SHANE J. CARPENTER *v.* BRADLEY J. DAAR ET AL.
(AC 42145)

Keller, Elgo and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages from the defendant dentist, D, and his business entity M Co., for medical malpractice in connection with a dental procedure performed on the plaintiff by D. The plaintiff alleged in his complaint that D held himself out as a specialist in endodontics and attached to his complaint a good faith certificate from what he alleged was a similar health care provider, S, an endodontist. The defendants moved to dismiss on the ground that the opinion letter did not comply with the requirements of the statute (§ 52-190a) because S was not a similar health care provider as defined by statute (§ 52-184c). The defendants attached an affidavit of D, in which he attested that he is a general dentist. The plaintiff objected to the motion to dismiss and attached a supplemental affidavit of S, which further elaborated on S's qualifications as a similar health care provider. The trial court granted the defendants' motion to dismiss on the ground that the plaintiff had failed to provide an opinion letter from a similar health care provider as required by §§ 52-190a and 52-184c. Specifically, because the plaintiff had attached an opinion letter authored by S, a specialist in endodontics, and D was a general dentist, the trial court determined that S's opinion letter was not that of a similar health care provider because D was not a specialist as defined by § 52-184c (c) and, thus, the opinion letter was required to be authored by a general dentist. Moreover, the court concluded that there was no information to establish that S had been involved in the teaching or practice of general dentistry in the five year period before the procedure so as to be a similar health care provider as defined by § 52-184c (b). The court rendered judgment in favor of the defendants and the plaintiff appealed to this court. *Held*:

1. The defendants could not prevail on their unpreserved claim that the trial court should not have considered the supplemental affidavit submitted by the plaintiff because it was obtained after the statute of limitations had expired and the court failed to state a factual basis for its application

of the accidental failure of suit statute (§ 52-592), which would have extended the statute of limitations for an additional year from the date judgment of dismissal was rendered in the plaintiff's prior action; although the defendants labeled their claim as an alternative ground for affirmance, they were seeking to alter the court's judgment to an extent that would actually require reversal and the defendants failed to file a cross appeal and likely could not have done so, given the fact that they prevailed and that they failed to seek reconsideration or articulation of the court's ruling that § 52-592 applied; moreover, to afford the defendants relief with respect to this claim would be prejudicial to the plaintiff, who has repeatedly briefed and argued his claim that the opinion letter is compliant with § 52-190a (a), with or without the supplemental affidavit.

2. The trial court properly determined that D was a nonspecialist practicing general dentistry; it was undisputed that D was not certified by the appropriate American board as a specialist and that he was not trained or experienced in a specialty, as the plaintiff failed to allege this in his complaint, and D attested in an affidavit that he was general dentist and that the dental procedure was performed in that capacity, and the plaintiff did not submit any counteraffidavits.

3. The judgment of the trial court was affirmed on the alternative ground that the trial court should not have considered the supplemental affidavit and the opinion letter was legally insufficient because it did not establish that S was a similar health care provider pursuant to the statutory nonspecialist definition in § 52-184c (b); the plaintiff was required to properly amend his complaint to make the allegations in the supplemental affidavit a part of the pleading process, as correcting deficiencies in process requires more than the filing of an affidavit, and, in failing to do so, the opinion letter that was attached to the plaintiff's complaint was insufficient to establish that S was someone teaching in the nonspecialty field of general dentistry, so as to qualify as a similar health care provider under § 52-184c (b).

Argued January 6—officially released August 4, 2020

Procedural History

Action to recover damages for the defendants' alleged medical malpractice, brought to the Superior Court in the judicial district of Middlesex, where the court, *Domnarski*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Kyle J. Zrenda, with whom was *Theodore W. Heiser*, for the appellant (plaintiff).

Beverly Knapp Anderson, for the appellees (defendants).

Opinion

KELLER, J. The plaintiff, Shane J. Carpenter, appeals from the judgment rendered by the trial court dismissing his medical malpractice action against the defendants, Dr. Bradley J. Daar (Daar), a dentist, and his business entity, Shoreline Modern Dental, LLC (Shoreline). The plaintiff claims that the court erred in determining that his certificate of good faith, specifically, the accompanying opinion letter, as supplemented by an affidavit filed with the plaintiff's objection to the motion to dismiss, (supplemental affidavit) failed to meet the requirements of General Statutes § 52-190a because the author of the opinion letter and supplemental affidavit, Dr. Charles S. Solomon[1] (Solomon), was not a "similar health care provider" as defined in General Statutes § 52184c.

