JAN GAWLIK *v.* SCOTT SEMPLE ET AL.
(AC 42550)

Elgo, Devlin and Sheldon, Js.

Syllabus

The plaintiff inmate sought declaratory and injunctive relief against the defendants, current and former employees of the Department of Correction, alleging that they had wrongly withheld religious literature and cards that had been mailed to him in violation of his rights to religious freedom under the state and federal constitutions, and the applicable state statute (§ 52-571b) and federal statute (42 U.S.C. § 2000cc et seq.). The plaintiff also alleged that the applicable department administrative directives that justified the defendants' actions were not promulgated in accordance with the applicable statute (§ 4-166 et seq.) governing

administrative procedures. The trial court rendered judgment for the defendants, and the plaintiff appealed to this court. *Held* that the trial court properly rendered judgment for the defendants, and, because that court's memorandum of decision thoroughly addressed the arguments raised in this appeal, this court adopted the trial court's well reasoned decision as a proper statement of the facts and the applicable law on the issues.

Argued January 22—officially released April 28, 2020

Procedural History

Action for, inter alia, a judgment declaring that the defendants violated the plaintiff's rights to religious freedom, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Ecker*, *J.*; judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

Jan Gawlik, self-represented, the appellant (plaintiff).

Steven R. Strom, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellees (defendants).

Opinion

PER CURIAM. The self-represented, incarcerated plaintiff, Jan Gawlik, brought this action for declaratory and injunctive relief against present and former employees of the Department of Correction (department)—namely, former Commissioner of Correction Scott Semple, District Administrator Angel Quiros, Warden Scott Erfe, and Simone Wislocki, a mail handler at the Cheshire Correctional Institution (Cheshire)—in their official capacities. The plaintiff alleged that the defendants had wrongly withheld from him religious literature, blank prayer cards and holiday cards in violation of his rights under the first amendment to the United States constitution; article first, § 3, of the constitution of Connecticut; the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq. (2012); and the

Connecticut Act Concerning Religious Freedom, General Statutes § 52-571b. The plaintiff also alleged that the applicable department administrative directives justifying the department's actions were not promulgated in accordance with the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq. The trial court rendered judgment in favor of the defendants, from which the plaintiff now appeals. We affirm the judgment of the trial court.

The record and the trial court's opinion reveal the following facts and procedural history. The plaintiff is presently incarcerated at Cheshire. While incarcerated, the plaintiff began studying to become a Catholic priest. In the course of his studies, the plaintiff ordered three used religious books, which were subsequently mailed to Cheshire. Upon arrival at Cheshire, these books were rejected by department personnel in accordance with department policy prohibiting inmates from receiving books that are not in "new condition." The plaintiff was also sent religious newspapers by some third party associated with Sts. Cyril and Methodius Church in Hartford. Because these were not sent directly from a publisher or commercial vendor, these newspapers were rejected in accordance with department policies. At various times, the plaintiff was mailed blank religious prayer cards by religious organizations in recognition of his monetary donations to these organizations. The prayer cards were rejected because department policy prohibits inmates from receiving mail containing blank envelopes. Last, the plaintiff was mailed a few religious and nonreligious holiday cards, some of which were homemade. These were rejected on the basis of concerns that such cards may be used to smuggle illegal drugs through the adhesives or decorative materials; nonetheless, the plaintiff received black and white photocopies of these cards.

On the basis of the rejection of these several items of mail, the plaintiff filed his complaint with the Superior

Court on June 1, 2016. Following three days of evidence, the court, *Ecker*, *J.*, issued a forty-three page memorandum of decision rendering judgment in favor of the defendants on all counts on September 4, 2018. This appeal followed.

Upon examination of the record on appeal and the briefs and arguments of the parties, we conclude that the judgment of the trial court should be affirmed. Because the court's memorandum of decision thoroughly addresses the arguments raised in this appeal, we adopt its well reasoned decision as a proper statement of the facts and the applicable law on the issues. See *Gawlik* v. *Semple*, Superior Court, judicial district of New Haven, Docket No. CV-16-5036776-S (September 4, 2018) (reprinted at 197 Conn. App. 86, 231 A.3d 332). It would serve no useful purpose for this court to engage in any further discussion. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Samakaab* v. *Dept. of Social Services*, 178 Conn. App. 52, 54, 173 A.3d 1004 (2017).

The judgment is affirmed.

APPENDIX

JAN GAWLIK *v.* SCOTT SEMPLE ET AL.*

Superior Court, Judicial District of New Haven
File No. CV-16-5036776-S

Memorandum filed September 4, 2018

Proceedings

Memorandum of decision in action alleging violation of plaintiff's rights to religious freedom. *Judgment for the defendants*.

Jan Gawlik, self-represented, the plaintiff.

Steven R. Strom, assistant attorney general, for the defendants.

* Affirmed. *Gawlik* v. *Semple*, 197 Conn. App. 83, 231 A.3d 326 (2020).

Opinion

ECKER, J. This is an action for declaratory and injunctive relief brought by an inmate at the Cheshire Correctional Institution (Cheshire) against various prison officials and staff. The plaintiff, Jan Gawlik, claims that the defendants have violated his constitutional and statutory rights to religious freedom by refusing to deliver incoming mail containing blank religious "prayer cards" and matching envelopes, used religious books, and religious newspapers sent from a source other than the publisher. He seeks a declaratory judgment holding that his religious rights have been violated by the defendants' practices and policies governing delivery of these items, and an injunction requiring the Commissioner of Correction to delete those portions of the Department of Correction (department) administrative directives that prohibit the delivery of such items. He also seeks a judicial declaration that the administrative directives at issue were promulgated illegally because the department adopted them without complying with the procedural requirements of the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq.

A bench trial was held before the undersigned judge on January 25, 2017, January 31, 2017, and March 22, 2017. Extensive posttrial briefs were submitted by the parties.[1] For the reasons that follow, judgment is entered in favor of the defendants.

I

FINDING OF FACTS

The plaintiff, Jan Gawlik, is serving a sixty year sentence for murder. He is incarcerated at the Cheshire Correctional Institution, which houses approximately 1300 inmates. Gawlik describes himself as a

[1] The final brief was filed July 17, 2017. The parties thereafter waived the 120 day deadline set forth in General Statutes § 51-183b. See Docket Entry 133.00 (Notice of Joint Consent, dated October 27, 2017).

devout Catholic. His family is from Poland. He speaks Polish and was raised as a "Polish Catholic." Gawlik has decided that he wants to become a Catholic priest and is engaged in a self directed course of study toward that end.[2] He also takes part in many religious practices and activities at Cheshire. He participates in daily mass services and also attends a collective weekly mass on Wednesdays. On Mondays, he attends a weekly Bible study class run by volunteers from the Legion of Mary. He attends a weekly confirmation class conducted by one of the prison chaplains, Deacon Robles. Gawlik also reads religious texts and books about religion; he has access to many religious books, including various Bibles and other texts, and keeps approximately fifteen (15) different religion related books in his cell. He also donates money from his prison account to outside religious organizations that aid poor, hungry, homeless, and/or disabled individuals.

The plaintiff's present lawsuit complains that his religious freedom, and other legal rights, are being violated by department employees at Cheshire as a result of their refusal to deliver certain types of incoming mail to him. Four types of incoming mail are at issue. The first is used books. Three used books ordered by the plaintiff were rejected by department staff: (1) a used copy of the 1983 Code of Canon Law, promulgated by Pope John Paul II; (2) a book entitled The Book of Angels; and (3) a book entitled International Eucharistic Congress Pictorial Album.[3] See Plaintiff's Exhibits 22, 33, 36, 37, 38, 56, 56-A. All three books were purchased by the plaintiff from a company called Preserving Christian Publications, Inc. See Plaintiff's Exhibit 35 (company catalogue, August-September, 2016). All three books are religious in nature.

[2] The plaintiff is not enrolled in any organized educational or training program to study for the priesthood.

[3] The record also includes reference to a used book entitled The Lovely Eucharist and Jesus Christ, which the Cheshire prison authorities also rejected for delivery to the plaintiff. It is unclear if this was a fourth book,

Upon delivery to the mail room at Cheshire, the books were rejected by department personnel under the authority of either or both of two provisions of department administrative directive 10.7 ("Inmate Communications"). The first directive, administrative directive 10.7 (4) (G) (1) ("Review, Inspection and Rejection"), includes the following general authorization to reject mail after the mandated inspection: "All incoming general correspondence may be rejected if such review discloses correspondence or material(s) which would reasonably jeopardize legitimate penological interests, including, but not limited to . . . (a) [preventing] the transport of contraband in or out of the facility . . . ." The second directive, administrative directive 10.7 (4) (N) ("Incoming Publications and Educational Materials"), states in relevant part: "An inmate may order books *in new condition only* from a publisher, book club, or book store."[4] (Emphasis added.) The department's underlying security concerns are discussed [in part II A of this opinion].

The second type of rejected material consists of newspapers mailed to Gawlik from outside sources other than the publisher. The newspapers included The Catholic Transcript, which is a publication of the Archdiocese of Hartford, Narod Polski, a bilingual publication of the Polish Roman Catholic Union of America, and various Polish language newspaper editions published by the New Britain Herald. See Plain-

or, instead, a reference by a different name to the third book listed above. There is no need to resolve the question for purposes of this adjudication.

[4] The precise meaning of this language is not crystal clear. It could mean (as the department maintains) that inmates may order for purchase only new books, and those purchases may be made only from the designated categories of vendors (publishers, book clubs or bookstores). Alternatively, the directive could be construed to mean that inmates may order only new books from the designated vendors (publishers or bookstores). This reading would imply, or at least leave open the possibility, that inmates are allowed to order used books and nonbook publications from sources other than publishers or bookstores. The plaintiff does not appear to challenge the department's construction as a grammatical matter. In any event, it is clear to the court that the department's construction is the intended meaning.

tiff's Exhibit 6. The newspapers evidently were forwarded to the plaintiff by someone associated with Sts. Cyril and Methodius Church in Hartford and perhaps other sources; they were not mailed to the plaintiff directly from the publisher or a commercial vendor.[5] Department staff explained to the plaintiff at the time that the newspapers were rejected by department personnel on the ground that "magazines and newspapers [are] allowed only by subscription or if mailed directly from the bookstore/bookseller/vendor." Plaintiff's Exhibit 47 (rejection form, dated January 6, 2017).

The third type of rejected materials consists of large quantities of "blank" religious "prayer cards" and matching envelopes sent to the plaintiff, free of charge, as a gesture of gratitude, by the churches, missions, and other religious organizations to which he has made monetary donations. Apparently, it is not unusual for these organizations to respond to a donation by sending a note of thanks, accompanied by a set of blank greeting cards of the type sold in stationery stores and gift shops. The cards typically are embossed with religious icons, symbols, prayers, biblical quotations, and the like. Matching envelopes are included. The idea is that the donor can use the cards to communicate religious messages to friends and loved ones on holidays and other occasions. The plaintiff wanted to use the cards for that purpose because he liked their religious messages, in contrast to what he called the "pagan" or "nonreligious" cards available from the prison commissary. Compare Plaintiff's Exhibit 4 (examples of "religious" prayer cards), with Plaintiff's Exhibit 5 (examples of "nonreligious" holiday cards). A combination of considerations under administrative directives 10.7 and 10.8 formed the basis of the department's rejection of these cards and envelopes. See [part II A of this opinion].

[5] A few other religious magazines/pamphlets are also included by the plaintiff in this category of rejected items. See Plaintiff's Exhibit 6.

The fourth type of rejected mail includes religious and nonreligious greeting cards or homemade cards (relatively few in number) containing glitter, crayon, lipstick, or similar decorative materials. Some of these were holiday cards for Christmas or Easter sent by correspondents in Poland; one rejected item was a decorative drawing made by the plaintiff's goddaughter. These cards and other items were rejected by department staff, under the authority of administrative directive 10.7, based on concerns that illegal drugs, including a substance known as "suboxone," have been found in similar decorative features of incoming correspondence sent to other prison inmates, both at Cheshire and elsewhere. The department has no means by which to conduct drug testing on each piece of incoming mail with these decorative features. See [part II A of this opinion].

Before commencing the present lawsuit, the plaintiff filed numerous administrative grievances and appeals concerning the staff's refusal to deliver the used books, blank prayer cards and envelopes.[6] Administrative directive 9.6 sets forth procedures governing inmate requests for administrative relief from adverse decisions regarding various conditions of confinement, including everything from allegations of improper disciplinary action to the unjustified rejection of incoming mail. See Administrative Directive 9.6 (4) (A) through (M). The department's administrative review process varies somewhat depending on the subject matter at issue but, in general, begins with an attempt at informal resolution, moves to a procedure involving a formal written grievance by the inmate, and then provides for one or more sequential levels of review ascending the administrative hierarchy.

[6] The problem involving delivery of newspapers to the plaintiff did not arise until after this lawsuit was filed. The plaintiff never amended the complaint to include a claim based on rejection of the newspapers, but the issue was made part of the case by the submission of such evidence at trial, without objection. The newspaper issue also was addressed by the parties in their respective posttrial briefs. The court deems the complaint to have been amended to conform to the proof in this regard.

The principal target of the plaintiff's complaints was the defendant Simone Wislocki, a department employee who works as a "mail handler" at Cheshire. Mail handlers are responsible for reviewing and inspecting incoming mail to determine whether the incoming item will be delivered to the addressee inmate under applicable department policy, including administrative directive 10.7 (4) (G) ("Incoming General Correspondence") and administrative directive 10.7 (4) (N) ("Incoming Publications and Educational Materials"). The record reflects that Wislocki rejected the plaintiff's incoming mail containing blank prayer cards and envelopes on many occasions in 2015 and 2016. The plaintiff was made aware of the rejections when he received a department form entitled "Returned Letter or Funds Notification," which was completed by Wislocki in connection with some (but not all) of the rejected cards and envelopes. The three used books were rejected in 2016 and early 2017. The newspapers were rejected in early 2017.

Of the plaintiff's numerous administrative grievances and appeals relating to these rejections of incoming mail, some complaints focused on substantive issues involving the alleged violation of his religious freedom under federal and state law. See, e.g., Plaintiff's Exhibits 16, 17, 28, 36, 43, 45, 46, 46A, 48, 48-A. Other complaints were procedural in nature, and claimed, for example, that Wislocki was rejecting prayer cards without providing the plaintiff with notice of rejection required by administrative directives 10.7 (4) (G) (2) or 10.7 (4) (N) (3); see, e.g., Plaintiff's Exhibits 21A, 21B, 23-25, 29; or that the rejection/administrative review process in some other respect had not been conducted in accordance with applicable department policy. See, e.g., Plaintiff's Exhibits 37, 41, 56, 56-A. It does not appear that any of these administrative grievances or appeals was successful.

The record is replete with evidence that the plaintiff pursued certain avenues of administrative recourse, by

filing grievances and appeals from denied grievances in connection with the mail handler's rejections of the used books, prayer cards/envelopes, and newspapers. The record is equally clear, however, that the plaintiff did not pursue other available means for obtaining relief.[7] Thus, with respect to prayer cards, for example, administrative directive 10.8 (5) (I) provides expressly that inmates may seek permission from the director of programs or treatment or that person's designee to purchase religious articles not available through the prison commissary.[8] Testimony at trial established that this recourse was available to the plaintiff but was not used by him as a way to obtain prayer cards or other items that he considered religiously appropriate. Likewise, evidence at trial established that the department allows inmates to obtain permission from designated department personnel to engage in "individual religious practices," which is defined [to] include, without limitation, "access to religious publications." Administrative Directive 10.8 (5) (D). The procedure for obtaining permission under administrative directive 10.8 (5) (D) requires the inmate to submit a request to the correctional facility's director of religious services (Father Bruno, during the time in question at Cheshire), who is required to "consider whether there is a body of

[7] The court's findings are based solely on evidence presented at trial. The court cannot, and has not, taken into consideration any nonrecord exhibits submitted with the plaintiff's posttrial briefs. The plaintiff's posttrial briefs include certain factual assertions and documents relating, in particular, to alleged efforts by him to obtain individualized permission, on religious grounds, to obtain access to otherwise prohibited items. The plaintiff was given every opportunity to present his proof at trial. He was well prepared and well organized, and did not appear to have any difficulty marshaling the evidence as he deemed necessary. There was clear and unequivocal evidence submitted at trial about what the plaintiff did—and did not do—as part of his efforts to obtain the religious materials at issue. No extrarecord submissions on this topic will be considered by the court.

[8] This same directive also states: "Donated religious articles and religious items shall not be permitted from any source." Administrative Directive 10.8 (5) (I). The plaintiff's alternative under administrative directive 10.8 (5) (I) was to seek permission to purchase the type of prayer cards that suited his preferences. The record is clear that he had abundant personal funds available to him, had he wished to avail himself of this option.

literature stating principles that support the practices and whether the practices are recognized by a group of persons who share common ethical, moral or intellectual views." Id. For security reasons, the directive also requires approval by the department's deputy commissioner of operations.[9] Again, the trial record shows that the plaintiff made no effort to obtain the desired items under administrative directive 10.8 (5) (D). Nor did he purchase a subscription to any of the newspapers that he wished to receive, despite having ample personal funds to do so. See Administrative Directive 10.7 (4) (N) (procedure for ordering subscriptions).

The court has paused to highlight the plaintiff's failure to pursue alternative means of redress because this evidence, though not essential to the judgment, reinforces the court's conclusion (based in large part on his own statements at trial) that the plaintiff was more interested in battling with the department over abstract principles than actually obtaining possession of the religious materials at issue. Rather than purchasing a newspaper subscription, or buying new religious books (presumably available in many thousands of titles through nationwide vendors),[10] or working through proper channels at Cheshire pursuant to administrative directive

[9] "For institutional safety and security, all recommendations for religious practices shall require approval of the Deputy Commissioner of Operations or designee in consultation with the Director of Religious Services." Administrative Directive 10.8 (5) (D).

[10] The parenthetical observation in the text is common knowledge in this day and age, but is not part of the record, and is not relied on by the court in reaching its conclusions in this case. It is made for the benefit of any reader who may be interested in seeking a nonjudicial solution to similar problems in the future. Vendors such as Amazon and Barnes & Noble offer for sale more new book titles than could be read in a lifetime. These vendors apparently will ship new books directly to correctional facilities upon purchase by or on behalf of an inmate. See, e.g., https://www.amazon.com/gp/help/customer/display.html?nodeId=201910480. If an inmate is unable to place an order directly, the Connecticut Department of Correction's website indicates that friends or family can order new books from such vendors for direct mailing to the correctional facility. See https://portal.ct.gov/DOC/Common-Elements, Common-Elements/Frequently-Asked-Questions-FAQ.

10.8 to obtain a workable, pragmatic solution providing him access to the sought-after religious materials without creating a risk to prison security, the plaintiff viewed the situation as a personal battle between himself and a "malicious" mail handler (Wislocki), and he became fixated on vindicating his absolutist and incorrect view of his legal "rights."[11] It is clear from the plaintiff's administrative grievances and the testimony at trial that the plaintiff considered the rejections as part of a campaign waged by Wislocki against him personally, and believed that Wislocki was acting out of a combination of religious animus and personal antipathy.[12] See, e.g., Plaintiff's Exhibit 16 (containing various administrative filings by plaintiff accusing Wislocki of "superseding" order to deliver "religious media mail," accusing Wislocki of engaging in deliberate actions to purposely cause harm to plaintiff as a "malicious punitive measure," and "knowingly" violating his religious freedom); Plaintiff's Exhibit 24 (grievance accusing Wislocki of implementing "punitive measures" against plaintiff by rejecting mail); Plaintiff's Exhibit 45 (stating that Wislocki's disposition reflects "deliberate indifference" to his grievances); Plaintiff's Exhibit 46 (accusing mail room staff of "fabrication" and allowing "ego and pride" to impair its performance); Plaintiff's Exhibit 58 (accusing Wislocki of "lying" with respect to basis for rejection).

The plaintiff filed this lawsuit in mid-2016. He seeks injunctive and declaratory relief of two kinds. First, he requests a judicial decree requiring the defendants to

Again, this footnote should not be understood as stating factual findings in the present case. It is included for informational purposes only, with the hope that the information might reduce the need for similar book related prisoner litigation in the future.

[11] Quotation marks are used because the plaintiff's position fails to acknowledge the significant limitations on these rights in the prison setting, as discussed in the legal analysis [in part II of this opinion].

[12] The plaintiff's administrative complaints contain allegations concerning other department employees as well, but Wislocki is the primary focus of his grievances.

deliver to himself (and all other inmates) all "religious and nonreligious cards with factory glitter . . . all artwork, letters, sketches, drawings, anything artistic . . . any form of communication from adults and/or children, written or colored or drawn in colored pencil(s), crayons, markers, letters sent with a lipstick kiss . . . used books, donated books, used donation[s] from prison ministries, churches, envelopes with and without postage, newspapers donated from churches, prayer, photo books . . . flyers, bookmarks, pamphlets, and any or all donations . . . ." See Plaintiff's Posttrial Brief, dated May 22, 2017, at 53; see also Plaintiff's "Injunction," dated January 31, 2017 (seeking permanent injunction prohibiting department from rejecting plaintiff's "religious media mail, religious correspondence, all prayer cards, religious blank envelopes, religious pamphlets, religious literature, religious books, used and new, from publisher(s), bookstore(s), book clubs, libraries, religious stationery, religious notebook(s), religious posters, bookmark(s), religious Catholic denominational materials in all forms of correspondence from churches, missions, orphanages, organizations, etc., incoming and outgoing, ordered/sent to the plaintiff").

Second, the plaintiff seeks a declaratory judgment determining that the department's administrative directives applicable to inmate property (administrative directive 9.6), inmate correspondence (administrative directive 10.7) and religious services (administrative directive 10.8) are invalid because they were not promulgated as "regulations" pursuant to the UAPA. See, e.g., Plaintiff's "Declaratory Judgment," dated February 27, 2017.

As noted, a bench trial before the undersigned was held over the course of three days. The plaintiff personally appeared and represented himself in a capable and organized manner. He submitted voluminous exhibits, which were admitted into evidence without objection.

In addition to his own testimony, the plaintiff called numerous department employees as witnesses, including the defendant Wislocki (the Cheshire mail handler); Selena Rios, department district administrator; Angel Quiros, department director of security; Christine Whidden; Captain Robert Hartnett; and Deputy Warden Richard LaFarge. These witnesses were cross-examined by the plaintiff on a range of subjects relating to department policies and practices concerning incoming mail and related security issues, media review procedures for rejected books, administrative review of grievances, and religious services available to inmates.

The court finds that there is no credible evidence whatsoever to support the plaintiff's claim of discriminatory treatment based on religion. The rejected items —books, newspapers, blank cards and envelopes, decorated cards and artwork from relatives, etc.—were disallowed based on content neutral considerations of safety and security in a prison setting. After hearing all of the testimony and viewing all of the exhibits, the court is convinced that the items would have received identical treatment had their content related to the New York Yankees, the native birds of Indonesia, or any other subject, religious or nonreligious. This finding does not end the case in all respects, but it is important to highlight this particular finding at the outset.

II

LEGAL ANALYSIS

A

Plaintiff's First Amendment Claims

The plaintiff's first amendment claims[13] cover relatively well-worn ground. It is clear that a person's constitutionally protected speech and religious rights are

[13] The plaintiff raises constitutional free speech as well as religious freedom claims under both the federal and Connecticut constitutions. He provides no independent analysis of the state constitutional claims, however, and those claims therefore are deemed abandoned. See *State* v. *Arias*, 322

not forfeited upon criminal incarceration. See, e.g., *Bell* v. *Wolfish*, 441 U.S. 520, 545, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) ("our cases have held that sentenced prisoners enjoy freedom of speech and religion under the [f]irst and [f]ourteenth [a]mendments"). It is equally clear, however, that these rights are subject to significant curtailment in the prison setting. Id. ("But our cases also have insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. 'Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' " (quoting *Price* v. *Johnston*, 334 U.S. 266, 285, 68 S. Ct. 1049, 92 L. Ed. 1356 (1948)). These general principles are firmly established. See, e.g., *Beard* v. *Banks*, 548 U.S. 521, 528–29, 126 S. Ct. 2572, 165 L. Ed. 2d 697 (2006) (plurality opinion); *Shaw* v. *Murphy*, 532 U.S. 223, 229, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001); *Thornburgh* v. *Abbott*, 490 U.S. 401, 409, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989); *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987); *Turner* v. *Safley*, 482 U.S. 78, 84–85, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

The following analysis will focus on the plaintiff's first amendment free exercise claims because those are the focus of his case. The same legal standard, taken from *Turner* v. *Safley*, supra, 482 U.S. 78, also applies

Conn. 170, 185 n.4, 140 A.3d 200 (2016) ("[b]ecause the defendant has not provided an independent analysis of his state constitutional claim under *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), we consider that claim abandoned and unreviewable"); *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003) ("[The Connecticut Supreme Court] repeatedly [has] stated that [it is] not required to review issues that have been improperly presented to [it] through an inadequate brief. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . *These same principles apply to claims raised in the trial court.*" (Citation omitted; emphasis added; internal quotation marks omitted.)).

to his first amendment free speech claims, with the same results. See, e.g., *Thornburgh* v. *Abbott*, supra, 490 U.S. 414 (holding that *Turner* analysis applies to inmates' free speech claims relating to publications sent into prison). The applicable legal analysis under *Turner* considers four factors:[14] "[I]n *Turner* [v. *Safley*, supra, 78], we adopted a unitary, deferential standard for reviewing prisoners' constitutional claims: [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. [Id., 89]. Under this standard, four factors are relevant. First and foremost, there must be a valid, rational connection between the prison regulation and the legitimate [and neutral] governmental interest put forward to justify it. [Id.] . . . If the connection between the regulation and the asserted goal is arbitrary or irrational, then the regulation fails, irrespective of whether the other factors tilt in its favor. [Id., 89–90]. In addition, courts should consider three other factors: the existence of alternative means of exercising the right available to inmates; the impact

[14] Many courts, before reaching the *Turner* factors, conduct a "threshold" inquiry requiring the plaintiff to show "that the disputed conduct substantially burdens his sincerely held religious beliefs." *Salahuddin* v. *Goord*, 467 F.3d 263, 274–75 (2d Cir. 2006). At least in the United States Court of Appeals for the Second Circuit, the continuing vitality of the "substantial burden" test in constitutional free exercise cases remains an open question after the Supreme Court's statement, in *Employment Division, Dept. of Human Resources* v. *Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), that application of the test "embroils courts in the unacceptable business of evaluating the relative merits of differing religious claims." (Internal quotation marks omitted.) *Holland* v. *Goord*, 758 F.3d 215, 220 (2d Cir. 2014); see *Salahuddin* v. *Goord*, supra, 274 n.3; *George* v. *County of Westchester*, No. 17-CV-3632 (NSR) (JCM), 2018 WL 3364393, *3 (S.D.N.Y. July 10, 2018); *Sabir* v. *Williams*, No. 3:17-cv-749 (VAB), 2017 WL 6514694, *5 (D. Conn. December 19, 2017). Because its current vitality as part of the constitutional free exercise analysis remains in doubt, and because the plaintiff's free exercise claim here fails for other reasons under the four factor *Turner* test, the court will not consider the "substantial burden" issue as part of its constitutional analysis. If the issue were considered, however, it would be decided against the plaintiff. See [part II B of this opinion] (analyzing "substantial burden" factor in connection with plaintiff's claims under Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq.).

accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally; and the absence of ready alternatives available to the prison for achieving the governmental objectives. [Id., 90].'' (Citation omitted; internal quotation marks omitted.) *Shaw* v. *Murphy*, supra, 532 U.S. 229–30; see, e.g., *Mikell* v. *Folino*, 722 Fed. Appx. 304, 308 (3d Cir. 2018) (applying *Turner* test to prisoner's religious freedom claims involving dietary restrictions); *Keys* v. *Torres*, 737 Fed. Appx. 717, 719 (5th Cir. 2018) (applying *Turner* test to prisoner's first amendment challenge to prison mail regulation prohibiting delivery of certain publications); *Davis* v. *Heyns*, No. 17-1268, 2017 WL 8231366, *4 (6th Cir. October 16, 2017) (applying *Turner* test to prisoner's religious freedom claims involving dietary restrictions).

The legal standard adopted in *Turner* reflects a policy of substantial deference to the judgment and expertise of prison officials with respect to issues of prison security. See, e.g., *Thornburgh* v. *Abbott*, supra, 490 U.S. 407–408 (due to ''the expertise of these [prison] officials and the [recognition that the] judiciary is ill equipped to deal with the difficult and delicate problems of prison management, this [c]ourt has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world'' (internal quotation marks omitted)). The court in *Turner* itself explained the underlying policy considerations: ''In our view, such a standard is necessary if prison [administrators . . . and] not the courts, [are] to make the difficult judgments concerning institutional operations.'' (Internal quotation marks omitted.) *Turner* v. *Safley*, supra, 482 U.S. 89. ''Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule

would also distort the [decision-making] process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration." (Internal quotation marks omitted.) Id.

