front row of the courtroom's public gallery, with Lawlor seated six to eight seats away from Rivera. From his vantage point, Rivera watched the defendant, Harris, and twelve other custodial arraignees, all of whom were handcuffed and surrounded by marshals, enter the courtroom single file through the courtroom doors. Rivera recognized the defendant and Harris "[i]nstantly"[15] when they walked through the doors. Once he was outside the courtroom, Rivera told Inspector Lawlor that he was "100 [percent certain] that those [were] the guys."[16]

A jury trial followed, at the conclusion of which the defendant was found not guilty of murder and felony murder, and guilty of two counts of robbery in the first degree. The court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of forty years of imprisonment, execution suspended after thirty years, followed by five years of probation. This appeal followed.

In connection with this same incident, Harris was tried separately and convicted of one count of felony murder, one count of conspiracy to commit robbery in

[15] As our Supreme Court noted in *State* v. *Harris*, 330 Conn. 91, 98 n.6, 191 A.3d 119 (2018), "[t]he trial court's . . . supplemental memorandum of decision, and testimony by Lawlor and Rivera differ on several details with respect to the arraignment process, for example, the order in which custodial arraignees entered, the number of arraignments observed, and the demographics of the arraignees. By all accounts, however, Rivera immediately identified [Harris] as he entered the courtroom, before he was actually arraigned."

[16] Rivera testified on cross-examination that Lawlor had responded that they may be the suspects, at which point the two men left the courthouse. Lawlor denied making that statement.

the first degree, and two counts of robbery in the first degree. See *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018). Harris appealed, and, on March 9, 2016, our Supreme Court, pursuant to Practice Book § 65-2, transferred Harris' appeal from this court to itself.

This court first heard oral argument in the defendant's appeal on January 5, 2017. On March 29, 2017, this court issued a stay in the defendant's case pending the final disposition of Harris' appeal. On September 4, 2018, *State* v. *Harris*, supra, 330 Conn. 91, was released by the Supreme Court. Thereafter, this court lifted the appellate stay and ordered the parties in the present appeal to file supplemental briefs to address the impact, if any, of *State* v. *Harris*, supra, 91, on this appeal. In addition to the supplemental briefing, this court ordered additional oral argument to be held on February 4, 2019. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court deprived him of his right to due process under the federal and state constitutions when it denied his motion to suppress the out-of-court and subsequent in-court identification of him by Rivera. Specifically, he argues that the August 13, 2012 arraignment identification procedure was unnecessarily suggestive and that the resulting identification was not reliable under the totality of the circumstances. Even assuming that the identification process at issue in the present case was unnecessarily suggestive,[17] we conclude that Rivera's

[17] The identification procedure at issue in the present case is the same identification procedure that our Supreme Court considered in *State* v. *Harris*, supra, 330 Conn. 91. The state argues that, although the court in *Harris* concluded that this identification procedure was unnecessarily suggestive, the identification procedure in the present case was not unnecessarily suggestive because "[t]he evidence in this case differs from the evidence relied on in *Harris* in respects that support the trial court's finding that the procedure was not unnecessarily suggestive. The evidence here showed that the police did not focus Rivera's attention specially or exclu-

identification of the defendant was sufficiently reliable to satisfy federal due process requirements. Accordingly, for purposes of the federal constitution, the defendant was not entitled to suppression of those identifications. Moreover, we conclude that the trial court's failure to apply the state constitutional standard set forth in *State* v. *Harris*, supra, 330 Conn. 91, which provides broader protection than the federal constitution with respect to the admissibility of eyewitness identification testimony, was harmless because the court reasonably could not have reached a different conclusion under that more demanding standard.

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to trial, the defendant moved to suppress Rivera's identification of him at the arraignment proceeding and any subsequent identification that he might be asked to make of the defendant at trial. On January 14 and 15,

sively on the custodial arraignees. Rather, they told him to, and he did, look at everyone he saw in the courthouse, including up to fifty people in the main hallway, twenty-five people in the public section of the courtroom, and forty or so custodial and noncustodial arraignees."

It is true that, at the suppression hearing in the present case, Inspector Lawlor testified that he told Rivera to look at people throughout the courthouse, including the main hallway and in the courtroom. In addition, Rivera testified that he did, in fact, look at people in the main hallway to see if he recognized anyone. Rivera, however, also acknowledged that he knew he was not there to see if anyone in the main hallway looked familiar and that Inspector Lawlor told him to look at the arraignees that would be brought through a door into the courtroom. Moreover, in *Harris*, the trial court similarly heard testimony that Inspector Lawlor told Rivera to look at the general population in the courthouse to see if anyone looked familiar. Our Supreme Court nonetheless held that the actual, operative array from which Rivera identified the defendants consisted solely of the fourteen custodial arraignees. *State* v. *Harris*, supra, 330 Conn. 104–105.

Because we conclude that Rivera's identification of the defendant was sufficiently reliable *even if* the identification process was unnecessarily suggestive, we need not address whether any differences in the evidence presented at the defendant's suppression hearing, as compared to Harris' suppression hearing, warrant a different conclusion as to the suggestiveness of the identification procedure.

2015, the court held a hearing on the motion. In addition to hearing testimony from Rivera, Inspector Lawlor, Detective Natale and Michael Udvardy, a private investigator, the court heard testimony from Steven Penrod, a psychologist, who was present at the hearing as the defendant's expert witness on eyewitness identifications. Dr. Penrod opined that the arraignment identification procedure was unnecessarily suggestive. He also testified as to numerous variables that could have affected the accuracy of Rivera's identification of the defendant. At the conclusion of the hearing, the court denied the motion in an oral ruling. At trial, Rivera testified and identified the defendant as the passenger side assailant.

In a supplemental memorandum of decision issued after the trial, the court set forth its reasons for denying the defendant's motion to suppress. It found that the arraignment identification procedure was not unnecessarily suggestive because, of the thirty-four total arraignees, fifteen to twenty were African-American males,[18] and of the custodial arraignees, all were male and the majority of them were African-American, which matched the description of the passenger side assailant that Rivera provided to Detective Natale. Specifically, the court found that five of the African-American males who had been arraigned that day were similar to the defendant, considering their height, weight and age. The trial court also found that, even if the identification procedure was unnecessarily suggestive, the identification itself was reliable under the totality of the circumstances. In support of its conclusion, the trial court observed the following: Rivera had approximately ten

[18] The trial court, in its supplemental memorandum of decision, first found that fifteen African-American males had been arraigned that day, but subsequently found that twenty African-American males had been arraigned that day. The parties do not raise any claim with respect to that numerical discrepancy.

minutes to observe and view the passenger side assailant during the commission of the crimes; the area was well illuminated; although the assailant had been wearing a baseball cap, it was worn backwards, which left his entire face exposed; Rivera was very close to the assailant during the crimes, and he was face to face with the assailant as he was going through Rivera's pockets taking his money and cell phone; Rivera was right next to the car as the assailant spent several minutes rummaging through the car with the car's interior light illuminating the defendant's face and features; Rivera indicated that the assailant had a distinctive beard, which he referred to as a "Rick Ross" beard; Rivera's attention was not impaired by alcohol or drugs; Rivera was able to recall the assailant's approximate age, height, weight, hairstyle and skin tone, as well as the clothes he was wearing; at the arraignment, Rivera had an unobstructed view of the defendant, who walked within a few feet of him; Rivera immediately identified the defendant as the passenger side assailant when the defendant came through the door for his arraignment; Rivera was 100 percent certain that the defendant was the passenger side assailant; and the length of time between the crimes and Rivera's identification of the defendant was fewer than fourteen days.

A

The following legal principles govern our analysis of the defendant's federal constitutional claim. "In the absence of unduly suggestive procedures conducted by state actors, the potential unreliability of eyewitness identification testimony ordinarily goes to the weight of the evidence, not its admissibility, and is a question for the jury. . . . A different standard applies when the defendant contends that an in-court identification followed an unduly suggestive pretrial identification procedure that was conducted by a state actor. In such cases, both the initial identification and the in-court

identification may be excluded if the improper procedure created a substantial likelihood of misidentification. . . .

"The test for determining whether the state's use of an unnecessarily suggestive identification procedure violates a defendant's federal due process rights derives from the decisions of the United States Supreme Court in *Neil* v. *Biggers*, 409 U.S. 188, 196–97, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98, 113–14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). As the court explained in *Brathwaite*, fundamental fairness is the standard underlying due process, and, consequently, reliability is the linchpin in determining the admissibility of identification testimony . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Harris*, supra, 330 Conn. 100–101. "Thus, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances. . . . Furthermore, [b]ecause the issue of the reliability of an identification involves the constitutional rights of an accused . . . we are obliged to examine the record scrupulously to determine whether the facts found are adequately supported by the evidence and whether the court's ultimate inference of reliability was reasonable. . . . Nevertheless, [w]e will reverse the trial court's ruling [on evidence] only [when] there is an abuse of discretion or [when] an injustice has occurred . . . and we will indulge in every reasonable presumption in favor of the trial court's ruling. . . . Because the inquiry into whether evidence of pretrial identification should be suppressed contemplates a series of [fact bound] determinations, which a trial court is far better equipped than this court to make,

we will not disturb the findings of the trial court as to subordinate facts unless the record reveals clear and manifest error. . . . Finally, the burden rests with the defendant to establish both that the identification procedure was unnecessarily suggestive and that the resulting identification was unreliable." (Citations omitted; internal quotation marks omitted.) Id., 101–102.

Assuming that the identification procedure was unnecessarily suggestive,[19] we consider whether the identification was nevertheless admissible. "An identification that is the product of an unnecessarily suggestive identification procedure will nevertheless be admissible, despite the suggestiveness of the procedure, if the identification is reliable in light of all the relevant circumstances. . . . As mandated in *Neil* v. *Biggers*, supra, 409 U.S. 188, and reiterated by the court in *Manson* v. *Brathwaite*, supra, 432 U.S. 98, for federal constitutional purposes, we determine whether an identifi-

[19] With respect to the first prong of the test, the court in *Harris* concluded: "[W]e disagree with the trial court's conclusion that the arraignment procedure was not unnecessarily suggestive because that conclusion was based on a clearly erroneous factual finding. Specifically, the trial court found that the composition of the corporeal array was not unnecessarily suggestive because, of thirty-four total arraignees, fifteen of them matched Rivera's description of the driver's side assailant with respect to race (African-American) and gender (male). The court's conception of the array as consisting of the thirty-four arraignees, however, was significantly broader than the actual, operative array from which Rivera identified the defendant." (Footnote omitted.) *State* v. *Harris*, supra, 330 Conn. 104.

The court stated that "[t]he proper starting point for the trial court's analysis of the composition of the array . . . should have been the fourteen custodial arraignees, only nine of whom were African-American males." Id., 105. The court concluded that the procedure was unnecessarily suggestive "[b]ecause none of [the] custodial arraignees was sufficiently similar to the defendant in height, weight and age"; id., 108; and, therefore, "the physical differences between the suspect and the custodial arraignees in the present case were clearly significant enough to emphasize or highlight the individual whom the police believe[d] was the suspect." (Internal quotation marks omitted.) Id., 107. To the extent that the testimony on this issue before the trial court in the present case differed from that in *Harris*, see footnote 18 of this opinion.

cation resulting from an unnecessarily suggestive procedure is reliable under the totality of the circumstances by comparing the corrupting effect of the suggestive identification against factors including the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the [identification], and the time between the crime and the [identification]." (Citation omitted; internal quotation marks omitted.) *State* v. *Harris*, supra, 330 Conn. 108. Here, as in *Harris*, the trial court made express findings regarding each of the *Biggers* factors, which we now address in turn.[20]

With respect to the first two *Biggers* factors, the trial court found that Rivera had "ample time"—approximately ten minutes—to observe the assailant. Moreover, the court found that Rivera observed the assailant from a "very close" distance, and was face to face with the assailant as the assailant was going through his pockets, and right next to the car while the defendant rummaged through it, in a well lit area. The trial court further found that Rivera was attentive[21] during his

[20] Because this case involves the same incident and the same witness, our analysis is similar to that of our Supreme Court in *State* v. *Harris*, supra, 330 Conn. 91. In *Harris*, the court concluded that the identification of the defendant was sufficiently reliable for purposes of the federal constitution. Id., 113. Despite the court's holding in *Harris*, the defendant maintains that the identification was not reliable for purposes of the federal constitution. He argues that, "[u]nlike in *Harris*, Rivera's description of the suspect did not match that of [the] defendant in regards to the distinctive beard the suspect had. Moreover, Rivera had already seen a photograph of the defendant prior to the arraignment and failed to pick it out, a factor not present in *Harris* and which the trial court did not consider. Thus, the holding in *Harris* that the identification was reliable under the federal constitution is not applicable here." For the reasons set forth in this opinion, we are not persuaded.

[21] The trial court found that Rivera's attention was not impaired by alcohol or drugs, that being struck in the head by the assailant's gun did not affect Rivera's ability to observe the events that evening, and it credited Rivera's testimony that he focused on the assailant's face.

encounter with the assailant, who had nothing covering his face.[22] These findings strongly support the trial court's conclusion concerning the reliability of Rivera's identification of the defendant as the passenger side assailant, even assuming that the state used a flawed identification procedure. See *State* v. *Harris*, supra, 330 Conn. 109.

The defendant, however, challenges the trial court's findings as clearly erroneous. In particular, he maintains that Rivera initially told Detective Natale that the incident "happened very quickly," contrary to the court's finding that Rivera had approximately ten minutes to observe the assailant, and that the area was not well illuminated.[23] Having carefully reviewed the record, we disagree with the defendant that the trial court's findings are unsupported by the evidence.

First, the court's finding that Rivera had approximately ten minutes to observe the assailant was supported by Rivera's testimony that the assailants had been at the car "a little more than ten minutes." Moreover, regardless of the configuration of the lights, the trial court reasonably concluded that there was sufficient light in the area such that Rivera had a good view of the assailant for a considerable period of time. See *State* v. *Harris*, supra, 330 Conn. 109. In addition to Rivera's testimony that there had been a porch light and a streetlight, he testified at trial that the lighting was such that he could see down the street and that he did not have difficulty seeing the assailants' faces.

[22] The court found that, although the assailant had been wearing a hat, it was worn backwards and, therefore, his entire face was exposed.

[23] The defendant argues that, although the court found that the area was well illuminated by a streetlight and a light from 49 Atwater Street, "neither of these lit up the area" because "[t]he light on the porch was over the front door, there was a roof on the porch, and one had to walk up three steps onto the porch in order to see the light," and, although Rivera testified that there had been streetlights, he also acknowledged that there had not been one directly across the street from his house.

Further, Officer King, who arrived at the scene shortly after the incident, described the location as being "well lit" and having "high visibility" due to the streetlights. In addition, the trial court credited Rivera's testimony that the interior lights in the car illuminated the defendant's face as he was rummaging through the car.

The record also supports the trial court's finding that Rivera was attentive during the encounter. Rivera testified that he was not under the influence of drugs or alcohol at the time of the robbery, and he further explained that he consciously tried to record a memory of the passenger side assailant so that he could later retaliate against him for the robbery.[24] "[A] finding of reliability may be bolstered by the witness' conscious effort to focus on the face of his assailant." *State* v. *Harris*, supra, 330 Conn. 110. The trial court was therefore entitled to credit Rivera's testimony in this regard.

With respect to the third *Biggers* factor, the accuracy of the eyewitness' description of the offender, the defendant argues that Rivera's description of the assailant had been general, rather than specific, and that his description of the assailant's facial hair had not been accurate. We disagree. Rivera's description of the assailant was both specific and accurate, and included the individual's race (African-American), gender (male), approximate age (twenties), approximate body type (medium build), approximate weight (160 pounds), approximate height (five feet, five inches), facial hair style (full beard), and clothing (white hat, black T-shirt). This detailed description conforms with considerable accuracy to the information in the record concerning the defendant's physical appearance.[25]

[24] Rivera testified that he focused on the assailant's face "[j]ust to make sure that if [he were] to retaliate [he] would make sure [he] would grab the right person and not the wrong one."

[25] During her investigation, Detective Natale found that "[the defendant] matched the description of the person who had Mr. Rivera out of the car at gunpoint."

As we previously have noted, Rivera described the assailant as having a full beard, which he referred to as a "Rick Ross" type beard, which was neatly sculpted and one to two inches off of the assailant's face. Rivera acknowledged that, at the time of the arraignment procedure, the defendant's beard appeared "scruffy," or messy, and two to three inches long. On appeal, the defendant argues that "[t]he beard . . . is problematic because [the] defendant did not have anything resembling a Rick Ross beard when Rivera identified him not even two weeks after the shooting. While Rivera claimed that it was [the] defendant's beard that connected him to the gunman, he admitted that [the] defendant's beard was messy, scraggly and had hair all sticking out—a far cry from the sculpted, groomed Rick Ross beard that was rounded under the chin and one to two inches long." We are not persuaded by the defendant's argument.

The defendant does not dispute that he has a full beard, consistent with Rivera's description of the assailant. Moreover, Rivera's description was based on how the assailant appeared at the time of the incident, on July 31, 2012. The arraignment procedure did not take place until two weeks later, on August 13, 2012. Given the passage of time, we cannot conclude that Rivera's description of the beard, as it appeared on July 31, 2012, was inaccurate.[26] Accordingly, we conclude that any difference in appearance between Rivera's description of the assailant's beard and the appearance of the defendant's beard, two weeks after the incident, does not render Rivera's identification of the defendant unreliable.[27]

[26] In addition to natural hair growth, the beard could have appeared different on the basis of grooming, or lack thereof, during that intervening two week time period.

