STATE OF CONNECTICUT *v.* ALANNA R. CAREY
(AC 40868)

Alvord, Sheldon and Eveleigh, Js.

Syllabus

Convicted, following a jury trial, of the crime of murder in connection with the shooting death of her former boyfriend, the defendant appealed. On appeal, she claimed, inter alia, that the trial court erred in admitting the testimony of M, a friend of the victim, to explain the victim's fear of the defendant and to rebut the defendant's claim of self-defense. Specifically, the defendant claimed that M's testimony was inadmissible hearsay and that she was prejudiced by the admission of the statements. *Held*:

1. The defendant's claim that the trial court erred in admitting the testimony of M was unavailing; even if the trial court erred in admitting M's testimony under the state of mind or residual exceptions to the hearsay rule, any error was harmless in light of the overwhelming evidence of the defendant's consciousness of guilt, as the defendant, after shooting the victim in a motel room, contacted C, her sister, instead of calling 911, the defendant subsequently left the motel with C and ignored her family members' repeated entreaties that she return to the scene of the shooting and call 911, the defendant returned to the motel only after being physically pushed out of C's car, the defendant finally called 911

after approximately three hours had passed from the time of the shooting, and she misled the 911 operator when she reported the shooting.

2. The defendant could not prevail on her claim that the state engaged in prosecutorial impropriety that deprived her of a fair trial when, during direct examination of the defendant, the prosecutor stated that defense counsel was cheating, as there was no ascertainable evidence in the record that the state engaged in prosecutorial impropriety during the defendant's direct examination; there was no evidence that the prosecutor's comment was considered by the jury, as the prosecutor's comment was not addressed to the jury and although while defense counsel speculated that the jury might have heard the prosecutor, there was no evidence that anyone, other than defense counsel, heard the comment.

3. The defendant's claim that he was deprived of a fair trial as a result of prosecutorial improprieties during closing argument was unavailing: the prosecutor did not improperly impugned the credibility of defense counsel, as the prosecutor's challenged comment responded directly to the statements of defense counsel regarding the credibility of a witness and properly stated that counsel's opinion was not evidence that could be considered by the jury, the prosecutor did not direct the jury to disregard the trial court's charge as to the affirmative defense of extreme emotional disturbance, the transcript having reflected that the prosecutor merely pointed out that there was not a factual basis for the jury to find that the defendant proved that affirmative defense, and the prosecutor did not improperly argue facts not in evidence when he said that a witness impermissibly spoke with the defendant during trial and that the defendant did not take her car to the motel because she was trying to avoid being caught on surveillance cameras, or improperly express his personal opinion regarding the defendant's credibility when he stated that the defendant's credibility was nonexistent, as the challenged comments asked the jury to draw reasonable inferences from facts that were properly in evidence and the reasonable inferences to be drawn from them.

4. The trial court did not abuse its discretion by giving the jury a falsus in uno instruction, which instructed the jury that if it concluded that a witness had deliberately testified falsely in some respect, it should carefully consider whether to rely on any of that person's testimony, as the instruction was within the court's discretion and the defendant had failed to show that it misled the jury; the falsus in uno instruction provided by the court correctly stated the law and merely advised the members of the jury as to their task of weighing witness credibility, and although the defendant relied on decisions from other jurisdictions that advise against the use of falsus in uno instructions, those cases are merely potentially persuasive authority, our appellate courts have recognized the maxim falsus in uno, falsus in omnibus as a permissive instruction, and the defendant did not demonstrate how the instruction misled the jury.

Argued October 18, 2018—officially released January 29, 2019

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New Britain, where the court, *Keegan*, *J.*, denied in part the defendant's motion to preclude certain evidence; thereafter, the matter was tried to the jury before *Keegan*, *J.*; subsequently, the court denied the defendant's motion for a mistrial; verdict and judgment of guilty; thereafter, the court denied the defendant's motion for a judgment of acquittal and the defendant's amended motion for a new trial, and the defendant appealed. *Affirmed.*

Jennifer B. Smith, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, *John H. Malone*, former supervisory assistant state's attorney, and *David Clifton*, assistant state's attorney, for the appellee (state).

Opinion

EVELEIGH, J. The defendant, Alanna R. Carey, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a (a).[1] On appeal, the defendant claims that (1) the trial court improperly admitted hearsay testimony, (2) the state engaged in prosecutorial impropriety that deprived her of a fair trial, and (3) the trial court's instruction on witness credibility improperly misled the

[1] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person . . . except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be . . . ."

jury. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The defendant and the victim, Edward Landry, began dating in May, 1999. Between 1999 and the victim's death in January, 2012, the defendant and the victim had a tumultuous relationship. In 2008, the victim moved into the defendant's house in Glastonbury, where the two lived together until 2011. Many of those acquainted with the defendant and the victim, including their relatives and neighbors, described their relationship as volatile and testified that the two often argued and fought.

On December 12, 2011, the defendant's twin sister, Johanna Carey-Lang, learned that the victim was having an affair with Jodi D'Onofrio when she walked into the defendant's home and found the victim and D'Onofrio together. That same day, the victim called the defendant and informed her of his infidelity. Nevertheless, later in the day, Carey-Lang saw the defendant and the victim "cuddling" on a couch in the defendant's house.

On December 14, 2011, the victim moved out of the defendant's house and moved to the Carrier Motor Lodge in Newington (motel). On that day, the victim removed his belongings from the defendant's house and left his keys in the house, which, according to D'Onofrio, was an attempt by the victim to communicate to the defendant that their relationship was over. D'Onofrio also testified that the victim told her that he did not want to be in a relationship with the defendant any longer and that he hoped the breakup would be amicable.

After the victim moved to the motel, he and the defendant remained in contact. Between December 15, 2011 and January 2, 2012, the two exchanged over ninety-five phone calls and twenty-five text messages. Additionally,

the defendant and the victim saw each other in person several times during that period.

On December 18, 2011, the defendant checked into the motel and rented a room close to the victim's. The defendant called Carey-Lang from the motel room and asked her to set up a three way phone call with the victim. D'Onofrio was with the victim when he received the defendant's call. According to D'Onofrio, the defendant asked the victim whether he still loved her, to which the victim responded that he loved D'Onofrio. The victim subsequently informed his friend, Jessica Montano, of his interaction with the defendant on December 18, 2011. According to Montano, the victim recounted that the defendant begged him not to end their relationship and that, as a result of this interaction, the victim feared the defendant.

On January 2, 2012, the defendant and Carey-Lang went to the shooting range at Hoffman's Gun Center (gun center) in Newington. Leon Brazalovich, Carey-Lang's boyfriend, accompanied the sisters to the gun center, but did not shoot while he was there. The defendant and Carey-Lang, both of whom had gun permits, signed in at the front desk and proceeded to shoot at the range for approximately thirty minutes to an hour. The defendant used her gun, a pink .380 Ruger light pistol, to shoot. After the defendant and Carey-Lang left the range, the defendant asked Brazalovich to load ammunition she had just purchased at the gun center into two magazines.

At 1:33 p.m., while the defendant was at the shooting range, she received a call from the victim. After speaking to the victim, the defendant told Carey-Lang that she planned to bring him lunch at the motel. At around 2 p.m., the defendant drove Carey-Lang and Brazalovich to Boston Market, where the defendant ordered lunch. The defendant then drove to the motel, where she got

out of the car and went to the victim's room, carrying the food and her purse, which contained her gun.

About forty-five minutes after the defendant arrived at the motel, Carey-Lang sent the defendant a text message, informing her that she and Brazalovich had finished lunch. The defendant responded that she would like to spend another hour at the motel, and Carey-Lang told her to call when she was ready to be picked up.

Three hours later, at approximately 4:20 p.m., the defendant sent Carey-Lang a text message, asking: "When will you be here." Approximately one minute later, the defendant again texted Carey-Lang, asking: "When can you pick me up? After dance?" Between 5:35 and 6:51 p.m., the following text message exchange took place:

"[The Defendant]: How long before you get here

"[Carey-Lang]: I [don't] know. Why

"[The Defendant]: Because he is yelling and threatening me.

"[Carey-Lang]: Why

"[The Defendant]: He hate[s] me

"[Carey-Lang]: What happened

"[The Defendant]: How long before you get here

"[Carey-Lang]: [I'm] at [Dani's] g class. [Can't] leave

"[Carey-Lang]: I [don't] know

"[The Defendant]: How long?

"[The Defendant]: ???

"[The Defendant]: Hello. . . .

"[Carey-Lang]: Just leaving

"[The Defendant]: How long"

Between 7:02 and 7:04 p.m., Carey-Lang sent the defendant text messages instructing the defendant to meet her at an Aldi market near the motel in five minutes. Approximately eight minutes later, Carey-Lang sent the defendant a text message stating that she was at Aldi. About eighteen minutes after that, at approximately 7:30 p.m., the defendant called Carey-Lang and asked her to come to the victim's room. Sometime during the period in which the defendant and Carey-Lang discussed meeting at Aldi, the defendant shot and killed the victim.

When Carey-Lang arrived at the motel, the defendant invited her into the room and informed her that "[the victim] came after [the defendant] with a knife, and that he put a hit on [their] family, and he was going to take care of [the defendant] himself." The victim's body was on the floor when Carey-Lang entered the room, but she did not recall seeing a knife near the victim. She checked the victim's pulse and could not detect one. Carey-Lang then instructed the defendant to call 911, but the defendant refused to do so.

At approximately 8 p.m., the defendant and Carey-Lang left the motel room. The defendant took the shell casings, which she placed in her pocket, with her purse, her cell phone, and the bag of food from Boston Market. The two drove from the motel directly to the home of their brother, Joseph Carey, in Wethersfield.

During the drive to Wethersfield, Carey-Lang continued to encourage the defendant to call 911. Once they arrived in Wethersfield, Carey-Lang and Joseph Carey urged the defendant to return to the motel and call 911.

Eventually, the defendant agreed, and Carey-Lang drove her back to the motel. Once they reached the motel, however, the defendant changed her mind and refused to go back into the victim's room. Carey-Lang drove to a nearby parking lot and called Joseph Carey

to ask if he would join them. When Joseph Carey arrived at the parking lot, Carey-Lang called their father, who also encouraged the defendant to call 911. After Joseph Carey spoke with the defendant, Carey-Lang drove the defendant back to the motel, where she "sort of tried to push [the defendant] out of the car" and drove away.

After being dropped off at the motel, the defendant returned to the victim's room, where she called Carey-Lang three more times, once at 9:35 p.m. and twice at 9:50 p.m. During the second 9:50 p.m. call, the defendant asked Carey-Lang to come back to the motel and pick her up, but Carey-Lang refused to do so.

Finally, at approximately 10 p.m., almost three hours after the defendant shot the victim, the defendant called 911. The defendant told the 911 operator: "My boyfriend and I were, you know, just talking and all of a sudden he got real angry, he came at me with a knife, and I was scared. I shot him." The operator asked whether the victim was moving, and the defendant responded, "I don't think so." The defendant also told the operator that she "didn't even know if [she] hit him" and, when asked whether she was injured, the defendant said: "I don't know. I don't think so."

The police arrived at the motel at approximately 10:13 p.m. and instructed the defendant to exit the victim's room. Once the defendant had exited the room, the police placed her in the back of a police vehicle. The police then entered the room, where they found the victim's body on the floor between two beds. Matthew D'Esposito, an officer with the Newington Police Department, "noticed that [the victim] was not breathing, [and that] he had no carotid pulse." D'Esposito testified that "[t]here was some slight rigor mortis in [the victim's] pinky fingers . . . ." After efforts to resuscitate the victim at the scene failed, he was transported to Hartford Hospital, where he was pronounced dead on arrival.

When the police searched the room, they found, on the floor, the defendant's gun and three shell casings that were subsequently determined to have been fired from that gun. They also found the defendant's purse, which contained a gun holster and case, as well as a magazine containing six .380 caliber bullets. The defendant's purse also contained a pair of latex gloves. The defendant's DNA was found on the exterior of the gloves.

After the defendant was placed in the back of the police vehicle, she was transported to the Hospital of Central Connecticut (hospital), in New Britain, because she was verbally unresponsive. When the defendant arrived at the hospital around 10:45 p.m., she was still unresponsive. From 12:30 a.m. to 7:30 a.m., on January 3, 2012, the defendant failed to respond to painful stimuli. Finally, around 7:30 a.m., she was revived by a sternal rub. Hamid Ehsani, an emergency physician at the hospital, diagnosed the defendant with conversion disorder, which is "a change in the neurologic status of a patient which cannot be explained easily by any obvious medical condition." Ehsani was unable to rule out a diagnosis of malingering, which, in Ehsani's words, "is when one acts in a certain way . . . to suit [his or her] purposes at the time." At approximately 8 a.m., on January 3, 2012, the defendant was discharged into police custody.

The jurors heard evidence from various witnesses at trial. Jason Daniel Elkins, who was in the room next to the victim's on the night of the shooting, testified that he heard three gunshots between 7:16 and 7:38 p.m., but that he did not hear any noises from the room prior to the gunshots.

Ira Kanfer, a medical examiner employed by the Office of the Chief Medical Examiner for the state of Connecticut, testified that the victim had been shot

three times—once in his left shoulder, once in his lower left abdomen and once in the left side of his chest. Three bullets matching the caliber of the defendant's gun were found inside the victim's body. Kanfer estimated that the victim's death was instantaneous or would have occurred within thirty to forty-five seconds of the time of the shooting.

John Brunetti, a fingerprint examiner employed by the state forensic lab, testified that he was unable to find latent fingerprints on any of the six knives belonging to the victim that were found inside the victim's room. Fung Kwok, a forensic examiner employed by the state forensic lab, testified that gunshot residue was found on both the defendant's and the victim's hands.[2]

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

I

The defendant first argues that the trial court erred in admitting the testimony of Mark Manganello, a friend of the victim, to explain the victim's fear of the defendant and to rebut the defendant's claim of self-defense. Specifically, the defendant argues that Manganello's testimony was inadmissible hearsay and that she was prejudiced by the admission of the statements. The state argues that the court did not abuse its discretion in admitting Manganello's testimony under the residual hearsay exception. The state further argues that, even if the trial court erred in admitting Manganello's testimony, the error was harmless. We agree with the state that, even if the trial court erred in admitting Manganello's testimony, any such error was harmless.[3]

[2] Kwok explained that gunshot residue could be transferred by physical contact with someone who had recently shot a gun.

[3] Because we conclude that the admission of the testimony was harmless, we need not address whether the court erred in admitting Manganello's testimony under the state of mind or residual hearsay exceptions.

The following additional facts and procedural history are relevant to the resolution of this claim. Before trial, the defendant filed a motion in limine to preclude Manganello from testifying about conversations he had had with the victim. The defendant argued that the statements were double hearsay and that, even if the defendant's statements to the victim fell within the state of mind exception to the hearsay rule, the second layer of hearsay—the victim's statements to Manganello—did not fall within any recognized hearsay exception. The state objected to the defendant's motion, arguing that the statements were admissible under the state of mind exception to show that the victim feared the defendant.

The court denied the defendant's motion, stating: "The state is offering this evidence as to a prior bad act of the defendant, and [it is] claiming that it is relevant with respect to intent and motive. Testimony of the victim's fear of the defendant is relevant, especially in a case where there is a homicide that involves . . . a domestic situation where there's evidence of a deteriorating relationship. It's also relevant to intent and motive and to rebut a defendant's self-defense claim. Again, this evidence will be subject to a limiting instruction to the jury that [it is] not to consider the evidence as establishing a predisposition on the part of the defendant to commit the crime charged or to demonstrate a criminal propensity but, rather, that it bears on the issue of the defendant's intent and motive in the case."

At trial, Manganello testified that the victim told him that he went to the defendant's house on December 24, 2011, to retrieve some belongings. The victim told Manganello that he thought the defendant was not at home, and that he entered the house by crawling through a window. Once he got inside, the victim encountered the defendant, who pointed a gun at him and told him

that if he ever returned "she would blow his f'ing brains out."

We begin by briefly setting forth the relevant standard of review and legal principles for this claim. "To the extent a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Citations omitted.) *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007).

"[W]hen an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [the improper admission of a witness' testimony] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *LeBlanc*, 148 Conn. App. 503, 508–509, 84 A.3d 1242, cert. denied, 311 Conn. 945, 90 A.3d 975 (2014).

In the present case, even if we assume, without deciding, that the trial court erred in admitting Manganello's

testimony under the state of mind or residual hearsay exceptions, any error was harmless in light of the overwhelming evidence of the defendant's consciousness of guilt. After shooting the victim sometime between 7:16 and 7:38 p.m., the defendant did not call 911. Instead, the defendant called and texted Carey-Lang, asking her to come to the motel. When Carey-Lang came to the room, she encouraged the defendant to call 911, but the defendant refused. Ultimately, the defendant retrieved the shell casings off of the floor and gathered her belongings, including her cell phone, her purse, and the bag of food she had brought, and left the motel with Carey-Lang. After leaving the motel, the defendant continued to refuse to call 911, despite being urged to do so by her brother and her father.

The defendant also ignored her family members' entreaties that she return to the scene of the shooting. In fact, the defendant returned to the motel only after being physically pushed out of Carey-Lang's car. Even after the defendant returned to the motel room, she called Carey-Lang and begged her to return to the motel and pick her up. Then, before the defendant finally called 911 at approximately 10:20 p.m., she staged the scene, putting the shell casings she had earlier picked up back on the floor.

Moreover, the defendant misled the 911 operator when she reported the shooting. Almost three hours had elapsed since the shooting, but the defendant suggested that the shooting had just occurred. Additionally, even though the defendant knew that the victim had died hours earlier, she told the operator: "I don't *think* [he's moving]." (Emphasis added.) In response to the operator's inquiry as to where the victim had been shot, the defendant said: "I didn't even know if I hit him." On the basis of the foregoing, we conclude that any error

in the admission of Manganello's testimony did not substantially affect the verdict and, therefore, was harmless.

II

The defendant next argues that the state engaged in prosecutorial impropriety that deprived her of a fair trial.[4] Specifically, the defendant claims that the state engaged in prosecutorial impropriety when the prosecutor made certain comments during (1) the defendant's direct examination and (2) the prosecutor's closing argument. In response, the state argues that the prosecutor's comments were not improper and contends that, even if they were, they did not deprive the defendant of a fair trial. We conclude that there is no evidence in the record that the state engaged in prosecutorial impropriety.[5]

We begin by setting forth the applicable standard of review and legal principles for claims of prosecutorial impropriety. "In analyzing claims of prosecutorial [impropriety], [the reviewing court] engage[s] in a two step analytical process. The two steps are separate and distinct: (1) whether [an impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of [her] due process right to a fair trial." (Internal quotation marks omitted.) *State* v. *Warholic*, 278 Conn. 354, 361, 897 A.2d 569 (2006). "[W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the

[4] Specifically, the defendant argues that she was denied a fair trial as guaranteed by "the fifth and fourteenth amendments to the [United States] constitution and article first, § 8, of the Connecticut constitution."

[5] Because we conclude that the prosecutor's comments were not improper, we need not address whether they deprived the defendant of a fair trial.

whole trial, the improprieties were so egregious that they amounted to a denial of due process. . . . On the other hand . . . if the defendant raises a claim that the prosecutorial improprieties infringed a specifically enumerated constitutional right, such as the fifth amendment right to remain silent or the sixth amendment right to confront one's accusers, and the defendant meets his burden of establishing the constitutional violation, the burden is then on the state to prove that the impropriety was harmless beyond a reasonable doubt." (Citation omitted.) *State* v. *Payne*, 303 Conn. 538, 562–63, 34 A.3d 370 (2012).

A

First, the defendant argues that the state engaged in prosecutorial impropriety when, during direct examination of the defendant, the prosecutor stated that defense counsel was "cheating." The defendant argues that this comment impugned the credibility and trustworthiness of defense counsel and, therefore, was impermissible. We disagree.

The following additional facts are relevant to this claim. During the defendant's direct examination, the following exchange occurred:

"[Defense Counsel]: Now, do you know how many calls you received from December 14, [2011], from [the victim] up until the point of January 2, [2012]? Do you know the exact number?

"[The Defendant]: That I do not know.

"[Defense Counsel]: Can you put that up, [clerk]? Thank you, [clerk]. Okay, and can we—all right, we'll come back to that in a moment. No problem, [clerk].

"[Defense Counsel]: [W]ould it refresh your recollection to look at the document to refresh you on the number of calls [the victim] made to you and the number

that you made to him during the timeframe of December 14, 2011, to January 2, [2012], would that refresh your memory to look at something?

"[The Defendant]: I'm not sure.

"[Defense Counsel]: Your Honor, the prosecutor just said—

"The Court: Let me just say, what is the question here because I did just hear your client say she's not sure she can—

"[Defense Counsel]: The prosecutor said in front of the jury [that] what I did was cheating just now. I don't know who heard it, and I'm concerned because I'm not cheating."

The court then instructed the jury not to consider the prosecutor's comment.

At the end of the state's rebuttal argument, the defendant moved for a mistrial based on this comment and several additional alleged improprieties committed by the prosecution during closing argument.[6] After hearing arguments on the motion, the court denied the defendant's motion, concluding that "[the prosecutor's conduct did not] rise to the level of error or defect that results in a substantial or irreparable prejudice to the defendant's case."

We reject the defendant's claim because there is no evidence that the prosecutor's comment was considered by the jury. The present case is distinguishable from *State* v. *Payne*, supra, 303 Conn. 564–65, where the prosecutor told the jury: "[Y]ou've heard defense counsel tell you her client was honest. It's your decision and your duty to decide who is being honest. In fact,

[6] The instances of alleged prosecutorial impropriety during closing argument are discussed in detail in subsequent sections of this opinion.

attorneys aren't even ethically allowed to say a particular witness is honest or not. That's for the jury . . . ." (Emphasis omitted; internal quotation marks omitted.) In the present case, the prosecutor's comment was not addressed to the jury, and while defense counsel speculated that the jury might have heard the prosecutor, there is no evidence that anyone, other than defense counsel, heard the comment. In fact, the court reporter did not record the comment. Indeed, the comment might not have been heard by any members of the jury had defense counsel not repeated it by stating, on the record, that the prosecutor had just accused him of cheating. Furthermore, instead of moving for a mistrial when the prosecutor made the comment at issue, the defendant proceeded with trial and did not move for a mistrial until the eve of jury deliberations. We conclude, therefore, that there is no ascertainable evidence in the record that the state engaged in prosecutorial impropriety during the defendant's direct examination. Accordingly, this claim fails.

B

The defendant also claims that the state committed prosecutorial improprieties during closing argument. Specifically, the defendant claims that the prosecutor improperly (1) impugned the integrity of defense counsel, (2) directed jurors to ignore certain jury instructions, (3) argued facts not in evidence on two occasions, and (4) expressed his own opinion regarding the defendant's credibility. We disagree.

At the outset, we set forth the legal principles that guide our review of allegations of prosecutorial impropriety during closing argument. "[O]ur Supreme Court has acknowledged that prosecutorial impropriety of a constitutional magnitude can occur in the course of closing arguments. In determining whether such [impropriety] has occurred, the reviewing court must give due

deference to the fact that [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . While a prosecutor may argue the state's case forcefully, such argument must be fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Consequently, the state must avoid arguments which are calculated to influence the passions or prejudices of the jury, or which would have the effect of diverting the jury's attention from [its] duty to decide the case on the evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Gordon*, 104 Conn. App. 69, 74–75, 931 A.2d 939, cert. denied, 284 Conn. 937, 937 A.2d 695 (2007).

1

First, the defendant claims that the prosecutor improperly told the jury that defense counsel should not have offered his personal opinion about the credibility of a witness. The defendant argues that this comment improperly impugned the credibility of defense counsel. We disagree.

The following additional facts and procedural history are relevant to this claim. During closing argument, defense counsel stated the following with respect to D'Onofrio's testimony: "I don't think, in this trial, [D'Onofrio] was forthcoming on this whole thing where you can trust her . . . ." In response, the prosecutor said the following during closing argument: "Counsel [has] mentioned to you several times that he gave you his opinion, or at least I see it as his opinion, when he said he didn't think that [D'Onofrio] was credible, and he talked about other things that he thought [about] people manipulating people. . . . [O]ur opinion is not in evidence. It's the evidence that counts. I'm not giving

you my opinion. . . . It's not proper. But [defense] counsel did it, and I suggest . . . that when you remember what he said, that you disregard it. It was just his opinion."

"Although . . . only the court has the authority to instruct the jury on the law . . . we recognize that in commenting on facts in evidence and the inferences to be drawn from them, it is common practice for counsel to refer to the law." (Citation omitted.) *State* v. *Gordon*, supra, 104 Conn. App. 75. Additionally, "[w]hen a prosecutor's allegedly improper argument is in direct response to matters raised by defense counsel, the defendant has no grounds for complaint." (Internal quotation marks omitted.) *State* v. *Brown*, 256 Conn. 291, 309, 772 A.2d 1107, cert. denied, 534 U.S. 1068, 122 S. Ct. 670, 151 L. Ed. 2d 584 (2001); see, e.g., id. (concluding that prosecutor's comment that "[the defendant is] able to call [the firefighters] names" was not impermissible because it was in "direct response to the defendant's sarcasm toward one of the firefighters during his cross-examination and to the [fire] department as a whole during his closing argument" [internal quotation marks omitted]).

When the prosecutor commented on the statements made by defense counsel, he stated an established legal principle, namely, that counsel's opinion is not evidence that may be considered by the jury. See, e.g., *State* v. *Stevenson*, 269 Conn. 563, 583, 849 A.2d 626 (2004). The prosecutor's comment was permissible under this court's decision in *Gordon*. Additionally, defense counsel raised the matter when he opined on D'Onofrio's credibility. The prosecutor's comment in the present case, like that of the prosecutor in *Brown*, responded directly to the statements of defense counsel. We conclude, therefore, that the prosecutor's comment did not constitute prosecutorial impropriety.

Second, the defendant claims that the prosecutor improperly "directed the jury not to follow jury instructions." Specifically, the defendant argues that the prosecutor told the jury that it could dismiss an instruction regarding the affirmative defense of extreme emotional disturbance. We disagree.

The following additional facts and procedural history are relevant to this claim.

At the charging conference on September 29, 2015, the defendant requested an extreme emotional disturbance instruction. The state objected to the instruction, but, on September 30, 2015, the court ruled that it would give the instruction. The court gave the jury the extreme emotional disturbance instruction on October 1, 2015.[7]

During closing argument, the prosecutor told the jury: "I would point out also that when we talk about extreme emotional disturbance, [defense] counsel did not say a word about that. Perhaps he doesn't think it's in the case either. He never argued to you that [the defendant] was under extreme emotional disturbance when she fired the gun. . . . [H]e never even mentioned that in his argument, and I think that you . . . can dismiss that from the case. It is an instruction the judge told us that she would give you, but there's not a shred

[7] The court instructed the jury in relevant part: "There are three parts to this affirmative defense [of extreme emotional disturbance]. The defendant must prove each of these parts by a preponderance of the evidence: one, that the defendant was exposed to an extremely unusual and overwhelming stress that was more than annoyance or unhappiness; two, that the defendant had an extreme emotional reaction to the stress, as a result of which there was a loss of self-control, and reason was overborne by extreme intense feelings, such as passion, anger, distress, grief, excessive agitation or other similar emotions; and three, that from the viewpoint of a reasonable person in the defendant's situation, under all the circumstances as the defendant believed them to be, there was a reasonable explanation or excuse for such extreme emotional disturbance influencing her conduct."

of evidence, and even he doesn't apparently think it's worth much."

After closing argument, defense counsel argued to the court that the prosecutor told the jury to "dismiss the [extreme emotional disturbance] instruction." The prosecutor responded: "I never said that. I'm sure [defense counsel] misheard me . . . ."

