GEOVANNY ZILLO *v.* COMMISSIONER OF CORRECTION (AC 41330)

Keller, Elgo and Bishop, Js.

Syllabus

The petitioner, who had been convicted of sexual assault in the first degree and risk of injury to a child, sought a writ of habeas corpus, claiming that his trial counsel provided ineffective assistance. At the beginning of the habeas trial, the petitioner informed the court that he was withdrawing certain of his claims, including a claim that his trial counsel was ineffective in failing to present certain medical testimony. On the second day of trial, which occurred nearly two months later, the petitioner requested that the court permit him to "unwithdrawn" that claim, but the court denied the request to reinstate the claim. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court did not abuse its discretion when it denied the petitioner's request to reinstate the claim he had withdrawn: that court reasonably recognized that almost all witnesses already had been examined when the request was made, and although not all of those witnesses would have been needed to address the claim, it would have been unfair to recall some witnesses after their dismissal, and to resurrect the claim would have required additional preparation and time to explore the claim with the previous witnesses; moreover, the petitioner waited nearly two months after the first day of trial to bring forth his request, which he could have explored at the end of the first day of trial or shortly thereafter, it was the petitioner who originally brought the claim forward and then subsequently elected to withdraw it, and his claim that the habeas court should have treated the request as a motion to amend the pleadings was inadequately briefed and not reviewable.
2. The petitioner's claim that the habeas court should have allowed into evidence documents that related to his medical condition was unavailing; because the habeas court never ruled on the issue of the admissibility with regard to the medical records, this court was unable to reach the merits of that issue on appeal.

3. The petitioner could not prevail on his claim that his trial counsel was ineffective in failing to pursue a motion to dismiss based on the statute of limitations in (§ 54-193a); because there was no credible evidence to show the actual commencement of the statute of limitations in March, 1999, in that there was no credible evidence to show that the victim had notified the requisite authorities in 1999, it was not unreasonable for the petitioner's trial counsel to conclude that a motion to dismiss, on that basis, was not worth pursuing, as it was not applicable to the present case.
4. The petitioner's claim that trial counsel was ineffective when he failed to object to allegedly harmful, inflammatory language in the state's substitute information that was read by the court clerk to the jury was unavailing; it was plain from the record that inflammatory details of the petitioner's perverse misbehavior came into evidence several times during the trial, and, therefore, there would have been no point in objecting to the recitation of the details underlying the charges, and because that information was adduced during the trial, the silence of the petitioner's trial counsel during the introductory part of the trial caused the petitioner no harm.
5. The petitioner could not prevail on his claim that his trial counsel was ineffective when he allegedly failed to assist the petitioner in freely choosing whether to testify in his own defense; the habeas court credited trial counsel's testimony that he had advised the petitioner against testifying and also that, ultimately, it was the petitioner's decision to make, and the petitioner admitted during the canvass that he was informed of the pros and cons about testifying from his trial counsel, that he was advised by his trial counsel not to testify and that he understood it was his right to testify, which supported a determination that it was the petitioner's decision not to take the stand at his own criminal trial in conjunction with the sound legal advice of his attorney.
6. The habeas court properly determined that the petitioner's trial counsel was not deficient in failing to pursue a hearing pursuant to *Franks* v. *Delaware* (438 U.S. 154) in the pretrial stage of the criminal proceedings with regard to a warrant that authorized the arrest of the petitioner and the omission from the warrant of certain relevant exculpatory information; the habeas court found that because the police obtained the evidence before the petitioner's arrest, any defects relative to the arrest warrant had no bearing on the admissibility of the previously acquired evidence so as to taint the fairness of the petitioner's criminal trial, the petitioner adduced no credible evidence to demonstrate intentional or reckless omission of material facts by the police or prosecutor, and the petitioner's criticisms of the arrest warrant affidavit appeared trivial and inconsequential toward the finding of probable cause, as a review of the affidavit showed an abundance of incriminating evidence against the petitioner.

7. The petitioner's claim that his trial counsel provided ineffective assistance when he failed to obtain the victim's education records in order to undermine her allegations was unavailing; even if trial counsel was deficient in this regard, the petitioner was not prejudiced thereby, as he was unable to produce any records or evidence regarding the victim's school attendance to undermine her testimony that she sometimes arrived late because of the petitioner's sexual abuse, and the petitioner did not argue, nor did he demonstrate, any harm that was caused to him by the absence of the records.

8. The petitioner could not prevail on his claim that his trial counsel was ineffective in failing to file a motion to suppress evidence concerning photographs taken of the petitioner's apartment during an illegal search; this court disagreed with the notion that an attorney's decision to forgo a motion to suppress nonincriminating evidence, stemming from a not yet determined illegal search, constituted ineffective assistance of counsel under *Strickland* v. *Washington* (466 U.S. 668), nor could defense counsel be faulted for electing not to allocate time to the pursuit of eliminating evidence that, on its face, was not prejudicial to his client.

Argued September 23—officially released December 31, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the matter was tried to the court, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court; thereafter, the court, *Sferrazza*, *J.*, denied in part the petitioner's motion for an articulation; subsequently, this court granted the petitioner's motion for review but denied the relief requested therein. *Reversed in part*; *judgment directed.*

Michael W. Brown, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva Lenczewski*, supervisory assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The petitioner, Geovanny Zillo, appeals from the judgment of the habeas court denying his revised amended petition for a writ of habeas corpus.

On appeal, the petitioner claims that the court (1) abused its discretion by denying his request to "unwithdraw" a claim and present medical evidence regarding his genitals, (2) improperly concluded that he was not denied the effective assistance of trial counsel, and (3) improperly concluded that he was not denied the effective assistance of appellate counsel. We conclude that the habeas court did not have subject matter jurisdiction over the third claim and dismiss that portion of the appeal.[1] We affirm the judgment of the habeas court as to the remaining two claims.

The following facts and procedural history are relevant to our resolution of the petitioner's appeal. In 2009, following a jury trial, the petitioner was convicted of three counts of sexual assault in the first degree, one count of attempt to commit sexual assault in the first degree, and four counts of risk of injury to a child. *State* v. *Zillo*, 124 Conn. App. 690, 691, 5 A.3d 996 (2010). The petitioner received a total effective sentence of thirty years of imprisonment, execution suspended after fifteen years, with fifteen years of probation. Id., 693. This court's opinion in the petitioner's direct appeal sets forth the following facts: "The family of the eleven year

[1] In his revised amended petition, the petitioner alleges that his appellate counsel's deficient performance prevented him from filing a timely petition for certification to appeal this court's affirmance of his judgment of conviction to our Supreme Court pursuant to Practice Book § 84-4. Notwithstanding that the petition for certification would have been late, because the petitioner never attempted to file a motion for permission to file a late petition for certification, the habeas court lacked jurisdiction to decide this claim. See *Janulawicz* v. *Commissioner of Correction*, 310 Conn. 265, 271–72, 77 A.3d 113 (2013) ("[w]e conclude that, despite the petitioner's failure to comply with the time period set forth in the Practice Book § 84-4 (a), the petitioner's habeas petition is not ripe for adjudication in view of the fact that the petitioner's injury is contingent on this court's denial of a motion to file a late petition for certification, a motion that the petitioner has never filed, because he will not suffer such an injury if this court were to grant his request for permission to file an untimely petition for certification to appeal"). Therefore, we will address only the petitioner's two other claims on appeal.

old victim in this case, all of whom emigrated to the United States from China, owned a Chinese restaurant that the [petitioner] frequented during 1998 and early 1999. During this time, the [petitioner] became friendly with the victim and her family, often assisting the children with their homework and with the English language. The [petitioner] was invited to family gatherings and holiday celebrations, and he purchased several gifts for the family, including a computer for the children and a $500 translator. The victim's parents eventually became concerned about the attention that the [petitioner] was showing the victim, especially his attempts to speak with her privately, and the family told the [petitioner] that he no longer was welcome at the restaurant. Accordingly, the [petitioner] stopped going to the restaurant.

"After the [petitioner] stopped going to the restaurant, he began to follow the victim and to pick her up as she waited for the bus to take her to school. The [petitioner] would take the victim to a house where he would sexually assault her. He also took her to a wooded area to take photographs of her, and he took her to a McDonald's restaurant. The victim testified that the [petitioner], whom she called G-Bunny, repeatedly sexually assaulted her when she was eleven years old. The [petitioner] made the victim remove her clothing, kissed her breasts, performed oral sex on her, digitally penetrated her vagina and her anus, licked her anus, made her hold his erect penis in her hand, made her urinate into his mouth so that he could taste her urine to see if it was as 'sweet' as she and attempted to make her perform oral sex on him. The [petitioner] instructed the victim not to tell anyone about his behavior, and he told her that he wanted to marry her. He also gave her money.

"In 2005 or 2006, the [petitioner] established an account on the social website Myspace.com (MySpace) using the name AnnaLuckyOne, where he purported

to be an Asian female and included a photograph of an unknown Asian female on his profile. He soon contacted the victim, who also had a MySpace account, and he attempted to establish a relationship with the victim by telling her that he was a young Asian girl. The [petitioner], acting as this young Asian girl, subsequently told the victim that the [petitioner] was Anna-LuckyOne's friend and asked if she would be willing to resume a friendship with him. Suspicious that her new friend really was the [petitioner] and not another young Asian female, the victim panicked and went to see her school counselor and her dormitory parent in whom she confided that the [petitioner] previously had sexually assaulted her. Soon thereafter, the victim filed a police report, and a warrant was issued for the [petitioner]'s arrest. The [petitioner] was tried on eight counts as set forth earlier in this opinion; he elected to be tried by a jury.

"The jury found the [petitioner] guilty on all eight counts as charged. The court accepted the jury's verdict and sentenced the [petitioner] to a total effective term of thirty years imprisonment, execution suspended after fifteen years, with fifteen years of probation." (Footnotes omitted.) Id., 692–93. The petitioner appealed his conviction to this court, which affirmed the judgment of the trial court.[2] Id., 706.

[2] The petitioner brought a direct appeal from his convictions before this court in 2010. See *State* v. *Zillo*, supra, 124 Conn. App. 691. In that appeal, the petitioner pursued two claims: (1) the trial court erroneously admitted 2188 photographs into evidence and (2) he was denied his constitutional right to a fair trial on the basis of prosecutorial impropriety. Id., 691–92. Specifically, the petitioner argued that the photographs were irrelevant to the charges he faced and highly prejudicial, and that the jury "could have concluded that because the [petitioner] possessed these [photographs] in 2006, he ha[d] a proclivity to Asian women and, because of that proclivity, he committed the charged offenses . . . ." (Internal quotation marks omitted.) Id., 694. With regard to the prosecutorial impropriety claim, the petitioner argued that "[t]he prosecutor made numerous statements to the jury during the state's closing argument that amounted to prosecutorial [impropriety] because the prosecutor vouched for the credibility of one of the state's

Shortly thereafter, the petitioner, acting as a self-represented party, filed a petition for a writ of habeas corpus and, after counsel had been appointed, he subsequently filed a revised amended petition for a writ of habeas corpus (revised amended petition). During the habeas trial, the petitioner asserted twelve claims that his criminal trial defense counsel, Attorney Jerry Attanasio, had provided ineffective assistance during his underlying criminal trial, as well as an ineffective assistance claim against his appellate counsel which, as previously noted, is not properly before this court. The habeas court denied all of the petitioner's claims. The petitioner filed a petition for certification to appeal the denial of his revised amended petition, which the court granted. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner first claims that the habeas court abused its discretion by (1) denying his request to "unwithdraw" a claim that he raised in his habeas petition that defense counsel rendered deficient performance by failing to present evidence related to a medical condition of his genitals that would have been crucial to his defense and (2) excluding evidence related to his medical condition and making adverse findings based upon the evidence that the petitioner sought to rebut with the medical evidence. We disagree.