[27] Regardless of any differences between Rivera's description of the beard and the appearance of the defendant's beard two weeks later, Rivera told Inspector Lawlor that it was the same beard. Moreover, Rivera did not identify the defendant based solely on the appearance of his beard. Rivera

The defendant also argues that the court's finding that Rivera was able to observe the assailant's hairstyle, skin tone, and clothing is clearly erroneous. We disagree. Rivera told Officer King, the responding officer, that the assailant was a black male who had been wearing a white hat and black T-shirt. Moreover, although Rivera could not see the assailant's hair because it was under his hat, he was able to observe the assailant's facial hair style, and told Detective Natale and Detective Zaweski, whom he met with less than two hours after the incident, that the assailant had a full, neatly groomed "Rick Ross" type beard. The court's finding, therefore, is supported by the evidence.

The fourth relevant consideration under *Biggers*, the level of certainty that Rivera displayed with respect to his identification of the defendant, also strongly favors the state's contention that Rivera's identification was reliable for purposes of the analysis required under the federal constitution. Rivera demonstrated not just high confidence in his identification, but "100 percent" certainty immediately after identifying the defendant.

With respect to the final *Biggers* factor, namely, the length of time between the crime and the identification, we find no merit to the defendant's contention that the two week period between the date of the crime and Rivera's identification of the defendant undermined the reliability of that identification. See *State* v. *Harris*, supra, 330 Conn. 112–13.[28]

testified that, in addition to the defendant's beard, "[i]t was the eyes . . . the cheekbones, the nose . . . you can't forget a person's eyes. You can't forget it. That's stuck in your head." He stated: "You can't forget a face like that." In addition, Rivera testified that it had not just been the defendant's face that caused him to be 100 percent certain in his identification—it was "his whole body structure, like, his whole demeanor . . . like, the way he was walking . . . ."

[28] In reaching this same conclusion, our Supreme Court noted: "In a previous case, we held that the reliability of an identification was not compromised when made in connection with an unduly suggestive arraignment procedure conducted less than one month after the crime . . . and we have reached the same conclusion despite a delay of two and one-half months

The defendant argues that the trial court "failed to take into account numerous factors that weakened the identification." First, the defendant argues that the identification was unreliable because Rivera failed to choose his photograph in the August 8, 2012 photographic array procedure and that the trial court "ignored this evidence." In its memorandum of decision, however, the court acknowledged that the defendant's photograph was included in the August 8, 2012 array and that Rivera failed to make a positive identification during the procedure. In doing so, the court found that the photograph of the defendant that had been included in the array was "outdated . . . ." This finding is supported by Detective Natale's testimony that the photograph of the defendant was not current and that it had been taken in March, 2011, one and one-half years earlier.

Moreover, Rivera testified that he is not the type of person who can look at a photograph and make an identification. He explained that "[with] pictures, you really don't see the whole body of the person. It just shows you the face of them, so you really don't know if they're really chubby, and you don't know if they're tall . . . you don't know anything about that." Similarly, Rivera testified that it had not just been the defendant's face that caused him to be 100 percent certain in his identification—it was "his whole body structure, like, his whole demeanor . . . like, the way he was walking . . . ." Accordingly, Rivera's failure to identify the defendant in the photographic array procedure does not lead us to conclude that his identification of the defendant, at the subsequent arraignment procedure, was unreliable.

between the crime and an identification following the eyewitness' viewing of an unnecessarily suggestive photographic array." (Citation omitted.) *State* v. *Harris*, supra, 330 Conn. 112.

The defendant also argues that the reliability of Rivera's identification of him was undermined by numerous factors, including the "weapon focus" effect and the effect of stress on Rivera's ability to observe the assailant, cross-race impairment, unconscious transference, and the weak correlation between a witness' confidence in his or her identification and the identification's accuracy. He argues the trial court failed to consider Dr. Penrod's testimony concerning these factors.[29]

First, in attempting to call into question the propriety of the trial court's finding regarding Rivera's level of attentiveness, the defendant relies on Dr. Penrod's testimony concerning the "weapon focus" effect and the effect of stress on Rivera's ability to observe the assailant.[30] The "weapon focus" effect is "a phenomenon whereby the reliability of an identification can be diminished by a witness' focus on a weapon . . . ." (Internal quotation marks omitted.) *State* v. *Harris*, supra, 330 Conn. 110. At the suppression hearing, Dr. Penrod explained that "the concern about the presence of a weapon at the scene of a crime is that it could attract people's attention away from the face of the perpetrator . . . ." With respect to the effect of stress, Dr. Penrod

[29] Many of these factors had been recognized by our Supreme Court in *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), as affecting the reliability of eyewitness identifications. Although *Guilbert* concerned the admissibility of expert testimony as to those certain factors affecting the reliability of eyewitness identifications, our Supreme Court, in *State* v. *Harris*, supra, 330 Conn. 91, endorsed those factors for determining the reliability of an identification under the due process provision of our state constitution. See part I B of this opinion. Our analysis under the federal constitution, however, continues to be governed by the *Biggers* framework. See *State* v. *Harris*, supra, 108.

[30] Specifically, the defendant argues that "Rivera's attention was impaired by the stress of the situation, the fact that he had been pistol-whipped, there was a gun in his face, and he was so angry that he couldn't focus on what was happening." Moreover, he argues that "Rivera testified [that] he was scared, upset and feared for his life, and that he told the police [that] he was rattled, yet the trial court never once mentioned those facts." (Internal quotation marks omitted.)

testified that being exposed to some level of physical violence, which includes being "pistol-whipped," would raise the stress level of an eyewitness, and that high stress conditions reduce the accuracy of eyewitness identifications.

The defendant also argues that cross-race impairment and unconscious transference undermine the reliability of Rivera's identification of him, and that the court should not have credited Rivera's confidence in his identification. With respect to "cross-race impairment," Dr. Penrod testified that studies have found "impairments [in identifications] whenever people were identifying somebody of a different race," and here, where Rivera is Hispanic and the perpetrator is African-American, there is the potential for cross-race impairment. Dr. Penrod also explained that unconscious transference, which is a phenomenon where "people can lose track of the context in which they had seen a face and mistakenly [identify] a face that they'd seen in one context as a face they've seen in another context," may have affected Rivera's identification in this case, where Rivera viewed a photograph of the defendant in the August 8, 2012 photographic array before identifying him in the August 13, 2012 arraignment procedure. In addition, the defendant argued that "although the court credited Rivera's claim [that] he was 100 percent certain that [the] defendant was the [assailant] . . . [t]here is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy." (Internal quotation marks omitted.)

First, we note that the court was not required to credit Dr. Penrod's testimony, nor was it required to set forth specific findings related to these factors. Moreover, "even though the evidence may have supported factors tending generally to undermine the reliability of the eyewitness identifications, the trial court was not required to afford more weight to those factors

here than to the factors upon which it relied." *State* v. *Day*, 171 Conn. App. 784, 822, 158 A.3d 323 (2017), cert. denied, 330 Conn. 924, 194 A.3d 776 (2018).[31] Those factors upon which the court relied—Rivera's opportunity to view the perpetrator, his degree of attention, the time between the crime and the identification, and his level of certainty—are supported by the record and by law. See id., 823; see also *Manson* v. *Brathwaite*, supra, 432 U.S. 114.

Moreover, even if the trial court fully credited Dr. Penrod's testimony concerning the weapon focus effect and the effect of stress on Rivera's ability to view the assailant, the court reasonably could have concluded that, under the circumstances, these factors did not operate to appreciably impair Rivera's ability to focus his attention on the assailant. Although Rivera testified that he had focused on the defendant's gun and acknowledged that he was "in panic mode" at the time of the incident, he also testified, as we previously have noted, that he focused on the assailant's face. Moreover, Rivera had the opportunity to observe the passenger side assailant over the course of approximately ten minutes, including while the assailant searched his pockets and rummaged through the car, during which time the gun was not pointed at him.

Similarly, even if the trial court fully credited Dr. Penrod's testimony concerning witness confidence, the court reasonably could have concluded that, under the circumstances of this case, there was a relationship between Rivera's confidence and the accuracy of his

[31] In *State* v. *Day*, supra, 171 Conn. App. 820, the defendant argued, inter alia, that "[t]he presence of a gun . . . the effects of stress . . . [and] the effects of cross-racial identification" undermined the reliability of the witnesses' identifications of him. (Internal quotation marks omitted.) This court determined that "[a]lthough many of the defendant's arguments have merit, the factors he relies upon do not necessarily outweigh the factors underlying the trial court's conclusion." Id., 822. This court concluded, therefore, that the identifications of the defendant were not so unreliable as to require their suppression as evidence at the defendant's trial. Id., 823.

identification of the defendant. Although the defendant argues that there "is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy"; (internal quotation marks omitted); Dr. Penrod acknowledged that there is a relationship between eyewitness confidence and the identification's accuracy under certain circumstances. He testified that "[i]f [confidence is] measured at the time your identification is made before there's any possibility of feedback to the witness . . . there is a modest relationship between confidence and accuracy," as is the case here.[32]

For these reasons, we will not disturb the trial court's conclusion that the identification was reliable, for purposes of the federal constitution, under the totality of the circumstances. Consequently, the defendant cannot prevail on his federal due process claim that the trial court improperly denied his motion to preclude testimony concerning that identification. See *State* v. *Harris*, supra, 330 Conn. 113.

In light of our conclusion that the trial court properly found that Rivera's pretrial identification of the defendant was sufficiently reliable to pass muster under the

[32] Rivera expressed "100 percent" certainty immediately after identifying the defendant and before receiving any feedback from Inspector Lawlor. At the suppression hearing, defense counsel argued that Inspector Lawlor's statement to Rivera, after his identification of the defendant and Harris, that they may be the suspects; see footnote 16 of this opinion; could potentially have boosted Rivera's confidence, affecting the reliability of his identification. This argument was in line with Dr. Penrod's testimony that a statement such as Inspector Lawlor's was "a weak confirmation that the witness has made a correct identification," and that "if you give people some indication that they have made a correct identification it inflates their confidence, so if you then ask them how confident are you about your identification, you see that they can be much more confident about the identification than would be the case if you asked them before they got any feedback." Rivera, however, told Inspector Lawlor that he was 100 percent certain in his identification *before* Inspector Lawlor allegedly told him that the defendant and Harris may be the suspects, and Lawlor denied having made that statement to Rivera.

federal constitution, it follows that the trial court also was correct in denying the defendant's motion to suppress Rivera's subsequent in-court identification. "[W]hen the defendant contends that an in-court identification followed an unduly suggestive pretrial identification procedure that was conducted by a state actor . . . both the initial identification and the in-court identification may be excluded if the improper procedure created a substantial likelihood of misidentification." *State* v. *Dickson*, 322 Conn. 410, 420, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017). In concluding that Rivera's identification of the defendant was reliable, however, we necessarily have rejected the defendant's contention that the procedure that produced it created a substantial likelihood of misidentification, such that it would be fundamentally unfair for the state to use it against the defendant. See *State* v. *Harris*, supra, 330 Conn. 91. It follows, therefore, that, because Rivera's out-of-court identification of the defendant was reliable, and therefore admissible, that identification, even if the product of an unnecessarily suggestive identification procedure, cannot be deemed to have so tainted the reliability of Rivera's in-court identification as to preclude the state from using it. See id.; see also *State* v. *Dickson*, supra, 430–31 (explaining that in-court identification of defendant is admissible when prior out-of-court identification of defendant also is admissible). For that reason, we also reject the defendant's challenge to the trial court's denial of his motion to suppress Rivera's in-court identification of him.

B

We next address the defendant's contention that he was entitled to suppression of Rivera's out-of-court and in-court identifications under the due process provision of article first, § 8, of the Connecticut constitution. In *State* v. *Harris*, supra, 330 Conn. 91, our Supreme Court

held that this provision affords greater protection than the federal due process clause with respect to the admissibility of an eyewitness identification following an unnecessarily suggestive identification procedure.[33] It concluded that it was "appropriate to modify the *Biggers* framework to conform to recent developments in social science and the law." Id., 115. Accordingly, it endorsed the factors for determining the reliability of an identification that it earlier identified as a matter of state evidentiary law in *State* v. *Guilbert*, 306 Conn. 218, 253, 49 A.3d 705 (2012),[34] and adopted the burden shifting framework embraced by the New Jersey Supreme Court in *State* v. *Henderson*, 208 N.J. 208, 288–89, 27 A.3d 872 (2011), for purposes of allocating the burden of proof with respect to the admissibility of an identification that was the product of an unnecessarily suggestive procedure.[35] *State* v. *Harris*, supra, 131.

[33] In doing so, our Supreme Court overruled its conclusion to the contrary in *State* v. *Ledbetter*, 275 Conn. 534, 569, 881 A.2d 290 (2005) (overruled in part by *State* v. *Harris*, 330 Conn. 91, 131, 191 A.3d 119 [2018]), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

[34] The *Guilbert* factors are: "(1) there is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy; (2) the reliability of an identification can be diminished by a witness' focus on a weapon; (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events; (4) cross-racial identifications are considerably less accurate than identifications involving the same race; (5) memory diminishes most rapidly in the hours immediately following an event and less dramatically in the days and weeks thereafter; (6) an identification may be less reliable in the absence of a double-blind, sequential identification procedure; (7) witnesses may develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification; and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another." *State* v. *Guilbert*, supra, 306 Conn. 253–54.

[35] "Pursuant to that framework, to obtain a pretrial hearing, the defendant has the initial burden of offering some evidence that a system variable undermined the reliability of the eyewitness identification. . . . If the defendant meets this burden, the state must then offer evidence demonstrating that

In *Harris*, the defendant claimed that if the trial court had applied the proper standard, it would have been precluded from considering Rivera's level of confidence and would have been compelled to consider the following factors: the tendency of eyewitnesses to overestimate the duration and quality of their opportunity to view the perpetrator; Rivera's lack of sleep and the poor lighting at the scene of the crime; the tendency of fear and stress to impair perception and recall; the two week interval between the crime and the observation; Rivera's nonspecific description of the perpetrator's facial features; the effect of the presence of a weapon and high levels of stress on the accuracy of the identification; and the fact that Rivera and the defendant were of different races. Id., 135. Our Supreme Court disagreed. Id. The court concluded that, although these factors were not expressly included in the *Biggers* framework, "the trial court's application of the *Biggers* framework instead of the reliability standard . . . adopted [in *Harris*] was harmless because it is not reasonably possible that the court would have reached a different conclusion as to the admissibility of Rivera's identification under [the] new framework." Id., 137–38.

The defendant argues that "[t]he facts of this case compel a different result" because in the present case, unlike in *Harris*, there was a risk of unconscious transference.[36] We are not persuaded.

Although the variable of unconscious transference is not expressly included in the *Biggers* framework,

the identification was reliable in light of all relevant system and estimator variables. . . . If the state adduces such evidence, the defendant must then prove a very substantial likelihood of misidentification. . . . If the defendant meets that burden of proof, the identification must be suppressed." (Citations omitted.) *State* v. *Harris*, supra, 330 Conn. 131.

[36] The defendant also argues that, unlike in *Harris*, Rivera's description of the defendant was not accurate due to his description of the assailant's beard. The accuracy of Rivera's prior description of the assailant, however, is expressly included in the *Biggers* framework. Thus, for the reasons set forth in part I A of this opinion, we are not persuaded.

as analyzed in our case, neither were the factors at issue in *Harris*. The court in *Harris* determined that "[a]lthough the specific factors that [the defendant's eyewitness identification expert] addressed are not expressly included in the *Biggers* framework, that framework does direct the court to consider the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, and the level of certainty demonstrated by the witness at the confrontation . . . ." (Internal quotation marks omitted.) *State* v. *Harris*, supra, 330 Conn. 136. The court explained: "[The] general factors [set forth in *Biggers*] encompass the more specific reliability factors that we have identified in the present case" and "the factors that we have adopted are generally comparable to the *Biggers* factors and are merely intended to more precisely define the focus of the relevant inquiry." (Internal quotation marks omitted.) Id. Thus, the variable of unconscious transference is not fatal to a finding that the trial court's application of the *Biggers* framework, instead of the reliability standard that our Supreme Court adopted in *Harris*, was harmless.

Moreover, Dr. Penrod, at the suppression hearing and at trial, testified as to the possible effect of unconscious transference. At the suppression hearing, after providing the court with a general explanation of unconscious transference, Dr. Penrod testified that, with respect to Rivera's identification of the defendant, unconscious transference "[a]bsolutely" may have come into play. At the conclusion of the hearing, defense counsel argued that unconscious transference affected the reliability of Rivera's identification of the defendant. As in *Harris*, there is no indication in the record that the trial court declined to consider any portion of Dr. Penrod's testimony because it believed that the evidence was not relevant under *Biggers*. See *State* v. *Harris*, supra, 330 Conn. 137. Finally, the defendant has not identified

any evidence that he was prevented from presenting at the suppression hearing or at trial on the ground that it was not relevant under *Biggers*. See id.

Accordingly, we conclude that the trial court's application of the *Biggers* framework, instead of the reliability standard that our Supreme Court adopted in *Harris*, was harmless because it is not reasonably possible that the court would have reached a different conclusion as to the admissibility of Rivera's identification under the new framework.

II

The defendant next claims that there was insufficient evidence to support his conviction of robbery as against Gonzalez. Specifically, he argues that there was no evidence that property had been taken from Gonzalez, and even if there were such evidence, there is no evidence that the defendant was the individual who took such property. On the basis of our review of the record, we conclude that there was sufficient evidence presented at trial to support the defendant's conviction of robbery in the first degree as against Gonzalez.

The following additional facts and procedural history are relevant to our resolution of this claim. During the victims' drive from Newington to New Haven, they stopped at a gas station convenience store. Gonzalez handed Rivera cash, which he kept in the car's center console, for Rivera to purchase items at the store.[37]

[37] At trial, the following exchange occurred between the state and Rivera:

"Q. . . . [W]here did you get the money to pay for the stuff?

"A. I grabbed it from [Gonzalez].

"Q. What do you mean you grabbed it from [Gonzalez]?

"A. He handed me some cash and he said, go in the store for me, and I went in the store and grabbed him something.

"Q. Okay. Where did he get the money from?

"A. Work.