"[I]t is the trial court's obligation to inform the jury what the law is as applicable to the facts of the case." *State* v. *Theriault*, 38 Conn. App. 815, 820, 663 A.2d 423, cert. denied, 235 Conn. 922, 666 A.2d 1188 (1995). Furthermore, "only the court has the authority to instruct the jury on the law . . . ." (Citation omitted.) *State* v. *Gordon*, supra, 104 Conn. App. 75. The parties and their counsel are responsible for presenting facts rather than law to the trier. See E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 1.19.3 (a), p. 72.

The prosecutor did not suggest to the jury that it "dismiss" the court's instruction, as contended by defense counsel. Although defense counsel insisted that the prosecutor used the term "disregard" when discussing the extreme emotional disturbance instruction during closing argument, the use of this verb is not borne out by the record. The transcript reflects that the prosecutor merely pointed out that there was not a factual basis for the jury to find that the defendant proved the affirmative defense of extreme emotional disturbance. In so doing, the prosecutor did not tell the jury to disregard the court's charge; rather, he remarked on the lack of evidence available to the members of the jury in their consideration of the affirmative defense of extreme emotional disturbance instruction. On this basis, we conclude that the prosecutor did not improperly direct the jury to ignore the court's instructions

with regard to the affirmative defense of extreme emotional disturbance.

3

Third, the defendant claims that the prosecutor improperly argued facts not in evidence twice during closing argument—once when he said that the defendant did not take her car to the motel because she was trying to avoid being caught on surveillance cameras, and again, when he said that Carey-Lang impermissibly spoke with the defendant during trial. The state argues that these comments supported reasonable inferences that the jury could have drawn from the evidence presented. We agree with the state.

The following additional facts and procedural history are relevant to this claim. At trial, the jury heard a tape recorded conversation between the defendant and Carey-Lang. In this conversation, the defendant asked Carey-Lang to send photographs of her home to her counsel, which Carey-Lang said she could not do because there was a sequestration order in place. The court informed the jury that the recording was to be used for impeachment purposes only, not to show that Carey-Lang violated the sequestration order. During closing argument, the prosecutor said: "[The defendant] brings in her sister again, [Carey-Lang], who we already know has violated the court's order about not talking about the evidence when she talked to her sister about the case."

The jury also heard evidence that the motel where the victim was shot had been the site of criminal activity in the past. The defendant testified that she brought her gun with her to the motel because she believed it was in a dangerous area. During closing argument, the prosecutor said that the defendant did not drive her own car to the motel because "[s]he [could] reasonably expect there'd be video cameras" at the motel.

It is well established that "[c]ounsel may comment upon facts properly in evidence and upon reasonable inferences to be drawn from them. . . . Counsel may not, however, comment on or suggest an inference from facts not in evidence." (Internal quotation marks omitted.) *State* v. *Lopez*, 280 Conn. 779, 803, 911 A.2d 1099 (2007); see, e.g., id., 804 ("the prosecutor did not rely on a fact not in evidence when he drew the jury's attention to the fact that the testimony of the witnesses who could not specifically identify the defendant was not inconsistent with the testimony of the two witnesses who did identify him").

In the present case, the comments the prosecutor made during closing argument asked the jury to draw reasonable inferences from facts that were properly in evidence. When the prosecutor commented on Carey-Lang's violation of the sequestration order, the jury had already heard the recording of the phone call that supported that assertion. Similarly, the prosecutor's comment regarding surveillance cameras was based on inferences the jury could draw from evidence that the defendant believed that the motel was in a dangerous area. As the prosecutor pointed out, the defendant could "reasonably expect" that there were surveillance cameras at the motel because it was in an area where criminal activity might occur. Additionally, the prosecutor did not explicitly state that the motel had surveillance cameras. Rather, he said that the defendant could "reasonably expect" that the motel had them. We conclude, therefore, that the prosecutor did not improperly argue facts that were not in evidence.

4

Fourth, the defendant argues that the prosecutor impermissibly gave his personal opinion regarding her credibility during closing argument. We disagree.

The following additional facts and procedural history are relevant to this claim. During closing argument, the prosecutor said the following to the jury: "I submit that the defendant's credibility is nonexistent. Her claim of self-defense is incredible and . . . the state has disproved it beyond a reasonable doubt." The prosecutor then discussed evidence from the defendant's testimony in support of the state's argument that the defendant was not a credible witness. When defense counsel moved for a mistrial, he argued that the prosecutor, during closing argument, had called the defendant a "liar" and accused her of "deliberately" lying.

"[A] prosecutor may not express his [or her] own opinion, directly or indirectly, as to the credibility of the witnesses. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . Put another way, the prosecutor's opinion carries with it the imprimatur of the [state] and may induce the jury to trust the [state's] judgment rather than its own view of the evidence. . . . Moreover, because the jury is aware that the prosecutor has prepared and presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions. . . . However, [i]t is not improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade [it] to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand." (Citation omitted; internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 583; see, e.g., id., 584 ("The assistant state's attorney's remark during

closing argument describing the defendant's explanation as to how he obtained money to buy drugs as 'totally unbelievable' did not necessarily express her personal opinion. Rather, it was a comment on the evidence presented at trial, and it posited a reasonable inference that the jury itself could have drawn without access to the assistant state's attorney's personal knowledge of the case.").

The prosecutor's statement about the defendant's credibility was permissible because the prosecutor was commenting on facts properly in evidence and reasonable inferences to be drawn from them. Like the prosecutor's comment in *Stevenson*, the prosecutor's comments regarding the defendant's credibility in the present case were based on reasonable inferences that could be made based on the defendant's testimony and demeanor at trial. In fact, the prosecutor specifically cited evidence in support of his comments about the defendant's lack of credibility, including the defendant's testimony regarding text messages that she exchanged with the victim on December 31, 2011,[8] and "her story, what she claims actually happened in [the victim's room]" prior to the shooting. Moreover, at the outset of closing argument, the prosecutor cautioned the jury to ignore any expressions of personal opinion he might make, stating: "I don't intend to offer you my personal opinion on this case. My personal opinion is completely irrelevant. So, if there's ever a point in my argument . . . that you feel I'm expressing a personal opinion, please disregard that. That is not my intention." Based on the foregoing, we conclude that the prosecutor did not improperly express his personal opinion as to the defendant's credibility.

[8] These text messages, which the state used to impeach the defendant, are set forth subsequently. See footnote 10 of this opinion.

III

Finally, the defendant claims that the trial court abused its discretion and misled the jury by giving a falsus in uno instruction.[9] Specifically, the defendant argues that, because falsus in uno instructions are not mandatory in Connecticut and other courts have advised against them, the court erred in giving such an instruction. The state argues that giving the instruction was squarely within the court's discretion and did not mislead the jury. We agree with the state.

We begin by setting forth the standard of review relevant to this claim. "Our review of [a jury instruction] claim requires that we examine the [trial] court's entire charge to determine whether it is reasonably [probable] that the jury could have been misled . . . . While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . Additionally, we have noted that [a]n [impropriety] in instructions in a criminal case is reversible . . . when it is shown that it is reasonably possible for [improprieties] of constitutional dimension or reasonably probable for nonconstitutional [improprieties] that the jury [was] misled. . . . A challenge to the validity of jury instructions presents a question of law over

[9] "The prerogative of the fact finder to discredit the entire testimony of a witness if it determines that the witness intentionally has testified falsely in some respect is referred to by the Latin maxim falsus in uno, falsus in omnibus." *State* v. *Caracoglia*, 134 Conn. App. 175, 191, 38 A.3d 226 (2012). The maxim literally means "false in one, false in all." Id., 191 n.4.

which [we exercise] plenary review." (Citations omitted; internal quotation marks omitted.) *State* v. *Daniel W. E.*, 322 Conn. 593, 610, 142 A.3d 265 (2016).

The following additional facts and procedural history are relevant to this claim. The following instruction was included in the court's proposed jury instructions: "If you conclude that a witness has deliberately testified falsely in some respect, you should carefully consider whether you should rely on any of that person's testimony." The defendant objected to the proposed jury instructions twice and requested that the quoted sentence be removed. The defendant argued that this instruction was prejudicial because the case "turn[ed] so tightly on whether [the jury] believe[d] her testimony . . . ." The state argued that the instruction ought to be given in the present case because it believed that the defendant testified falsely about a series of text messages that she exchanged with the victim on December 31, 2011.[10]

The court's final instructions included the sentence to which the defendant had objected. The court qualified this instruction by including the following language in the jury charge: "In deciding whether or not to believe a witness, keep in mind that people sometimes forget things. You need to consider, therefore, whether a contradiction is an innocent lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or with only a small detail."

"Connecticut recognizes the maxim falsus in uno, falsus in omnibus as a permissive instruction. . . .

[10] The defendant testified that the following text messages referred to UGG boots: "[The Defendant]: Please call about product. . . .

"[The Defendant]: Can you get what we talked about?

"[The Victim]: How much . . . .

"[The Defendant]: [Two] 8's."

Keith Graham, a sergeant with the Connecticut Statewide Narcotics Bureau, testified, however, that based on his training and experience, "two 8s" refers to "8 balls" of cocaine, or about seven grams of the drug.

Instruction on the maxim is a matter resting in the sound discretion of the trial judge. . . . Furthermore, the court has broad discretion regarding the instruction on the falsus in uno, falsus in omnibus maxim." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Opotzner* v. *Bass*, 63 Conn. App. 555, 563–65, 777 A.2d 718, cert. denied, 257 Conn. 910, 782 A.2d 134 (2001), and cert. denied, 259 Conn. 930, 793 A.2d 1086 (2002); see, e.g., id., 564–65 (concluding that jury was not misled by court's instruction that if it found that witness "gave false testimony . . . you should . . . believe those parts of it which you think in your exercise of judgment and discretion you should believe" [internal quotation marks omitted]). Like the trial court in *Opotzner*, the court in the present case correctly stated the falsus in uno maxim and informed the jury that it could, in its judgment, choose whether to believe a witness. The falsus in uno instruction provided by the court in the present case correctly stated the law and merely advised the members of the jury as to their task of weighing witness credibility.

The defendant cites decisions from other courts, including state courts in Florida, Alabama, and Rhode Island, and two federal circuit courts of appeal, which advise against the use of falsus in uno instructions. These decisions, however, are merely potentially persuasive authority, and the defendant has failed to cite any Connecticut case law that disapproves generally of the use of falsus in uno instructions. Indeed, the charge has been used in Connecticut for many years. See *Raia* v. *Topehius*, 165 Conn. 231, 234, 332 A.2d 93 (1973) ("[t]he maxim falsus in uno, falsus in omnibus in its permissive form has been approved in this state as an instruction to the jury in relation to [its] determination of the credibility of witnesses"); see also *Willametz* v. *Guida-Seibert Dairy Co.*, 157 Conn. 295, 297, 301, 254 A.2d 473 (1968); *Craney* v. *Donovan*, 92 Conn. 236, 246,

102 A. 640 (1917); *Gorman* v. *Fitts*, 80 Conn. 531, 538, 69 A. 357 (1908). We, therefore, are not persuaded that we should overrule such an established practice. Moreover, the defendant has not demonstrated how the instruction misled the jury in the present case. For the foregoing reasons, we conclude that the defendant has failed to show that the instruction misled the jury and, therefore, that the court did not abuse its discretion by giving the falsus in uno instruction.

The judgment is affirmed.

In this opinion the other judges concurred.

MARIA G. *v.* COMMISSIONER OF CHILDREN AND FAMILIES*
(AC 40692)

Alvord, Bright and Bear, Js.

Syllabus

The petitioner filed a petition for a writ of habeas corpus seeking custody of a minor child, S, from the respondent Commissioner of Children and Families. In 2009, the petitioner illegally brought S into the United States using both a fraudulent passport and birth certificate, which falsely listed the petitioner and her then husband as S's birth parents. Subsequently, the respondent obtained temporary custody and eventually placed S in a foster home, and the petitioner filed her habeas petition seeking to regain custody of S. In response to a motion to dismiss for lack of standing filed by the respondent, the trial court ordered the petitioner to offer proof, at a preliminary evidentiary hearing on her standing, that she was S's legal guardian. Prior to the hearing, S's biological mother, M, filed a declaratory action with a Guatemalan court asking the court to grant custody of S to the petitioner, and the Guatemalan court, relying on the false birth certificate and a sworn affidavit from M in which she averred she had conferred to the petitioner legal authority over S, granted the petitioner parental rights, custody and representation

* 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.

of S. After the petitioner submitted, inter alia, a copy of the Guatemalan court's judgment file as a full exhibit at the evidentiary hearing, the trial court found that she had established prima facie evidence of her standing to withstand the motion to dismiss. Thereafter, the respondent filed a motion for summary judgment, claiming that the Guatemalan court's decree was not entitled to recognition because it was based on a false birth certificate and notice of the proceedings had not been provided. The trial court granted the respondent's motion for summary judgment and rendered judgment dismissing the habeas petition, from which the petitioner appealed to this court. *Held*:

1. The petitioner could not prevail on her claim that the same evidence used by the trial court to rule on the motion to dismiss, namely, the Guatemalan court's decree, also established, at the very least, a genuine issue of material fact that precluded the court from granting the respondent's motion for summary judgment; the trial court properly concluded that the Guatemalan court's judgment, in which it relied on the fraudulently obtained birth certificate and M's sworn affidavit, was not required to be enforced as a matter of comity, which is the recognition that one nation allows within its territory to the legislative, executive or judicial acts of another nation, as the petitioner's claim was premised on the false birth certificate admittedly instigated and procured by the petitioner and her former husband with the cooperation of M, who knew the untruthfulness of its content, and, thus, the enforcement of the Guatemalan court's decree, based at least in part on the false birth certificate, was contrary to this state's public policy of the prevention of fraud as a matter of law, which prohibited recognition of the Guatemalan decree.
2. The trial court correctly determined that any notice of the Guatemalan proceedings that was provided to the respondent was insufficient as a matter of law; given that the Guatemalan declaratory action was not filed until June 17, 2015, and that a hearing was held the following day, the respondent could not have been provided with notice of the proceedings prior to June 17 because the action had not yet been filed, the petitioner did not dispute that notice to the respondent, as described by statute (§ 46b-115g [a]), was not provided in the period between the filing of the proceeding and when the hearing took place one day later, and if the petitioner knew at a hearing on June 3, 2015, that a petition for custody and legal guardianship was going to be filed in the Guatemalan court, that filing was not disclosed to the court and the parties and no documents relating to the planned filing were provided.

Argued November 14, 2018—officially released January 29, 2019

Procedural History

Petition for a writ of habeas corpus seeking custody of a minor child from the respondent Commissioner of Children and Families, and for other relief, brought to

the Superior Court in the judicial district of Fairfield, where the matter was transferred to the judicial district of Stamford-Norwalk; thereafter, the court, *Hon. Barbara M. Quinn*, judge trial referee, granted the respondent's motion for summary judgment, denied the petitioner's motion for summary judgment, and rendered judgment dismissing the habeas petition; subsequently, the court denied the petitioner's motion to reargue and reconsider, and the petitioner appealed to this court; thereafter, the court, *Hon. Barbara M. Quinn*, judge trial referee, denied the petitioner's motions to open judgment and for articulation; subsequently, this court granted the petitioner's motion for review, but denied the relief requested therein. *Affirmed.*

Dana M. Hrelic, with whom were *Brendon P. Levesque* and, on the brief, *Karen L. Dowd*, *Scott T. Garosshen* and *Glenn Formica*, for the appellant (petitioner).

Michael Besso, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (respondent).

Joshua Michtom, assistant public defender, for the minor child.

Opinion

BEAR, J. The petitioner, Maria G., appeals from the trial court's rendering of summary judgment in favor of the respondent, the Commissioner of Children and Families, on the petitioner's writ of habeas corpus seeking custody of the minor child, Santiago.[1] On appeal,

[1] Both parties have at times referred to the trial court's rendering of summary judgment as premised on the petitioner's lack of standing to bring the habeas petition. The trial court, however, did not make reference to any standing issue in its memorandum of decision. In its memorandum of decision on the petitioner's motion to reargue her motion for summary judgment, the court set forth that it previously had concluded that the petitioner's prima facie claim of standing could not form a basis for the finding, without more, that a 2015 Guatemalan decree conclusively awarded

the petitioner claims that the court erroneously failed to credit a Guatemalan court's decree, which purportedly granted her parental guardianship rights over, and custody of, Santiago, when the court concluded that (1) public policy prohibited recognition of the decree because it was premised on a false birth certificate, and (2) the decree was obtained without notice to the respondent.[2] We affirm the judgment of the court.

The following factual and procedural history is relevant to our disposition of this appeal.[3] The petitioner

custody to her and must be recognized. In that memorandum, the court also rejected the petitioner's claim under the Hague Convention first mentioned in her motion for summary judgment.

The court's conclusion in its memorandum of decision rendering summary judgment was as follows: "If neither the birth certificate nor the 2015 decree purporting to award the petitioner parental guardianship and custody can be legally recognized, the crux of the habeas claim cannot be proven. If the gravamen of a habeas petition is that the petitioner must establish that she is the parent or the legal guardian of the child she seeks, then [Maria G.] cannot establish her claim under any set of facts she has brought forth. The respondent has demonstrated through counteraffidavits, other submissions, and the law a legally sufficient defense to this action. Summary judgment in favor of the defendant is properly granted if the defendant in its motion raises at least one legally sufficient defense that would bar the plaintiff's claim and involves no triable issue of fact. . . . The court finds that there remains no triable issue of fact and the petitioner's request for relief therefore fails." (Citation omitted; internal quotation marks omitted.) The court, accordingly, dismissed the petition for a writ of habeas corpus.

[2] The petitioner's table of contents in her brief before this court includes the following: "I. Where the trial court previously found that the evidence established that the 2015 Guatemalan proceedings were proper at an evidentiary hearing on that very issue, the trial court erred in then discrediting that evidence at summary judgment and holding that they were indisputably improper. A. Comity generally requires recognition of foreign court proceedings. B. As a matter of law, the 2015 Guatemalan judgment was not obtained by fraud or, at the very least, there was a genuine issue of material fact on that issue. C. As a matter of law, the 2015 Guatemalan court proceedings were adequately noticed or, at the very least, there was a genuine issue of material fact on that issue."

[3] A thorough factual and procedural background of the proceedings concerning Santiago is provided in *In re Santiago G.*, 154 Conn. App. 835, 108 A.3d 1184, aff'd, 318 Conn. 449, 121 A.3d 708 (2015), and *In re Santiago G.*, 325 Conn. 221, 157 A.3d 60 (2017). In *In re Santiago G.*, supra, 154 Conn. App. 861, this court affirmed the judgment of the trial court denying Santiago's

is a citizen of Argentina and a legal resident of the United States who resides in Stamford, Connecticut. Shortly after Santiago's birth in 2009, the petitioner, utilizing both a birth certificate that falsely listed her, and her husband at that time, as Santiago's parents and a fraudulent United States passport, illegally brought him into the United States.[4] Santiago remained in the petitioner's care until October, 2012, when the Superior Court, *Heller*, *J.*, granted the respondent's motion for an order of temporary custody. *In re Santiago G.*, 318 Conn. 449, 456–57, 121 A.3d 708 (2015). After initially removing Santiago to a temporary foster home in November, 2012, the Department of Children and Families (department) placed him in another foster home in December, 2012, where he remains today. Id., 457.

On November 8, 2013, the petitioner filed a petition for a writ of habeas corpus seeking to regain custody of Santiago. The petitioner alleged that the department's refusal to release Santiago to her custody violated her and Santiago's federal and state constitutional rights to due process and was contrary to Santiago's best interest. On July 3, 2014, the respondent filed a motion to dismiss the petition claiming that the petitioner lacked

biological mother's motion to revoke the commitment of her minor child to the respondent. Our Supreme Court affirmed that decision in *In re Santiago G.*, supra, 318 Conn. 449, 475, 121 A.3d 708 (2015). The petitioner had filed a motion to intervene in those proceedings, which the trial court denied. Id., 457 n.4. In *In re Santiago G.*, supra, 325 Conn. 223, 236, the petitioner appealed from the judgment of the trial court denying her motion to intervene as of right and permissively, and our Supreme Court dismissed that appeal for lack of subject matter jurisdiction.

In the present case, the trial court stated that "[m]any of the underlying facts in this matter are not in dispute; rather, it is the legal import of the uncontested crucial facts and documents which are at issue in both [summary judgment] motions."

[4] On April 16, 2013, the petitioner pleaded guilty to a federal felony in connection with her bringing Santiago into the country illegally with forged documents and, as part of her sentence, she was to be deported to Argentina. *In re Santiago G.*, 318 Conn. 449, 460–61, 121 A.3d 708 (2015).

standing because she was neither the biological parent nor a properly declared adoptive parent of Santiago, and she had not otherwise claimed to be Santiago's legal guardian. The petitioner filed an objection to the motion to dismiss, claiming that on September 19, 2013, a Guatemalan court had recognized the validity of the admittedly false birth certificate and, therefore, recognized her as Santiago's parent. On October 23, 2014, the court issued a memorandum of decision in which it found that "the mere assertion by the petitioner that she is the legal guardian of the child under [Guatemalan] law, without more, is insufficient to confer standing." As a result of this finding, the court ordered the petitioner to offer proof, at a preliminary evidentiary hearing on her standing, that she was Santiago's legal guardian.

On June 17, 2015, prior to the evidentiary hearing, Santiago's biological mother filed a declaratory action with a Guatemalan court asking the court to grant custody of Santiago to the petitioner. One day later, on June 18, 2015, the Guatemalan court issued a declaratory judgment granting the petitioner "parental rights, custody, and representation [of Santiago] . . . ." The Guatemalan court relied on the false birth certificate as well as an affidavit from Santiago's biological mother in granting custody of Santiago to the petitioner.

On November 17, 2015, the court held the evidentiary hearing. During the hearing, the petitioner submitted a copy of the judgment file from the Guatemalan court proceedings as a full exhibit and presented testimony of the Guatemalan attorney who had represented Santiago's biological mother regarding the Guatemalan court's decree. The court subsequently allowed both parties to file posthearing briefs. The respondent argued in her brief that the Guatemalan decree did not deserve

recognition by Connecticut courts because (1) the process underlying that decree contained procedural irregularities fatal to recognition, and (2) the substance of the decree was based on an admittedly false birth certificate.

The court, *Colin*, *J.*, rendered its decision on February 16, 2016, and found that the petitioner had established prima facie evidence of her standing,[5] but noted that "[t]he determination that a prima facie case has been established in denying a motion to dismiss does not necessarily mean that the court, at the time of the final hearing on the merits, is required to take as true the evidence offered by the petitioner at the standing hearing." On March 7, 2016, the respondent filed a motion to reargue. The court thereafter granted the respondent's motion in part, denied it in part, and reaffirmed its decision on the issue of standing.

The parties subsequently filed separate motions for summary judgment. The petitioner argued in her motion that the court's previous recognition of prima facie evidence of standing established that there was no genuine issue of material fact as to the petitioner's legal right to custody of Santiago. The respondent argued in her motion that the Guatemalan court decree was not entitled to recognition because it was based on a false birth certificate, and notice of the Guatemalan proceedings had not been provided to the respondent.

[5] Specifically, the court found the following facts sufficient to establish standing: "(1) [T]he now adult biological mother of the child has formally requested through the Guatemalan court that the petitioner have custody of her child; (2) a family court in Guatemala granted that request in [June, 2015]; (3) the child was raised in Stamford, Connecticut by the habeas petitioner from the child's birth in [2009] until [the department] removed the child from the petitioner's custody in October, 2012; and (4) the juvenile court on September 9, 2013, noted that '[the petitioner] is the only mother that [Santiago] has known, and she is unquestionably his psychological mother.' "

On January 12, 2017, the court granted the respondent's motion for summary judgment, denied the petitioner's motion for summary judgment, and dismissed the habeas petition.[6] In rendering its decision, the court applied the Uniform Child Custody Jurisdiction and Enforcement Act, General Statutes § 46b-115 et seq. (act), and determined that the Guatemalan court decree was not entitled to recognition because it was based on the petitioner's fraudulent and illegal conduct that was repugnant to the public policy of this state, it relied on the false birth certificate, and it was secured without adequate notice to the respondent. The court, therefore, concluded that the petitioner could not demonstrate that she is the biological parent or legal guardian of Santiago and dismissed the habeas petition. On February 1, 2017, the petitioner filed a motion to reargue, and the court reaffirmed its decision on June 20, 2017. See footnote 1 of this opinion. This appeal followed.[7]

We first set forth the applicable standard of review. "Our review of the trial court's decision to grant [a] motion for summary judgment is plenary. . . . In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of

[6] The court subsequently filed a corrected memorandum of decision on January 26, 2017, to address several minor errors, leaving the substance of its decision intact.

[7] On August 4, 2017, during the pendency of this appeal, the petitioner filed a motion for articulation, requesting that the trial court articulate whether it found that she lacked standing to bring the habeas petition, and, if so, that the court state the factual and legal basis for its holding. Additionally, on October 20, 2017, the petitioner filed a motion to open the judgment.

On March 15, 2018, the trial court denied the petitioner's motion to open judgment. On March 16, 2018, the trial court denied the motion for articulation, concluding that "[t]he interpretation of the decision and the logical conclusions to be drawn from it are within the purview of the appellant and need not be provided by the court." The petitioner subsequently filed a motion for review of the trial court's decision, and this court granted the motion for review but denied the requested relief.

fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Citation omitted; internal quotation marks omitted.) *Rickel* v. *Komaromi*, 144 Conn. App. 775, 779–80, 73 A.3d 851 (2013).

I

The petitioner claims that the same evidence used by the court to rule in her favor on the motion to dismiss also established, at the very least, a genuine issue of material fact that precluded the court from granting the respondent's motion for summary judgment. Specifically, the petitioner argues that, despite the admittedly false birth certificate, the Guatemalan court's decree created a genuine issue of material fact that she was the legal guardian or custodian of Santiago. The respondent claims that the court properly determined that there was no genuine issue of material fact that the Guatemalan decree was not entitled to recognition, arguing that the petitioner's participation in the fraud regarding the

birth certificate made enforcement of the decree repugnant to the public policy of this state.

We first note that the false birth certificate cannot be the basis for the petitioner's claim for custody because it clearly was fraudulent, and the petitioner has conceded that the birth certificate falsely listed her and her former husband as Santiago's biological parents. Moreover, our Supreme Court determined that the birth certificate has no legal effect in the United States. See *In re Santiago G.*, supra, 318 Conn. 471–72 ("[A]lthough [the petitioner] was in possession of a birth certificate naming her as Santiago's mother, she ultimately conceded that that birth certificate was fraudulent. As we previously have explained, [a] birth certificate is a vital record that must accurately reflect legal relationships between parents and children—it does not create those relationships. . . . In sum, it was absolutely correct that Santiago had no legal guardian in the United States, and neither the parties nor the court was mistaken in this regard." [Citation omitted; internal quotation marks omitted.]).

The crux of the petitioner's claim, therefore, is that, despite the previous ruling of our Supreme Court acknowledging the fraudulent nature of the birth certificate, the Guatemalan court's decree was entitled to recognition under the rules of comity, and summary judgment in favor of the respondent should not have been rendered because there was a genuine issue of material fact as to whether the decree was obtained by fraud.

"[C]omity is a flexible doctrine, the application of which rests in the discretion of the state where enforcement of a foreign order is sought. . . . The doctrine traces its roots to the decision of the United States Supreme Court in *Hilton* v. *Guyot*, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895), which observed that [c]omity

. . . is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. . . . [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, *after due citation or voluntary appearance of the defendant*, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and *there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect*, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact." (Citations omitted; emphasis added; internal quotation marks omitted.) *Zitkene* v. *Zitkus*, 140 Conn. App. 856, 865–66, 60 A.3d 322 (2013).