A

We first address the petitioner's claim that the court abused its discretion by denying his request to "unwithdraw" a claim concerning the features of his genitals.

key witnesses; his statements appealed to and inflamed the jury's emotions; and, his comments distracted the jurors from making their own independent judgment based on the evidence properly before the court." (Internal quotation marks omitted.) Id., 700–701. This court affirmed the judgment of the trial court, holding that the petitioner failed to demonstrate harmfulness with respect to the photographic evidence and that the comments made by the prosecutor were of the type previously deemed proper by our Supreme Court. Id., 700, 706.

More specifically, the petitioner argues that the court should have treated the request to "unwithdraw" the claim set forth in paragraph 28 (R) of his revised amended complaint as a request to amend the pleadings to conform to the evidence. We are not persuaded.

We first set forth the standard of review and applicable legal principles that guide our analysis. With regard to a withdrawn claim, "[t]he trial court may exercise its discretion . . . to deny the reinstatement of a claim that has been expressly withdrawn. Only where the trial court has abused that discretion will this court order a reversal. [E]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . Demonstrating that the trial court has abused its discretion is a difficult task." (Citation omitted; internal quotation marks omitted.) *McKnight* v. *Commissioner of Correction*, 35 Conn. App. 762, 767–68, 646 A.2d 305, cert. denied, 231 Conn. 936, 650 A.2d 173 (1994).

The following additional procedural history is relevant to our review of the petitioner's claim. The habeas trial lasted for three days; however, the first and second days were nearly *two months* apart. At the beginning of the habeas trial, on October 6, 2017, the petitioner informed the court that he was withdrawing several of his claims, including the claim set forth in paragraph 28 (R) of his revised amended petition alleging that his right to effective assistance of trial counsel was violated because trial counsel's performance was deficient in that "[counsel] failed to present the testimony of John Antonucci, M.D., or other evidence of unusual features of the petitioner's genitalia . . . ." On the second day of trial, November 29, 2017, the petitioner requested that the court permit him to "unwithdraw" paragraph 28 (R), averring that there was information from the first day of trial that he did not expect to be presented in evidence and, as a result, he wanted to "pursue [the]

issue at least somewhat." The court denied the request to reinstate that claim, recognizing that the habeas proceeding had "already gone through ten witnesses" and that "[i]t would be very difficult to reconstruct how those witnesses would have been questioned or not questioned." Additionally, the court added that "it would be very unfair to reopen it and after we've had the attorney, trial attorney, the appellate attorney, [and] the expert witness [testify] . . . . [The petitioner] made the choice and sought to withdraw it."

We are not persuaded that the habeas court abused its discretion when it denied the petitioner's request to "unwithdraw" paragraph 28 (R). The court reasonably recognized that almost all witnesses already had been examined and, while not all of them would have been needed to address the claim set forth in paragraph 28 (R), it would still be unfair to recall some witnesses after their dismissal. Additionally, although the habeas court did not specifically address the issue of time, we are cognizant of the fact that the trial already had spanned two months. To resurrect a claim would require additional preparation and time to explore that claim with the previous witnesses. Furthermore, the petitioner waited nearly two months after the first day of trial to bring forth his request to "unwithdraw," something he could have explored at the end of the first day of trial or shortly thereafter. Lastly, as the habeas court observed, it was the petitioner who originally brought the claim forward and then subsequently elected to withdraw it.

With regard to his argument that the habeas court should have treated his request to "unwithdraw" as a motion to amend the pleadings to conform to the evidence, the petitioner has not provided any support for this argument and, accordingly, we decline to review it as it is inadequately briefed. See *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016) ("[w]e are not required to review issues that have been improperly

presented to this court through an inadequate brief" [internal quotation marks omitted]).

For the foregoing reasons, we conclude that the habeas court did not abuse its discretion when it denied the petitioner's request to "unwithdraw" paragraph 28 (R).

B

Next, the petitioner argues that the habeas court should have allowed into evidence documents that related to his medical condition.[3] The petitioner asserts that the court abused its discretion by not permitting him to introduce medical evidence related to the condition of his genitals. He argues that such evidence would have been relevant to a viable defense, which should have been presented at the petitioner's criminal trial, and that if such evidence had been introduced, it would have rebutted the testimony of trial counsel that the petitioner had refused to cooperate with the investigation into the issue. The petitioner further argues that this evidence was also relevant to several other claims he raised. Based on our review of the record, we are unable to assess this claim because it appears that the habeas court never ruled on the proffered evidence relating to the petitioner's medical condition.

"It is elementary that to appeal from the ruling of a trial court there must first be a ruling." *State* v. *Kim*, 17 Conn. App. 156, 157, 550 A.2d 896 (1988). "[We] . . . will not address issues not decided by the trial court." (Internal quotation marks omitted.) *Lee* v. *Stanziale*, 161 Conn. App. 525, 539, 128 A.3d 579 (2015), cert. denied, 320 Conn. 915, 131 A.3d 750 (2016).

During the second day of trial, the petitioner informed the habeas court that there were a few issues he wanted

[3] According to the habeas trial transcript, the petitioner had "medical records from the doctor that trial counsel said that the petitioner didn't attend appointments . . . [they] are from the time of around the criminal trial or the middle of the criminal trial."

to review before the trial continued, namely the "issue of medical records or medical condition that the petitioner has." The petitioner then moved right into a discussion of the withdrawn paragraph 28 (R). As the petitioner continued his presentation to the habeas court, his habeas counsel stated: "[M]y simple request is to unwithdraw [paragraph 28 (R)] . . . ." After hearing objections from the state's attorney, the habeas court ruled that it was "going to deny the request to reinstate [paragraph 28 (R)]." After the court's ruling, the petitioner continued, in an effort to try "to make [his] record," and primarily focused his arguments on why the claim in paragraph 28 (R) should be "unwithdrawn." At the conclusion of the petitioner's argument on this claim, the court opined, as previously noted, "you . . . sought to withdraw [the claim]."

It is apparent from the record that the habeas court never ruled, from the bench or in its memorandum of decision, as to the issue of allowing into evidence documentation on the petitioner's medical condition. The habeas court's ruling specifically addressed the petitioner's attempt to "unwithdraw" paragraph 28 (R) of his revised amended petition and nothing more. Because the habeas court did not rule on the issue of admissibility with regard to the medical records, we are unable to reach the merits of that issue on appeal.

II

We next turn to the petitioner's claim that the "habeas court erred by finding that the petitioner's right to the effective assistance of counsel was not violated at the petitioner's criminal trial." More specifically, the petitioner claims that trial counsel, Attorney Jerry Attanasio, failed to (1) pursue dismissal of the information under the applicable statute of limitations; (2) object to inflammatory information; (3) assist the petitioner in freely choosing whether to testify in his own defense;

(4) pursue a *Franks*[4] hearing; (5) obtain the education records of the victim, R;[5] and (6) file a motion to suppress evidence. We address each claim in turn.

We begin our analysis with the well established standard of review. "A petitioner's right to the effective assistance of counsel is guaranteed by the sixth and fourteenth amendments to the United States constitution, and by article first, § 8, of the Connecticut constitution. . . . In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given their testimony. . . .

"In *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court enunciated the two requirements that must be met before a petitioner is entitled to reversal of a conviction due to ineffective assistance of counsel. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversarial process that renders the result unreliable. . . .

"The first component, generally referred to as the performance prong, requires that the petitioner show that counsel's representation fell below an objective

[4] *Franks* v. *Delaware*, 438 U.S. 154, 155–56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

[5] 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.

standard of reasonableness. . . . In *Strickland*, the United States Supreme Court held that [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . .

"[T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. . . . The [petitioner] is also not guaranteed assistance of an attorney who will make no mistakes. . . . What constitutes effective assistance [of counsel] is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation." (Citation omitted; internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, 149 Conn. App. 681, 690–92, 89 A.3d 426 (2014), appeal dismissed, 321 Conn. 765, 138 A.3d 278, cert. denied sub nom. *Jackson* v. *Semple*, U.S. , 137 S. Ct. 602, 196 L. Ed. 2d 482 (2016).

"An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied. . . . It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier. . . . In its analysis, a reviewing court may look to the performance prong or the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Citation omitted; internal quotation marks omitted.) *Echeverria* v. *Commissioner of Correction*, 193 Conn. App. 1, 9–10, A.3d , cert. denied, 333 Conn. 947, A.3d (2019).

A

First, the petitioner claims that the habeas court erred by not finding that his trial counsel provided ineffective assistance during his criminal trial when Attorney Attanasio failed to pursue a motion to dismiss based on the statute of limitations set forth in General Statutes § 54-193a.[6] The petitioner asserts that Attorney Attanasio knew that there might have been a statute of limitations issue and that his testimony at the habeas trial confirmed as much when he admitted to knowing about a confrontation between the petitioner and police during a traffic stop in 1999, during which police allegedly told the petitioner to stay away from R and her family because of allegations of sexual misconduct. Attorney Attanasio confirmed that *if* he felt that he could have submitted a motion to dismiss based on the statute of limitations, he "would absolutely [have] file[d] that."

[6] General Statutes § 54-193 provides in pertinent part: "Notwithstanding the provisions of section 54-193, no person may be prosecuted for any offense, except a class A felony, involving sexual abuse, sexual exploitation or sexual assault of a minor except within thirty years from the date the victim attains the age of majority or within five years from the date the victim notifies any police officer or state's attorney acting in such police officer's or state's attorney's official capacity of the commission of the offense, whichever is earlier, provided if the prosecution is for a violation of subdivision (1) of subsection (a) of section 53a-71, the victim notified such police officer or state's attorney not later than five years after the commission of the offense."

However, according to his additional testimony, Attorney Attanasio believed that the petitioner's case no longer fell within the statute of limitations; accordingly, Attorney Attanasio did not pursue a motion to dismiss. The petitioner further asserts that he was prejudiced by Attorney Attanasio's failure to pursue dismissal because there was "a reasonable probability that a motion to dismiss would have been successful . . . ." We disagree.

The following additional facts are relevant to the petitioner's claim. The petitioner claimed he was stopped and ticketed for motor vehicle violations on March 11, 1999. According to the petitioner, during that time, he was interrogated for over two hours while he remained in his car. He identified three police officers who participated in the interrogation: Howard Northrop, Dana Lent, and Richard Binkowski. Officers Northrop and Lent testified, however, that they had no recollection of such an interrogation, while Trooper Binkowski testified that he never interacted with the petitioner on that date; nor did he possess any knowledge about R and incidents related to sexual assault.