"Q. All right. Did he keep it in any place specific in his car? . . .

"A. In his center console, I mean, like the arm . . . the armrest where he normally put stuff in."

When the victims were at 49 Atwater Street, after the defendant and Harris approached Gonzalez' car, the defendant asked the victims where the drugs and money were. After Rivera exited the car, he watched the defendant and Harris rummage through Gonzalez' car, until he heard one of them say, "bingo, I got it," at which point the defendant and Harris stopped searching and left.

After Officer King responded to the scene and accompanied Gonzalez to a hospital, Rivera remained at 49 Atwater Street to talk to detectives. As he waited for the detectives to arrive, Rivera searched the car to see what the defendant and Harris took from Gonzalez. He discovered that the defendant and Harris had taken Gonzalez' cell phone and his cash.

We begin by setting forth the standard of review and legal principles that guide our analysis of this claim. "In reviewing a sufficiency of the evidence claim, we construe the evidence in the light most favorable to sustaining the verdict, and then determine whether from the facts so construed and the inferences reasonably drawn therefrom, the trier of fact reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . Although the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense . . . each of the basic and inferred facts underlying those conclusions need not be [proven] beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of

evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Citation omitted; internal quotation marks omitted.) *State* v. *Bonilla*, 317 Conn. 758, 765, 120 A.3d 481 (2015).

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Crespo*, 317 Conn. 1, 17, 115 A.3d 447 (2015).

Section 53a-134 (a), with which the defendant was charged, provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . ." General Statutes § 53a-133 provides: "A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another

person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny." General Statutes § 53a-119 defines larceny: "A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner."

The defendant raises two distinct arguments with respect to the sufficiency of the evidence for his conviction of robbery as against Gonzalez. Both arguments are based on his claim that there was insufficient evidence that he committed a larceny, a necessary element of robbery. Specifically, he argues that (1) there was no evidence that property had been taken from Gonzalez, and (2) even if there were sufficient evidence that property had been taken, there was no evidence that the defendant was the individual who took such property. We address each argument in turn.

A

The defendant first argues that there was insufficient evidence that he committed a larceny because there was no evidence that property had been taken from Gonzalez. Although the defendant acknowledges that Rivera took an inventory of Gonzalez' car and discovered that Gonzalez' money and cell phone were missing, he argues that "Rivera had no actual knowledge [that] there was money and a cell phone in the car prior to the 'robbery,' and he never saw what, if anything, the men took." We are not persuaded.

Contrary to the defendant's claim, the jurors did not have to resort to "mere conjecture or speculation alone." Rather, the jury could have drawn a reasonable

inference that Rivera knew that Gonzalez had cash and his cell phone in his car prior to the defendant's and Harris' search of the vehicle, and that either the defendant or Harris, or both, had taken the property, from the following evidence: Rivera knew Gonzalez kept cash in his center console;[38] the defendant asked the victims where the drugs and money were; the defendant and Harris searched the car until one of them said, "bingo, I got it," at which point they exited the car and left; Rivera checked Gonzalez' car specifically to see if the defendant and Harris had taken Gonzalez' cash;[39] and Rivera concluded that Gonzalez' cash and cell phone were missing.

The defendant nevertheless argues that his case is similar to *State* v. *Adams*, 164 Conn. App. 25, 141 A.3d 875 (2016). In *Adams*, the defendant had been convicted of conspiracy to commit larceny in the sixth degree based on the state's theory that the defendant stole Beats headphones from a Microsoft store located in the Danbury Fair Mall. Id., 27–28. On appeal, this court concluded that "the evidence was insufficient to prove beyond a reasonable doubt that the defendant or his alleged coconspirator committed a larceny"; id., 34; because "it was too great an inferential step for the court to take on this evidence to conclude that the defendant or his alleged coconspirator stole the missing headphones from the store." Id., 40.

[38] The defendant argues that "[t]here is a difference between Gonzalez 'normally' putting money in the center console and Rivera knowing for a fact there was money in the console that night." Rivera, however, had not testified that Gonzalez "normally" put money in the center console. Rather, he testified that Gonzalez gave him money to spend at the gas station convenience store and that Gonzalez kept his money in the center console, and *when describing the center console*, stated that it was where he "normally put stuff . . . ." See footnote 37 of this opinion.

[39] At trial, Rivera explained: "I had basically checked in the car to make sure what exactly did they take and, yes, *that the main priority to see if they did take his cash*, and that's exactly what happened. And they took his cell phone, my cell phone . . . and my cash and his cash." (Emphasis added.)

This court explained: "[T]he fact finder would have had to infer that the missing headphones actually had been stolen by someone and removed from the store, rather than lost or misplaced within the store or taken into the possession of another customer who had not yet presented them to a sales clerk to be purchased. *However, there was insufficient evidence to support such an inference because* [*the store manager's*] *own testimony established that the opposite was true.* According to [the store manager], although she believed that the headphones had been stolen, it was possible that another customer was walking around with them at the time their absence from the accessory area was first noticed by another store employee." (Emphasis added.) Id., 38. Moreover, this court emphasized that the defendant in *Adams* had been engaged in "innocent, ordinary conduct" when he was in the public area of a retail establishment where goods were displayed for sale. Id.

The facts of the present case are wholly distinguishable from those presented in *Adams*. The defendant had not been engaged in "innocent, ordinary conduct." To the contrary, he approached Gonzalez' car shortly after 3:30 a.m., with a gun, asked where the drugs and money were, struck Rivera on the head with his gun, and then searched Gonzalez' car. Moreover, unlike in *Adams*, where the store manager had testified that it was possible that another customer was walking around with the headphones at the time they were missing, there had been no testimony in the present case regarding other possible explanations for the missing money and cell phone. Thus, it was not "too great an inferential step" for the jury to conclude that Gonzalez' money and cell phone had been taken.

B

The defendant next argues that, even if there were sufficient evidence that property had been taken, there

was no evidence that the defendant was the individual who took such property. Specifically, the defendant argues that the state was limited to proving his criminal liability under § 53a-134 (a) solely as a principal and that it failed to do so. We are not persuaded.

As we determined in part II A of this opinion, there was sufficient evidence presented for the jury to conclude that either the defendant or Harris, or both, had taken Gonzalez' money and cell phone. There was, undisputedly, no evidence presented at trial as to who, precisely, the defendant or Harris, if not both, had taken these items.

The defendant is correct that, in the present case, he could not have been convicted on the basis of accessorial liability because the jury was not instructed on accessorial liability. The state does not argue otherwise. Rather, the state argues that "[t]he evidence showed that the defendant and Harris acted in concert as principals in the robbery [and] . . . [that] they were working together as a team of equals." We agree with the state.

The record does not support the defendant's assertion that he could only have been convicted as an accessory. An accessory is "[a] person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense . . . ." General Statutes § 53a-8 (a). In the present case, the evidence showed that the defendant and Harris, together, as principals, committed the robbery as against Gonzalez. Both approached Gonzalez' car at the same time, and both had guns. The defendant had been the person to ask the victims where the drugs and the money were, and the defendant had been the person to strike Rivera on the head with his gun, forcing the victims to exit the car. Both the defendant and Harris searched the interior of Gonzalez' car, and

once the property was found and taken—either by the defendant or Harris, or both—both men exited the car and left.[40] Thus, the evidence was sufficient to prove that the defendant acted as a principal. See *State* v. *Latorre*, 51 Conn. App. 541, 552, 723 A.2d 1166 (1999) (evidence sufficient to prove that defendant acted as principal where he and second individual, who had taken items from the victim, "were acting in concert to commit the crime"); see also *State* v. *Kalil*, 136 Conn. App. 454, 480, 46 A.3d 272 (2012) ("burglary and larceny are not crimes that only can be committed by one person at a time, rather they are crimes which can be committed simultaneously by more than one individual"), aff'd, 314 Conn. 529, 107 A.3d 343 (2014). Accordingly, we conclude that there was sufficient evidence to support the jury's finding that the defendant committed the crime of robbery against Gonzalez.

[40] The defendant argues that "he cannot be convicted for the acts of Harris," and "because the jurors were never told they could consider the acts of Harris as a basis for finding [the] defendant guilty of robbery, they could not have properly [found] him [guilty] on that basis." The defendant, however, was not convicted for the acts of Harris. There was no evidence presented at trial that Harris, rather than the defendant, had taken Gonzalez' cash and cell phone.

The defendant also argues that "if the state's theory at trial was that [the] defendant was guilty by acting in concert with Harris, it should have requested the court to include the 'or another participant' language from the robbery statute in its instructions." We disagree.

As previously stated, § 53a-134 (a), with which the defendant was charged, provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, *he or another participant in the crime* . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . ." (Emphasis added.)

In the present case, with respect to the robbery charge as against Gonzalez, the court omitted the language "or another participant" in its instruction to the jury. The "or another participant" language, however, does not relate to the commission of the larceny or robbery. Rather, it relates to the individual displaying or threatening the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun, or other firearm, which is not at issue on appeal.

III

The defendant lastly claims that the court, *Clifford*, *J.*, abused its discretion by denying the defendant's motion to disqualify Judge Fischer. Specifically, the defendant argues that "any reasonable person would question the judge's impartiality and whether he was predisposed to believing Rivera's testimony" at the suppression hearing because Judge Fischer presided over Harris' trial, ruled on Harris' motion to suppress involving the same identification procedure, and "indicated his admiration for [Rivera]" at Harris' sentencing. We disagree.

The following additional procedural history is relevant to our resolution of this claim. At Harris' sentencing, Judge Fischer made the following statements: "The surviving victim, Jose Rivera, cooperated with law enforcement officials, and he courageously entered into this courtroom and testified to his observations of the robbery and shooting," and, "I give Jose Rivera so much credit for cooperating with law enforcement and for having the fortitude and courage to come into this court and confront one of the men who committed this violent, senseless act."

On December 17, 2014, the defendant filed a motion to disqualify the court, *B. Fischer*, *J.*, from presiding over his case on the ground that Judge Fischer had presided over Harris' case. The defendant argued that because he would be making arguments similar to those of Harris in his motion to suppress, "a reasonable person would question Judge Fischer's impartiality in the instant matter on the basis of all the circumstances." The defendant submitted a memorandum of law in support of his motion, in which he argued that "Judge Fischer, in deciding [Harris'] motion to suppress the eyewitness identification, was the fact finder and made numerous findings that will be squarely at issue in

the defendant's case. It is unrealistic to expect Judge Fischer, or any judge, to stray from factual findings made in a prior case, in a subsequent case where the circumstances are substantially similar." On January 5, 2015, the court, *Clifford*, *J.*, held a hearing on the motion to disqualify Judge Fischer, at the conclusion of which it denied the motion.

We begin by setting forth the standard of review and legal principles that guide our analysis of this claim. Rule 2.11 (a) of the Code of Judicial Conduct provides in relevant part that "[a] judge shall disqualify himself . . . in any proceeding in which the judge's impartiality might reasonably be questioned including, but not limited to, the following circumstances . . . (1) [t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. . . ." "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 authority. . . . Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially . . . the burden rests with the party urging disqualification to show that it is warranted. . . . Our review of the trial court's denial of a motion for disqualification is governed by an abuse of discretion standard." (Citation omitted; internal quotation marks omitted.) *State* v. *Milner*, 325 Conn. 1, 12, 155 A.3d 730 (2017).

"[O]pinions that judges may form as a result of what they learn in earlier proceedings in the same case rarely constitute the type of bias, or appearance of bias, that requires recusal. . . . To do so, *an opinion must be so extreme as to display clear inability to render fair judgment.* . . . In the absence of unusual circumstances, therefore, equating knowledge or opinions acquired during the course of an adjudication with an appearance of impropriety or bias requiring recusal finds no support in law, ethics or sound policy." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Rizzo*, 303 Conn. 71, 121, 31 A.3d 1094 (2011), cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012). "[C]ourts routinely hold that a judge's familiarity with a criminal defendant and his or her prior offenses through participation in a separate, earlier trial of the defendant . . . *or with his or her current offenses through participation in the trial of a codefendant* . . . does not create grounds for disqualification."[41] (Citations omitted; emphasis added.) Id., 120 n.39.

To support his argument, the defendant points to a variety of other cases, statutes, and rules of practice indicating that, when certain previously decided issues arise for a second time in criminal proceedings, a different judge generally should preside. See, e.g., *State* v. *Canales*, 281 Conn. 572, 599, 916 A.2d 767 (2007) ("the

[41] Although the defendant recognizes that a judge is not ordinarily disqualified from sitting on a case because he gained knowledge about the case or the defendant from his participation in a previous proceeding, he argues that "there is a recognized distinction between a judge who presides over a jury trial and a judge who must act as the fact finder in a proceeding." In *Rizzo*, however, our Supreme Court found persuasive *Boyd* v. *State*, 321 Md. 69, 581 A.2d 1 (1990), a case that involved successive court trials of codefendants by the same judge. In *Boyd*, the court ruled that there was no error in the denial of a motion for recusal, even though the judge acted as the fact finder in the defendant's trial and had previously acted as the fact finder in a codefendant's trial.

determination of probable cause required for issuing warrants, although not identical, is sufficiently similar to the determination required for the constitutional probable cause hearing to justify the extension, by implication, of the preference that a different judge preside over the probable cause proceedings"); General Statutes § 54-33f (a) (judge issuing search warrant may not hear motion to suppress evidence obtained as a result of that warrant); Practice Book § 41-17 (same); General Statutes § 51-183h (judge issuing arrest warrant cannot preside over hearing attacking validity or sufficiency of that warrant); General Statutes § 51-183c (judge cannot preside at a retrial if the case has been reversed on appeal and a new trial has been granted); Practice Book § 1-22 (a) (same). The defendant points out the concern present in these situations: "Some may argue that a judge will feel the motivation to vindicate a prior conclusion when confronted with a question for the second or third time . . . ." (Internal quotation marks omitted.) *Liteky* v. *United States*, 510 U.S. 540, 562, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) (Kennedy, J., concurring in the judgment).

The defendant argues that "[d]isqualification here is in accord with the policy behind these statutes and rules. There is no practical difference between preventing a judge who issued an arrest warrant from presiding over a probable cause hearing and preventing a judge who ruled on a motion to suppress in another case from ruling on a motion to suppress in a codefendant's case when the identification occurred at the same time in both cases and the judge has praised the courage of that eyewitness for coming forward." (Emphasis omitted.) We disagree.

In considering the defendant's motion to suppress Rivera's identification of him, Judge Fischer was not confronted with the same question that he considered in Harris' motion to suppress. Although the motions to

suppress in both cases involved the same identification procedure, Judge Fischer's ruling on the motion in the present case specifically addressed Rivera's identification *of the defendant*. Thus, in considering the defendant's motion to suppress, Judge Fischer heard different testimony and considered different evidence. For example, in the present case, Judge Fischer heard testimony from a different expert witness, who testified as to reliability factors unique to this case, such as unconscious transference. See part I of this opinion. Moreover, in his analysis of whether the identification procedure was unnecessarily suggestive, Judge Fischer considered whether the other arraignees present during the arraignment procedure were similar in appearance to the defendant, looking particularly at the defendant's height, weight, and age. Similarly, in considering whether Rivera's identification was reliable, Judge Fischer considered whether Rivera's description of the passenger side assailant was accurate by comparing Rivera's description to the defendant's unique characteristics. Accordingly, unlike the situations cited by the defendant, there is no concern that Judge Fischer would have felt motivated, in ruling on the defendant's motion to suppress, to vindicate his conclusion reached with respect to the identification of Harris.

The defendant also argues that his claim "is not that Judge Fischer should have been disqualified solely because he had previously presided over Harris' case . . . . Rather, it was the fact that Judge Fischer made remarks praising the courage of Jose Rivera, the state's key witness, which gave an appearance of partiality because it demonstrated he was predisposed to believe Rivera's testimony at [the] defendant's suppression hearing." (Citation omitted.) We are not persuaded.

In support of his argument, the defendant cites to several out-of-state cases, including *In re George G.*, 64 Md. App. 70, 494 A.2d 247 (1985), superseded by statute

in part as stated in *In re Demetrius J.*, 321 Md. 468, 476, 583 A.2d 258 (1991), *People* v. *Gibson*, 90 Mich. App. 792, 282 N.W.2d 483 (1979), leave to appeal denied, 408 Mich. 868 (1980), and *People* v. *Robinson*, 18 Ill. App. 3d 804, 310 N.E.2d 652 (1974).[42] In each of those cases, the trial judges presided over the defendants' respective bench trials and, accordingly, acted as the triers of fact with respect to the determination of the defendants' guilt or innocence. Before each trial, however, the judges in these cases made statements that

[42] The defendant also cites to *State* v. *Smith*, 200 Conn. 544, 512 A.2d 884 (1986), *People* v. *Silverman*, 252 App. Div. 149, 297 N.Y.S. 449 (1937), *Brent* v. *State*, 63 Md. App. 197, 492 A.2d 637 (1985), and *People* v. *Zappacosta*, 77 App. Div. 2d 928, 431 N.Y.S.2d 96, leave to appeal denied, 52 N.Y.2d 839 (1980). The present case, however, is readily distinguishable from each of those cases.

First, the courts in *Smith* and *Silverman* considered comments that a trial judge made *in front of a jury* regarding the credibility of witnesses. See *State* v. *Smith*, supra, 200 Conn. 551 ("the trial court questioned the state's principal witness in a manner that tended to enhance the witness' credibility in the jury's eyes"); see also *People* v. *Silverman*, supra, 252 App. Div. 174 ("defendants were prejudiced by the court's commendation of the witness . . . in effect admonishing the jury thereby that he was a reliable witness"). The comments were improper in those contexts because, in a jury trial, "[d]eterminations of credibility are solely the function of the jury." *State* v. *Smith*, supra, 550. In the present case, the defendant does not argue that Judge Fischer improperly commented on the credibility of Rivera in the presence of the jury. Accordingly, we are not persuaded by the courts' reasoning in *Smith* or *Silverman*.