The plaintiff has failed to meet his burden under the applicable legal standard.[15] His claim relating to the used books will be taken up first. Prison authorities based their refusal to deliver the three used books principally on the mandate contained in administrative directive 10.7 (4) (N), which states in relevant part: "An inmate may order books in new condition only from a publisher, book club, or book store. . . ." The directive contains two significant restrictions on an inmate's ability to obtain books from outside of the correctional facility: first, the book must be new, and second, the seller must be either the publisher, a book club or a bookstore. At trial, the court heard credible testimony from numerous department witnesses about the legitimate security concerns underlying administrative directive 10.7 (4) (N). Books in general are a particularly effective means for outsiders to pass contraband into prison.[16] It is difficult for prison staff to detect hidden

[15] "The burden, moreover, is not on the [s]tate to prove the validity of prison regulations but on the prisoner to disprove it." *Overton* v. *Bazzetta*, 539 U.S. 126, 132, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003).

[16] "Contraband" necessarily includes a very broad category of items in the prison context because an inmate's right to possess personal property is strictly limited due to safety and security concerns. See Administrative Directive 10.7 (3) (A) ("Definitions/Acronyms") ("Contraband. Anything not authorized to be in an inmate's possession or anything used in an unauthorized or prohibited manner."). The basic limitation is set forth in administrative directive 6.10 (1) ("Inmate Property," "Policy"), which states: "An inmate may possess only that property authorized for retention upon admission to the facility, issued while in custody, purchased in the facility commissary,

items such as drugs, weapons, or secret messages (plans of illegal activity), which can easily be secreted in book bindings, between interior pages, or in other overlooked crevices or crannies. A thorough search for such contraband would require prison personnel to inspect every page of every book sent from any source to every prisoner, an untenable task. The purpose of administrative directive 10.7 (4) (N) is to restrict the flow of such contraband by limiting incoming books to new books sent directly by a publisher or other reputable source. Limiting sources to specified commercial enterprises (publishers, bookstores and book clubs) minimizes the risk that an inmate or outsider can arrange with a friend or family member for delivery of banned material. It also makes sense that new books are far easier to inspect for contraband than used books. By limiting permissible incoming items to new books only, sent by specified commercial sources only, the department directive makes it less likely that books will serve as a conduit for contraband into prison.

Substantial case law applying *Turner* v. *Safley*, supra, 482 U.S. 78, upholds the constitutionality of similar prison rules prohibiting used books or otherwise restricting the source or physical characteristics of books sent to inmates. See *Minton* v. *Childers*, 113 F. Supp. 3d 796, 802–803 (D. Md. 2015) ("The [c]ourt concludes that the [prison's] directive banning incoming used books not sent directly by the publisher is not unconstitutional. . . . The ban is expressly aimed at advancing jail security and protecting the safety of jail personnel and other inmates and is logically connected to those goals."); *Phipps* v. *Vail*, No. C11-5093-BHS-JRC, 2012 WL 472894, *5–6 (W.D. Wn. January 9, 2012);

or approved at the facility in accordance with this Administrative Directive." In this context, it is important to be aware that many items that we may consider ordinary and innocuous can easily be made into weapons or used for destructive purposes in a prison setting. Shoelaces are one of countless examples. Some such items (sewing needles, for example) are easily hidden. The scarcity of personal property among inmates gives rise to additional security issues. See [part II A of this opinion].

id., *6 (rejecting inmate's first amendment challenge to correctional facility's decision to refuse delivery of two used books based on valid concern that "the chance of the book being altered or tampered with increases when the book is used [rather than new]"); see also *Bell* v. *Wolfish*, supra, 441 U.S. 550–51 (holding that first amendment is not violated by prison regulation prohibiting inmates from receiving books that were not directly mailed from publisher, book club or bookstore); *Azukas* v. *Arnone*, No. 3:14-cv-721 (RNC), 2017 WL 1282196, *2–3 (D. Conn. March 31, 2017) (rejecting inmate's first amendment challenge to Connecticut correctional facility's decision to refuse delivery of two books based on quantity limitation provision contained in administrative directive 10.7); *Walker* v. *Calderon*, No. C95-2770 FMS, 1997 WL 703774, *3 (N.D. Cal. October 31, 1997) ("[a]pplying the *Turner* analysis to the ban on the receipt of books mailed by correspondents other than approved or verified vendors, the [c]ourt finds first that the regulation is rationally connected to the prison's concerns about contraband being smuggled into the prison in book packages to which third parties have had physical access").

The first *Turner* factor, then, is easily satisfied here. There clearly is a valid, rational connection between the general prohibition on used books contained in administrative directive 10.7 (4) (N) and a legitimate governmental objective in prison security.

Turner also instructs courts to examine three additional factors: the existence of "alternative means of exercising the right"; "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and "the absence of ready alternatives" available to the prison for achieving the governmental alternatives. *Turner* v. *Safley*, supra, 482 U.S. 90. These considerations also favor the defendants' position on this record.

The plaintiff has at least two alternative means of exercising the right to religious freedom at issue. First, there is an administrative procedure available to the plaintiff by which he can request religious books that are unavailable. As explained, administrative directive 10.8 (5) (D) provides a mechanism by which inmates may obtain permission to engage in "individual religious practices," which includes "access to religious publications" not otherwise available in the prison library or through the usual means under administrative directive 10.7 (4) (N) (purchase of new books). The procedure requires approval by the director of religious services and the deputy commissioner of operations. The evidence at trial established that the plaintiff never pursued this option. See [part I of this opinion]. Second, the plaintiff has virtually unrestricted access to new books. See, e.g., *Minton* v. *Childers*, supra, 113 F. Supp. 3d 803 ("[plaintiff] was allowed to receive new books sent directly from the publisher"). No showing has been made that the plaintiff is unable to obtain new books containing essentially the same or equivalent material as that contained in the three "out of print" books made unavailable to him under administrative directive 10.7 (4) (N). The court does not find, on this record, that any of these books contain information that is unique, unusual or particularly distinctive in form, expression or substance.

The third *Turner* factor asks what impact accommodation of the asserted right will have on prison staff, other inmates, and the allocation of prison resources generally. There are approximately 1300 inmates housed at Cheshire alone. Every day, eight to fourteen bins of incoming mail addressed to inmates are delivered for distribution at Cheshire, and, because contraband cannot be found unless it is seen or felt, every single item (except legal mail) must be visually and "tactilely" inspected by a department mail handler before it is delivered to an inmate. The mail handler

must search for contraband of all types, including seemingly innocuous items that can be used for improper or illegal purposes. The task is made more difficult due to the fact that some prohibited items are easily hidden or camouflaged. Certain drugs such as "suboxone" can be easily hidden or absorbed in paper strips or other unobtrusive materials "laced" with the illegal substance, for example. This has occurred many times at department facilities in connection with incoming mail items.

Under these circumstances, and in light of the grave dangers that can arise when incoming contraband escapes detection, it is reasonable for the department to draw the line where it does, by distinguishing between new and used books as an efficient and sensible means to deploy its limited resources for the purpose of safeguarding the prison population while still allowing its residents robust, expansive access to published books. A new book mailed directly from the vendor presumably can be delivered to an inmate after a relatively quick, cursory inspection. Inspection of a used book, by contrast, would require a mail handler to engage in a time-consuming examination of the binding, cover, interior markings (for improper messages), and even individual pages (to ensure that the paper has not been glued together or "laced" with suboxone). Anything less than a painstaking, resource intensive inspection of used books would place at risk the safety and security of prison guards and other inmates alike. This third *Turner* factor therefore also weighs in favor of upholding the prison policy. See, e.g., *Phipps* v. *Phelps*, supra, 2012 WL 472894, *6 ("[a] much more costly search process would have to be implemented [if used books were allowed]").

Fourth and finally, there is no reason for the court to believe that the policy with respect to used books is an unreasonable, "exaggerated response to prison concerns." (Internal quotation marks omitted.) *Turner*

v. *Safley*, supra, 482 U.S. 90. The plaintiff has failed to identify any "alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests . . . ." Id., 91.

The plaintiff's constitutional free exercise claims regarding an asserted right to receive blank prayer cards/envelopes and nonsubscription newspapers fails for much the same reasons. Judge Christopher F. Droney addressed and rejected a similar claim in the case of *Sadler* v. *Lantz*, Civil No. 3-07-cv-1316 (CFD), 2011 WL 4561189 (D. Conn. September 30, 2011). *Sadler* apparently was brought as a free speech rather than a free exercise claim, but the same four factor *Turner* analysis was employed to adjudicate whether the inmate had a first amendment right to receive a blank greeting card and envelope from outside sources. This court finds Judge Droney's analysis persuasive. *Sadler* explains that the department's policy prohibiting incoming mail containing blank cards and unused envelopes in that case rested on the same basic, underlying set of directives relied on by the defendants in the present case: "[Department] [a]dministrative [d]irective 6.10 . . . which was in effect at the time of the rejection of the [rejected blank] card, provided that an inmate may possess only that property authorized for retention upon admission to the facility, issued while in custody, purchased in the facility commissary, or approved at the facility in accordance with this [a]dministrative [d]irective. [Id., 6.10 (1).] Contraband is defined as anything not authorized to be in an inmate's [possession . . . . Id., 6.10 (3) (B)]. The main purpose of [a]dministrative [directive] 6.10 (1) is to minimize the opportunity for contraband to be sent to inmates from individuals outside of prison. In addition, the directive serves to minimize the time spent by correctional staff in searching correspondence." (Internal quotation marks omitted.) *Sadler* v. *Lantz*, supra, 2011 WL 4561189, *3.

Administrative directive 10.7, which was also in effect at the time of the rejection of the items mailed to the plaintiff, provided: "All incoming general correspondence shall be opened and inspected for contraband and money . . . . All incoming general correspondence may be rejected if such review discloses correspondence or material(s) which would reasonably jeopardize legitimate penological interests, including, but not limited to, material[s] which contain or [are believed to contain] or concern: (a) the transport of contraband in or out of the facility . . . . Incoming general correspondence containing any of the foregoing may be restricted, confiscated, returned to the sender, retained for further investigation, referred for disciplinary proceedings or forwarded to law enforcement officials. [Id., 10.7 (4) (F) (1)]." (Internal quotation marks omitted.) *Sadler* v. *Lantz*, supra, 2011 WL 4561189, *3. These directives provided the basis for the department's prohibition of blank greeting cards. Id.[17] In addition, administrative directive 10.7 (4) (G) (1) (h) expressly prohibits inmates from receiving incoming mail containing "envelopes with or without postage stamps."[18]

These policies are content neutral and plainly bear a rational connection to the safety and security concerns identified by the department's witnesses, particularly Wislocki, Quiros, Whidden and LaFarge. As in *Sadler*, this court heard credible testimony about the real, nonfanciful risk that outsiders will attempt to convey drugs (such as suboxone) to inmates by "lacing" the decorations or adhesives contained on cards or stationery with

[17] The relevant language in the administrative directives remains essentially unchanged in substance since *Sadler*, which was decided in 2011. Two slight alterations made by the department in 2013 are indicated by the court in the quoted excerpt above using brackets.

[18] To ensure the ready availability of materials needed by inmates to correspond in writing with the outside world, administrative directive 10.7 (4) (P) mandates that "[e]ach correctional facility commissary shall sell . . . stationery, envelopes, postcards, greeting cards and postage . . . ." In addition, indigent inmates must be provided postage and writing materials free of charge. See Administrative Directive 10.7 (4) (D).

the illegal substance.[19] See *Sadler* v. *Lantz*, supra, 2011 WL 4561189, *2. Witnesses, including District Administrator Quiros and Director Whidden, also testified credibly that careful control over the incoming supply of blank cards and envelopes in prison is considered necessary due to safety and security risks associated with barter and trade among inmates. See also id., *6 ("permitting unsigned greeting cards to be mailed to inmates would also increase the likelihood of inmate barter or trade, gambling and thefts and inmate argument and fighting, with the potential for injuries to both correctional staff and inmates"). The large volume of cards sent to the plaintiff in the present case, and the resulting resource imbalance relative to other inmates, could only have increased the potential for such problems here.

The other three *Turner* factors also weigh in favor of the constitutionality of the prohibition on incoming mail containing blank cards/envelopes. Cards, envelopes and blank paper are all available to inmates through the prison commissary. If the plaintiff does not like the preprinted messages contained on the stock greeting cards and wishes to communicate a different, more pious or serious religious message, he can use stationery to draw or write his own prayers or religious messages on his own cards. There is no reason to believe that such custom-made cards would encounter any official censorship or curtailment. (Again, the restrictions confronted by the plaintiff have nothing to do with the religious content of the incoming cards. Alternatively, if the plaintiff prefers commercially printed religious cards over the homemade variety but cannot find sufficiently solemn cards at the commissary, he can request individualized approval from the director of religious services to purchase otherwise

[19] The testimony and exhibits established that suboxone and certain other drugs can be concealed in decorative materials (script or drawings made with crayon, colored pencil, or glitter) used in cards and artwork mailed to inmates. See, e.g., Defendants' Exhibits A and B.

unavailable religious cards, pursuant to administrative directive 10.8 (5) (I). See [part I of this opinion].

The court also finds that there is no evidence indicating that it would be practicable for the department to take reasonable steps to accommodate the asserted right to blank prayer cards while still safeguarding prison security. There are no practical, cost-effective means for individually testing or inspecting the cards and envelopes for drugs like suboxone. Nor have the defendants suggested how the prison authorities might mitigate the dangers arising from the underground economy that inevitably would accompany the unrestricted incoming flow of blank cards/envelopes to inmates. The department policy barring these items does not violate the plaintiff's constitutional right to free exercise of religion. See *Sadler* v. *Lantz*, supra, 2011 WL 4561189, *7; *Spruytte* v. *Feighner*, Docket No. 93-2009, 1994 WL 32669, *1 (6th Cir. February 4, 1994) ("Michigan Department of Corrections Policy Directive PD-BCF-63.03 requires prisoners to purchase items only from authorized vendors. [The plaintiff's] parents, who are not authorized vendors, sent him the greeting card in the mail. The defendants' refusal to allow [the plaintiff] to receive the card did not infringe upon [his] constitutional rights."); *Avery* v. *Powell*, 806 F. Supp. 7, 10–11 (D.N.H. 1992) (upholding constitutionality of prison policy prohibiting inmates from obtaining blank greeting cards except from authorized vendors).

The court reaches the same conclusion with respect to the department's ban on newspapers or magazines sent from sources other than the publisher. For much the same reason that incoming mail containing books must be mailed to inmates from presumptively legitimate commercial sources (publisher, book club or bookstore), it makes sense that the department has seen fit to impose similar restrictions on newspapers and magazines. See, e.g., *Ward* v. *Washtenaw County Sheriff's Dept.*, 881 F.2d 325, 328–30 (6th Cir. 1989)

(upholding constitutionality of prison's "publisher-only" restriction on magazines); *Hurd* v. *Williams*, 755 F.2d 306, 307–308 (3d Cir. 1985) (upholding constitutionality of prison's "publisher-only" restriction on newspapers and periodicals); *Kines* v. *Day*, 754 F.2d 28 (1st Cir. 1985) (upholding constitutionality of prison's "publisher-only" restriction on hardcover, softcover, and newspaper publications); cf. *Minton* v. *Childers*, supra, 113 F. Supp. 3d 803 ("[t]he [c]ourt concludes that the [prison] directive banning incoming used books not sent directly by the publisher is not unconstitutional [under *Turner*]"); *Walker* v. *Calderon*, supra, 1997 WL 703774, *3 ("[a]pplying the *Turner* analysis to the ban on the receipt of books mailed by correspondents other than approved or verified vendors, the [c]ourt finds first that the regulation is rationally connected to the prison's concerns about contraband being smuggled into the prison in book packages to which third parties have had physical access").

Newspapers and magazines, unlike books, usually do not have bindings, but they do contain voluminous densely printed pages, and this physical characteristic justifies the source restriction imposed by the department. See *Allen* v. *Coughlin*, 64 F.3d 77, 79 (2d Cir. 1995) (observing that "bulk" of newspaper makes it difficult to inspect for prohibited content and contraband in prison setting).[20] The plaintiff does not claim that he is unable to order a subscription to The Catholic Transcript or any of the other religious (or nonreligious) newspapers he wishes to read. The publications are readily available to him. His claim is solely based on the notion that he should be able to receive these publications from sources other than the publisher. On this

[20] *Allen* v. *Coughlin*, supra, 64 F.3d 77, uses this very point to distinguish between "publisher-only" rules as applied to entire newspapers, which pass constitutional muster under *Turner*, and a rule that would extend the publisher only rule to newspaper clippings, which the United States Court of Appeals for the Second Circuit suggests would be impermissible under *Turner* due to the relative ease of inspecting clippings. Id., 80–81. Newspaper clippings are not at issue in this case.

evidentiary record, the claim is not viable under *Turner*. There is no need to repeat the entire analysis again. See [part II A of this opinion].

To summarize, the plaintiff has failed to carry his burden to establish any violation of his first amendment rights. The challenged department policies, on this record, pass constitutional muster under the *Turner* analysis.

B

Due Process and Equal Protection

The plaintiff's substantive due process claim rests on his assertion that he has been "deprive[d]" of his Catholic religious faith by the department as a result of its refusal to deliver the used books to study for the priesthood and the prayer cards containing statements of faith central to his religious beliefs. See, e.g., Plaintiff's Response to Defendants' Posttrial Briefs and Facts, dated June 23, 2017, at 29. He argues that the department's practices are "sadistic and evil," and says that the department is operating a "concentration camp that has no respect for human rights, dignity, respect for any human life." Id. The plaintiff's substantive due process claim fails for two reasons. First, the Supreme Court has instructed that "[w]here a particular [a]mendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that [a]mendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." (Internal quotation marks omitted.) *County of Sacramento* v. *Lewis*, 523 U.S. 833, 842, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998); see also *Southerland* v. *City of New York*, 680 F.3d 127, 142–43 (2d Cir. 2012), cert. denied, 568 U.S. 1150, 133 S. Ct. 980, 184 L. Ed. 2d 773 (2013). The plaintiff's claims in this case are fundamentally grounded in rights defined by the first amendment. His claims based on religious freedom and freedom of speech therefore should not be reevaluated under substantive due process principles.

Second, even if (or to the extent that) the plaintiff's allegations warrant independent consideration as substantive due process claims, no violation has occurred on these facts. A person's substantive due process right under the fourteenth amendment is violated when the government's conduct "shocks the conscience." See, e.g., *Velez* v. *Levy*, 401 F.3d 75, 93 (2d Cir. 2005) (substantive due process is violated by governmental conduct that "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience," quoting *County of Sacramento* v. *Lewis*, supra, 523 U.S. 848 n.8 (internal quotation marks omitted)). Although no objective measure has been developed to identify such a violation with scientific precision, it is understood that "malicious and sadistic" abuses of power by government officials, intended to "oppress or to cause injury," and designed for no legitimate government purpose, "unquestionably shock the conscience." (Internal quotation marks omitted.) *Velez* v. *Levy*, supra, 94. The doctrine is designed to protect the individual "against . . . the exercise of power without any reasonable justification in the service of a legitimate governmental objective . . . ." (Citation omitted.) *County of Sacramento* v. *Lewis*, supra, 846.

The record is devoid of any evidence supporting the plaintiff's substantive due process claim. In prison, he remains free to pray and believe as he wishes, attend religious services, abide by religious dietary rules, purchase religious texts (liturgical, theological, legal, historical, and otherwise), and read those texts, virtually to his heart's content. The sole limitation is that the purchased books must be available from a commercial seller in new condition. This restriction does not shock the court's conscience. To the contrary, it appears to be, at most, a relatively insignificant constraint. The plaintiff is fortunate to have the financial resources to purchase new books, religious and nonreligious alike, from any publisher or bookstore that sells books to

the public. He clearly has the intelligence and practical ability to arrange for such purchases, and has done so during his incarceration. Or he can ask friends and family to place the order for him. He also can subscribe to religious newspapers and have them sent by the publisher to his prison address. Or, again, he can have friends and family make those arrangements for him. He can purchase greeting cards from the commissary or request permission from the religious director to buy more religiously minded cards from other sources, or he can make his own customized prayer cards using materials available to him for correspondence with the outside world.

The court does not wish to trivialize the plaintiff's feeling, expressed so intensively in his briefs and other submissions, that he is subject to severe restrictions on his liberty while incarcerated. He must appreciate, however, that loss of liberty is largely the point of incarceration as a criminal sanction. In his case, that period of confinement is extremely lengthy, and it seems likely that he must confront, on a daily basis, the harsh and painful reality that he will spend most or all of his remaining life behind bars, under near constant surveillance and subject to the strict control of prison rules enforced by prison guards. The company he keeps, moreover, consists of other inmates similarly situated in many respects. At times, the plaintiff undoubtedly must feel very lonely, indeed. He also must live with the heavy burden of his particular crime, the killing of his father. This combination of factors may explain, at least in part, his (re)turn to religion.

Gawlik cannot be blamed for feeling frustrated and even dehumanized by his circumstances, and it would not be surprising if these circumstances have made him peculiarly sensitive to the sting of certain restrictions, as applied to him. His inability to order a used book on a particular subject, for example, may be highly cathected in a way that fuels his sense of outrage. Perhaps not. But whatever the reason, it is clear that the

plaintiff's own personal sense of right and wrong seems genuinely shocked by the deprivation of which he complains. His feelings are not shared by the judicial conscience charged with safeguarding substantive due process, certainly not on this record.

For the reasons addressed in the preceding paragraph, Gawlik can be forgiven for the inapt and wildly inaccurate comparison contained in his brief, quoted above, in which he likens his conditions to those in a "concentration camp." He should be reminded that he sits in prison, not because of his religion, ethnicity or race, but because he killed a man. Out of respect for the historical record, and in recognition of his own personal role in creating his current state of deprivation, it seems fair to ask him to acknowledge the fundamental differences between his present circumstances and those existing at the "concentration camps" to which he refers.

The plaintiff's procedural due process claim focuses on two alleged deficiencies in the department's treatment of his mail.[21] The first relates to the alleged failure of department staff, on occasion, to follow the department's own written rules requiring staff to notify the plaintiff that his incoming mail had been rejected. See Administrative Directive 10.7 (4) (G) (2). The second involves allegations that the Cheshire staff violated applicable procedures by rejecting the used books sent to the plaintiff without complying with the "media review procedures" set forth in administrative directive 10.7 (4) (G). Neither of these constitutional claims has merit.

A procedural due process claim must be based on the deprivation of a constitutionally protected liberty

[21] Additional procedural grievances are also mentioned in the plaintiff's briefs, but it has been difficult to discern the precise contours of the plaintiff's procedural due process claims, in part because the plaintiff's written presentation contains passing references to certain factual allegations made in multiple, partially duplicative filings. The court has done its best to identify the specific procedural due process claims for adjudication.

or property interest. See, e.g., *Kentucky Dept. of Corrections* v. *Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989) ("The types of interests that constitute liberty and property for [f]ourteenth [a]mendment purposes are not unlimited; the interest must rise to more than an abstract need or desire . . . and must be based on more than a unilateral hope . . . . Rather, an individual claiming a protected interest must have a legitimate claim of entitlement to it. Protected liberty interests may arise from two sources—the [d]ue [p]rocess [c]lause itself and the laws of the [s]tates." (Citations omitted; internal quotation marks omitted.)). Numerous doctrinal principles have been developed over the years to guide the analysis of procedural due process claims arising in the prison context. The oft-repeated starting point is the observation that "[although] prisoners do not shed all constitutional rights at the prison gate . . . [l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." (Citation omitted; internal quotation marks omitted.) *Sandin* v. *Conner*, 515 U.S. 472, 485, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). Under *Sandin*, which involved claims relating to prison disciplinary proceedings, the court held that inmates are not entitled to procedural due process protections unless the disciplinary measure imposes an "atypical and significant hardship on the inmate *in relation to the ordinary incidents of prison life*." (Emphasis added.) Id., 484. This standard has been applied to a wide variety of due process claims made by prisoners since *Sandin* was decided in 1995. See, e.g., *Proctor* v. *LeClaire*, 846 F.3d 597, 608 (2d Cir. 2017) (reciting district judge's unchallenged conclusion that confinement of prisoner in segregated housing for more than [one] decade gave rise to cognizable liberty interest under *Sandin*); *Graziani* v. *Murphy*, No. 3:11-CV-1615

(RNC), 2012 WL 2785907, *3 (D. Conn. July 5, 2012) (holding under *Sandin* that complaint failed to state procedural due process claim arising from suspension of plaintiff's eligibility for contact visits in prison).

Sandin also makes it clear that the due process clause does not constitutionalize all ostensibly "mandatory" internal rules and directives governing prison life. See *Sandin* v. *Conner*, supra, 515 U.S. 483–84 (expressly rejecting idea that constitutionally protected liberty interest in prison context is created by mandatory language in prison regulations). This holding is consistent with the well settled view that a procedural due process violation is not triggered merely upon a showing, without more, that prison officials have failed to abide by the correctional system's own written grievance procedures: "Courts of appeal have held that inmates do not have a constitutionally protected liberty interest in having prison officials comply with institutional grievance procedures. See, e.g., *Grieveson* v. *Anderson*, 538 F.3d 763, 772 (7th Cir. 2008); *Thomas* v. *Warner*, 237 Fed. Appx. 435, 437–38 (11th Cir. 2007); *Rhoades* v. *Adams*, 194 Fed. Appx. 93, 95 (3d Cir. 2006); *Geiger* v. *Jowers*, 404 F.3d 371, 373–74 (5th Cir. 2005); *Ramirez* v. *Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) [cert. denied sub nom. *McEnroe* v. *Ramirez*, 541 U.S. 1063, 124 S. Ct. 2388, 158 L. Ed. 2d 963 (2004)]; *Buckley* v. *Barlow*, 997 F.2d 494, 495 (8th Cir. 1993) (per curiam). Thus, to the extent that the complaint may be construed to assert a due process claim regarding any institutional grievances, the complaint fails to state a cognizable claim." *Gaskin* v. *Albreski*, No. 3:11-cv-834 AWT, 2012 WL 827073, *2 (D. Conn. March 8, 2012); accord, e.g., *Fernandez* v. *Armstrong*, No. 3:02-CV-2252 (CFD), 2005 WL 733664, *9 (D. Conn. March 30, 2005) (holding that failure of department staff to abide by grievance procedures set forth in administrative directive 9.6, standing alone, did not state cognizable claim under federal law).

The defendants argue that the plaintiff's procedural due process claims in the present case are foreclosed by *Sandin* because the limitations imposed on the plaintiff's access to reading materials and incoming mail fall far short of the type of "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" necessary to trigger due process protections. *Sandin* v. *Conner*, supra, 515 U.S. 484.[22] The court agrees that the plaintiff's procedural due process claims fail under the *Sandin* standard.

Less certain, however, is that the *Sandin* standard encompasses the entire due process analysis applicable to claims implicating first amendment rights, as the plaintiff's claims do. The question arises because the Supreme Court previously has held that the censorship of inmate mail by prison authorities must be accompanied by certain basic due process protections. See *Procunier* v. *Martinez*, 416 U.S. 396, 418–19, 94 S.

[22] The *Sandin* standard was formulated to determine the existence of a cognizable "liberty" interest entitled to due process protection. The defendants contend that courts use the same standard in the prison context to decide claims based on an alleged deprivation of a property interest. See Defendants' Posttrial Brief, dated May 26, 2017, at 31–32 (citing cases). Although the case law relied on by the defendants is not crystal clear on this point, it makes sense that an inmate's property based due process claim normally must be analyzed through the lens of the plaintiff's liberty based entitlements because prisoners largely forfeit the right to possess property while incarcerated and, therefore, an inmate often will not be able to allege deprivation of a "property interest" within the usual due process framework. See *Board of Regents* v. *Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) (providing definition of "property interest" in due process analysis). A constitutionally protected "property interest" outside of prison, in other words, is often prohibited "contraband" inside prison. See Administrative Directive 6.10 (3) (B) (defining "contraband" as anything "not authorized to be . . . in an inmate's possession"). At least for doctrinal purposes, it seems sensible in this context to view the "liberty" (as opposed to the "property") component of the due process clause as the source of any limits on the state's authority to curtail an inmate's right to possess property. See also *Hudson* v. *Palmer*, 468 U.S. 517, 533, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) (prisoner's property rights adequately protected by meaningful postdeprivation procedures under state law).