"[J]udgments of courts of foreign countries are recognized in the United States because of the comity due to the courts and judgments of one nation from another. Such recognition is granted to foreign judgments with due regard to international duty and convenience, on the one hand, and to rights of citizens of the United States and others under the protection of its laws, on the other hand. This principle is frequently applied in divorce cases; a decree of divorce granted in one country by a court having jurisdiction to do so will be given full force and effect in another country by comity . . . . The principle of comity, however, has several important exceptions and qualifications. A decree of divorce will

not be recognized by comity *where it was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the divorce offends the public policy of the state in which recognition is sought . . . .*" (Emphasis added.) *Litvaitis* v. *Litvaitis*, 162 Conn. 540, 544–45, 295 A.2d 519 (1972); *Zitkene* v. *Zitkus*, supra, 140 Conn. App. 866.

In addition to the doctrine of comity, the act, as adopted in § 46b-115ii, provides that "[a] court of this state shall treat a foreign child custody determination[8] made under factual circumstances in substantial conformity with the jurisdictional standards of this chapter, *including reasonable notice and opportunity to be heard to all affected persons*, as a child custody determination of another state under sections 46b-115 to 46b-115t, inclusive, unless such determination was rendered under child custody law which violates fundamental principles of human rights *or unless such determination is repugnant to the public policy of this state*." (Emphasis added; footnote added.) This court has recognized that the prevention of fraud is an important public policy. "The important public policy we identify is the one against fraud, which is deeply rooted in our common law . . . ." *Schmidt* v. *Yardney Electric Corp.*, 4 Conn. App. 69, 74, 492 A.2d 512 (1985); see also *Broome* v. *Beers*, 6 Conn. 198, 210–12 (1826).

The petitioner admitted to investigators from the department and the United States Department of Homeland Security that she brought Santiago into the country illegally with a false birth certificate and a fraudulent passport, and she subsequently pleaded guilty to a federal felony in connection with the fraudulent passport.

[8] General Statutes § 46b-115hh provides in relevant part that " '[f]oreign child custody determination' means any judgment, decree or other order of a court or tribunal of competent jurisdiction of a foreign state providing for legal custody, physical custody or visitation with respect to a child. . . ."

In re Santiago G., supra, 318 Conn. 460–61. Additionally, the petitioner does not dispute that the Guatemalan court relied on the same false birth certificate in issuing its judgment confirming the petitioner's parental guardianship rights to Santiago. The trial court also listed the following undisputed facts set forth in the petition: "The petitioner is a citizen of Argentina and a legal resident of the United States . . . . [The] Guatemalan birth certificate identifies the petitioner and her estranged husband as the child's parents. She brought him to the United States shortly after his birth. . . . She admitted that she obtained custody of a newborn that was not legally adopted and that she illegally brought the child into the United States with a false birth certificate and a fraudulent United States passport." (Footnote omitted.)

The petitioner, however, presented additional evidence during the summary judgment proceeding that she had disclosed to the Guatemalan court that she was not Santiago's biological mother, and that the birth certificate was falsified. This included the sworn affidavit of Santiago's biological mother, as well as DNA evidence confirming that the petitioner was not Santiago's biological mother. The respondent, in the summary judgment proceeding, did not submit any contrary evidence that the petitioner made false representations to the Guatemalan court about those matters. Construing the evidence in the light most favorable to the petitioner, a factfinder could conclude that by providing such information to the Guatemalan court, she was attempting to correct her earlier fraud and have the Guatemalan court, after considering all of the evidence, confirm that the birth certificate, despite its factual flaws, was entitled to legal recognition under Guatemalan law. Because the facts relied upon by the petitioner regarding the Guatemalan court proceedings are undisputed, the remaining legal issue is whether the Guatemalan decree, like the birth certificate on which it is

based, is void as against Connecticut public policy as found by the trial court.

The petitioner argues that the respondent failed to satisfy her burden of proof on summary judgment that there was no genuine issue of material fact that the Guatemalan decree was not entitled to recognition under comity. Specifically, the petitioner argues that there is a genuine issue of material fact as to whether the Guatemalan court could conclude that she still had parental rights to Santiago, "despite the initial misrepresentation that she was Santiago's biological mother."[9] We conclude, however, that this purported genuine issue of material fact is in reality a legal question about the enforcement of the Guatemalan court decree in Connecticut. On appeal, the petitioner relies on the Guatemalan court decree to satisfy the legal guardianship requirement of Connecticut law, and asks that we recognize that decree through the principle of comity.

In Connecticut, a petitioner in a habeas corpus petition for custody of a child, in order to set forth a cognizable claim, must establish that she is the child's biological parent, his adoptive parent through a proper adoption, or his legal guardian through a recognized court procedure. See *Weidenbacher* v. *Duclos*, 234 Conn. 51, 62–63, 661 A.2d 988 (1995). In *Livaitis*, another family law case, our Supreme Court stated that a foreign decree "will not be recognized by comity where it was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the [decree] offends the public policy of the state in which recognition is sought, or where the foreign court lacked jurisdiction." *Litvaitis* v. *Litvaitis*, supra, 162 Conn. 545.

[9] The petitioner alleged in her petition that Santiago is her legal child. She, however, has not disputed that she is not Santiago's biological mother, and she has relied at various stages of this continuing litigation on the support of the biological mother.

In the present case, the trial court stated that our law does not permit those who engage in fraud to benefit from that fraud, and that the petitioner's fraudulent conduct "attack[ed] the very core of the court's inherent integrity." Thus, the court concluded that the Guatemalan decree, having been "obtained by fraud, or where [it] offends the public policy of the state in which recognition is sought"; id.; was not entitled to recognition under the general rules of comity or under the specific requirements of the act.

In *In re Santiago G.*, supra, 318 Conn. 474–75, our Supreme Court reflected upon the unusual factual circumstances of this case and the unfortunate results that occurred from the choices of the petitioner and her former husband: "As a final matter, we must reject the suggestion of the parties that the highly unusual facts of this case warranted a disregard of the typical procedures attendant to a motion to revoke commitment, in favor of some alternative approach more suited to the circumstances. The problem here is not so much that the statutory framework is inadequate, but that it was not designed to accommodate individuals who have chosen to operate outside of the strictures of the law, regardless of their reasons. It was because the [biological mother] and [the petitioner] knowingly agreed to effectuate an illegal international adoption that [the petitioner] was vulnerable to the cruel act of a vindictive individual . . . and all of the subsequent occurrences that that act set in motion. Because [the petitioner] lacked the status of a legal parent, she also lacked the constitutional and statutory rights attendant to that status. Additionally, the illegalities involved in [the petitioner] obtaining Santiago and transporting him, using a fraudulent passport, to the United States resulted in significant delay in the discernment of the truth, during which the interests of Santiago in stability and permanency began to diverge, as it turns out inexorably, from

the interests of the [biological mother] and [the petitioner]. We say this not to chastise or lay blame, but rather, to explain that the law is ill equipped to save those who have chosen to disregard it." (Footnote omitted.)

At the time of its consideration of the summary judgment motions, the court had before it the petitioner's admissions and our Supreme Court's recognition that the birth certificate relied on by the Guatemalan court had knowingly been instigated and procured by the petitioner and her former husband, with the cooperation of the biological mother, who had consented to them being listed as the biological parents although that was false. The court did not err in rendering summary judgment in favor of the respondent, who had met her burden of establishing the lack of any factual dispute concerning the invalidity of the Guatemalan court decree which was admittedly based, at least in part, on the false birth certificate.[10]

In the present case, the petitioner merely refers to the court's finding after the evidentiary hearing on the motion to dismiss that there was some factual dispute as to the propriety of the Guatemalan court decree. This court has found, however, that "[i]t is not enough . . . for the opposing party [to a motion for summary judgment] merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented

[10] Our Supreme Court has noted the mischief that could occur because of a false birth certificate: "We also reject the claim of the plaintiff and the child's attorney that the child's birth certificate conclusively established that the plaintiff is her mother. One does not gain parental status by virtue of false information on a birth certificate. See *Remkiewicz* v. *Remkiewicz*, [180 Conn. 114, 120, 429 A.2d 833 (1980)] ('[i]f a stepfather could acquire parental rights through the simple expedient of changing his stepchild's birth certificate, all sorts of mischief could result')." *Doe* v. *Doe*, 244 Conn. 403, 446, 710 A.2d 1297 (1998).

to the court under Practice Book § [17-45]." (Internal quotation marks omitted.) *Rickel* v. *Komaromi*, supra, 144 Conn. App. 780. Moreover, "[i]t is well recognized that courts will not lend their assistance to enforce agreements whose inherent purpose is to violate the law . . . even to reach what appears to be an equitable result. . . . Generally, agreements contrary to public policy, that is, those that negate laws enacted for the common good, are illegal and therefore unenforceable." (Citations omitted; internal quotation marks omitted.) *In re Santiago G.*, supra, 318 Conn. 475 n.17.

As our Supreme Court found, "[the petitioner] and [Santiago's biological mother] knowingly agreed to engage in a subterfuge to evade the strictures of [federal] adoption laws and achieve more expeditiously their own goals, albeit admirable ones." Id. Our Supreme Court further recognized that accepting the wishes of the petitioner and the biological mother as to who Santiago's mother should be would be tantamount to enforcing the illegal agreement between them and would be, therefore, "contrary to the public policies underlying the adoption laws of both this country and of Guatemala." Id.

In light of the fact that the petitioner's claim is premised upon the false birth certificate admittedly instigated and procured by the petitioner and her former husband, with the cooperation of the biological mother, who knew the untruthfulness of its content, we agree with the trial court that enforcement of the Guatemalan court's decree, which is based, at least in part, on the false birth certificate, is contrary to this state's public policy as a matter of law. Accordingly, we conclude that the trial court, in construing the evidence in a light most favorable to the petitioner, properly concluded that the Guatemalan court's reliance on the fraudulently obtained birth certificate and Santiago's biological mother's sworn affidavit, in which she avers that she conferred legal authority to the petitioner over Santi-

ago, did not require its judgment to be enforced as a matter of comity.

II

Additionally, the petitioner argues that the Guatemalan proceedings were adequately noticed or, at the very least, there was a genuine issue of material fact that adequate notice was provided. The petitioner asserts that, given the respondent's representations to the trial court at the June 3, 2015 hearing prior to the evidentiary hearing on the motion to dismiss,[11] it is apparent that

[11] Specifically, the petitioner directs this court to the following colloquy that occurred between the respondent and the court at the June 3, 2015 hearing:

"[The Respondent]: [W]ithin the past week, and this is not a representation from [the petitioner's counsel], *there is a pending court matter in Guatemala* by which they anticipate a judge in Guatemala . . . is considering and might very well grant an order in Guatemala in effect validating or ratifying the custodial placement of the child with [the petitioner].

"*If that were true and if that were to come to pass*, I would anticipate that the department would withdraw its standing objection so at least we would get past that and the court would be able to consider the merits.

"I can't represent to the court what the department's ultimate position would be, but since we are only at the standing stage, *if* [*the petitioner's counsel*] *were to make those representations to the court and in fact he led me to believe he'd actually be asking for a . . . continuance to attempt to secure confirmation of this new order from Guatemala . . . .*" (Emphasis added.)

When the court asked the respondent what action to take while waiting for the petitioner's counsel to ask for a continuance of the evidentiary hearing, the respondent stated that it "would not also be adverse to the court on its own sua sponte issuing a continuance pending a report from [the petitioner's counsel] about the status *of this purported new Guatemalan order* . . . which might very well lead to the department withdrawing its standing objection." (Emphasis added.) The court then replied that the future "evidentiary hearing *may also involve the issue of what if any recognition this court should give to any order entered by the court in Guatemala* and how such an order if it exists is impacted by any other orders concerning custody . . . ." (Emphasis added.)

After the court decided it would leave it to either of the parties to request a continuance date, the respondent stated: "I would rather not . . . ask for a necessary date because *I think* [*the petitioner's counsel*] *would like the opportunity to work out the details from Guatemala and I don't know while he is hopeful that will happen soon . . . .*" (Emphasis added.)

the respondent had actual notice of the Guatemalan proceedings. The respondent replies that the Guatemalan judgment does not warrant recognition because there existed no genuine issue of material fact that adequate notice of the pendency of the Guatemalan proceedings was not provided.[12]

As previously discussed, § 46b-115ii treats all foreign child custody determinations as child custody determinations of another state under §§ 46b-115 to 46b-115t, inclusive, and, accordingly, affords all parties affected by a foreign child custody determination "reasonable notice and an opportunity to be heard." Section 46b-115o (a) provides that "[b]efore a child custody determination is made under this chapter, notice and an opportunity to be heard in accordance with the standard established in section 46b-115g shall be given to the parties, any parent whose parental rights have not been previously terminated and any person who has physical custody of the child."

Additionally, General Statutes § 46b-115g (a) provides that "[n]otice required for the exercise of jurisdiction over a person outside this state shall be given in a manner reasonably calculated to give actual notice, and may be: (1) By personal delivery outside this state in the manner prescribed for service of process within this state; (2) in the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction; (3) any form of mail addressed to the person to be served and requesting a receipt; or (4) as directed by the court including publication, if other means of notification are ineffective." Moreover, "[t]hese methods are not exclusive. Any method of serving notice may be employed as long as it is given in a

[12] The respondent first raised the notice argument in her objection to the petitioner's motion for summary judgment.

manner reasonably calculated to give actual notice and meets due process requirements as they exist at the time of the proceeding." (Internal quotation marks omitted.) *Hurtado* v. *Hurtado*, 14 Conn. App. 296, 306–307, 541 A.2d 873 (1988).

The petitioner argues that the colloquy between the respondent and the trial court on June 3, 2015, establishes that, at the very least, a genuine issue of material fact exists as to whether the respondent was provided with notice of the Guatemalan proceedings. The Guatemalan declaratory action, however, was not filed until June 17, 2015, and a hearing was held the next day on June 18, 2015. The respondent could not have been provided with notice of the proceedings prior to June 17, 2015, because the action had not yet been filed. If the petitioner knew on June 3, 2015, that a petition for custody and legal guardianship was going to be filed in the Guatemalan court on June 17, 2015, that filing was not disclosed to the court and the parties at the preevidentiary hearing, and no documents relating to the planned filing were provided at such hearing. Moreover, the petitioner does not dispute that notice to the respondent, as described in § 46b-115g (a), was not provided in the period between the filing of the proceeding and when the hearing took place one day later. As such, we conclude that the respondent met her burden of establishing that there was no genuine issue of material fact that adequate notice was not provided pursuant to § 46b-115ii.

III

In sum, the petitioner has not established that there is any genuine issue of material fact that the court erroneously failed to accept and apply a Guatemalan court's decree, purportedly granting her parental guardianship rights over, and custody of, Santiago, on the

grounds set forth in her appeal, i.e., that the court erroneously concluded that (1) public policy prohibited recognition of a decree premised on a false birth certificate, and (2) the decree was obtained without proper notice to the respondent. The court properly ruled as a matter of law that such decree was against the public policy of, and not entitled to be enforced in, Connecticut. The court also correctly determined that any notice of the Guatemalan proceedings that was provided to the respondent was insufficient as a matter of law.

Because we conclude that there was no genuine issue of material fact that the Guatemalan decree was not entitled to recognition in Connecticut, and that the respondent was entitled to summary judgment as a matter of law, we conclude that the trial court properly granted the respondent's motion for summary judgment and dismissed the petitioner's habeas corpus petition.

The judgment is affirmed.

In this opinion the other judges concurred.

JAMES T. COSTELLO ET AL. *v.* GOLDSTEIN AND PECK, P.C., ET AL.
(AC 40465)

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

Syllabus

The plaintiffs, C and S, sought to recover damages from the defendant law firm and two of its attorneys for, inter alia, legal malpractice in connection with their representation of the plaintiffs in two prior actions. S previously had retained the defendants to represent her when her former attorney brought an action against her to collect legal fees, and C previously had retained the defendants to represent him in an unrelated dispute concerning his dealings with a condominium association. C and S commenced the present legal malpractice action and filed a single complaint against the defendants alleging claims related to the two distinct matters. The trial court granted the defendants' motion to strike the complaint for improper joinder and rendered judgment in favor of

the defendants, from which the plaintiffs appealed to this court. *Held* that the trial court properly granted the motion to strike for improper joinder, as the plaintiffs' action concerned two separate and distinct transactions that were independent of each other; although the two prior matters alleged in the complaint shared common defendants and background information regarding the defendants and their motivations, the question of whether the defendants committed legal malpractice involved the defendants' conduct regarding the individual transactions and separate evidence was required for each transaction, each plaintiff had a separate contract with the defendants for their representation, as well as a separate and distinct legal claim, the plaintiffs were neither necessary nor indispensable parties in the other's case, as each case could be fully and fairly resolved without the other being a party, and the doctrines of collateral estoppel and res judicata would not bar subsequent litigation by one of the plaintiffs once removed from the present case; moreover, the trial court did not err in denying the plaintiffs' motion for costs arising out of a prior appeal they had brought in which they prevailed in the Supreme Court, as the relevant statute (§ 52-243) authorizes the award of litigation costs only if there had been a verdict in the plaintiffs' favor in the trial court.

Argued September 17, 2018–officially released January 29, 2019

Procedural History

Action to recover damages for, inter alia, legal malpractice, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Sommer*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court, which affirmed the trial court's judgment; thereafter, the plaintiffs, on the granting of certification, appealed to the Supreme Court, which reversed the judgment of this court and remanded the case to this court with direction to remand the case to the trial court with direction to deny the defendants' motion to dismiss; subsequently, the court, *Kamp*, *J.*, denied in part the plaintiffs' motion for costs and granted the defendants' motion to strike the second amended complaint; thereafter, the court, *Kamp*, *J.*, granted the defendants' motion for judgment and rendered judgment in favor of the defendants, from which the plaintiffs appealed to this court. *Affirmed.*

James T. Costello, self-represented, with whom, on the brief, was *Dorothy Smulley Costello*, self-represented, the appellants (plaintiffs).

Nadine M. Pare, with whom, on the brief, was *Carmine Annunziata*, for the appellees (defendants).

Opinion

BEACH, J. The plaintiffs, James T. Costello and Dorothy Smulley Costello,[1] appeal from the judgment of the trial court,[2] rendered subsequent to its granting of the motion to strike the second amended complaint filed by the defendants, Goldstein & Peck, P.C. (law firm), William J. Kupinse, Jr., and Andrew M. McPherson.[3] The plaintiffs claim that the court (1) improperly granted the defendants' motion to strike, (2) failed to consider alternatives to striking the complaint, and (3) improperly denied the plaintiffs' claim for costs pursuant to General Statutes § 52-243. We affirm the judgment of the trial court.

The operative complaint alleged in detail transactions between the plaintiffs and the defendants. The complaint first alleged various facts regarding the law firm. It then described, under separate headings, a transaction regarding Smulley and her former attorney, Juda Epstein (Epstein matter), and a transaction regarding Costello and a condominium association (Lynwood matter).

The plaintiffs alleged the following facts regarding the Epstein matter. Smulley retained the defendants to

[1] Hereafter, Costello and Smulley Costello will be referred to collectively as the plaintiffs, and individually by name, where appropriate. Smulley Costello will be referred to as Smulley.

[2] After the court granted the motion to strike, the plaintiffs did not plead over. The defendants then filed a motion for judgment, which the court granted.

[3] Hereafter, Kupinse, McPherson, and the law firm will be referred to collectively as the defendants, and individually by name, where appropriate. Kupinse and McPherson were attorneys employed by the law firm.

represent her on June 16, 2008, after Epstein, her former attorney, brought an action against her to collect legal fees. Kupinse filed defenses and a counterclaim, and Epstein filed a motion for summary judgment. Meanwhile, at some point prior to August 6, 2009, Kupinse and Epstein allegedly entered into a business arrangement wherein Epstein would refer new clients to the defendants in exchange for a fee. The plaintiffs alleged that, as a result of this agreement, the defendants set Smulley's matter aside in order to pursue more lucrative matters, thus causing a nine month delay in opposing Epstein's motion for summary judgment. The plaintiffs further alleged that the defendants repeatedly advised her to exchange mutual withdrawals and releases with Epstein and delayed the Epstein matter without Smulley's knowledge or approval by filing continuances and failing to object to Epstein's motion for a continuance until prompted by Smulley to do so. Smulley's special defenses were also amended at least five times, allegedly due to the defendants' errors.

The plaintiffs further alleged that in February, 2010, the defendants charged Smulley for preparation for a trial that did not take place. In April, 2010, Kupinse demanded approximately $15,000 in order to continue his representation, as well as $3,250 for expert witness fees. Although Smulley paid the expert's fees, she later learned that Kupinse failed to forward her payment to the expert, and the expert therefore terminated his engagement. In May, 2010, Kupinse demanded $25,000 in order to continue his representation. Subsequently, Kupinse filed a motion to withdraw as Smulley's counsel, which was granted in June, 2010. Three months after Kupinse withdrew from the Epstein matter, Kupinse attempted to charge Smulley for unauthorized meetings, including meetings with an attorney who was consulted after Kupinse's withdrawal, the expert who withdrew from the Epstein matter, and a client whom

Epstein had referred to Kupinse. The plaintiff alleged various conflicts of interest on the part of Kupinse.

The plaintiffs made the following allegations concerning the Lynwood matter. Costello retained the defendants on November 18, 2008, to represent him in a dispute concerning funds associated with the Lynwood Condominium Association (Lynwood), and a receiver was appointed several months later. Costello eventually was appointed temporary receiver, but Kupinse allegedly delayed the appointment by failing to file the appropriate motion for nearly five months. When unit owners challenged Costello's authority to act as substitute receiver and accused him of misappropriating funds, Kupinse allegedly failed to file any response in Costello's defense. After a court hearing in which Costello agreed to provide certain documents to Lynwood's counsel, Costello sent those documents to Kupinse, but Kupinse allegedly failed to forward the documents properly. Additionally, Costello's motion for reimbursement of attorney's fees failed "because Kupinse failed to appear to reaffirm his motion in support thereof." Finally, at the time of his withdrawal from the Lynwood matter, Kupinse sent Costello a bill for several hundred dollars for time spent with Lynwood's counsel, though Kupinse provided no explanation for the charges. Costello further alleged various incidents in which Kupinse failed to act diligently.

The plaintiffs' operative complaint also alleged the following facts concerning their relationship and shared experiences with the defendants. The plaintiffs, who are married to each other, each participated fully in the other's matter and shared the payment of legal fees charged by the defendants. The defendants failed to develop a strategic plan for either plaintiff. Instead, they filed claims that were easily defeated and that they later withdrew. The conflict in the Epstein matter "spilled over" into the defendants' representation of Costello in

the Lynwood matter, and the behavior of the defendants was similar in both cases. The operative complaint alleged legal malpractice against Kupinse and McPherson, and as to both sets of transactions they alleged unfair trade practices in violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes 42-110a et seq., against the law firm. The defendants moved to strike the complaint for improper joinder.

The trial court held that, although both plaintiffs relied broadly on a theory of inadequate legal representation, the plaintiffs' "reasons for their respective dissatisfaction, and indeed the nature of the representations, diverge[d] sharply." The court noted, that "[w]here Smulley's allegations sound alternatively in intentional and neglectful misconduct, Costello appears to allege a more general sort of incompetent representation." The court stated that the plaintiffs' pleadings did not demonstrate a common scheme sufficient to satisfy the requirement that each plaintiff's right of relief arise out of the same transaction or series of transactions in order to qualify for permissive joinder. Accordingly, the court granted the defendants' motion to strike. The plaintiffs claim that the court erred in granting the motion to strike.

The plaintiffs also claim that the court erred in denying costs arising from a prior appeal by the plaintiffs pursuant to § 52-243. The basis for the prior appeal is as follows. The trial court previously had granted the defendants' motion to dismiss the complaint on the ground that the writ of summons had not been accompanied by either a third party recognizance[4] or certification of the plaintiffs' financial responsibility, as required

[4] "A recognizance is an obligation acknowledged before some court for a certain sum, with condition that the plaintiff shall prosecute a suit pending in court, or for the prosecution of an appeal. . . . . A recognizance is in effect a bond as to its obligation." (Internal quotation marks omitted.) *Costello* v. *Goldstein & Peck, P.C.*, 321 Conn. 244, 247 n.1, 137 A.3d 748 (2016), citing *Palmer* v. *Des Reis*, 136 Conn. 232, 233, 70 A.2d 141 (1949).

by the Practice Book and by statute. Following summary affirmance by this court, our Supreme Court reversed and remanded for further proceedings. See *Costello* v. *Goldstein & Peck, P.C.*, 321 Conn. 244, 247–48, 259, 137 A.3d 748 (2016).

Following the remand, the plaintiffs filed a motion for litigation costs arising from the appeal pursuant to General Statutes §§ 52-243[5] and 52-257 (d)[6], seeking $623.63. The court denied costs sought pursuant to § 52-243, because there had not been a verdict, but granted costs under § 52-257 (d) in the amount of $100. This appeal followed. The plaintiffs assert that the court erred in finding that joinder was improper and that the court improperly denied costs under § 52-243.

"We begin our analysis by setting forth the applicable standard of review. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's

[5] General Statute § 52-243 provides: "If a verdict is found on any issue joined in an action in favor of the plaintiff, costs shall be allowed to him, though on some other issue the defendant should be entitled to judgment, unless the court which tried the issue is of the opinion that the defendant had probable cause to plead the matter found against him."

[6] General Statutes § 52-257 (d) provides: "The following sums may be allowed to the prevailing party in causes on appeal, in the discretion of the court: (1) For all proceedings, one hundred dollars; (2) for expenses actually incurred in printing or photoduplicating copies of briefs, a sum not exceeding two hundred dollars; and (3) to the plaintiff in error, plaintiff in a cause reserved, or appellant, as the case may be, the record fee, provided judgment shall be rendered in his favor. Such costs in the Superior Court in appealed causes and in the Supreme Court or Appellate Court shall be in the discretion of the court on reservation of a cause for advice, or when a new trial is granted."

motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) *McCart* v. *Shelton*, 81 Conn. App. 58, 60, 837 A.2d 872 (2004).

"All persons may be joined in one action as plaintiffs in whom any right of relief *in respect to or arising out of the same transaction* or series of transactions is alleged to exist either jointly or severally when, if such persons brought separate actions, any common question of law or fact would arise . . . ." (Emphasis added.) Practice Book § 9-4. "A motion to strike shall be used whenever any party wishes to contest . . . the joining of two or more causes of action which cannot properly be united in one complaint, whether the same be stated in one or more counts . . . ." Practice Book § 10-39 (a) (4).

The plaintiffs argue that the court improperly granted the defendants' motion to strike the plaintiffs' second amended complaint on the basis of improper joinder. We disagree, because the plaintiffs' underlying action concerns two separate and distinct transactions: the Epstein matter and the Lynwood matter. As recited previously, the Epstein matter was litigation between Smulley and her prior attorney, which arose initially from a fee dispute, whereas the Lynwood matter involved Costello's relationship and dealings with a condominium association.

It is useful to compare the complaint in this case with that in *McCart*, in which seventy-three plaintiffs claimed that their assessments for the installation of sewers had been excessive. *McCart* v. *Shelton*, supra, 81 Conn. App. 59–60. The complaint alleged that the defendant city and its sewer authority had assessed each property for the benefit conferred by the construction of a sewer and used a common method of valuation; there was, thus, a set of common facts. Id., 60. The "real

question" of the complaint, however, was "whether, in the case of each individual plaintiff, the method of assessment was correctly applied under the particular facts to reach a proper result." Id., 62. This court held that the individual differences in the properties were paramount. When the matters were tried, it would be necessary for each plaintiff to provide "individual evidence." Id.

As in *McCart*, the complaint in the present case alleges discrete transactions that are not dependent on the other. The transactions share common defendants, and the background information regarding the defendants and their alleged motivations are relevant to both transactions. But, as in *McCart*, the "real question" involves the conduct regarding each transaction, and separate evidence is required for each. The overlap is, as in *McCart*, tangential and, therefore, joinder is not proper.