In addition, the courts in *Brent* and *Zappacosta* determined that the trial judges, who presided over the defendants' respective bench trials, should have recused themselves because they had heard evidence in prior, related proceedings that was both incriminating and inadmissible as against the defendants. See *Brent* v. *State*, supra, 63 Md. App. 205 ("[t]here are times when evidence is so prejudicial that we cannot assume the trier of fact will be able to put the evidence aside and arrive at an impartial adjudication" [internal quotation marks omitted]); see also *People* v. *Zappacosta*, supra, 77 App. Div. 2d 930 ("[e]ven the most learned [j]udge would have difficulty in excluding all such information from his subconscious deliberations"). In the present case, the defendant does not argue that any evidence presented at Harris' trial was inadmissible as against the defendant, or that there was any evidence that Judge Fischer would have had to disregard or set aside in ruling on his motion to suppress. *Zappacosta* and *Brent*, therefore, do not provide persuasive support for the defendant's claim.

indicated they had prejudged the defendant's guilt. See *People* v. *Gibson*, supra, 797 (trial judge commenting on the defendant's guilt at conclusion of his codefendant's trial); see also *In re George G.*, supra, 77, 79 (trial judge telling defense counsel "[y]ou might be able to prove that [the defendant] is innocent," even though "[i]t is elementary that in a criminal case the state has the burden of proving, beyond a reasonable doubt, the guilt of the accused and that the accused need not prove his innocence" [emphasis omitted; internal quotation marks omitted]); *People* v. *Robinson*, supra, 808 (The trial judge concluded that the defendant was guilty at the conclusion of his codefendant's trial and stated, before the defendant's trial, "I heard the testimony. I came to that conclusion and my statement was correct." [Internal quotation marks omitted.]).

In the present case, unlike in *In re George G.*, *Gibson*, and *Robinson*, Judge Fischer did not make any statement to indicate that he prejudged the ultimate issues on which he was to rule with respect to the defendant's motion to suppress, namely, whether the identification procedure was unnecessarily suggestive and, if so, whether the identification was nevertheless sufficiently reliable. Even though the defendant claims that "Judge Fischer made remarks praising the courage of Jose Rivera," which the defendant characterizes as statements regarding Rivera's credibility,[43] these remarks do not indicate that Judge Fischer prejudged the issues raised in the defendant's motion. As we previously have noted, Judge Fischer's ruling on the defendant's motion to suppress involved considerations independent of Rivera's credibility, such as factors affecting the reliability of the identification, and whether the composition

[43] We do not view these remarks about Rivera's character as Judge Fischer's opinion with respect to Rivera's credibility. Rather, we view these remarks as being made in recognition that victims, and witnesses, may refrain from coming forward to speak with law enforcement out of fear of retaliation.

of the procedure included individuals sufficiently similar in appearance to the defendant.

Contrary to the defendant's arguments, Judge Fischer's statements do not reflect "an opinion . . . so extreme as to display clear inability to render fair judgment." (Internal quotation marks omitted.) *State* v. *Rizzo*, supra, 303 Conn. 121. Accordingly, we cannot conclude that the court abused its discretion in denying the defendant's motion to disqualify Judge Fischer.

The judgment is affirmed.

In this opinion the other judges concurred.

BOARD OF EDUCATION OF THE TOWN OF STRATFORD ET AL. *v.* CITY OF BRIDGEPORT ET AL.
(AC 40525)

Keller, Prescott and Harper, Js.

Syllabus

The plaintiff boards of education for the towns of Stratford, Trumbull and Monroe, and the plaintiff F, a Stratford resident, brought this action against the defendants, the State Board of Education, the Commissioner of Education, the Board of Education of the City of Bridgeport, the city of Bridgeport, the mayor of Bridgeport and Bridgeport's interim superintendent of schools, seeking, inter alia, a declaratory judgment and injunctive relief in connection with the commissioner's authorizing, pursuant to statute (§ 10-264*l* [m] [2]), the Bridgeport board to charge neighboring school districts $3000 per year in tuition for each nonresident student who attended the city's interdistrict magnet schools. In their six count complaint, the plaintiffs alleged, in count one, that the commissioner did not apply the criteria set forth in § 10-264*l* (m) (2), various constitutional challenges to § 10-264*l* (m) (2) in counts two through four, unjust enrichment in count five and civil theft as to the Bridgeport defendants in count six. The trial court granted the defendants' motions to dismiss and render judgment thereon dismissing all counts of the complaint for lack of subject matter jurisdiction on the ground that the plaintiffs failed to exhaust their administrative remedies pursuant to the statute (§ 4-176) that permits any person to petition an agency for a declaratory ruling as to the applicability of a statute to specified circumstances. On the plaintiffs' appeal to this court, *held*:

1. The plaintiffs could not prevail on their claim that the trial court erred by dismissing counts one through four of their compliant against the state defendants for lack of subject matter jurisdiction for their failure to exhaust their administrative remedies:

   a. The trial court properly dismissed count one of the complaint, the plaintiffs having failed to exhaust their administrative remedies; the claim in count one, which sought a declaratory ruling as to the applicability of § 10-264*l* (m) (2) to the alleged circumstances, was the type of claim that the state board's hearing process was designed and intended to address, and, contrary to the plaintiffs' contention, the allegations in count one were not the type of special circumstances that our courts have determined warrant an exception to the exhaustion requirement, and, therefore, the plaintiffs had an available administrative process to challenge the commissioner's decision to authorize the charge of tuition, and their failure to exhaust this available process prior to commencing the present action divested the trial court of subject matter jurisdiction over count one.

   b. The trial court properly dismissed counts two, three and four of the complaint, which raised various as applied constitutional challenges to § 10-264*l* (m) (2), the plaintiffs having failed to exhaust their administrative remedies as to those counts; because the state board, which, pursuant to § 4-176, has the power to interpret statutes, was well positioned to provide the plaintiffs with the very relief that they sought in the trial court if they had brought a petition for a declaratory ruling, and the plaintiffs failed to sufficiently show how it would have been demonstrably futile to file a petition for a declaratory ruling with the state board, the plaintiffs did not avail themselves of the administrative process available to them and their failure to do so divested the trial court of subject matter jurisdiction over those counts of the complaint.

2. The trial court properly dismissed count six of the plaintiff's complaint, which alleged that the Bridgeport defendants committed civil theft in violation of the applicable statutes (§§ 52-564 and 53a-119 [1], [2], [3] and [6]), as that claim was not ripe for review, and, therefore, the court lacked subject matter jurisdiction over it; although the plaintiffs claimed that the ripeness doctrine did not bar their civil theft claim because they sought injunctive relief to prevent the city from unlawfully misappropriating the tuition moneys under color of state law and that requiring them to wait until the Bridgeport defendants unlawfully are in receipt of the money would render moot any claim for injunctive relief, injunctive relief was not a remedy available to the plaintiffs under § 52-564, which provides that a party aggrieved under the statute is entitled to treble damages, and the record clearly indicated that no payment for the tuition had in fact been paid out by the plaintiff boards to the Bridgeport defendants and no invoice for tuition had even been sent to the plaintiff boards at the time the Bridgeport defendants filed their motion to dismiss, and, therefore, it was apparent that the plaintiffs had

not suffered an injury sufficient to give rise to the alleged civil theft, particularly, in light of their failure to allege that the Bridgeport defendants intentionally deprived them of their property.

Argued January 31—officially released July 23, 2019

Procedural History

Action for, inter alia, a declaratory judgment that the defendants' request to charge certain tuition to certain school districts for nonresident students who attend certain magnet schools is erroneous and unlawful, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the Board of Education of the Town of Monroe was added as a party plaintiff; thereafter, the court, *Bellis*, *J.*, granted the defendants' motions to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Daniel L. Healy, with whom, on the brief, was *Norman A. Pattis*, for the appellants (plaintiffs).

Ralph E. Urban, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *George Jepsen*, former attorney general, for the appellees (defendant State Board of Education et al.)

John R. Mitola, associate city attorney, for the appellees (named defendant et al.).

Opinion

KELLER, J. The plaintiffs, the Board of Education of the Town of Stratford, James Feehan,[1] the Board of Education of the Town of Trumbull, and the Board of Education of the Town of Monroe, appeal from the judgment of the trial court granting the motions to dismiss filed by the defendants, the State Board of Education (state board); the Commissioner of Education

[1] The complaint alleges that "Feehan is a resident and taxpayer of the town of Stratford and a resident of the Stratford public school district. Additionally, he is the chairman of the Stratford Board of Education."

(commissioner); the Board of Education of the City of Bridgeport (Bridgeport board); the city of Bridgeport (city); Joseph Ganim, the mayor of the city; and Aresta Johnson, the interim superintendent of the city's schools.[2] On appeal, the plaintiffs claim that the trial court erred by (1) dismissing counts one, two, three, and four of their complaint against the state defendants for lack of subject matter jurisdiction for failing to exhaust their administrative remedies, and (2) dismissing count six, a civil theft claim against the Bridgeport defendants, for lack of subject matter jurisdiction for failing to exhaust their administrative remedies. For the reasons discussed herein, we affirm the judgment of the trial court.

In their verified complaint dated March 16, 2017, the plaintiffs alleged the following facts. The city, the Bridgeport board, and Johnson operate two interdistrict magnet schools, Fairchild Wheeler Interdistrict Magnet School (Fairchild Wheeler) and Interdistrict Discovery Magnet Elementary School (Discovery). The plaintiff boards are required, pursuant to General Statutes § 10-220d, to permit operators of interdistrict magnet schools to recruit students from their districts to attend magnet schools in other districts. Fairfield Wheeler and Discovery, which began operations in 2013, currently serve children from the plaintiffs' districts, in addition to others.

Fairfield Wheeler and Discovery, heretofore, have been operated exclusively with state funds. During the 2016–2017 school year, the parties learned that the state would reduce its grants to these magnet schools by

[2] For ease of exposition, we refer to the state board and the commissioner as the state defendants, and to the Bridgeport board, the city, Mayor Ganim, and Johnson, as the Bridgeport defendants. Any reference in this opinion to the defendants, refers to all the defendants. We will, however, refer to individual parties as necessary.

approximately $500,000. On June 30, 2016, Frances Rabinowitz, the predecessor to Johnson as interim superintendent of the city's schools, wrote a letter to the commissioner requesting permission for the city to bill neighboring districts $3000 a year for each nonresident student who attended the magnet schools. By letter dated August 31, 2016, the commissioner granted this request. The plaintiffs alleged that the commissioner's approval of the request to charge outside school districts would result in approximately $1,818,000 in revenue for the city's public school system. This revenue would result in the school system receiving $1,215,000 from the plaintiffs alone, which is $715,000 more than is required to replenish the $500,000 cutback in state funding.[3]

Furthermore, the plaintiffs alleged that the Bridgeport board commingles its operating accounts with the city's general municipal operating accounts. They alleged that this commingling permits the Bridgeport public school district and the city to convert or misappropriate the moneys supplied by the plaintiffs for the purpose of interdistrict magnet school operation to pay for nonmagnet school and noneducational expenses, such as general municipal operating expenses.

The plaintiffs set forth six counts in their complaint. They claimed that (1) the commissioner did not apply the criteria set forth in General Statutes § 10-264*l* (m) (2)[4] (count one); (2) § 10-264*l* (m) (2) violates principles

[3] We note that the complaint is conspicuously devoid of any allegations of loss with respect to Feehan as a Stratford taxpayer.

[4] General Statutes § 10-264*l* (m) (2) provides: "For the school year commencing July 1, 2015, and each school year thereafter, any interdistrict magnet school operator that is a local or regional board of education and did not charge tuition to a local or regional board of education for the school year commencing July 1, 2014, may not charge tuition to such board unless (A) such operator receives authorization from the Commissioner of Education to charge the proposed tuition, and (B) if such authorization is granted, such operator provides written notification on or before September first of the school year prior to the school year in which such tuition is to be charged to such board of the tuition to be charged to such board for

of due process as set forth in article first, §§ 1, 2, 8, 10, 11, 18, and 20, of the Connecticut constitution (count two); (3) § 10-264*l* (m) (2) exceeds the powers implicitly and explicitly granted to the General Assembly in article eighth, § 1, of the Connecticut constitution (count three); (4) § 10-264*l* (m) (2) violates the plaintiffs' right to home rule in violation of article tenth, § 1, of the Connecticut constitution (count four); (5) unjust enrichment (count five); and (6) civil theft as to the Bridgeport defendants (count six).

On March 24, 2017, the state defendants filed a motion to dismiss, inter alia, counts one through four of the plaintiffs' complaint for lack of subject matter jurisdiction on the basis that the plaintiffs failed to exhaust their administrative remedies contained in General Statutes § 4-176.[5] On April 12, 2017, the Bridgeport defendants also filed a motion to dismiss the plaintiffs' complaint in its entirety on the basis that the court lacked subject matter jurisdiction over the plaintiffs' claims against them. After receiving memoranda of law in support of and in opposition to the motions, the court heard

each student that such board is otherwise responsible for educating and is enrolled at the interdistrict magnet school under such operator's control. In deciding whether to authorize an interdistrict magnet school operator to charge tuition under this subdivision, the commissioner shall consider (i) the average per pupil expenditure of such operator for each interdistrict magnet school under the control of such operator, and (ii) the amount of any per pupil state subsidy and any revenue from other sources received by such operator. The commissioner may conduct a comprehensive financial review of the operating budget of the magnet school of such operator to verify that the tuition is appropriate. The provisions of this subdivision shall not apply to any interdistrict magnet school operator that is a regional educational service center or assisting the state in meeting the goals of the 2008 stipulation and order for Milo Sheff, et al. v. William A. O'Neill, et al., as extended, or the goals of the 2013 stipulation and order for Milo Sheff, et al. v. William A. O'Neill, et al., as extended."

[5] General Statutes § 4-176 provides in relevant part: "(a) Any person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency. . . ."

oral argument regarding both motions to dismiss on April 24, 2017.

In a memorandum of decision dated May 10, 2017, the court granted the state defendants' motion to dismiss counts one, two, three, and four of the plaintiffs' complaint for lack of subject matter jurisdiction on the basis that the plaintiffs failed to exhaust their administrative remedies pursuant to § 4-176 prior to commencing the present action. With respect to count five, the dismissal of which is not challenged in this appeal, the court acknowledged that the plaintiffs had conceded that the plaintiffs' unjust enrichment claim against the state defendants was barred by the doctrine of sovereign immunity.

In a separate memorandum of decision dated May 23, 2017, the court recognized that the Bridgeport defendants, in their memorandum of law in support of their motion to dismiss, had expressly adopted the same arguments that had been set forth by the state defendants with respect to counts one, two, three, and four. Resultantly, in granting the Bridgeport defendants' motion to dismiss with respect to these counts, the court adopted the same reasoning concluding that the plaintiffs failed to exhaust their administrative remedies contained in § 4-176. With respect to counts five and six as alleged against the Bridgeport defendants, the court similarly concluded that it lacked subject matter jurisdiction over their claims because the plaintiffs failed to exhaust their administrative remedies. This appeal followed.

As a preliminary matter, we begin by setting forth the principles of law governing our standard of review. "In an appeal from the granting of a motion to dismiss on the ground of subject matter jurisdiction, this court's review is plenary." (Internal quotation marks omitted.) *Walenski* v. *Connecticut State Employees Retirement*

Commission, 185 Conn. App. 457, 464, 197 A.3d 443, cert. denied, 330 Conn. 951, 197 A.3d 390 (2018). This court must decide whether the trial court's "conclusions are legally and logically correct and find support in the facts that appear in the record. . . . It is a familiar principle that a court which exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." (Internal quotation marks omitted.) Id., 464–65.

"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. . . . Further, in addition to admitting all facts well pleaded, the motion to dismiss invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts." (Citation omitted; internal quotation marks omitted.) *Metropolitan District* v. *Commission on Human Rights & Opportunities*, 180 Conn. App. 478, 485, 184 A.3d 287, cert. denied, 328 Conn. 937, 184 A.3d 267 (2018).

This appeal concerns the proper application of the exhaustion doctrine. "It is a settled principle of administrative law that if an adequate administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter." (Internal quotation marks omitted.) *Stepney, LLC* v. *Fairfield*, 263 Conn. 558, 563, 821 A.2d 725 (2003). In other words, "a trial court lacks subject matter jurisdiction over an action that seeks a remedy that could be provided through an administrative proceeding, unless and until that remedy has been sought in the administrative

forum." (Internal quotation marks omitted.) *Republican Party of Connecticut* v. *Merrill*, 307 Conn. 470, 477, 55 A.3d 251 (2012). In the absence of exhaustion of that remedy, the action must be dismissed. *Piteau* v. *Board of Education*, 300 Conn. 667, 678, 15 A.3d 1067 (2011). Thus, "where a statute has established a procedure to redress a particular wrong, a person must follow the specified remedy and may not institute a proceeding that might have been permissible in the absence of such a statutory procedure." *Norwich* v. *Lebanon*, 200 Conn. 697, 708, 513 A.2d 77 (1986).

"A primary purpose of the doctrine is to foster an orderly process of administrative adjudication and judicial review, offering a reviewing court the benefit of the agency's findings and conclusions. It relieves courts of the burden of prematurely deciding questions that, entrusted to an agency, may receive a satisfactory administrative disposition and avoid the need for judicial review. . . . Moreover, the exhaustion doctrine recognizes the notion, grounded in deference to [the legislature's] delegation of authority to coordinate branches of [g]overnment, that agencies, not the courts, ought to have primary responsibility for the programs that [the legislature] has charged them to administer. . . . Therefore, exhaustion of remedies serves dual functions: it protects the courts from becoming unnecessarily burdened with administrative appeals and it ensures the integrity of the agency's role in administering its statutory responsibilities." (Internal quotation marks omitted.) *Coyle* v. *Commissioner of Revenue Services*, 142 Conn. App. 198, 206, 69 A.3d 310 (2013), appeal dismissed, 312 Conn. 282, 91 A3d 902 (2014).