Ct. 1800, 40 L. Ed. 2d 224 (1974) ("The District Court [held that due process] required that an inmate be notified of the rejection of a letter written by or addressed to him, that the author of that letter be given a reasonable opportunity to protest that decision, and that complaints be referred to a prison official other than the person who originally disapproved the correspondence. These requirements do not appear to be unduly burdensome, nor do appellants so contend."). Although the first amendment analysis adopted in *Procunier* has since been abandoned in part; see *Thornburgh* v. *Abbott*, supra, 490 U.S. 413–14 (overruling *Procunier*'s first amendment analysis as it relates to incoming mail but not outgoing mail); at least some courts have held that the due process component of *Procunier* remains good law, such that inmate mail cannot be censored without notice to the inmate and a right to appeal the rejection to a prison official other than the original decision maker. See, e.g., *Krug* v. *Lutz*, 329 F.3d 692, 697 (9th Cir. 2003); *Witherow* v. *Crawford*, 468 F. Supp. 2d 1253, 1271 (D. Nev. 2006).

There is no need here to definitively resolve this legal question.[23] Even assuming that the plaintiff's right to receive incoming mail is entitled to some procedural due process protection after *Sandin*, the court finds that he received all the process that was due under the circumstances. See *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (enumerating factors to be considered). The plaintiff received abundant written notifications from the mail room staff at Cheshire informing him that the blank prayer cards, used books, repackaged newspapers, and other items were being rejected. The plaintiff filed multiple grievances challenging the rejections and explaining why, in his view, the withholding of mail was improper, unjustified and illegal. The grievances were processed up the chain of command; none succeeded. The fact

[23] The parties do not squarely address the issue in their briefing.

that the plaintiff was displeased with the result, of course, does not establish a due process violation.

The plaintiff complains that he was not given written notification of rejection with respect to every single undelivered item of mail, and it appears to be the case that the mail room did not always provide notice of rejection on every single occasion due to the volume and/or frequency of prohibited items (prayer cards/envelopes in particular). The fact remains that the plaintiff received written notice sufficient to make him fully aware of the basic nature and scope of the interdiction: he knew that the mail room staff was not delivering his mail containing blank prayer cards, envelopes, used books, nonsubscription newspapers, and artwork containing crayon and/or glitter. He received many notices and filed many grievances. At least on the facts of this case, when the plaintiff was made aware by written notice of the nature and scope of the challenged conduct, due process did not require item by item notification of every item. To require redundant notification under these circumstances would serve no purpose except to impose a significant, unnecessary administrative burden on prison staff.

The plaintiff also contends that his due process rights were violated because the three used books ordered by him were rejected without review by the "media review board" (MRB) under the procedures set forth in administrative directive 10.7. This argument is based on a fundamental misunderstanding about the function of the MRB, which exists to promulgate guidelines and conduct substantive review and censorship of incoming publications that have been rejected on initial review based on the content of those incoming materials. Thus, for example, if a book or other incoming publication is rejected by mail room staff because of inappropriate sexual content, or because it contains information about making weapons or alcohol, or depicts methods of escape from correctional facilities, the initial decision to reject the item is subject to review by the MRB.

See Administrative Directive 10.7 (4) (N) (1) and (2). The MRB process played no role in the plaintiff's case because the used books were not rejected based on their substantive content—they were rejected because they were in used condition. See [parts I and II A of this opinion]. The plaintiff was not entitled to MRB review on these facts.[24]

The plaintiff's equal protection claim is not well elaborated, but the crux of his argument is that the defendants treated incoming mail of a "religious" nature differently than secular mail. There is no evidentiary basis for this claim. To the contrary, it is clear to the court that all of the items at issue were rejected based on neutral criteria relating to legitimate concerns regarding institutional security and safety. Religious content had nothing to do with it. There is no credible evidence that otherwise similar nonreligious material (e.g., secular used books, secular blank greeting cards from outside sources, or secular repackaged newspapers) were treated any differently. There simply was no evidence of discrimination—or discriminatory intent. See *Arlington Heights* v. *Metropolitan District Housing Corp.*, 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) ("[p]roof of . . . discriminatory intent or purpose is required to show a violation of the [e]qual [p]rotection [c]lause").

C

Plaintiff's Statutory Claims

1

Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc

Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc et seq., states: "No government shall impose a substan-

[24] The plaintiff's misunderstanding may have been fueled by Officer Wislocki's mistaken use of the incorrect "Publication Rejection" form on one or more occasions.

tial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1 (a) (2012).

Under the statute's burden-shifting framework, the plaintiff first must show that (1) the relevant religious exercise is "grounded in a sincerely held religious belief," and (2) the government's action or policy "substantially burden[s] that exercise . . . ." *Holt* v. *Hobbs*, 574 U.S. 352, 361, 135 S. Ct. 853, 190 L. Ed. 2d 747 (2015). If the plaintiff carries this threshold burden, the burden shifts to the government to show that the challenged action or policy is (1) in furtherance of a compelling governmental interest and (2) the least restrictive means of furthering that interest. Id., 362. Despite RLUIPA's express purpose to protect the religious observances of individualized persons, the statute nevertheless anticipated that courts entertaining RLUIPA challenges "would accord 'due deference to the experience and expertise of prison and jail administrators.' " *Cutter* v. *Wilkinson*, 544 U.S. 709, 717, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005) (quoting 146 Cong. Rec. 16,698, 16,699 (2000), joint statement of Senator Orrin G. Hatch and Senator Edward M. Kennedy). "Due deference," of course, does not mean "unquestioning" acceptance. *Holt* v. *Hobbs*, supra, 364.

The court does not question the sincerity of the plaintiff's religious beliefs. He has failed to show, however, that the policies and practices at issue have imposed any meaningful, much less "substantial," burden on the exercise of his religion. There is no evidence that the defendants have done anything that directly or indirectly requires or compels or pressures the plaintiff to

"engage in conduct that seriously violates his religious beliefs"; *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014); or that they have done anything that would prevent him from participating in any activity or practice necessary for him to partake in religious exercise. See, e.g., *Holt* v. *Hobbs*, supra, 574 U.S. 361 (prison policy requiring plaintiff to shave his beard, contrary to religious law, substantially burdened religious exercise). It may cause the plaintiff a slight inconvenience to order new books rather than used books on a particular subject, or order newspapers directly from the publisher, or make his own religious greeting cards, but these are truly de minimis constraints and cannot fairly be considered to "burden" the exercise of his religion. There is nothing in the record to support a finding that the unavailability of the books, newspapers or cards at issue actually impairs or burdens the plaintiff's religious exercise in any material or meaningful respect. See, e.g., *Daker* v. *Warren*, 660 Fed. Appx. 737, 746 (11th Cir. 2016) (per curiam) (holding that prisoner failed to establish RLUIPA violation in connection with prison's ban on hardcover books because, "[a]lthough [the plaintiff] listed some religious books that he could only obtain in hardcover format . . . he did not explain or show how the inability to acquire these books constituted a substantial burden on his religious exercise" (citation omitted)), cert. denied, U.S. , 138 S. Ct. 94, 199 L. Ed. 2d 60 (2017), and cert. denied, U.S. , 138 S. Ct. 98, 199 L. Ed. 2d 60 (2017). The plaintiff is offended by the defendants' assertion of authority, which makes certain items available by mail only in accordance with specified security related procedures, and he might derive religious gratification in having access to the prohibited items (used books and prayer cards). This sense of subjective frustration, however, and the plaintiff's preference for alternative or additional means of religious gratification, do not establish that the prison

policies at issue substantially burden the plaintiff's free exercise of religion. See, e.g., *Robinson* v. *Jackson*, 615 Fed. Appx. 310, 313–14 (6th Cir. 2015) (holding that prison policy of providing Muslim inmate vegetarian entrees without providing Halal meat entrees did not substantially burden free exercise because vegetarian entrees meet requirements of Halal and, therefore, meals do not violate religious beliefs, despite Halal meat entrees being preferred).

2

Connecticut Act Concerning Religious Freedom

Connecticut has adopted a "Little RFRA," the Act Concerning Religious Freedom (ACRF), General Statutes § 52-571b.[25] The ACRF prohibits the state from burdening a person's exercise of religious freedom under [article first, § 3] of the Connecticut constitution, even if the burden results from a rule of general applicability; General Statutes § 52-571b (a); unless the state can demonstrate that application of the burden to the person (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest. General Statutes § 52-571b (b).

The statute does not contain definitions of its operative terms. In *Rweyemamu* v. *Commission on Human Rights & Opportunities*, 98 Conn. App. 646, 659, 911 A.2d 319 (2006), cert. denied, 281 Conn. 911, 916 A.2d 51, cert. denied, 552 U.S. 886, 128 S. Ct. 206, 169 L. Ed. 2d 144 (2007), our Appellate Court derived a nuanced

[25] The term "Little RFRA" is the colloquial name given to the statutes enacted by various states following the passage of the federal Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq. According to the National Conference of State Legislatures, twenty-one states (including Connecticut) had passed such laws as of 2015. See http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (last consulted August 22, 2018).

understanding of the statute's key provisions, including the prohibition against a state imposed " 'burden [on] a person's exercise of religion' "; id., 656 n.7; by reviewing the legislative history in light of related doctrinal developments taking place at the federal level. Id., 659–64. Two important points emerge from the *Rweyemamu* analysis. First, the "overarching purpose" of the statute; id., 660; was to restore free exercise jurisprudence to its status prior to the United States Supreme Court's decision in *Employment Division, Dept. of Human Resources* v. *Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). See *Rweyemamu* v. *Commission on Human Rights & Opportunities*, supra, 660–61.[26] Second, the term " 'exercise of religion' " in subsections (a) and (b) of the ACRF; id., 656 n.7; refers specifically to religious rituals and practices (as opposed to religious beliefs). See id., 664 ("[b]y protecting 'free exercise' with the strict scrutiny test of subsections (a) and (b), the legislature intended to provide greater protection to religious *practices*, such as the ritualistic use of peyote at issue in *Smith*" (emphasis in original)); id., 664 n.10 (citing to legislative history to provide examples of kind of free exercise practices, such as lighting of candles in church, receiving of wine at Holy Communion, and wearing yarmulke in court).

[26] *Smith* held that the constitutionality of facially neutral laws of general application would be reviewed using the "rational basis" standard, rather than the heightened "strict scrutiny" standard, under the free exercise clause. The Connecticut legislature in the ACRF, like the federal Congress in the [Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq.], revived the applicability of the pre-*Smith* "strict scrutiny" standard. The goal of restoring the status quo ante is clear from the Connecticut statute's legislative history: "[T]o be absolutely clear, this does not—this bill does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the compelling interest test prior to the *Smith* case." (Internal quotation marks omitted.) 36 S. Proc., Pt. 8, 1993 Sess., p. 2785, remarks of Senator George C. Jepsen, quoted in *Rweyemamu* v. *Commission on Human Rights & Opportunities*, supra, 98 Conn. App. 660–61.

The clarification provided in *Rweyemamu* is useful and confirms that the plaintiff cannot prevail under the ACRF. There is no evidence that the prison policies under review in the present case impose any material burden on the plaintiff's "religious exercise" within the meaning of the statute. The plaintiff remains fully able to engage in the rituals, rites and practices of his chosen religion by attending mass, reading the Bible and other sacred texts, observing Lenten dietary restrictions, and so forth. On this record, the fact that the plaintiff cannot purchase the three out of print books, or receive newspapers and prayer cards from unauthorized sources, fails to establish any violation of the ACRF.

D

Plaintiff's Claim Under Uniform Administrative Procedure Act

The plaintiff's final argument is that the department's administrative directives at issue are invalid because they were not promulgated in accordance with the requirements of the UAPA. To adopt a regulation under the UAPA, an agency must comply with extensive procedural requirements, which include, among other things, legislative review and approval. See General Statutes § 4-168. The plaintiff contends that the department's failure to follow the required procedures under the UAPA renders the relevant administrative directives legally defective. This claim is without merit for a number of reasons.

The Appellate Court's holding in *Pierce* v. *Lantz*, 113 Conn. App. 98, 965 A.2d 576, cert. denied, 293 Conn. 915, 979 A.2d 490 (2009), which obviously binds this court, largely disposes of the plaintiff's argument. See also *Harris* v. *Armstrong*, Docket No. CV-03-0825678-S, 2009 WL 5342484, *3–5 (Conn. Super. December 7, 2009) (*Prescott*, *J.*) (following *Pierce* to uphold validity of department's administrative directive regarding outgoing mail). *Pierce* involved an inmate's challenges to

the validity of a department administrative directive relating to incoming mail restrictions, among other things: the plaintiff objected in particular to department "censorship" of publications depicting sexual activity between consenting adults. *Pierce* v. *Lantz*, supra, 100. He argued, as the plaintiff does here, that the relevant administrative directive—which, as in the present case, was also contained in administrative directive 10.7—had not been adopted as a "regulation" in accordance with the UAPA. Id. The Appellate Court rejected the claim. It reasoned that the administrative directive at issue represented a perfectly legitimate intra-agency interpretation and application of existing regulatory authority conferred on the department and its commissioner by General Statutes § 18-81 and various regulations promulgated thereunder. Id., 103–104.

Pierce points out, first of all, that § 18-81 expressly authorizes the Commissioner of Correction to "establish rules for the administrative practices and custodial and rehabilitative methods of [such correctional] institutions . . . in accordance with recognized correctional standards." General Statutes § 18-81. The decision also emphasizes that the administrative guidelines at issue fit within an existing regulatory framework, which not only confers general authority upon the commissioner to administer and direct department operations, including supervision and direction of department facilities and institutions under department control, but also contains provisions specifically authorizing inspection and rejection of incoming mail for safety and security reasons. *Pierce* v. *Lantz*, supra, 113 Conn. App. 103–104 (discussing Regs., Conn. State Agencies § 18-81-1 (general authority), § 18-81-32 (authority to inspect and reject incoming mail) and § 18-81-39 (authority to review and reject incoming publications)). This statutory and regulatory framework, concludes the Appellate Court, "empowers the commis-

sioner to create such administrative directives for the administration and operation of the correctional institutions." Id., 104.

Pierce provides especially strong guidance here because it involved a challenge to the same administrative directive at issue in the present case, administrative directive 10.7, relating to restrictions on incoming mail. And, as *Pierce* observes, the core provisions of administrative directive 10.7 that authorize rejection of incoming mail and publications have been promulgated as regulations under the UAPA. See Regs., Conn. State Agencies §§ 18-81-32 and 18-81-39.[27] Administrative directive 10-7 contains more detailed guidance than the regulations, as one might expect, but the fundamental authority to inspect mail, and reject items posing a

[27] Section 18-81-32 of the Regulations of Connecticut State Agencies ("Incoming general correspondence") in pertinent part contains the following language, which also appears in administrative directive 10-7 (4) (G) (1) in essentially identical terms: "(a) Review, Inspection and Rejection. . . . All incoming general correspondence may be rejected if such review discloses correspondence or material(s) which would reasonably jeopardize legitimate penological interests, including, but not limited to, material(s) which contain or concern: (1) The transport of contraband in or out of the facility. . . . (10) Any other general correspondence, rejection of which is reasonably related to a legitimate penological interest." ("[c]ontraband" is defined in § 18-81-28 (b) of the Regulations of Connecticut State Agencies to mean "anything not authorized to be in an inmate's possession or anything used in an unauthorized or prohibited manner").

Section 18-81-39 ("Incoming publications and materials") contains the following language, which can also be found in administrative directive 10.7 (4) (N): "Requests for any local orders for books, magazines, newspapers, educational materials or periodicals shall be made through the school principal or other person as designated by the Unit Administrator who shall determine that the inmate is able to pay for such material(s). . . . An inmate may order hardcover books in new condition only from a publisher, book club, or book store." [Subsection] (a) of 18-81-39, "Procedures for Review of Publications and Sexually Explicit Materials," contains this general statement: "The Unit Administrator may reject a publication only if it is determined to be detrimental to the security, good order, or discipline of the facility or if it might facilitate criminal activity. The Unit Administrator may not reject a publication solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant."

potential threat to security, derives from the governing UAPA compliant regulatory framework.

A second, independent reason for rejecting the plaintiff's UAPA based argument is that General Statutes § 18-78a exempts "security and emergency procedures" promulgated by the department from the UAPA's procedural requirements. Section 18-78a (a) (1) provides in relevant part: "The provisions of chapter 54 [the UAPA] shall apply to the Department of Correction, except that in adopting regulations in regard to riot control procedures, security and emergency procedures, disciplinary action or classification the Department of Correction shall not be required to follow the procedures in sections 4-168, 4-168a, 4-168b, 4-172, 4-173, 4-174, and 4-176. . . ." The various administrative directives relied on by the defendants to reject the mail items at issue in the present case were "security" procedures within the meaning of § 18-78a (a) (1) and therefore are exempt from the procedural requirements of the UAPA. See *Beasley* v. *Commissioner of Correction*, 50 Conn. App. 421, 434–36, 718 A.2d 487 (1998) (holding that administrative directive relating to inmate classification was exempt from UAPA under § 18-78a (a) (1)), aff'd, 249 Conn. 499, 733 A.2d 833 (1999); *Harris* v. *Armstrong*, supra, 2009 WL 5342484, *5 (same holding with respect to administrative directive 10.7).

III

CONCLUSION

Judgment shall enter for the defendants. No costs.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION *v.* SONIA SYED ET AL.
(AC 41723)

Lavine, Bright and Devlin, Js.

Syllabus

The defendant appealed to this court from the judgment of strict foreclosure rendered by the trial court in favor of the second substitute plaintiff, W Co. The defendant initially executed a mortgage in favor of M Co.; J Co. then assigned the mortgage to itself, commenced this action, and thereafter filed a motion to substitute C Co. as the plaintiff. C Co. filed a motion for summary judgment as to liability, and the defendant opposed the motion, claiming that the note, which was endorsed in blank by M Co., was endorsed falsely by R, a former employee of the relevant department of M Co., who did not actually sign the note but, rather, someone else signed R's name or used a signature stamp bearing R's signature on the endorsement. The trial court granted C Co.'s motion for summary judgment as to liability and subsequently rendered judgment of strict foreclosure. *Held*:

1. The defendant could not prevail on her claim that the trial court improperly granted summary judgment as to liability, which was based on her claim that there were genuine issues of material fact concerning whether J Co. was the holder of the note at the time it commenced this action due to an invalid endorsement of the note by M Co.: the defendant's claim that, because the purported signature was not R's signature it was not an endorsement at all, was inconsistent with the broad definition of signature under the applicable statute (§ 42a-3-401 (b)), and the defendant did not dispute that the endorsement stamp was placed on the note by someone affiliated with M Co., the name of a former employee fell within the definition of § 42a-3-401 (b), and the fact that M Co. chose to use a stamp bearing the signature of a former employee was of no import to the analysis under § 42a-3-401 (b), which pertains to a bank's rights and obligations related to the note, rather than to one of the bank's former employees; accordingly, the stamped signature met the signature requirements for negotiable instruments and, because the endorsement did not identify a person to whom it made the instrument payable, the note was endorsed in blank, making it payable to the bearer and, thus, J Co., which was in possession of the original note, was entitled to the presumption that it was the owner of the debt with the right to enforce it.
2. The defendant's claim that the trial court improperly rejected her first and third special defenses when granting summary judgment as to liability was unavailing: by the defendant's own characterization, the first and third special defenses pertained to the issue of damages and not

to liability, and the court's determination that the special defenses failed to defeat summary judgment was isolated to the issue of liability, as there was no indication that the court disposed of the special defenses for purposes of challenging the amount of debt before it rendered judgment of strict foreclosure; moreover, at the hearing on the motion for a judgment of strict foreclosure, the defendant failed to raise these special defenses or challenges to the amount of debt owed and, therefore, could not attempt to use her challenge to the court's decision granting summary judgment as to liability as a vehicle to resurrect the special defenses she failed to raise during the hearing on the motion for a judgment of strict foreclosure.

3. The defendant could not prevail on her claim that the trial court improperly struck the fourth count of her amended counterclaim when granting summary judgment as to liability, which was based on her claim that the court incorrectly determined that the count of her counterclaim seeking attorney's fees pursuant to statute (§ 42-150bb), did not meet the transaction test set forth in the applicable rule of practice (§ 10-10): the defendant's claim mischaracterized the record because the court was not asked to strike the fourth count of her counterclaim, and the court's memorandum of decision contained no indication that it did so; moreover, the court highlighted the bizarre nature of the fourth count, in which the defendant claimed she was entitled to attorney's fees, and held that, even if such a right existed, the count had no reasonable nexus to the making, validity or enforcement of the mortgage note, and, accordingly, the court concluded that it was not precluded from granting summary judgment on that basis; thus, the court did not strike the count but, instead, analyzed the merits of the count and its potential effects on C Co.'s prima facie case of liability and concluded that the count was insufficient to preclude the granting of summary judgment as to liability.

Argued January 9—officially released April 28, 2020

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the named defendant filed a counterclaim; thereafter, Christiana Trust, A Division of Wilmington Savings Fund Society, FSB, as Trustee for Normandy Mortgage Loan Trust Series 2013-18, was substituted as the plaintiff; subsequently, the named defendant filed an amended counterclaim; thereafter, the court, *Sheridan*, *J.*, granted the substitute plaintiff's motion for summary judgment as to liability; subsequently, Wilmington Savings Fund Society, FSB, doing

business as Christiana Trust, as Trustee for Normandy Mortgage Loan Trust, Series 2017-1, was substituted as the plaintiff; thereafter, the court, *Cobb*, *J.*, rendered judgment of strict foreclosure, from which the named defendant appealed to this court. *Affirmed.*

John L. Radshaw III, for the appellant (named defendant).

Adam L. Avallone, for the appellee (second substitute plaintiff).

Opinion

BRIGHT, J. In this foreclosure action, the defendant Sonia Syed[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the second substitute plaintiff, Wilmington Savings Fund Society, FSB, doing business as Christiana Trust, as Trustee for Normandy Mortgage Loan Trust, Series 2017-1 (Wilmington). On appeal, the defendant claims that the trial court erroneously (1) granted the motion filed by the first substitute plaintiff, Christiana Trust, A Division of Wilmington Savings Fund Society, FSB as Trustee for Normandy Mortgage Loan Trust Series 2013-18 (Christiana Trust), for summary judgment as to liability, despite questions concerning whether the original plaintiff, JPMorgan Chase Bank, National Association (JPMorgan), was the holder of the note at the time it commenced this foreclosure action, (2) rejected the defendant's first and third special defenses when granting summary judgment as to liability, and (3) struck the defendant's fourth count of her amended counterclaim when it granted summary judgment as to liability. We affirm the judgment of the trial court.

[1] Sonia Syed is also known as Sonia Haque. Also named as defendants in the complaint were JPMorgan Chase Bank, National Association, as attorney in fact for the Federal Deposit Insurance Corporation, as receiver for Washington Mutual Bank, formerly known as Washington Mutual Bank, FA; Citibank (South Dakota), N.A.; and state of Connecticut, Department of Revenue Services. The only defendant relevant to this appeal, however, is Sonia Syed, whom we refer to as the defendant.

The following facts and procedural history are relevant to our disposition of this appeal. The defendant is the borrower on a note and the mortgagor of a mortgage, which initially were executed in favor of Washington Mutual Bank, FA (Washington Mutual), on property located at 1200 Neipsic Road in Glastonbury (property). JPMorgan, as attorney in fact for the Federal Deposit Insurance Corporation, as receiver for Washington Mutual, assigned the mortgage to itself via an assignment dated April 17, 2013.

On May 17, 2013, JPMorgan commenced the present foreclosure action by service of process on the defendant. On December 2, 2014, JPMorgan filed a motion to substitute Christiana Trust as the first substitute plaintiff, which the court granted on December 18, 2014. On January 8, 2014, JPMorgan executed an assignment of mortgage to Christiana Trust. On March 12, 2015, the defendant filed an answer with eighteen affirmative defenses and a two count counterclaim. On May 5, 2015, the defendant filed a disclosure of defense, alleging that Christiana Trust was not the party entitled to collect the debt and enforce the mortgage.

On May 28, 2015, Christiana Trust filed a motion to strike the defendant's special defenses and counterclaim, which the court granted on July 13, 2015. On July 28, 2015, the defendant filed an amended answer, with seven special defenses, and, on September 9, 2015, she filed an amended counterclaim, in which she alleged four counts. On January 5, 2016, Christiana Trust filed a motion for summary judgment as to liability, which was opposed by the defendant on the grounds that she had viable special defenses and a counterclaim, and that the note, "which was endorsed in blank by [Washington Mutual] was endorsed falsely by an individual named Cynthia Riley, who was not who she said she was at the time of endorsement and/or was not an employee

of [Washington Mutual] at the time of the endorsement, and/or did not actually sign the document and someone else signed her name or used a signature stamp on the endorsement."

On January 2, 2018, the court, in a thorough memorandum of decision, concluded that the defendant's special defenses and counterclaim did not create a triable issue as to the defendant's liability to Christiana Trust and that there was no dispute that JPMorgan was the holder of the note at the time it commenced this foreclosure action. Accordingly, the court granted Christiana Trust's motion for summary judgment as to liability. On January 26, 2018, Christiana Trust filed a motion for judgment of strict foreclosure.

On May 2, 2018, Christiana Trust filed a motion to substitute Wilmington as the second substitute plaintiff, which the court granted on May 14, 2018.[2] Also on May 14, 2018, the court rendered a judgment of strict foreclosure, with law days commencing on September 17, 2018. This appeal followed.

On appeal, the defendant claims that the court erred in granting Christiana Trust's motion for summary judgment as to liability. Specifically, the defendant claims that the trial court improperly granted summary judgment as to liability despite questions concerning whether JPMorgan was the holder of the note at the time that it commenced this foreclosure action, that it improperly rejected the defendant's first and third special defenses, and that it improperly struck the defendant's fourth count of her counterclaim. We disagree.

[2] The May 2, 2018 motion to substitute contained as exhibits a September 5, 2017 assignment of mortgage from Christiana Trust to Series 1 of Normandy Mortgage Depositor Company, LLC (Series 1), which was filed on the Glastonbury land records on October 31, 2017, and another assignment of mortgage, executed on September 9, 2017, from Series 1 to Wilmington, which also was filed on the Glastonbury land records on October 31, 2017.

"The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, 132 Conn. App. 629, 637–38, 33 A.3d 783 (2011), aff'd, 308 Conn. 146, 61 A.3d 485 (2013).

"[T]o establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense." (Citations omitted; internal quotation marks omitted.) *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 176, 73 A.3d 742 (2013).

I

The defendant claims that the court improperly rendered summary judgment despite the existence of a genuine issue of material fact regarding whether JPMorgan was the holder of the note at the time it commenced this foreclosure action. The defendant specifically argues that, due to an invalid endorsement of the note by Washington Mutual, JPMorgan and the subsequent substitute plaintiffs were not holders entitled to enforce the note.[3] We are not persuaded.

[3] The defendant also notes that "[t]he week before judgment of strict foreclosure [was] entered, [Christiana Trust] filed a motion to have Wilmington substituted in as [the] plaintiff. The documents filed with the motion

"In Connecticut, one may enforce a note pursuant to the [Uniform Commercial Code (UCC) as adopted in General Statutes § 42a-1-101 et seq.] . . . . General Statutes § 42a-3-301 provides in relevant part that a [p]erson entitled to enforce an instrument means . . . the holder of the instrument . . . . When a note is endorsed in blank, the note is payable to the bearer of the note. . . . A person in possession of a note endorsed in blank, is the valid holder of the note. . . . *Therefore, a party in possession of a note, endorsed in blank and thereby made payable to its bearer, is the valid holder of the note, and is entitled to enforce the note.* . . .

"In *RMS Residential Properties, LLC* v. *Miller*, [303 Conn. 224, 32 A.3d 307 (2011), overruled on other grounds by *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 71 A.3d 492 (2013)], our Supreme Court stated that to enforce a note through foreclosure, a holder must demonstrate that it is the owner of the underlying debt. *The holder of a note, however, is presumed to be the rightful owner of the underlying debt,*

to substitute [however] reflect that possession or ownership changed while summary judgment was pending, nearly one year prior, after summary judgment [was] filed, before oral argument and before decision. The [defendant] objected as [to] the substitution of Wilmington, as the dates of the assignment further undercut that [Christiana Trust] was really the holder or the party entitled to enforce the note . . . ." According to the defendant, "[t]he later filed motion to substitute is further evidence of the [plaintiff's] chicanery." Other than setting forth the underlying facts and making bald assertions as to their significance, the defendant offers no legal analysis or any authority supporting her argument. Thus, to the extent that the defendant offers this argument as a separate ground for reversing the court's judgment, we decline to review it as inadequately briefed. See *Bank of New York Mellon* v. *Horsey*, 182 Conn. App. 417, 439, 190 A.3d 105 (this court need not address issues that are inadequately briefed), cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018). Nevertheless, we do note that the law is quite clear that an assignee of a mortgage is entitled to pursue a previously instituted foreclosure action in the name of the assignor and does not need to be substituted formally as a party to the action. See, e.g., *Citibank, N.A.* v. *Stein*, 186 Conn. App. 224, 244, 199 A.3d 57 (2018), cert. denied, 331 Conn. 903, 202 A.3d 373 (2019); *Dime Savings Bank of Wallingford* v. *Arpaia*, 55 Conn. App. 180, 184, 738 A.2d 715 (1999).

and unless the party defending against the foreclosure action rebuts that presumption, the holder has standing to foreclose the mortgage. A holder only has to produce the note to establish that presumption. The production of the note establishes his case prima facie against the [*defendant*] *and he may rest there. . . . It* [*is*] *for the defendant to set up and prove the facts* [*that*] *limit or change the plaintiff's rights*." (Citations omitted; emphasis in original; internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Fitzpatrick*, 190 Conn. App. 773, 784–85, 212 A.3d 732, cert. denied, 333 Conn. 916, 217 A.3d 1 (2019).