In its opinion, the habeas court did not credit the petitioner's testimony nor did it find such an event, if it did occur, to be sufficient to implicate the running of the statute of limitations under § 54-193a. The habeas court relied, correctly, on our Supreme Court's decision in *State* v. *George J.*, 280 Conn. 551, 565–66, 910 A.2d 931 (2006), cert. denied, 549 U.S. 1326, 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007). There, the court held that the five year limitation in § 54-193a does not run unless "the *actual* victim notifies the specified authorities." (Emphasis added.) Id., 566. In the present case, there is no credible evidence that R notified the requisite authorities in 1999; on the contrary, she testified that she first spoke to law enforcement about the petitioner in 2006.

Because there was no credible evidence to show the actual commencement of the statute of limitations under § 54-193a in March, 1999, it was not unreasonable for Attorney Attanasio to conclude that a motion to dismiss, on that basis, was not worth pursuing, as it was not applicable to the present case. Therefore, under the first *Strickland* prong, we do not find that Attorney Attanasio's representation fell below an objective standard of reasonableness with regard to the petitioner's first claim.

B

Next, the petitioner claims that the habeas court erred by not finding that his trial counsel provided ineffective assistance when Attorney Attanasio failed to object to the harmful, inflammatory language in the state's substitute information read by the court clerk to the jury. Specifically, the petitioner argues that the habeas court "incorrectly concluded (1) only one part of the information was unnecessarily inflammatory, and (2) [that] later testimony about inflammatory details cured any error in their inclusion in the information." The petitioner further asserts he was prejudiced by the reading of graphic details in the information to the jury because "before any evidence was presented, without an opportunity for the defense to rebut those inflammatory details with a statement by the defense, the prosecutor started its case at an unfair advantage."

The following additional facts as found by the habeas court are relevant to the petitioner's claim. Initially, the state charged the petitioner with fifteen counts that involved risk of injury to a minor, sexual assault in the first degree, and attempted sexual assault in the first degree. The habeas court found it "appropriate and pragmatic" for the state to provide details of each crime to the jury in order to appropriately distinguish which counts pertained to which act and that the "level of

detail was especially necessary because the date of all the offenses was the same . . . .'' However, the habeas court took issue with the information of then count four, which ''averred that the petitioner disrobed the eleven or twelve year old victim . . . [and] that count unnecessarily particularized one of the removed garments as 'white Winnie-the-Pooh underwear.' '' Despite finding the reference to Winnie-the-Pooh as ''superfluous and potentially inflammatory,'' the habeas court held that it was harmless because those specific details came up several times throughout the trial in the form of (1) testimony from R ''that the petitioner had a predilection for removing the Winnie-the-Pooh underwear from the victim'' and (2) the petitioner gave R gifts related to Winnie-the-Pooh.

As previously noted, the second prong of *Strickland*, the prejudice prong, provides that in order to effectively prove ineffective assistance of counsel, a petitioner ''must show that the deficient performance prejudiced the defense.'' (Internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, supra, 149 Conn. App. 691. Under the prejudice prong, ''counsel's deficient performance prejudice[s] the defense [if] there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . The second prong is satisfied if it is demonstrated that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'' (Citation omitted; internal quotation marks omitted.) *Crocker* v. *Commissioner of Correction*, 126 Conn. App. 110, 116, 10 A.3d 1079, cert. denied, 300 Conn. 919, 14 A.3d 333 (2011). Without showing harm, a petitioner cannot prove ineffective assistance of counsel. See id.

In the present case, the petitioner's core argument involving harm is that the inflammatory language in

the information read to the jury allowed the state to shortcut its presentation of evidence and that this early recitation to the jury gave the state an unfair advantage. The record does not support this claim. As the record makes plain, inflammatory details of the petitioner's perverse misbehavior came into evidence several times during the trial. Therefore, there would have been no point in objecting to the recitation of the details underlying the charges. Additionally, because this information was adduced during the trial, counsel's silence during the introductory part of the trial caused the petitioner no harm. Accordingly, this claim fails.

C

The petitioner's third claim of ineffective assistance of counsel is that Attorney Attanasio failed to assist him in freely choosing whether to testify in his own defense. To support this claim, he points to Attorney Attanasio's advice that the petitioner should not testify because the state produced an electronic disk, the contents of which were unknown, and the fact that Attorney Attanasio failed to put the disk in evidence or alert the court to the fact that it could not be accessed. The petitioner posits that these actions undermined his ability to make a reasoned decision about testifying at his criminal trial. He argues that his ability to testify "coherently and competently" at the habeas trial is evidence that Attorney Attanasio failed to properly protect the petitioner's decision to testify and, thus, he was prejudiced under *Strickland*. We are not persuaded.

The following additional facts are relevant to the petitioner's claim. During the habeas trial, the petitioner testified that (1) he created a fake internet identity via MySpace in order to lure R into a series of online message exchanges and (2) he did so in order to further pursue R and inquire about her allegations of sexual abuse. Additionally, Attorney Attanasio testified that

the petitioner did not want to testify about or present evidence with regard to his genitalia. Attorney Attanasio also testified that he was hesitant about the petitioner testifying because he did not think the petitioner's explanations made any sense or that a jury would find him believable. Despite preparing the petitioner until 3:30 a.m. on the morning of his intended testimony, Attorney Attanasio was not confident that taking the stand was the best decision for the petitioner. That belief was strengthened by the state's production of the inaccessible disk just before that day's proceedings were set to begin.

Several times during the habeas trial, Attorney Attanasio testified that he did, in fact, advise the petitioner against testifying but that, ultimately, it was the petitioner's decision to make. The habeas court recognized in its decision that "[t]he trial judge diligently canvassed the petitioner concerning his decision [not to testify]. The petitioner acknowledged that he understood that the choice was his to make, that he had discussed the options with Attorney Attanasio, and that defense counsel had advised him as to the risks and benefits attendant to each option."

"[T]he appropriate vehicle for claims that the defendant's right to testify was violated by defense counsel is [through] a claim of ineffective assistance of counsel [pursuant to] [*Strickland*]. . . . As is the case in any such claim, the burden [is] on the petitioner to show that he was not aware of his right to testify . . . ." (Citation omitted; internal quotation marks omitted.) *Rodriguez* v. *Commissioner of Correction*, 35 Conn. App. 527, 537, 646 A.2d 919, cert. denied, 231 Conn. 935, 650 A.2d 172 (1994). Before petitioners can claim they have been deprived of the right to testify, they "are required to take some affirmative action regarding [that] right . . . ." Id. In *Rodriguez*, this court concluded that when a petitioner never expressed his desire to testify

at trial and his counsel provided sound advice with regard to the pros and cons of the decision to testify, the petitioner could not then prevail on his claim that counsel's performance was deficient. Id., 536–37.

In the present case, the habeas court credited Attorney Attanasio's testimony that he advised the petitioner against testifying and also that, ultimately, it was the petitioner's decision to make. Additionally, during the canvass, the petitioner admitted that he was informed of the pros and cons about testifying from Attorney Attanasio, he was advised by Attorney Attanasio not to testify, and that he understood it was his right to testify. We conclude that it was the petitioner's decision not to take the stand at his own criminal trial in conjunction with the sound legal advice of his attorney. Without other evidence to show that Attorney Attanasio's advice against testifying was akin to undermining or preventing the petitioner from testifying, we are not persuaded that Attorney Attanasio's actions resulted in ineffective assistance of counsel.

D

The petitioner's fourth claim of ineffective assistance of counsel is that Attorney Attanasio failed to pursue a *Franks* hearing, in the pretrial stage of the criminal proceedings, with regard to (1) a warrant that authorized the arrest of the petitioner and (2) the omission from the arrest warrant of relevant exculpatory information from the online messages between R and the petitioner, in which R denied understanding what "AnnaLuckyOne"[7] was discussing but later claimed it was a reference to a urine fetish. According to the petitioner, the arrest warrant affidavit contained unreliable information from an unrelated incident where the petitioner was an uncharged person of interest.

[7] "AnnaLuckyOne" was the MySpace account name the petitioner used to connect with R.

The petitioner argues that the habeas court incorrectly concluded that the legitimacy of the conviction remained intact despite the warrant lacking probable cause and that the court should have focused on whether a *Franks* motion would have been successful if competently pursued by Attorney Attanasio before the trial began. He also argues that if a proper *Franks* hearing had been conducted, there was a reasonable probability he would have been able to convince the court that there was not, in fact, probable cause to arrest the petitioner. We disagree.

"In [*Franks* v. *Delaware*, 438 U.S. 154, 155–56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)], the United States Supreme Court held that 'where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the [f]ourth [a]mendment requires that a hearing be held at the defendant's request.' . . .

As our Supreme Court has explained, before a defendant is entitled to a *Franks* hearing, the defendant must '(1) make a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit; and (2) show that the allegedly false statement is necessary to a finding of probable cause.' " (Citation omitted.) *State* v. *Crespo*, 190 Conn. App. 639, 651, 211 A.3d 1027 (2019).

The habeas court articulated three reasons for not finding trial counsel ineffective with regard to this claim. The court stated: "First, the legitimacy of a conviction remains intact despite the fact that the arrest warrant application that initiated the criminal proceeding lacked probable cause . . . . That is, an unlawful

arrest does not require dismissal of criminal charges, unless that illegality impaired the fairness of a subsequent trial . . . . In the petitioner's case, the salient evidence seized by the police was pursuant to a search warrant which predated the issuance and execution of the arrest warrant. That evidence included the petitioner's laptop computer, an external hard drive, and photographs of the petitioner's car and home. Also, the police interviewed the petitioner in conjunction with execution of the search warrant, and the petitioner revealed certain information used against him at his trial.

"Because the police obtained this evidence before his arrest, any defects relative to the arrest warrant had no bearing on the admissibility of the previously acquired evidence so as to taint the fairness of his criminal trial.

"Secondly, in order for Attorney Attanasio to seek a *Franks* hearing, he needed to harbor a good faith belief that he could present a substantial showing that the police affiants intentionally submitted a false or misleading arrest warrant application, or did so with reckless disregard, as to material matters pertinent to a probable cause determination by the issuing authority . . . . [The petitioner] submits that relevant information was intentionally or recklessly left out in order to mislead the judge.

"The court finds that the petitioner adduced no credible evidence to demonstrate intentional or reckless omission of material facts by the police or prosecutor. . . .

"Thirdly . . . a *Franks* hearing is only required if the correction of the misleading information would deprive the affidavit of sufficient facts to establish probable cause. In other words, if the unsullied portions of the affidavit still justify a finding of probable cause, no hearing is warranted . . . .

"A review of the arrest warrant affidavit shows an abundance of incriminating evidence against the petitioner even if one considers the information that the petitioner argues was missing. The victim personally described in great detail to the police the various sexual, predatory, and injurious acts performed by the petitioner. The petitioner's own statement admitted engaging in a ruse to entice the victim to communicate with him, albeit unknowingly. The petitioner's criticisms of the affidavit appear trivial and inconsequential toward the finding of probable cause." (Citations omitted; emphasis omitted; internal quotation marks omitted.)

On the basis of our review of the record, we agree with the analyses and conclusions of the habeas court. Therefore, this claim fails.