The inability to meet the same transaction test is dispositive of the plaintiffs' claims. We nonetheless briefly address the plaintiffs' objections to the application of the rule in this case. The plaintiffs claim that they are "necessary parties in privity" and therefore joinder is required. We disagree. "Necessary parties . . . have been described as [p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. . . . [B]ut if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties." (Internal quotation marks omitted.) *Sturman* v. *Socha*, 191 Conn. 1, 6–7, 463 A.2d 527 (1983). The

plaintiffs are neither necessary nor indispensable parties[7] in the other's case. Each plaintiff's case can be fully and fairly resolved without the other being a party. Each of the plaintiffs had a separate and distinct legal claim and the result of one would not necessarily govern the result of the other.

Next, the plaintiffs assert that there was only a single contract applicable to both plaintiffs during the time period in question and therefore joinder was proper. The plaintiffs claim that because the defendants allegedly agreed to represent Costello under the same "terms and conditions" that governed their representation of Smulley, there was only one contract. The fact that two contracts may contain the same terms and conditions, however, does not necessarily mean that the two contracts are a single contract. The pleadings allege two distinct agreements, one for the representation of Smulley and the other, months later, for the representation of Costello.

The plaintiffs next assert that if, as the trial court instructed, one plaintiff were to remain alone in this action and the other were to bring a separate action, the doctrines of res judicata and collateral estoppel would bar subsequent litigation. We disagree. "The doctrine of res judicata holds that an existing final judgment rendered [on] the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." *Wellswood Columbia, LLC* v. *Hebron*, 327 Conn. 53, 65, 171 A.3d 409 (2017). A motion to strike for improper joinder is not a determination on the merits and therefore res judicata does not apply. See, e.g.,

[7] We note that there is a somewhat archaic distinction between "necessary" and "indispensable" parties; see *Sturman* v. *Socha*, supra, 191 Conn. 6–7; but the distinction does not make a difference in the present case.

Bank of New York Mellon v. *Mauro*, 177 Conn. App. 295, 320, 172 A.3d 303 (2017) (noting in context of counterclaims that "where a court determines that the counterclaims at issue fail the transaction test of [Practice Book] § 10-10, the appropriate remedy is not a final judgment on the merits of those counterclaims, but rather a judgment dismissing those counterclaims on the ground of improper joinder with the plaintiff's primary action, without prejudice to the defendants' right to replead that claim, unless it is otherwise barred, in a separate action"); see also *Inovejas* v. *Dufault*, Superior Court, judicial district of New Britain, Docket No. CV-99-0496171-S (March 13, 2000) (26 Conn. L. Rptr. 395) ("The court's granting of the motion to strike . . . against [the plaintiffs] was . . . not upon the basis that the plaintiff had failed to state a legally sufficient cause of action, which necessarily tests the legal merits of the [plaintiffs'] claim[s], but upon the strictly procedural basis that the plaintiff had improperly joined two insufficiently related causes of action in one complaint, which in no way tested the merits of the [plaintiffs'] claim[s]. Accordingly res judicata does not apply.").

Similarly, collateral estoppel would not bar subsequent litigation in the present circumstances. "[C]ollateral estoppel . . . prohibits the relitigation of an issue when that issue has been actually litigated and necessarily determined in a prior action between the same parties or those in privity with them upon a different claim." *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 600, 922 A.2d 1073 (2007). An issue is actually litigated when "properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined . . . . An issue may be submitted and determined on a motion to dismiss for failure to state a claim, a motion for judgment on the pleadings, a motion for summary judgment . . . a motion for a directed verdict, or their equivalents, as well as on a judgment entered on a verdict." 1 Restatement (Second), Judgments § 27, com-

ment (d), p. 255 (1982). The court's ruling that is the subject of this appeal did not determine any substantive issue and, thus, would not serve to bar subsequent determination.[8]

The plaintiffs also assert that the trial court "failed to consider alternatives to strike on misjoinder." To support this argument, plaintiffs cite Practice Book § 15-2[9] and claim that the trial court should have bifurcated their trial instead of granting the motion to strike. This argument is without merit. "The exclusive remedy for misjoinder of parties is by motion to strike." *Zanoni* v. *Hudon*, 42 Conn. App. 70, 73, 678 A.2d 12 (1996); see also Practice Book § 11-3. Upon finding that joinder was improper, the trial court had no alternatives to consider.[10]

Finally, the plaintiffs contend that the trial court erred in denying their motion for costs, pursuant to § 52-243, arising from their previous appeal in this action, on which they prevailed in our Supreme Court. The plaintiffs claimed that they incurred substantial costs in the course of their ultimately successful appeal from the trial court's prior dismissal of the action on the ground of improper recognizance. The court denied the motion for costs pursuant to § 52-243 because there had "been no verdict on any issue joined in favor of the plaintiff," as required for the recovery of costs pursuant to that

[8] Similarly, the transactions are separate and distinct, as discussed previously in this opinion, such that neither claim would be barred on the ground of privity. See *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 167, 129 A.3d 677 (2016) ("[p]rivity as used in the context of res judicata or collateral estoppel, does not embrace the relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation" [internal quotation marks omitted]).

[9] Practice Book § 15-2 provides: "The judicial authority may, upon motion, for good cause shown, order a separate trial between any parties."

[10] The plaintiffs also assert that they were denied due process rights when the trial court granted the motion to strike. The plaintiffs, however, had a full and fair opportunity to be heard on the matter and, as previously stated, were instructed that both plaintiffs were able to continue their actions separately.

statute. Section 52-243 provides: "If a verdict is found on any issue joined in an action in favor of the plaintiff, costs shall be allowed to him, though on some other issue the defendant should be entitled to judgment, unless the court which tried the issue is of the opinion that the defendant had probable cause to plead the matter found against him."

The plaintiffs argue that the language of § 52-243 does not define the term "verdict," and that a dictionary definition broadly equating "verdict" with any decision or result applies. We disagree. The statutory language clearly establishes that the statute in issue provides for costs only after verdicts in the trial court. Although the plaintiffs' broad definition may be correct in common parlance, a "verdict" in the legal context is defined as "[a] jury's finding or decision on the factual issues of a case [or] . . . in a nonjury trial, a judge's resolution of the issues of a case." Black's Law Dictonary (7th Ed. 1999); see also *Gionfriddo* v. *Avis Rent A Car System, Inc.*, 192 Conn. 301, 306, 472 A.2d 316 (1984) (citing § 52-243 to show that legislature intended "verdict" to include judgments rendered after court trials). Further, § 52-243 on its face addresses the issue of whether the plaintiff may recover costs after prevailing on some but not all of the issues raised.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* BERNARD J. PELUSO (AC 40998)

DiPentima, C. J., and Sheldon and Bear, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree, sexual assault in the fourth degree and risk of injury to a child in connection with his alleged sexual abuse of the minor victim, the defendant appealed,

claiming, inter alia, that the state lacked good cause to amend the information during the trial. The defendant was alleged to have sexually assaulted the victim when the defendant lived in the same condominium complex as the victim's family. The long form information alleged that the incidents occurred during either 2010 or 2011, which was when the victim was in the fifth grade. During trial, however, the victim testified that the incidents had taken place when she was in the third grade, which would have been either in 2008 or 2009. Thereafter, the defendant filed a motion for a judgment of acquittal on the ground that the alleged offenses could not have occurred during the time frame provided in the state's information, as he had moved out of the condominium complex in 2010. Subsequently, the state filed a motion to amend its information to conform to the victim's testimony to allege that the offenses occurred in either 2008 or 2009. The court denied the defendant's motion for a judgment of acquittal and granted the state's motion to amend. On the defendant's appeal, *held*:

1. The trial court did not abuse its discretion in permitting the state to amend its information to conform to the victim's testimony as to when the offenses alleged in the information had occurred; this court, having recognized that prosecuting child sexual assault cases presents a unique set of challenges, has permitted amendments during trial where testimony suggested that the offenses occurred outside the time frame alleged in the operative information, and in light of the victim's age and the length of time between when the offenses allegedly occurred and when the prosecution of this matter took place, and the rationale that has guided this court's precedent with respect to this issue, the state had good cause to amend its information during trial, as the victim's statements to investigators prior to the commencement of trial indicated a less specific time frame than the one she ultimately identified in her testimony, and there was no indication that had the state been more diligent in its pretrial investigation, it could have alleged a more precise time frame before trial.

2. The defendant's claim that the court erred in concluding that his substantive rights were not prejudiced by the state's amendment to its information was unavailing: although the defendant contended that his entire defense was predicated on claiming that he did not live in the condominium complex at the time alleged in the information, given the nature of the allegations and the information available to him, the state's amendment did not deprive him of adequate notice, nor was he prejudiced by the amendment, as he clearly was aware of the time frame that was at issue regardless of the dates that were provided in the information prior to trial; moreover, the trial court did not abuse its discretion in deciding that a one week continuance was sufficient time for the defendant to augment his defense in response to the amended information, as the court, without addressing whether the defendant had been prejudiced by the amendment to the information, indicated that it was willing to

allow the defendant as much time as he needed to reconfigure his defense, the defendant did not provide any substantive basis for his request for a five week continuance apart from a general need to investigate and ascertain his whereabouts during the new time frame, and following the court's decision to grant the defendant only a one week continuance, the defendant informed the court he was willing to accept a three day continuance.

Argued October 23, 2018—officially released January 29, 2019

Procedural History

Substitute information charging the defendant with two counts each of the crimes of sexual assault in the first degree and sexual assault in the fourth degree, and with three counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *K. Murphy, J.*; thereafter, the court granted the state's motion to amend its information and denied the defendant's motion for judgment of acquittal; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

James P. Sexton, assigned counsel, with whom were *Megan L. Wade*, assigned counsel, and, on the brief, *Matthew C. Eagan*, assigned counsel, and *Marina L. Green*, assigned counsel, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Amy Sendensky*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Bernard J. Peluso, appeals from the judgment of conviction, rendered after a jury trial, on two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), two counts of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A), and three counts of risk of injury to a child in violation of

General Statutes § 53-21 (a) (2). On appeal, the defendant claims that the trial court improperly granted the state's motion to amend its information.[1] Specifically, he argues that the state lacked good cause to amend its information during trial and, alternatively, that the court improperly concluded that his substantive rights would not be prejudiced by the amendment. We disagree and, thus, affirm the judgment of conviction.

The jury reasonably could have found the following facts in support of its verdict. In 2008 and 2009, when the victim, S,[2] was in the third grade, she lived in a condominium complex with her mother, her older sister, L, and her older brother. During this time, the defendant lived in the same condominium complex and, approximately three to five times a week, S and L would spend time with him after school. The defendant was "like an uncle" to the girls, and he called them "his nieces." Although the defendant had a girlfriend who lived with him, she typically was not home when the girls came over. At some point, while S was still in the third grade, the defendant began to make suggestive comments to her. Soon thereafter, the defendant began sexually assaulting S.

[1] The defendant also claims on appeal that his sentence is illegal insofar as the court imposed fifteen years of probation for his conviction of multiple counts of sexual assault in the first degree in violation of § 53a-70 (a) (2). He argues, and the state agrees, that a conviction under § 53a-70 (a) (2) is a class A felony and, pursuant to General Statutes § 53a-29 (a) and our Supreme Court's holding in *State* v. *Victor O.*, 301 Conn. 163, 193, 20 A.3d 669, cert. denied, 565 U.S. 1039, 132 S. Ct. 583, 181 L. Ed. 2d 429 (2011), the court may impose only a period of special parole, not probation, for any suspended portion of a sentence imposed for a conviction of a class A felony. At oral argument, the state agreed that this portion of the defendant's sentence was illegal and reported that it had been corrected during the pendency of this appeal. The defendant agreed that this resolution was consistent with the relief he had requested. Accordingly, the issue is moot and we need not address it in this decision.

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

The state charged the defendant in connection with three separate incidents.[3] The first incident of sexual assault occurred when the defendant and S were alone watching a movie on the couch in the defendant's living room. The defendant put his hands down the S's pants, touched her vagina and digitally penetrated her. After he touched her, the defendant kissed her neck and made her place her hands on his jeans, over his penis. Following the incident, and before she went home, the defendant told S not to tell his girlfriend.

The second incident occurred when S came over to the defendant's house while he was shaving. The defendant told S to come into the bathroom. When S came into the bathroom, she noticed that the defendant was wearing only a towel, which was wrapped around his waist. While S was in the bathroom with him, the defendant went over to the toilet and urinated. While he was doing so, he told S to touch his penis, which she did. Later that same day, S went and used the defendant's bathroom. While she was in the bathroom, the defendant opened the door and stared at her.

Finally, the third incident occurred when, on another occasion, the defendant took S upstairs to his computer room. He made S lie on the floor while he performed cunnilingus on her. As with the prior incident on the couch, the defendant told S not to tell his girlfriend.

[3] S recalled two other instances that were not part of the charged offenses. The first incident occurred when S was in the defendant's computer room and found a pornographic magazine in a desk drawer. The defendant came into the room and made her look at the magazine with him. While they were looking at the magazine, the defendant described the sexual acts that were depicted. The second incident took place when S was in the kitchen with the defendant; he picked her up, put her on a table and kissed her neck several times. After this evidence was introduced, the court gave a limiting instruction to the jury that these two instances of prior misconduct were not alone sufficient to convict the defendant of the offenses charged in the information.

At some point after S had finished third grade, the defendant and his girlfriend moved out of the condominium complex. Occasionally, S would still see the defendant, most often when her grandmother would take her out to eat at the restaurant that he owned. As she got older, S saw the defendant less and less frequently. The last time she encountered him was when she was in the ninth grade. S was walking home from her bus stop with a friend, when the defendant pulled up alongside the two girls in his pickup truck. The defendant talked to S briefly before writing down his phone number and giving it to her. He told S to call him sometime.

In January, 2015, S told a friend about the sexual abuse she had experienced as a child. The next day, the friend notified a guidance counselor, and, in accordance with her obligations as a mandated reporter,[4] the guidance counselor informed the police. Later that day, detectives interviewed S about the allegations. S provided the police with a written statement, in which she detailed the incidents that had occurred while she was in elementary school. In her statement, S indicated that the incidents had occurred when she was in the fifth grade.

Soon thereafter, the defendant was arrested and charged. The long form information, dated April 19, 2016, alleged that the incidents had occurred during either 2010 or 2011. During trial, however, S testified that the incidents had taken place when she was in the third grade, which would have been in either 2008 or 2009. The following day, the defendant filed a motion for a judgment of acquittal, and the state filed a motion to amend its information to allege that the offenses had occurred in either 2008 or 2009. The court granted the state's motion to amend and denied the defendant's motion for judgment of acquittal. The jury subsequently

[4] See General Statutes § 17a-101b.

found the defendant guilty on all seven counts. The court rendered judgment accordingly and sentenced the defendant to a total effective sentence of twenty-two years of incarceration, execution suspended after twelve years, followed by fifteen years of probation. This appeal followed.

With respect to the defendant's only operative claim on appeal, we begin by noting that a trial court's decision to permit the state to amend its information is reviewed for an abuse of discretion. *State* v. *Grant*, 83 Conn. App. 90, 96–97, 848 A.2d 549, cert. denied, 270 Conn. 913, 853 A.2d 529 (2004). We acknowledge, however, that although "a prosecutor has broad authority to amend an information under Practice Book § [36-17]" prior to the commencement of the trial, "[o]nce the trial has started . . . the prosecutor is constrained by the provisions of Practice Book § [36-18]. . . . Practice Book § 36-18 provides in relevant part: After commencement of the trial for good cause shown, the judicial authority may permit the prosecuting authority to amend the information at any time before a verdict or finding if no additional or different offense is charged and no substantive rights of the defendant would be prejudiced. . . . It is well settled that the state bears the burden of demonstrating that it has complied with the requirements of § 36-18 in seeking permission to amend the information." (Citations omitted; internal quotation marks omitted.) *State* v. *Ayala*, 324 Conn. 571, 585, 153 A.3d 588 (2017).

The following additional facts and procedural history are relevant to the defendant's claim. The day after S testified, the defendant filed a motion for a judgment of acquittal on the grounds that the alleged offenses could not have occurred during the time frame provided in the state's information. In response to the defendant's motion, the state filed a motion to amend its information to conform to the victim's testimony. The defendant

objected to the motion to amend, arguing that the state lacked good cause to do so because S had consulted with prosecutors at least two weeks prior to trial and, during this meeting, it was determined that the incidents could not have occurred in 2010 or 2011.[5] Thus, it was the defendant's position that the state had no justifiable reason for failing to amend its information before the commencement of trial. Alternatively, the defendant argued that he would be prejudiced by the late amendment insofar as his defense was predicated largely on the fact that he did not live in the condominium complex when the incidents were alleged to have occurred.

The state claimed that, although prosecutors had spoken with S prior to trial about the issue with the time frame provided in her police statement, S maintained during this meeting that the incidents had occurred when she was in the fifth grade or earlier. The state averred that it did not know precisely when the incidents had taken place until S testified at trial. Moreover, the state argued that the defendant's claim of prejudice was without merit because he knew that the charged offenses were alleged to have occurred when he was living in the condominium complex, which would have been before 2010.[6]

Mindful that it is often difficult for prosecutors to delineate specific time frames in cases involving allegations of sexual assault against minor victims, the court granted the state's motion to amend its information. In so doing, the court offered to grant the defendant a continuance in order to prepare his defense in

[5] On cross-examination, S testified that when she met with prosecutors prior to trial, they informed her that the defendant did not live in the condominium complex when she was in fifth grade.

[6] Specifically, the state noted that in her police statement and testimony at trial, S provided details that clearly indicated the offenses occurred when the defendant was living in the condominium complex. "She talks about his couches, his pornography magazine, his desks, his bed when he clearly is living there. . . . She talked about how they cooked, how they watched TV. So this is not an undue surprise to the defendant."

light of the newly amended information. After a brief recess, the following colloquy occurred:

"[Defense Counsel]: We're going to need a continuance, Your Honor.

"The Court: Okay, and how long do you need?

"[Defense Counsel]: We're going to need at least five weeks.

"The Court: Why?

"[Defense Counsel]: He's got a number of employers. We have to hire an investigator.

"The Court: To do what? No. No. No. Be specific here. . . . We're not taking a five week continuance unless—if you need a five week continuance, you'll get it. You need to tell me what it is in your defense not what his employer needs.

* * *

"[Defense Counsel]: We need to track his whereabouts now from the time this girl was eight years old 'til the time—

"The Court: You don't need to track his whereabouts.

* * *

"So, what is it you need to do during this continuance period? Be as specific as possible.

"[Defense Counsel]: Your Honor, we need to investigate.

"The Court: Don't just say investigate. You need to be more specific so I can evaluate [the] timeframe that you need. You said you need to do some records checking.

"[Defense Counsel]: Yes, Your Honor.

"The Court: Okay. I will give you a week continuance and if that's your request, you can subpoena in any witness that you feel you need to examine as well as anyone that's already been called you could examine again.

"[Defense Counsel]: Thank you."

On appeal, the defendant claims that the court abused its discretion in concluding (1) that the state had good cause to seek an amendment to its information during trial and (2) that the defendant, having been granted a one week continuance, was not prejudiced by the amendment. We do not agree.

Pursuant to Practice Book § 36-18, "[g]ood cause . . . assumes some circumstance that the state could not have reasonably anticipated or safeguarded against before trial commenced." *State* v. *Ayala*, supra, 324 Conn. 585–86. "To meet its burden of showing good cause to amend an information pursuant to the rules of practice, the state must provide more than a bare assertion that it is merely conforming the charge to the evidence." *State* v. *Jordan*, 132 Conn. App. 817, 825, 33 A.3d 307, cert. denied, 304 Conn. 909, 39 A.3d 1119 (2012). This court has recognized, however, that prosecuting child sexual assault cases presents a unique set of challenges, and, thus, we have permitted amendments during trial where testimony suggests that the offenses occurred outside the time frame alleged in the operative information. See, e.g., *State* v. *Victor C.*, 145 Conn. App. 54, 66, 75 A.3d 48 (good cause for amendment where victim could not remember specific date incidents occurred and other witness' testimony was inconsistent with time frame in the original information), cert. denied, 310 Conn. 933, 78 A.3d 859 (2013); *State* v. *Grant*, 83 Conn. App. 90, 95–98, 848 A.2d 549 (affirming trial court's decision that in light of victim's age there was good cause to amend information to conform to

victim's testimony), cert. denied, 270 Conn. 913, 853 A.2d 529 (2004).

Cognizant of the rationale that has guided our precedent with respect to this issue, and in light of the victim's age and the length of time between when the offenses allegedly occurred and when the prosecution of this matter took place, we conclude that the state had good cause to amend its information during trial. As in *State* v. *Grant*, supra, 83 Conn. App. 93–94, S's statements to investigators prior to the commencement of trial indicated a less specific time frame than the one she ultimately identified in her testimony. Further, there is no indication that had the state been more diligent in its pretrial investigation it could have alleged a more precise time frame before trial. See *State* v. *Wilson F.*, 77 Conn. App. 405, 413, 823 A.2d 406, cert. denied, 265 Conn. 905, 831 A.2d 254 (2003). Simply stated, the court did not abuse its discretion in permitting the state to amend its information to conform to the victim's testimony as to when the offenses alleged in the information had occurred.

The defendant also claims that the court erred in concluding that his substantive rights were not prejudiced by the state's amendment. "In the prejudice analysis, the decisive question is whether the defendant was informed of the charges with sufficient precision to be able to prepare an adequate defense. . . . If the defendant has not asserted an alibi defense and time is not an element of the crime, then there is no prejudice when the state amends the information to amplify or to correct the time of the commission of the offense. . . . Ultimately, if the amendment has no effect on the defendant's asserted defense, there is no prejudice." (Citations omitted; internal quotation marks omitted.) *State* v. *Enrique F.*, 146 Conn. App. 820, 826, 79 A.3d 140 (2013), cert. denied, 311 Conn. 903, 83 A.3d 350 (2014).

Here, the defendant did not assert an alibi defense and, although he contends that his entire defense was predicated on claiming he did not live in the condominium complex at the time alleged in the information, we conclude that on the basis of the nature of the allegations and the information available to him, the state's amendment did not deprive the defendant of adequate notice. As the state argued in its brief, the victim's statement to the police indicated that the offenses had occurred while she was spending time with the defendant when he was living in the condominium complex. Further, the defendant acknowledged prior to trial that some aspects of the charged offenses, and the uncharged prior misconduct, had in fact occurred, but disputed the allegations of inappropriate behavior asserted therein.[7] In this regard, we cannot conclude that the defendant was prejudiced by the amendment, given that he clearly was aware of the time frame that was at issue, regardless of the dates that were provided in the information prior to trial.[8] See *State* v. *Victor C.*, supra, 145 Conn. App. 67 (forensic interview report provided to defendant before trial indicated time frame at issue).

In conjunction with this claim, the defendant argues that the court agreed to grant him with a continuance

[7] For example, the state introduced into evidence a telephone call from prison between the defendant and his girlfriend. During the call, the defendant and his girlfriend discussed an incident that occurred when S came over while he was in the bathroom.

"[The Defendant's Girlfriend]: Do you remember talking to me one time that they came in and caught you in the shower.

"[The Defendant]: Yup.

"[The Defendant's Girlfriend]: You came out with a towel on and that kind of got twisted out of shape.

"[The Defendant]: Yeah. I know—"

The defendant also testified that he recalled an incident in which he found S and L looking at a Playboy magazine that he owned. He testified that he admonished the girls for looking at it.

[8] Additionally, when the defendant testified at trial, he admitted that he knew that S was alleging he sexually assaulted her when he was living in the condominium complex.

as a means of mitigating the prejudice created by the state's amendment to the information, and that the court erred insofar as it determined that a one week continuance was sufficient.[9] We disagree. The court, without addressing whether the defendant had been prejudiced by the amendment to the information, indicated that it was willing to allow the defendant as much time as he needed to reconfigure his defense. When asked to articulate the reasoning behind his request for a five week continuance, however, the defendant could not provide any substantive basis apart from a general need to "investigate" and ascertain his whereabouts during the new time frame. Further, following the court's decision to grant the defendant only a one week continuance, the defendant informed the court that he was willing to accept a three day continuance instead. Accordingly, to the extent that there is any support in

[9] The defendant also argues that the court improperly placed the burden on him to justify the need for a five week continuance. The defendant contends that in cases where the state seeks to amend the information during trial, the defendant should be entitled to a continuance of a "presumptively reasonable" length and "the state should retain the burden . . . for rebutting that presumptive period if it seeks a shorter continuance." We decline to adopt this approach. In our view, it would be an unworkable constraint on the inherent discretion of the trial court to establish a "presumptively reasonable" continuance period that would not account for the unique factual and procedural circumstances that may arise in a given case. Rather, it is the proponent's burden to prove the need for and the length of the requested continuance, and the court's decision is subject to an abuse of discretion standard of review by this court. See, e.g., *Kennedy* v. *Kennedy*, 83 Conn. App. 106, 109–110, 847 A.2d 1104 ("A motion for continuance is addressed to the discretion of the trial court, and its ruling will not be overturned absent a showing of a clear abuse of discretion. . . . The burden of proof is upon the party claiming an abuse of discretion. . . . Every reasonable presumption in favor of the proper exercise of the trial court's discretion will be made." [Internal quotation marks omitted.]), cert. denied, 270 Conn. 915, 853 A.2 530 (2004); see also *West Haven Lumber Co.* v. *Sentry Construction Corp.*, 117 Conn. App. 465, 472, 979 A.2d 591 (defendant did not meet burden of proof in showing that court's denial of motion for a continuance was unreasonable or arbitrary decision), cert. denied, 294 Conn. 919, 984 A.2d 70 (2009); *O'Connell* v. *O'Connell*, 101 Conn. App. 516, 525–27, 922 A.2d 293 (2007).

the record for the assertion that the court offered a continuance as a means of addressing the prejudice prong of Practice Book § 36-18, we conclude that the trial court did not abuse its discretion in deciding that a one week continuance was sufficient time for the defendant to augment his defense in response to the amended information.

The judgment is affirmed.

In this opinion the other judges concurred.

BANK OF AMERICA, N.A. *v.* WILLIAM GONZALEZ ET AL.
(AC 40405)

Sheldon, Prescott and Pellegrino, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant G. In response, G filed an answer and six special defenses, each of which alleged misconduct by B, a mortgage broker who allegedly was an employee or agent of the original lender and mortgagee, M Co. Following a trial, the trial court rendered a judgment of strict foreclosure. In reaching its decision, the court rejected G's special defenses, finding that he had not satisfied his burden of proving that B was an agent or employee of M Co. On G's appeal to this court, *held* that the trial court correctly concluded that G could not prevail on his special defenses, as that court's finding that B was not an agent or employee of M Co. was not clearly erroneous and the existence of the agency relationship between B and M Co. was critical to the viability of G's special defenses; G failed to produce evidence to establish that B was an agent or employee of M Co. or that he was acting with its apparent authority, and although G argued that M Co. communicated with him exclusively through B and that M Co. had the power to control the means by which such communications were to be made, there was no evidence that M Co. knew of or promoted the line of communication between B and G, and there was no evidence indicating that G knew of or relied on any statement or action of M Co. when he entered into the subject transaction, especially given that G testified that he did not learn that M Co. was the lender until the date of the closing.

Argued October 24, 2018—officially released January 29, 2019

Procedural History

Action to foreclose a mortgage on certain real property of the named defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Michael Hartmere*, judge trial referee; judgment of strict foreclosure, from which the named defendant appealed to this court. *Affirmed.*

Ridgely Whitmore Brown, with whom, on the brief, was *Benjamin Gershberg*, for the appellant (named defendant).

Pierre-Yves Kolakowski, for the appellee (plaintiff).

David Lavery filed a brief for the Connecticut Fair Housing Center as amicus curiae.