The defendant attempts to rebut the presumption that JPMorgan, as the party in possession of the note, was the rightful owner of the debt and was therefore entitled to foreclose on the property securing it. She argues that the presumption of ownership only exists when the note is endorsed in blank and contends that, due to Washington Mutual's allegedly fraudulent or otherwise invalid endorsement, the requirement for the presumption to apply was not met. According to the defendant, JPMorgan's simple possession of the note was insufficient to establish its right to enforce the note. To support this claim, the defendant relies on the fact that the endorsement by Washington Mutual was made using the name and signature stamp of Cynthia Riley, a former employee of the bank who was no longer employed at the time of the endorsement.[4] The defendant argues that because the endorsement bore the signature of an individual who no longer had the capacity to make endorsements on behalf of Washington Mutual, the note was never properly negotiated to JPMorgan and, therefore, remained a specially

[4] In her objection to the motion for summary judgment, the defendant included excerpts of a deposition of Riley from an unrelated case in another jurisdiction, in which she admitted to never signing any endorsements, that there were multiple stamps with her name and signature, and that her staff used them to endorse notes. She also stated that she left the department in November, 2006, which precedes the date of the subject note.

endorsed note payable only to Washington Mutual, rather than a blank endorsement payable to the bearer. The defendant contends that, consequently, neither JPMorgan nor any of the subsequent substitute plaintiffs could have been holders entitled to enforce the note.

Wilmington argues that Riley's employment status was immaterial to the validity of the signature and, therefore, the endorsement was unaffected by the fact that it was made using Riley's signature stamp even though she was no longer employed by Washington Mutual. We agree with Wilmington.

General Statutes § 42a-3-204 (a) defines an endorsement as "a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (i) negotiating the instrument,[5] (ii) restricting payment of the instrument, or (iii) incurring endorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an endorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than endorsement." (Footnote added.) The official commentary to § 42a-3-204 clarifies that "[t]he general rule is that a signature is an indorsement[6] if the instrument does not indicate an unambiguous intent of the signer not to sign as

[5] General Statutes § 42a-3-201 (a) defines " '[n]egotiation' " as "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder."

[6] We note that the difference in spelling of "endorse" and "indorse" is a distinction without significance; the terms have the same meaning. See Black's Law Dictionary (11th Ed. 2019) p. 925 (defining "indorse" to mean: "To sign (a negotiable instrument) . . . either to accept responsibility for paying an obligation memorialized by the instrument or to make the instrument payable to someone other than the payee. —Also spelled *endorse*.") Because the General Statutes use "endorse," we have adopted that spelling throughout this opinion except where we quote from sources that have adopted the alternative spelling.

an indorser." An endorsement that does not identify a person to whom it makes the instrument payable is a "blank endorsement." General Statutes § 42a-3-205 (b). "When endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed." General Statutes § 42a-3-205 (b). In this case, the defendant does not claim that the purported signature of Riley could be read as anything other than an endorsement in blank. Instead, she claims that because the purported signature was not her signature, it is simply not an endorsement at all. The defendant's argument is inconsistent with how the UCC defines a signature.

General Statutes § 42a-3-401 (b) sets forth signature requirements for a negotiable instrument and provides that "[a] signature may be made (i) manually or by means of a device or machine, and (ii) by the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing." The official commentary to § 42a-3-401 explains that "[a] signature may be handwritten, typed, printed or made in any other manner. . . . It may be made by mark, or even by thumbprint. It may be made in any name, including any trade name or assumed name, however false and fictitious, which is adopted for the purpose." Furthermore, the official commentary to § 42a-3-401 states that a "[s]ignature includes an endorsement."

In its memorandum of decision, the court stated that "[t]he defendant ha[d] established only that . . . Riley did not personally sign the endorsement or personally authorize the use of her signature stamp for that purpose. The defendant has not offered evidence to suggest that the endorsement was 'false and fraudulent' in that it was not authorized or adopted by the holder of the note, [Washington Mutual], or that the subsequent negotiation of the note and mortgage to [JPMorgan]

was fraudulent and, as a result, [JPMorgan] was not the owner of the debt at the time this action was commenced." We agree.

We are not aware of any Connecticut jurisprudence directly on point and, therefore, have looked to other jurisdictions that have addressed similar issues involving identical or nearly identical versions of the UCC provisions relevant to our disposition of the present case. *In re Bass*, 366 N.C. 464, 738 S.E.2d 173 (2013), a case from North Carolina, illustrates the general approach utilized by courts that have addressed issues regarding the validity of signatures on negotiable instruments. In *In re Bass*, the borrower challenged the validity of an endorsement that was made using a signature stamp that bore only the name of the lender, on the basis that it did not include "some representation of an individual signature . . . ." Id., 469. The borrower argued that, without an individual signature, there would be no way of identifying the individual making the transfer and whether they had authority to authorize the transfer. Id. In other words, the borrower took issue with the content of the signature itself and not just its form (i.e., a stamp versus handwritten).

Regarding the contested stamped signature, the court in *In re Bass* held: "[It] indicates on its face an intent to transfer the debt . . . . We also observe that the original [n]ote was indeed transferred in accordance with the stamp's clear intent. The stamp evidences that it was executed or adopted by the party with present intention to adopt or accept the writing. . . . Under the broad definition of signature and the accompanying official comment, the stamp . . . constitutes a signature.[7]

[7] North Carolina's Commercial Code defines " '[s]igned' " as "any symbol executed or adopted with present intention to adopt or accept a writing." N.C. Gen. Stat. Ann. § 25-1-201 (b) (37) (West 2011).

"The stamp therefore was an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances *unambiguously indicate* that the signature was made for a purpose other than indorsement. . . . With no unambiguous evidence indicating the signature was made for any other purpose, the stamp was an indorsement that transferred the [n]ote . . . ." (Citations omitted; emphasis in original; footnote added; internal quotation marks omitted.) Id., 469–70. The court then explained that the borrower failed to offer evidence demonstrating the actual possibility of forgery or error on the part of the lender to overcome the presumption in favor of the signature before concluding that the note was properly endorsed and transferred. Id., 470–71.

We find the analysis of the North Carolina Supreme Court in *In re Bass* to be persuasive. Although we recognize that the argument presented by the defendant in the present case—that the individual whose name the signature bears lacked the authority to make the endorsement—is more nuanced than that presented by the borrower in *In re Bass*, we are not persuaded that such distinction affects the analysis. The dispositive consideration in both cases is the same, namely, whether the *entity* applying the stamp to the instrument intended that the stamp constitute a signature for the purposes of endorsing and negotiating the instrument.

In the present case, the defendant does not dispute that the endorsement stamp was placed on the note by someone at Washington Mutual. In fact, the stamp specifically states: "Pay to the order of [blank] Without Recourse WASHINGTON MUTUAL BANK, FA." Pursuant to the broad definition of signature set forth in § 42a-3-401 (b), Washington Mutual could have used any mark to manifest its intent to create an endorsement through a signature. The name of a former employee

certainly falls within the category of "any name, including a trade or assumed name, or by a word, mark, or symbol . . . ." General Statutes § 42a-3-401 (b). The fact that Washington Mutual chose to use a stamp bearing the signature of a former employee is of no import to the analysis pursuant to § 42a-3-401, which pertains to a bank's rights and obligations related to the note, rather than those of a former employee. Any argument regarding Riley's lack of authority to make the endorsement is misguided because it was *Washington Mutual* that endorsed the note, and there is no evidence in the record to suggest that it did not have the "present intention to authenticate [the] writing." General Statutes § 42a-3-401 (b). Furthermore, Washington Mutual's intent for the signature to serve as an endorsement and for JPMorgan to acquire the rights to enforce the note is evidenced by the assignment of the mortgage to JPMorgan, the sworn affidavit, and JPMorgan's possession of the original note. See *Ulster Savings Bank* v. *28 Brynwood Lane, Ltd.*, 134 Conn. App. 699, 709–10, 41 A.3d 1077 (2012).[8]

We conclude that the stamped signature on the note meets the signature requirements for negotiable instruments set forth in § 42a-3-401 (b). Pursuant to § 42a-3-204, the stamp constitutes an endorsement, as it is a signature made for the purpose of negotiating the instrument. Because the endorsement did not identify a person to whom it makes the instrument payable, the note was endorsed in blank, making it payable to the bearer. Thus, JPMorgan, which was in possession of the original note, was entitled to the presumption that it is the

[8] The plaintiff alternatively argues that any potential " 'issues' " with the signature itself should not affect its standing as a holder of the note because, even if the note lacked an endorsement entirely, the plaintiff would still have the right to enforce the note. See *Ulster Savings Bank* v. *28 Brynwood Lane, Ltd.*, supra, 134 Conn. App. 709–10. We find no need to address this argument because we conclude that there was a valid endorsement.

owner of the debt evidenced by the note with the right to enforce it.

The defendant failed to offer any evidence to rebut this presumption. To raise a genuine issue of material fact as to a plaintiff's standing, a defendant must present some evidence that another party is the owner of the note and debt. See *Bank of America, N.A.* v. *Kydes*, 183 Conn. App. 479, 489, 193 A.3d 110 ("[b]ecause [the plaintiff] duly alleged that it possessed the note at the time it commenced this action, it was entitled to rely upon that allegation unless the defendant presented facts to the contrary"), cert. denied, 330 Conn. 925, 194 A.3d 291 (2018); see also *JPMorgan Chase Bank National Assn.* v. *Simoulidis*, 161 Conn. App. 133, 146, 126 A.3d 1098 (2015) ("The defending party does not carry its burden [of proving that the holder of the note is not the owner of the debt] by merely identifying some documentary lacuna in the chain of title that *might* give rise to the possibility that a party other than the foreclosing party owns the debt. . . . To rebut the presumption . . . the defending party must prove that another party is the owner of the note and debt." [Citation omitted; emphasis in original.]), cert. denied, 320 Conn. 913, 130 A.3d 266 (2016).

The defendant failed to present any evidence to create a genuine issue of material fact that someone other than JPMorgan and the subsequent plaintiffs was the owner of the note and debt. As the bearer of the note at the time this action was commenced, JPMorgan was the holder of the note and presumed owner of the debt and had the right to foreclose the mortgage. This right to foreclose was transferred to the substitute plaintiff upon negotiation of the note by JPMorgan, and, in the absence of any meritorious special defenses, Christiana Trust established its prima facie case to warrant summary judgment as to liability.

II

We next address the defendant's claim that the trial court erred in adjudicating the special defenses that related to damages at the summary judgment stage for liability only. The defendant's first special defense asserts, in pertinent part, the nonapplication or misapplication of payments and an incorrect computation of debt by Christiana Trust. The third special defense asserts, in pertinent part, that "the note was previously paid in full to a prior holder, or, [Christiana Trust] has received payments sufficient to pay off the entire alleged outstanding balance."

In its memorandum of decision, the court held: "The defendant has offered no evidence that would conceivably support her first and third special defenses related to payment. Thus, the first and third special defenses raise no genuine issue of material fact that could defeat the present motion." On appeal, the defendant challenges what she characterizes as the trial court's rejection of these two special defenses. She argues in her brief: "[Christiana Trust] was seeking summary judgment on liability only. These special defenses should remain, inasmuch as they may be raised relating to the damages portion of [Christiana Trust's] claims." Wilmington argues that the defendant's "[defense] of payment was inadequate to affect summary judgment . . . . Neither of these defenses can assist [the] defendant as she failed to present a defense as to the amount of debt." (Internal quotation marks omitted.) We agree with Wilmington.

Payment, such that a debt is no longer owed to a plaintiff, is a valid defense to liability in a foreclosure action. See, e.g., *Homecomings Financial Network, Inc.* v. *Starbala*, 85 Conn. App. 284, 289, 857 A.2d 366 (2004). By contrast, a defense as to the amount of the debt, which becomes applicable only after liability has been determined, involves a defendant's challenge to a

plaintiff's claim as to the amount of the mortgage debt that remains due. "In a mortgage foreclosure action, a defense to the amount of the debt must be based on some articulated legal reason or fact." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Chainani*, 174 Conn. App. 476, 486, 166 A.3d 670 (2017).

By the defendant's own characterization, the first and third special defenses pertain to the issue of damages and not liability.[9] The defendant seems to assume that, in making its summary judgment ruling as to liability, the court disposed of the first and third special defenses entirely, such that they were no longer viable for purposes of contesting the amount due to Wilmington when the court considered whether to render a judgment of strict foreclosure. This is a misunderstanding of the court's ruling. The court's determination that the special defenses failed to defeat summary judgment was isolated to the issue of liability. In our review of the memorandum of decision, we find no indication that the court

[9] The allegations in the first special defense make it apparent that the defendant is challenging the amount of debt, namely, the application of payments and charges to the balance of the alleged debt. As alleged, however, the third special defense is less clear, as some of the allegations could be interpreted as challenging either liability or the amount of debt. To the extent that the defendant is arguing that she is released from liability because the debt is no longer owed to the plaintiff ("the note was previously paid in full to a prior holder, or, [the] plaintiff has received payments sufficient to pay off the entire alleged outstanding balance"), she would be asserting a payment defense. The defendant, however, "must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . 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. . . . In other words, [d]emonstrating a genuine issue of material fact requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred." (Citations omitted; internal quotation marks omitted.) *Bank of New York Mellon* v. *Horsey*, supra, 182 Conn. App. 436. Because the defendant failed to offer evidence beyond the allegations in the special defenses to establish a genuine issue of material fact, her special defense of payment is insufficient to preclude summary judgment on the issue of liability.

disposed of the special defenses for purposes of challenging the amount of debt before rendering a judgment of strict foreclosure. "[T]he strict foreclosure hearing establishes the amount of the debt owed by the defendant." *TD Bank, N.A.* v. *Doran*, 162 Conn. App. 460, 468, 131 A.3d 288 (2016). Yet, at the hearing on the motion for judgment of strict foreclosure, the defendant failed to raise these special defenses or make any challenges to the submission of the amount of debt owed. Because the defendant failed to present a defense as to the amount of debt at the strict foreclosure hearing, she cannot now attempt to use her challenge to the court's decision granting summary judgment on liability as a vehicle to resurrect the special defenses that she failed to raise during the judgment phase.

III

Lastly, the defendant claims that the trial court erred when it struck the fourth count of her amended counterclaim. Specifically, she argues that the court incorrectly determined that the count of the counterclaim that sought attorney's fees pursuant to General Statutes § 42-150bb[10] did not meet the transaction test set forth in Practice Book § 10-10. This claim is without merit.

The defendant's claim that the court "struck" her fourth count mischaracterizes the record. The court

[10] General Statutes § 42-150bb, a consumer protection law, provides in relevant part: "Whenever any contract . . . to which a consumer is a party, provides for the attorney's fee of the commercial party to be paid by the consumer, an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease. . . . For the purposes of this section, 'commercial party' means the seller, creditor, lessor or assignee of any of them, and 'consumer' means the buyer, debtor, lessee or personal representative of any of them. The provisions of this section shall apply only to contracts or leases in which the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes."

was not asked to strike the fourth count,[11] and the language in the court's memorandum of decision contains no indication that it struck that count. In its memorandum of decision, the court highlighted the "bizarre" nature of the fourth count, in which the defendant claimed that she was entitled to attorney's fees for defending this action. The court held that, even if such a right to attorney's fees existed, the count violated the transaction test set forth in Practice Book § 10-10, as "it has no reasonable nexus to the making, validity or enforcement of the mortgage or note, and is therefore legally insufficient as a counterclaim."[12] It concluded its analysis by stating: "As counterclaim count four violates the transaction test set forth in . . . § 10-10 because it does not arise out of the same transaction as the complaint, this court is *not precluded from granting summary judgment* to [the] plaintiff." (Emphasis added.) Thus, the court did not strike the fourth count of the counterclaim as argued by the defendant, but, instead, properly analyzed the merits of the count and its potential effects on Christiana Trust's prima facie case of liability, ultimately concluding that it was insufficient to preclude the granting of summary judgment as to liability. Furthermore, on appeal, the defendant fails to address how the count seeking attorney's fees

[11] In its motion for summary judgment, the plaintiff did not request that the court strike or dismiss the defendant's counterclaim. Cf. *Bank of New York Mellon* v. *Mauro*, 177 Conn. App. 295, 316–17, 172 A.3d 303 (portion of plaintiff's motion for summary judgment treated as motion to strike where plaintiff sought *dismissal* of defendant's counterclaims), cert. denied, 327 Conn. 986, 175 A.3d 45 (2017). Instead, the plaintiff submitted that "the counterclaims do not directly contest the validity of the security instrument itself and, therefore [are] collateral and not part of the same underlying transaction from which the complaint originated. As such, the plaintiff respectfully submits that its motion for summary judgment should be granted notwithstanding the counterclaims."

[12] Practice Book § 10-10 provides in relevant part: "In any action for legal or equitable relief, any defendant may file counterclaims against any plaintiff . . . provided that each such counterclaim . . . arises out of the transaction or one of the transactions which is the subject of the plaintiff's complaint . . . ."

for a successful defense of the action—which could not occur unless the court rendered judgment for the defendant, which it did not do—could possibly affect the court's finding as to liability. Instead, her brief focuses entirely on how the count met the transaction test, an argument that is entirely irrelevant to the court's resolution of Christiana Trust's motion for summary judgment as to liability.[13]

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

In this opinion the other judges concurred.

VICTOR HARRIS ET AL. *v.* CHRISTINE NEALE ET AL.
(AC 42301)

Alvord, Moll and Beach, Js.

Syllabus

The plaintiffs, H, a minor, through his next friend, A, his mother, sought to recover damages allegedly sustained as a result of the defendants' negligence. Following certain noncompliance with discovery, the plaintiffs' attorney sought and was granted a withdrawal from the case. Thereafter, A withdrew her claims. When H did not appear in court on the date trial was set to begin, the trial court rendered judgment of dismissal. Subsequently, counsel appeared for H and filed a motion to open the judgment, which the trial court denied. H appealed to this court, claiming that the trial court abused its discretion in denying his

[13] The defendant's argument regarding the counterclaim is recited here in full: "The court incorrectly determined that the defendant's counterclaim for attorney's fees under . . . § 42-150bb did not meet the transaction test. The claim meets the transaction test as a successful defense of the action by the defendant would entitle the defendant to fees under the statute. This claim has a reasonable nexus to the enforcement of the note and mortgage, if the plaintiff fails in its prosecution of the foreclosure action, the defendant is entitled to attorney's fees. . . . Also, the counterclaim meets the transaction test as it has a reasonable nexus to the validity of mortgage as the terms of the mortgage require compliance with the law, and, under . . . § 42-150bb, a Connecticut consumer protection law, a successful defense of the foreclosure action will result in the plaintiff being required to pay fees." (Citation omitted.)

motion to open. *Held* that the trial court did not properly exercise its discretion in denying H's motion to open the judgment, as H satisfied his burden of demonstrating that he was prevented by reasonable cause from prosecuting the action; the trial court's finding that H's negligence prevented him from prosecuting the action was clearly erroneous, and, to the contrary, the unique challenges H faced in the months leading up to the dismissal of his action, including that he, as a minor, lacked consistent familial support to enable him to prosecute his action and his relationship with A had broken down and was undisputedly plagued by conflict, established reasonable cause that prevented him, a minor allegedly suffering from a major neurocognitive disorder as a result of a traumatic brain injury, from prosecuting his action.

Argued January 22—officially released April 28, 2020

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, brought to the Superior Court in the judicial district of Fairfield, where the court, *Bellis*, *J.*, granted the motion of the plaintiffs' attorney for permission to withdraw his appearance; thereafter, the plaintiff Andrea Hill withdrew her claims; subsequently, the court rendered judgment of dismissal; thereafter, the court denied the named plaintiff's motion to open the judgment, and the named plaintiff appealed to this court. *Reversed*; *judgment directed*; *further proceedings*.

John C. Turner, *Jr.*, for the appellant (named plaintiff).

Ashley A. Noel, with whom, on the brief, was *Kevin R. Kratzer*, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff Victor Harris appeals from the judgment of the trial court denying his motion to open the judgment of dismissal rendered in favor of the defendants, Christine Neale and Christopher Neale. On appeal, Harris claims that the court abused its discretion in denying his motion to open. We agree and, accordingly, reverse the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of Harris' appeal. On October 15, 2016, Harris' mother, Andrea Hill, acting as both Harris' next friend[1] and coplaintiff, commenced the present action against the defendants.[2] The plaintiffs, who were represented by Attorney John Cirello, alleged that Harris, who was a minor both at the time of the injury and the commencement of the action, had sustained injuries in October, 2014, while riding a dirt bike over a ramp in the defendants' backyard. Hill sought to recover medical expenses she had paid on behalf of Harris. On March 10, 2017, the court, *Kamp*, *J.*, approved a scheduling order, inter alia, requiring the completion of discovery by September 30, 2017, setting a pretrial conference for January 24, 2018, and scheduling trial to begin in February, 2018. Following the defendants' filing of a request to revise, the plaintiffs filed the operative complaint on March 21, 2017. In the four count operative complaint, each plaintiff alleged one count of negligence on the basis of parental liability and one count of premises liability. On April 21, 2017, the defendants filed an answer and special defenses.

On April 27, 2017, the plaintiffs sought and received a sixty day extension of time to respond to the defendants' interrogatories and requests for production dated February 17, 2017. On September 27, 2017, the defendants filed a motion to compel the deposition of Harris, arguing that they twice had been required to mark off Harris' noticed deposition because they had not

[1] "A next friend is a person who appears in a lawsuit to act for the benefit of . . . [a] minor plaintiff . . . . It is well established that a child may bring a civil action only by a guardian or next friend, whose responsibility it is to ensure that the interests of the ward are well represented." (Citation omitted; internal quotation marks omitted.) *Lowe* v. *Shelton*, 83 Conn. App. 750, 755, 851 A.2d 1183, cert. denied, 271 Conn. 915, 859 A.2d 568 (2004).

[2] Hill withdrew her claims on April 3, 2018, and is not a party to this appeal. We refer herein to Harris and Hill collectively as the plaintiffs and to each individually by name, where appropriate.

received the plaintiffs' discovery responses. They represented that they had not received any subsequent dates from the plaintiffs to conduct Harris' deposition, despite having made numerous requests. The defendants represented that they had renoticed the deposition for October 17, 2017, and sought an order from the court compelling Harris to appear on that date or within thirty days of the filing of the motion to compel. On October 10, 2017, the court, *Kamp*, *J.*, granted the motion and ordered Harris to submit to a deposition on or before October 31, 2017, or be subject to a nonsuit on motion from the defendants.

On November 24, 2017, the defendants filed a motion for order of compliance, in which they alleged that the plaintiffs had failed to produce records critical to the evaluation and defense of the plaintiffs' claims against them. They requested, inter alia, that the court compel the plaintiffs to comply with the defendants' standard discovery requests and, in the event that the plaintiffs failed to comply fully on or before December 6, 2017, that the court enter a judgment of nonsuit and/or dismissal. On November 30, 2017, the defendants filed a motion for nonsuit, claiming that the plaintiffs had failed to comply with two court orders, the order requiring Harris to submit to a deposition by October 31, 2017, and the order granting the plaintiffs an extension of time, through May 18, 2017, to respond to the defendants' discovery requests. With respect to the deposition, the defendants represented that it had been further delayed, first at the plaintiffs' request because Harris' father was in critical medical condition and was to be placed in a medically induced coma, and second, at the request of the plaintiffs' counsel due to his trial schedule. According to the defendants, they had renoticed Harris' deposition for November 27, 2017, and the plaintiffs failed to appear on that date. Neither the defendants' motion for order of compliance nor their

motion for nonsuit was ruled on, and both were marked off by the court, *Bellis*, *J.*,[3] on January 16, 2018.

By motion filed on November 20 and amended on December 22, 2017, Cirello sought to withdraw his appearance on behalf of the plaintiffs on the basis that a conflict of interest had arisen with and between the plaintiffs.[4] Specifically, Cirello represented that the plaintiffs had "recently been feuding and refuse to speak or be in the same building as one another." He further stated that Harris had requested that he remove Hill as a plaintiff. He represented that the deteriorating relationship between the plaintiffs had resulted in a lack of communication between the plaintiffs and himself and had materially limited his ability to adequately represent each of their interests. Accordingly, he requested that the court withdraw his appearance on behalf of both plaintiffs and stay the proceedings for three months or other reasonable time to provide the plaintiffs with sufficient time for each to retain independent counsel. The motion was scheduled for a hearing on January 16, 2018, on which date the court granted the motion. Three days later, the defendants filed a motion for default against the plaintiffs for failure to appear, which was not ruled on by the court.

On January 23, 2018, the defendants filed a case flow request, in which they stated that "[t]he plaintiffs are not represented at this time and a status conference has been scheduled for January 30, 2018, the defendants request that this pretrial be marked off and rescheduled

[3] Unless otherwise noted, all references to the trial court hereinafter are to Judge Bellis.

[4] On December 15, 2017, Harris filed a motion for a continuance of the hearing on the motion to withdraw appearance, which had been scheduled for December 18, 2017. In support of his request, Harris represented that his father was in a comatose state, there was no ongoing parent-child relationship between Hill and himself, the Department of Children and Families had opened an investigation on November 6, 2017, and a guardianship proceeding was soon to be filed in the Bridgeport Probate Court.

for a date chosen by the court. Please note proper consent has not been given due to the plaintiffs' nonrepresentation." The court's order on the case flow request stated: "The status conference will go forward on [January 30, 2018,] as scheduled. The case will be dismissed if the plaintiffs remain nonappearing. The pretrial is cancelled." The plaintiffs then sought to have the status conference postponed to February 24, 2018. In support of their motion for a continuance, the plaintiffs stated: "Self-represented party kindly requests continuance to allow action to be taken on motion to open judgment regarding motion to withdraw appearance and time to procure counsel." The court denied the plaintiffs' motion for a continuance.

By motion filed January 24 and amended January 25, 2018, the plaintiffs sought to vacate the court's order permitting Cirello to withdraw his appearance. In support of their motion, the plaintiffs argued, inter alia, that neither Hill nor Harris had been served with notice of the hearing on the motion to withdraw, that Hill did not appear at the hearing because of a medical emergency, and that Harris was concerned regarding "erroneous proceedings against a minor or person of unsound mind." Also on January 24, 2018, Hill filed an appearance as a self-represented party, and the next day, Harris did the same. On January 29, 2018, Harris filed a case flow request again seeking that the January 30, 2018 status conference be rescheduled, stating: "Victor Harris is a minor with major neurocognitive disorder due to traumatic brain injury with behavioral disturbance who filed an appearance per instruction of prior counsel in order case is not dismissed for failure to appear still on day before court, kindly request status conference to instead be scheduled once minor is represented by counsel or following ruling on motion to vacate order." On January 30, 2018, the court sua sponte entered an order that provided: "The attempted appearance and any filings filed on behalf of the minor plaintiff

Victor Harris are improper and are hereby stricken, sua sponte, by the court. Only an attorney may represent him as he is a minor."

On February 13, 2018, Hill filed a case flow request seeking to have the trial continued. In support of her request, she stated that she needed time to prepare for trial following her counsel's withdrawal in January. She also informed the court that a guardianship proceeding had been commenced that day in the Bridgeport Probate Court and represented that such matters are generally resolved in sixty days. On February 20, 2018, the court entered an order with respect to Hill's case flow request: "This will be addressed on [February 27, 2018] as case flow does not have the plaintiffs' telephone numbers to schedule a status conference prior to that." On February 27, 2018, the trial was continued to May 24, 2018, to afford the plaintiffs additional time to obtain counsel, and a status conference was scheduled for April 3, 2018.[5]

On April 2, 2018, the plaintiffs filed a motion to substitute Harris' stepmother, Mildred Mutape, "as a named party" in place of Hill. In support of their motion, the plaintiffs attached a March 19, 2018 order from the Bridgeport Probate Court, which indicated, inter alia, that Hill had consented to the appointment of a temporary custodian of Harris and that Mutape had been appointed his temporary custodian.