E

The petitioner's fifth claim of ineffective assistance of counsel is that Attorney Attanasio failed to obtain R's education records. The petitioner argues that Attorney Attanasio should have subpoenaed R's education records in order to undermine her allegations that the petitioner would pick her up while she was on her way to school, for the purpose of sexually abusing her. He further argues that his trial attorney expert, who testified at the habeas trial, agreed that Attorney Attanasio was deficient in his performance for failing to obtain R's records. Lastly, he argues that if Attorney Attanasio had subpoenaed those records and they were not produced, the trial court would have been able to instruct the jury about the nonavailability of those records, pursuant to *State* v. *Morales*, 232 Conn. 707, 657 A.2d 585 (1995), which would have allowed the jury to draw inferences favorable to the petitioner, creating a reasonable probability of a different outcome of the trial. We are not persuaded.

First, we note the petitioner's misplaced reliance on our Supreme Court's decision in *Morales*. In *Morales*, our Supreme Court addressed the following two issues: "(1) what degree of protection the due process clause of our state constitution offers to criminal defendants when the police fail to preserve potentially useful evidence, and (2) what remedy should follow if the defendant has established that a failure to preserve such evidence has violated his state constitutional rights." Id., 713. *Morales* primarily concerns the failure of police to preserve potentially exculpatory evidence. See id., 728–29. In the present case, the petitioner's trial attorney elected not to obtain certain records that may or may not have been available at the time of trial or assisted the petitioner in his defense. We, therefore, find *Morales* to be inapposite to the present case.

Second, even if we were to conclude that Attorney Attanasio's failure constituted a violation of the performance prong under *Strickland*, we are unpersuaded that the petitioner was prejudiced as a result. In its decision, the habeas court concluded that the petitioner failed to establish ineffective assistance of counsel as to this claim because the petitioner was unable to produce *any* records or evidence regarding R's school attendance to undermine her testimony that she sometimes arrived late because of the petitioner's sexual abuse. Additionally, the petitioner does not argue, nor does he demonstrate, any harm that was caused to him by the absence of these records. Without R's school records, or other evidence related to those records, we are not in a position to decide whether Attorney Attanasio's decision not to obtain them was prejudicial because those records could have just as easily affirmed R's claims as they could have affirmed the claims of the petitioner. We refuse to engage in such speculation. Therefore, we disagree with the petitioner that Attorney Attanasio's failure to obtain R's school records constitutes ineffective assistance of counsel.

F

The petitioner's final claim of ineffective assistance of counsel is that Attorney Attanasio failed to file a motion to suppress evidence with regard to photographs taken of the petitioner's apartment during an illegal search. The petitioner asserts that a search warrant executed by the investigating authorities was for 267 Old Town Farm Road in Woodbury, which is the address of his father, and that the petitioner's apartment is a "fully independently contained apartment that was attached to the main structure" of his father's residence. It is the petitioner's contention that the search warrant was illegal because "[t]he investigating authority did not obtain a search warrant that specified the petitioner's apartment"; therefore, Attorney Attanasio, who was aware of this issue, should have moved to suppress evidence of the seized photographs. The petitioner posits that, notwithstanding the fact that no incriminating evidence was found in the apartment, the state's reference to the messiness of his apartment through the photographs, was prejudicial because they reflected unfavorably on him "in general." The habeas court opined that this claim should fail for the lack of persuasive evidence connecting Attorney Attanasio's failure to move to suppress with either component of the *Strickland* test. We agree.

We disagree with the notion that an attorney's decision to forgo a motion to suppress nonincriminating evidence, stemming from a not yet determined illegal search, constitutes ineffective assistance of counsel under *Strickland*. We cannot fault a defense attorney for electing not to allocate time to the pursuit of eliminating evidence that, on its face, is not prejudicial to his client.

The form of the judgment is improper, the judgment of the habeas court is reversed only with respect to the petitioner's ineffective assistance of appellate counsel

claim and the case is remanded with direction to render judgment dismissing that claim for lack of jurisdiction; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* DALPHINE BENNETT ET AL.
(AC 42128)

Alvord, Prescott and Flynn, Js.

Syllabus

The plaintiff bank, B Co., sought to foreclose a mortgage on certain real property owned by the defendant D, who filed special defenses and counterclaims, alleging, inter alia, vexatious litigation. Specifically, D alleged that a previous foreclosure action brought against D by B Co.'s predecessor in interest, which concerned the same property, was dismissed in 2009 for failure to establish probable cause with respect to the chain of custody of the loan, and that B Co.'s present action, without evidence of loan assignment documents demonstrating probable cause to bring the present action, constituted vexatious litigation, as the same counsel who brought the prior foreclosure action also commenced B Co.'s foreclosure action. The trial court granted B Co.'s motion for summary judgment as to liability only on the complaint and on D's counterclaims and, subsequently, rendered judgment of strict foreclosure. On appeal, D claimed, inter alia, that the trial court erred in concluding that her vexatious litigation counterclaim was barred by the statute of limitations (§ 52-577). *Held:*

1. The trial court properly rendered summary judgment as to D's vexatious litigation counterclaim, as such claims may not be brought until the underlying action that is the source of the alleged misconduct has concluded in the claimant's favor; contrary to D's claim that her counterclaim was centered on a combination of the dismissal of the 2009 foreclosure action and the commencement of the present action, D's vexatious counterclaim was based on conduct occurring in the present foreclosure action, and therefore, D's counterclaim was premature, as it could not be brought in the same action as that which D claimed was vexatious.
2. The trial court properly rendered summary judgment as to D's abuse of process counterclaim: although D alleged that genuine issues of material fact existed regarding the court's dismissal of the 2009 action for failure to establish a proper chain of custody, the record revealed that the 2009 action was dismissed for dormancy, the trial court properly determined that no genuine issues of material fact existed that the primary purpose

of B Co.'s filing of the present action was to prosecute a foreclosure action and that B Co. was the owner of the note and the mortgage, and D failed to provide any evidence to demonstrate that a genuine issue of material fact existed as to whether B Co.'s primary purpose in filing the foreclosure action was to accomplish a purpose for which such an action was not designed; moreover, because abuse of process claims require that the underlying litigation has been completed and, in the present case, the counterclaim was raised in the action claimed to be an abuse of process, the trial court properly determined that D's abuse of process counterclaim was premature, as the foreclosure action was ongoing at the time the counterclaim was made.

3. D could not prevail on her claim that the trial court improperly relied on B Co.'s uncontested evidence of the debt without holding an evidentiary hearing, as the trial court was not required to hold a hearing where, as here, there was no genuine contest as to the amount of the debt owed; B Co. presented an affidavit of debt, a foreclosure worksheet and an oath of appraisers with its motion for judgment of strict foreclosure, D failed to file an objection nor referenced any evidence contesting the amount of the debt, and although D requested a hearing, the request lacked specificity in that it failed to state a basis for the objection, it was not based on an articulated legal reason or fact, and the court had already rendered summary judgment in favor of B Co. on D's special defenses and counterclaims at the time of the request for a hearing.

Argued September 16—officially released December 31, 2019

Procedural History

Action to foreclosure a mortgage on certain of 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 defendant Money Market Mortgage, LLC, et al. were defaulted for failure to plead; thereafter, the named defendant filed counterclaims; subsequently, the court, *Dubay, J.*, granted the plaintiff's motion for summary judgment as to liability on the complaint and as to the counterclaims, and the named defendant appealed to this court; thereafter, this court granted, in part, the plaintiff's motion to dismiss the appeal; subsequently, the court, *Dubay, J.*, rendered a judgment of strict foreclosure, and the named defendant filed an amended appeal. *Affirmed.*

Maria K. Tougas, for the appellant (named defendant).

Zachary Grendi, for the appellee (plaintiff).

Opinion

FLYNN, J. The defendant Dalphine Bennett[1] appeals from the entry of a judgment of strict foreclosure in favor of the plaintiff, U.S. Bank National Association as trustee, successor in interest to Bank of America, National Association, as trustee, successor by merger to LaSalle Bank, National Association, as trustee for Bear Stearns Asset Backed Securities Trust 2005-4, Asset-Backed Certificates, Series 2005-4. The defendant claims that the court improperly (1) granted the plaintiff's motion for summary judgment as to the defendant's counterclaims alleging (a) vexatious litigation and (b) abuse of process; and (2) failed to hold an immediate hearing in damages following the entry of summary judgment as to liability only, which violated Practice Book § 17-50. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to the defendant's claims on appeal. In January, 2016, the plaintiff commenced a foreclosure action against the defendant in which it alleged that a 2004 note was in default and that it sought to accelerate the balance due on the note, to declare the note to be due in full, and to foreclose on the mortgage securing the note. The defendant filed an answer, special defenses, and a two count counterclaim alleging vexatious litigation and abuse of process. The counterclaims centered

[1] The complaint also named as defendants, the city of Hartford; Mark S. Rosenblit, as executor of the estates of Ellen Rosenblit and Jack L. Rosenblit; Money Market Mortgage, LLC; Preferred Financial Services, LLC; Greater Hartford Police FCU also known as Greater Hartford Police Federal Credit Union; and Louise Hunter. The plaintiff filed motions for default against these defendants, which the court granted. We use the term defendant in this opinion to refer to Bennett only.

on a previous 2009 foreclosure action brought by Bank of America on the same 2004 note against the same defendant.

The plaintiff filed a motion for summary judgment as to liability only on the foreclosure complaint and on the counterclaims. The defendant filed an objection in which she argued, inter alia, that genuine issues of material fact exist as to her counterclaims. The defendant attached to her motion a JDNO notice[2] from the 2009 foreclosure action, which indicated that a show cause hearing had been scheduled for March 18, 2013. At the hearing in the 2009 action, a transcript of which was also attached to the defendant's motion, the court had inquired as to the status of the case, and the plaintiff's counsel had indicated that he was waiting on documents from Bank of America. In the 2009 action, the court then ordered the matter dismissed. By an order dated March 18, 2013, in the 2009 action the court stated: "Any motions to open the judgment must state in the first paragraph that the matter needs to be referred to the presiding judge. Motions to open will only be considered by the court when the plaintiff moves for judgment."

In the present action, on September 7, 2018, the court granted the plaintiff's motion for summary judgment and entered judgment in favor of the plaintiff as to liability on the foreclosure complaint and against the defendant on her counterclaims. On September 20, 2018, the defendant appealed from the court's decision granting the plaintiff's motion for summary judgement as to liability only. The plaintiff filed a motion to dismiss the appeal, arguing that the court's decision rendering

[2] "The designation 'JDNO' is a standard notation used to indicate that a judicial notice of a decision or order has been sent by the clerk's office to all parties of record. Such a notation raises a presumption that notice was sent and received in the absence of a finding to the contrary." (Internal quotation marks omitted.) *McTiernan* v. *McTiernan*, 164 Conn. App. 805, 808 n.2, 138 A.3d 935 (2016).

summary judgment as to liability only on the foreclosure complaint was not a final judgment and that the claims on appeal from the judgment on the counterclaim were frivolous. This court ordered the motion "granted as to the portion of the appeal challenging the granting of summary judgment as to liability only on the complaint and denied as to any portion of the appeal challenging the granting of summary judgment on the defendant's counterclaim."