I

The plaintiffs first claim that the court erred in dismissing counts one through four of their complaint for lack of subject matter jurisdiction on the basis that they

failed to exhaust their administrative remedies. The plaintiffs do not dispute that there was an administrative process available to them pursuant to § 4-176 (a). They also do not dispute that they did not avail themselves of that process. Rather, the plaintiffs argue that they were not required to exhaust their administrative remedies through this process because "the claims against the state defendants . . . involve the 'special circumstances' exception [to the exhaustion doctrine], or, in the alternative, the constitutional question exception to the exhaustion requirement . . . ."

Our Supreme Court repeatedly has held that "when a plaintiff can obtain relief from an administrative agency by requesting a declaratory ruling pursuant to § 4-176, the failure to exhaust that remedy deprives the trial court of subject matter jurisdiction over an action challenging the legality of the agency's action." *Republican Party of Connecticut* v. *Merrill*, supra, 307 Conn. 478, citing *Polymer Resources, Ltd.* v. *Keeney*, 227 Conn. 545, 557–58, 630 A.2d 1304 (1993) (plaintiff's claim for injunctive relief barred by exhaustion doctrine because plaintiff failed to seek declaratory ruling from Commissioner of Environmental Protection pursuant to § 4-176). The exhaustion doctrine, however, like many judicial doctrines, is subject to several exceptions. See *Stepney, LLC* v. *Fairfield*, supra, 263 Conn. 565. These exceptions have been employed infrequently and used only for narrowly defined purposes "such as when recourse to the administrative remedy would be futile or inadequate." (Internal quotation marks omitted.) Id.

Our Supreme Court has made clear that "a plaintiff may not circumvent the requirement to exhaust available administrative remedies merely by asserting a constitutional claim. . . . [S]imply bringing a constitutional challenge to an agency's actions will not necessarily excuse a failure to follow an available statutory appeal process. . . . [D]irect adjudication even of

constitutional claims is not warranted when the relief sought by a litigant might conceivably have been obtained through an alternative [statutory] procedure . . . which [the litigant] has chosen to ignore. . . . [W]e continue to limit any judicial bypass of even colorable constitutional claims to instances of demonstrable futility in pursuing an available administrative remedy. . . .

"Limiting the judicial bypass of colorable constitutional claims to those instances of demonstrable futility is consistent with our duty to eschew unnecessarily deciding constitutional questions . . . . Pursuant to that duty, we must limit circumvention of administrative proceedings to instances in which those proceedings would be futile because no adequate administrative remedy exists. Moreover, the mere assertion in an administrative proceeding of a constitutional challenge to a statute or agency procedure does not automatically satisfy the futility exception to the exhaustion doctrine. To determine whether a party properly may seek court intervention prior to the completion of administrative proceedings, we examine whether the court has been asked to address issues entrusted to the [commissioner] and whether the [commissioner] could issue appropriate relief." (Citations omitted; internal quotation marks omitted.) *St. Paul Travelers Cos.* v. *Kuehl*, 299 Conn. 800, 813–14, 12 A.3d 852 (2011).

A

With respect to count one of the plaintiffs' complaint, which alleged that the commissioner failed to comply with § 10-264*l* (m) (2) in rendering her initial authorization allowing the Bridgeport board to charge $3000 in tuition per pupil to the suburban school districts sending students to Fairfield Wheeler and Discovery, the plaintiffs essentially argue that, although on its face count one "looks and sounds like the very sort of issue

the [state] board's hearing process was designed and intended to address," the "complaint as a whole sounds in the use of the education financing statute as a form of indirect taxation." They argue that this tuition amounts to indirect taxation and is not the sort of issue that the state board's hearing process was designed to address. The plaintiffs acknowledge that count one does not raise a constitutional question, but they contend that the facts of the present case constitute special circumstances warranting an exception to the exhaustion requirement as our appellate courts have recognized in other instances.

In support of their arguments, the plaintiffs direct our attention to our Supreme Court's decisions in *Stepney Pond Estates, Ltd.* v. *Monroe*, 260 Conn. 406, 797 A.2d 494 (2002), and *McKinney* v. *Coventry*, 176 Conn. 613, 410 A.2d 453 (1979). In both cases, the court considered a collateral challenge to the imposition of a tax based on the plaintiffs' claims that the tax in those cases were unconstitutional. In *Stepney Pond Estates, Ltd.*, the court determined, on the basis of the rationale set forth in *McKinney*, that the trial court did not lack jurisdiction to hear the claim because the plaintiff "challenge[d] the validity of the tax in the first instance," not that the tax "was improperly calculated." *Stepney Pond Estates, Ltd.* v. *Monroe*, supra, 420.

The plaintiffs acknowledge that *Stepney Pond Estates, Ltd.*, and *McKinney* are not "perfect fits" with respect to count one. We agree with them to that extent. It is clear from the language of count one that the plaintiffs are not challenging the constitutionality of the statute itself; they explicitly acknowledge in their appellate brief that count one is not constitutional in nature. Thus, it appears that the plaintiffs' reliance on *Stepney Pond Estates, Ltd.*, and *McKinney*, which involved facial constitutional challenges to tax statutes, is misplaced with respect to count one. Nevertheless, the plaintiffs argue

that one of the paragraphs in count one "frames the issue as more than mere misapplication of a technical statute," and further contend that "the commissioner ignored the statutory requirements altogether—the functional equivalent of denying a hearing, resulting in default." If anything, this argument is more akin to a claim raised in *LaCroix* v. *Board of Education*, 199 Conn. 70, 505 A.2d 1233 (1986), where the plaintiff alleged that the defendant board of education violated his right to due process by failing to provide him a hearing prior to, and for four months subsequent to, terminating his employment contract. Even so, in light of the facts of this case, we conclude that *LaCroix* is no more availing for the plaintiffs.

We read count one of the plaintiffs' complaint as a challenge to the commissioner's application of the criteria set forth in § 10-264*l* (m) (2) in authorizing the Bridgeport board to charge tuition to the suburban school districts. Although they attempt to argue that this count is actually a challenge to "indirect taxation" by the defendants and that the state board is ill equipped to review this type of claim, our review of the allegations in count one lead us to conclude that this is just the type of claim that the state board's hearing process was designed and intended to address. As the trial court correctly noted, the plaintiffs "[sought] a declaratory ruling as to the applicability of § 10-264*l* (m) (2) to the alleged circumstances, which is precisely the relief that the relevant agency, namely, the state board, has the statutory authority to provide pursuant to § 4-176 and by way of the rules set forth in §§ 10-4-21 and 10-4-22 of the [Regulations of Connecticut State Agencies]."[6]

[6] Section 10-4-21 of the Regulations of Connecticut State Agencies provides in relevant part: "(a) Who May File. Any interested person(s) . . . may petition the agency, as appropriate, to issue a declaratory ruling regarding the validity of any regulation or the applicability to specified circumstances of any statute, regulation or order enforced, administered or promulgated by the agency. . . ." Subsection (b) of the regulation sets forth the petition requirements.

Despite the plaintiffs' asseverations, the allegations in count one are not the type of special circumstances that our courts have determined warrant an exception to the exhaustion requirement. Simply put, the plaintiffs had an available administrative process to challenge the initial tuition authorization by the commissioner where they could have informed the state board of what they perceived to be error in the commissioner's decision. Their failure to exhaust this available process prior to commencing this action divested the court of subject matter jurisdiction over count one. See *LaCroix* v. *Board of Education*, supra, 199 Conn. 78 (our courts "have long adhered to the rule that, where a statutory right of appeal from an administrative decision exists, an aggrieved party may not bypass the statutory procedure and instead bring an independent action to test the very issue which the appeal was designed to test" [internal quotation marks omitted]). The court, therefore, properly dismissed count one for lack of subject matter jurisdiction.

B

With respect to counts two through four of their complaint, the plaintiffs contend that each one raises independent constitutional claims warranting an exception to the exhaustion requirement. They argue that even if this court concluded that count one fell within the state board's regulatory ambit, the constitutional claims do not. In particular, they argue that the constitutional claims are independent, do not involve agency expertise or discretion, and are the type of constitutional claims our courts recognize as warranting an exception to the exhaustion requirement. In their appellate brief, the plaintiffs categorize counts two through four as follows: "Count two contends that this unusual

Section 10-4-22 of the Regulations of Connecticut State Agencies sets forth the procedure following the filing of a petition for a declaratory ruling.

tax amounts to a due process violation, depriving the [plaintiffs] of property without due process of law arising under the state constitution. Count three contends that this tax is imposed by executive fiat, and not legislative process, in violation [of] the state constitution's separation of powers doctrine. Count four contends that the tax in question is imposed in violation of the state constitution's home rule provision, effectively giving one town permission to tax residents of adjoining municipalities."

The defendants maintain that the plaintiffs' arguments on appeal evince a complete reversal of their characterization of the counts as represented to the trial court. Namely, they argue that the plaintiffs repeatedly characterized their constitutional claims as "as applied" before the trial court, but now, on appeal, make arguments that can only be read as being "facial" constitutional challenges. The defendants thus argue that the plaintiffs are bound by their representations to the trial court and may not pursue before this court a legal theory they did not pursue before the trial court.

This court has often stated that to allow a plaintiff to pursue one theory before the trial court and then to press a distinctly different theory on appeal would amount to an ambuscade of the trial court. See *Jahn* v. *Board of Education*, 152 Conn. App. 652, 665, 99 A.3d 1230 (2014). In such instances, we have declined to review those claims. See, e.g., *AvalonBay Communities, Inc.* v. *Zoning Commission*, 130 Conn. App. 36, 62 and n.24, 21 A.3d 926, cert. denied, 303 Conn. 909, 32 A.3d 962 (2011). To the extent that the plaintiffs are arguing on appeal that counts two through four of their complaint are facial constitutional challenges, we decline to review them as such. As the defendants correctly note, the plaintiffs argued explicitly before the trial court that counts two through four were as applied constitutional challenges. Accordingly, we will review

whether these counts alleging as applied constitutional caims were properly dismissed by the trial court for the plaintiffs' failure to exhaust available administrative remedies.

The plaintiffs first rely on *LaCroix* v. *Board of Education*, supra, 199 Conn. 70, a case in which our Supreme Court allowed a plaintiff teacher to bring a civil action based on a due process property right violation because the defendant board failed to follow the process required by the Teacher Tenure Act, General Statutes § 10-151 (b), when it terminated the plaintiff's employment without first providing him a hearing. Id., 71–72. Under the specific factual circumstances of *LaCroix*, the court recognized an exception to the doctrine of exhaustion of administrative remedies and held that "the plaintiff's failure to follow the administrative appeal route to challenge the . . . termination did not preclude him from bringing a collateral judicial action to test this basic constitutional infirmity in the [defendant] board's termination process." Id., 81. The court explained that two circumstances led it to that conclusion: "the plaintiff's timely request for a hearing [was] evidence that he did not deliberately decide to bypass the statutory appeal route, and the defendant board's unwillingness to provide the hearing within the statutory period was a significant contributing factor in the plaintiff's failure to pursue a direct appeal." Id. The court explained that "the defendant's total default relieved the plaintiff of the obligation to pursue further administrative steps, and permitted the plaintiff to invoke judicial remedies to vindicate his constitutional rights to due process." Id.

Although the plaintiffs assert broadly that counts two through four raise independent constitutional claims warranting an exception to the exhaustion requirement equivalent to the exception recognized in *LaCroix*, the facts of the present case bear little similarity to those

of *LaCroix*. *LaCroix* involved an instance where the court permitted a plaintiff to bring a collateral judicial action when he did not deliberately bypass the statutory appeal route but, instead, was constrained by the defendant board's failure to hold a timely hearing. In the present case, however, the plaintiffs were not constrained or limited by the defendants in any way, and could have availed themselves of the administrative appeal process available to them but deliberately chose not to. See General Statutes § 4-176.

The plaintiffs additionally rely on *McKinney* v. *Coventry*, supra, 176 Conn. 613, and *Stepney Pond Estates, Ltd.* v. *Monroe*, supra, 260 Conn. 406, for the contention that the facts of the present case warrant an exception to the exhaustion requirement like the "collateral challenge" doctrine invoked in those cases, which involved constitutional challenges to tax statutes. The evident flaw with the plaintiffs' argument is the fact that they made as applied constitutional challenges and sought relief that could have been provided to them by the state board.

As we noted previously, in both *McKinney* and *Stepney Pond Estates, Ltd.*, our Supreme Court considered collateral challenges to the imposition of a tax on the basis of the plaintiffs' claims that the taxes in those cases were unconstitutional. In *Stepney Pond Estates, Ltd.*, the court determined, on the basis of the rationale set forth in *McKinney*, that the trial court did not lack jurisdiction to hear the claim because the plaintiff "challenge[d] the validity of the tax in the first instance," not that the tax "was improperly calculated." *Stepney Pond Estates, Ltd.* v. *Monroe*, supra, 260 Conn. 420.

In the present case, however, the plaintiffs explicitly argued before the trial court that their claims were "as applied challenge[s] and [were] not challenging the legislation . . . ." Furthermore, they argued that the

law "permit[s] them to question [the commissioner's] interpretation and that is precisely what they are doing in this as applied challenge." Thus, the plaintiffs' arguments make clear that they were not facially challenging the constitutionality of § 10-264*l* (m) (2) in the first instance, but, rather, the constitutionality of the commissioner's interpretation and calculation of the tuition under § 10-264*l* (m) (2) as applied to them. Accordingly, their constitutional challenges would not have required the state board to strike down the statute as unconstitutional—a power the state board lacks. Instead, their challenges, when properly construed, simply would have permitted the state board to declare that the statute could not be applied to the plaintiffs under the particular circumstances of the present case, a power the state board most certainly could have exercised. The state board, to which the legislature has conferred the power to interpret statutes and regulations pursuant to § 4-176, was well positioned to provide the plaintiffs with the very relief that they sought in the trial court had they brought a petition for a declaratory ruling. See *Connecticut Mobile Home Assn., Inc.* v. *Jensen's, Inc.*, 178 Conn. 586, 588–89, 424 A.2d 285 (1979) (declaratory judgment action seeking determination that certain lease provisions violated state statute barred by exhaustion doctrine because plaintiff failed to seek declaratory ruling from real estate commission pursuant to § 4-176, which confers on state agencies power to interpret statutes and regulations). Moreover, our courts "continue to limit any judicial bypass of even colorable constitutional claims to instances of demonstrable futility in pursuing an available administrative remedy." (Internal quotation marks omitted.) *Stepney, LLC* v. *Fairfield*, supra, 263 Conn. 571.

The plaintiffs have not sufficiently shown how it would have been demonstrably futile to file a petition for a declaratory ruling with the state board. In fact,

our review of the record discloses that the process the plaintiffs had available to them would have given them the opportunity to challenge the commissioner's interpretation of the statute and ultimate award of tuition.[7] This process could have then corrected any of the purported errors with respect to the commissioner's interpretation of the statute or the approval of the tuition award, which would have remedied the constitutional concerns the plaintiffs alleged in their complaint. If the plaintiffs were not satisfied with the resolution of the petition, they could have subsequently brought a declaratory judgment action in the Superior Court. See General Statutes § 4-183.

The plaintiffs in this case did not avail themselves of the administrative process available to them before first filing an action in the Superior Court. Consequently, their failure to do so divested the court of subject matter jurisdiction over counts two, three, and four of their complaint.

II

The plaintiffs claim next that the court erred by dismissing count six, a civil theft claim against the Bridgeport defendants, for lack of subject matter jurisdiction for failing to exhaust their administrative remedies. We need not, however, reach this issue because we conclude that the court lacked subject matter jurisdiction over this claim for another reason, namely, because the claim is not ripe for adjudication.[8]

[7] We acknowledge that the parties argued before the trial court the issue of whether Feehan had taxpayer standing to bring an action. We agree with the trial court, that, even if we assumed that he did have taxpayer standing, he, like the plaintiff school boards, was required to exhaust the administrative remedy of filing a petition for a declaratory ruling with the state board.

[8] Although the ripeness issue was raised before the trial court, it never decided the issue. Our Supreme Court has stated that "[o]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised *and decided* in the trial court. . . . This rule applies equally to alternate grounds for affirmance." (Emphasis added; internal quotation marks omitted) *Perez-Dickson* v. *Bridgeport*,

In count six of the plaintiffs' complaint, they alleged that the actions of the Bridgeport defendants will at some future point, constitute civil theft as set forth in General Statutes §§ 52-564 and 53a-119 (1), (2), (3), and (6).[9] In particular, the plaintiffs allege that the Bridgeport defendants (1) will embezzle insofar as they have overstated the tuition costs necessary to operate the magnet schools and have done so with the intent to deprive the plaintiff boards of operating funds by misappropriating interdistrict magnet school revenues to municipal operating costs that are unassociated with the operation of the magnet schools; (2) will commit larceny by false pretenses insofar as they are submitting a false pretense, token, or device in the form of a request to charge the plaintiff boards tuition that overstates the necessary operating costs of the magnet schools; (3) will commit larceny by false promise insofar as they are promising to serve the students of the plaintiff boards with $1,818,000 of tuition and only intend to serve those students with approximately $500,000 worth of tuition; and (4) will defraud a public community insofar as they have authorized, certified, attested, or filed a request to charge the plaintiff boards that they know to be false, and they are knowingly accepting the benefits resulting from the request to charge from a public community.

The Bridgeport defendants moved to dismiss count six on the basis that the court lacked subject matter jurisdiction because the plaintiffs failed to exhaust their

304 Conn. 483, 498–99, 43 A.3d 69 (2012). One such exceptional circumstance is a claim that implicates the trial court's subject matter jurisdiction, which may be raised at any time and, thus, is not subject to our rules of preservation. Id., 500 n.23; see *Gerardi* v. *Bridgeport*, 294 Conn. 461, 466–67, 985 A.2d 328 (2010). Because ripeness implicates the court's subject matter jurisdiction; *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 86, 952 A.2d 1 (2008); it is proper for us to consider it as an alternative ground for affirmance of the trial court's dismissal of count six.