Also on April 2, 2018, the defendants filed a motion for nonsuit as to Hill, pursuant to Practice Book § 13-14, alleging that Hill had failed to comply with the court's order requiring Harris to submit to a deposition and its order granting the plaintiffs an extension of time to comply with the defendants' discovery requests. On April 3, 2018, Hill filed a withdrawal form indicating that she sought to withdraw from the action as a party

[5] On February 28, 2018, the defendants filed a motion for default for failure to appear as to Harris, which motion was denied on March 7, 2018.

plaintiff.[6] In an April 11, 2018 order, the court acknowledged that Hill was "no longer a party in this case by virtue of a withdrawal filed [April 3, 2018]."

On May 24, 2018, the date trial was set to begin, Harris did not appear in court. Mutape attended the proceeding, identified herself as "the recently court-appointed guardian for . . . Harris," and stated that she was seeking to intervene in the case. After the court explained that it would not address Mutape because she was not a party to the case, Mutape responded that she understood and that she only attended to prevent the case from being dismissed. After reciting the previous continuances that Harris had been afforded in order to permit him to retain counsel, the court stated: "Well, I think because the plaintiffs are nonappearing that I have no choice but to dismiss the case. Now, whether—whether they ultimately retain counsel and try to file an [action pursuant to the] accidental failure of suit statute or a new lawsuit or try to revive this case, I'm not going to speak to that. But I do have no choice now since they are nonappearing. So, I am going to dismiss the case." The court rendered judgment of dismissal pursuant to Practice Book § 14-3 on the basis that "the plaintiffs are nonappearing for their second trial date."

On September 21, 2018, counsel appeared for Harris and filed a motion to open the judgment of dismissal. Harris argued reasonable cause prevented him from prosecuting the action in a timely manner, which he alleged included his serious injuries from the dirt bike accident, his father's illness, Hill's withdrawal from the case, and Cirello's withdrawal from the case. Harris maintained that his case remained viable as to liability and damages and expressed his understanding of the

[6] On the withdrawal form, Hill indicated that she alone sought to withdraw. The defendants then filed a motion for default for failure to appear on the basis that Harris' attempted appearance had been stricken by the court and Hill had filed a withdrawal of her appearance. The motion was denied.

importance of cooperating with discovery requests, should the judgment be opened. He also requested that the court cite in Mutape, whom he stated had been appointed his temporary guardian, as his next friend. On October 4, 2018, the defendants filed an objection to the motion to open, arguing that Harris had failed to show reasonable cause for opening the judgment. On October 9, 2018, the court summarily denied the motion to open the judgment. Harris subsequently filed a motion to reargue pursuant to Practice Book § 11-12 and attached thereto an affidavit of Mutape. The defendants filed an objection, and the court summarily denied the motion to reargue. This appeal followed.

On November 27, 2018, Harris filed a motion for articulation. On December 3, 2018, the court filed its articulation, in which it stated that the "motion to open and motion to reargue were denied by the court, given [Harris'] own negligence, and lack of good cause to open the judgment." Noting that Harris was represented by counsel from the time of the filing of the action in October, 2016, through January 16, 2018, when counsel withdrew, the court stated that Harris had failed to appear for his scheduled deposition and did not provide full and fair discovery compliance. It further explained that, following the withdrawal of Harris' counsel, "Harris was unrepresented from January 16, 2018, through September 21, 2018, which was nearly four months after the case was dismissed," and that such delay prevented the defendants from obtaining the depositions and discovery needed to defend the action. In sum, the court stated that Harris "failed to diligently pursue the case when represented by counsel, failed to comply with standard discovery, ignored court orders, refused to communicate with his attorney, and was nonappearing for his trial dates."[7]

[7] On January 7, 2019, Harris, acting through Mutape as next friend, commenced a new action pursuant to the accidental failure of suit statute, General Statutes § 52-592. See *Harris* v. *Neale*, Superior Court, judicial district of Fairfield, Docket No. CV-19-6082604-S. In that action, the defen-

On appeal, Harris claims that the trial court improperly denied his motion to open the judgment.[8] We agree.

"Disciplinary dismissals pursuant to Practice Book § 14-3 . . . may be set aside and the action reinstated to the docket upon the granting of a motion to open filed in accordance with Practice Book § 17-43 and [General Statutes] § 52-212." *Bank of New York Mellon* v. *Horsey*, 182 Conn. App. 417, 429, 190 A.3d 105, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018); cf. *Pump Services Corp.* v. *Roberts*, 19 Conn. App. 213, 216, 561 A.2d 464 (1989) (concluding that "proper way" to open judgment of dismissal rendered pursuant to predecessor to Practice Book § 14-3 is to file motion to open pursuant to predecessor to Practice Book § 17-4, which parallels General Statutes § 52-212a).[9] "Practice Book § 17-43 provides in relevant part that the disciplinary dismissal of an action may be set aside within four months upon

dants filed a motion to strike the complaint on the basis that a plaintiff who is nonsuited may not file both an appeal from the judgment of dismissal and a new action pursuant to § 52-592. The court, *Kamp*, *J.*, granted the defendants' motion to strike the complaint. Following Harris' failure to file a substitute pleading, the court rendered judgment in favor of the defendants on May 20, 2019. Harris did not file an appeal from that judgment.

[8] Harris also claims that the court improperly denied his motion to reargue the court's ruling on the motion to open the judgment. Our conclusion that the court abused its discretion in denying the motion to open the judgment makes it unnecessary to address his claim with respect to the motion to reargue. Because we do not address the motion to reargue, we do not consider Mutape's affidavit attached thereto.

Moreover, we note that, because Harris filed his motion to open the judgment more than twenty days after the judgment of dismissal, our review is limited to determining whether the court abused its discretion in denying that motion and does not involve a review of the underlying judgment of dismissal. See *Langewisch* v. *New England Residential Services, Inc.*, 113 Conn. App. 290, 294, 966 A.2d 318 (2009).

[9] We recognize that there is a conflict in our case law as to whether a motion to open a judgment of dismissal rendered pursuant to Practice Book § 14-3 is governed by § 52-212 and Practice Book § 17-43 or § 52-212a and Practice Book § 17-4. We need not resolve this conflict at this time because it does not affect the outcome of our analysis. Additionally, on appeal, the parties have not addressed this conflict; rather, they rely on § 52-212 and/or Practice Book § 17-43 in analyzing the court's denial of Harris' motion to open. Accordingly, in resolving this appeal, we presume, without concluding, that § 52-212 and Practice Book § 17-43 govern Harris' motion to open.

the written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action in whole or in part existed at the time of the rendition of such judgment . . . and that the plaintiff . . . was prevented by mistake, accident or other reasonable cause from prosecuting the action. Section 52-212 contains nearly identical language. A motion to open . . . is addressed to the [trial] court's discretion, and the action of the trial court will not be disturbed on appeal unless it acted unreasonably and in clear abuse of its discretion." (Internal quotation marks omitted.) *Bank of New York Mellon* v. *Horsey*, supra, 429–30.

"The court's discretion, however, is not unfettered; it is a legal discretion subject to review. . . . [D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In addition, the court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." (Citation omitted; internal quotation marks omitted.) *Multilingual Consultant Associates, LLC* v. *Ngoh*, 163 Conn. App. 725, 735, 137 A.3d 97 (2016).

We begin by noting that the court did not determine, in either its summary ruling denying the motion to open the judgment or its articulation, that Harris had failed to demonstrate the existence of a good cause of action. In support of his motion to open the judgment, Harris argued that he had alleged a viable cause of action against the defendants. Harris asserted that he was seriously injured when he fell from the dirt bike he was riding over a ramp on the defendants' property. He cited the allegations of his complaint that the ramp was dangerous and defective and that the defendants failed to supervise his biking activity and ensure his safety. Harris maintained that he suffered several injuries from

the fall, including "postconcussive syndrome, cervical sprain, acute anxiety, and chronic headaches that have adversely affected his lifestyle and well-being."

Harris attached to his motion to open the judgment an October 19, 2017 letter authored by Kathryn A. McVicar, a pediatric neurologist and assistant professor of pediatrics and neurology, stating that Harris "had a traumatic neck and head injury that has caused sequelae." The letter further stated that Harris had been diagnosed with "[m]ajor neurocognitive disorder due to traumatic brain injury, with behavioral disturbance," "[u]nspecified Attention-Deficit/Hyperactivity Disorder," "[r]efractory migraine with aura," "[v]ertigo," "[c]ervical neck pain," and "[s]leep disturbance." The letter stated that Harris had "been recommended to receive inpatient services at Gaylord Specialty Healthcare, in addition to contacting the Brain Injury Alliance of Connecticut for additional service support."

In light of the foregoing, we agree with Harris that his motion to open the judgment made the required showing that a good cause of action existed, and the court understandably did not conclude to the contrary.[10] See *Bridgeport* v. *Grace Building, LLC*, 181 Conn. App. 280, 299, 186 A.3d 754 (2018). In its articulation, the court stated that it denied the motion to open "given [Harris'] own negligence, and lack of good cause to open the judgment," concluding that Harris had failed to satisfy the second prong of § 52-212 (a). Having reviewed closely the procedural record below, we conclude that the court's finding that Harris' negligence prevented him from prosecuting the action is clearly erroneous.[11] To the contrary, the unique challenges Harris faced in the months leading up to the dismissal of

[10] We note that the defendants, in their objection to Harris' motion to open the judgment, did not argue that Harris had failed to make the required showing that a good cause of action existed but, instead, argued only that Harris had failed to establish reasonable cause to open the judgment.

[11] "[I]n order to determine whether the court abused its discretion [in ruling on a motion to open], we must look to the conclusions of fact upon

his action establish reasonable cause that prevented him from prosecuting his action.

Specifically, the record reflects that Harris, a minor, lacked consistent familial support to enable him to prosecute his action. His father was reportedly critically ill and, for some period of time, comatose,[12] and his relationship with Hill, his next friend, was undisputedly plagued by conflict. The discord between Harris and Hill was described in Cirello's motion to withdraw, in which he represented that the two were "feuding" and that Harris had requested that he remove Hill as a plaintiff. Despite the breakdown in their relationship, the plaintiffs sought continuances from the court in order to obtain new counsel. Around the same time, Hill advised the court that a guardianship proceeding had been filed with respect to Harris. Mutape was appointed Harris' temporary custodian in March, 2018, and Hill withdrew from the case in April, 2018. Just before withdrawing from the action, the plaintiffs sought to have Mutape substituted for Hill, representing to the court that the Probate Court had scheduled a hearing for May 18, 2018, regarding the removal of Hill as Harris'

which the trial court predicated its ruling. . . . Those factual findings are reviewed pursuant to the clearly erroneous standard . . . ." (Citation omitted; internal quotation marks omitted.) *Bridgeport* v. *Grace Building, LLC*, supra, 181 Conn. App. 301.

Because we conclude that the court's finding that the failure to prosecute the action was attributable to Harris' own negligence is clearly erroneous, we need not reach the defendants' argument that a trial court lacks authority to set aside a judgment of nonsuit upon a finding of negligence. See *Jaconski* v. *AMF, Inc.*, 208 Conn. 230, 238–39, 543 A.2d 728 (1988) (concluding that court was within its discretion in finding plaintiffs negligent in failing to file revised complaint and respond to discovery requests, and court correctly concluded that it lacked authority to set aside judgment of nonsuit because plaintiffs failed to meet statutory requirements of § 52-212).

[12] The plaintiffs had attached to various motions, including their January 25, 2018 motion to open the court's order permitting Cirello to withdraw his appearance, an October 4, 2017 letter authored by Antonio Constantino Jr., a physician, which stated that Harris' father remained admitted at Bridgeport Hospital where he was receiving "advanced critical care therapy including, but not limited to mechanical ventilation and advanced life support."

guardian. As of May 24, 2018, when the action was dismissed, Harris, a minor, lacked a next friend and was unrepresented by counsel. The record reveals that it was these circumstances, which were largely beyond the control of Harris, a minor allegedly suffering from a major neurocognitive disorder as a result of a traumatic brain injury, that impeded his ability to diligently pursue the action.[13]

Accordingly, we conclude that Harris satisfied his burden of demonstrating that he was prevented by rea-

[13] The defendants do not dispute that Harris was without counsel or next friend at the time the court dismissed the action but argue, as the trial court found, that Harris' own negligence caused his failure to pursue the action. They challenge Harris' reliance on Cirello's withdrawal, arguing that Harris had abused the discovery process, including by failing to provide full discovery responses and to appear for his deposition, before Cirello withdrew. They further suggest that Cirello's withdrawal was due to Harris' own conduct, including his refusal to communicate with Hill. The defendants also point to the time period following the withdrawals of Cirello and Hill, emphasizing that Harris offered no explanation for the eight month delay in retaining new counsel, and stating that Mutape had become Harris' "legal guardian" in March, 2018, more than two months prior to the scheduled trial date. We disagree that the challenges faced by Harris were of his own making, such that he failed to establish that reasonable cause prevented him from prosecuting his action.

The defendants rely on *Biro* v. *Hill*, 231 Conn. 462, 650 A.2d 541 (1994), and *Kung* v. *Deng*, 135 Conn. App. 848, 43 A.3d 225 (2012), in support of their argument that the court in the present case did not abuse its discretion. We find both cases distinguishable. In *Biro* v. *Hill*, supra, 464–66, our Supreme Court affirmed the trial court's denial of a motion to set aside a judgment of nonsuit rendered on the basis of the plaintiffs' failure to respond, even partially, to discovery requests. In moving to set aside the judgment, the plaintiffs stated that they failed to comply with the three previously entered deadlines for discovery responses because they had decided to retain new counsel and they believed it would be unfair to bind new counsel with responses to discovery requests before he had the opportunity to evaluate the case. Id., 466. In *Kung* v. *Deng*, supra, 849–50, this court affirmed the trial court's denial of a motion to open a judgment of dismissal rendered on the basis of the plaintiffs' failure to comply with discovery, despite having more than two years to respond and receiving two court orders requiring them to provide the medical records requested. The plaintiffs had argued that they were not able to obtain all the requested records. Id., 850.

Both *Biro* and *Kung* involved dismissals of actions on the basis that the plaintiffs had failed to comply with discovery orders. In seeking to open the judgment, the plaintiffs in each case neither offered nor established reasonable cause preventing them from complying with the discovery orders. In contrast, the record in the present case abounds with challenges experienced by Harris that prevented him from prosecuting his action.

sonable cause from prosecuting the action. Under the circumstances of this case, we cannot conclude that the court properly exercised its discretion in denying Harris' motion to open the judgment.

The judgment is reversed and the case is remanded with direction to grant Harris' motion to open the judgment of dismissal and for further proceedings according to law.

STATE OF CONNECTICUT *v.* JUBAR T. HOLLEY (AC 42104)

Lavine, Moll and Flynn, Js.

Syllabus

The defendant, who had been convicted, on a plea of nolo contendere, of four counts of the crime of criminal possession of a firearm, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. In his motion, the defendant claimed that, because the four firearms were found in a single event, his possession of them constituted only one offense, and, therefore, the imposition by the sentencing court of consecutive sentences violated the federal and state constitutional prohibitions against double jeopardy. In concluding that the consecutive sentences did not violate double jeopardy, the trial court analyzed the controlling statute ((Rev. to 2013) § 53a-217 (a) (1)), which provided in relevant part that a person is guilty of criminal possession of a firearm when such person possesses a firearm and has been convicted of a felony. *Held*:

1. The trial court properly concluded that the defendant's consecutive sentences did not violate the constitutional prohibition against double jeopardy and denied the defendant's motion to correct an illegal sentence: that court properly construed § 53a-217 (a) (1) as criminalizing the possession of a single firearm, and, therefore, the plain and unambiguous words of the statute demonstrated the legislature's intent to punish the possession of each individual firearm; moreover the defendant's reliance on *State* v. *Rawls* (198 Conn. 111) and *State* v. *Ruscoe* (212 Conn. 223) in support of his contention that § 53a-217 (a) (1) was ambiguous was unavailing, as those cases were factually distinguishable from the present case because § 53a-217 (a) (1) criminalized the possession of "a" firearm, not "any" firearm, as was the case in *Rawls*, and the word firearm is not a word that can be both singular and plural, as was the case with the word at issue in *Ruscoe*.

2. The defendant could not prevail on his claim that the trial court improperly failed to apply the rule of lenity when a reasonable doubt persisted as to whether the legislature intended to authorize punishments for the simultaneous possession of more than one firearm under § 53a-217 (a) (1); because this court rejected the defendant's contention that § 53a-217 (a) (1) was ambiguous, the rule of lenity was not applicable.

Argued January 15—officially released April 28, 2020

Procedural History

Information charging the defendant with thirty-eight counts of criminal possession of a firearm, brought to the Superior Court in the judicial district of Hartford, where the court, *Bentivegna*, *J.*, denied the defendant's motion to suppress; thereafter, the defendant was presented to the court, *Alexander*, *J.*, on a plea of nolo contendere to four counts of criminal possession of a firearm; judgment of guilty of four counts of criminal possession of a firearm; subsequently, the state entered a nolle prosequi on each of the remaining counts, and the defendant appealed to this court; thereafter, the appeal was transferred to the Supreme Court, which affirmed the judgment of the trial court; subsequently, the court, *Schuman*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Deborah G. Stevenson, assigned counsel, for the appellant (defendant).

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

Opinion

LAVINE, J. The defendant, Jubar T. Holley, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. The defendant's central claim on appeal is that the trial court improperly concluded that his consecutive sentences did not violate the federal and state constitutional prohibitions against

double jeopardy. Specifically, the defendant claims that the trial court improperly denied his motion to correct an illegal sentence by (1) relying on federal and sister state case law, rather than on Connecticut precedent, (2) applying an incorrect standard of review, and (3) failing to apply the rule of lenity.[1] To resolve the defendant's appeal, we are required to determine whether the legislature, in enacting General Statutes (Rev. to 2013) § 53a-217 (a) (1),[2] the criminal possession of a firearm statute, intended to punish the possession of each firearm or to punish only once the act of possessing multiple firearms. Our resolution of this question informs our analysis of the defendant's ancillary claim that the trial court improperly failed to apply the rule of lenity. We affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. On March 14, 2013, the police executed a search warrant at the defendant's home and seized numerous firearms and firearm related items. The defendant was charged with thirty-eight counts of criminal possession of a firearm in violation of § 53a-217 (a) (1). The state alleged as to each count that "on or about March 15, 2013 at approximately 9:00 a.m. at or near 22 Livingston Road, East Hartford, Connecticut, the defendant possessed a firearm and had been convicted of a felony." The defendant filed a motion to suppress on the ground that the search warrant was invalid, which the court denied. The defendant pleaded nolo contendere to the first four counts of criminal possession of a firearm in violation of § 53a-217 (a) (1), conditioned on his right to appeal from the trial court's denial of his motion to suppress. The defendant's conviction was upheld by our Supreme Court. See *State* v. *Holley*, 324 Conn. 344, 346–50, 152 A.2d 532 (2016)

[1] Our analysis of the first two claims is subsumed within our plenary determination of whether the defendant's sentences violated the constitutional prohibition against double jeopardy.

[2] Hereinafter, unless otherwise indicated, all references to § 53a-217 (a) (1) in this opinion are to the 2013 revision of the statute.

(affirming denial of defendant's motion to suppress). The trial court sentenced the defendant to five years of incarceration on count one, two years of incarceration, followed by three years of special parole on each of counts two and three, consecutive to one another and consecutive to count one, and five years of incarceration on count four, to run concurrently with count one. The defendant's total effective sentence was nine years of incarceration, followed by six years of special parole.

On February 17, 2017, the self-represented defendant filed a motion to correct an illegal sentence and argued, inter alia, that his sentences violated the fifth and fourteenth amendments to the United States constitution and article first, §§ 8, 10, and 20, of the constitution of Connecticut[3] because he received four sentences for one crime that was predicated on essentially the same facts, offense, conduct, and time, and for a single occurrence. The trial court, *Dewey*, *J.*, concluded that there had been no constitutional violation and dismissed the motion on July 28, 2017.

On January 19, 2018, the self-represented defendant filed a second motion to correct an illegal sentence and a memorandum of law in support thereof. The defendant asserted that, because the four firearms were found in a single event, his possession of them constituted only one offense. He argued, therefore, that the imposition of consecutive sentences violated the fed-

[3] The double jeopardy clause of the fifth amendment to the United States constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const., amend. V. "The double jeopardy clause of the fifth amendment is made applicable to the states through the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *State* v. *Carlos P.*, 171 Conn. App. 530, 537, 157 A.3d 723, cert. denied, 325 Conn. 912, 158 A.3d 321 (2017). "The Connecticut constitution provides coextensive protection, with the federal constitution, against double jeopardy. . . . This constitutional guarantee . . . protects against multiple punishments for the same offense [in a single trial] . . . ." (Internal quotation marks omitted.) *State* v. *McColl*, 74 Conn. App. 545, 566, 813 A.2d 107, cert. denied, 262 Conn. 953, 818 A.2d 782 (2003).

eral and state constitutional prohibitions against double jeopardy.[4] The defendant retained counsel who filed supplemental memoranda in support of the defendant's motion on April 13 and May 23, 2018. The state argued in opposition that the defendant pleaded nolo contendere to four separate and distinct counts and, with respect to each count, the defendant received a sentence that was within the statutory guidelines and did not exceed the maximum sentence set by the legislature. The motion was heard by the court, *Schuman*, *J.*, on July 16, 2018.

The court issued a memorandum of decision on July 19, 2018, denying the defendant's motion. The court resolved the defendant's claim—that his consecutive sentences based on a single act of possession constituted multiple punishments for the same offense in violation of the double jeopardy clause[5]—by analyzing the controlling statute, § 53a-217 (a) (1). The court concluded: "The use of the word 'a' in § 53a-217 (a) defines the unit of prosecution in singular terms. In multiple instances in this case the defendant was in possession of 'a firearm.' Accordingly, the [sentencing] court properly imposed separate sentences for each firearm possessed."

The defendant appealed from the denial of his second motion to correct an illegal sentence.

I

The defendant claims that the trial court improperly concluded that his consecutive sentences did not vio-

[4] The defendant clarified in his second motion to correct an illegal sentence that he was not attacking the conviction or the sentences themselves but, rather, the manner in which the trial court imposed consecutive punishments.

[5] The defendant's claim fails to account for the fact that the imposition of his sentences was premised on his plea of nolo contendere to four separate counts.

late the constitutional prohibition against double jeopardy. The defendant argues that § 53a-217 (a) (1) and its legislative history do not reveal whether the legislature intended to authorize multiple punishments for the simultaneous possession of multiple firearms and that the statute is therefore ambiguous and requires the finding of a double jeopardy violation.[6] The state counters that the plain and unambiguous use of the language "a firearm"—in the singular—establishes that each possession of a firearm by a convicted felon constitutes a separate, punishable violation of the statute. We agree with the state.[7]

We begin with the relevant legal principles and the applicable standard of review. "A motion to correct an

[6] The defendant's principal argument regarding the alleged double jeopardy violation is that the trial court should have applied the test set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), and, had it done so, it would have determined that his consecutive sentences violated the prohibition against double jeopardy. We do not address this argument because *Blockburger* does not apply in cases in which the defendant was convicted of multiple violations of the same statutory provision. See *State* v. *Hearl*, 182 Conn. App. 237, 272, 190 A.3d 42 ("[t]he proper double jeopardy inquiry when a defendant is convicted of multiple violations of the *same* statutory provision is whether the legislature intended to punish the individual acts separately or to punish only the course of action which they constitute" (emphasis in original)), cert. denied, 330 Conn. 903, 192 A.3d 425 (2018).

[7] The state argues alternative grounds to affirm the trial court's judgment. Specifically, it argues that, pursuant to *State* v. *Adams*, 186 Conn. App. 84, 198 A.3d 691 (2018), the defendant was foreclosed from raising a claim that his consecutive sentences violated double jeopardy where he pleaded guilty to four counts of criminal possession of a firearm. See id., 88 ("[J]ust as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes. . . . [U]nless a double jeopardy violation is apparent on the face of the charging documents, a defendant's ability to raise such a challenge is foreclosed by the admissions inherent in his or her guilty plea." (Citations omitted; internal quotation marks omitted.)). We see significant merit in this alternative argument set forth by the state; however, we choose to resolve this appeal by way of statutory interpretation as the trial court did.

The state also argues that the defendant's claim in his second motion to correct an illegal sentence is barred by the doctrine of res judicata. We decline to address this argument and, instead, reach the merits of the defendant's claim.

illegal sentence under Practice Book § 43-22 constitutes a narrow exception to the general rule that, once a defendant's sentence has begun, the authority of the sentencing court to modify that sentence terminates." (Internal quotation marks omitted.) *State* v. *Brown*, 192 Conn. App. 147, 151, 217 A.3d 690 (2019). "A violation of a defendant's right against double jeopardy is one of the permissible grounds on which to challenge the legality of a sentence." *State* v. *Santiago*, 145 Conn. App. 374, 379, 74 A.3d 571, cert. denied, 310 Conn. 942, 79 A.3d 893 (2013).

"Double jeopardy claims present a question of law over which our review is plenary. . . . The fifth amendment to the United States constitution provides in relevant part: No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . . The double jeopardy clause of the fifth amendment is made applicable to the states through the due process clause of the fourteenth amendment." (Citation omitted; internal quotation marks omitted.) *State* v. *Carlos P.*, 171 Conn. App. 530, 537, 157 A.3d 723, cert. denied, 325 Conn. 912, 158 A.3d 321 (2017). "The Connecticut constitution provides coextensive protection, with the federal constitution, against double jeopardy. . . . This constitutional guarantee . . . protects against multiple punishments for the same offense [in a single trial] . . . ." (Internal quotation marks omitted.) *State* v. *McColl*, 74 Conn. App. 545, 566, 813 A.2d 107, cert. denied, 262 Conn. 953, 818 A.2d 782 (2003).

"The proper double jeopardy inquiry when a defendant is convicted of multiple violations of the *same* statutory provision is whether the legislature intended to punish the individual acts separately or to punish only the course of action which they constitute. . . . The issue, though essentially constitutional, becomes one of statutory construction." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Hearl*, 182 Conn. App. 237, 272, 190 A.3d 42, cert. denied, 330 Conn. 903, 192 A.3d 425 (2018).

"[T]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . [E]very case of statutory interpretation . . . requires a threshold determination as to whether the provision under consideration is plain and unambiguous. This threshold determination then governs whether extratextual sources can be used as an interpretive tool. . . . [O]ur case law is clear that ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation." (Internal quotation marks omitted.) Id., 272–73.

In the present case, there is no dispute that the defendant was convicted of four counts charging violations of the same statutory section. Therefore, the question with which we are presented is whether the legislature, in enacting § 53a-217 (a) (1), intended to punish the possession of *each* firearm or to punish only once the act of possessing all of the firearms. The trial court addressed this question in its memorandum of decision, and we do the same pursuant to our plenary review.

In March, 2013, at the time the defendant was arrested for criminally possessing firearms, General Statutes (Rev. to 2013) § 53a-217 provided in relevant part: "(a) A person is guilty of criminal possession of a firearm or electronic defense weapon when such person possesses *a firearm* or electronic defense weapon and (1) has been convicted of a felony . . . ." (Emphasis added.) The statute criminalized the possession of a single firearm, and, therefore, we share the trial court's view that the plain and unambiguous words of the statute demonstrate the legislature's intent to punish the

possession of each individual firearm.[8] "[I]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so." (Internal quotation marks omitted.) *State* v. *Kevalis*, 313 Conn. 590, 604, 99 A.3d 196 (2014). Our conclusion is supported by the relationship of § 53a-217 (a) (1) to General Statutes § 53-202aa, which criminalizes the trafficking of "one or more firearms." The comparison evidences the legislature's awareness of the distinction between criminalizing conduct involving a single firearm and criminalizing conduct involving more than one firearm.

The defendant primarily relies on *State* v. *Rawls*, 198 Conn. 111, 502 A.2d 374 (1985), and *State* v. *Ruscoe*, 212 Conn. 223, 563 A.2d 267, cert. denied, 493 U.S. 1084, 110 S. Ct. 1144, 107 L. Ed. 2d 1049 (1989), in support of his argument that the statute is ambiguous. Those cases, however, are readily distinguishable from the facts of the present case.

"In *Rawls*, the defendant was charged and convicted under General Statutes § 19-481 (a), now General Statutes § 21a-279, which imposed liability on '[a]ny person who possesses or has under his control any quantity of any narcotic substance . . . .' The defendant argued that the convictions of two counts of possession of narcotics for the simultaneous possession of heroin and cocaine punished him twice for the same offense and thereby violated the double jeopardy provision of the United States constitution. [Our Supreme Court] stated that '[t]he proper double jeopardy inquiry when a defendant is convicted of multiple violations of the *same* statutory provision is whether the legislature intended to punish the individual acts separately or to punish

[8] In light of our conclusion that the statute is clear and unambiguous, we need not consider relevant federal and out-of-state case law as the trial court did in its memorandum of decision.

only the course of action which they constitute.' . . . [The court] noted that the statute at issue in that case was ambiguous with respect to whether separate punishments were intended for the possession of more than one kind of narcotic substance. Accordingly, [the court] held that '[u]nless a clear intention to fix separate penalties for each narcotic substance involved is expressed, the issue should be resolved in favor of lenity and against turning a single transaction into multiple offenses.' " (Citation omitted; emphasis in original.) *State* v. *Ruscoe*, supra, 212 Conn. 257.