On December 10, 2018, the plaintiff filed a motion for a judgment of strict foreclosure. The defendant filed a "motion for stay/objection to motion for judgment of strict foreclosure" in which she requested a discretionary stay pursuant to Practice Book § 61-11 (f) to the extent that the pending appeal did not trigger the automatic stay provisions of Practice Book § 61-1 (a). The trial court denied the defendant's motion and rendered a judgment of strict foreclosure. The defendant, thereafter, amended her appeal, in which she challenged the judgment of strict foreclosure and summary judgment as to liability only.

I

The defendant first claims that the court improperly granted the plaintiff's motion for summary judgment as to her counterclaims. We disagree.

We set forth our well established standard for reviewing a grant of summary judgment. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine

issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the [plaintiff's] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 278 Conn. 305, 314, 898 A.2d 777 (2006).

We now address in turn the defendant's arguments regarding the counterclaims.

A

The defendant argues that the court erred in determining that her vexatious litigation counterclaim was barred by the statute of limitations, General Statutes § 52-577.[3] We are not persuaded.

"The cause of action for vexatious litigation permits a party who has been wrongfully sued to recover damages. . . . [T]o establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the [counterclaim] plaintiff's favor." (Citations omitted; internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 158 Conn. App. 176, 183, 118 A.3d 158 (2015).

In count one of the counterclaim in the present action, alleging vexatious litigation, the defendant alleged the following. During the 2009 foreclosure action, she presented a 2013 letter to the court from Bank of America, the plaintiff's predecessor in interest, demonstrating that Bank of America never held a mortgage on the property being foreclosed. The trial court

[3] General Statutes § 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

in the 2009 action entered an order requesting Bank of America to "show cause" as to why it was entitled to proceed on the merits. The case was dismissed with prejudice, due to Bank of America's lack of ability to establish probable cause with respect to the chain of custody of the loan. The same counsel who had represented Bank of America in the 2009 action, brought the present foreclosure action in the name of U.S. Bank National Association, as trustee, successor in interest to Bank of America, National Association. In the present foreclosure action, the plaintiff did not attach to the operative complaint any loan assignment documents demonstrating probable cause to bring suit. The defendant alleged that the plaintiff's commencement of the present action, absent evidence of loan assignment documents demonstrating probable cause to bring the present action, constitutes vexatious litigation.

In its decision in the present action, granting the plaintiff's motion for summary judgment as to liability only, the court determined that the plaintiff had established that no genuine issues of material fact existed, that it was the owner of the note and mortgage, that the defendant had defaulted on the note, and that the conditions precedent to foreclosure had been satisfied. The court noted that "[t]he plaintiff is the holder of the note as the plaintiff is in physical possession of the note endorsed in blank. . . . The mortgage was assigned from Argent to Ameriquest, from Ameriquest to Mortgage Electronics Registration Systems, Inc. (MERS), and, prior to the commencement of the present action, from MERS to the plaintiff. . . . Upon the defendant's default for failure to make monthly payments, the plaintiff satisfied the conditions precedent to the enforcement of the mortgage and note by providing the defendant with a notice of default."

In the present action, the court agreed with the plaintiff's argument that it was entitled to summary judgment

on the defendant's vexatious litigation counterclaim because the counterclaim was either time barred to the extent it related to the 2009 action, or premature to the extent that it related to the present action. The court stated: "Inasmuch as the defendant's vexatious litigation counterclaim is based on the present action, there is no genuine issue of material fact that it is premature, as such a claim requires termination of suit in the claimant's favor. Inasmuch as the defendant bases this claim on the prior action, there is no genuine issue of material fact that it is time barred, as the prior action was dismissed on March 18, 2013, and the defendant brought the present counterclaim on December 5, 2017. Even assuming that the maintenance of the prior action served to toll the statute of limitations [§ 52-577] until its dismissal, the present counterclaim was not brought within three years of that date. Accordingly, the plaintiff is entitled to judgment as a matter of law on the defendant's vexatious litigation counterclaim."

On appeal, the defendant essentially argues that her vexatious litigation counterclaim is centered on a combination of the dismissal of the 2009 action and the commencement of the present action and, therefore, is neither premature nor time barred. She contends that the court misinterpreted the nature of her counterclaim, as reflected by "conflicting statements" in the court's decision in which it concluded that the vexatious litigation counterclaim is time barred to the extent that it was based on the prior 2009 action, and premature to the extent that it was based on the present action. She states that the counterclaim was based on the dismissal of the 2009 action followed by the "recommencement" of the present action. She argues that the dismissal of the 2009 action satisfies the "favorable termination" element of her vexatious litigation counterclaim. She further argues that the statute of limitations should not begin to run from the date of the favorable termination

of the 2009 action because under those circumstances, the vexatious litigation claim would be ripe only after the commencement of the second case in spite of that termination. She contends that the trigger date for the statute of limitations should instead be the date of commencement of the second foreclosure action against the same defendant after the favorable termination of the first foreclosure action.

The defendant alleged in her counterclaim in the present action that counsel for the plaintiff "knew or should have known that it lacked the necessary evidence to establish probable cause in the 2009 case and its commencement of the [present] case despite this knowledge, constitutes vexatious litigation." Thus, it is clear that the defendant alleged that conduct occurring in the commencement of the present action is vexatious. The defendant's interpretation of the orders in the 2009 action provide a basis for her allegations concerning the vexatious nature of the present action. Because the defendant alleged that the filing of the present action constituted part of the plaintiff's vexatious conduct, her counterclaim cannot be brought within the present action. "Vexatious litigation claims may not be brought until the underlying action that is the source of the alleged misconduct has concluded. [U]nder Connecticut law, a counterclaim alleging vexatious litigation may not be brought in the same action as that which the defendant claims is vexatious. . . . In suits for vexatious litigation, it is recognized to be sound policy to require the plaintiff to allege that prior litigation terminated in his favor. This requirement serves to discourage unfounded litigation without impairing the presentation of honest but uncertain causes of action to the courts. . . . This favorable termination requirement is an essential element of a vexatious litigation claim." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*,

supra, 158 Conn. App. 183–84. The defendant's vexatious litigation counterclaim, therefore, is premature. As such, we need not discuss her statute of limitations argument and conclude that the court properly rendered summary judgment as to the vexatious litigation counterclaim.

B

The defendant next argues that the court improperly entered summary judgment on her abuse of process counterclaim. We disagree.

"An action for abuse of process lies against any person using a legal process against another in an improper manner or to accomplish a purpose for which it was not designed. . . . Because the tort arises out of the accomplishment of a result that could not be achieved by the proper and successful use of process, the Restatement Second (1977) of Torts, § 682, emphasizes that the gravamen of the action for abuse of process is the use of a legal process . . . against another primarily to accomplish a purpose for which it is not designed . . . ." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Mozzochi* v. *Beck*, 204 Conn. 490, 494, 529 A.2d 171 (1987).

In her abuse of process counterclaim, the defendant alleged that the continued prosecution of the present action by the same law firm that brought the 2009 action constituted an abuse of process because the present plaintiff and its counsel knew or should have known, based on the dismissal of the 2009 action, that it could not prevail on the merits of the present action, which was based on a subsequent assignment of the loan. In its memorandum of decision, the court concluded that "the plaintiff's exhibits demonstrate that there is no genuine issue of material fact that it has filed this action with the primary purpose of prosecuting a foreclosure action. The exhibits submitted by the defendant in

opposition to the plaintiff's motion for summary judgment fail to raise a genuine issue of material fact as to the plaintiff's primary purpose in prosecuting such action. Accordingly, the plaintiff is entitled to judgment as a matter of law on the defendant's abuse of process counterclaim."

The defendant argues that genuine issues of material fact exist regarding whether the court's dismissal of the 2009 action was for failure to establish a proper chain of custody; whether the assignment of the note and mortgage to the plaintiff following the dismissal of the 2009 action was done in an attempt to circumnavigate the court's order in the 2009 action that required the court's permission to proceed; and whether the plaintiff knew that the 2009 action was dismissed because Bank of America could not establish the chain of custody of the loan documents. We are not persuaded.

Contrary to the defendant's assertion that the 2009 action was dismissed on the merits, the record reveals that the 2009 action was dismissed for dormancy. The JDNO notice, which was attached as an exhibit to the defendant's memorandum of law in opposition to the plaintiff's motion for summary judgment, states that the 2009 action was dismissed at the March 18, 2013 hearing. The transcript of that hearing, which also was attached as an exhibit, reveals that the court in the 2009 action asked Bank of America's counsel: "The file reflects that there's been no pleading or action since July, 2011, counsel. Do you know why that is?" The plaintiff's counsel responded, "we are waiting on documents from our client." The court then dismissed the 2009 action.

Moreover, the court in the present action determined that no genuine issues of material fact existed that the primary purpose of the plaintiff's filing of the present

action was to prosecute a foreclosure action, and that the plaintiff was the owner of the note and mortgage. The defendant submitted no evidence to the trial court that raised a genuine issue of material fact that the plaintiff's primary purpose in filing the foreclosure action was to accomplish a purpose for which such an action is not designed. The defendant's allegations in her counterclaim and her speculative arguments made on appeal do not suffice to show that the plaintiff used the present foreclosure action for a purpose for which such an action is not designed. "A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . [T]he existence of the genuine issue of material fact must be demonstrated by counteraffidavits and concrete evidence. . . . If the affidavits and the other supporting documents are inadequate, then the court is justified in granting the summary judgment, assuming that the movant has met his burden of proof. . . . When a party files a motion for summary judgment and there [are] no contradictory affidavits, the court properly [decides] the motion by looking only to the sufficiency of the [movant's] affidavits and other proof." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Little* v. *Yale University*, 92 Conn. App. 232, 234–35, 884 A.2d 427 (2005), cert. denied, 276 Conn. 936, 891 A.2d 1 (2006).

The court properly rendered summary judgment on the abuse of process counterclaim for the additional reason that the counterclaim is premature. "Although abuse of process claims do not include favorable termination as an essential element, the cause of action is still considered premature until the underlying litigation has been completed. . . . In *Larobina* [v. *McDonald*, 274 Conn. 394, 407–408, 876 A.2d 522 (2005)] . . . our Supreme Court concluded that an abuse of process claim was properly dismissed as premature when the

underlying action was still pending. . . . In reaching this conclusion, the court stated: Although we do not suggest that success in the first action would be a prerequisite for an abuse of process claim . . . it is apparent that the eventual outcome of that action and the evidence presented by the parties therein would be relevant in litigating an abuse of process claim. . . . Moreover, allowing the [abuse of process] claim could . . . effectively chill the vigorous representation of clients by their attorneys." (Citation omitted; internal quotation marks omitted.) *MacDermid* v. *Leonetti*, supra, 158 Conn. App. 184–85. In the present case, the counterclaim was raised in the action claimed to be an abuse of process and, thus, the action was ongoing at the time the counterclaim was made. Therefore, as explained by *Larobina* v. *McDonald*, supra, 407–408, and *MacDermid* v. *Leonetti*, supra, 184–85, the abuse of process counterclaim is premature.

For the foregoing reason we conclude that the court properly rendered summary judgment on the defendant's abuse of process counterclaim.

II

The defendant last claims that the court's entry of a judgment of strict foreclosure was improper because the court did not hold an immediate hearing in damages pursuant to Practice Book § 17-50, following the entry of summary judgment as to liability only. We disagree.