Opinion

PELLEGRINO, J. The defendant William Gonzalez[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, Bank of America, N.A. On appeal, the defendant claims that the court erred by concluding that he had failed to satisfy his burden of proving that the mortgage broker was an agent or employee of the original mortgagee and concluding, on that basis, that he had failed to prove any of his special defenses, all of which were based on the alleged conduct of the broker. The defendant further claims that the trial court incorrectly concluded that he had failed to sustain his burden of proving that the mortgage was unconscionable.[2] We

[1] David J. Bigley and the state of Connecticut also were named as defendants but are not parties to this appeal. We therefore refer in this opinion to Gonzalez as the defendant.

[2] The Connecticut Fair Housing Center, as amicus curiae, also argues that multiple indicia of fraud are present in this case and that the subject transaction has many of the hallmarks of a "property flip fraud" as described by the white paper prepared by the Federal Financial Institutions Examination Council. Because the defendant did not allege, and the court did not find, that this was a fraudulent property flip, we decline to review this issue.

disagree with the defendant and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of the defendant's claims on appeal. The plaintiff filed this action in August, 2013, seeking to foreclose a residential mortgage on property located at 80 Oakwood Street in Bridgeport. According to the complaint, on March 20, 2006, the defendant executed the mortgage in favor of Mortgage Electronic Registration Systems, Inc., as nominee for Mortgage Capital Group, LLC (Mortgage Capital), as security for a $267,750 promissory note payable to the order of Mortgage Capital. The complaint alleged that the note was in default and that the plaintiff, which was in possession of the note, was exercising its option to declare the entire balance of the note due and payable.

On June 25, 2015, the defendant filed an amended answer and six special defenses. The special defenses alleged fraudulent inducement, negligent misrepresentation, equitable estoppel, unconscionability, duress and unclean hands. Each of the special defenses alleged misconduct by David J. Bigley, an alleged employee and/or agent of the original lender and mortgagee, Mortgage Capital.[3] On May 5, 2016, the plaintiff filed its reply,

[3] The special defenses alleged that Mortgage Capital, through its employees and/or agents, including, but not limited to, Bigley, falsely represented to the defendant that his monthly mortgage payment would be $1200 per month and later informed him that it would be $2165 per month; falsely represented to the defendant that the total closing costs would be $9000 but then demanded an additional $16,000 in closing costs; falsely informed the defendant that if he did not pay the additional $16,000 in closing costs and enter into the mortgage transaction, he would forfeit his deposit of $20,000; failed to disclose that Bigley had a second mortgage on the property that would be paid off as part of the closing on the defendant's property; failed to disclose that the attorney that the defendant hired was Bigley's cousin; and failed to disclose that the appraiser who conducted the appraisal for Mortgage Capital was Bigley's brother.

denying each of the defendant's special defenses. Following a trial on April 18 and 19, 2017, the court rendered a judgment of strict foreclosure.[4] In its oral decision, the court found that the plaintiff had presented prima facie evidence to support the judgment of strict foreclosure. The court rejected the defendant's special defenses, finding that the defendant had not satisfied his burden of proving that Bigley was an agent or employee of Mortgage Capital. The defendant then filed the present appeal.

We first set forth our standard of review. "The standard of review of a judgment of . . . strict foreclosure is whether the trial court abused its discretion. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *Bank of New York Mellon* v. *Talbot*, 174 Conn. App. 377, 382, 165 A.3d 1253 (2017).

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied." (Internal quotation marks omitted.) *U.S. Bank, N.A.* v. *Foote*, 151 Conn. App. 620, 632, 94 A.3d 1267, cert. denied, 314 Conn. 930, 101 A.3d 952 (2014). In its decision, the trial court noted that there was no disagreement that the plaintiff had established

[4] This matter was previously tried to the court, *Hon. Richard P. Gilardi*, judge trial referee, but the court failed to render a decision within 120 days as required by General Statutes § 51-183b. The matter was then reassigned to the court, *Hon. Michael Hartmere*, judge trial referee.

a prima facie case. On appeal, the defendant has not challenged the plaintiff's standing as the owner of the note and mortgage or the defendant's default on the note. We, therefore, limit our review to the issues raised by the defendant concerning his special defenses.

"Where the plaintiff's conduct is inequitable, a court may withhold foreclosure on equitable considerations and principles. . . . [O]ur courts have permitted several equitable defenses to a foreclosure action. [I]f the mortgagor is prevented by accident, mistake or fraud, from fulfilling a condition of the mortgage, foreclosure cannot be had . . . ." (Internal quotation marks omitted.) *Hirsch* v. *Woermer*, 184 Conn. App. 583, 588, 195 A.3d 1182, cert. denied, 330 Conn. 938, 195 A.3d 384 (2018). The defendant bears the burden of proof on his or her special defenses. *Kaye* v. *Housman*, 184 Conn. App. 808, 817, 195 A.3d 1168 (2018).

The defendant argues that the court erred in concluding that he had failed to prove that Bigley was an agent or employee of the original mortgagee, Mortgage Capital.[5] Each of the special defenses alleged that Bigley,

[5] The defendant also argues that the court erred in concluding that he had failed to prove that Attorney Thomas V. Battaglia, Jr., was an agent or employee of Mortgage Capital. The defendant's special defenses, however, were all premised on the allegation that Bigley was an agent or employee of Mortgage Capital. The special defenses did not allege that Battaglia was an agent or employee of Mortgage Capital. Furthermore, the court's decision focused solely on whether Bigley was an agent or employee of Mortgage Capital, and did not make a finding regarding whether Battaglia was an agent or employee of Mortgage Capital. The defendant did not file a motion for articulation regarding whether Battaglia was an agent or employee of Mortgage Capital. "Without the necessary factual and legal conclusions furnished by the trial court, either on its own or in response to a proper motion for articulation, any decision made by us . . . would be entirely speculative." (Internal quotation marks omitted.) *Bayview Loan Servicing, LLC* v. *Park City Sports, LLC*, 180 Conn. App. 765, 781, 184 A.3d 1277, cert. denied, 330 Conn. 901, 192 A.3d 426 (2018). We, therefore, limit our consideration of this issue to the court's conclusion that the defendant had failed to prove that Bigley was an agent or employee of Mortgage Capital.

as an agent or employee of Mortgage Capital, induced the defendant to enter into this mortgage transaction. In order to prevail on these special defenses, therefore, the defendant was required to prove that Bigley was an agent or employee of Mortgage Capital. See *CitiMortgage, Inc.* v. *Coolbeth*, 147 Conn. App. 183, 192, 81 A.3d 1189 (2013), cert. denied, 311 Conn. 925, 86 A.3d 469 (2014). "The existence of an agency relationship is a question of fact . . . which may be established by circumstantial evidence based upon an examination of the situation of the parties, their acts and other relevant information." (Citation omitted; internal quotation marks omitted.) *Gagliano* v. *Advanced Specialty Care, P.C.*, 329 Conn. 745, 755, 189 A.3d 587 (2018). We review the trial court's findings of fact under the clearly erroneous standard of review. *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 157 Conn. App. 139, 158, 117 A.3d 876, cert. denied, 318 Conn. 902, 122 A.3d 631 (2015) and 318 Conn. 902, 123 A.3d 882 (2015). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 507–508, 4 A.3d 288 (2010).

"Three elements are required to show the existence of an agency relationship: (1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking. . . . Although stated as a three part test, [our Supreme Court] has also acknowledged there are various factors to be considered in assessing whether [an agency] relationship exists [which] include: whether the alleged principal has the

right to direct and control the work of the agent; whether the agent is engaged in a distinct occupation; whether the principal or the agent supplies the instrumentalities, tools, and the place of work; and the method of paying the agent. . . . In addition, [a]n essential ingredient of agency is that the agent is doing something at the behest and for the benefit of the principal." (Citation omitted; internal quotation marks omitted.) *Gagliano* v. *Advanced Specialty Care, P.C.*, supra, 329 Conn. 755.

Additionally, "[a]pparent authority is that semblance of authority which a principal, through his own acts or inadvertences, causes or allows third persons to believe his agent possesses. . . . Apparent authority thus must be determined by the acts of the principal rather than by the acts of the agent. . . . Furthermore, the party seeking to impose liability upon the principal must demonstrate that it acted in good faith based upon the actions or inadvertences of the principal." (Citations omitted; internal quotation marks omitted.) *Beckenstein* v. *Potter & Carrier, Inc.*, 191 Conn. 120, 140–41, 464 A.2d 6 (1983).

At trial, the defendant testified that after he received an inheritance from his brother's estate, he consulted his friend, Vincent Curcio, who recommended that he purchase the subject property. Curcio also referred the defendant to Attorney Thomas V. Battaglia, Jr., to represent him in the purchase of the property. Bigley, a mortgage broker doing business as Main Street Mortgage, LLC, assisted the defendant with securing financing to purchase the house.[6] Bigley obtained a lender, Mortgage Capital, who was not disclosed to the defendant until the date of the closing.

[6] According to the statement of Battaglia, which was admitted into evidence, Curcio referred the defendant to Main Street Mortgage, LLC, which was owned by Bigley.

The defendant testified that he paid $40,000 as a deposit on the property. He testified that when he first met Bigley, he told Bigley that he could only afford a mortgage in the amount of $1250 per month. On the date of the closing, however, he was told that his monthly payment would be $2618.16 per month and that if he did not proceed with the transaction, he would lose $20,000 of his deposit. At that point, Bigley agreed to loan the defendant the shortfall of $16,000 to complete the closing. The defendant was not informed that Bigley held a mortgage on the property from Sunrise Contracting, LLC, the seller of the property, in the amount of $249,600, that would be paid off with the proceeds of the sale to the defendant. The mortgage from Sunrise Contracting, LLC, to Bigley was witnessed by Battaglia who, unbeknownst to the defendant, was Bigley's cousin.[7]

In addition to the defendant's testimony, the court considered several exhibits that were admitted into evidence. Specifically, the mortgage loan origination agreement, signed by the defendant on January 30, 2006, identified Main Street Mortgage, LLC, as an independent contractor and licensed mortgage broker under the laws of the state of Connecticut. This document provided in relevant part: "In connection with this mortgage loan we are acting as an independent contractor and not as your agent. We will enter into separate independent contractor agreements with various lenders." Similarly, the mortgage broker fee disclosure, signed by the defendant on January 30, 2006, provided in relevant part: "The mortgage broker will submit your application for a residential mortgage loan to a participating lender with which it from time to time contracts upon such

[7] The defendant filed a prior action against Bigley and Battaglia based on the same underlying transaction, but the trial court, *Sommer*, *J.*, rendered summary judgment in favor of the defendants on the ground that the action was time barred.

terms and conditions as you may request or a lender may require. . . . The mortgage broker may be acting as an independent contractor and not as your agent. If you are unsure of the nature of your relationship, please ask the mortgage broker for clarification. . . . The mortgage broker has entered into separate independent contractor agreements with various lenders." Finally, the mortgage broker fee disclosure also provided: "You may work with the mortgage broker to select the method [by] which it receives its compensation depending on your financial needs, subject to the lender's program requirements and credit underwriting guidelines." The "Good Faith Estimate," also signed by the defendant on January 30, 2006, provided that it was "being provided by Main Street Mortgage, LLC, a mortgage broker, and no lender has yet been obtained."

On cross-examination, the defendant testified that he had no evidence that Mortgage Capital set Bigley's hours or supplied any office supplies to Bigley. He further testified that he had no evidence that Mortgage Capital provided or told Bigley who to get as customers. Finally, the defendant testified that he did not read any of the closing documents.

In its oral decision at the conclusion of the trial, the court stated: "The defenses basically rely on an allegation that Bigley induced the defendant to enter into this mortgage. In order to prove each or any of the special defenses, the defendant had to prove that Bigley [was] an agent or employee of the originating lender, the originating lender being Mortgage Capital . . . [and] the court will find that the evidence showed that Bigley, at that time, was not an agent or employee of Mortgage Capital . . . . Bigley acted as an independent contractor who worked for and owned, according to Battaglia's statement, Main Street Mortgage, LLC, and that's who Bigley was working for. The defendant, in order to make out or prove any of these special

defenses, had to establish a link, connection between Bigley, the broker, and the lender. And the evidence, credible evidence, just didn't show that."

The court further stated that Mortgage Capital "had little control over the actions of . . . Bigley. Bigley was not acting for the sole benefit of [Mortgage Capital] and [it] did not . . . provide the instrumentalities, the tools, or place of work for the broker and all of that tends to prove the lack of an agency relationship." The court continued by stating that "another important factor . . . is that neither the plaintiff nor [Mortgage Capital], according to the evidence, told the defendant anything. All the allegations, which [the defendant] testified to, are against Bigley, and there's no evidence that the plaintiff or [Mortgage Capital] made any representations to [the defendant] at all. Now the court is not unsympathetic to the position and the predicament that [the defendant] found himself in, but based upon the evidence and the credible evidence that's been presented, again, the . . . special defenses simply aren't supported. And the fact that [the defendant] has testified that he didn't read these various documents is not a defense."[8]

In support of its decision, the court relied on *CitiMortgage, Inc.* v. *Coolbeth*, supra, 147 Conn. App. 183. In that case, the trial court granted the plaintiff's motion for summary judgment as to liability on its complaint

[8] The court further stated: "[T]he defendant . . . signed off on these various documents and whether the—what credits that testimony or not, the documents speak for themselves. They were signed. Some of them signed in multiple places and multiple times, and the documents speak for themselves and . . . contradict the special defenses." According to the defendant, these statements indicate that, because the documents "speak for themselves," the court failed to consider the credibility of the defendant's testimony in light of all of the evidence presented. We disagree with the defendant's narrow reading of the court's decision, which states that "based upon the . . . credible evidence that's been presented," the defendant had not proven his special defenses.

and as to the defendants' special defenses and counterclaim, which alleged fraud and unconscionable conduct by the plaintiff. Id., 188. The court concluded that the defendants had failed to raise a genuine issue of material fact with respect to the existence of an agency relationship among the plaintiff, the mortgage broker, and Citibank, which maintained the defendants' credit card accounts. Id. In affirming the judgment of the trial court, this court stated: "The existence of an agency relationship is critical to the viability of the defendants' special defenses and counterclaim, insofar as the special defenses and counterclaim are primarily directed toward the representations and actions of the mortgage broker and Citibank—not the plaintiff." Id., 192, citing *Barasso* v. *Rear Still Hill Road, LLC*, 81 Conn. App. 798, 805, 842 A.2d 1143 (2004).

On the basis of our review of the evidence in the present case, we agree that the defendant did not produce evidence to establish that Bigley was an agent or employee of Mortgage Capital, or that he was acting with its apparent authority. Although the defendant argues that Mortgage Capital communicated with him exclusively through Bigley and that Mortgage Capital had the power to control the means by which such communications were to be made, there is no evidence that it knew of or promoted the line of communication between Bigley and the defendant. Furthermore, there is no evidence indicating that the defendant knew of or relied upon any statement or action of Mortgage Capital when he entered into the transaction at issue; the defendant, rather, testified that he did not learn that Mortgage Capital was the lender until the date of the closing. "It is not within the province of this court to 'connect the dots' " to find that Bigley was an agent of Mortgage Capital. *CitiMortgage, Inc.* v. *Coolbeth*, supra, 147 Conn. App. 198. We cannot say, therefore, that the trial court's finding that Bigley was not an agent or

employee of Mortgage Capital was clearly erroneous. Because the existence of the agency relationship was critical to the viability of the defendant's special defenses; id., 192; the court correctly concluded that the defendant could not prevail on his special defenses.[9]

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

[9] This conclusion is dispositive of the defendant's separately briefed claims that the court's finding that Bigley was not an agent of Mortgage Capital was clearly erroneous and that the court's ultimate conclusion that he had failed to satisfy his burden of proving each of his special defenses was improper. The defendant further argues, however, that the court incorrectly concluded that he had failed to sustain his burden of proving that the mortgage was unconscionable. In support of this argument, the defendant attempts to distinguish the present case from *CitiMortgage, Inc.* v. *Coolbeth*, supra, 147 Conn. App. 183, arguing that although the alleged misrepresentations in *CitiMortgage, Inc.*, may have resulted in a mortgage that was more expensive than the borrowers originally sought, there is no indication that the mortgage in that case was completely unaffordable and would almost certainly result in a default and foreclosure. The defendant further points out that *CitiMortgage, Inc.*, involved a refinance rather than the purchase of a home, while in this case, the defendant lost his home and the $40,000 he paid because the mortgage was completely unaffordable. Under these circumstances, the defendant argues that a finding of procedural unconscionability was not required and the status of Bigley as an agent was irrelevant. We disagree.

"The doctrine of unconscionability, as a defense to contract enforcement, generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party . . . ." (Internal quotation marks omitted.) *Hirsch* v. *Woermer*, 184 Conn. App. 583, 589–90, 195 A.3d 1182, cert. denied, 330 Conn. 938, 195 A.3d 384 (2018). The trial court concluded, and we agree, that an agency relationship was required for the defendant to prevail on his special defenses, including his special defense of unconscionability, insofar as the special defense was primarily directed toward the representations and actions of Bigley. See *CitiMortgage, Inc.* v. *Coolbeth*, supra, 147 Conn. App. 192. Because the defendant did not establish that Bigley was an agent or employee of Mortgage Capital, the court correctly concluded that the defendant could not prevail on his special defense of unconscionability.

PEOPLE'S UNITED BANK, NATIONAL ASSOCIATION *v.* KEVIN PURCELL ET AL.
(AC 40408)

Prescott, Elgo and Bear, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant P. A state marshal had served P at his usual place of abode and, after P was defaulted for failure to appear, the trial court rendered judgment of foreclosure by sale. P then filed a motion to open the judgment and to dismiss the plaintiff's action on the ground that the court lacked personal jurisdiction over him because he had never been served with the writ of summons and complaint. The court conducted an evidentiary hearing in which P provided two addresses and testified that his usual place of abode had been at a different address at the time service of process was made. In denying P's motion, the court determined that P's testimony was inconsistent and incredible, and credited the testimony of the state marshal, finding that it conformed with and expanded on the information in her return of service. On P's appeal to this court, *held* that the trial court did not abuse its discretion in denying P's motion to open the judgment and to dismiss the plaintiff's action, as P failed to demonstrate that the court's factual findings were clearly erroneous; that court was not required to conclude that service of process was required to be made at the different address that P claimed was his usual place of abode, as service of process was valid at either of P's addresses, the return of service stated that P was served at his usual place of abode, and the state marshal testified that a neighbor of P had told her that P lived at the address where she made service, which also was identified as P's address in a letter from P to the plaintiff, and the court properly weighed the credibility of the witnesses in making its findings of fact and in concluding that the defendant did not present sufficient evidence to show insufficient service of process on him by the state marshal.

Submitted on briefs November 26, 2018—officially released January 29, 2019

Procedural History

Action to foreclose a mortgage on certain real property of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Hartford, where the named defendant was defaulted for failure to appear; thereafter, the court, *Robaina*, *J.*,

granted the plaintiff's motion for a judgment of foreclosure and rendered judgment of foreclosure by sale; subsequently, the court, *Dubay, J.*, denied the named defendant's motion to open the judgment and to dismiss; thereafter, the court, *Dubay, J.*, issued an articulation of its decision and denied the named defendant's motion for reconsideration, and the named defendant appealed to this court. *Affirmed.*

Loida John-Nicholson filed a brief for the appellant (named defendant).

Robert J. Piscitelli filed a brief for the appellee (plaintiff).

Opinion

PER CURIAM. The defendant Kevin Purcell[1] appeals following the trial court's denial of his motion to open the judgment of foreclosure by sale and to dismiss the action. Specifically, the defendant claims that the trial court should have dismissed the action because it lacked personal jurisdiction over him due to insufficient service of process on him. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The plaintiff, People's United Bank, National Association, commenced this action against the defendant on June 3, 2016, seeking to foreclose on his mortgaged property located at 180 Palm Street in Hartford. The state marshal's return of service indicated that she served the defendant by leaving the writ of summons and a copy of the complaint at the defendant's usual place of abode, the 180 Palm Street address.

[1] The other named defendants, Connecticut Light & Power Company, the city of Hartford, Esther Purcell, also known as Ester Purcell, and Saint Francis Hospital and Medical Center did not participate in this appeal. For clarity, we refer to Kevin Purcell as the defendant. Nonappearing parties included Nicole Morant, Unifund CCR Partners, and The Palisades Collection, LLC.

On July 26, 2016, the defendant was defaulted for failure to appear. The court subsequently rendered a judgment of foreclosure by sale on October 31, 2016. On February 3, 2017, the defendant filed a motion to open the judgment and to dismiss the action, arguing that the court lacked jurisdiction over him because he was never served with the writ of summons and complaint.[2] After an evidentiary hearing, at which both the defendant and the marshal who served him by abode service testified, the court denied the defendant's motion to open the judgment and to dismiss the plaintiff's action, and set a new sale date.

The defendant next filed a motion to reargue his motion to open the judgment and for the court to reconsider its ruling, which the court also denied. The defendant then filed this appeal and subsequently moved for an articulation of the court's decision denying his motion to open the judgment and to dismiss the plaintiff's action. In its articulation, the trial court stated that it had credited the testimony of the marshal, noting that her testimony conformed with and expanded upon the information provided in her return of service. Moreover, the court also found that the defendant's testimony was "inconsistent and entirely incredible."

On appeal, the defendant argues that the court improperly denied his motion to open the judgment of foreclosure by sale and to dismiss the action for lack of personal jurisdiction. We disagree.

We first set forth the applicable legal principles and standard of review that guide our analysis. "We review a trial court's ruling on motions to open under an abuse of discretion standard. . . . Under this standard, we

[2] Prior to the filing of the defendant's motion and the sale date, the court denied a motion to open the judgment that was filed by Esther Purcell, the defendant's mother and a co-owner of the property at issue. The sale date was subsequently reset for March 25, 2017.

give every reasonable presumption in favor of a decision's correctness and will disturb the decision only where the trial court acted unreasonably or in a clear abuse of discretion. (Citations omitted; internal quotation marks omitted.) *GMAC Mortgage, LLC* v. *Ford*, 178 Conn. App. 287, 294–95, 175 A.3d 582 (2017).

Further, "[t]he Superior Court . . . may exercise jurisdiction over a person only if that person has been properly served with process, has consented to the jurisdiction of the court or has waived any objection to the court's exercise of personal jurisdiction. . . . When . . . the defendant is a resident of Connecticut who claims that no valid abode service has been made upon her that would give the court jurisdiction over her person, the defendant bears the burden of disproving personal jurisdiction. The general rule putting the burden of proof on the defendant as to jurisdictional issues raised is based on the presumption of the truth of the matters stated in the officer's return. When jurisdiction is based on personal or abode service, the matters stated in the return, if true, confer jurisdiction unless sufficient evidence is introduced to prove otherwise." (Citations omitted; internal quotation marks omitted.) *Knutson Mortgage Corp.* v. *Bernier*, 67 Conn. App. 768, 771, 789 A.2d 528 (2002).

"Whether a particular place is the usual place of abode of a defendant is a question of fact. Although the sheriff's return is prima facie evidence of the facts stated therein, it may be contradicted and facts may be introduced to show otherwise." (Internal quotation marks omitted.) *Tax Collector* v. *Stettinger*, 79 Conn. App. 823, 825, 832 A.2d 75 (2003).

"It is well established that we review findings of fact under the clearly erroneous standard." Id., 825. "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. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling" (Internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 765–66, 43 A.3d 567 (2012).

Our review of the record leads us to conclude that the defendant has not demonstrated that the court's findings of fact were clearly erroneous. The return states that the marshal served the defendant by leaving a true and attested copy of the complaint at 180 Palm Street, the defendant's usual place of abode. At the evidentiary hearing, the marshal testified that a neighbor of the defendant, when asked by the marshal, stated that the defendant lived at 180 Palm Street. Additionally, the plaintiff produced a letter from the defendant addressed to the plaintiff, which, in its upper right corner, stated the defendant's address as 180 Palm Street.

Conversely, the defendant testified that he had not lived at 180 Palm Street for fourteen years and that his usual place of abode at the time of service was 86 Plainfield Street. When the defendant was asked to provide his name and address for the record, however, he provided two different addresses.[3] Although the defendant submitted an affidavit, his driver's license, tax records, and other documents to show that he no longer resided at 180 Palm Street, and that his place of abode

[3] The defendant stated on the record that his home address was "196 Plainfield Street—Colebrook Street" in Hartford.

at the time of service was 86 Plainfield Street, the court was not required to conclude that service was required to be made at that location. See *Tax Collector* v. *Stettinger*, supra, 79 Conn. App. 827. In fact, "[o]ne may have two or more places of residence within a [s]tate . . . and each may be a usual place of abode. . . . *Service of process will be valid if made in either of the usual places of abode*." (Emphasis in original; internal quotation marks omitted.) Id.

In summary, the defendant moved to open the judgment of foreclosure by sale and to dismiss the action for lack of personal jurisdiction over him. The court held an evidentiary hearing on the motion. The defendant and the marshal testified at the hearing. The court, after finding that the defendant's testimony was inconsistent and entirely incredible and that the marshal's testimony was credible, denied the motion. On appeal, the defendant has not demonstrated that the court's factual findings were clearly erroneous. The court properly weighed the credibility of the witnesses in making its findings of fact and in concluding that the defendant did not present sufficient evidence to show insufficient service of process on him. The court thus did not abuse its discretion in denying the defendant's motion to open the judgment and to dismiss the action.

The judgment is affirmed and the case is remanded for the purpose of setting a new sale date.

CAMILA COPPEDGE *v.* CURTIS TRAVIS
(AC 40787)

Elgo, Bright and Beach, Js.

Syllabus

The plaintiff sought to recover damages from the defendant dog owner, pursuant to statute ([Rev. to 2013] § 22-357), for personal injuries she sustained when the defendant's dog bounded toward her, causing her

to become startled and frightened, and to trip and fall as she tried to avoid the dog's advance. After a trial to the court, the court rendered judgment in favor of the plaintiff, from which the defendant appealed to this court. *Held* that the trial court properly determined that § 22-357 applied to the facts of this case: although that court did not use the words mischievous or vicious in describing the dog's behavior, it implicitly found that the dog's actions were not passive, innocent or involuntary, as the plaintiff testified that the defendant's unleashed dog bounded toward her in an exuberant manner, which fit within the definition of mischievous behavior; moreover, the court's finding on the element of proximate cause was not clearly erroneous, as the court found that the cause of the plaintiff's injuries was that the dog, with no leash attached, bounded ahead of the defendant, which caused the plaintiff to become startled and frightened, and to trip and fall as she tried to avoid the dog, and that the dog charging toward the plaintiff set in motion a chain of events that brought about her injuries, and the plaintiff's testimony that the dog stood over her after she fell supported a reasonable inference that the dog was close enough to the plaintiff when she fell as to be the proximate cause of the plaintiff's fall.

Argued December 5, 2018—officially released January 29, 2019

Procedural History

Action to recover damages for personal injuries sustained as a result of an attack by a dog owned by the defendant, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Pittman, J.*; judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

Kelly Grey, for the appellant (defendant).

Katherine L. Matthews, for the appellee (plaintiff).

Opinion

BRIGHT, J. The defendant dog owner, Curtis Travis, appeals from the judgment of the trial court, rendered after a trial to the court, in favor of the plaintiff, Camila Coppedge, in this tort action, commenced pursuant to General Statutes (Rev. to 2013) § 22-357,[1] commonly

[1] General Statutes (Rev. to 2013) § 22-357 was the version of the statute in effect when this incident occurred. The statute subsequently was amended by No. 13-223 of the 2013 Public Acts, which became effective October 1, 2013, and was amended several times thereafter. Hereinafter, all references to § 22-357 are to the 2013 revision unless otherwise indicated.

known as the dog bite statute. On appeal, the defendant claims that (1) "[t]he evidence supports a finding that . . . § 22-357 does not apply as the dog's conduct was innocent," and (2) "[t]he evidence does not support a finding of proximate cause." We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the trial court found the following facts, which it set forth in a July 18, 2017 memorandum of decision. "On April 14, 2013, the plaintiff, who worked as a personal care assistant to elderly and disabled people, was carrying certain items into a motel room in East Hartford from a motor vehicle. The defendant, who was a long distance truck driver, was playing fetch with his dog on a grassy area next to the motel building. The defendant's dog was a one year old medium-sized Labradoodle named Lilly, with whom the defendant sometimes traveled. At the end of their exercise, the defendant and Lilly intended to return to the motel room where they were staying. Lilly, with no leash attached, bounded toward the motel ahead of the defendant.