In *Ruscoe*, our Supreme Court stated: "[T]he language of [General Statutes] § 53-132[9] does not indicate an intention to authorize multiple punishments for the simultaneous possession of more than one item. Indeed, as the defendant points out, the statute itself proscribes the possession of certain 'equipment,' a term that can be singular or plural. Furthermore, the evidence does not indicate that the defendant acquired the three items on which the serial numbers had been defaced in separate transactions and the jury might well have concluded that only 'possession' of them had been proved. Accordingly, because § 53-132 is ambiguous in respect to whether separate punishments were intended for the possession of more than one item with defective identification marks, the rule of lenity dictates that the issue be resolved in the defendant's favor, and that two of the defendant's convictions under § 53-132 must be vacated." (Footnote added.) Id., 257–58.

[9] General Statutes (Rev. to 1989) § 53-132 provides: "Any person who, with intent to defraud, knowingly, for himself or for others, buys, sells, receives, disposes of, conceals, uses or attempts to sell or dispose of, or has in his possession for any of said purposes, *any* electrical motor, apparatus, appliance, device, mechanism, container, cabinet, receptacle, *equipment* or part on which the manufacturer's serial number or other distinguishing number, name or identification mark has been removed, defaced, concealed, altered or destroyed, shall be fined not more than one hundred dollars or imprisoned not more than three months or both." (Emphasis added.) See *State* v. *Ruscoe*, supra, 212 Conn. 270 n.3.

In *Rawls*, § 19-418, now § 21a-279, criminalized the possession of "*any* quantity of *any* narcotic substance," and in *Ruscoe*, § 53-132 criminalized the selling of "*any* . . . *equipment*" with defective identification marks. (Emphasis added.) Our Supreme Court concluded in both cases that the statutes were ambiguous as to whether separate punishments were authorized for the possession of more than one item. See, e.g., *State* v. *Ruscoe*, supra, 212 Conn. 257. It consequently concluded that, pursuant to the rule of lenity, the defendants' respective multiple convictions violated the prohibition against double jeopardy.[10] See, e.g., id, 258. In marked contrast, the statute at issue in the present case, § 53a-217 (a) (1), criminalized the possession of "a" firearm, not "any" firearm, as was the case in *Rawls*. Moreover, firearm is not a word that can be singular and plural, as was the case with the word equipment in *Ruscoe*.

We conclude that the trial court properly construed § 53a-217 (a) (1) and, therefore, conclude that it properly denied the defendant's second motion to correct an illegal sentence.

II

The defendant also claims that the trial court improperly failed to apply the rule of lenity when a reasonable doubt persisted as to whether the legislature intended to authorize punishments for the simultaneous possession of more than one firearm. The state argues that the rule of lenity applies only when an ambiguity concerning the legislative intent exists after applying the

[10] The defendant also argues that, in *Rawls* and *Ruscoe*, our Supreme Court analyzed the issue of multiple punishments for possession of multiple items pursuant to the *Blockburger* test. However, neither case cites *Blockburger*. Instead, the court looked to the text of the statutes themselves to determine the legislative intent. See, e.g., *State* v. *Rawls*, supra, 198 Conn. 121 ("the question before us becomes whether the legislature in enacting § 19-481 (a) intended to authorize dual convictions for the simultaneous possession of cocaine and heroin").

rules of statutory construction. We agree with the state.

"[T]he touchstone of [the] rule of lenity is statutory ambiguity. . . . Thus, as the United States Supreme Court has explained, courts do not apply the rule of lenity unless a reasonable doubt persists about a statute's intended scope *even after resort to the language and structure, legislative history, and motivating policies of the statute.*" (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Lutters*, 270 Conn. 198, 219, 853 A.2d 434 (2004).

Because we reject the defendant's contention that § 53a-217 (a) (1) is ambiguous; see part I of this opinion; we also reject his claim that the rule of lenity applies under the facts of the present case. Accordingly, the trial court properly denied the defendant's second motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other judges concurred.

JOSEPH STEPHENSON *v.* COMMISSIONER OF CORRECTION (AC 41812)

Alvord, Devlin and Norcott, Js.

Syllabus

The petitioner, who previously had pleaded guilty to larceny in the fifth degree and larceny in the sixth degree, sought a writ of habeas corpus, claiming that his trial counsel rendered ineffective assistance by failing to accurately advise him about the consequences of pleading guilty under federal immigration law. The petitioner was ordered removed from the United States on the basis of the two larceny convictions as well as a prior conviction of robbery. The habeas court rendered judgment dismissing the habeas petition as moot, concluding that it could provide no practical relief because the petitioner did not challenge the robbery conviction in his amended habeas petition and that conviction was a separate basis for the petitioner's ordered removal. Thereafter, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The trial court did not improperly dismiss the amended habeas petition as moot because no practical relief from his ordered removal could be afforded to the petitioner; a decision on the merits challenging the larceny convictions could not provide the petitioner relief from his ordered removal because the petitioner's robbery conviction, not challenged in the amended habeas petition, serves as an independent basis for the petitioner's ordered removal.
2. The trial court improperly dismissed the amended habeas petition as moot because the larceny convictions give rise to a reasonable possibility of prejudicial collateral consequences as a matter of law; the petitioner has not yet been removed from the United States and additional sources of prejudicial consequences apart from removal and barred reentry are a reasonable possibility in connection with the petitioner's potential future involvement with the criminal justice system, and, accordingly, the judgment was reversed and a new habeas trial was ordered.
3. This court declined to review the petitioner's ineffective assistance of counsel claim; the habeas court did not rule on the merits and there were existing factual disputes that could not be resolved on appeal.

Argued October 16, 2019—officially released April 28, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed*; *new trial*.

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

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo*, *Jr.*, state's attorney, *Juliana Waltersdorff*, assistant state's attorney, and *Michael Proto*, senior assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Joseph Stephenson, appeals from the judgment of the habeas court dismissing, as moot, his petition for a writ of habeas corpus. The court dismissed the petition, which alleged that the petitioner's trial counsel had rendered ineffective assistance by inaccurately advising him about the consequences of pleading guilty under federal immigration

law, because the petitioner's ordered removal from the United States rests, in part, on a conviction that he did not challenge in his habeas petition. On appeal, the petitioner claims that the court improperly dismissed his petition as moot, arguing that (1) "deportation—not a deportation order—is the triggering event that renders a case moot, and that a case does not become moot until [the] petitioner is actually physically removed from the United States," and (2) "collateral consequences other than immigration exist and will continue to exist until the petitioner's actual physical removal from the United States." We agree with the petitioner's second argument and, thus, reverse the judgment of the court.[1]

The following undisputed facts and procedural history are relevant to this appeal. The petitioner is a citizen of Jamaica, which is his country of origin. On or about December 20, 1985, the petitioner was admitted to the United States under nonimmigrant B-2 status. On February 14, 2000, the petitioner's immigration status was changed to that of a lawful permanent resident.

On March 5, 2013, the petitioner pleaded guilty to charges of larceny in the fifth degree, in violation of General Statutes § 53a-125a in one docket, and larceny in the sixth degree, in violation of General Statutes § 53a-125b in a second docket (larceny convictions).[2] On April 9, 2013, the petitioner was sentenced to two concurrent 364 day terms of imprisonment on the larceny convictions.[3] The concurrent 364 day sentences

[1] The petitioner also claims that his "constitutional right to effective assistance of counsel . . . was violated by counsel's failure to adequately advise [him] about the immigration consequences of pleading guilty." Because we conclude in part II of this opinion that the court did not make sufficient factual findings to enable our review of this claim, we do not reach it but, instead, remand the case for a new trial. See footnote 20 of this opinion.

[2] The petitioner further pleaded guilty to being a persistent larceny offender under General Statutes § 53a-40.

[3] The petitioner's habeas counsel represented that, as of the date of trial on his habeas petition, the petitioner had completed serving his concurrent 364 day sentences. The petitioner's counsel further represented that the

were negotiated by James Lamontagne, the petitioner's counsel, and the prosecutor in an effort by Attorney Lamontagne to alleviate any adverse consequences that the petitioner might encounter under federal immigration law as a result of the larceny convictions.

On July 9, 2013, the United States Department of Homeland Security (department) charged the petitioner "as removable pursuant to [the Immigration and Nationality Act, 8 U.S.C. § 1227 (a) (2) (A) (ii) (2012)] based on [the] larceny convictions." Subsequently, on January 21, 2014, the department further charged the petitioner "as removable pursuant to [8 U.S.C. § 1227 (a) (2) (A) (iii) (2012)], as an aggravated felon" for a prior conviction of robbery in the third degree (robbery conviction).[4] In a decision dated July 22, 2014, the immigration

petitioner was currently serving sentences for a subsequent conviction of burglary in the third degree, attempt to commit tampering with physical evidence, and attempt to commit arson in the second degree, all of which arose from events occurring in March, 2013. See *State* v. *Stephenson*, 187 Conn. App. 20, 22, 201 A.3d 427, cert. granted, 331 Conn. 914, 204 A.3d 702 (2019). The petitioner received a total effective sentence of twelve years of incarceration followed by eight years of special parole on this conviction. Id., 29. On direct appeal, this court reversed the trial court's judgment of conviction rendered against the petitioner and remanded the case with direction to render a judgment of acquittal on all charges. Id., 22. The state petitioned for certification to appeal from this court's judgment, which our Supreme Court granted in part. *State* v. *Stephenson*, 331 Conn. 914, 204 A.3d 702 (2019). The petitioner remains incarcerated pending resolution of the state's appeal to our Supreme Court.

[4] In 2010, a judgment of conviction of, inter alia, robbery in the third degree was rendered against the petitioner, which judgment this court affirmed on appeal. *State* v. *Stephenson*, 131 Conn. App. 510, 512–13, 27 A.3d 41 (2011), cert. denied, 303 Conn. 929, 36 A.3d 240 (2012).

Thereafter, the petitioner brought a habeas action in the United States District Court for the District of Connecticut challenging the robbery conviction. *Stephenson* v. *Connecticut*, United States District Court, Docket No. 3:12CV1233 (RNC) (D. Conn. March 31, 2014). The petitioner raised three claims in his original petition and, subsequently, filed two motions to amend his petition to allege additional claims. Id. The District Court denied the petitioner's motions to amend on the ground that the claims raised therein—ineffective assistance of counsel, improper dismissal of a juror, and actual innocence—were procedurally defaulted. Id. The District Court also denied the petition. Id.

On appeal, the Second Circuit Court of Appeals "remanded for a determination of whether the new claims, although procedurally defaulted, can be

judge concluded that the larceny convictions constituted crimes of moral turpitude under 8 U.S.C. § 1227 (a) (2) (A) (ii), and that the robbery conviction was an aggravated felony under 8 U.S.C. § 1227 (a) (2) (A) (iii). On the basis of these conclusions, the immigration judge ordered that the petitioner be removed from the United States to Jamaica. On December 15, 2014, the Board of Immigration Appeals (board) "affirm[ed] that the [petitioner] ha[d] been convicted of an aggravated felony for the reasons given in the [i]mmigration [j]udge's decision" and, accordingly, dismissed his appeal. Because the board affirmed the immigration judge's determination that the robbery conviction was an aggravated felony, it concluded that it "need not address whether the [petitioner] [w]as also . . . convicted of crimes involving moral turpitude."

On September 25, 2013, while in custody serving his concurrent 364 day sentences and shortly after the department charged him as removable, the petitioner filed a self-represented petition for a writ of habeas corpus seeking to vacate the larceny convictions.[5] On January 2, 2018, the petitioner, now represented by counsel, filed an amended petition for a writ of habeas corpus (operative petition). In the operative petition, the petitioner alleged that Attorney Lamontagne rendered ineffective assistance of counsel. Specifically,

adjudicated on the merits based on [the] petitioner's claim that he is actually innocent of [the robbery conviction]." *Stephenson* v. *Connecticut*, United States District Court, Docket No. 3:12CV1233 (RNC) (D. Conn. January 8, 2018); see also *Stephenson* v. *Connecticut*, 639 Fed. Appx. 742, 746 (2d Cir. 2016). The District Court, on remand, "conclude[d] that [the petitioner] ha[d] not met his burden of establishing a credible, compelling claim of actual innocence and therefore dismiss[ed] the petition." *Stephenson* v. *Connecticut*, supra, United States District Court, Docket No. 3:12CV1233 (RNC). Neither the District Court nor the Second Circuit issued the petitioner a certificate of appealability, and, thus, his appeal from the District Court's judgment was dismissed. See *Stephenson* v. *Connecticut*, United States Court of Appeals, Docket No. 18-367 (2d Cir. February 8, 2019).

[5] The petitioner did not file a direct appeal from the larceny convictions.

the petitioner alleged that Attorney Lamontagne's failure to accurately advise him that pleading guilty to the larceny charges against him would make him "deportable, removable, and inadmissible for reentry under federal immigration law," constituted deficient performance.[6] The petitioner further alleged that, but for Lamontagne's deficient performance, "[t]here [wa]s a reasonable probability that . . . [he] would not have entered a guilty plea."

On May 22, 2018, a trial on the operative petition was held before the court, *Sferrazza*, *J.* On May 29, 2018, Judge Sferrazza issued a memorandum of decision in which he held that the operative petition was moot. Judge Sferrazza found that the immigration judge had concluded that the robbery conviction constituted an aggravated felony and had ordered the petitioner's removal, in part, on that basis. Judge Sferrazza found that the petitioner did not challenge the robbery conviction in the operative petition. He further found that, on appeal, the board affirmed both the immigration judge's aggravated felony conclusion and order of removal. Accordingly, Judge Sferrazza concluded that his adjudication of the petitioner's claim "can provide no practical benefit to [him] because the mandated removal order, affirmed on appeal, is premised on an entirely different conviction for an aggravated felony, apart from [the] larceny convictions" that were challenged in the operative petition.[7] The petitioner filed a petition for certification to appeal, which Judge Sferrazza granted. This appeal followed.

[6] The petitioner also alleged that Attorney Lamontagne provided deficient performance by failing "to advise [him] that a guilty plea constituted a waiver of his right to appeal from the trial court's denial of his motion for the supervised diversionary program under [General Statutes] § 54-56*l*." The court denied that claim and the petitioner does not appeal from that decision. Therefore, we do not discuss it in this opinion.

[7] The petitioner thereafter filed a "motion for reconsideration and reargument," which Judge Sferrazza denied.

I

In his principal brief, the petitioner claims that the court improperly dismissed, as moot, the operative petition, alleging that Attorney Lamontagne provided ineffective assistance by inaccurately advising him about the consequences under federal immigration law of pleading guilty to his larceny charges, because (1) "a case does not become moot until [the] petitioner is actually physically removed from the United States," as opposed to being ordered removed, and (2) "collateral consequences other than immigration exist and will continue to exist until the petitioner's actual physical removal from the United States."[8]

With respect to his first argument, the petitioner asserts that by dismissing his claim, as moot, the court "improperly extended Connecticut's mootness jurisprudence." Specifically, the petitioner asserts that, under *State* v. *Aquino*, 279 Conn. 293, 901 A.2d 1194 (2006), a claim "challenging a conviction may be rendered moot once the person challenging the conviction has been deported from the United States," but that "[n]o . . . court . . . has extended the *Aquino* doctrine to conclude that mootness occurs before deportation." The petitioner further contends that, "[a]lthough there exists a separate basis for [his] removal, [he] is currently challenging the [robbery] conviction underlying that basis in a federal proceeding. Were [he] to be successful in that challenge, a decision vacating his larceny convictions would provide him with practical immigration relief. . . . Accordingly, there is a reasonable possibility that a favorable decision in this case would

[8] The petitioner also argues that (1) the court's improper dismissal of his claim is evidenced by the court reaching the merits of his claim that Attorney Lamontagne provided ineffective assistance of counsel by failing "to advise [him] that a guilty plea constituted a waiver of his right to appeal from the trial court's denial of his motion for the supervised diversionary program under [General Statutes] § 54-56*l*"; see footnote 6 of this opinion; and (2) his claim "is a quintessential example of [one] that is capable of repetition, yet evading review." In light of our conclusion in part I C of this opinion that

provide [him] with practical relief."[9] In response, the respondent, the Commissioner of Correction (commissioner), argues that, "[w]hether [the] petitioner has been deported due to the [robbery conviction], whether he will be once released from state incarceration, or whether deportation proceedings will commence hereafter, the fact remains that reversing the [larceny convictions] here will have no effect on deportability."

As to his second argument, the petitioner asserts that "[p]rior to being deported, [he] is likely to suffer a litany

the petitioner's claim is not moot because there is a reasonable possibility of prejudicial collateral consequences due to future involvement with the criminal justice system, we do not consider these arguments.

[9] In order for the petitioner's argument to have any merit we would have to assume that his federal habeas petition challenging the robbery conviction will be successful on the merits. This we cannot do. See *Daniels* v. *United States*, 532 U.S. 374, 382, 121 S. Ct. 1578, 149 L. Ed. 2d 590 (2001) ("[t]hus, we have held that if, by the time of sentencing under the [Armed Career Criminal Act of 1984], a prior conviction has not been set aside on direct or collateral review, that conviction is presumptively valid and may be used to enhance the federal sentence"); *McKenzie* v. *Dept. of Homeland Security*, United States District Court, Docket No. 3:04CV0067 (JBA) (D. Conn. April 23, 2004) ("[t]hus, the conviction is presumptively valid and may be used by the immigration authorities as a basis for an order of removal until set aside on direct or collateral review"); *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 113, 136 A.3d 596 (2016) (*Zarella*, *J.*, dissenting) ("The habeas petitioner does not come before the [habeas] [c]ourt as one who is innocent, but on the contrary as one who has been convicted by due process of law . . . . Accordingly, the petitioner bears a heavy burden of proof when attacking a presumptively valid conviction." (Citation omitted; internal quotation marks omitted.)); *Myers* v. *Manson*, 192 Conn. 383, 387, 472 A.2d 759 (1984) ("the plaintiff in a habeas corpus proceeding bears a heavy burden of proof"). Because we cannot assume that the robbery conviction will be vacated, that conviction supports the petitioner's ordered removal and bars reentry regardless of whether the petitioner ultimately were to succeed on the merits of the operative petition challenging the larceny convictions. See part I B of this opinion. Accordingly, we reject this argument.

Moreover, on February 8, 2019, nineteen days *prior to* the petitioner filing his principal brief in this appeal on February 27, 2019, the Second Circuit dismissed the petitioner's appeal from the District Court's dismissal of his petition for a writ of habeas corpus challenging the robbery conviction. See footnote 4 of this opinion. Even if the petitioner's argument possessed any merit in the abstract, the fact that his federal habeas petition was dismissed would obviate its applicability to his case.

of collateral consequences that result from the [larceny] convictions," including adverse effects on his inmate level and eligibility for programs and parole while in the commissioner's custody, on his standing in the community, and in seeking future job opportunities. According to the petitioner, therefore, "these prejudicial collateral consequences would be alleviated in the event that the . . . larceny convictions were vacated." In response, the commissioner argues that, "given [the] petitioner's lengthy prior record, including his six prior larcenies, two prior adjudications as a persistent larceny offender and his robbery conviction . . . [he] cannot show a reasonable possibility that the [larceny convictions] here will have any measureable effect."

Following oral argument before this court, we ordered, sua sponte, that the parties provide supplemental briefing to address the following questions: "(1) Whether the petition for a writ of habeas corpus is moot in light of *St. Juste* v. *Commissioner of Correction*, 328 Conn. 198, 218 [177 A.3d 1144] (2018), which held that 'in the absence of evidence of a crime of moral turpitude *that would serve as a permanent bar from reentering this country*, we conclude that [the challenged conviction] gives rise to a reasonable possibility of prejudicial collateral consequences—namely, his deportation and a barrier to reentry.' . . . See also *Wala* v. *Mukasey*, 511 F.3d 102 (2d Cir. 2007) (holding that, under modified categorical approach, record of conviction did not necessarily support [board's] finding that petitioner had intent of *permanent* taking pursuant to Connecticut larceny statute, General Statutes § 53a-119, required to hold that petitioner had committed a crime involving moral turpitude). (2) Whether the nonimmigration collateral consequences identified in the petitioner's briefing to this court are cognizable under Connecticut law in light of the petitioner's circumstances?" (Emphasis in original.)

In response to the first question in our order for supplemental briefing, the petitioner directs our attention to *In re Walton*, Board of Immigration Appeals, File No. A041-657-485 (December 5, 2019), a decision recently issued by the board, which, according to the petitioner, "held that a full pardon of an aggravated felony from the . . . Board of Pardons and Paroles has the 'effect of an executive pardon' such that it may be used to terminate immigration proceedings and vacate a removal order." In light of this holding, the petitioner argues that, "[b]ecause any of [his] prior convictions—including the robbery conviction that serves as an alternate ground for [his] removal and inadmissibility—may be pardoned, there is a reasonable possibility that vacating the larceny convictions at issue in this case will afford [him] practical immigration relief." Thus, the petitioner contends, "this court cannot find evidence of any crimes 'that would serve as a permanent ban from reentering this country' . . . because the possibility of a pardon prevents this court from concluding that any of his prior convictions have the effect of a permanent ban." (Emphasis omitted.) With respect to the question of whether the robbery conviction is a crime involving moral turpitude that would bar the petitioner's reentry, the petitioner concedes the answer is yes, citing *Webster* v. *Mukasey*, 259 Fed. Appx. 375, 376 (2d Cir. 2008) ("[r]obbery is universally recognized as a crime involving moral turpitude"). The commissioner likewise argues that the robbery conviction is a crime involving moral turpitude that bars reentry and renders the operative petition moot.[10]

[10] The commissioner also argues that, because the petitioner did not argue "at trial or on appeal that the instant convictions are his only bar to reentry to the United States," we "should not reach the issue . . . the parties did not explore, and the habeas court did not make factual findings on . . . ." The commissioner cites *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 84 A.3d 840 (2014), in support of his argument that "this [c]ourt should not review the issue." In citing to *Blumberg Associates Worldwide, Inc.*, the commissioner ignores language in that case compelling this court to address the question of whether the

In response to the second question in our order for supplemental briefing, the petitioner argues that, "[u]ntil [a] habeas petitioner has actually been removed from the United States, a habeas petitioner with a deportation order suffers the exact same nonimmigration collateral consequences as a habeas petitioner with no deportation order." Specifically, the petitioner argues that the larceny convictions could be weighed against him by the sentencing judge should he be convicted of the assault of public safety personnel charge that is currently pending against him. The commissioner argues that, "regardless of whether consequences from the [larceny convictions] might save a typical case from being moot, the unique rationale employed in immigration mootness cases should be recognized." The commissioner asserts that the "unique rationale employed in immigration mootness cases" is that "if a conviction is not the sole reason for adverse immigration consequences, such as deportation, denial of reentry or inability to obtain naturalization, an appeal is moot because reversal can provide no practical *immigration* relief."

robbery conviction would serve as a permanent bar to the petitioner's reentry into the United States because that question implicates whether the operative petition is moot and, thus, implicates our subject matter jurisdiction. See id., 149 ("Our cases have recognized a number of circumstances in which the reviewing court not only can but is obligated to exercise its power to review an unpreserved claim if certain conditions are met. First, this court repeatedly has held that claims implicating subject matter jurisdiction may be raised by the parties or by the court at any time . . . and must be resolved once they are raised." (Citation omitted.)); see also *St. Juste* v. *Commissioner of Correction*, supra, 328 Conn. 209 n.10 ("We released our decision in *State v. Jerzy G.* [326 Conn. 206, 162 A.3d 692 (2017)], after the parties filed their briefs in the present appeal but prior to oral argument. The parties have filed supplemental briefs addressing the effect, if any, of our decision in *Jerzy G.* on the present appeal, in response to our order . . . ."); *St. Juste* v. *Commissioner of Correction*, supra, 208 ("mootness implicates the court's subject matter jurisdiction" (internal quotation marks omitted)). Because our order for supplemental briefing from the parties involved questions that concern mootness and, thus, implicate subject matter jurisdiction, it was proper for us both to issue the order and now to discuss the questions raised therein.

(Emphasis in original.) The commissioner argues that in order to recognize this unique rationale in immigration mootness cases, the focus should not be "on what collateral consequences might arise in the community, in employment or in state courts, but rather what consequences may arise in federal immigration matters."

A

In order to assess the relative arguments of the parties, it is necessary first to review the cases in which our Supreme Court has applied its mootness doctrine where prejudicial collateral consequences were alleged as a result of federal immigration law. We begin our review by setting forth axiomatic principles of law and the standard of review. "Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . The first factor relevant to a determination of justiciability—the requirement of an actual controversy—is premised upon the notion that courts are called upon to determine existing controversies, and thus may not be used as a vehicle to obtain advisory judicial opinions on points of law. . . . Moreover, [a]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citations omitted; internal quotation marks omitted.) *State* v. *McElveen*, 261 Conn. 198, 204–205, 802 A.2d 74 (2002). "[A] case does not necessarily become moot by virtue of the fact that . . . due to a change in circumstances, relief from the actual injury is unavailable. . . . [A] controversy continues to

exist, affording the court jurisdiction, if the actual injury suffered by the litigant potentially gives rise to a collateral injury from which the court can grant relief. Although the facts and circumstances of each case raising this issue have differed, a common theme emerges upon review of those cases: whether the litigant demonstrated a basis upon which we could conclude that, under the circumstances, prejudicial collateral consequences are reasonably possible as a result of the alleged impropriety challenged on the appeal." Id., 205. "Because mootness implicates the court's subject matter jurisdiction, it raises a question of law subject to plenary review." (Internal quotation marks omitted.) *St. Juste* v. *Commissioner of Correction*, supra, 328 Conn. 208. "[I]n determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) Id., 218.

Our Supreme Court's seminal case considering mootness when consequences under federal immigration law are alleged is *State* v. *Aquino*, supra, 279 Conn. 293. In *Aquino*, the defendant was a "Guatemalan national who illegally entered the United States in 1986 and remained here as an illegal alien for the next seventeen years." (Internal quotation marks omitted.) Id., 295. After the defendant entered a guilty plea to multiple charges, he filed a motion in the trial court to withdraw his guilty plea claiming that his attorney had failed to advise him adequately about the consequences of that plea under federal immigration law. Id., 294. That motion was denied by the trial court, which judgment this court affirmed on appeal. Id., 294–95. The defendant appealed to our Supreme Court, which did not reach the merits of the appeal but, rather, dismissed the appeal as moot. Id., 295. The court noted that the defendant was removed while his appeal was pending before this court. Id., 298 and n.2. The court stated that "[its] careful

review of the record reveals . . . that [the defendant] has never claimed and that the record contains no evidence, that his guilty plea in the present case was the sole reason for his deportation. . . . Thus, his illegal immigration status could have been the reason for his deportation." Id., 298 n.2. The court further stated that "[j]ust as there is no evidence in the record before us establishing the reason for the defendant's deportation . . . there is no evidence to suggest that, in the absence of the guilty plea, the defendant would be allowed to reenter this country or become a citizen." Id., 298–99 n.3. The court held that, "in the absence of any evidence that the defendant's guilty plea was the sole reason for his deportation, the defendant's appeal must be dismissed as moot," because, "[i]f [the deportation] was not the result of his guilty plea alone, then [the] court can grant no practical relief and any decision rendered by [the] court would be purely advisory." Id., 298.

In *State* v. *Jerzy G.*, 326 Conn. 206, 162 A.3d 692 (2017), our Supreme Court again assessed whether an appeal was moot where the defendant was removed from the United States under federal immigration law during the pendency of the appeal. In *Jerzy G.*, the defendant, a citizen of Poland, entered the United States on a nonimmigrant B-2 visitor's visa that authorized him to remain for no longer than six months. Id., 209. Six years later, while still residing in the United States, the defendant was charged with sexual assault in the fourth degree. Id. The defendant applied for and was granted a pretrial diversionary program of accelerated rehabilitation. Id., 209–10. In accordance with the terms of the accelerated rehabilitation program, the defendant's case was continued for a two year period of probation that would end upon his successful completion of the program. Id., 210. Soon thereafter, however, the defendant was removed to Poland for remaining in the United States for a period longer than permitted,

without authorization. Id. The defendant was notified by the department that he was prohibited from entering the United States for a period of ten years from his departure date. Id. The defendant's removal was brought to the attention of the trial court; the state sought a termination of his involvement in the accelerated rehabilitation program and the issuance of an order for his rearrest. Id., 210–11. The court found that the defendant had failed to complete the accelerated rehabilitation program, ordered his rearrest, and imposed as a condition of his release that he post a $5000 cash or surety bond. Id., 211. The defendant appealed to this court, which dismissed his appeal as moot, concluding that, "because [he] had produced no evidence to establish that, in the absence of the termination of accelerated rehabilitation, he would be permitted to reenter, visit, or naturalize, the purported collateral consequences were too conjectural." Id., 212.