Following the court's entry of summary judgment as to liability, the plaintiff filed a motion for judgment of strict foreclosure. The defendant did not file an objection to the plaintiff's calculation of the debt, nor did she file any counter affidavits or other evidence as to the amount of the debt. Instead, the defendant filed a "motion for stay/objection to motion for judgment of strict foreclosure." At the January 2, 2019 hearing on the motion for stay and the motion for judgment of strict foreclosure, the defendant's counsel stated, "we

would like to contest the debt and have a hearing on same." The court inquired, "[a]nd did you file any kind of objection," to which question the defendant's counsel answered, "[y]es. Well, I filed . . . for today an objection and a motion for stay, which I was under the impression would be granted." The plaintiff's counsel suggested that the defendant was using delay tactics. The court noted that the case had been pending for three years and denied the defendant's request for a hearing on the amount of the debt.

"The standard of review of a judgment of foreclosure by sale or by 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.) *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 186, 73 A.3d 742 (2015). "The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary." (Citations omitted; internal quotation marks omitted.) *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.2d 1027 (2010).

The defendant argues that the court erred in failing to hold an immediate hearing in damages, as required by Practice Book § 17-50, following the court's denial of the defendant's motion for a discretionary stay following the entry of summary judgment as to liability only. The defendant contends that the court was required to hold a hearing in damages even though the

defendant had not filed additional documents contesting damages.[4]

Practice Book § 17-50 provides in relevant part: "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to damages. In such case the judicial authority shall order an immediate hearing before a judge trial referee, before the court, or before a jury, whichever may be proper, to determine the amount of the damages." In relating the hearing requirement of Practice Book § 17-50 to the present case, we note a basic tenet of statutory construction that we are required to read Practice Book rules "together when they relate to the same subject matter. . . . Accordingly . . . we look not only [to] the provision at issue, but also to the broader . . . scheme to ensure the coherency of our construction." (Internal quotation marks omitted.) *In re Jusstice W.*, 308 Conn. 652, 663, 65 A.3d 487 (2012).

Case law explains the relevant procedural framework as follows: "Where a foreclosure defendant's liability has been established by summary judgment, all that remains for the court to determine at the judgment hearing is the amount of the debt and the terms of the judgment." *GMAC Mortgage, LLC* v. *Ford*, supra, 144 Conn. App. 186. Practice Book § 23-18 (a) provides that in mortgage foreclosure cases "where no defense as to the amount of the mortgage debt is interposed, such

[4] The defendant also argues that the trial court abused its discretion by not staying the entry of the award of damages and costs in this case until the outcome of this appeal. We decline to review this claim because the proper avenue through which to challenge the trial court's denial of her request for a stay is not on direct appeal, but rather by way of a motion for review. Practice Book § 61-14 provides in relevant part: "The sole remedy of any party desiring the court to review an order concerning a stay of execution shall be by motion for review." "Issues regarding a stay of execution cannot be raised on direct appeal." (Internal quotation marks omitted.) *Housing Authority* v. *Morales*, 67 Conn. App. 139, 140, 786 A.2d 1134 (2001).

debt may be proved by presenting to the judicial authority the original note and mortgage, together with the affidavit of the plaintiff or other person familiar with the indebtedness, stating what amount, including interest to the date of the hearing, is due, and that there is no setoff or counterclaim thereto." "A defense is that which is offered and alleged by a party proceeded against in an action or suit, as a reason in law or fact why the plaintiff should not recover or establish what he seeks. . . . In a mortgage foreclosure action, a defense to the amount of the debt must be based on some articulated legal reason or fact. . . . The case law is clear that a defense challenging the amount of the debt must be actively made in order to prevent the application of § 23-18 (a). [A] mere claim of insufficient knowledge as to the correctness of the amount stated in the affidavit of debt is not a defense for purposes of [§ 23-18 (a)]. . . . It is axiomatic that such a defense may be raised by pleading a special defense attacking the amount of the debt claimed, but it may also be raised by objection, supported with evidence and arguments challenging the amount of the debt, upon the attempted introduction of the affidavit in court." (Citations omitted; internal quotation marks omitted.) *Bank of America, N.A.* v. *Chainani*, 174 Conn. App. 476, 486, 166 A.3d 670 (2017).

In the present case, the amount of the debt submitted by the plaintiff was uncontested. The plaintiff filed a motion for judgment of strict foreclosure, an affidavit of debt, a foreclosure worksheet, and an oath of appraisers. The defendant did not raise a defense or counterclaim regarding the amount of the mortgage debt. A defense or a counterclaim does not affect the applicability of Practice Book § 23-18 (a) unless it "actually challenges in some manner the amount of the debt alleged by the plaintiff." (Internal quotation marks omitted.) Id., 478. Additionally, at the time of the hearing on the

motion for a judgment of strict foreclosure, the court had granted summary judgment in favor of the plaintiff as to the defendant's special defenses and counterclaims.

The defendant did not file an objection to the evidence of the debt that was submitted by the plaintiff in connection with its motion for a judgment of strict foreclosure. The defendant neither submitted nor referenced any evidence contesting the amount of the debt in advance of or at the January 2, 2019 hearing on the motion for a judgment of strict foreclosure. Although the defendant made a request for a hearing as to the debt, the request lacked specificity. The request did not indicate the basis for the objection to the debt, namely, whether the objection was squarely focused on the amount of the debt or focused on matters ancillary to the amount of the debt, such as whether the plaintiff is the holder of the note and mortgage, which is a matter of liability. Because the request for a hearing was not based on some articulated legal reason or fact, Practice Book § 23-18 (a) applies. See id., 486. Accordingly, the court was not required to hold a hearing as to damages, pursuant to Practice Book § 17-50, when no genuine contest as to the amount of the debt existed. "Where a defendant fails to raise a defense as to the amount of the debt, the plaintiff may prove the debt by way of an affidavit pursuant to Practice Book § 23-18." (Footnote omitted.) *Bank of America, FSB* v. *Franco*, 57 Conn. App. 688, 694, 751 A.2d 394 (2000). In *GMAC Mortgage, LLC* v. *Ford*, supra, 144 Conn. App. 186–87, the trial court granted the mortgagee's motion for a judgment of strict foreclosure following its granting of the plaintiff's motion for summary judgment as to liability only. We held in *GMAC Mortgage* that the trial court did not abuse its discretion in declining to hold an evidentiary hearing as to the amount of debt when the mortgagor did not raise a challenge to the amount of the debt. Id. We conclude that the court's decision not to hold an

evidentiary hearing as to the debt and, instead, to calculate the debt on the basis of the plaintiff's uncontested evidence of debt was not improper.

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

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MAURICE FRANCIS (AC 42443)

Prescott, Bright and Sheldon, Js.

Syllabus

Convicted, after a jury trial, of the crime of murder in connection with the death of the victim, the defendant appealed. The defendant's conviction stemmed from an incident in which he caused the victim's death, dragged her body out of their shared apartment, drove to a used car shop where the body was left in the defendant's vehicle all day until the defendant drove back to the apartment and put the body in a bathtub, after which he made a 911 phone call claiming that he found the victim in the bathtub. At trial, the court denied the defendant's motion for a judgment of acquittal, which was made at the close of the state's case-in-chief, the defendant rested without putting on evidence, and the jury found the defendant guilty of murder. *Held*:

1. The trial court properly denied the defendant's motion for a judgment of acquittal, as there was sufficient evidence for the jury to have found the defendant guilty of murder beyond a reasonable doubt: even though the defendant claimed that there was insufficient evidence to establish that he caused the victim's death or that he had the specific intent to cause her death, the defendant conceded that there was sufficient evidence to support an inference that he dragged the victim's body out of their apartment, down the stairs and across the grass, that he put the body into his vehicle and drove, in broad daylight, to a used car shop, where he left the body in his vehicle all day, and that he subsequently transferred the body to another vehicle and drove the body back to the apartment, where he remained for several hours before calling 911, and, therefore, the evidence was more than sufficient for the jury to have concluded that the defendant intended to kill the victim and did succeed in killing the victim; moreover, there was substantial evidence of consciousness of guilt, including that the defendant declined to provide emergency assistance to the victim and repeatedly lied to the police and emergency personnel, and the jury could have inferred an intent

to kill from the infliction of numerous superficial wounds caused by a sharp weapon, followed by the defendant's failure to summon help as the victim bled to death.

2. The defendant could not prevail on his claim that this court should change its long-standing standard of review with respect to sufficiency of evidence claims to a more rigorous standard that would require this court to determine if there was a reasonable view of the evidence that would support a hypothesis of innocence; our Supreme Court recently addressed and rejected a similar claim, determining that a reviewing court does not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence but, rather, asks whether there is a reasonable view of the evidence that supports the jury's verdict of guilty, and as an intermediate appellate court, it was not within this court's power to overrule Supreme Court authority.

Argued October 17—officially released December 31, 2019

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Crawford*, *J.*; thereafter, the court denied the defendant's motion for a judgment of acquittal; verdict and judgment of guilty, from which the defendant appealed. *Affirmed*.

Conrad Ost Seifert, assigned counsel, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Donna Mambrino*, senior assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Maurice Francis, appeals from the judgment of conviction rendered by the trial court of one count of murder in violation of General Statutes § 53a-54a. On appeal, the defendant claims that the court improperly denied his motion for a judgment of acquittal[1] because there was insufficient evidence to

[1] "[W]hen a motion for [a judgment of acquittal] at the close of the state's case is denied, a defendant may not secure appellate review of the trial court's ruling without [forgoing] the right to put on evidence in his or her own behalf. The defendant's sole remedy is to remain silent and, if convicted,

establish that he caused the death of the victim[2] or that he had the specific intent to cause the death of the victim. In the alternative, the defendant requests that we change our long-standing standard of review with respect to insufficiency of evidence claims, so that we review the evidence under a much more rigorous standard to determine if there is a reasonable view of the evidence that would support a hypothesis of innocence. We affirm the judgment of the trial court.

The following evidence, which was admitted at trial, and relevant procedural history inform our review. The victim and the defendant lived together in an apartment building located at 47 Berkeley Drive in Hartford. The victim was employed as a school bus monitor with Specialty Transportation (Specialty), which was previously known as Logisticare. She had worked in that position for approximately four or five years. Her supervisor was Timothy Gamble. Gamble described the victim as "happy, always smiling, [and] coming to work on time every day . . . ." Gamble stated that when the victim began dating the defendant, however, she changed. The victim then began to come to work with cuts, bruises, and other injuries to her body. Her disposition changed. On more than one occasion, she arrived at work with a bloodied shirt and injuries. On one specific occasion, she arrived at work wearing dark glasses in an attempt to hide her blackened eye. As time went on, Gamble became so concerned for the victim that he invited her to move in with him and his wife, an offer

to seek reversal of the conviction because of insufficiency of the state's evidence. If the defendant elects to introduce evidence, the appellate review encompasses the evidence in toto." (Internal quotation marks omitted.) *State* v. *Seeley*, 326 Conn. 65, 67 n.3, 161 A.3d 1278 (2017); see Practice Book § 42-41. In the present case, the defendant rested following the court's denial of his motion for a judgment of acquittal.