"The plaintiff saw Lilly coming, became startled and frightened, and tripped and fell as she tried to avoid the dog's advance. Lilly never actually made physical contact with the plaintiff, but came close and stood over the plaintiff as the plaintiff lay on the ground.

"The defendant attempted to help the plaintiff up off the ground but words were exchanged about the presence of the dog. The defendant put Lilly in his motel room, away from the plaintiff, and helpfully called 911 for an ambulance.

"It was obvious that the plaintiff was injured. She had fallen backwards with her right arm and wrist under her body as she landed. The plaintiff was in great pain. She was taken by ambulance to Manchester Memorial Hospital where she was examined, x-rayed, and treated.

Her right wrist was fractured in two places. The plaintiff was discharged from the hospital with a cast on her right wrist."

The court further found "that the exuberant, unleashed Lilly was a proximate cause of the plaintiff falling and injuring herself. There is no dispute that the defendant was, and still is, the owner and keeper of the dog. The court finds that the plaintiff has met her burden of proving all of the essential elements of a claim for damages under . . . § 22-357." Thereafter, on the basis of the evidence submitted on the question of damages, the court entered the following damages award, subject to any applicable collateral source reduction: "[F]or physical and emotional pain and suffering, for loss of use of right hand and wrist for a temporary period during treatment and rehabilitation, and for current 8 [percent] permanent partial impairment which the court finds is related to this incident. Total: $45,000." This appeal followed.

The defendant claims that (1) "[t]he evidence supports a finding that . . . § 22-357 does not apply as the dog's conduct was innocent," and (2) "[t]he evidence does not support a finding of proximate cause." We are not persuaded.

We first address our standard of review. The defendant contends that "the standard of review in this case is limited to the standard of plain error." We disagree with this assertion and conclude that the plain error doctrine is not implicated in this case.[2] Rather, the

[2] "The plain error doctrine, which is codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. . . . [I]t is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness

defendant's claims involve a challenge to the court's factual findings. Accordingly, we review the defendant's claims under the clearly erroneous standard of review.[3]

"On appeal, it is the function of this court to determine whether the decision of the trial court is clearly erroneous. . . . This involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . In 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. . . . On appeal, we will give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled. . . . A factual finding may be rejected by this court only if it is clearly erroneous. . . .

"A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when

and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Internal quotation marks omitted.) *Perricone* v. *Perricone*, 292 Conn. 187, 218–19, 972 A.2d 666 (2009).

[3] The plaintiff argues that we should decline to review the defendant's claims because this case does not implicate the plain error doctrine, and the plaintiff does not request review under any other doctrine or standard of review. Because the parties have briefed the issues, our record is adequate, and we understand the defendant's claims and arguments, in the exercise of our discretion, we will review his claims under the appropriate standard of review.

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." (Citations omitted; internal quotation marks omitted.) *Murphy* v. *Buonato*, 42 Conn. App. 239, 242, 679 A.2d 441 (1996), aff'd, 241 Conn. 319, 696 A.2d 320 (1997).

Section 22-357 provides in relevant part: "If any dog does any damage to either the body or property of any person, the owner or keeper . . . shall be liable for such damage, except when such damage has been occasioned to the body or property of a person who, at the time such damage was sustained, was committing a trespass or other tort, or was teasing, tormenting or abusing such dog. . . ."

"Specifically . . . § 22-357 imposes strict liability on the owner or keeper of a dog for harm caused by the dog, with limited exceptions. [The] principal purpose and effect [of § 22-357] was to abrogate the common-law doctrine of scienter as applied to damage by dogs to persons and property, so that liability of the owner or keeper became no longer dependent upon his knowledge of the dog's ferocity or mischievous propensity; literally construed the statute would impose an obligation on him to pay for any and all damage the dog may do of its own volition." (Footnote omitted; internal quotation marks omitted.) *Giacalone* v. *Housing Authority*, 306 Conn. 399, 405, 51 A.3d 352 (2012); see *Granniss* v. *Weber*, 107 Conn. 622, 625, 141 A. 877 (1928).

The defendant first claims that § 22-357 does not apply to this case because the dog's conduct was innocent. He argues that under *Atkinson* v. *Santore*, 135 Conn. App. 76, 78–79, 41 A.3d 1095, cert. denied, 305 Conn. 909, 44 A.3d 184 (2012) (plaintiff, who claimed that she may have been exposed to rabies virus from defendant's dogs, could not sustain cause of action

because statute does not extend to damage caused by dog's merely passive, innocent, and involuntary behavior), a dog must be engaged in vicious or mischievous conduct for its owner to be held strictly liable for its actions. We conclude that the court properly applied § 22-357 to the facts of this case. Although the court did not use the word mischievous or vicious in describing the dog's behavior, it found that the "exuberant" dog "bounded" toward the motel, where the plaintiff was removing things from her vehicle, which frightened the plaintiff. Accordingly, it implicitly found that the dog's actions were not passive, innocent or involuntary.

Merriam-Webster's Collegiate Dictionary (10th Ed. 2001) defines "mischievous" as: "Harmful, injurious . . . able or tending to cause annoyance, trouble, or minor injury . . . irresponsibly playful . . . ." The fact that the unleashed dog bounded toward her in an exuberant manner fits within the definition of mischievous. Accordingly, the defendant's claim that the dog's actions were innocent is without merit.

The defendant's second claim contests the court's finding on the element of proximate cause, which we also review under the clearly erroneous standard. See *Cammarota* v. *Guerrera*, 148 Conn. App. 743, 755, 87 A.3d 1134 ("The question of proximate causation . . . belongs to the trier of fact because causation is essentially a factual issue. . . . It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact." [Internal quotation marks omitted.]), cert. denied, 311 Conn. 944, 90 A.3d 975 (2014).

The defendant argues that there was no evidence as to how far away the dog was from the plaintiff at the time she fell. He contends: "Certainly, if there [were]

one hundred yards between [the dog] and the [plaintiff] when [the plaintiff] became startled and frightened, the causal nexus between the plaintiff's fall and the dog's conduct [would be] too attenuated to justify the imposition of liability." (Internal quotation marks omitted.) We disagree.

"The liability of the owner or keeper extends to all damage to the person which is proximately occasioned by the dog. . . . The statute is drastic, and its purport is that a person who owns a dog does so at his peril. . . . The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the proximate cause." (Citations omitted.) *Fellows* v. *Cole*, 4 Conn. Cir. Ct. 677, 680, 239 A.2d 56 (1967).

In *Malone* v. *Steinberg*, 138 Conn. 718, 723, 89 A.2d 213 (1952), our Supreme Court explained that for a defendant to be liable under the dog bite statute, it was sufficient for the plaintiff to establish that "the menacing attitude of the dog frightened the plaintiff and caused him to fall . . . even though it did not appear that the dog actually knocked him down." In that case, the parties had conceded that the dog did not come into actual contact with the plaintiff. Id. The court explained that contact was unnecessary under the statute and that "[t]he liability of a keeper extends to all damage to the person which is proximately occasioned by the dog."[4] Id.

In the present case, the court specifically found that the proximate cause of the plaintiff's injuries was that

[4] The defendant attempts to distinguish this case from *Malone* because there was no evidence that his dog was "barking, growling, salivating, or baring her teeth." Such behavior was not necessary, however, to prove that the dog acted mischievously. In fact, the defendant's counsel conceded during oral argument before this court that the defendant would be liable under the statute if the dog playfully had come into contact with the plaintiff and knocked her down.

the dog, "with no leash attached, bounded toward the motel ahead of the defendant. The plaintiff saw Lilly coming, became startled and frightened, and tripped and fell as she tried to avoid the dog's advance. Lilly never actually made physical contact with the plaintiff, but came close and stood over the plaintiff as the plaintiff lay on the ground."

The plaintiff testified that as she was getting things out of her vehicle to bring into her daughter's motel room, which was approximately four feet from the vehicle, she saw the defendant and his unleashed dog across the yard. She further testified that the dog then "start[ed] galloping. Coming, coming, coming towards me. So [she] was coming. I was scared. So I was trying to turn and run, and that's when I fell on my hand on the ground. And the dog . . . came over to me." The plaintiff was afraid that the dog was going to bite her as she quickly ran toward her. She then indicated that the dog charging toward her was what caused her to fall.

The plaintiff was asked if she had spoken with the East Hartford Police Department about the incident. She responded that she had spoken with them and informed them that "the dog was charging at me, and I was scared, and I was trying to run and I tripped and fell. And [the officer] asked me [if] the dog [was] on a leash, and I said no." She then indicated that she fell backward while trying to avoid the dog. The plaintiff was asked by her attorney whether the dog could have been going someplace else. The plaintiff responded: "No, [she] was coming. [She] was coming straight where I was, and when I was on the ground, [she] was right there." She also testified that after she fell to the ground, the dog "came close to me. . . . The only thing [was that the dog] just was over me."

On the basis of this evidence, the court reasonably could have found that the dog charging toward the

plaintiff set in motion a chain of events that brought about her injuries. See *Fellows* v. *Cole*, supra, 4 Conn. Cir. Ct. 680; see also *Malone* v. *Steinberg*, supra, 138 Conn. 723. Furthermore, the plaintiff's testimony that the dog stood over her after she fell supported a reasonable inference that the dog was close enough to the plaintiff when she fell as to be the proximate cause of the plaintiff's fall. Accordingly, the court's finding of proximate cause was not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JERRELL R.*
(AC 40155)

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

Syllabus

Convicted of the crime of unlawful restraint in the second degree, and of two counts of the crime of risk of injury to a child in violation of statute (§ 53-21 [a] [1] and [2]), the defendant appealed to this court. The defendant's conviction stemmed from an incident involving the minor victim, who was his daughter. On appeal, the defendant claimed that his conviction of two counts of risk of injury to a child violated the double jeopardy clause and that he was denied a fair trial due to certain instances of prosecutorial impropriety that occurred during closing and rebuttal arguments. *Held*:

1. The defendant could not prevail on his unpreserved claim that his conviction under subdivisions (1) and (2) of § 53-21 (a) violated the constitutional prohibition against double jeopardy, as he failed to establish that the charged offenses arose out of the same act or transaction: the evidence, charging documents, and the state's theory of the case reflected that the defendant's conduct was separable into distinct parts, each punishable as a separate offense, as the jury reasonably could have credited the testimony of the victim and her mother that the defendant waited until the victim's mother was in the shower, and then pulled

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

down the victim's pants, pinned her against the wall and forced her head toward his exposed penis while instructing her to suck it, which supported the defendant's conviction of risk of injury to a child under § 53-21 (a) (1), and the jury reasonably could have credited the victim's statements in her forensic interview that the defendant touched her vagina while also discrediting the defendant's testimony that the touching was accidental, which supported his conviction of risk of injury to a child under § 53-21 (a) (2); moreover, the defendant's reliance on certain case law in support of his claim that this court must conclude that the crimes arose out of the same transaction because it was unclear what conduct the jury relied on to convict him was misplaced, as the case law relied on by the defendant was distinguishable from the present case in that the reviewing court looked only to the charging documents and did not consider, as instructed by more recent case law, the evidence presented at trial or the state's theory of the case to discern what the jury reasonably could have found to support the conviction.

2. The defendant's claim that he was deprived of a fair trial as a result of certain instances of prosecutorial impropriety during closing and rebuttal arguments was unavailing:

a. The prosecutor did not misstate the law with respect to subdivision (2) of § 53-21 (a) during closing argument by referring to evidence relating to the risk of injury charge under § 53-21 (a) (1); the prosecutor aptly explained the difference between the two charges and correctly stated that the sexual contact itself must impair the health or morals of a child to support a conviction under § 53-21 (a) (2), the prosecutor was not required in presenting closing argument to neatly arrange the evidence introduced at trial according to the charge it supported, and the defendant failed to object to the remarks, which suggested that he did not view them as improper at the time they were made.

b. The prosecutor did not, during rebuttal argument, improperly offer her personal opinion regarding the credibility of the victim's sister, who had testified to the defendant's prior acts of sexual misconduct committed on her while she was sleeping; the prosecutor's challenged remark was based on the evidence presented at trial and was a proper request for the jurors to use their common sense to draw reasonable inferences from the evidence to support the theory that the defendant intentionally touched the victim's intimate parts in a similarly sexual manner, the prosecutor's use of the phrase "in my opinion" in this context did not raise the concern of improper unsworn testimony, and the defendant did not object to the remarks at the time they were made.

Argued October 9, 2018–officially released January 29, 2019

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree and

unlawful restraint in the second degree, and with two counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Pavia*, *J.*; verdict and judgment of guilty of unlawful restraint in the second degree and risk of injury to a child, from which the defendant appealed to this court. *Affirmed.*

Matthew C. Eagan, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

Brett R. Aiello, special deputy assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Colleen P. Zingaro*, assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Jerrell R., appeals from the judgment of conviction, rendered following a jury trial, of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), risk of injury to a child in violation of § 53-21 (a) (2), and unlawful restraint in the second degree in violation of General Statutes § 53a-96 (a). On appeal, the defendant claims that (1) his conviction of both risk of injury to a child charges violate his constitutional protection against double jeopardy and (2) the prosecutor made improper remarks to the jury during closing and rebuttal arguments that deprived him of his due process right to a fair trial. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. The victim, the victim's mother, and the victim's two siblings lived on the first floor of a six family home. The defendant was the father of both the victim, who was six years old, and the victim's sister. On the evening of March 7, 2015, the defendant sent text messages to

the victim's mother, asking if he could come to her home. The victim's mother acquiesced, and the defendant arrived twenty minutes later. After watching television and conversing with the defendant and the victim in the bedroom of the victim's mother, the victim's mother left the room to shower.

After approximately eight minutes, the victim's mother heard the victim screaming. At first, the victim's mother did not think anything of the screaming because she believed that the defendant and victim were just playing. After realizing that the victim was calling for help, the victim's mother ran out of the bathroom and toward her bedroom, where the door was partially shut. Upon opening the door, the victim's mother witnessed the defendant holding the victim by the face and pinning her against the wall while her pants were halfway down. After the victim's mother returned to the bedroom, the defendant went into the kitchen, got on his knees, and started crying and pulling on his hair. At that point, the defendant left the home after the victim's mother told him to leave. The victim later revealed in a forensic interview that while her mother was in the shower, the defendant had removed her pants, touched her vagina, and forced her head toward his exposed penis.

After the defendant left the home, the victim described her encounter with the defendant to her mother, who then tried to reach the defendant via phone in an attempt to have him come back to the house. After he stopped answering text messages, the victim's mother contacted the police, who subsequently interviewed the victim at her home. The victim's mother again urged the defendant to come back to the house, but he refused once he came close to the home and noticed police cars parked outside. The victim subsequently was transported to the hospital, accompanied by her mother and the responding police officers. In an attempt to get the defendant to come to the hospital,

the victim's mother sent a text message to the defendant saying that the victim had suffered an asthma attack and was going to the hospital.

The defendant later arrived at the hospital, where he spoke with police officers after waiving his *Miranda*[1] rights. During questioning, the defendant claimed to be concerned that other men were touching his daughter inappropriately, and he admitted that he might have touched the victim's vagina. Additionally, the defendant later conceded in an interview with a social worker from the Department of Children and Families that he restrained the victim and may have touched her vagina by accident.

The state originally filed a seven count information after the victim's two siblings also alleged that the defendant had inappropriate sexual contact with them. After one of the victim's siblings declined to testify at trial, the state filed an amended information, charging the defendant with sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), risk of injury to a child in violation of § 53-21 (a) (1), risk of injury to a child in violation of § 53-21 (a) (2), and unlawful restraint in the second degree in violation of § 53a-96 (a). All of these charges related to the incident with the victim.

At trial, the jury found the defendant not guilty of sexual assault in the first degree and guilty of unlawful restraint and both counts of risk of injury to a child. The court subsequently sentenced the defendant to a total effective sentence of eighteen years imprisonment, execution suspended after eight years, followed by twenty-five years of probation. This appeal followed. Additional facts will be set forth as necessary.

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

I

First, the defendant claims that his conviction of risk of injury to a child under both § 53-21 (a) (1)[2] and (2)[3] violates his constitutional protection against double jeopardy because the offenses arose from the same transaction and, pursuant to *Blockberger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), both offenses required proof of substantively identical elements. We disagree.

As a preliminary matter, the defendant acknowledges that he failed to raise the present claim before the trial court. The defendant argues, however, that his unpreserved claim nonetheless is reviewable pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional

[2] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of . . . a class C felony . . . ."

[3] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in [General Statutes §] 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ."

violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40. "The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim." (Internal quotation marks omitted.) *State* v. *Britton*, 283 Conn. 598, 615, 929 A.2d 312 (2007).

The claim is reviewable pursuant to *Golding* because the record is adequate for review and the claim is of constitutional magnitude. See *State* v. *Urbanowski*, 163 Conn. App. 377, 386, 136 A.3d 236 (2016), aff'd, 327 Conn. 169, 172 A.3d 201 (2017). Moreover, the defendant claims that he has received duplicative punishments for the same offense in a single trial. "A defendant may obtain review of a double jeopardy claim, even if it is unpreserved, if he has received two punishments for two crimes, which he claims were one crime, arising from the same transaction and prosecuted at one trial . . . ." (Internal quotation marks omitted.) Id., 386–87. Because the defendant's claim is reviewable, we next address its merits.

We first set forth the applicable standard of review and relevant legal principles that guide our analysis. "A defendant's double jeopardy challenge presents a question of law over which we have plenary review. . . . The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause is applicable to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial. . . .

"Double jeopardy analysis in the context of a single trial is a two-step process. First, the charges must arise

out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Citations omitted; internal quotation marks omitted.) *State* v. *Wright*, 319 Conn. 684, 689, 127 A.3d 147 (2015). If we determine that the charges do not arise from the same transaction, we do not need to proceed to the second step of the analysis. *State* v. *Schovanec*, 326 Conn. 310, 328, 163 A.3d 581 (2017).

"Traditionally we have applied the *Blockburger* test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . . This test is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial. . . .

"Our analysis of [the defendant's] double jeopardy [claim] does not end, however, with a comparison of the offenses. The *Blockburger* test is a rule of statutory construction, and because it serves as a means of discerning [legislative] purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent. . . . Thus, the *Blockburger* test creates only a rebuttable presumption of legislative intent, [and] the test is not controlling when a contrary intent is manifest. . . . When the conclusion reached under *Blockburger* is that the two crimes do not constitute the same offense, the burden remains on the defendant to demonstrate a clear legislative intent to the contrary." (Citations omitted; internal

quotation marks omitted.) *State* v. *Wright*, supra, 689–90.

We begin our analysis by determining whether the conviction for both counts of risk of injury to a child pursuant to § 53-21 (a) (1) and (2) arose from the same act or transaction. "[D]istinct repetitions of a prohibited act, however closely they may follow each other . . . may be punished as separate crimes without offending the double jeopardy clause. . . . The same transaction, in other words, may constitute separate and distinct crimes where it is susceptible of separation into parts, each of which in itself constitutes a completed offense. . . . [T]he test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the [statute]." (Citations omitted; internal quotation marks omitted.) *State* v. *Tweedy*, 219 Conn. 489, 497–98, 594 A.2d 906 (1991). When analyzing whether the conviction arose from the same act or transaction, "it is not uncommon that we look to the evidence at trial and to the state's theory of the case . . . in addition to the information against the defendant, as amplified by the bill of particulars." (Citation omitted; internal quotation marks omitted.) *State* v. *Porter*, 328 Conn. 648, 662, 182 A.3d 625 (2018).

At the onset, we note that the defendant did not obtain a bill of particulars to clarify the charges alleged in the information.[4] As a result, pursuant to our Supreme Court's recent decision in *Porter*, we look to the information, the evidence adduced at trial, and the state's

[4] "We acknowledge that the defendant's failure to pursue a motion for a bill of particulars complicates this inquiry." *State* v. *Flynn*, 14 Conn. App. 10, 17, 539 A.2d 1005, cert. denied, 488 U.S. 891, 109 S. Ct. 226, 102 L. Ed. 2d 217 (1988); see also *State* v. *Schovanec*, supra, 326 Conn. 328 n.7 (defendant's failure to request bill of particulars and failure to raise double jeopardy claim before trial court "contributed to the ambiguity that is now present in the record").

theory of the case to discern whether the conviction arose from the same act or transaction. Our Supreme Court, when examining those materials, has asked whether a jury reasonably could have found a separate factual basis to support its conviction for the offenses charged. See id., 656–57 (noting that *Schovanec* looked to what a jury reasonably could have found); *State* v. *Schovanec*, supra, 326 Conn. 329; *State* v. *Snook*, 210 Conn. 244, 265, 555 A.2d 390 (1987), cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989). We conclude that the defendant's conviction pursuant to both risk of injury to a child charges arose from separate acts and transactions.

The defendant argues that the state intermingled evidence, making it impossible to deduce what evidence the jury relied on to support its conviction for both counts of risk of injury to a child. Specifically, the defendant points to several statements made by the state during closing argument, suggesting that the state misled the jury into considering evidence related to the situational risk of injury to a child charge under § 53-21 (a) (1) when discussing the sexual contact risk of injury charge under § 53-21 (a) (2) and vice versa.[5] We are not persuaded.

[5] When discussing the situational risk charge under § 53-21 (a) (1), the state argued that "[the victim] was trapped up against the wall, that her body [was] being *touched inappropriately* by her father and having to try and have her suck his penis. That's—of all those factors and some other ones like [it], being six years old, and it being late at night, and being in this room, and not having anybody to help and having to scream out to your mother . . . all of those things go into this situation . . . ." (Emphasis added.) In essence, the defendant argues that the jury could have been misled to consider the inappropriate touching in convicting him under § 53-21 (a) (1).

Similarly, the defendant notes that during rebuttal closing argument, the state asserted: "[F]irst of all I think I could have a hundred jurors sit here and—and describe the penetration into a child's vagina with the fingers by a father, that's—is that indecent, is that sexual. But then you add on top of that this asking [her] to suck the penis—his penis, and she consistently said that." The defendant argues that this statement could have led the jury to consider the defendant asking the victim to suck his penis when deliberating

In *State* v. *Schovanec*, supra, 326 Conn. 312–17, the defendant was convicted of identity theft in the third degree in violation of General Statutes § 53a-129d, credit card theft in violation of General Statutes § 53a-128c (a), illegal use of a credit card in violation of General Statutes § 53a-128d (2), and larceny in the sixth degree in violation of General Statutes § 53a-125b after he stole the victim's wallet and later utilized her credit cards to purchase gasoline and cigarettes. In support of his argument that his conviction violated his constitutional protection against double jeopardy, the defendant essentially argued that because the trial court had referred to the purchase of gasoline and cigarettes with the stolen credit cards, in addition to the theft of the wallet, when charging the jury on the larceny in the sixth degree charge, all of the defendant's acts were part of the same transaction. Id., 328–29. Our Supreme Court rejected this argument, opining that "because the jury, and not the judge, was the fact finder . . . because the information was broad enough to encompass the theft of the wallet and its contents and the separate unauthorized charges on the credit cards, and because the prosecutor both argued the case and presented evidence in that manner relating to both incidents, we reject the defendant's arguments in that regard." Id., 329.

Similarly, in the present case, we find that the information was broad enough to encompass both risk of injury charges and that the state presented evidence at trial in a manner that supported the jury's factual findings. Additionally, a review of the record reveals that the defendant's conduct is susceptible to separation

the element of § 53-21 (a) (2) that requires an inappropriate *touching* to be sexual in nature.

Finally, the defendant broadly asserts that the state comingled evidence during closing argument when it urged the jury to consider corroborating evidence.

into distinct parts, which supports the conviction for both charges of risk of injury to a child. The jury reasonably could have found a separate factual basis, on the basis of the testimony of witnesses and the evidence admitted at trial, to support each conviction of risk of injury to a child.

First, the jury reasonably could have credited the testimony of the victim and the victim's mother that the defendant waited until the victim's mother was in the shower, pulled down the victim's pants, pinned her against the wall, and forced her head toward his exposed penis. These statements would support a conviction of risk of injury to a child under § 53-21 (a) (1). Moreover, the jury reasonably could have credited the victim's statements in her forensic interview that the defendant touched her vagina while also discrediting the defendant's testimony that his contact with the victim's vagina was accidental and was done out of concern that other men were touching her in that area. These statements would support a conviction of risk of injury to a child under § 53-21 (a) (2).

To bolster his claim, the defendant relies on *State* v. *Mezrioui*, 26 Conn. App. 395, 402–403, 602 A.2d 29, cert. denied, 224 Conn. 909, 617 A.2d 169 (1992), for the proposition that where it is unclear what conduct the jury relied on to convict the defendant, we must conclude that the crimes arose out of the same transaction. In *Mezrioui*, the defendant was convicted of sexual assault in the first degree and sexual assault in the third degree after he raped the victim in his car. Id., 396–98. The trial court instructed the jury that the defendant's contact with either the victim's groin or breasts would support a conviction of sexual assault in the third degree. Id., 402–403. Because sexual assault in the first degree entailed incidental contact with the groin, and because it was unclear whether the jury relied on the defendant's contact with the victim's groin or breasts

for its conviction of sexual assault in the third degree, this court concluded that the crimes arose out of the same act or transaction. Id., 403.

A key distinction in *Mezrioui*, however, is that this court's analysis looked only to the charging documents. Id., 402. Therefore, it did not consider the evidence presented at trial and the state's theory of the case to discern what the jury reasonably could have found to support the conviction at issue. Id. Consequently, we are unpersuaded by the defendant's reliance on *Mezrioui* because it does not reflect our more recent double jeopardy jurisprudence that looks to the evidence presented at trial as well as the state's theory of the case under the first part of the double jeopardy analysis.

In conclusion, the defendant's conviction did not arise from the same acts or transactions. Because the defendant has failed to satisfy the first part of our double jeopardy inquiry, we decline to move to the second step of the analysis. Accordingly, we find that the defendant's constitutional protection against double jeopardy was not violated.

II

The defendant next claims that he was deprived of a fair trial due to prosecutorial impropriety during the course of closing and rebuttal arguments. Specifically, he argues that the prosecutor (1) misstated the law and (2) gave her personal opinion as to the credibility of a witness. We disagree.

We begin by setting forth the relevant law that guides our analysis. Although the defendant did not object to the prosecutor's remarks at trial, his claim is nonetheless reviewable because "a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of [*Golding*], and, similarly, it is unnecessary for a reviewing

court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.) *State* v. *Papantoniou*, 185 Conn. App. 93, 110, 196 A.3d 839 (2018).

"[O]ur Supreme Court has explained that a defendant's failure to object at trial to each of the occurrences that he now raises as instances of prosecutorial impropriety, though relevant to our inquiry, is not fatal to review of his claims. . . . This does not mean, however, that the absence of an objection at trial does not play a significant role in the determination of whether the challenged statements were, in fact, improper. . . . To the contrary, we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time." (Internal quotation marks omitted.) *State* v. *Roberts*, 158 Conn. App. 144, 151, 118 A.3d 631 (2015).

"In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . The two steps of [our] analysis are separate and distinct, and we may reject the claim if we conclude that the defendant has failed to establish either prong." (Citations omitted; internal quotation marks omitted.) *State* v. *Papantoniou*, supra, 185 Conn. App. 110–11. A reviewing court need not conduct the first step of the analysis if it determines that, even if the prosecutor's conduct was improper, it did not deprive the defendant of a fair trial. *State* v. *Hickey*, 135 Conn. App. 532, 554, 43 A.3d 701, cert. denied, 306 Conn. 901, 52 A.3d 728 (2012).