The defendant appealed to our Supreme Court, which reversed this court's judgment. Id., 213. At the outset of its discussion, the court recognized that *State* v. *McElveen*, supra, 261 Conn. 198, set forth "the contours of the collateral consequences doctrine"; *State* v. *Jerzy G.*, supra, 326 Conn. 213; and recited its standard for determining whether prejudicial collateral consequences exist: "[F]or a litigant to invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these consequences are more probable than not. This standard provides the necessary limitations on justiciability underlying the mootness doctrine itself. Where there is no direct practical relief available from the reversal of the judgment . . . the collateral consequences doctrine acts as a surrogate, calling for a determination whether a decision in the case can afford the

litigant some practical relief in the future. The reviewing court therefore determines, based upon the particular situation, whether, the prejudicial collateral consequences are reasonably possible." (Internal quotation marks omitted.) Id., 214–15.

The court made two additional points that are relevant to the present case. First, the court noted that, "[o]n its face, *Aquino* appears to be inconsistent with our collateral consequences jurisprudence," in that *Aquino* "makes no express reference to 'collateral consequences' or the 'reasonable possibility' standard set forth in *McElveen*." Id., 220. The court further noted that the suggestion in *Aquino* "that the defendant must produce evidence that he 'would be allowed' to reenter this country or become a citizen . . . seems to be in tension with [the *McElveen*] standard." (Citation omitted.) Id. The court, nevertheless, concluded that *Aquino* was consistent with *McElveen* because, in *Aquino*, the lack of evidence in the record to establish both the reason for the defendant's deportation and, conversely, the lack of any impediment aside from his guilty plea to preclude reentry resulted in the court in *Aquino* "apparently deem[ing] it impossible to determine whether, even if Aquino prevailed on appeal and his conviction was reversed, such a decision would improve his chances of reentry into the country or naturalization." Id., 221. According to the court in *Jerzy G.*, the decision in *Aquino* was supported by the "settled principle under both federal and Connecticut case law that, if a favorable decision necessarily could not afford the practical relief sought, the case is moot." Id.

Second, the court noted in *Jerzy G.*, the approach of the court in *McElveen* to the question of "whether there could be collateral consequences to overcome a charge of mootness even though granting relief would not remove similar prejudice remaining from other sources." Id., 216. Specifically, it explained that, in

McElveen, the court concluded that there was a reasonable possibility of prejudicial collateral consequences arising from the defendant's violation of probation even though the defendant also had a conviction of attempted robbery in the third degree that created similar prejudicial collateral consequences. Id., 216–17; see also id., 217–18 ("[t]he proposition that the challenged decision did not have to be the sole source of possible prejudice found support in the court's earlier decision in *Housing Authority* v. *Lamothe*, 225 Conn. 757, 765, 627 A.2d 367 (1993)"). In *Jerzy G.*, however, the court found *McElveen*'s principle inapplicable to cases in which a conviction, other than the one being challenged, results in a permanent ban of an individual's reentry into the United States because the alternative source of prejudice in such cases is "necessarily dispositive regarding the collateral injury . . . ." *State* v. *Jerzy G.*, supra, 326 Conn. 222.

The court in *Jerzy G.* then turned to its analysis of the defendant's case. It first determined that the defendant's case was distinguishable from *Aquino* because, "[u]nlike *Aquino*, the record establishes the reason for the defendant's deportation—overstaying the term of his visitor visa without permission to do so" and "[t]he record also establishes that the ground for the defendant's removal does not permanently bar him from reentering the United States . . . ." Id., 223. On this basis, the court "conclude[d] that there is a reasonable possibility of prejudicial collateral consequences should the defendant seek to lawfully reenter the United States." Id. Specifically, the court stated a reasonable possibility of prejudicial collateral consequences existed in the following: (1) "the fact that there is a pending criminal charge against the defendant could be a significant factor in dissuading federal immigration officials from admitting him into the country, as such a decision would be discretionary"; (2) even if the

defendant was permitted to enter the United States, he "would be subject to arrest upon entry"; (3) upon arrest, "[i]n order to obtain a release, he would have to post a $5000 bond"; and (4) "[i]f he was unable to [post bond], he would be imprisoned." Id., 223–24. Were the defendant to succeed on the merits of his appeal, however, those impediments could be removed. Id., 224.

In *St. Juste* v. *Commissioner of Correction*, supra, 328 Conn. 198, our Supreme Court most recently addressed the issue of mootness in a case in which a petitioner alleged prejudicial collateral consequences on the basis of his removal from the United States under federal immigration law. In *St. Juste*, the petitioner pleaded guilty to assault in the second degree and possession of a sawed-off shotgun. Id., 202. In a petition for a writ of habeas corpus, the petitioner alleged that his trial counsel rendered ineffective assistance because he, inter alia, "(1) failed to educate himself about the immigration consequences of the pleas, (2) misadvised the petitioner with respect to the immigration consequences of the pleas, and (3) failed to meaningfully discuss with the petitioner what immigration consequences could . . . flow from the pleas." Id., 203. The petitioner further alleged that his guilty pleas "were not knowingly, voluntarily, and intelligently made because he made them under the mistaken belief that his conviction would not subject him to deportation." Id. Lastly, the petitioner alleged that as a result of his conviction of assault in the second degree and possession of a sawed-off shotgun, he had been ordered removed from this country. Id.

The habeas court denied the petition, and the petitioner appealed to this court. Id., 204. Prior to filing his appeal, however, the petitioner was removed to Haiti solely on the basis of his conviction of assault in the second degree. Id., 204 and n.7. Because of the petitioner's removal, this court did not reach the merits of his

appeal but, instead, dismissed the appeal as moot. Id., 205. In doing so, this court observed that, in addition to the conviction of assault in the second degree and possession of a sawed-off shotgun, the petitioner had a prior conviction of threatening in the second degree in violation of General Statutes (Rev. to 2005) § 53a-62 (a).[11] Id., 205. This court concluded that the petitioner's prior conviction of threatening in the second degree was a crime involving moral turpitude that would bar his reentry into the United States, irrespective of any relief provided on his challenged conviction, thereby rendering his appeal moot. Id., 206–207.

On appeal, our Supreme Court reversed this court's decision. Id., 208. The court noted that this court had applied the categorical approach, rather than the modified categorical approach,[12] to determine whether § 53a-62 (a) was a crime involving moral turpitude. Id.,

[11] General Statutes (Rev. to 2005) § 53a-62 (a) provides: "A person is guilty of threatening in the second degree when: (1) By physical threat, such person intentionally places or attempts to place another person in fear of imminent serious physical injury, (2) such person threatens to commit any crime of violence with the intent to terrorize another person, or (3) such person threatens to commit such crime of violence in reckless disregard of the risk of causing such terror." The legislature made significant changes to § 53a-62 since the events underlying the appeal in *St. Juste* v. *Commissioner of Correction*, supra, 328 Conn. 201–202 n.3. See Public Acts 2017, No. 17-111, § 4; Public Acts 2016, No. 16-67, § 7. Our references in this opinion to § 53a-62 (a) are to the 2005 revision of the statute.

[12] "In general, the [board] and [the Second Circuit] have applied either a categorical or a modified categorical approach to determine whether a specific crime falls within a [ground] for removability. . . . Under the categorical approach, a reviewing court look[s] to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [the] petitioner's crime. . . . This approach requires a court to focus on the intrinsic nature of the offense, rather than on the singular circumstances of an individual petitioner's crimes, and only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant. . . . In describing the categorical approach, we have held that every set of facts violating a statute must satisfy the criteria for removability in order for a crime to amount to a removable offense; the [board] may not justify removal based on the particular set of facts underlying an alien's criminal conviction.

"Under the modified categorical approach, however, a limited review of a petitioner's circumstances may be warranted where a statute of conviction is divisible. . . . A statute is divisible if it encompasses multiple categories of offense conduct, some, but not all, of which would categorically constitute

207. The court determined that because § 53a-62 (a) is divisible, an application of the modified categorical approach was required. Id., 208. The court reasoned that, under Second Circuit precedent, whether a threatening offense under § 53a-62 (a) is a crime of moral turpitude depends on the mental state that must be proven to convict under it. Id., 212. If committed with an intentional mental state, it is a crime of moral turpitude, but, if committed with a reckless mental state, it is not a crime of moral turpitude unless combined with aggravating circumstances. See id., 213 ("crimes committed recklessly (where recklessness is defined as a *conscious* disregard of substantial and unjustifiable risk) have, *in certain aggravated circumstances*, been found to express a sufficiently corrupt mental state to constitute a [crime of moral turpitude]" (emphasis in original; internal quotation marks omitted)). The court deemed § 53a-62 (a) divisible because "[e]ach subdivision of § 53a-62 (a) requires proof of a different act or particular mental state. . . . [S]ubdivision (1) requires proof that an accused intentionally placed another person in fear of imminent serious physical injury, while subdivision (2) requires proof that an accused intentionally terrorized another person. Section 53a-62 (a) (3), however, requires proof that an accused recklessly disregarded the risk of causing terror in another person." Id., 212. The court further concluded that because § 53a-62 (a) (3) lacks aggravating circumstances, it is not a crime involving moral turpitude. Id., 214.

Having concluded that § 53a-62 (a) is divisible, the court proceeded to review the record of conviction

a removal offense. . . . In reviewing a conviction under a divisible statute, we may refer to the record of conviction to ascertain whether a petitioner's conviction was under the branch of the statute that proscribes removable offenses. . . . The record of conviction includes, inter alia, the charging document, a plea agreement, a verdict or judgment of conviction, a record of the sentence, or a plea colloquy transcript." (Citations omitted; internal quotation marks omitted.) *Wala* v. *Mukasey*, supra, 511 F.3d 107–108.

pursuant to the modified categorical approach to determine under which subdivision the petitioner was convicted. Id., 216. Because the record of conviction was inconclusive, the court could not determine "that the petitioner was convicted of a crime of moral turpitude that is a permanent ban from reentering this country . . . ." (Internal quotation marks omitted.) Id., 218. The court summarized that, "in the absence of evidence of a crime of moral turpitude that would serve as a permanent ban from reentering this country, we conclude that the petitioner's assault conviction, which he challenges in the present habeas action, gives rise to a reasonable possibility of prejudicial collateral consequences—namely, his deportation and a barrier to reentry." Id.

B

Informed by our review of *Aquino*, *Jerzy G.*, and *St. Juste*, we turn now to the petitioner's first argument that the court improperly dismissed the operative petition as moot because a reasonable possibility of prejudicial collateral consequences exists in connection with his ordered removal from the United States under federal immigration law. In *Aquino*, *Jerzy G.*, and *St. Juste*, the litigant had been removed from the United States by the time our Supreme Court considered the issue of mootness.[13] As such, the court's analysis turned on whether the litigant was barred from reentry into the United States.[14] In the present case, the petitioner has not yet been removed from the United States. Therefore, the mootness analysis focuses on whether a decision on the merits of the operative petition challenging the larceny convictions could provide the petitioner relief

[13] See *St. Juste* v. *Commissioner of Correction*, supra, 328 Conn. 204; *State* v. *Jerzy G.*, supra, 326 Conn. 210; *State* v. *Aquino*, supra, 279 Conn. 298.

[14] See *St. Juste* v. *Commissioner of Correction*, supra, 328 Conn. 210; *State* v. *Jerzy G.*, supra, 326 Conn. 223; *State* v. *Aquino*, supra, 279 Conn. 298 n.3.

from his ordered removal—which is based on both the larceny convictions and the robbery conviction—or, if not, from a barrier to his future reentry. We conclude that a decision on the merits of the operative petition could not provide the petitioner with relief from either. Accordingly, we disagree with the petitioner's first argument.

The robbery conviction, which serves as one of the bases for the petitioner's ordered removal, was not challenged in the operative petition. Regardless of whether the petitioner succeeds on the merits of the operative petition challenging the larceny convictions, his ordered removal will stand because it is supported by the robbery conviction. Thus, a decision on the merits of the operative petition could provide no relief to the petitioner from his ordered removal.

Moreover, in his supplemental briefing, the petitioner concedes in accordance with Second Circuit precedent that the robbery conviction is a crime involving moral turpitude. See *St. Juste* v. *Commissioner of Correction*, supra, 328 Conn. 210 ("decisions of the Second Circuit, while not binding upon this court, nevertheless carry particularly persuasive weight in the resolution of issues of federal law" (internal quotation marks omitted)). In *Webster* v. *Mukasey*, supra, 259 Fed. Appx. 375, the Second Circuit vacated a board decision denying a petitioner's application for a waiver of deportation. In doing so, however, the court acknowledged that "[i]t [was] unnecessary to remand for a decision on whether a conviction for second degree robbery under Connecticut law could form the basis of exclusion under [8 U.S.C. § 1182 (a)] as a crime involving moral turpitude" because the board had "already determined that robbery is a crime involving moral turpitude that renders an alien inadmissible." Id., 376. Applying *Webster* to the present case, we conclude that, under 8 U.S.C. § 1182 (a) (2) (A) (i) (I), the robbery conviction is a crime

involving moral turpitude and, thus, a permanent bar to reentry.[15] Because the robbery conviction was not challenged in the operative petition, independently supports the petitioner's ordered removal from the United States, and is a permanent bar to his reentry, a decision on the merits of the operative petition challenging the larceny convictions could provide no practical relief to the petitioner from the consequences he faces under federal immigration law.[16]

The petitioner argues that, in light of *In re Walton*, Board of Immigration Appeals, File No. A041-657-485 (December 5, 2019), "any of [his] prior convictions—including the robbery conviction that serves as an alternate ground for [his] removal and inadmissibility—may be pardoned, [and, thus] there is a reasonable possibility that vacating the larceny convictions at issue in this case will afford [him] practical immigration relief." The petitioner has not identified in the record

[15] Although the petitioner does not argue that an exception applies under 8 U.S.C. § 1182 (a) (2) (A) (ii) to the robbery conviction constituting a crime involving moral turpitude, we note that, indeed, no exception is available to him because he was over the age of eighteen when he committed the robbery; see 8 U.S.C. § 1182 (a) (2) (A) (ii) (I); and the maximum penalty possible for the robbery conviction exceeds imprisonment for one year. See 8 U.S.C. § 1182 (a) (2) (A) (ii) (II); see also General Statutes § 53a-136 (b) ("[r]obbery in the third degree is a class D felony"); General Statutes § 53a-25 (a) ("[a]n offense for which a person may be sentenced to a term of imprisonment in excess of one year is a felony").

[16] The petitioner argues that "a case does not become moot until [the] petitioner is actually physically removed from the United States." This argument, as it pertains to the facts presented in this case, has no merit. The fact that the petitioner remains incarcerated in the United States has no bearing on whether relief could be provided to him from his order of removal, which eventually will result in his physical removal from the United States. The petitioner has been ordered removed under the larceny convictions and the robbery conviction, but has challenged only the larceny convictions in the operative petition. Even if the petitioner were to succeed on the merits of the operative petition, resulting in the larceny convictions being vacated, the robbery conviction remains valid and will continue to support the petitioner's ordered removal and bar any future reentry into the United States. See footnote 9 of this opinion.

any pardon received from the Board of Pardons and Paroles. Accordingly, we conclude that this alleged source of prejudicial collateral consequence is wholly speculative. See *State* v. *Jerzy G.*, supra, 326 Conn. 214 ("the litigant must establish these consequences by more than mere conjecture" (internal quotation marks omitted)); *State* v. *Aquino*, supra, 279 Conn. 298 (citing lack of evidence in record to support mootness conclusion).[17]

C

We next consider the petitioner's argument that prejudicial collateral consequences exist while he is incarcerated on subsequent convictions and will continue until he is physically removed from the United States. Specifically, the petitioner argues that he has been charged with assault of public safety personnel in violation of General Statutes § 53a-167c, which, if he is convicted of that offense, will result in a judge's consideration of the larceny convictions, as a part of the petitioner's criminal history, during sentencing.[18] Because the larceny convictions give rise to a reasonable possibility of prejudicial collateral consequences as a matter of law, we conclude that the operative petition is not moot.

[17] In contrast to future involvement with the criminal justice system, which is a recognized source of prejudicial collateral consequences from which practical relief can be afforded; see part I C of this opinion; the potential for a pardon is conjectural because, in the absence of one, we presume that a conviction is valid. See *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 113; *Myers* v. *Manson*, supra, 192 Conn. 387.

[18] The petitioner argues that the larceny convictions present him with other forms of prejudicial collateral consequences while incarcerated, such as adverse effects on his inmate level and eligibility for programs and parole while in the commissioner's custody. Because we conclude that the larceny convictions, as a matter of law, give rise to a reasonable possibility of prejudicial collateral consequences in connection with potential future involvement with the criminal justice system, we do not reach these claimed alternative sources of prejudicial collateral consequences.

As previously set forth, "for a litigant to invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these consequences are more probable than not. . . . The reviewing court therefore determines, based upon the particular situation, whether, the prejudicial collateral consequences are reasonably possible." *State* v. *McElveen*, supra, 261 Conn. 208.

"It is well established that since collateral legal disabilities are imposed as a matter of law because of a criminal conviction, a case will not be declared moot even where the sentence has been fully served." *Barlow* v. *Lopes*, 201 Conn. 103, 112, 513 A.2d 132 (1986); see also *Shays* v. *Local Grievance Committee*, 197 Conn. 566, 572 n.4, 499 A.2d 1158 (1985); *State* v. *Scott*, 83 Conn. App. 724, 727, 851 A.2d 353 (2004). "[C]ollateral consequences of a criminal conviction are legion, involving possible heavier penalties in the event of future convictions . . . ." *Monsam* v. *Dearington*, 82 Conn. App. 451, 455, 844 A.2d 927 (2004). In holding that "collateral legal disabilities are imposed as a matter of law because of a criminal conviction"; *Shays* v. *Local Grievance Committee*, supra, 572 n.4; our Supreme Court has cited to persuasive federal precedent, which presumes collateral consequences from a criminal conviction. See *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108 n.3, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) ("[C]ases have held that the possibility of a criminal defendant's suffering collateral legal consequences from a sentence already served permits him to have his claims reviewed here on the merits. . . . In any future state criminal proceedings against respondent, this conviction may be relevant to setting bail and length of sentence, and to the availability of probation." (Internal quotation marks

omitted.)); *Sibron* v. *New York*, 392 U.S. 40, 55, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968) ("in *Pollard* v. *United States*, 352 U.S. 354 [77 S. Ct. 481, 1 L. Ed. 2d 393 (1957)], the [c]ourt abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed").

In light of the foregoing precedent, we conclude that the larceny convictions give rise to a reasonable possibility of prejudicial collateral consequences as a matter of law. More specifically, in this case, the larceny convictions give rise to a reasonable possibility of prejudicial collateral consequences in connection with the petitioner's potential future involvement with the criminal justice system.[19] See *State* v. *McElveen*, supra, 261 Conn. 213 (finding reasonable possibility of prejudicial collateral consequences in connection with future involvement with criminal justice system arising from revocation of probation). Although we conclude that the petitioner's potential future involvement with the criminal justice system is sufficient to establish a reasonable possibility of prejudicial collateral consequences, we also note that the petitioner is currently facing a charge of assault of public safety personnel. *State* v. *Stephenson*, Superior Court, judicial district of Hartford, geographical area number thirteen, Docket No. H13W-CR-19-0191163-S; see also *Pennsylvania* v. *Mimms*, supra,

[19] In light of the petitioner's ordered removal from the United States, it is unclear whether he will face other collateral consequences presumed in cases in which mootness is raised as an issue because the sentence of a criminal conviction has been served, consequences such as community stigma and decreased employment opportunities. See *State* v. *McElveen*, supra, 261 Conn. 216. Irrespective of his impending removal from the United States, however, the larceny convictions could be considered against the petitioner in the future should he become involved in the criminal justice system prior to the execution of his ordered removal. Because that potentiality is sufficient to give rise to prejudicial collateral consequences, we need not consider whether the larceny convictions will affect the petitioner's ability to secure employment or his reputation in the community such that they are legally cognizable prejudicial collateral consequences under the circumstances presented in this case.

434 U.S. 108–109 n.3 ("[i]n view of the fact that respondent, having fully served his state sentence, is presently incarcerated . . . we cannot say that [consideration of his conviction in future criminal proceedings is] unduly speculative even if a determination of mootness depended on a case-by-case analysis"). This pending criminal charge is useful to illustrate how the larceny convictions give rise to a reasonable possibility of prejudicial collateral consequences in connection with the criminal justice system. For example, were the petitioner to be convicted of the assault of public safety personnel charge, the larceny convictions, as part of his past criminal history, could be weighed against him by the judge in determining the appropriate sentence to impose. See General Statutes § 54-91a (a) ("any court may, in its discretion, order a presentence investigation for a defendant convicted of any crime or offense"); General Statutes § 54-91a (c) ("the probation officer shall promptly inquire into . . . the criminal record . . . of the defendant"); General Statutes § 54-91a (d) ("[i]n lieu of ordering a full presentence investigation, the court may order an abridged version of such investigation, which (1) shall contain . . . (F) the criminal record of the defendant"); see also *State* v. *Bell*, 303 Conn. 246, 265, 33 A.3d 167 (2011) ("sentencing principles generally . . . require the court [to] fashion a sentence that fits the crime and the criminal" (internal quotation marks omitted)). Thus, the larceny convictions present a reasonable possibility of prejudicial collateral consequences from which the court can grant practical relief, namely, consideration of the larceny convictions against the petitioner in future criminal proceedings.

The commissioner argues that, "regardless of whether consequences from the [larceny convictions] might save a typical case from being moot, the unique rationale employed in immigration mootness cases should be recognized." Thus, "if a conviction is not

the sole reason for adverse immigration consequences, such as deportation, denial of reentry or inability to obtain naturalization, an appeal is moot because reversal can provide no practical *immigration* relief." (Emphasis in original.) We disagree. In each of our previously discussed Supreme Court cases analyzing mootness when federal immigration law is implicated, the appealing party had already been removed from the United States by the time their appeal reached the court. See *St. Juste* v. *Commissioner of Correction*, supra, 328 Conn. 204; *State* v. *Jerzy G.*, supra, 326 Conn. 210; *State* v. *Aquino*, supra, 279 Conn. 298. Therefore, the alleged sources of prejudicial collateral consequences in those cases were the parties' removal from the United States and their potential bar from reentry, to which the court limited its analysis. But see *State* v. *Jerzy G.*, supra, 326 Conn. 224 (concluding that practical relief could be provided from defendant's ordered rearrest and imposed bond, should he be permitted reentry into United States). This case, however, alleges additional sources of prejudicial collateral consequences other than removal and barred reentry, sources which are uniquely present because the petitioner is incarcerated under subsequent convictions and has yet to have his ordered removal from the United States executed. Because "every presumption favoring jurisdiction should be indulged"; (internal quotation marks omitted) *St. Juste* v. *Commissioner of Correction*, supra, 218; we conclude that the larceny convictions do give rise to a reasonable possibility of prejudicial collateral consequences from which practical relief can be granted.

II

Because we have concluded that the operative petition is not moot, we turn to the petitioner's second claim on appeal. The petitioner claims that his constitutional right to the effective assistance of counsel was violated by counsel's failure to accurately advise him about the

immigration consequences of pleading guilty. The commissioner argues that because the court "dismissed [the operative petition] without deciding its merits, it did not make sufficient factual findings to enable appellate review." Therefore, the commissioner argues that, "if the [operative petition] is not moot, the case should be remanded for the . . . court to make factual findings and decide the merits . . . ." We agree with the commissioner.

We begin by setting forth the principles of law and standard of review. "A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel is governed by the two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. Under *Strickland*, the petitioner has the burden of demonstrating that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance." (Footnote omitted; internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, 169 Conn. App. 266, 277–78, 149 A.3d 185 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017).

The first prong of *Strickland* was discussed in *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). "In *Padilla* . . . the United States Supreme Court concluded that the federal constitution's guarantee of effective assistance of counsel

requires defense counsel to accurately advise a noncitizen client of the immigration consequences of a guilty plea. . . . [T]he Supreme Court recognized that there may be occasions when the consequences of a guilty plea will be unclear or uncertain to competent defense counsel. . . . In those circumstances, counsel need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. . . . But when the immigration consequences under federal law are clearly discernable, *Padilla* requires counsel to accurately advise his client of those consequences. . . . For some convictions, federal law calls for deportation, subject to limited exceptions. . . . In these circumstances, because the likely immigration consequences of a guilty plea are truly clear, counsel has a duty to inform his client of the deportation consequences set by federal law." (Citations omitted; internal quotation marks omitted.) *Budziszewski* v. *Commissioner of Correction*, 322 Conn. 504, 511–12, 142 A.3d 243 (2016). In *Budziszewski*, "[b]ecause federal law called for deportation for the petitioner's conviction, his counsel was required to unequivocally convey to the petitioner that federal law mandated deportation as the consequences for pleading guilty." Id., 512.

"For claims of ineffective assistance of counsel arising out of the plea process, the United States Supreme Court has modified the second prong of the *Strickland* test to require that the petitioner produce evidence that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied." (Internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, supra, 169 Conn. App. 278.

The petitioner argues that, "[a]lthough the . . . court did not rule on the merits of [the operative petition], it made all of the factual findings necessary for this court to exercise plenary review over [the operative petition]." Alternatively, the petitioner argues that "to the extent that this court concludes that there are factual questions that were not resolved by the . . . court, but that are necessary to permit review of [his] claims, those findings can be made by this court because they are inevitable as a matter of law or are based on the uncontroverted evidence and testimony in the record."

Portions of Judge Sferrazza's memorandum of decision seem to bear on the two prongs of *Strickland*. Nevertheless, the merits of the petitioner's *Padilla* claim were not discussed in Judge Sferrazza's memorandum of decision. Furthermore, Judge Sferrazza did not make any specific findings with respect to issues that the parties disputed. For instance, with respect to deficient performance, there were no specific findings made as to, inter alia, what Attorney Lamontagne told the petitioner concerning the consequences he faced under federal immigration law by pleading guilty to the larceny charges and accepting the sentences negotiated by Attorney Lamontagne, or whether there were any viable alternative options to doing so. With respect to the prejudice prong, the parties disputed the strength of the prosecution's larceny cases against the petitioner and whether the petitioner understood the immigration consequences during the plea canvass. Moreover, where the petitioner and Attorney Lamontagne provided conflicting testimony, the court did not indicate whose testimony it credited. Thus, there are existing factual disputes that preclude us from deciding the petitioner's *Padilla* claim. See *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 517 (concluding that, although, "[i]n some cases, [the court is] able to resolve an appeal without reversal by applying the correct legal standard to the facts found by the habeas

court," court could not do so because habeas court made insufficient findings); *State* v. *Daly*, 111 Conn. App. 397, 400, 960 A.2d 1040 (2008) ("it is well established that as an appellate tribunal, we do not find facts"), cert. denied, 292 Conn. 909, 973 A.2d 108 (2009). Accordingly, we remand the case to the habeas court to conduct a new trial.[20]

The judgment is reversed and the case is remanded for a new habeas trial.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* FREDRIK HOLMGREN (AC 43221)

Lavine, Bright and Devlin, Js.

Syllabus

Convicted, after a jury trial, of the crimes of home invasion, burglary in the first degree and sexual assault in the third degree in connection with an incident in which the defendant forced the victim into her apartment at knifepoint, forced her to undress and sexually assaulted her, the defendant appealed. *Held*:

1. The defendant could not prevail on his claim that the evidence presented at trial was insufficient to sustain his conviction of the charges of home invasion and burglary in the first degree:

   a. There was sufficient evidence to support the defendant's conviction of home invasion; contrary to the defendant's claim that the state failed to prove that he entered a dwelling while the victim was present in that dwelling, as required by the home invasion statute (§ 53a-100aa (a) (1)), because the victim was not actually present in her apartment when he entered it, the jury was entitled to credit the victim's testimony that she entered her apartment before the defendant and, therefore, was present in it when the defendant entered.

   b. The defendant's claim that the evidence underlying his conviction of burglary in the first degree was insufficient because the state failed to prove beyond a reasonable doubt that he entered the victim's apartment with the intent to commit a crime was unavailing; the jury reasonably could have inferred the defendant's intent to commit a sexual assault from the fact that he was in possession of a syringe and injectable

[20] During the pendency of this appeal, Judge Sferrazza retired. As a result, we remand the case to the habeas court to conduct a new trial on the merits of the operative petition.

erectile dysfunction medication when he unlawfully entered the victim's apartment, and there was no merit to the defendant's challenge to the permissibility of such an inference on the ground that he told a police detective that those items were intended to be used with his former girlfriend, as the jury was not required to credit the defendant's statement.