[2] In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to use the victim's full name. See General Statutes § 54-86e.

which the victim declined. He also suggested that she go to a women's shelter, which she also declined.

On the morning of Saturday, November 1, 2008, at approximately 8:30 a.m., Beverly Copeland, who lived across the street from the defendant and the victim, left her apartment. As Copeland went to get into her vehicle, which was parked in front of her building, she saw a black male standing, looking down at the grass in front of his apartment building. At first, Copeland thought the man was looking at a pile of clothing in the grass. When the man bent down to pick up what was in the grass, Copeland realized that it was not a pile of clothing, but, rather, it was the body of a woman, who had braids in her hair. Copeland then saw the man put the woman's body over his shoulders. After taking a couple of steps, the man put down the woman and then began to drag her by the hands and arms across the street, as her back dragged along the ground. The woman, herself, did not move. After the man got to a silver Volvo station wagon that was parked across the road, he put the woman's body into the front passenger's seat. Still, the woman did not move. The man then got into the driver's seat of the silver Volvo station wagon and began to drive away; Copeland wrote down the license plate number, which was 110-XDZ.[3]

The defendant drove the silver 1998 Volvo station wagon (1998 Volvo), with the woman's body in the passenger's seat, to Sparks Motor Sales in Hartford (Sparks). When he arrived at approximately 9 a.m., he telephoned Garth Wallen, the owner of Sparks, who was still at home. The defendant had purchased his 1998 Volvo from Sparks the previous month, and he recently had made arrangements with Wallen to

[3] Copeland later gave the license plate number and a description of the vehicle to the police, who determined that the license plate was registered to the defendant's silver 1998 Volvo station wagon. At trial, Copeland positively identified photographs of the defendant's silver 1998 Volvo station wagon, as well.

exchange that vehicle for a different vehicle. When Wallen arrived at Sparks, the defendant was standing beside his 1998 Volvo, which was parked in front of the locked driveway gate. Wallen then opened the gate so they could enter. Wallen saw a woman in the passenger's seat, whom he recognized to be the defendant's girlfriend, but the woman did not speak or make any gestures. The defendant then drove the 1998 Volvo down the driveway, parking it with the driver's side of the vehicle along the wall of the building, facing a wooden fence, in an area where a dumpster generally is kept but which was not present at that time. The defendant got out of his vehicle, leaving the woman inside. The defendant was "hanging around" at Sparks until approximately 4 p.m., when Wallen obtained a 1999 Volvo for him to test drive for the weekend. The woman never got out of the defendant's vehicle during the six or seven hours it was parked at Sparks, used the bathroom, or looked at the 1999 Volvo when it was brought over. The defendant, however, at one point during the day, asked Wallen if it would be okay if he got his girlfriend a cup of water; Sparks had a rented Poland Spring dispenser with cups.

After obtaining the 1999 Volvo, the defendant moved the 1998 Volvo and aligned it beside the 1999 Volvo, passenger side to passenger side, in the "back section" of Sparks. Wallen, thereafter, was busy assisting a customer. He noticed, however, that the defendant later moved the 1998 Volvo back to where he had parked it in the morning, alongside the wall of the building. The defendant also took the plates off his 1998 Volvo and put them on the 1999 Volvo, hung the keys to his 1998 Volvo in the garage, and drove away in the 1999 Volvo. Because the windows of the 1999 Volvo were tinted, Wallen could not see the defendant's girlfriend inside the 1999 Volvo as the defendant drove away in the vehicle. The defendant and Wallen had made plans that

they would wrap up the paperwork for the purchase of the 1999 Volvo the following week. They had no plans to talk again until then. The defendant, however, telephoned Wallen later that day, after leaving Sparks, and he told Wallen that a kid in his neighborhood really liked the 1999 Volvo and that he just wanted Wallen to know.

At 10:50 p.m. that night, the defendant called 911, and he told the dispatcher he had just returned home when he found the victim in the bathtub, after having spoken to her on the phone approximately a half hour or an hour before;[4] the front door was open when he returned home and every light was on; he had dropped off the victim at home a "couple of hours ago"; the victim had no pulse when he found her; he did not want to attempt CPR on her; he did not want to touch the victim; the victim had been having problems with a neighbor who had psychological problems; the victim was kind of "retarded"; the victim had been having mental problems and problems like "falling down the stairs," which could be verified by hospital records; the victim had a cut over her left eye; the victim had been with him all day; and he could provide "proof" that she had been with him from the owner of a car dealership.

At approximately 11 p.m., Michael DiGiacamo, a firefighter with the Hartford Fire Department, arrived at 47 Berkeley Drive. The defendant, who was standing outside, directed DiGiacamo to his second floor apartment. Upon entering the apartment, DiGiacamo saw the victim lying in the bathtub. She was naked, dry, cold and unresponsive; the bathtub contained no water or blood. DiGiacamo and another firefighter removed the victim from the tub and began CPR; the victim still

[4] Andrew Weaver, who was a member of the Hartford Police Department in November, 2008, and was trained in computers, cell phones, and cell phone call data mapping, testified that the defendant's cell phone was not used to call the victim's cell phone on November 1, 2008.

did not respond. DiGiacamo noticed that the victim had "multiple wounds and laceration type stab wounds" on her body. Additional emergency medical personnel arrived and continued CPR. While the paramedics were attending to the victim, DiGiacamo went into the living room where the defendant was speaking with a lieutenant from the fire department. The defendant repeatedly asked if the victim was dead. DiGiacamo thought this was odd because, in his experience, most people ask whether a victim is okay, not whether a victim is dead.

In an interview conducted at the Hartford Police Department on November 2, 2008, the defendant told Detective R. Kevin Salkeld that, on the morning of November 1, 2008, after showering at 8 a.m., he and the victim went to Sparks in his 1998 Volvo. He stated that the victim stayed in the passenger's seat of the car all day while he did odd jobs for Wallen until approximately 5 p.m.[5] The defendant told Salkeld that he brought the victim five bottles of water during the day, which she drank.[6] The defendant also told Salkeld that he went to Sparks because he wanted to pick up a 1999 Volvo to test drive for the weekend, which is the car in which he and the victim drove home after he did the odd jobs throughout the day. The defendant also told Salkeld that he unlocked the door for the victim when they arrived home, and that he then returned to Sparks to help Wallen clean up, and although it was the victim's habit to lock the doors, when the defendant returned home the front door was open.[7] According to the defendant, he was supposed to meet Wallen at Wallen's home

[5] Wallen testified that the defendant was "hanging around" Sparks all day but that he did not do any odd jobs.

[6] Wallen testified that Sparks had a Poland Springs water dispenser that used cups and that the defendant asked once to bring the victim a cup of water.

[7] Wallen testified that the defendant did not return to Sparks that evening, and that he closed up shortly after the defendant left.

after the cleanup, and, although he went to Wallen's home, Wallen never came;[8] the defendant stated that he waited at Wallen's home and that he repeatedly telephoned Wallen until approximately 10:30 p.m., but Wallen did not answer the calls;[9] the defendant told Salkeld, however, that he did not remember Wallen's home address. The defendant told Salkeld that after waiting for Wallen, he returned home, found the door open, and saw the victim lying in the bathtub; he then called 911.[10]

At approximately 7:12 a.m., on November 2, 2008, Detective Ramon Baez from the Hartford Police Department Crime Scene Division, began to process the scene of the victim's death. One of the items Baez processed was a clump of braided hair that he discovered in front of the apartment building. John Schienman, a forensic science examiner from the Division of Scientific Services, performed DNA testing on the roots of several pieces of hair from the clump that was found by Baez, and he determined that the DNA found on those hair roots was consistent with the victim's DNA profile.[11] Baez also found numerous small blood stains through-

[8] Wallen testified that he and the defendant did not have plans to meet up later that evening, and that the defendant telephoned him the following day to tell him about the victim's death and to suggest to him that he "remember" that the defendant was supposed to come back to Sparks the previous evening to help Wallen clean up. Wallen said that he told the defendant that he did not want to hear it, and he hung up the telephone.

[9] Weaver testified, however, that no phone calls were made by the defendant's cell phone to Wallen's cell phone after 4:45 p.m.

[10] Salkeld testified, however, that both he and Detective Seth Condon, the lead investigator on the victim's suspicious death, who had since passed away, were at the scene after the defendant called 911. Salkeld explained that the defendant also had stated at that time that he had just returned home and found the victim and that Condon then walked over to the 1999 Volvo and felt the hood, which was cold to the touch. The defendant, thereafter, complained of chest pains and had to be taken to the hospital.

[11] For example, Dr. Schienman testified that, as to one of the hair roots, labeled as 2Z3, "the expected frequency of individuals who could be the source of item 2Z3, was less than one in seven billion in [population groups consisting of African Americans, Caucasians, and Hispanics]."

out the defendant's apartment.[12] Dr. Schienman testified that DNA in the swabs of those stains also was consistent with the victim's DNA profile.

Inspector Claudette Kosinski, also from the Hartford Police Department Crime Scene Division, processed the two Volvo vehicles. In the 1998 Volvo, Kosinski took samples from two stains in the front passenger's seat that appeared to be blood; the presence of blood was confirmed by Jane R. Codraro, a forensic biologist, from the state's Forensic Science Laboratory. Dr. Schienman performed a DNA analysis of the DNA from these blood stains and determined that the DNA was consistent with the victim's DNA profile.[13]

On November 3, 2008, Susan Williams, an associate medical examiner and forensic pathologist, performed an autopsy of the victim. Dr. Williams found that the victim's eyes were cloudy, demonstrating "decompositional changes," and that she had "multiple small cuts or incised wounds[14] over her body, as well as many small linear . . . scars all over her body." (Footnote added.) The victim had very little blood remaining in her body. The victim had a fresh three-quarter inch linear incised wound on the upper right area of her forehead, a fresh one and one-half inch linear incised wound "over her left eyebrow extending . . . down onto her face," and another fresh linear incised wound

[12] Baez also saw several towels that appeared to be soaked with water and blood in the bathroom where the victim's body was found. The towels, however, were not examined by the forensic science laboratory.

[13] Dr. Schienman testified that "the expected frequency of individuals who could be the source [of the DNA on the blood stains from the passenger's seat of the 1998 Volvo] is less than one in seven billion in the three population groups."

[14] Dr. Williams explained that an incised wound is "a wound made by a sharp instrument, such as a knife or a machete or the sharp end of a scissor. The edges are smooth . . . and it cuts through the tissue below it. . . . [A]n incised wound is wider on the skin [than] it is deep, as opposed to, for instance, a stab wound."

on her left upper eyelid; she also sustained a "fracture of the skull of her orbital ridge" that was a "sharp forced injury," meaning it was caused by "a knife or a machete," rather than a fall or a hit with something akin to a baseball bat. The victim also had a fresh incised wound to the right side of her abdomen and several on her arms, legs, back, and chest; she also had blunt force bruising to her back, wrist, and legs. She had no alcohol or illegal drugs in her system. Dr. Williams concluded that the victim was the victim of a homicide, brought about by "multiple sharp forced injuries"; Dr. Williams opined that the victim "did not have enough blood in her system . . . to sustain [her] life."