"[P]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however] [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom." *State* v. *Reddick*, 174 Conn. App. 536, 559, 166 A.3d 754, cert. denied, 327 Conn. 921, 171 A.3d 58 (2017), and cert. denied, U.S. , 138 S. Ct. 1027, 200 L. Ed. 2d 285 (2018). "[W]hen reviewing the propriety of a prosecutor's statements, we do not scrutinize each individual comment in a vacuum but, rather, review the comments complained of in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Holmes*, 169 Conn. App. 1, 11, 148 A.3d 581, cert. denied, 323 Conn. 951, 151 A.3d 847 (2016). We address each of the defendant's claims of prosecutorial impropriety in turn.

A

The defendant first argues that the prosecutor misstated the law by urging the jury to consider evidence related to the risk of injury charge under § 53-21 (a) (1) when discussing the § 53-21 (a) (2) charge.

Specifically, during closing argument, the prosecutor stated: "[The victim] said . . . that [the defendant] exposed his penis and was pulling her head towards him and telling her to, suck it, and she turned her head away and was screaming. . . . And does being exposed to sexual contact by her father in that manner and being asked to suck his penis, is that gonna affect her health and morals . . . ."

"It is well settled that [c]ounsel may comment upon facts properly in evidence and upon reasonable inferences to be drawn from them." (Internal quotation marks omitted.) *State* v. *Chankar*, 173 Conn. App. 227, 250, 162 A.3d 756, cert. denied, 326 Conn. 914, 173 A.3d 390 (2017). "Furthermore, prosecutors are not permitted to misstate the law." (Internal quotation marks omitted.) *State* v. *Walton*, 175 Conn. App. 642, 648, 168 A.3d 652, cert. denied, 327 Conn. 970, 173 A.3d 390 (2017).

After reviewing the record, we are unpersuaded that the prosecutor's remarks were improper. During closing argument, the state highlighted the difference between the two risk of injury to a child charges, stating, in relevant part: "This third count is risk of injury under what we say a sexual contact risk of injury. There's two counts of risk of injury and they're—and *they're very different*.

"The first one has to do with sexual contact, and that's when a person has sexual contact—when a person has contact with the intimate parts of a child under the age of sixteen, in a sexual and indecent manner *likely to impair the health or morals* of such child. . . .

"Risk of injury, the second count, is what we call a situational risk. Situational risk is did this situation affect the child. Specifically . . . it's when a person places a child under the age of sixteen in a situation that the morals of said child were likely to be impaired. *It's a very different thing than the sexual contact, risk of injury in count three*. It's a situation." (Emphasis added.)

When considering these additional statements, it is apparent that the state attempted to delineate the two separate risk of injury charges and did not misstate the law. Rather, the prosecutor correctly stated that the sexual contact itself must impair the health or morals of a child to support a conviction under § 53-21 (a)

(2). Although the state may have mentioned evidence pertaining to the § 53-21 (a) (1) charge when discussing the § 53-21 (a) (2) charge, the defendant has failed to cite to any authority which suggests that the state is required at closing argument to neatly arrange evidence introduced at trial according to what charge it supports. To the contrary, our case law makes clear that closing argument is not a precise exercise. Moreover, the defendant failed to object to the prosecutor's statement, suggesting that the defendant did not view the remarks as improper at the time they were made. As a result, we conclude that the prosecutor's statement was not improper.

B

The defendant next argues that the prosecutor improperly disclosed her own opinion regarding the credibility of a witness to the jury during rebuttal closing argument. Specifically, the prosecutor said, "[o]ne thing makes this, *in my opinion*, and *only my opinion* because you are the judges of the facts . . . [t]hat of a sexual nature rather than an innocent nature. Specifically in—in a context of [the victim's sister], she was asleep and that sexual contact started." (Emphasis added.)

"The prosecutor may not express his opinion, directly or indirectly, as to the credibility of the witnesses. . . . Nor should a prosecutor express his opinion, directly or indirectly, as to the guilt of the defendant. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position." (Internal quotation marks omitted.) *State* v. *Warholic*, 278 Conn. 354, 363, 897 A.2d 569 (2006).

"Although there are restrictions on a prosecutor's ability to express a personal opinion during closing argument, [i]t is not improper for the prosecutor to

comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom. . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand." (Internal quotation marks omitted.) *State* v. *Chankar*, supra, 173 Conn. App. 251.

Our review of the record leads us to conclude that the prosecutor's remark was not improper.[6] The prosecutor was commenting on evidence presented at trial that the victim's sister was touched inappropriately by the defendant while sleeping. In light of this evidence, the prosecutor urged the jury to infer that the defendant's touching of the victim was not accidental as he suggested, but sexual in nature. The prosecutor's use of the phrase "in my opinion" in this context does not raise the concern of improper unsworn testimony or secret knowledge reaching the ears of the jury. Rather, these comments were an invitation for the jury to draw commonsense inferences on the basis of evidence presented at trial. We also note that the defendant did not object to this statement either, once again creating a suggestion that the defendant did not view the remarks as improper at the time they were made. Accordingly, we conclude that the prosecutor's remarks were not improper.

The judgment is affirmed.

In this opinion the other judges concurred.

[6] We acknowledge, and the state concedes, that it nonetheless is preferable that a prosecutor refrain from the use of the phrase "in my opinion." See *State* v. *Gibson*, 302 Conn. 653, 660, 31 A.3d 346 (2011) (acknowledging that prosecutors should avoid phrases beginning with pronoun "I").

NORMAND CARON ET AL. *v.* CONNECTICUT PATHOLOGY GROUP, P.C.
(AC 40462)

Lavine, Prescott and Harper, Js.

Syllabus

The plaintiffs, C and D, sought to recover damages from the defendant medical practice for, inter alia, alleged medical malpractice in connection with the false positive cancer diagnosis of C by pathologists employed by the defendant. C had undergone an endoscopy at a hospital during which a biopsy was performed. Tissue samples from the biopsy were placed on a slide by hospital personnel and sent to the defendant for analysis. The defendant's pathologists incorrectly determined that C had cancer on the basis of their interpretation of a contaminated sample. In bringing their action, the plaintiffs, pursuant to the statute (§ 52-190a [a]) that requires a plaintiff in a medical malpractice action to submit an opinion letter from a similar health care provider as defined by statute (§ 52-184c [c]), attached to their complaint an opinion letter authored by R, a board certified clinical pathologist. Thereafter, the defendant filed a motion to dismiss the action for lack of personal jurisdiction on the ground that the opinion letter was not authored by a similar health care provider as required by § 52-190a (a). Specifically, it argued that because the plaintiffs' complaint alleged negligence in the interpretation of the tissue samples for the purpose of diagnosing cancer, the plaintiffs were required to obtain an opinion letter from an anatomic pathologist, not a clinical pathologist. The trial court granted the defendant's motion to dismiss for lack of personal jurisdiction and rendered judgment thereon. In reaching its decision, the court found that anatomic pathology and clinical pathology are distinct subspecialties of pathology, and interpreted the complaint as alleging negligence by the defendant's pathologists in their interpretation of the tissue samples, which was within the province of anatomic pathology. On that basis, the court concluded that the opinion letter was legally insufficient pursuant to § 52-190a (a) because it was not authored by a similar health care provider. On the plaintiffs' appeal to this court, *held* that the trial court properly granted the defendant's motion to dismiss for lack of personal jurisdiction, as that court properly interpreted the plaintiffs' complaint as having alleged negligence by the pathologists employed by the defendant in their capacity as anatomic pathologists, and, therefore, R's opinion letter was not authored by a similar health care provider as required by § 52-190a (a); because the plaintiffs' complaint sounded in negligence predicated on the pathologists' interpretation of the tissue samples, which fell within the expertise of anatomic pathologists, the plaintiffs were required to attach to their complaint an opinion letter authored

by a physician trained, experienced and board certified in anatomic pathology, and because it was undisputed that R had specialized training in clinical, but not anatomic, pathology, his opinion letter was not authored by a similar health care provider as that term is defined in § 52-184c, regardless of his ample experience in clinical pathology.

Argued September 20, 2018—officially released January 29, 2019

Procedural History

Action to recover damages for, inter alia, medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Domnarski, J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Gerald S. Sack, with whom, on the brief, was *Jonathan A. Cantor*, for the appellants (plaintiffs).

James F. Biondo, with whom, on the brief, was *Diana M. Carlino*, for the appellee (defendant).

Opinion

PRESCOTT, J. This appeal arises out of a medical malpractice action brought by the plaintiffs, Normand Caron and Donna Caron,[1] against the defendant, Connecticut Pathology Group, P.C., after a false positive cancer diagnosis. The plaintiffs appeal from the judgment of the trial court dismissing their complaint against the defendant for failure to attach to their complaint a legally sufficient opinion letter authored by a similar health care provider as required by General Statutes § 52-190a (a). On appeal, the plaintiffs, who attached to their complaint an opinion letter authored by a board certified clinical pathologist, claim that the court found that anatomic pathology is a medical specialty distinct from clinical pathology and, on the basis of that finding and the allegations in the complaint,

[1] For convenience, all references to Caron in this opinion are to Normand Caron.

improperly determined that the plaintiffs were required to submit an opinion letter authored by a board certified anatomic pathologist. We disagree and conclude that the court properly granted the defendant's motion to dismiss. Accordingly, we affirm the judgment of the trial court.

The following facts, as alleged in or necessarily implied from the plaintiffs' complaint and affidavits submitted by the plaintiffs and the defendant, and procedural history are relevant to our resolution of the plaintiffs' claim. On March 25, 2014, Caron underwent an endoscopy at Middlesex Hospital in Middletown. During the endoscopy, a biopsy was performed. Tissue samples extracted during the biopsy were placed on a slide by Middlesex Hospital personnel.[2] The slide containing the tissue samples was then sent to the defendant for analysis. On the basis of their interpretation of the samples, physicians employed by the defendant determined that Caron had cancer. Caron was then informed of the diagnosis.

From March 25 to August 15, 2014, Caron underwent medical treatment for cancer. On August 15, 2014, Caron was informed that the sample upon which his cancer diagnosis was based had been contaminated and that he did not, in fact, have cancer.

The plaintiffs commenced the present action on August 30, 2016. In paragraph 6 of their complaint, the plaintiffs alleged: "The conduct of the defendant . . .

[2] The plaintiffs first brought an action against Middlesex Hospital in April, 2016, on the basis of the hospital's handling of the tissue samples. See *Caron* v. *Middlesex Hospital*, Superior Court, judicial district of Middlesex, Docket No. CV-16-6015463-S. Specifically, the plaintiffs alleged that Middlesex Hospital and its employees violated the applicable standards of care by contaminating the slide that contained tissue samples extracted during Caron's biopsy. The same opinion letter used in the present case was attached to the complaint in this prior action. The plaintiffs ultimately settled their case against Middlesex Hospital.

its agents, servants, and/or employees, including, but not limited to, its pathologists and other professional staff, violated the applicable standard of care . . . in the following ways: (a) in that pathologists employed by [the defendant] failed to consider contamination error in the initial pathology finding or in subsequent consultations when, in the exercise of reasonable care, they could and should have done so; (b) in that pathologists employed by [the defendant] failed to diagnose a contamination error in a timely manner when, in the exercise of reasonable care, they could and should have done so; (c) in that pathologists employed by [the defendant] failed to perform or request a nucleic acid identification of the tissue from the initial biopsy, when, in the exercise of reasonable care, they could and should have done so; and (d) in that pathologists employed by [the defendant] failed to properly interpret the plaintiff's biopsy sample." The plaintiffs alleged that, as a result of the defendant's negligence, they incurred expenses for medical care and medicines and that Caron suffered physical and emotional injuries.

As required by § 52-190a,[3] the plaintiffs attached a good faith letter and an opinion letter to their complaint.

[3] General Statutes § 52-190a (a) provides in relevant part: "No civil action . . . shall be filed to recover damages resulting from personal injury or wrongful death . . . in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint . . . shall contain a certificate of the attorney or party filing the action . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant. . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. . . ."

The opinion letter was authored by Samuel Reichberg, a board certified clinical pathologist, who opined that "the erroneous false positive cancer results obtained in [Caron's] biopsy was caused by the failure to follow prevailing standards of care, both in the handling of the specimen by the staff of [the defendant], and in the *interpretation* of the biopsy findings by the [defendant's] pathologists." (Emphasis added.) Reichberg is not board certified as an anatomic pathologist.

On October 26, 2016, the defendant filed a motion to dismiss the action for lack of personal jurisdiction because the opinion letter that the plaintiffs attached to their complaint was not authored by a similar health care provider as required by § 52-190a (a). Specifically, the defendant argued that because their complaint alleged negligence in the interpretation of the samples for the purpose of diagnosing cancer, the plaintiffs were required to obtain an opinion letter from an anatomic pathologist, not a clinical pathologist.

In support of the motion to dismiss, the defendant attached an affidavit from Jonathan Levine, a board certified clinical and anatomic pathologist, averring: "Clinical [p]athology and [a]natomic [p]athology are primary board certifications, each with their own separate and distinct training protocol and board examinations. They are not sub-specialties of one another. . . . Anatomic [p]athology involves the examination of surgical tissue specimens to diagnose disease. . . . Prior to becoming eligible to sit for the [a]natomic [p]athology board examination, a physician must complete specialized training in [a]natomic [p]athology. . . . Clinical pathology involves the direction of divisions of the laboratory which may include the blood bank, clinical chemistry, microbiology, hematology, and other special divisions. . . . Prior to becoming eligible to sit for the [c]linical [p]athology board examination, a physician

must complete specialized training in [c]linical [p]athology. . . . The examination of the tissue samples as set forth in their [c]omplaint, concerns the examination of tissue specimens for the purpose of diagnosing cancer, and thus fall within the field of [a]natomic [p]athology."

On December 9, 2016, the plaintiffs filed an objection to the motion to dismiss. In support of their objection, the plaintiffs submitted an affidavit from Reichberg. Reichberg did not contradict the definitions of clinical and anatomic pathology provided by Levine in his affidavit. Rather, he stated a legal conclusion, averring: "The conduct of the [d]efendant . . . by their pathologists . . . *as alleged in* [*p*]*aragraph 6* (*a*)-(*c*) *of the* [*p*]*laintiffs*' [*c*]*omplaint*, is not restricted to the subspecialty of [a]natomic [p]athology, but is also the purview of [c]linical [p]athology, a specialty in which both I and the [d]efendant's pathologists have board certification."[4] (Emphasis added.)

On January 17, 2017, the court heard oral argument on the defendant's motion to dismiss. At oral argument, the defendant again explained that clinical pathology and anatomic pathology are separate and distinct specialties. In response, the plaintiffs argued that there was nothing beyond Levine's affidavit to "delineate distinctly the differences between [clinical and anatomic pathology]." They did not, however, provide their own definitions of the specialties. Moreover, neither party moved for an evidentiary hearing at this point, despite the fact that the plaintiffs later argued that such a hearing was necessary to the adjudication of the motion. In fact, the plaintiffs did not move for an evidentiary

[4] We are not bound by Reichberg's interpretation of the plaintiffs' complaint because the construction of pleadings is a question of law over which this court has plenary review. See, e.g., *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 536, 51 A.3d 367 (2012). Contrary to Reichberg's interpretation, our reading of the complaint reveals that it does not implicate the defendant's handling of the tissue samples.

hearing until after the court granted the defendant's motion to dismiss.

On February 16, 2017, without holding an evidentiary hearing, the court issued a memorandum of decision granting the defendant's motion to dismiss. The court, relying on Levine's affidavit and Stedman's Medical Dictionary, found that anatomic and clinical pathology are distinct subspecialties of pathology. Specifically, the court stated: "Reichberg's affidavit . . . does not contradict [Levine's] characterization [of anatomic and clinical pathology]; indeed, these definitions are in line with those provided in Stedman's Medical Dictionary. . . . Stedman's Medical Dictionary defines anatomic pathology in relevant part as 'the subspecialty of [pathology] that pertains to the gross and microscopic *study of organs and tissue removed for biopsy . . . and also the interpretation of the results of such study*' . . . Stedman's Medical Dictionary (28th Ed. 2006) p. 1442; whereas clinical pathology is defined in relevant part as 'the subspecialty in [pathology] concerned with the *theoretical and technical aspects* (*i.e. the methods or procedures*) of chemistry . . . and other fields as they pertain to the diagnosis of disease.' . . . Stedman's Medical Dictionary, supra, p. 1442." (Citation omitted; emphasis in original.)

In its memorandum of decision, the court also concluded that the plaintiffs' complaint alleged negligence within the province of anatomic pathology, stating: "What the [plaintiffs] [are] essentially alleging is that the defendant's pathologists, in endeavoring to interpret the samples, failed to recognize and, consequently, failed to investigate, the possibility that one or more of the samples may have been contaminated and thus failed to ultimately conclude that one of the samples was indeed contaminated. These allegations fall within the defined province of anatomic pathology." On the

basis of these conclusions, the court granted the defendant's motion to dismiss.

On February 28, 2017, the plaintiffs filed two motions: a motion to vacate and/or reargue the judgment of dismissal and a motion for an evidentiary hearing.[5] On March 10, 2017, the defendant filed an objection to both of the plaintiffs' motions. The plaintiffs filed a reply to the defendant's objection on March 31, 2017, and, ultimately, after holding oral argument on the motions, the court denied the relief requested by the plaintiffs. This appeal followed.

On appeal, the plaintiffs claim that the court improperly granted the defendant's motion to dismiss on the basis of its determination that the opinion letter was legally insufficient pursuant to § 52-190a (a) because it was not written by a similar health care provider. Specifically, the plaintiffs argue that the court misconstrued their complaint as alleging negligence by the pathologists employed by the defendant in their capacity as anatomic pathologists and that their opinion letter, which was written by a clinical pathologist, was

[5] In support of their motion for an evidentiary hearing, the plaintiffs argued that the affidavits from Reichberg and Levine were contradictory and, therefore, that the court was faced with a factual dispute that needed to be resolved before it could render judgment on the motion to dismiss. Although evidentiary hearings may be necessary when deciding motions to dismiss that involve factual disputes; see *Conboy* v. *State*, 292 Conn. 642, 651–54, 974 A.2d 669 (2009); see also *Roberts* v. *Roberts*, 32 Conn. App. 465, 475, 629 A.2d 1160 (1993) ("when the exercise of the court's discretion depends on issues of fact which are disputed, due process requires that a trial-like hearing be held, in which opportunity is provided to present evidence and cross-examine adverse witnesses" [internal quotation marks omitted]); such a hearing was not required in the present case because there were no material facts in dispute. In making the factual finding that clinical and anatomic pathology are distinct specialties, the court relied on Levine's affidavit and the definitions in Stedman's Medical Dictionary, neither of which were contested by the plaintiffs until *after* the court decided the motion to dismiss.

therefore not authored by a similar health care provider, as required by § 52-190a.[6] We disagree.

We begin with our standard of review and other applicable principles of law. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a . . . 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. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. (Internal quotation marks omitted.) *Wilkins* v. *Connecticut Childbirth & Women's Center*, 314 Conn. 709, 718, 104 A.3d 671 (2014).

"[I]f the complaint is supplemented by undisputed facts established by affidavits submitted in support of

[6] The plaintiffs on appeal have not challenged the court's denial of their motion for an evidentiary hearing. Furthermore, there is a question as to whether the plaintiffs waived the right to an evidentiary hearing by failing to request one in a timely manner. See *Angersola* v. *Radiologic Associates of Middletown, P.C.*, 330 Conn. 251, 273, 193 A.3d 520 (2018); *Marcus* v. *Cassara*, 142 Conn. App. 352, 357, 66 A.3d 894 (2013) ("[i]t is unfair to the court to leave it with the impression that counsel is in agreement with the court's preference to decide the motion on the papers and then argue on appeal that the court abused its discretion by failing to schedule an evidentiary hearing"). In the present case, the plaintiffs had ample opportunity to request such a hearing, including at the time the court held oral argument on the motion to dismiss. They did not do so, however, until after the court granted the defendant's motion to dismiss.

We caution, however, that when courts are faced with genuine factual disputes in deciding motions to dismiss, an evidentiary hearing is required. See, e.g., *Conboy* v. *State*, 292 Conn. 642, 652–54, 974 A.2d 669 (2009) ("where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts").

the motion to dismiss . . . other types of undisputed evidence . . . and/or public records of which judicial notice may be taken . . . the trial court, in determining a jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 651–52, 974 A.2d 669 (2009).

"The interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . [W]e long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and to substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension. . . . [E]ssential allegations may not be supplied by conjecture or remote implication . . . ." (Citations omitted; internal quotation marks omitted.)

Grenier v. *Commissioner of Transportation*, 306 Conn. 523, 536, 51 A.3d 367 (2012).

Turning to the substance of the issue before us, "[§] 52-190a (a) provides . . . that, prior to filing a personal injury action against a health care provider, the attorney or party filing the action . . . [must make] a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. . . . To show the existence of such good faith belief that there has been negligence in the care or treatment of the claimant. . . . To show the existence of such good faith, the claimant or claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in [General Statutes §] 52-184c . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. . . . Failure to attach to the complaint a legally sufficient opinion letter authored by a similar health care provider mandates dismissal because the court lacks personal jurisdiction over the defendant. . . .

"Section 52-184 defines similar health care provider. Pursuant to that provision, the precise definition of similar health care provider depends on whether the defendant health care provider is certified by the American board as a specialist, is trained and experienced in the medical specialty or holds himself out as a specialist . . . . Our Supreme Court has construe[d] . . . § 52-184c (c) as establishing [the qualifications of a similar health care provider] when the defendant is board certified, trained and experienced in a medical specialty, or holds himself out as a specialist . . . .

"If the [plaintiff] [alleges] in his complaint that the defendant [is a specialist] . . . the opinion letter . . .

ha[s] to be . . . authored by a similar health care provider as defined by § 52-184c (c) . . . . Pursuant to subsection (c) of § 52-184c, a similar health care provider is one who [i]s trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty . . . .

"Our precedent indicates that under § 52-184c (c), it is not enough that an authoring health care provider has familiarity with or knowledge of the relevant standard of care . . . . A similar health care provider must be trained and experienced in the same specialty and certified by the appropriate American board in the same specialty." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Gonzales* v. *Langdon*, 161 Conn. App. 497, 504–505, 128 A.3d 562 (2015).

In the present case, the court interpreted the complaint as alleging negligence by the defendant in its interpretation of the tissue samples, which is within the province of anatomic pathology. We agree and are unable to see, even construed in the manner most favorable to the plaintiffs, how the complaint alleges anything other than negligence in the defendant's interpretation of the tissue samples.

The plaintiffs' complaint clearly revolves around the defendant's interpretation of the tissue samples they received from Middlesex Hospital. The interpretation of the samples falls within the specialty of anatomic pathology. Paragraph 2 of the complaint expressly frames the issue as one of negligent interpretation by the defendant, stating: "On or about March 25, 2014, [Caron] underwent an endoscopy . . . . The biopsy results from the endoscopy were *interpreted* by physicians employed by, and acting in the course of their employment with, [the defendant], as positive for cancer. The *interpretation* of the biopsy samples by the physicians [employed by the defendant] led [Caron's]

treaters to conclude that he was suffering from cancer." (Emphasis added.)

Similarly, the specific instances of negligence alleged by the plaintiffs in paragraph 6 (a) through (d) of their complaint all relate to the defendant's interpretation of the tissue samples, which is within the province of anatomic pathology, not clinical pathology. Paragraph 6 (d) of the complaint expressly alleges that the defendant's pathologists "failed to properly *interpret* [Caron's] biopsy sample." (Emphasis added.)

The plaintiffs argue that paragraph 6 (a) through (c) of their complaint alleges negligence by the defendant in its operation of the laboratory, which arguably could be interpreted as falling within the field of clinical pathology. We are not persuaded. Although these subparagraphs do not expressly use the term interpretation, the allegations clearly relate to the standard of care used in analyzing a sample in order to diagnose the presence, if any, and type of disease after it is placed on a slide. This function is within the province of anatomic pathology. Similarly, paragraph 6 (a) alleges that the defendant "failed to consider contamination error in the initial pathology finding . . . ." Because the defendant received the tissue samples after they were handled by Middlesex Hospital, the defendant's consideration of contamination would necessarily occur as part of the defendant's efforts to interpret the slides. Paragraph 6 (b) alleges that the defendant "failed to diagnose a contamination error," which also implicates negligence by the defendant when analyzing the samples, namely, the failure to recognize the signs of contamination. Finally, paragraph 6 (c), which alleges that "pathologists employed by [the defendant] failed to perform or request a nucleic acid identification of the tissue from the initial biopsy," relates to interpretive negligence. This subparagraph essentially alleges that, after looking at the slide and interpreting it, the defendant

should have ordered additional testing to clarify abnormalities in the slide. Ordering subsequent testing to clarify errors detected while interpreting a slide would squarely fall within the role of an anatomic pathologist. Paragraph 6 (a) through (c) of the plaintiffs' complaint, therefore, alleges negligence in the defendant's interpretation of the tissue samples.

Nowhere in their complaint do the plaintiffs allege that the defendant operated a laboratory or played any role in the preparation, handling or contamination of the tissue samples, all of which is conduct related to clinical pathology. Indeed, at oral argument on the plaintiffs' motion to vacate and/or reargue, the plaintiffs' counsel stated: "There's nothing in the complaint that I see that directly says that [the defendant ran a laboratory]." Additionally, at oral argument before this court, the plaintiffs were unable to point to any part of their complaint that alleges that the defendant operated a laboratory and, therefore, breached its duty of care in the realm of clinical, rather than anatomic, pathology.

Because the plaintiffs' complaint sounds in negligence predicated on the defendant's interpretation of the tissue samples, and the interpretation of samples falls within the expertise of anatomic pathologists, the plaintiffs were required to attach to their complaint an opinion letter authored by an anatomic pathologist. Specifically, the plaintiffs were required to attach an opinion letter from a physician (1) trained and experienced in anatomic pathology, and (2) board certified in anatomic pathology. See, e.g., *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 14, 12 A.3d 865 (2011). It is undisputed that Reichberg has specialized training in clinical, not anatomic, pathology. Reichberg averred on two occasions that he is "a board certified clinical pathologist with forty years of experience in clinical laboratory medical and managerial direction." He is not, however, board certified in anatomic pathology.

The plaintiffs argue that Reichberg's opinion letter is sufficient because he is qualified to assess the duty of care of anatomic pathologists. In support of this, Reichberg averred: "I am cognizant of the overall responsibility of the [defendant's] [d]irector for the operation of the whole laboratory, regardless of subspecialty, and I [am] well qualified to assess the operational aspects of the histology laboratory [operated by the defendant]." Again, it is undisputed that Reichberg is not board certified in anatomic pathology and, therefore, regardless of his ample experience in clinical pathology, he is not a similar health care provider as that term is defined by § 52-184c.

On the basis of the foregoing, we conclude that the court properly interpreted the plaintiffs' complaint to allege negligence by the pathologists employed by the defendant in their capacity as anatomic pathologists and that the opinion letter, therefore, was not authored by a similar health care provider, as required by § 52-190a. Accordingly, the court properly dismissed this action.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* FRANCIS ANDERSON (AC 40378)

Sheldon, Prescott and Pellegrino, Js.