[9] In the plaintiffs' memorandum of law in opposition to the defendants' motions to dismiss, they acknowledged that, as of the date they filed the complaint, they had made no tuition payments to the Bridgeport board.

administrative remedies and because the plaintiffs' claim was not ripe. The plaintiffs filed an opposition to the Bridgeport defendants' motion. In the court's memorandum of decision dated May 23, 2017, it concluded that "the issue of whether the plaintiffs' claims are ripe for review is immaterial as the court lack[ed] subject matter jurisdiction over the plaintiffs' claims because the plaintiffs . . . failed to exhaust their administrative remedies."

In their principal brief on appeal, the plaintiffs argued that they need not exhaust their administrative remedies prior to bringing the underlying claim because the state board does not have the authority to hear claims regarding theft or misappropriation of moneys. The Bridgeport defendants argued that the court was correct in dismissing count six on this ground. Although the parties argued the issue of ripeness before the trial court, there was little discussion of it in their appellate briefs. On May 17, 2019, following oral argument before this court, we issued an order notifying the parties that they were permitted to file a supplemental brief on the issue of whether the trial court lacked subject matter jurisdiction over count six because the statutory theft claim was not ripe. The plaintiffs, the Bridgeport defendants, and the state defendants each filed a supplemental brief by the May 31, 2019 deadline.

In the defendants' supplemental briefs, they argue that the plaintiffs' civil theft claim is not ripe because the record before this court unequivocally reflects that the Bridgeport defendants have not collected or received any tuition from the plaintiffs, and that no invoice for the tuition payments was even sent to the plaintiff boards at the time the Bridgeport defendants filed their motion to dismiss. They observe that the plaintiffs do not dispute that they have not made any of the payments at issue. They observe, as well, that no theft, civil or otherwise, can occur absent the loss of property. The plaintiffs argue, however, that the ripeness doctrine does not bar the action. They argue that

the plaintiffs sought injunctive relief to prevent the city from unlawfully misappropriating moneys under color of state law and that requiring the plaintiffs to wait until the Bridgeport defendants unlawfully are in receipt of the moneys would render moot any claim for injunctive relief.

"[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter." (Internal quotation marks omitted.) *Cadle Co.* v. *D'Addario*, 111 Conn. App. 80, 82, 957 A.2d 536 (2008). "A case that is nonjusticiable must be dismissed for lack of subject matter jurisdiction." *Mayer* v. *Biafore*, *Florek & O'Neill*, 245 Conn. 88, 91, 713 A.2d 1267 (1998). "The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Keller* v. *Beckenstein*, 305 Conn. 523, 531–32, 46 A.3d 102 (2012).

"[T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . . Accordingly, in determining whether a case is ripe, a trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire." (Citation omitted; internal quotation marks omitted.) *Chapman Lumber*, *Inc.* v. *Tager*, 288 Conn. 69, 86–87, 952 A.2d 1 (2008).

The plaintiffs argue that the ripeness doctrine does not bar their claim in count six because they sought injunctive relief to prevent the city from unlawfully misappropriating the tuition moneys under color of state law and that requiring them to wait until the Bridgeport defendants unlawfully are in receipt of the moneys

would render moot any claim for injunctive relief. This argument is not persuasive. First, as stated previously, the plaintiffs alleged in count six that the Bridgeport defendants committed civil theft in violation of §§ 52-564 and 53a-119 (1), (2), (3), and (6). Section 52-564 provides: "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner *treble his damages*." (Emphasis added.) We have held that "[s]tatutory theft under . . . § 52-564 is synonymous with larceny [as provided in] . . . § 53a-119." (Internal quotation marks omitted.) *News America Marketing In-Store, Inc.* v. *Marquis*, 86 Conn. App. 527, 544, 862 A.2d 837 (2004), aff'd, 276 Conn. 310, 885 A.2d 758 (2005). Pursuant to § 53a-119, "[a] person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner."

Although the plaintiffs attempt to obfuscate the issue by arguing that dismissing count six will render moot its claim for injunctive relief, we remind the plaintiffs that injunctive relief is not a remedy available to them under the statutory theft statute. See General Statutes § 52-564. Rather, a party aggrieved under the statute is entitled to treble damages. General Statutes § 52-564. In the present case, the record makes clear that no payment for the tuition has in fact been paid out by the plaintiff boards to the Bridgeport defendants. Additionally, as the Bridgeport defendants note in their supplemental brief, no invoice for tuition had even been sent to the plaintiff boards at the time they filed their motion to dismiss. Thus, it is apparent that the plaintiffs have not suffered an injury sufficient to give rise to the cause of action alleged. In particular, the plaintiffs failed to allege that the Bridgeport defendants intentionally deprived them of their property. See *Mystic Color Lab, Inc.* v. *Auctions Worldwide, LLC*, 284 Conn. 408, 418–

19, 934 A.2d 227 (2007) ("[s]tatutory theft . . . requires an element over and above what is necessary to prove conversion, namely, that the defendant intentionally deprived the complaining party of his or her property"); see also *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 771–72, 905 A.2d 623 (2006) ("[M]oney can be the subject of statutory theft. . . . The plaintiffs must establish, however, legal ownership or right to possession of specifically identifiable moneys." [Citation omitted.]). We also note that it would be impossible for a court to treble the plaintiffs' damages when no damages have been incurred in the first place. On the basis of the foregoing, we have little difficulty concluding that count six was not ripe for review and, thus, the trial court lacked subject matter jurisdiction over it. Accordingly, we conclude, albeit on a different jurisdictional ground than that on which the court relied, that the court properly dismissed count six of the plaintiffs' complaint.

The judgment is affirmed.

In this opinion the other judges concurred.

SACK PROPERTIES, LLC *v.* MARTEL REAL ESTATE, LLC, ET AL.
(AC 41499)

Prescott, Elgo and Bishop, Js.

Syllabus

The plaintiff, the owner of lots 1 and 3 located in a three lot commercial subdivision, brought this action for, inter alia, quiet title and a declaratory judgment related to a drainage easement over lot 2 in the subdivision, which was owned by the defendant M Co. In 1978, the owner of the subdivision, B, had filed a revised map of the subdivision showing a drainage right-of-way, which commenced on the easterly line of lot 3, then down the southerly line of lot 1 and northerly line of lot 2, until it ran in its entirety down the northeast corner of lot 2. The stormwater runoff passed under the easement area through a subsurface concrete pipe. In 1984, B conveyed all three lots to I Co., which, in 2003, conveyed

lot 2 back to B and conveyed lots 1 and 3 to the plaintiff. The deed conveying lot 2 to B provided that the premises were subject to a drainage right-of-way along the northerly line of lot 2 but did not state who enjoyed that right-of-way. The deed conveying lots 1 and 3 to the plaintiff provided that they were conveyed together with a drainage easement across lots 1 and 2. Both deeds provided that the property was transferred with the appurtenances thereof. In 2007, B conveyed lot 2 to M Co., and that deed provided that only lot 1 enjoyed the right-of-way along lot 2. In 2013, M Co. connected to the pipe to provide additional drainage to its property. Following a trial to the court, the trial court rendered judgment in part in favor of M Co. on the plaintiff's claims for quiet title and trespass, and on its claim that M Co. overburdened its right to use the drainage easement. On the plaintiff's appeal to this court, *held:*

1. The plaintiff could not prevail in its claim that the trial court improperly rejected its quiet title and trespass claims and found that the plaintiff failed to prove that it exclusively owned the pipe through which its drainage ran: although the plaintiff claimed that it introduced evidence of ownership through the deeds and that the court neglected to consider that claim, it could not reasonably be disputed that the court carefully considered the evidence on which the plaintiff based its claim and rejected it, as the deeds relied on by the plaintiff were admitted into evidence, transcripts of the trial revealed extensive testimony and argument relating to the language of the deeds, the court instructed the parties to file posttrial briefs addressing the deeds and their significance to the plaintiff's claims, the court allowed the parties to argue their positions to the court and during argument the court discussed with counsel its concerns with and understanding of the evidence before it, and, therefore, the court's statement that the plaintiff presented "no evidence" of exclusive ownership constituted a determination that it was not persuaded by the plaintiff's evidence, not an erroneous finding that the plaintiff had not presented any evidence at all; moreover, the trial court's finding that the plaintiff failed to prove exclusive ownership of the pipe through which its easement runs was not clearly erroneous, as the plaintiff claimed exclusive ownership of the pipe on the basis of the deeds relating to the properties, which did not contain any reference to the pipe at issue, and although it was clear from the language of the deed conveying lots 1 and 3 to the plaintiff that the drainage easement over lot 2 was an appurtenance of lots 1 and 3, the plaintiff did not introduce evidence that the pipe itself, particularly that portion underneath lot 2, was an appurtenance to lots 1 and 3, as the language in the pertinent deeds referring to appurtenances pertained to appurtenances on the lot being conveyed, not appurtenances on the land over which the dominant estate enjoyed its easement and, thus, while the portion of the pipe that went through lot 1 may be considered an appurtenance to lot 1, the plaintiff cited no legal authority supporting its claim that

a certain habendum clause of the deed by which it obtained title to lot 1 also conveyed to it exclusive ownership of the portion of the pipe that went through lot 2.

2. The trial court's finding that the plaintiff failed to prove that M Co.'s use of the pipe to drain excess stormwater overburdened the drainage system was not clearly erroneous; in resolving this claim, the court credited the testimony of M Co.'s expert over that of the plaintiff's expert, and that credibility determination was within the exclusive province of the trial court to make.

Argued March 11—officially released July 23, 2019

Procedural History

Action seeking, inter alia, to quiet title to certain real property, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Moukawsher, J.*; judgment in part for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Benjamin M. Wattenmaker, with whom, on the brief, was *John M. Wolfson*, for the appellant (plaintiff).

Edward W. Gasser, with whom, on the brief, was *Margot E. Vanriel*, for the appellee (named defendant).

Opinion

BISHOP, J. In this action involving three lots of commercial property and a drainage easement enjoyed by the plaintiff, Sack Properties, LLC, the owner of two of those lots, over the lot owned by the defendant Martel Real Estate, LLC,[1] the plaintiff challenges the judgment of the trial court, rendered after a court trial, in part in favor of the defendant.[2] On appeal, the plaintiff claims that the trial court improperly (1) rejected its quiet title

[1] Thomaston Savings Bank, The U.S. Small Business Administration and Martel Transportation, LLC, are also defendants in this action. Because they have not participated in this appeal, any reference herein to the defendant is to Martel Real Estate, LLC.

[2] The plaintiff owns lots 1 and 3 of the property at issue. The court found in favor of the plaintiff on its claim that lot 3, in addition to lot 1, also enjoyed a drainage easement over the defendant's lot. The defendant has not challenged that determination.

and trespass claims on the ground that it failed to prove that it exclusively owned the pipe through which its drainage easement ran, and (2) found that it failed to prove that the defendant had overburdened its right to use the drainage easement. We disagree, and, accordingly, affirm the judgment of the trial court.[3]

The following relevant facts are undisputed. In 1976, the Town Planning Commission of Canton approved a three lot subdivision plan titled, "Powder Mill Industrial Park," submitted by the then-owner of the property, Henry Bahre. In 1978, Bahre filed a revised map of the subdivision, as required by the town, showing a drainage right-of-way, which commenced on the easterly line of lot 3, then down the southerly line of lot 1 and northerly line of lot 2, until it ran in its entirety down the northeast corner of lot 2, and went under Powder Mill Road, before it dumped into the Farmington River. The stormwater runoff passes under the easement area by way of a 24 inch subsurface concrete pipe.

In 1984, Bahre conveyed all three lots to Inertia Dynamics, Inc. The deed conveying lot 1 provided, inter alia: "Said premises are subject to a twenty (20') foot drainage right-of-way along the southeasterly boundary of the lot . . ." The deed conveying lots 2 and 3 provided, inter alia: "Lot No. 2 is subject to a drainage right-of-way along the northerly line of [l]ot No. 2."

Subsequently, on April 30, 2003, Inertia Dynamics, Inc. conveyed lot 2 back to Bahre. The deed conveying lot 2 to Bahre provided that the "premises are subject to a drainage right-of-way along the northerly line of [l]ot No. 2." It did not state who enjoyed that right-of-way. On the same day, Inertia Dynamics, Inc., conveyed lots 1 and 3 to the plaintiff. The deed conveying lots 1

[3] The court also found in favor of the defendant on the plaintiff's claims of nuisance, unjust enrichment and quantum meruit. The plaintiff has not challenged the court's judgment on those claims.

and 3 to the plaintiff provided that they were "conveyed together with a drainage easement across [l]ots 1 and 2 . . . ." Both of the 2003 deeds provided that the property was being transferred "with the appurtenances thereof . . . ." The deed conveying lot 2 to Bahre was recorded on the land records before the deed conveying lots 1 and 3 to the plaintiff.

In 2005, the plaintiff, at its sole expense, installed and/or made improvements to the subsurface drainage structures within the drainage easement area to service its drainage needs.

On April 13, 2007, Bahre conveyed lot 2 to the defendant. This deed also referenced the drainage right-of-way, but provided that only lot 1 enjoyed that right-of-way along the northerly line of lot 2. In 2013, the defendant, in developing its property, connected to the 24 inch pipe to provide additional drainage from its property.

The plaintiff filed this action by way of a seven count complaint, alleging a quiet title action pursuant to General Statutes § 47-31, an action for declaratory judgment pursuant to General Statutes § 52-29, interference with its easement, trespass, nuisance, unjust enrichment, and quantum meruit. The crux of the plaintiff's claims is that it exclusively owns both the right to enjoy the drainage easement—over lot 2, from both lots 1 and 3—and the 24 inch concrete pipe that services that easement, and that the defendant's connection to that pipe has overburdened the drainage system to the plaintiff's detriment.

Following a court trial, the trial court issued a memorandum of decision dated March 8, 2018, finding in the plaintiff's favor that it enjoyed the drainage easement not only from lot 1, which was not disputed by the defendant, but also from lot 3. In ruling on the plaintiff's additional claims, the court reasoned: "[The plaintiff]

has [not] proved it owned the pipe. The pipe was there when [the plaintiff] bought lot 1. The water was flowing through it. But [the plaintiff] did [not] prove who built the pipe or prove that its entire length was conveyed to [the plaintiff] when it bought lot 1. Remember, this was one lot and it [is] possible the developer intended the pipe on lot 2 to be owned by the lot 2 owner with a right to use it by the lot 1 owner. Indeed, the evidence shows that the pipe had the stub of a pipe attached to it pointed in the direction of the rest of lot 2. It sits in a way that implies it was there for lot 2 to connect with. In fact, while [the defendant] replaced the pipe stub with a new pipe, [it] connected to the concrete drainage pipe at the very spot where the concrete stub had been installed. There is no evidence showing [that the plaintiff] exclusively owns the pipe. Therefore, [the plaintiff] has not met its burden to prove ownership and trespass."

The court also rejected the plaintiff's claim that the defendant interfered with its easement. The court reasoned: "[The plaintiff] has [not] proved its right to drain is impaired—that its easement over lot 2 is surcharged by excessive drainage into the pipe. [The defendant's] lot 2 drainage system only uses the pipe as an overflow system. Its main system is two infiltration basins—sand pits encircled by a permanent stone barrier. At one side of the property this is fed by an elongated swale or trench. In both locations the basins have a raised concrete outlet structure with a grate across the top of it. In particularly heavy rains water would flow into the grate and openings on the elevations of the structure. The credible testimony of Kevin Clark, the engineer who designed it, shows that the pipe might get some use in a two year storm—a storm that has a 25 [percent] chance of happening in any given year. But the pipe most likely would [not] get any use in a typical rain storm of an inch or less. This discredits the testimony

and calculations of [the plaintiff]'s expert, James Cassidy. [Cassidy's calculations] depended on both lots 1 and 3 draining into the pipe when lot 3 does [not] yet and may never drain into it, and they also depend on lot 3 being developed to virtually the maximum extent possible with 50 [percent] of the lot being covered with an impervious material that would dramatically increase the amount of drainage from lot 3 and into the pipe. Since even [the plaintiff]'s wrong-headed and hypothetical assumptions showed the pipe barely over capacity, there can be little doubt that Clark's more credible assumptions show a minimal impact on the pipe capacity.

"This minimal impact means the system likely has little effect on [the plaintiff]'s anti-pollution device. This is especially the case in light of Martel's testimony that any water that reached it would be part of a lot 2 system that includes a 1500 gallon oil and water separator that removes many pollutants long before the water even reaches [the plaintiff]'s anti-pollution device.

"[The plaintiff] has [not] proved that connecting the lot 2 system to the pipe has had or will have any negative effect on its pollution control device or that it surcharges [the plaintiff]'s drainage easement."

The court, therefore, found in favor of the defendant on the remainder of the plaintiff's claims. This appeal followed.

This court has held that "[w]hether a disputed parcel of land [or a portion of that land] should be included in one or another chain of title is a question of fact for the court to decide." *Porter* v. *Morrill*, 108 Conn. App. 652, 663, 949 A.2d 526, cert. denied, 289 Conn. 921, 958 A.2d 152 (2008). Similarly, the determination of whether one has interfered with the use of an easement is a question of fact. *Kelly* v. *Ivler*, 187 Conn. 31, 49, 450 A.2d 817 (1982). "The trial court's findings are binding

upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . 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. . . .

"In applying the clearly erroneous standard of review, [a]ppellate courts do not examine the record to determine whether the trier of fact could have reached a different conclusion. Instead, we examine the trial court's conclusion in order to determine whether it was legally correct and factually supported. . . . This distinction accords with our duty as an appellate tribunal to review, and not to retry, the proceedings of the trial court. . . .