2. The defendant could not prevail on his claim that the trial court improperly allowed the state to introduce the testimony of a police detective regarding statements made by the defendant pertaining to a gift bag containing a syringe and injectable erectile dysfunction medication that he had with him in the victim's apartment, as the probative value of the gift bag evidence outweighed any undue prejudice caused to the defendant by its admission.

Argued February 4—officially released April 28, 2020

Procedural History

Substitute information charging the defendant with the crimes of home invasion, kidnapping in the first degree, burglary in the first degree and sexual assault in the third degree, brought to the Superior Court in the judicial district of New Britain and tried to the jury before *Graham*, *J.*; verdict and judgment of guilty of home invasion, burglary in the first degree and sexual assault in the third degree, from which the defendant appealed. *Affirmed*.

Stephanie L. Evans, assigned counsel, for the appellant (defendant).

Samantha Oden, deputy assistant state's attorney, with whom, on the brief, was *Brian Preleski*, state's attorney, for the appellee (state).

Opinion

DEVLIN, J. The defendant, Fredrik Holmgren, appeals from the judgment of conviction, rendered after a jury trial, of home invasion in violation of General Statutes § 53a-100aa (a) (1), burglary in the first degree in violation of General Statutes § 53a-101 (a) (3), and sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (1) (B). On appeal, the defendant claims that (1) the evidence presented at trial was insufficient to sustain his conviction on the charges of home

invasion and burglary in the first degree, and (2) the trial court improperly allowed the state to introduce irrelevant and prejudicial evidence of statements that he made to a police detective prior to his arrest. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. At approximately 5:15 p.m. on January 6, 2016, the victim[1] returned to her apartment after work. Upon arriving, she noticed the defendant, whom she later recognized as the former boyfriend of one of her neighbors, standing toward the side of the building. After the victim entered the exterior door and into the lobby, the defendant came up behind her and put a knife to her back. The defendant forced the victim to walk across the lobby, where they reached another door, which was locked. The defendant then moved the knife to the victim's throat, and she screamed. The defendant told her that he would slit her throat if she continued to scream. With the defendant walking behind the victim and holding a knife to her throat, they proceeded to the victim's apartment. The victim unlocked her apartment door, and the defendant followed her inside.

After the defendant and the victim entered her apartment, the victim told him to take anything that he wanted. She began talking to him to try to calm him down, and he eventually removed the knife from her throat, and, after approximately one hour, he put it on top of the refrigerator. The victim observed that, in addition to the knife, the defendant also had a gift bag with him that contained a syringe. The defendant told the victim that he used the syringe "to inject himself because he had a hard time getting it up." The defendant instructed the victim to remove her clothes. Because

[1] In accordance with our policy of protecting the privacy interests of the victims of sexual abuse, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

she was "afraid for [her] life," she began to do so, and then he finished undressing her. The defendant started touching the victim and told her that she was beautiful. The defendant also removed his clothes, and they got onto the bed. The defendant touched the victim "everywhere," including her buttocks, and he licked her breasts. After being on the bed for approximately two hours, the defendant removed the syringe from the gift bag, went into the bathroom, and injected himself.

After several hours, the victim claimed that she had cramps, went into the bathroom, and "curled up in the fetal position . . . in hopes that it would get [the defendant] just to leave and at least not touch [her] anymore." Over the course of the several hours that the defendant remained in the victim's apartment, the victim told him repeatedly that she wanted him to leave. At approximately 12:30 a.m., the defendant left the victim's apartment. Before he left, the defendant made the victim promise that she would not "call the cops on him and that [she] would just let him walk away . . . ."

After the defendant left, the victim was fearful that he might be waiting outside of her apartment, so she did not call anybody. She remained awake for the next six hours until she got up from her bed and went to work. One of the victim's coworkers asked her if something was wrong, and the victim "just collapsed [to] the floor and lost it." The police were called, and the victim was transported to a hospital where she underwent a physical examination and a sexual assault evidence collection kit was administered. The victim's breasts were swabbed for saliva and subsequent testing revealed that it matched the defendant's DNA.

The victim first spoke to the police at the hospital and then again at the police station later that evening. She was shown a photographic array that included a photograph of the defendant, whom she identified as her assailant with 100 percent certainty.

A few hours later, Detective Peter Dauphinais of the Bristol Police Department and three additional members of the department located and spoke to the defendant at his sister's residence. Dauphinais asked the defendant about the gift bag that he had while at the victim's apartment, and the defendant told him that it had contained a kitchen knife, rubber gloves, syringes and erectile dysfunction medication. The defendant told Dauphinais that he had brought the gift bag for his former girlfriend and that he discarded it on Route 8 after he left the victim's apartment. The defendant consented to a search of his home, where the officers recovered syringes and injectable erectile dysfunction medication.

The defendant was arrested and charged, by way of a substitute long form information, with home invasion in violation of § 53a-100aa (a) (1), kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A), burglary in the first degree in violation of § 53a-101 (a) (3), and sexual assault in the third degree in violation of § 53a-72a (a) (1) (B). The jury found the defendant not guilty of kidnapping in the first degree but guilty of the remaining charges. The court imposed a total effective sentence of twenty-five years of incarceration. This appeal followed.

I

The defendant first claims that the evidence adduced at trial was insufficient to sustain his conviction on the charges of home invasion and burglary in the first degree. "In reviewing the sufficiency of the evidence to support a criminal conviction 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 [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element 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. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Crespo*, 317 Conn. 1, 16–17, 115 A.3d 447 (2015). With these principles in mind, we address each of the defendant's sufficiency claims.

A

Section 53a-100aa (a) provides in relevant part: "A person is guilty of home invasion when such person enters or remains unlawfully in a dwelling, while a person other than a participant in the crime is actually present in such dwelling, with intent to commit a crime therein, and, in the course of committing the offense: (1) Acting either alone or with one or more persons, such person or another participant in the crime commits or attempts to commit a felony against the person of

another person other than a participant in the crime who is actually present in such dwelling . . . .'' General Statutes § 53a-100 (a) (2) defines a dwelling as ''a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present . . . .''

In challenging the evidentiary sufficiency of his conviction of home invasion, the defendant argues that the state failed to prove that he entered a dwelling in violation of § 53a-100aa (a) (1) while the victim was present in that dwelling. Specifically, he contends that the victim was not ''actually present'' in her apartment when he entered it because he either had dragged her into the apartment or they entered simultaneously. This argument is belied by the victim's testimony that ''[t]he way that [the defendant] was dragging me because I had to open my apartment, I entered, I was in first.'' The victim confirmed that she was ''in [her] apartment before [the defendant] came into the apartment.'' Because the jury was entitled to credit the victim's testimony that she entered her apartment before the defendant, the defendant's argument that the evidence underlying his conviction of home invasion was insufficient because the victim was not actually present in her apartment when he entered fails.[2]

B

Section 53a-101 (a) (3) provides that ''[a] person is guilty of burglary in the first degree when . . . such person enters or remains unlawfully in a dwelling at night with intent to commit a crime therein.'' The defendant argues that the state failed to prove beyond a reasonable doubt that he entered the victim's apartment

[2] In *State* v. *Gemmell*, 151 Conn. App. 590, 607, 94 A.3d 1253, cert. denied, 314 Conn. 915, 100 A.3d 405 (2014), this court affirmed a conviction of home invasion in a similar situation in which the defendant unlawfully entered the victim's apartment or dwelling after he struggled with her and pushed her into her apartment.

with the intent to commit a crime. We are not persuaded.

"Because direct evidence of an accused's state of mind typically is not available, his intent often must be inferred from his conduct, other circumstantial evidence and rational inferences that may be drawn therefrom. . . . For example, intent may be inferred from the events leading up to, and immediately following, the conduct in question . . . the accused's physical acts and the general surrounding circumstances. . . . [W]hen a jury evaluates evidence of a defendant's intent, it properly rel[ies] on its common sense, experience and knowledge of human nature in drawing inferences and reaching conclusions of fact." (Internal quotation marks omitted.) *State* v. *Williams*, 172 Conn. App. 820, 829, 162 A.3d 84, cert. denied, 326 Conn. 913, 173 A.3d 389 (2017).

Here, the state charged the defendant with unlawfully entering the victim's apartment with the intent to kidnap her or to sexually assault her. The jury reasonably could have inferred the defendant's intent to commit a sexual assault from the fact that he was in possession of a syringe and injectable erectile dysfunction medication when he unlawfully entered the victim's apartment. The defendant challenges the permissibility of such an inference on the ground that he told Dauphinais that the syringe and erectile dysfunction medication were intended for his use with his former girlfriend. The jury, however, was not required to credit the defendant's statement and was, therefore, free to infer that his possession of those items when he forced the victim into her apartment at knifepoint evinced his intent to sexually assault the victim. Accordingly, the defendant's claim that the evidence underlying his conviction of burglary in the first degree was insufficient is unavailing.

II

The defendant also claims that the trial court improperly allowed the state to introduce Dauphinais' testimony regarding the defendant's statements pertaining to the gift bag that he had with him in the victim's apartment because it was irrelevant and unduly prejudicial. We disagree.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence . . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion." (Citation omitted; internal quotation marks omitted.) *State* v. *Sampson*, 174 Conn. App. 624, 635–36, 166 A.3d 1, cert. denied, 327 Conn. 920, 171 A.3d 57 (2017). "Although relevant, evidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jur[ors]. . . . The trial court . . . must determine whether the adverse impact of the challenged evidence outweighs its probative value. . . . Finally, [t]he trial court's discretionary determination that the probative value of evidence is not outweighed by its prejudicial effect will not be disturbed on appeal unless a clear abuse of discretion is shown. . . . [B]ecause of the difficulties inherent in this balancing process . . . every reasonable presumption should be given in favor of the trial court's ruling. . . . Reversal

is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Allen*, 140 Conn. App. 423, 439–40, 59 A.3d 351, cert. denied, 308 Conn. 934, 66 A.3d 497 (2013).

Here, it cannot reasonably be argued that the defendant's possession of injectable erectile dysfunction medication and a syringe at the time that he entered the victim's apartment was not probative of his intent to commit sexual assault. The defendant argues, as he did before the trial court, that the gift bag was irrelevant because he told Dauphinais that its contents were intended to be used with his former girlfriend, not with the victim. We agree with the trial court's ruling that neither it nor the jury was "obligated to accept the defendant's postincident characterization of whom the [gift] bag was intended for . . . ." Because the defendant's challenge to the evidence pertaining to the gift bag and its contents is premised on his misapprehension that the court was bound by his stated intended use of the contents of the gift bag, his claim that the evidence was irrelevant is without merit. Furthermore, although the evidence of his possession of those items was damaging to him, it was not likely to have aroused the emotions of the jurors any more than the evidence that the defendant had forced the victim into her apartment at knifepoint, where he forced her to undress and remained against her wishes for several hours. We agree with the trial court's conclusion that probative value of the gift bag evidence outweighed any prejudice caused to the defendant by its admission.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* FREDRIK H.* (AC 41448)

Lavine, Bright and Devlin, Js.

Syllabus

Convicted, following a jury trial, of the crimes of unlawful restraint in the first degree, interfering with an emergency call, and criminal mischief in the third degree, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which he argued with the victim, his girlfriend. During the argument, the defendant grabbed the victim by her neck and pushed her down onto the bed, and took her cell phone. He then held the victim by her neck when she tried to exit the house and slammed her onto a coffee table. On appeal, the defendant claimed that there was insufficient evidence to prove he specifically intended to restrain the victim and that the trial court improperly allowed the state to introduce evidence of certain uncharged misconduct. *Held*:

1. The evidence presented at trial was sufficient to support the defendant's conviction of unlawful restraint in the first degree; the jury could have reasonably found that the defendant, in holding the victim down on the bed by her neck to take her cell phone from her, intended to substantially interfere with her liberty, and this intent was also apparent from the defendant's actions in blocking the victim's access to a door and window and grabbing her by the neck and throwing her onto the coffee table.
2. The trial court did not abuse its discretion in admitting evidence of uncharged misconduct that occurred nine months after the incident underlying his conviction; certain statements made by the defendant to a detective about the victim, following his arrest for a separate incident involving a different complainant who lived in the victim's new apartment building, were probative of his motive and intent during the underlying incident because they revealed the defendant's ongoing hostility toward the victim, they were not irrelevant merely because they occurred nine months after the underlying incident and they were not unduly prejudicial; moreover, evidence as to the contents of a gift bag in the defendant's possession when he was arrested after the separate incident was relevant and not overly prejudicial because it was the defendant's description of the items in that bag, including a knife and rubber gloves,

* In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2012); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

that prompted the detective to ask the defendant if he intended to harm the victim and led to the defendant's contested statements.

Argued February 4—officially released April 28, 2020

Procedural History

Substitute information charging the defendant with the crimes of strangulation in the second degree, unlawful restraint in the first degree, interfering with an emergency call and criminal mischief in the third degree, brought to the Superior Court in the judicial district of Litchfield, geographical area number eighteen, and tried to the jury before *Danaher*, *J.*; verdict of guilty of unlawful restraint in the first degree, interfering with an emergency call, and criminal mischief in the third degree; thereafter, the defendant was presented to the court on a plea of guilty to being a persistent serious felony offender; judgment of guilty in accordance with the verdict and the plea, from which the defendant appealed to this court. *Affirmed*.

Stephanie L. Evans, assigned counsel, for the appellant (defendant).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *David S. Shepack*, former state's attorney, and *Gregory Borrelli*, assistant state's attorney, for the appellee (state).

Opinion

DEVLIN, J. The defendant, Fredrik H.,[1] appeals from the judgment of conviction, rendered after a jury trial, of unlawful restraint in violation of General Statutes § 53a-95 (a), interfering with an emergency call in violation of General Statutes § 53a-183b (a), and criminal mischief in violation of General Statutes § 53a-117 (a) (1) (A). On appeal, the defendant claims that (1) the

[1] We note that the defendant's first name has been spelled inconsistently in various court documents in this case. We use the spelling that is consistent with the original information.

evidence presented at trial was insufficient to prove that he specifically intended to restrain the victim, and (2) the trial court improperly allowed the state to introduce evidence of certain uncharged misconduct. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. As of April 23, 2015, the defendant and the victim were engaged and residing together in Torrington. The victim was supposed to pick the defendant up from work in Winsted at 6:30 p.m. with the vehicle that they shared, but, because she was running late, the defendant called her and angrily told her to "forget it" and that he would get another ride home. When the victim got home, she parked the car in the driveway, and the defendant came outside yelling at her. He opened the car door before she could do so, and then slammed it in her face. The defendant went into the house and the victim stayed in the car for "a little bit" to afford the defendant time to cool down.

The victim eventually went into the house, put some water in a pot on the stove to make herself some tea, and began to do the dishes while the defendant was in the shower. When the defendant came out of the shower, he continued to talk to the victim about not picking him up from work on time earlier that evening. The victim tried not to engage him, hoping not to make him angrier, but the defendant picked up the victim's laptop from the kitchen table and threw it into the living room. The victim and the defendant then started yelling at each other in the kitchen and the defendant took the pot of water off the stove and threw it toward the victim. Although the water splashed all over the floor, the victim was only splashed "a little bit" and was not injured.

The victim then told the defendant that she was going to call the police and she went into the bedroom to get her cell phone from her purse. The defendant followed

her into the bedroom, grabbed her by the neck from behind, and pushed her down onto the bed. The defendant held the victim down on the bed while he was "looming over" her, with one hand on her neck, while she tried to flail her legs and hands to "get him off" of her. After a few seconds, the defendant "just stopped" and walked out of the bedroom with the victim's cell phone.

The victim then ran to the door in the kitchen to try to exit the house through a side entrance, but she was unable to do so because the defendant "was right there next to [her]." While holding the victim against the door, the defendant put both of his hands around her neck and applied "a good amount" of pressure, such that the victim was not able to breathe, talk or "do much of anything." Eventually, the defendant again "just stopped" and the victim tried to get to the front door to get out of the house. The defendant followed the victim to the front door and blocked it so she could not get out. The victim then tried to get out through a window in the living room, but she became tangled in the curtains when the defendant tried to push her away from the window. While the victim was tangled in the curtains, the defendant grabbed her and picked her up by the neck and slammed her into the coffee table. The defendant told her that he was done with their relationship and left the room, at which time the victim was able to run out through the window.

The victim ran across the street to a nail salon, where she used the telephone to call 911. The defendant left the house. When the police arrived, they obtained a statement from the victim and took pictures of the victim's injuries, which included red marks on her neck and bruising on her back.

The victim called her mother and asked her to call the police when the defendant came home the following

night because she did not want the defendant to hear her on the phone with the police. Upon learning that the victim had given the police a sworn statement regarding the incident that occurred the previous night, the defendant became angry and told the victim that she "needed to fix it" so that he would not be arrested.

On April 30, 2015, the defendant was arrested. By way of an amended long form information filed on October 11, 2017, the defendant was charged with strangulation in the second degree in violation of General Statutes § 53a-64bb (a), unlawful restraint in the first degree in violation of § 53a-95 (a), interfering with an emergency call in violation of § 53a-183b (a), and criminal mischief in the third degree violation of § 53a-117 (a) (1) (A). The jury found the defendant not guilty of strangulation, but guilty of the remaining charges. The defendant thereafter pleaded guilty to a part B information charging him with being a persistent serious felony offender under General Statutes § 53a-40 (c) and (k). The court imposed a total effective sentence of eleven years of incarceration, execution suspended after ten years, followed by three years of probation. This appeal followed.

I

The defendant first challenges the sufficiency of the evidence adduced at trial underlying his conviction of unlawful restraint in the first degree. Specifically, the defendant argues that the evidence was insufficient to prove that he specifically intended to restrain the victim. We disagree.

"In reviewing the sufficiency of the evidence to support a criminal conviction 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 [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element 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. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Crespo*, 317 Conn. 1, 16–17, 115 A.3d 447 (2015).

"A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose such other person to a substantial risk of physical injury. General Statutes § 53a–95 (a). [T]he hallmark of an unlawful restraint . . . is a restraint. . . . As applicable to § 53a–95 (a), [p]ersons are restrained when their movements are intentionally restricted so as substantially to interfere with

their liberty, either (1) by moving them from one place to another, or (2) by confining them either to the place where the restriction commences or to the place where they have been moved without their consent. General Statutes § 53a-91 (1). . . .

"Furthermore, unlawful restraint in the first degree requires that the defendant had the specific intent to restrain the victim. . . . Specific intent is an intent to bring about a certain result. . . . Thus, to prove unlawful restraint in the first degree, the state must also establish that the defendant had restricted the victim's movements *intentionally and unlawfully* in such a manner as to interfere substantially with her liberty by confining her without her consent. . . .

"Because direct evidence of an accused's state of mind typically is not available, his intent often must be inferred from his conduct, other circumstantial evidence and rational inferences that may be drawn therefrom. . . . For example, intent may be inferred from the events leading up to, and immediately following, the conduct in question . . . the accused's physical acts and the general surrounding circumstances. . . . [W]hen a jury evaluates evidence of a defendant's intent, it properly rel[ies] on its common sense, experience and knowledge of human nature in drawing inferences and reaching conclusions of fact." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Williams*, 172 Conn. App. 820, 827–28, 162 A.3d 84, cert. denied, 326 Conn. 913, 173 A.3d 389 (2017).

Here, the state argued at trial that the defendant unlawfully restrained the victim in the bedroom when he held her down on the bed by putting his hand around her neck, and then again in the living room, when she tried to leave the house through the front door or window and he grabbed her by the neck and slammed her down onto the coffee table. The defendant contends

that his intent in the bedroom was not to restrain the victim, but to take her cell phone away from her. Although the defendant did take the victim's cell phone from her, he did so after he pushed her down onto the bed and held her down by her neck while looming over her. While the defendant was holding the victim down on the bed by the neck, the victim was "flailing" to try to free herself. Although the defendant may have been holding the victim down because he was trying to get her phone from her, the jury reasonably could have found that he specifically intended to substantially interfere with her liberty in so doing. See *State* v. *Rice*, 167 Conn. App. 615, 622 n.4, 142 A.3d 1267 (one can have more than one intent at given time), cert. denied, 323 Conn. 932, 150 A.3d 232 (2016). The defendant's specific intent to substantially interfere with the victim's liberty is similarly apparent from his actions in the living room where he blocked her access to the door and window and then grabbed her by the neck and threw her onto the coffee table. The defendant contends that the victim only adopted the prosecutor's terminology in describing the defendant's actions of holding her down, pushing her and grabbing her. Of course, the jury heard the direct and cross-examination of the victim and was free to accept or reject the victim's characterization of the defendant's actions. Because we construe the evidence in the light most favorable to sustaining the verdict, the defendant's argument that the evidence could be viewed in a manner consistent with his version of the events is unavailing.[2]

II

The defendant also claims that the trial court improperly allowed the state to introduce evidence of

[2] We further note that, although the state argued that the unlawful restraint occurred in the bedroom and the living room, the jury was entitled to consider the defendant's act of preventing the victim's escape through the kitchen door as evidence of his specific intent to substantially interfere with her liberty.

uncharged misconduct that occurred nine months after the incident underlying his conviction in this case. The defendant contends that the challenged evidence was irrelevant and unduly prejudicial to him and that its admission into evidence substantially affected the jury's verdict. We are not persuaded.

On October 11, 2017, the state filed a notice of its intent to offer misconduct evidence, specifically, the conduct of the defendant on January 7, 2016, and his statements to Detective Peter Dauphinais of the Bristol Police Department, concerning the victim in this case. On January 7, 2016, the defendant was arrested for a separate incident involving a different complainant, who lived in the victim's new apartment building.[3] During that incident, the defendant had brought a Christmas gift bag into the complainant's apartment and had discussed with her his relationship with the victim in this case. When Dauphinais asked the defendant about the gift bag, the defendant indicated that the bag contained a kitchen knife, rubber gloves, a syringe, and medication that he injects into his penis to achieve an erection. The defendant admitted that he brought the gift bag into the complainant's apartment on January 6, 2016, but told Dauphinais that the "contents of the bag were for [the victim in this case]." When Dauphinais asked the defendant if he intended to harm or hurt the victim in this case, the defendant became angry and responded: "[I] lost a house and three cars because of that little cunt, so what do you think I was going to do?" The state argued that the foregoing evidence was relevant to the defendant's intent, motive or malice toward the victim in this case.

On October 27, 2017, the court held a hearing on the state's proffered misconduct evidence, to which

[3] The state did not seek to introduce evidence regarding the nature of the incident that gave rise to the defendant's January 7, 2016 arrest.

defense counsel orally objected. Defense counsel argued that the challenged statements could not have had any bearing on the defendant's alleged motive, intent or malice nine months earlier, and that the state could ask the victim about the financial distress that she and the defendant were experiencing. Defense counsel argued that the challenged statements were more prejudicial than probative because "[t]hey do create the impression that my client is a bad guy, despite what the state says. I think a jury would—be able to try to make a connection that [the defendant] had some negative intent, some . . . intention to cause harm . . . based on those two statements."

By way of a written decision filed on November 6, 2017, the court determined that the fact that the defendant was arrested in 2016 was irrelevant to this case and was more prejudicial than probative. The court further found, however, that the defendant's statements to Dauphinais "reflect[ed] an animus by the defendant against [the victim] and for that reason alone are relevant to the question of whether the defendant specifically intended the actions alleged in the information." The court reasoned: "It is true that the statements postdated the events of 2015 and so could be interpreted as reflecting an animus that arose after the events of 2015, but the statements could also be readily interpreted to establish an ongoing animus that did not abate after the events of 2015, and so are relevant to the defendant's specific intent in 2015. The fact that both of the foregoing arguments can be made goes to the weight rather than the admissibility of the statements." The court further found that the statements were "also relevant to the issue of whether any of the defendant's actions in 2015 were a mistake or an accident. The objections that the statements are not relevant, and/or are more prejudicial than probative, are overruled."

As to the contents of the gift bag that the defendant admitted to carrying with him during the 2016 incident, the court determined that they "reflect 'acts' of a person, which when viewed in conjunction with the defendant's statement that those contents were 'for [the victim in this case]' constitute acts that meet several of the bases for admission identified in [§ 4-5 of the] Connecticut Code of Evidence . . . . All of the items, when viewed in the context of the balance of the evidence [that] the state indicates it will offer prior to the offer of the contents of the bag, constitute evidence of the defendant's specific intent at the 2015 event (and specific intent must be shown relative to each of the four counts in the information); they constitute evidence of malice toward [the victim in this case]; they show absence of mistake or accident relative to the events of 2015; and they will corroborate testimony that the state indicates it will offer." The court further explained: "For the defendant, in 2016, to travel to [the victim's] new apartment in another town, while in possession of a bag containing a knife, rubber gloves, and items related to sexual contact, all intended 'for [the victim],' arguably demonstrates the defendant's animosity toward [the victim] in 2016, and thus permitting the jury to conclude that he possessed such animosity in 2015." The court rejected the defendant's additional arguments that the challenged statements were irrelevant because he made them several months after the incident in this case and that the state could have introduced alternative evidence of the defendant's financial difficulties.

Finally, the court concluded that the defendant's statements to Dauphinais and the contents of the gift bag were not more prejudicial than probative. The court explained: "[T]he defendant's words, if introduced after the evidence of the defendant's acts [in this case], will not be more prejudicial than probative. . . . [W]ords

are, by definition, less prejudicial than actions, at least in this case. . . . Any concern that the evidence of the contents of the bag that the defendant brought 'for [the victim]' is more prejudicial than probative is mitigated, not only by the way the state will structure the introduction of the evidence, but also by a limiting instruction, making clear that the evidence is not being offered to suggest that the defendant committed any other offense relative to [the victim in this case], or that he intended to commit any such offense, but rather to support the state's claim that the defendant had the specific intent to commit the crimes charge[d], that he held malice toward [the victim] in 2015, and that his conduct in 2015 was not the product of accident or mistake." The defendant now challenges the admission of that evidence.

"Evidence of a defendant's uncharged misconduct is inadmissible to prove that the defendant committed the charged crime or to show the predisposition of the defendant to commit the charged crime. . . . Exceptions to this rule have been recognized, however, to render misconduct evidence admissible if, for example, the evidence is offered to prove intent, identity, malice, motive, a system of criminal activity or the elements of a crime. . . . To determine whether evidence of prior misconduct falls within an exception to the general rule prohibiting its admission, we have adopted a two-pronged analysis. . . . First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence. . . . [Because] the admission of uncharged misconduct evidence is a decision within the discretion of the trial court, we will draw every reasonable presumption in favor of the trial court's ruling. . . . We will reverse a trial court's decision only [if] it has abused its discretion or an injus-

tice has occurred." (Internal quotation marks omitted.) *State* v. *Abdus-Sabur*, 190 Conn. App. 589, 603–604, 211 A.3d 1039, cert. denied, 333 Conn. 911, 215 A.3d 735 (2019).

The defendant challenges the trial court's ruling on the grounds that the defendant's statements were irrelevant because they occurred nine months after the event underlying his convictions in this case and they involved issues that were unrelated to the event that provoked the defendant in the 2015 incident, namely, the victim's failure to pick him up from work on time. The defendant has not, however, provided any legal authority in support of his alleged requirement of temporal proximity. Indeed, the defendant's stated perception that the victim was responsible for his financial difficulties, which existed at the time of the 2015 incident, demonstrate that his animus toward the victim was ongoing. Likewise, although the 2015 incident was precipitated by the victim's lack of punctuality, she also testified that the argument on the night in question evolved into the defendant's ongoing complaints about the victim's conduct throughout their relationship. We agree with the trial court that the defendant's statements in 2016 revealed the defendant's ongoing hostility toward the victim and were thus probative of his motive and intent in 2015.

The defendant also claims that the misconduct evidence was unduly prejudicial because it constituted inadmissible character or propensity evidence. To be sure, the challenged evidence did not paint the defendant in a positive light. We agree with the trial court, however, that the evidence of the defendant's statements to Dauphinais regarding his hostility toward the victim was minimally prejudicial relative to the defendant's uncontested conduct on the night of April 23, 2015.

As to the contents of the gift bag, it was the defendant's description of the contents that prompted Dauphinais to ask the defendant if he intended to harm the victim. This, in turn, led to the defendant's statements. Accordingly, the contents were relevant and not overly prejudicial. We thus conclude that the trial court did not abuse its discretion in admitting the misconduct evidence.[4]

The judgment is affirmed.

In this opinion the other judges concurred.

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[4] Because we conclude that the trial court did not err in admitting the misconduct evidence, we do not reach the defendant's argument that he was harmed by its admission.