Syllabus

The defendant, who had been convicted of assault in the second degree and reckless endangerment in the second degree, appealed to this court from the trial court's denial in part and dismissal in part of his motion to correct an illegal sentence, and from the dismissal of his motion to revise the judgment mittimus. The defendant had been in the custody of the Psychiatric Security Review Board and confined to a state hospital after previously having been found not guilty of various charges by reason of mental disease or defect in 2008. While confined at the hospital,

the defendant commenced a pattern of assaulting other patients and hospital staff and various charges were brought against him related thereto. When he failed to post bond for those charges, he was transferred to a correctional facility. He subsequently was found guilty of assault in the second degree and reckless endangerment in the second degree. Eleven months before the defendant's release date on his 2008 conviction, the trial court sentenced him on September 12, 2016, on the assault and reckless endangerment charges to a term of incarceration that was to run consecutively to the term of incarceration that he was then serving. The court remanded him to the custody of the Commissioner of Correction instead of ordering that he be returned to the state hospital. The defendant claimed in his motion to correct that the trial court lacked the authority to remand him to the custody of the Commissioner of Correction and that he, instead, should have been returned to the state hospital where he had been serving his 2008 sentence. The defendant further claimed that all time that he had spent in prison completing his 2008 sentence as presentence jail credit should be credited toward the consecutive sentence on the assault and reckless endangerment charges. He further claimed that the judgment mittimus should be revised to implement the court's order that he receive all pretrial credits to which he was entitled. The court denied the defendant's motion to correct, concluding that it was not appropriate to allow the defendant to remain at the state hospital as a consequence of his prior insanity acquittal when he had seriously injured a staff member and endangered others, and that the defendant had not proved that he suffered from a mental disease or defect at the time he committed the crimes that led to his conviction on the assault and reckless endangerment charges. The court also dismissed the defendant's request for pretrial jail credit for lack of jurisdiction, ruling that it did not constitute a viable claim for relief under the applicable rule of practice (§ 43-22). *Held* that the trial court properly denied in part and dismissed in part the defendant's motion to correct an illegal sentence, and dismissed his related motion to revise the judgment mittimus: even if the trial court should have returned the defendant to the state hospital instead of remanding him to prison, the defendant already had received full credit toward his 2008 sentence for the period in which he was incarcerated from September 12, 2016, to August 5, 2017, the release date for his 2008 conviction, and because he was not entitled to jail time credit for the same period of incarceration toward the service of two separate sentences that did not run concurrent to each other, the defendant's claim that the eleven months at issue should be credited a second time therefore failed; moreover, the defendant was not entitled to presentence credit for all time he had spent incarcerated in lieu of bail in this case or to a revision of the judgment mittimus to implement the court's order that he receive all pretrial credits to which he was entitled, as the trial court's jurisdiction under § 43-22 applies only to claims that arise from

the sentencing proceeding, the defendant's claim concerned the legality of his sentence as calculated by Department of Correction and did not arise from the sentencing proceeding, and, therefore, the trial court properly dismissed the claim for lack of subject matter jurisdiction.

Argued October 24, 2018—officially released January 29, 2019

Procedural History

Substitute information charging the defendant with the crime of assault in the second degree and with four counts of the crime of reckless endangerment in the second degree, brought to the Superior Court in the judicial district of Middlesex and tried to the court, *Vitale*, *J.*; judgment of guilty, from which the defendant appealed to this court, which affirmed the judgment of the trial court; thereafter, the Supreme Court denied the defendant's petition for certification to appeal; subsequently, the court, *Vitale*, *J.*, denied in part and dismissed in part the defendant's motion to correct an illegal sentence, and the defendant appealed to this court; thereafter, the court, *Vitale*, *J.*, dismissed the defendant's motion to revise or correct the judgment mittimus, and the defendant filed an amended appeal. *Affirmed.*

Monte P. Radler, public defender, for the appellant (defendant).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *Peter A. McShane*, former state's attorney, and *Jeffrey Doskos*, senior assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Francis Anderson, appeals following the trial court's denial in part and dismissal in part of his motion to correct an illegal sentence, and from the dismissal of his related motion for a new mittimus to implement the court's order on the date it imposed the challenged sentence that he

receive all pretrial jail credits to which he is legally entitled toward that sentence. The sentence at issue is a term of incarceration, which the court ordered that the defendant serve consecutively to an unexpired term of incarceration that he was serving at the time of the offenses at issue at the Whiting Forensic Division of Connecticut Valley Hospital (Whiting), to which he had been committed to receive psychiatric care and treatment following his acquittal by reason of mental disease or defect of a third set of unrelated charges. The defendant does not challenge the length of his consecutive sentence. Instead, he claims that that sentence was imposed on him in an illegal manner because the court, after pronouncing that sentence, ordered that he be transferred at once to a state correctional facility to complete his earlier sentence and receive such further psychiatric care and treatment, as necessary, rather than returned to Whiting for those purposes. Claiming that the court had no jurisdiction to enter any order with respect to his earlier sentence, which allegedly would have been completed in a hospital setting rather than a prison had the court not ordered his immediate imprisonment after sentencing, the defendant seeks to correct the court's alleged error by crediting all time that he improperly spent in prison completing his earlier sentence as presentence jail credit toward his consecutive sentence, thereby advancing his release date on that sentence by approximately eleven months. The trial court disagreed, denying that portion of the defendant's motion to correct, in which he made the foregoing argument, and dismissing his parallel claim that the pretrial jail time credit to which he allegedly was entitled had not properly been credited toward his sentence. On this appeal, we affirm all aspects of the trial court's challenged rulings.

The following procedural history is relevant to the defendant's claims on appeal. "On January 10, 2008, the

[defendant] entered guilty pleas, pursuant to the *Alford* doctrine,[1] to three counts of burglary . . . and one count of larceny . . . and admitted a violation of probation. The state entered a nolle prosequi as to the remaining charges. On March 6, 2008, the trial court sentenced the [defendant] to a total effective sentence of five years imprisonment and three years of special parole. The [defendant] did not file a direct appeal." (Footnote in original; internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 308 Conn. 456, 458, 64 A.3d 325 (2013). On May 6, 2011, the defendant received a consecutive sentence of five years imprisonment on additional charges. The release date for that sentence, to which we have referred as "the 2008 sentence," was calculated by the Department of Correction (department) to be August 5, 2017. "Following an incident that occurred on or about July 6, 2012, the defendant was charged with assault of a correction officer, breach of the peace and failure to submit to fingerprinting. . . . The defendant subsequently was found not guilty of these charges by reason of mental disease or defect.[2] On August 15, 2013, the trial court, *McMahon*, *J.*, committed the defendant to the custody of the Commissioner of Mental Health and Addiction Services. The defendant was transferred to . . . Whiting . . . where he received a psychiatric evaluation pursuant to General Statutes § 17a-582.[3] The October

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

[2] General Statutes § 53a-13 provides in relevant part: "(a) In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law. . . ."

[3] General Statutes § 17a-582 provides in relevant part: "(a) When any person charged with an offense is found not guilty by reason of mental disease or defect pursuant to section 53a-13, the court shall order such acquittee committed to the custody of the Commissioner of Mental Health and Addiction Services who shall cause such acquittee to be confined, pending an order of the court pursuant to subsection (e) of this section, in any of the state hospitals for psychiatric disabilities . . . .

23, 2013 report resulting from that evaluation recommended that the defendant be returned to prison. On November 18, 2013, Judge McMahon disagreed with the hospital's recommendation and, consistent with the contrary recommendation of an independent evaluator sought by the defendant pursuant to § 17a-582 (c),[4] ordered that the defendant be committed to the custody of the Psychiatric Security Review Board (board) and confined at the hospital for a period not exceeding ten years.[5] On February 7, 2014, the board held the defendant's initial commitment hearing, after which it concluded that he had a psychiatric illness that required care, custody and treatment. It concluded further that he had a psychiatric disability to the extent that his discharge would constitute a danger to himself or others, and that he required confinement in a maximum

"(b) Not later than sixty days after the order of commitment pursuant to subsection (a) of this section, the superintendent of such hospital . . . shall cause the acquittee to be examined and file a report of the examination with the court, and shall send a copy thereof to the state's attorney and counsel for the acquittee, setting forth the superintendent's . . . findings and conclusions as to whether the acquittee is a person who should be discharged. . . ."

[4] Pursuant to § 17a-582 (c), following receipt of the hospital's report, counsel for the acquittee may seek a separate examination of the acquittee by a psychologist or psychiatrist of the acquittee's choice, and any resulting report from such examination must be filed with the trial court within thirty days of the filing of the hospital's report.

[5] Pursuant to § 17a-582 (d), the trial court, after receiving the results of a hospital evaluation conducted pursuant to § 17a-582 (b) and, if the acquittee requests it, a separate evaluation conducted by a psychologist or psychiatrist of the acquittee's choice pursuant to § 17a-582 (c), must conduct a hearing to determine whether the court may find that the acquittee should be either discharged, conditionally released or confined. See General Statutes § 17a-582 (e) (1) and (2). "If the court finds that the acquittee is a person who should be confined . . . the court shall order the acquittee committed to the jurisdiction of the board and . . . confined in a hospital for psychiatric disabilities . . . for custody, care and treatment pending a hearing before the board pursuant to section 17a-583; provided (A) the court shall fix a maximum term of commitment, not to exceed the maximum sentence that could have been imposed if the acquittee had been convicted of the offense . . . ." General Statutes § 17a-582 (e) (1).

security setting. Accordingly, the board ordered that the defendant remain confined at the hospital under maximum security conditions.[6]

"Upon arriving at the hospital, the defendant allegedly commenced a pattern of assaulting other patients and hospital staff. As a result of his conduct on various dates from October, 2013, through February, 2014, he was charged with several misdemeanors.[7] Thereafter,

[6] Pursuant to § 17a-583 (a), "[t]he board shall conduct a hearing to review the status of [an insanity] acquittee within ninety days of an order committing the acquittee to the jurisdiction of the board," and, pursuant to § 17a-583 (b), at that hearing, "the board shall make a finding and act pursuant to section 17a-584." General Statutes § 17a-583 (b).

General Statutes § 17a-584 directs the board, at the hearing held pursuant to § 17a-583 (a), to "make a finding as to the mental condition of the acquittee . . . considering that its primary concern is the protection of society . . . ." It further authorizes the board to find that the acquittee either should be discharged, conditionally released or confined. See General Statutes § 17a-584 (1) through (3). "If the board finds that the acquittee is a person who should be confined, the board shall order the person confined in a hospital for psychiatric disabilities . . . for custody, care and treatment." General Statutes § 17a-584 (3).

General Statutes § 17a-599 provides in relevant part that, "[a]t any time the court or the board determines that the acquittee is a person who should be confined, it shall make a further determination of whether the acquittee is so violent as to require confinement under conditions of maximum security. . . ." Pursuant to General Statutes § 17a-561, "[t]he Whiting Forensic Division of the Connecticut Valley Hospital shall exist for the care and treatment of [inter alia] (1) patients with psychiatric disabilities, confined in facilities under the control of the Department of Mental Health and Addiction Services, who require care and treatment under maximum security conditions . . . ."

[7] "The record indicates that, as a result of incidents occurring on five separate dates, the defendant was charged with a total of eleven misdemeanors, including one count of unlawful restraint in the second degree, three counts of assault in the third degree, two counts of threatening in the second degree, one count of criminal mischief in the third degree, three counts of disorderly conduct and one count of breach of the peace in the second degree.

"Moreover, the hospital's October 23, 2013 report indicates that, between August 24, 2013, and October 1, 2013, while the defendant was being evaluated by the hospital, he engaged in an additional five unprovoked physical altercations with other patients, as well as other verbal altercations with both patients and hospital staff. None of these incidents resulted in any

in April, 2014, he was charged with, inter alia, two counts of assault of health care personnel, a class C felony. See General Statutes § 53a-167c. In connection with all but one of these charges, the defendant was released on a promise to appear and ordered returned to Whiting.[8] Also, in April, 2014, the state filed a motion for bond review, in which it requested that the trial court modify the defendant's existing conditions of release and impose an appropriate monetary bond. The defendant filed an opposition to the state's motion and an accompanying memorandum of law, arguing therein that the court lacked the authority to impose a monetary bond under the circumstances of this case. The parties attached exhibits to these filings, including the hospital's October 23, 2013 report concerning its psychiatric evaluation of the defendant, several reports from the defendant's independent psychiatric evaluator, the transcript of the commitment hearing before the board and the board's report recommending that the defendant be confined in a maximum security setting.

"On June 18, 2014, the trial court, *Gold*, *J.* . . . concluded that, although the defendant was a confined insanity acquittee, the court retained the authority, conferred by General Statutes § 54-64a . . . and Practice Book § 38-4 . . . to set a monetary bond upon his commission of new offenses in the hospital setting, particularly for the purpose of ensuring the safety of other persons. The court then scheduled an evidentiary hearing on the state's motion for bond review to consider whether the defendant's existing conditions of release should be modified. Before that hearing could occur, however, the defendant was charged with another felony count of assault of health care personnel, as well

criminal charges against the defendant." *State* v. *Anderson*, 319 Conn. 288, 294–95 n.11, 127 A.3d 100 (2015).

[8] "As to the charge of threatening in the second degree, the trial court, *Gold*, *J.*, imposed a $1000 nonsurety bond." *State* v. *Anderson*, 319 Conn. 288, 295 n.12, A.3d 100 (2015).

as three additional misdemeanors. On August 25, 2014, at the defendant's arraignment on those charges, the court set a bond in the amount of $100,000, cash or surety. Because the defendant was unable to post that bond, he was transferred to the custody of the Commissioner of Correction. . . . See General Statutes § 54-64a (d). The court directed that the mittimus reflect that the defendant required mental health treatment and that he should be housed and monitored in a way to ensure, to the extent possible, the safety of other inmates and correction personnel." (Footnote added; footnotes omitted; internal quotation marks omitted.) *State* v. *Anderson*, 319 Conn. 288, 292–97, 127 A.3d 100 (2015).[9]

[9] "At a subsequent hearing to address the defendant's motion for stay of the trial court's order setting a monetary bond pending disposition of this appeal . . . the court elaborated on its reasons for that order. It reiterated its belief that it 'retain[ed] the inherent authority to set bond and to establish conditions of release, including financial conditions, even as to insanity acquittees who are alleged to have committed new crimes during their period of insanity commitment.' The court reasoned further that a rule to the contrary 'would effectively deprive the court of its right—in fact, its obligation—to set conditions of release that are necessary to ensure that the safety of other persons will not be endangered.' Moreover, according to the court, such a rule 'would mean that an insanity acquittee, regardless of the frequency and seriousness of his . . . new crimes committed during the commitment period, would be free to commit those crimes, confident that he would be ultimately returned to the same facility to be placed, again, among the same staff and same patients that [he allegedly] victimized in the first instance.' The court observed that the defendant allegedly committed seven assaults on seven separate people at seven different times.

"The trial court further explained that, as authorized by Practice Book § 38-4 (b), it had considered the defendant's history of violence and the risk posed to the physical safety of the staff and other patients at the hospital, and had concluded that financial conditions of release were necessary to ensure their safety. Moreover, the court indicated that it had considered the rights of victims afforded by the state constitution, particularly their right to be protected from an accused. . . . Additionally, the court reasoned that, even if the defendant had a right to psychiatric treatment, it was not an unqualified and inalienable right to a certain type of treatment, and the nature of the treatment afforded to him had to be determined with reference to the management issues that he presented, with his interests weighed against the interests of other patients who also were entitled to treatment.

The defendant appealed to our Supreme Court, claiming "that the trial court's order setting a monetary bond as a condition of release and, because he was unable to post that bond, his subsequent transfer to the custody of the Commissioner of Correction were in violation of his constitutional rights, namely, his right to bail under the state constitution and his right to procedural due process under the federal constitution." Id., 299. The court rejected each of the defendant's claims, and further held "that the defendant's remedy, if he believes that the mental health treatment he is receiving while in the custody of the Commissioner of Correction is constitutionally inadequate, is through an expedited petition for a writ of habeas corpus challenging the conditions of his confinement." Id.

As a result of the incidents that occurred while he was at Whiting, the defendant was convicted, after a court trial, of one count of assault in the second degree in violation of General Statutes § 53a-60 (a) (3) and four counts of reckless endangerment in the second degree in violation of General Statutes § 53a-64 (a). At the defendant's sentencing hearing, the prosecutor argued that sending the defendant back to Whiting was not a viable option due to his repeated "violent propensities toward staff, patients and inmates . . . ." Before articulating the defendant's position at the sentencing hearing, defense counsel called Dr. Madelon V. Baranoski, a forensic psychologist who met with and evaluated the defendant, to testify. Baranoski testified, inter alia, that Whiting was not a suitable placement for the defendant. In his remarks to the court, defense counsel explained the unique circumstances of the defendant:

Finally, the court noted that, pursuant to its order, the defendant was to receive psychiatric treatment while in the custody of the Commissioner of Correction, and correction officials remained free to consult with the hospital and the board regarding that treatment." *State* v. *Anderson*, supra, 319 Conn. 297–99.

"He's a convicted criminal defendant awaiting sentencing . . . . He's [an] involuntarily committed insanity acquittee under the [jurisdiction of the board]. He's a sentenced prisoner with [a] concurrently running unexpired sentence and also a pretrial detainee under multiple docket numbers under which he remains incarcerated pursuant to a bond he was unable to post." Defense counsel argued that it was inappropriate to punish an insanity acquittee by incarceration, but acknowledged that "the only practical options [for the defendant] are available through the correction system . . . ." He explained that "he can't go back to Whiting untreated, and he shouldn't go back to Whiting, according to Dr. Baranoski, at all . . . ."

The court posited: "The question now is the nature of an appropriate sentence and more practically where the sentence will be served once it is imposed under the unique circumstances presented, and to ensure that [the defendant] receives the opportunity for appropriate treatment." The court then explained: "The . . . circumstances [of this case] are unique in that the defendant is presently now serving the aforementioned ten year sentence while also simultaneously an insanity acquittee, again, to speak colloquially, on different charges, and is now facing sentencing on subsequent crimes he committed at Whiting for which this court has found him criminally responsible. Thus, the defendant's sentencing presents the preliminary questions of whether and how the defendant can be moved to the [department's] jurisdiction for . . . these subsequent criminal offenses when he's still under technically the jurisdiction of the board although simultaneously also serving a criminal sentence in a different matter."

The court further explained: "The court has considered the sentencing goals as well as all the information before it, including balancing the defendant's rights to mental health treatment if needed with that of the rights

of the victims under . . . the Connecticut constitution to be protected from the accused. . . .

"[T]he court intends to impose a sentence and order that the defendant be immediately transferred to the custody of the [department]. The court believes this action to be appropriate based on the serious nature of these allegations and is a consequence of the defendant's seemingly unabated proclivity to assault or threaten staff in a treatment setting or in corrections.

"In the court's view, it defies logic to conclude that it would be appropriate to allow the defendant to remain at Whiting as a consequence of a prior insanity acquittal despite the fact that he thereafter seriously injured a staff member and endangered others. And this court has found that at the time of the assault that is before this court, the defendant did not prove he suffered from a mental disease or defect, as required by law. To conclude otherwise would mean the defendant would be free to commit new crimes, confident he would just be returned to the same facility among potential victims who are both staff and other patients. The victims have a constitutional right to be protected from the defendant." The court imposed a sentence of seven years incarceration, suspended after five and one-half years, and two years probation to be served consecutively to the 2008 sentence that he was then serving. The court thereupon ordered that the defendant be remanded to the custody of the Commissioner of Correction instead of returned to Whiting.

On January 20, 2017, the defendant filed a motion to correct "an illegal disposition and/or sentence imposed in an illegal manner." In his motion, the defendant argued that the court did not have the authority, when sentencing him on September 12, 2016, to remand him to the custody of the Commissioner of Correction. He claimed that because the sentence that was imposed

on September 12, 2016, was to be served consecutively to the sentence that he was then serving, which was the 2008 sentence, he should have been returned to Whiting to continue serving the 2008 sentence, which is where he had been serving the 2008 sentence until he was transferred to the department as a pretrial detainee. He argued that because he had not been restored to sanity and was still hospitalized as an insanity acquittee at the time of his September 12, 2016 sentencing, he was entitled to be treated for his mental disease or defect instead of being punished by incarceration. He also asked the court to award him credit toward his consecutive sentence for all time he had spent in jail as a pretrial detainee in this case, which he inadvertently neglected to request when he was sentenced. The state did not file a written objection to the defendant's motion.

At the hearing on the motion to correct, defense counsel explained that he was "not asking the [reviewing court] to review the sentence itself. This motion is directed to the orders of the court as far as imposing the sentence and the impact of the court's order on custody of [the defendant]. . . . I'm proceeding specifically under the subsection [of Practice Book § 43-22], disposition imposed in an illegal manner." The defendant argued that the illegality of the sentence was the court's "imposition of the sentence consecutive to a sentence which did not expire until August of 2017, and then simultaneously ordering [the defendant] into [the department's] custody as a sentenced prisoner under authority of that sentence that was running that had nothing to do with the subject matter of the trial. Essentially, Your Honor ordered [the defendant] to be taken directly into [the department's] custody upon sentencing to recommence serving an older sentence over which Your Honor, as trial judge, had no jurisdiction

or authority . . . .”[10] The defendant also argued that he was entitled to credit toward his September 12, 2016 sentence for all the time he had spent in the custody of the Commissioner of Correction as a pretrial detainee.

In response, the state argued that the defendant's motion should be denied. The state contended that the court properly imposed the September 12, 2016, sentence to run consecutively to the defendant's 2008 sentence. The state further argued that the court properly declined to remand the defendant to Whiting on September 12, 2016 as it was not a safe environment for the defendant or the staff or other patients receiving treatment there. The state also argued that the court did not have jurisdiction pursuant to Practice Book § 43-22 over the defendant's claim for pretrial confinement credit.

The court orally denied the defendant's motion to correct, citing the rationale on which it relied in imposing the September 12, 2016 sentence. The court also dismissed the defendant's request for pretrial jail credit for lack of jurisdiction because that request did not constitute a viable claim for relief under Practice Book § 43-22. This appeal followed.

[10] At the hearing on the motion to correct, the prosecutor explained that the defendant had not been only an insanity acquittee on September 12, 2016. He also was a sentenced inmate on the 2008 sentence, and that is the sentence to which the court in this case ordered the defendant to serve his sentence consecutively. The prosecutor explained: “I think what makes this case even more unique than some of the cases that [defense counsel] has cited is that the defendant was serving a [sentence in the custody of the Commissioner of Correction] concurrently with a [commitment to the board as a result of previously having been found not guilty by reason of mental disease or defect]. If he was only [an acquittee as a result of having been found not guilty by reason of mental disease or defect], and the court sentenced him to a term of incarceration consecutive to that, then I would agree with [defense counsel]. I don't necessarily think the court could do that; it would have to be stayed, much like the other cases have indicated. The court sentenced him to a period of incarceration consecutive to the . . . sentence of incarceration [in the custody of the Commissioner of Correction], and I had the same questions in mind that the court has asked [defense counsel]: where should he serve his sentence?”

We begin by setting forth the following relevant legal principles. "The Superior Court is a constitutional court of general jurisdiction. In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law. . . . It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence. . . . Because it is well established that the jurisdiction of the trial court terminates once a defendant has been sentenced, a trial court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . . [Practice Book] § 43-22 embodies a common-law exception that permits the trial court to correct an illegal sentence or other illegal disposition. . . . Thus, if the defendant cannot demonstrate that his motion to correct falls within the purview of § 43-22, the court lacks jurisdiction to entertain it. . . . [I]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack. . . .

"[A]n illegal sentence is essentially one [that] either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. By contrast . . . [s]entences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right

that the government keep its plea agreement promises . . . . These definitions are not exhaustive, however, and the parameters of an invalid sentence will evolve . . . as additional rights and procedures affecting sentencing are subsequently recognized under state and federal law. . . .

"Recently, our Supreme Court explained, in addressing the trial court's dismissal on jurisdictional grounds of a motion to correct an illegal sentence that [t]he 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. . . . At issue is whether the defendant has raised a colorable claim within the scope of Practice Book § 43-22 that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of a sentence. . . . In the absence of a colorable claim requiring correction, the trial court has no jurisdiction to modify the sentence." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Jason B.*, 176 Conn. App. 236, 243–44, 170 A.3d 139 (2017).

"We review the [trial] court's denial of [a] defendant's motion to correct [an illegal] sentence under the abuse of discretion standard of review. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Logan*, 160 Conn. App. 282, 287, 125 A.3d 581 (2015), cert. denied, 321 Conn. 906, 135 A.3d 279 (2016). "Our determination of whether a motion to correct falls within the scope of Practice Book § 43-22 is a question of law and, thus, our review is plenary." (Internal quotation marks omitted.)

State v. *Lugojanu*, 184 Conn. App. 576, 580, 195 A.3d 1191 (2018).

The defendant first claims that his 2016 sentence was imposed in an illegal manner because the court improperly ordered that he be immediately remanded to the custody of the Commissioner of Correction and incarcerated, instead of remanded to the custody of the board and returned to Whiting, where he had been serving his 2008 sentence.[11] He claims: "By having imposed a consecutive sentence to an unexpired 2008 sentence, and subsequently ordering immediate imprisonment pursuant to the 2008 sentence, the trial court effectively modified the term of a valid judgment imposed by an earlier court without the legal authority to do so." The defendant thus is arguing that he should have been sent back to Whiting on September 12, 2016 to finish serving his 2008 sentence, which has now expired. By way of relief, the defendant asks this court to "remand [this case] with instructions to the trial court to impose its original sentence for the convictions in this case retroactive to September 12, 2016." The defendant explains: "The specific sentencing relief that [he] is seeking from this particular claim is retroactivity of the sentence imposed by [the] trial court from August 5, 2017, the estimated release date of the 2008 sentence, to its imposition date of September 12, 2016, an advance of [his] estimated release date from this sentence by nearly eleven months."

The defendant's claim is misplaced because, even if we assume, arguendo, that the trial court should have returned him to Whiting instead of remanding him to prison, he has already received full credit toward his 2008 sentence for the period in which he was incarcerated from September 12, 2016, to August 5, 2017. It is

[11] The defendant does not challenge the trial court's authority to impose his 2016 sentence, or the sentence itself.

axiomatic that a defendant is not entitled to credit for the same period of incarceration, toward the service of two separate sentences, unless the court orders that such sentences are to be served concurrently.[12] The defendant's claim that the eleven months here at issue should be credited a second time therefore must fail.

The defendant's claim that the court erred in dismissing that portion of his motion to correct an illegal sentence in which he asserted that he was entitled to presentence credit for all time he had spent incarcerated in lieu of bail in this case, and his related request to revise his mittimus to implement the court's order that he receive all pretrial credits to which he was entitled, are likewise unavailing. As previously noted, the trial court's jurisdiction under Practice Book § 43-22 is narrow, applying only to limited claims that arise from the sentencing proceeding itself. See *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 199 n.21, 982 A.2d 620 (2009) ("[i]n order for the court to have jurisdiction over a motion to correct an illegal sentence [under Practice Book § 43-22] after the sentence has been executed, the sentencing proceeding . . . must be the subject of the attack" [internal quotation marks

[12] See General Statutes § 53a-8 (b), which provides in relevant part: "Where a person is under more than one definite sentence, the sentences shall be calculated as follows: (1) If the sentences run concurrently, the terms merge in and are satisfied by discharge of the term which has the longest term to run; (2) if the sentences run consecutively, the terms are added to arrive at an aggregate term and are satisfied by discharge of such aggregate term."

See also General Statutes § 18-98d (a) (1), which provides in relevant part: "Any person who is confined to a community correctional center or a correctional institution for an offense committed on or after July 1, 1981, under a mittimus or because such person is unable to obtain bail or is denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed; provided (A) *each day of presentence confinement shall be counted only once for the purpose of reducing all sentences imposed after such presentence confinement* . . . ." (Emphasis added.)

omitted]). The defendant's claim does not arise from the sentencing proceeding or, in fact, from any action taken by the trial court, but concerns, as he put it in his brief to this court, "the legality of his sentence as calculated by the department . . . ." Because the defendant's claim does not fall within the narrow ambit of § 43-22, the court properly dismissed it for lack of subject matter jurisdiction. See *State* v. *Montanez*, 149 Conn. App. 32, 41, 88 A.3d 575, cert. denied, 311 Conn. 955, 97 A.3d 985 (2014).

The judgment is affirmed.

In this opinion the other judges concurred.