"[I]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Citations omitted; internal quotation marks omitted.) *FirstLight Hydro Generating Co. v. Stewart*, 328 Conn. 668, 679–80, 182 A.3d 67 (2018). With these principles in mind, we address the plaintiff's claims on appeal in turn.

I

The plaintiff first claims that the trial court improperly rejected its quiet title and trespass claims on the ground that it failed to prove that it exclusively owns the 24 inch pipe through which its drainage easement runs under lot 2. The plaintiff argues that the trial court erroneously found that there was "no evidence" of exclusive ownership and that it failed to prove exclusive ownership. We are not persuaded.

We first address the plaintiff's claim that the trial court erroneously found that "[t]here is no evidence showing [the plaintiff] exclusively owns the pipe." The plaintiff contends that it did, in fact, introduce evidence of ownership, specifically, the deeds, and, therefore, that the trial court's statement that there was "no evidence" was erroneous and that the court erred in failing to consider the evidence before it. In support of this argument, the plaintiff cites to our Supreme Court's recent decision in *In re Jacob W.*, 330 Conn. 744, 200 A.3d 1091 (2019). Our Supreme Court explained, in that termination of parental rights case, that "[t]he trial court . . . did not provide any analysis as to the second prong of [General Statutes] § 45a-717 (g) (2) (C). Instead, the court grounded its decision on the conclusory finding that '[t]here was no evidence presented by the petitioner at trial that would support a claim that additional time to reestablish a relationship with the children would be detrimental [to their best interests].' That finding cannot be reconciled with the record, which reveals that there *was* evidence presented that was relevant to this question. . . .

"In arriving at its finding that the petitioner had presented no evidence that it would be detrimental to allow the respondent more time to develop or reestablish a relationship with the children, the trial court did not accord any effect to evidence that had been presented at trial that was relevant to that precise question." (Emphasis in original.) Id., 770–71.

Our Supreme Court construed the trial court's finding of "no evidence" as "expressly declining to consider . . . relevant evidence." Id., 771–72. Our Supreme Court concluded: "In light of the abundance of evidence in the record contrary to the trial court's statement that there was *no evidence* presented that it would be detrimental to the best interests of the children to allow

additional time for the respondent to develop a relationship with them, we are left with a firm conviction that a mistake has been made and, therefore, conclude that the trial court's finding was clearly erroneous." Id., 774.

Unlike in *In re Jacob W.*, our review of the record in the present case does not leave us with a firm conviction that a mistake has been made. The plaintiff's argument that, "[b]ecause the trial court did not address the plain language of the deeds in its final, written analysis of the plaintiff's argument in this case, it is impossible to know whether the trial court considered and rejected the plaintiff's argument in reaching its final decision or whether the trial court simply neglected to consider the argument" is belied by the record before us. It cannot reasonably be disputed, given the entirety of the trial court record in this case, that the trial court carefully considered the evidence on which the plaintiff based its claim of ownership of the pipe and rejected it. All of the deeds relied on by the plaintiff in support of its claim of exclusive ownership of the pipe were admitted into evidence, and the transcripts of the trial reveal extensive testimony and argument relating to the language of the deeds. Not only was there extensive discussion and argument regarding the deeds among counsel and the court, but the court instructed the parties to file posttrial briefs specifically addressing the deeds and their significance to the plaintiff's claims.[4] Following the filing of these briefs, the trial court allowed the parties to argue their respective positions to the court. During that argument, the court discussed with counsel for both parties, its concerns with and understanding of the evidence before it. On the basis of our review of the record, which is replete with discourse between the court and the parties relating to the plaintiff's claims

[4] Specifically, the trial court ordered posttrial briefs seeking "law on what appurtenances include, law on the sequence of conveyances . . . and law on the sequence of recording on the land records . . . ."

and the evidence that it had introduced in support of those claims, the plaintiff's argument that the court either neglected or forgot about its claim regarding the deeds is untenable. Moreover, "it is inevitable that the court considered other evidence not expressly identified in its decision. Rather, we presume that the trier considered *all* of the evidence in making its findings, and we review them only for clear error." *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 384, 112 A.3d 1 (2015). We thus conclude that the court's statement that the plaintiff presented "no evidence" of exclusive ownership constituted a determination that it was not persuaded by the plaintiff's evidence, not an erroneous finding that the plaintiff had not presented any evidence at all.

We also cannot conclude that the trial court's finding that the plaintiff failed to prove exclusive ownership of the pipe through which its easement runs was clearly erroneous. "It is well settled that [a]n easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the rules authorized by the easement. . . . [T]he benefit of an easement . . . is considered a nonpossessory interest in land because it generally authorizes limited uses of the burdened property for a particular purpose. . . . [E]asements are not ownership interests but rather privileges to use [the] land of another in [a] certain manner for [a] certain purpose . . . ." (Internal quotation marks omitted.) *Stefanoni* v. *Duncan*, 282 Conn. 686, 700, 923 A.2d 737 (2007).

Although it is undisputed that the plaintiff enjoys a drainage easement over lot 2, and the right to use the pipe that lies beneath its own lot and lot 2 to effectuate that drainage, it also claimed exclusive ownership of the entire pipe, as it stretches from lot 2 to lot 1, then back across lot 2, and under Powder Mill Road, until it empties into the Farmington River. The plaintiff bases

its claim of exclusive ownership of the pipe on the deeds relating to the subject properties, particularly, the deed by which it acquired lots 1 and 3 from Inertia Dynamics, Inc. It is undisputed that neither that deed, nor any of the other deeds pertaining to the properties in this case, contain any reference to the pipe at issue. The sole language on which the plaintiff relies in support of its claim of exclusive ownership of the pipe is the habendum clause contained in the deed that provided that the lots 1 and 3 were transferred to the plaintiff with the "appurtenances thereof . . . ."[5]

"In considering what passes by a deed, appurtenances are things belonging to another thing as principal and which pass as incident to the principal thing. . . . The term 'appurtenance' passes nothing but the land and such things as belong thereto and are a part of the realty. . . . It is conveyed with the principal property. . . . Thus, an appurtenance is a right or privilege incidental to the property conveyed. . . . Appurtenances that pass are not limited to such as are absolutely necessary to the enjoyment of the property conveyed . . . but include such as are necessary to the full enjoyment thereof . . . and, a deed of property with 'appurtenances' conveys only what is appurtenant at the time of the conveyance." (Footnotes omitted.) 26A C.J.S., Deeds § 285.

[5] The plaintiff also argues that the lack of a similar habendum clause in the deed conveying lot 2 to the defendant reflects an intent by Bahre that the owner of lots 1 and 3 would be the exclusive owner of the entire pipe. Although the deed by which Bahre conveyed lot 2 to the defendant was the only pertinent deed lacking a habendum clause, we disagree with the plaintiff that the absence of such language is conclusive proof of an intent by Bahre that the owner of lots 1 and 3 exclusively own the pipe. Because appurtenances regularly run with land as it is conveyed, regardless of the presence or lack of a habendum clause, and because the deeds were drafted by different lawyers and at different times, the trial court reasonably could have declined to afford any weight to the lack of a habendum clause in the deed by which the defendant obtained title to lot 2.

In *Algonquin Gas Transmission Co.* v. *Zoning Board of Appeals*, 162 Conn. 50, 291 A.2d 204 (1971), our Supreme Court explained: "An appurtenance is . . . an apt term for detached apparatus which is built as an adjunct to a structure, to further its convenient use." (Citation omitted.) Id., 57–58. Examples of appurtenances include "a right of way or other easement to land; an outhouse, barn, garden, or orchard, to a house or messuage." *Black's Law Dictionary* (6th Ed., 1990). "Appurtenances of a ship include whatever is on board a ship for the objects of the voyage and adventure in which she is engaged, belonging to her owner. Appurtenant is substantially the same in meaning as accessory, but it is more technically used in relation to property, and is the more appropriate word for a conveyance." *Black's Law Dictionary* (3rd Ed., 1933).

Here, although it is clear from the language of the deed conveying lots 1 and 3 to the plaintiff that the drainage easement over lot 2 is an appurtenance of lots 1 and 3, the plaintiff did not introduce any evidence that the pipe itself, particularly that portion of the pipe that lies beneath the surface of lot 2, is an appurtenance to lots 1 and 3. As the defendant aptly pointed out in argument before this court, the language in the pertinent deeds referring to appurtenances pertains to appurtenances on the lot that is being conveyed, not appurtenances on the land over which the dominant estate enjoys its easement. Thus, while the portion of the pipe that goes through lot 1 may be considered an appurtenance to lot 1, the plaintiff has cited to no legal authority, nor are we aware of any, that supports its claim that the habendum clause of the deed by which it obtained title to lot 1 also conveyed to it exclusive ownership of the portion of the pipe that goes through lot 2. To the contrary, the Appellate Court of Illinois has held that when real property is conveyed by deed, only those "buildings and appurtenances located

thereon are likewise conveyed." (Emphasis added.) *McPeak v. Thorell*, 148 Ill.App.3d 430, 434, 101 Ill.Dec. 730, 499 N.E.2d 97 (1986). In other words, *McPeak* stands for the proposition that a sewer line is only an appurtenance to the property on which it is located.

The holding in *McPeak* underscores the evidentiary insufficiency of the plaintiff's claim of exclusive ownership of the pipe that runs beneath lot 2. Not only do the pertinent deeds in this case not reference the pipe, but the plaintiff did not introduce any evidence of the parties' intent at the time of the conveyance of lots 1 and 3 to convey exclusive ownership of the pipe to the plaintiff. The court was persuaded by other factors that weighed against the plaintiff's argument of exclusive ownership of the pipe, such as the existence of the stub of the pipe to which the defendant connected that pointed in the direction to lot 2. We thus conclude that the trial court's finding that the plaintiff failed to prove exclusive ownership of the pipe was not clearly erroneous.[6]

II

The plaintiff also claims that the trial court erroneously determined that the defendant did not interfere with its enjoyment of its easement over lot 2. The plaintiff claims that adding stormwater runoff from lot 2 to the pipe at issue overburdens the usable capacity of the pipe, to its detriment. In resolving this claim, the trial court credited the testimony of the defendant's expert over that of the plaintiff's expert. Because that credibility determination is within the exclusive province of the trial court, we cannot disturb it. See *State*

[6] Moreover, the defendant argued that, when Inertia Dynamics conveyed lot 2 back to Bahre, which occurred prior to Inertia conveying lots 1 and 3 to the plaintiff, the pipe on lot 2 went with that conveyance, and therefore could not have gone to the plaintiff with the subsequent conveyances of lots 1 and 3. In other words, Bahre acquired the pipe on lot 2 before the plaintiff acquired lots 1 and 3 and their appurtenances, so the pipe could not have been considered an appurtenance to lots 1 and 3 at the time of the conveyance to the plaintiff.

v. *Montana*, 179 Conn. App. 261, 265–66, 178 A.3d 1119, cert. denied, 328 Conn. 911, 178 A.3d 1042 (2018). Accordingly, we cannot conclude that the court's determination that the plaintiff failed to prove that the defendant's use of the pipe to drain excess stormwater overburdened the drainage system was erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE ADRIAN K.*
(AC 42633)

Keller, Bright and Devlin, Js.

Syllabus

The respondent father, whose minor child, A, previously had been adjudicated neglected, appealed to this court from the judgment of the trial court denying his motion to dismiss an order of temporary custody and modifying the dispositive order from protective supervision with the respondent mother to commitment to the custody of the petitioner, the Commissioner of Children and Families. After the trial court had adjudicated A neglected, it had ordered placement of A with the mother with protective supervision. The petitioner thereafter placed a ninety-six hour hold on A and filed a motion for an order of temporary custody, which was granted ex parte. The court scheduled a preliminary hearing on the order for temporary custody, and the petitioner filed a motion to modify the dispositive order from protective supervision to commitment. The trial court sustained the order of temporary custody and denied the father's motion to dismiss, and the father appealed to this court. *Held:*

1. The respondent father could not prevail on his claim that the trial court improperly denied his motion to dismiss the order of temporary custody, which was based on his claim that the trial court's subject matter jurisdiction ended when protective supervision expired on December 6, 2018, and that the court's jurisdiction was not continued as a result of the petitioner's failure to file a timely motion to modify as required under the applicable rule of practice (§ 33a-6 [c]), which provides that a motion

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

to modify protective supervision shall be filed no later than the next business day before a preliminary hearing on an ex parte custody order: the father's claim that the trial court's subject matter jurisdiction was limited by § 33a-6 (c) was unavailing, as rules of practice do not and cannot create or circumscribe jurisdiction, and, thus, whether the timing requirement of § 33a-6 (c) is mandatory or directory and whether the motion to modify protective supervision was timely filed are irrelevant to the question of whether the trial court had subject matter jurisdiction to sustain the order of temporary custody; moreover, on the basis of the plain language of the relevant statute (§ 46b-129 [b]), which provides that a motion for an order of temporary custody may be granted subsequent to the filing of a neglect petition, as had occurred in the present case, the court had jurisdiction to enter an ex parte order of temporary custody, as the neglect petition was pending when the order of temporary custody was signed, and the fact that a new petition was not filed with the motion for order of temporary custody was irrelevant, and although § 46b-129 is silent as to whether an order of temporary custody modifies an order of protective supervision, given the purposes underlying § 46b-129 and the clear language of the statute (§ 46b-121 [b] [1]) that gives the petitioner authority to enter orders regarding the protection and proper care of a child, an order of temporary custody issued pursuant to § 46b-129 (b) necessarily suspends or interrupts a period of protective supervision, such that previously ordered protective supervision cannot expire and terminate the underlying neglect petition while the order of temporary custody is in place; accordingly, when the order of temporary custody was granted, it essentially modified the existing period of protective supervision by suspending it, and the order of temporary custody, which suspended the order of protective supervision, was ongoing at the time the motion to modify was filed, and, therefore, the court had subject matter jurisdiction over the order of temporary custody when the petitioner subsequently filed the motion to modify the disposition.

2. The respondent father could not prevail on his claim that the court's denial of his motion to dismiss violated his rights to substantive and procedural due process, which was based on his unpreserved claims that the court's interpretation of the applicable rule of practice (§ 33a-6 [c]) as directory rather than mandatory created jurisdiction, thereby leaving A in the petitioner's care in violation of his right to family integrity, and deprived him of timely notice, as he failed to demonstrate the existence of a constitutional violation pursuant to *State* v. *Golding* (213 Conn. 233): because the trial court, pursuant to statute (§ 46b-129 [b]), had ongoing jurisdiction to rule on the order of temporary custody even though neither a new neglect petition nor a motion to modify had been filed by December 6, 2018, and because Practice Book § 33a-6 (c) could not confer or circumscribe the court's jurisdiction, the father's substantive due process rights were not violated; moreover, the court did not deprive the father of his right to family integrity and timely notice because although he has a vital interest in directing the care and

custody of his biological child, the court's decision to allow the petitioner to file a motion to modify one day late did not deprive the father of procedural due process or create a substantial risk of erroneous deprivation of the private interest of the father, who had notice of the ex parte order of temporary custody in advance of the preliminary hearing, was represented by counsel and had an opportunity to be heard and to contest fully the order of temporary custody and motion to modify before the court sustained the order of temporary custody and modified disposition to commitment.

Argued May 29—officially released July 18, 2019**

Procedural History

Petition to adjudicate the respondents' minor child neglected, brought to the Superior Court in the judicial district of Middletown, Juvenile Matters, where the court, *Woods*, *J.*, adjudicated the child neglected and ordered protective supervision; thereafter, the court, *Sanchez-Figueroa*, *J.*, issued ex parte orders granting temporary custody of the child to the petitioner; subsequently, the petitioner filed a motion to open and modify the disposition; thereafter, the court, *Sanchez-Figueroa*, *J.*, sustained the orders of temporary custody and denied the respondent father's motion to dismiss, and the respondent father appealed to this court. *Affirmed.*

Karen Oliver Damboise, for the appellant (respondent father).

Carolyn A. Signorelli, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Christopher DeMatteo, for the minor child.

Opinion

BRIGHT, J. The respondent father, Luis K.,[1] appeals from the judgment of the trial court denying his motion

** July 18, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The father is referred to herein as the respondent. The mother, Kali D., although also a respondent in the underlying proceedings, did not appeal, and for convenience is referred to herein as the mother.

to dismiss an order of temporary custody and modifying the dispositive order from protective supervision with the mother to commitment to the custody of the petitioner, the Commissioner of Children and Families. The respondent claims that (1) the court improperly denied his motion to dismiss the order of temporary custody for lack of subject matter jurisdiction, and (2) the court's denial of his motion to dismiss violated his right to due process under the fourteenth amendment to the United States constitution. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant. On November 29, 2017, the petitioner filed a neglect petition on behalf of the infant minor child. An addendum to the petition stated that the mother had used poor judgment by leaving the child alone in a car with the respondent, who had physically abused the child in October, 2017, despite the "clear recommendation" of the Department of Children and Families (department) that the respondent be supervised at all times when he was with the child. The child was adjudicated neglected on March 6, 2018. The court, *Woods*, *J.*, ordered placement of the child with the mother with six months of protective supervision until September 6, 2018. Specific steps for the respondent and the mother were ordered. On April 10, 2018, the respondent was convicted of risk of injury to a child and assault in the third degree arising out of his physical abuse of the child in October, 2017. At the respondent's sentencing, the court issued a standing criminal protective order prohibiting the respondent from having any contact with the child until January 1, 2083. On August 2, 2018, the court, *Sanchez-Figueroa*, *J.*, granted the petitioner's motion to extend protective supervision of the child in the mother's custody until December 6, 2018. Following an in-court review on November 1, 2018, the court ordered that full custody was vested

with the mother and confirmed that the period of protective supervision would expire on December 6, 2018.