Following the testimony of Dr. Williams, the state rested, and the defendant moved for a judgment of acquittal, arguing that the state had not established a prima facie case; the court denied the motion, and the defense rested without putting on evidence. Following closing arguments and the court's charge to the jury, the jury found the defendant guilty of murder. The court accepted the jury's verdict and, thereafter, rendered a judgment of conviction, sentencing the defendant to fifty years of incarceration. This appeal followed.

The defendant claims that the court improperly denied his motion for a judgment of acquittal. He argues that the evidence was insufficient to establish that he caused the death of the victim or that he had the specific intent to cause the death of the victim. We are not persuaded.

The following general principles guide our review. "In reviewing a sufficiency of the evidence claim, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the

cumulative force of the evidence established guilt beyond a reasonable doubt. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Daniel B.*, 331 Conn. 1, 12, 201 A.3d 989 (2019).

"[T]he jury must find every element [of a crime] proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 187, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

"[I]t does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 504, 180 A.3d 882 (2018).

"[T]he state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. . . . Because it is practically impossible to know what someone is thinking or intending at any given moment, absent an outright declaration of intent, a person's state of mind is usually [proven] by circumstantial evidence . . . ." (Internal quotation marks omitted.) *State* v. *Bonilla*, 317 Conn. 758, 766, 120 A.3d 481 (2015). "Intent to cause death may be inferred from the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the death." (Internal quotation marks omitted.) *State* v. *Campbell*, supra, 328 Conn. 504.

The defendant argues that the state's case was based on circumstantial evidence and that "the jury resorted to speculation when it found [that he] caused [the victim's] death" and that he "had the specific intent to kill [the victim]." In his reply brief, the defendant argues: "The defendant agrees with the state that there is sufficient factual evidence to support the jury inferring that the defendant dragged the already dead body of [the victim] out of the apartment, down the stairs, and dragged it across the grass, put it into his 1998 Volvo and drove, in broad daylight, to Mr. Wallen's used car shop on November 1, 2008. And, the jury could possibly infer that somehow, without being seen by anyone while her body sat upright in the defendant's 1998 Volvo with no tinted windows for hours on end, the defendant then transferred her body to the 1999 Volvo which Mr. Wallen allowed the defendant to have in trade for the 1998 Volvo. The defendant, for whatever unknown reason, then drove the body back to their apartment, got the . . . body up the stairs and into the bathtub. . . . A few hours later, the defendant called 911. Bringing the body back to the apartment in his new car makes no logical sense, but, ignoring the bizarre nature of the

conduct for a moment, all of this inferred postdeath conduct fails to prove murder." We conclude that the evidence was sufficient for the court to have denied the defendant's motion for a judgment of acquittal and for the jury to have found him guilty of murder beyond a reasonable doubt.

Although we recognize that "the jury could not properly have inferred an intent to commit murder from the mere fact of the death of the victim, [or] even from her death at the hands of the defendant"; (internal quotation marks omitted) *State* v. *Otto*, 305 Conn. 51, 67, 43 A.3d 629 (2012); we conclude that the evidence in this case was more than sufficient for the jury to have concluded that the defendant intended to kill the victim and indeed succeeded in killing the victim.

As conceded by the defendant, the jury reasonably could have found that he dragged the victim's dead body out of the apartment, down the stairs, across the lawn, and into his 1998 Volvo, that he then drove her to Sparks where he left her body in his vehicle all day, that he thereafter transferred her body into the new 1999 Volvo and drove her home, that he then dragged her back into the apartment and put her in the bathtub, that he remained in the apartment for several more hours, and that he then called 911 to report her death. See id., 68 (defendant's failure to summon medical help to render aid to victim supports an "antecedent intent to cause death" [internal quotation marks omitted]). The evidence also proved that the victim died as a result of multiple incised wounds all over her body that caused her to bleed to death, that by the time the defendant called 911, the victim had very little blood in her body, that her blood was throughout the apartment, on doors, walls, and floors, and that it was in the 1998 Volvo, on the passenger's seat. Several of the incised wounds were in areas of her body, including her back, where the victim could not have inflicted them on herself.

There also was evidence from which the jury reasonably could have inferred that the defendant physically assaulted the victim on multiple occasions, leaving her cut, bruised and bloodied.

In addition to this evidence, there was substantial evidence of consciousness of guilt, including that the defendant declined to provide emergency assistance to the victim when he did not call 911 on the morning of November 1, 2008, but, instead, dragged her body down the stairs and across the lawn at approximately 8:30 a.m., kept her in a vehicle for up to seven hours, in an apparent attempt to construct an alibi, and failed to call 911 until 10:50 p.m.; he lied both to the 911 dispatcher and to Detectives Salkeld and Condon when he told them that he had been out in the 1999 Volvo and had just returned home when he found the victim and called 911; he lied to the police about having plans with Wallen in the evening of November 1, 2008; he lied to the police about having gone to Wallen's home in the evening of November 1, 2008; he lied to the police about having returned to Sparks to help Wallen clean up in the early evening of November 1, 2008; he lied to the police about having telephoned Wallen repeatedly over a period of several hours; and he lied to the 911 dispatcher and to the police about having telephoned the victim shortly before calling 911. Our Supreme Court has explained: "[C]onsciousness of guilt evidence [is] part of the evidence from which a jury may draw an inference of an intent to kill." *State* v. *Sivri*, 231 Conn. 115, 130, 646 A.2d 169 (1994); see *State* v. *Otto*, supra, 305 Conn. 72–73.

In fact, the evidence in this case is similar to, if not stronger than, the evidence our Supreme Court held was sufficient to convict the defendant in *Sivri*. In *Sivri*, the defendant was convicted of murdering the victim in his home even though the victim's body was never found. *State* v. *Sivri*, supra, 231 Conn. 130. Although

there was significant evidence that the victim was killed in the defendant's home, and blood of the same type as the victim's was found in the defendant's car, the defendant argued that there was insufficient evidence to prove that he had the specific intent to kill the victim. Id., 121–26. Our Supreme Court noted that there was no evidence of a body, no evidence of a specific weapon used, no evidence of the specific type of wound inflicted on the victim, and no evidence of "prior planning, preparation or motive." Id., 127. Nevertheless, the court pointed to various pieces of circumstantial evidence from which the jury could infer that the defendant intended to kill the victim. Id., 127–31.

First, the court noted that the amount of blood of the victim's blood type found in the defendant's home was significant, representing "approximately one-fourth of the total blood in the body of a woman of average build." Id., 128. In the present case, Dr. Williams testified that the victim died from a slow loss of blood that resulted in her body going into shock because there was insufficient blood to make a pulse and keep her heart beating. Dr. Williams further testified that a person enters into an irreversible shock when she loses approximately 40 percent of her blood. The jury reasonably could have inferred from the victim's extensive slow blood loss that the defendant intended to kill the victim because he allowed her slowly to bleed to death from her wounds.

Second, the court in *Sivri* noted that there was sufficient evidence from the amount of blood present in the defendant's home to support the inference that the victim's fatal wound was caused by a weapon. Id. In the present case, Dr. Williams testified that the victim's fatal wounds were caused by a weapon, in particular, "a sharp instrument, such as a knife, or a machete, or the sharp end of a scissor."

Third, in *Sivri*, the state's expert testified that the amount of blood found in the defendant's home required the weapon used to cut very deeply into the victim's body or to have cut a vein or artery. *State* v. *Sivri*, supra, 231 Conn. 128. The court concluded that the jury could infer from this testimony that the weapon the defendant used had an edge or point and had been used vigorously enough to cause massive bleeding. Id., 128–29. In the present case, as noted previously, Dr. Williams testified that the victim's wounds were caused by a sharp edged weapon. Although, unlike in *Sivri*, the victim in the present case died from slow blood loss from multiple wounds, as opposed to massive blood loss from a single wound, the jury could have inferred an intent to kill from the methodical infliction of numerous superficial wounds, followed by the defendant's failure to summon medical help as the victim slowly bled to death.

Fourth, in *Sivri*, the court noted that the jury could have inferred that the victim's death occurred in the defendant's family room, a room not likely to have weapons readily at hand, suggesting that the defendant either had such a weapon in his possession while he was in that room or had purposefully obtained the weapon from another room of the house and brought it into the family room to kill the victim. Id., 129. In the present case, the jury reasonably could have inferred that the defendant's actions were purposeful from the fact that he methodically used a weapon to inflict multiple wounds all over the victim's body.

Fifth, in *Sivri*, the court noted the defendant's failure to summon medical assistance for the victim as evidence that the defendant intended to cause her death. Id. Similarly, in the present case, the defendant did not summon medical assistance on the morning of November 1, 2008. Instead, he dragged the victim's body from the apartment, placed her in his car, and kept her there for hours before returning her to the apartment,

undressing her, and placing her in the bathtub. This course of conduct is particularly relevant to the defendant's intent because of the slow manner in which the victim died, as her blood drained from her body. The defendant had more time to summon help to save the victim's life than would have been the case if the victim had been subjected to a single grievous injury.

Finally, the court in *Sivri* relied on the defendant's actions *after* the victim's death to show a consciousness of guilt as evidence of his intent to kill the victim. Id., 130. In the present case, the jury was presented with very strong consciousness of guilt evidence, including the defendant's failure to aid the victim as she bled out, dragging the victim's body to his 1998 Volvo, leaving her in that vehicle all day, dragging her back to his apartment, and repeatedly lying to emergency personnel.

In sum, we conclude that there was sufficient evidence for the jury reasonably to have inferred that (1) On November 1, 2008, the defendant killed the victim; (2) the defendant used a weapon with a sharp edge repeatedly to cut or penetrate the body of the victim, in such a manner as to cause the victim to lose much of the blood that was in her body; (3) the defendant, after inflicting the many wounds, failed to summon medical assistance for his victim and, instead, allowed her to bleed out; (4) the defendant dragged her body down the stairs, across the lawn and into his 1998 Volvo, driving her to Sparks for the day and then returned her body to their apartment and placed her in bathtub; (5) even after returning from this day long expedition, the defendant still waited nearly six more hours before calling 911; and (6) the defendant repeatedly lied to the 911 dispatcher and to the police. Viewing all of this evidence together, we conclude that its cumulative force reasonably supports the inference that the defendant intended to kill the victim and succeeded in doing so.

The defendant also asks that we change our long-standing standard of review so that we review the evidence under a much more rigorous standard to see if there is a reasonable view of the evidence that would support a hypothesis of innocence. Our Supreme Court addressed and rejected a similar request in *Sivri*, stating: "This, of course, would be directly contrary to our traditional scope of review of jury verdicts, and to the way in which we traditionally employ it. Under that scope of review and application, we give deference not to the hypothesis of innocence posed by the defendant, but to the evidence and the reasonable inferences drawable therefrom that support the jury's determination of guilt. On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." Id., 134. Our Supreme Court very recently confirmed this standard of review in *State* v. *Daniel B.*, supra, 331 Conn. 12. As an intermediate appellate court, it is not within our power to overrule Supreme Court authority. See *State* v. *Fuller*, 56 Conn. App. 592, 609, 744 A.2d 931, cert. denied, 252 Conn. 949, 748 A.2d 298, cert. denied, 531 U.S. 911, 121 S. Ct. 262, 148 L. Ed. 2d 190 (2000).

The judgment is affirmed.

In this opinion the other judges concurred.