On November 26, 2018, the department received a new referral alleging that the mother was engaging in substance abuse and was allowing the respondent access to the child. After an investigation, the petitioner, pursuant to General Statutes § 17a-101g, placed a ninety-six hour hold on the child and removed him from the mother's custody. On November 29, 2018, the petitioner filed a motion for an order of temporary custody, which was granted ex parte that same day.[2] A preliminary hearing was scheduled for December 7, 2018. In light of the order of temporary custody, the petitioner, pursuant to Practice Book § 33a-6 (c),[3] should have filed a motion to modify protective supervision at least one business day prior to the preliminary hearing. The petitioner, however, did not file a motion

[2] The court also ordered specific steps, which required, inter alia, that the mother comply with the lifetime criminal protective order as it pertains to the respondent and the child.

[3] Practice Book § 33a-6 provides in relevant part: "(a) If the judicial authority finds, based upon the specific allegations of the petition and other verified affirmations of fact provided by the applicant, that there is reasonable cause to believe that: (1) the child or youth is suffering from serious physical illness or serious physical injury or is in immediate physical danger from his or her surroundings and (2) that as a result of said conditions, the child's or youth's safety is endangered and immediate removal from such surroundings is necessary to ensure the child's or youth's safety, the judicial authority shall, upon proper application at the time of filing of the petition or at any time subsequent thereto, either (A) issue an order to the respondents or other persons having responsibility for the care of the child or youth to appear at such time as the judicial authority may designate to determine whether the judicial authority should vest in some suitable agency or person the child's or youth's temporary care and custody pending disposition of the petition, or (B) issue an order ex parte vesting in some suitable agency or person the child's or youth's temporary care and custody.

"(b) A preliminary hearing on any ex parte custody order or order to appear issued by the judicial authority shall be held as soon as practicable but not later than ten days after the issuance of such order.

"(c) If the application is filed subsequent to the filing of the petition, a motion to amend the petition or to modify protective supervision shall be filed no later than the next business date before such preliminary hearing."

to open and modify the dispositional order of protective supervision to commitment until the morning of the hearing on December 7, 2018.

At the December 7, 2018 preliminary hearing, the respondent argued that protective supervision had expired on December 6, 2018, the motion to modify was filed one day late according to Practice Book § 33a-6 (c), and that "as of today, there is no underlying neglect petition that accompanies this order . . . of temporary custody . . . . Therefore, we would argue that the court does not have jurisdiction, as there is no underlying neglect petition and the department did not file any such motion to modify protective supervision, pursuant to this Practice Book section within the time period specified in that Practice Book section."

The court sustained the order of temporary custody without prejudice until further order of the court. The court allowed the respondent, who was represented by counsel, time to brief his jurisdictional argument. The respondent filed a motion to dismiss on December 21, 2018. Following a hearing, the court denied the motion to dismiss on January 17, 2019, reasoning that Practice Book § 33-6a (c) is directory and that the court had jurisdiction to act on the motion for an order of temporary custody. The court stated that the fact that the motion for an order of temporary custody was granted on November 29, 2018, further solidified the court's subject matter jurisdiction because the order of temporary custody was filed and signed while the existing neglect petition was still active, and the motion for an order of temporary custody served as a "tacit request to modify the disposition of the protective supervision." After a contested hearing, the court, on February 19, 2019, sustained the order of temporary custody and committed the child to the care and custody of the petitioner. The court found that the child would be in immediate physical danger from his surroundings if he

were returned to the care and custody of the mother or the respondent. The court noted that the respondent could not have custody of the child due to his incarceration, and that the mother had not reached a level of understanding to make sure the child was kept safe and away from the respondent when he is released from incarceration. This appeal followed.

I

The respondent claims that the court improperly denied his motion to dismiss. He contends that the court's subject matter jurisdiction ended when protective supervision expired on December 6, 2018, and that the only mechanism to continue the court's jurisdiction was for the petitioner to file a timely motion to modify. He argues that there was no pending controversy because the petitioner's motion to modify was filed untimely on the day of the preliminary hearing in contravention of what the respondent argues is a mandatory requirement of Practice Book § 33a-6 (c) to file such a motion one business day before the preliminary hearing.[4] We do not agree.

"[I]t is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . When reviewing an issue of subject matter jurisdiction on appeal, [w]e have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented

[4] The attorney for the minor child argued in his appellate brief that the court improperly denied the respondent's motion to dismiss because the expiration of protective supervision deprived the court of subject matter jurisdiction, and the ex parte order of temporary custody did not interrupt or toll the period of protective supervision. The attorney for the minor child adopted the brief of the petitioner as to the respondent's constitutional claim, which is addressed in part II of this opinion.

by the action before it . . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Citation omitted; internal quotation marks omitted.) *Keller* v. *Beckenstein*, 305 Conn. 523, 531–32, 46 A.3d 102 (2012).

The respondent's claim is premised, in part, on his argument that Practice Book § 33a-6 (c) acts as a limit on the court's subject matter jurisdiction. In particular, he argues that "[b]y [the petitioner] failing to file the motion [to modify protective supervision] within the mandatory time frame prescribed by . . . [§ 33a-6 (c)], the court lacked jurisdiction to continue to preside over the matter." The respondent's reliance on a Superior Court rule of practice is misplaced. The law is clear that rules of practice adopted by our courts do not and cannot create or circumscribe jurisdiction. General Statutes § 51-14 (a) explicitly provides that the rules adopted by the justices of the Supreme Court, the judges of the Appellate Court and the judges of the Superior Court "shall not abridge, enlarge or modify any substantive right or the jurisdiction of any of the courts." See also *State* v. *Reid*, 277 Conn. 764, 776 n.14, 894 A.2d 963 (2006); *State* v. *Carey*, 222 Conn. 299, 307, 610 A.2d 1147 (1992). Consequently, whether the timing requirement of § 33a-6 (c) is mandatory or directory and whether the motion to modify protective supervision was timely filed are irrelevant to the question of whether the court had subject matter jurisdiction to sustain the order of temporary custody.

The real crux of the respondent's argument is that because the court-ordered period of protective supervision ended on December 6, 2018, there was no longer a neglect petition pending in the court on December 7,

2018, when the court held its preliminary hearing on the order of temporary custody. According to the respondent, because the case involving the child ended on December 6, 2018, and no new neglect petition had been filed on behalf of the child, there was no statutory basis for the court to proceed with the hearing.

The petitioner argues that the respondent's claim is legally incorrect in that General Statutes § 46b-129 (b)[5] specifically provides that a motion for an order of temporary custody may be granted subsequent to a neglect petition, which is what occurred in this case. According to the petitioner, once the motion was granted, the court maintained continuing jurisdiction to conduct further hearings on it. The petitioner further argued in opposition to the respondent's motion to dismiss in the trial court that "an [order of temporary custody], by its nature, modifies a custodial order. It removes custody from the parent and vests it in the [petitioner] in this case. Therefore, the . . . custody of the child that was vested in the parent under protective supervision, has been modified. That protective supervision order itself

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

has been modified. The custodial portion of that has been changed to vest that custody in the petitioner." The petitioner also relies on General Statutes § 46b-121 (b) (1), which provides, in relevant part, that "[i]n juvenile matters, the Superior Court shall have authority to make and enforce such orders directed to parents . . . as the court deems necessary or appropriate to secure the welfare, protection, proper care . . . of a child subject to the court's jurisdiction or otherwise committed to or in the custody of the [petitioner]." According to the petitioner, this statute gave the court authority to enter orders regarding the child, who was, at the time, in the petitioner's custody. We agree with the petitioner.

On the basis of the plain language of § 46b-129 (b), there is no question that the court had jurisdiction to enter the November 29, 2018 ex parte order of temporary custody and schedule a hearing on the order. Section 46b-129 (b) provides that an order of temporary custody may arise "from the specific allegations of the petition and other verified affirmations of fact accompanying the petition and application, or *subsequent thereto* . . . ." (Emphasis added.) The language "or subsequent thereto" clearly indicates that the legislature envisioned situations wherein a child's circumstances may change subsequent to the filing of a neglect petition, thereby requiring the filing of a motion for an order of temporary custody. Therefore, the court may grant a motion for an order of temporary custody subsequent to the filing of a neglect petition. In the present case, the neglect petition was still pending when the order of temporary custody was signed on November 29, 2018, and the fact that a new neglect petition was not filed with the motion for an order of temporary custody is not relevant. In fact, before the trial court, the respondent conceded that, at the time it was issued, the November 29, 2018 order of temporary custody "was a valid order."

The key issue then becomes whether the order of protective supervision expired on December 6, 2018, thereby ending the pending neglect petition, or whether, in essence, it was modified by the trial court's issuance of the ex parte order of temporary custody on November 29, 2018. We note that § 46b-129 is silent as to whether an order of temporary custody in any way modifies an order of protective supervision. Nevertheless, logic, the purposes underlying § 46b-129, and the clear language of § 46b-121 (b) (1) lead us to conclude that an order of temporary custody issued pursuant to § 46b-129 (b) necessarily suspends or interrupts a period of protective supervision, such that a previously ordered period of protective supervision cannot expire and terminate the underlying neglect petition while the order of temporary custody is in place.

First, logically, protective supervision ceases to exist when an order of temporary custody issues. Protective supervision involves the petitioner supervising someone else's, typically a parent's, custody of the child. In this case, the mother's custody of the child was the subject of the petitioner's supervision. Once the petitioner took custody of the child pursuant to the ninety-six hour hold, the petitioner was no longer supervising the mother's custody, but had assumed temporary custody of the child pending further order of the court. Consequently, as a matter of fact, at that point in time, the disposition of protective supervision had been modified and interrupted.

Second, the respondent's position would lead to bizarre results at odds with protecting a child suffering from serious physical illness or serious physical injury or who is in immediate physical danger, which is the purpose of orders issued pursuant to § 46b-129 (b). For example, under the respondent's analysis, if the ninety-six hour hold had been invoked by the petitioner at 11:59 p.m. on December 6, 2018, the petitioner would

have been required to return the child to the mother at 12:01 a.m. on December 7, 2018, because the period of protective supervision would have ended. Thus, the petitioner would have been required to return the child to the same unsafe circumstance she had removed the child from just minutes before. We will not conclude that the legislature intended such an absurd result. See, e.g., *In re Corey E.*, 40 Conn. App. 366, 373–74, 671 A.2d 396 (1996) (rejecting interpretation of statute that would lead to "bizarre" result of forcing department to return child to parent whose neglect caused commitment); *In re Adrien C.*, 9 Conn. App. 506, 512, 519 A.2d 1241 (rejecting interpretation of statute that would lead to return of child to "what could be a hostile, unsafe and dangerous environment"), cert. denied, 203 Conn. 802, 522 A.2d 292 (1987).

In reaching this conclusion we find instructive the Superior Court case of *In the Interests of Felicia B.*, Superior Court, judicial district of Middletown, Docket Nos. FO4-CP-000291, FO4-CP-000292, FO4-CP-003125, FO4-CP-003126, FO4-CP-003373 (April 21, 1999) (Quinn, J.), which addressed the interplay of orders of protective supervision and orders of temporary custody on facts similar to those in the present case. In *Felicia B.*, five children were adjudicated neglected and, on August 5, 1998, placed with their mother under protective supervision, which was set to expire on March 5, 1999. Ex parte orders of temporary custody were then issued on September 18, 1998, and a hearing was scheduled for September 24, 1998. The hearing did not go forward on that date and eventually was scheduled to proceed on March 18, 1999. At that time, the respondent moved to dismiss the orders of temporary custody because the period of protective supervision ended on March 5, 1999, thereby depriving the court of subject matter jurisdiction. The court rejected the respondent's argument. It first noted that "[c]ustody of the [children] with [the

petitioner] is inherently contradictory to orders leaving the children with their mother under protective supervision. The [orders of temporary custody] must therefore either have terminated or suspended the earlier orders of protective supervision." Using tenets of statutory construction, the court interpreted the conflicting orders harmoniously and concluded that the orders of temporary custody suspended the orders of protective supervision. The court determined that "the date provided for the expiration of the orders of protective supervision, March 5, 1999, was merely a courtesy extended by the court to compute the six month period and not the controlling jurisdictional date." The court denied the respondent's motion to dismiss and concluded that the orders of temporary custody suspended the period of protective supervision such that there were still four and one half months remaining on the protective supervision orders, meaning that the court continued to have subject matter jurisdiction.

We agree with the trial court's approach in *Felicia B.*, to harmonize the conflicting orders. In the present case, the order of temporary custody, which placed the child temporarily in the custody of the petitioner, and the order of protective supervision, which placed the child in the custody of the mother, cannot coexist. Realistically, the petitioner's ninety-six hour hold on the child followed by the court's order of temporary custody, both of which occurred prior to the expiration of protective supervision, had the effect of removing the child from the care and custody of the mother. Accordingly, when the order of temporary custody was granted, it essentially modified the existing period of protective supervision by suspending it. The order of temporary custody, which suspended the order of protective supervision, was ongoing at the time the motion to modify was filed. Therefore, the court had subject matter jurisdiction over the order of temporary custody when the petitioner subsequently filed the motion to modify the disposition.

We further note that § 46b-121 (b) (1) provides in relevant part: "In juvenile matters, the Superior Court shall have authority to make and enforce such orders directed to parents . . . as the court deems necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child subject to the court's jurisdiction or otherwise committed to or in the custody of the [petitioner]. . . ." Even if we were to conclude, which we do not, that the protective supervision expired on December 6, 2018, and the underlying neglect petition had been terminated, the trial court nonetheless had the authority to issue an order of temporary custody pursuant to § 46b-121 (b) (1) to protect the child who was "otherwise . . . in the custody of the [petitioner]."

On the basis of the foregoing, we conclude that the trial court had jurisdiction over the order of temporary custody. Accordingly, the court properly denied the respondent's motion to dismiss.

II

The respondent next claims that his constitutional rights to (1) substantive and (2) procedural due process were violated by the court's denial of his motion to dismiss. We are not persuaded.

A

The respondent argues that the court's interpretation of Practice Book § 33a-6 (c) as being directory improperly created jurisdiction thereby leaving the minor child in the petitioner's care in violation of his constitutional right to family integrity.[6] We disagree.

The respondent concedes that this claim is unpreserved and seeks review under *State* v. *Golding*, 213

[6] The respondent's purported concern about his right to family integrity is somewhat curious given that he is prohibited from having any contact with the child until January 1, 2083.

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). Under *Golding*, "a [respondent] 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 [respondent] of a fair trial; and (4) if subject to harmless error analysis, the [petitioner] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the [respondent's] claim will fail." (Emphasis omitted; footnote omitted.) Id.; see *In re Yasiel R.*, supra, 781, (modifying third prong of *Golding* by eliminating word "clearly").

The record is adequate for review, and the claim, which involves the custody and care of the respondent's biological child, is of constitutional magnitude. See *In re Zoey H.*, 183 Conn. App. 327, 348, 192 A.3d 522 ("[p]arents have a substantive right under the [d]ue [p]rocess [c]lause to remain together [with their children] without the coercive interference of the awesome power of the state" [internal quotation marks omitted]), cert. denied, 330 Conn. 906, 192 A.3d 425 (2018). Therefore, the claim is reviewable.

Regarding the third prong of *Golding*, we conclude, however, that the alleged constitutional violation does not exist. Interpreting Practice Book § 33a-6 (c) as directory does not expand the trial court's jurisdiction because, as we stated in part I of this opinion, the rules of practice cannot confer or circumscribe the court's jurisdiction. Under § 46b-129 (b), the trial court had ongoing jurisdiction to rule on the order of temporary custody even though neither a new neglect petition nor a motion to modify had been filed by December 6, 2018. Accordingly, the respondent's substantive due process rights were not violated.

B

The respondent next argues that by failing to interpret Practice Book § 33a-6 (c) as being mandatory, the court deprived him of his right to family integrity and timely notice. The respondent's claim meets the first two prongs of *Golding* for the same reasons as stated in part II A of this opinion and, therefore, is reviewable. The respondent's claim fails to satisfy the third prong of *Golding* because the alleged constitutional violation does not exist.

"The United States Supreme Court established a three-pronged balancing test in *Mathews* [v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)] to determine what safeguards the federal constitution requires to satisfy procedural due process. Courts apply that balancing test when the state seeks to terminate parental rights. . . . The three factors to be considered are (1) the private interest that will be affected by the state action, (2) the risk of an erroneous deprivation of such interest, given the existing procedures, and the value of any additional or alternate procedural safeguards, and (3) the government's interest, including the fiscal and administrative burdens attendant to increased or substitute procedural requirements. [Id., 335.]" (Citations omitted.) *In Re Shaquanna M.*, 61 Conn. App. 592, 606, 767 A.2d 155 (2001).

Under the first factor, the respondent has a vital interest in directing the care and custody of his biological child. See *In re Baby Girl B.*, 224 Conn. 263, 279, 618 A.2d 1 (1992) ("the interest of parents in their children is a fundamental constitutional right that undeniably warrants deference and, absent a powerful countervailing interest, protection"). We are not persuaded, under the second factor, that the court's exercise of its discretion to permit the department to file a motion to modify one day late created a substantial risk of an erroneous deprivation of the respondent's private interest. The

respondent had notice of the ex parte order of temporary custody in advance of the preliminary hearing. He was represented by counsel and had an opportunity to be heard at the preliminary hearing. Furthermore, the respondent had an opportunity to contest fully the order of temporary custody and the motion to modify the disposition before the court sustained the order of temporary custody and modified disposition to commitment on February 19, 2019. Regarding the third factor, "the express public policy of this state [is] to provide all of its children a safe, stable nurturing environment." *State* v. *Anonymous*, 179 Conn. 155, 171, 425 A.2d 939 (1979).

In balancing the factors, we conclude that the court's decision to accept the petitioner's motion to modify, which had been filed one day later than the time set forth in our rules of practice, when the respondent had notice of the order of temporary custody over which the court had jurisdiction, and when the respondent was afforded an opportunity to contest fully the order of temporary custody, did not deprive him of his right to procedural due process. Accordingly, we conclude that the respondent has not demonstrated the existence of a constitutional violation.

The judgment is affirmed.

In this opinion the other judges concurred.