The defendants counter that the certificate of good faith and its accompanying opinion letter did not demonstrate that Solomon was a similar health care provider under the definitions set forth in § 52-184c. They further assert, as alternative grounds for affirmance of the trial court's judgment, that the supplemental affidavit should not have been considered by the trial court because (1) it was procedurally improper for the plaintiff to have attempted to cure a § 52-190a (a) defect in an opinion letter attached to the complaint with information contained in a supplemental affidavit of the author of the opinion without amending the complaint; (2) it was obtained and submitted by the plaintiff after the two year statute of limitations in General Statutes § 52-584 had expired, and the court failed to state a factual basis to support the applicability of the accidental failure of suit statute, General Statutes § 52-592, which would have extended the statute of limitations for an additional year from the date the judgment of

[1] Although the opinion letter attached to the complaint in the present action had the name of the author redacted, which is authorized pursuant to § 52-190a (a), in their briefs, both the plaintiff and the defendants acknowledge that Solomon was the author.

dismissal was entered in the first action; see General Statutes § 52-190a (a); and (3) without the supplemental affidavit, the opinion letter attached to the complaint did not contain sufficient information to demonstrate that Solomon is a similar health care provider to Daar under either definition of a similar health care provider set forth in § 52-184c. We affirm the judgment of the trial court.

The following relevant facts, alleged as the factual predicate for the plaintiff's cause of action or as found by the court, and procedural history are relevant to our disposition of this appeal. On June 1, 2017, in the judicial district of Middlesex, the plaintiff commenced a prior medical malpractice action against the defendants, based on the same alleged conduct as in the present case. See *Carpenter* v. *Daar*, Superior Court, judicial district of Middlesex, Docket No. CV-17-6017957-S.[2] On October 11, 2017, the court dismissed the plaintiff's first medical malpractice action against the defendants because the opinion letter attached to the complaint, which also was authored by Solomon, did not comply with § 52-190a (a). Although the letter contained an opinion as to whether there was evidence that medical negligence had occurred, it did not contain, pursuant to § 52-184c, any information regarding Solomon's training and experience to establish that he was a similar health care provider to Daar. Although the plaintiff filed a request to amend his complaint, it was undisputed that his request was filed after the applicable two year statute of limitations in § 52-584 had expired.

On February 21, 2018, the plaintiff commenced the present action against the defendants pursuant to the accidental failure of suit statute. See General Statutes § 52-592. As to dental malpractice, the plaintiff alleged that on June 16, 2015, during root canal surgery, Daar

[2] This court may take judicial notice of court files in other cases. See *Jewett* v. *Jewett*, 265 Conn. 669, 678 n.7, 830 A.2d 193 (2003).

negligently failed to diagnose and treat an infection in the plaintiff's tooth and that, as a result, the plaintiff suffered an infection in his mouth, throat, face and neck that required additional emergency medical care, hospitalization, oral and neck surgery and continuing dental treatment. The plaintiff named Shoreline as a defendant on the basis of vicarious liability for Daar's negligent treatment.

Pursuant to § 52-184c (c), the plaintiff further alleged that Daar held himself out as a specialist in endodontics on Shoreline's website by indicating that he had completed hundreds of hours of training in endodontics and by providing a general explanation of the nature of that dental specialty.

The plaintiff attached to his complaint a good faith certificate and what he alleged in the complaint to be a "written and signed opinion from a similar health care provider stating that there appears to be evidence of negligence by the defendants, a violation of the standard of care, and providing detailed basis for the formation of that opinion, along with a supplemental correspondence outlining that similar health care provider's qualifications." The "written and signed opinion letter" attached to the complaint is the same letter from Solomon that was deemed noncompliant with § 52-190a (a) in the prior action. The "supplemental correspondence" attached to the complaint, dated August 10, 2017, contained information regarding Solomon's qualifications to establish that he was a similar health care provider to Daar.[3] The supplemental correspondence, also authored by Solomon, indicated that he is a graduate of Columbia University College of Dental Medicine (Columbia), had been licensed to practice dentistry in the state of New York, "with credentials that would satisfy the requirement of any other state," and received his "specialty

[3] The opinion letter and the supplemental correspondence that were attached to the complaint in the present action, hereafter shall be referred to as the "opinion letter."

[b]oards in [e]ndodontics" in 1970. It also stated that Solomon practiced endodontics in New York for more than forty years, and that for the past eight years he has been a full-time clinical professor of endodontics at Columbia, "teaching clinical and didactic [e]ndodontics."

On April 5, 2018, the defendants moved to dismiss the present action on the ground that the opinion letter did not comply with §§ 52-190a (a) and 52-184c because it failed to demonstrate that Solomon is a similar health care provider to Daar, who is a general dentist, not a specialist in endodontics. They argued that, as an endodontist, Solomon is not a similar health care provider under § 52-184c (b) because Daar is not a specialist in endodontics and was not holding himself out to be one. They further argued that Solomon also was not a similar health care provider under § 52-184c (c) because Daar is a practitioner of general dentistry and Solomon had not practiced or taught general dentistry within the five years preceding June 16, 2017.[4] In addition to submitting a memorandum of law in support of the motion to dismiss, the defendants attached an affidavit from Daar with other related exhibits.

In his affidavit, Daar attested that he is a general dentist and has been licensed by the state of Connecticut to practice dentistry since November, 1982. He indicated that, as a general dentist, he provides such services as fillings, inlay and onlays, crowns and bridges, dentures, veneers, root canal treatments, simple extrac-

[4] General Statutes § 52-184c (b) provides in relevant part that where the defendant health care provider is not a specialist or holding himself as a specialist, a "similar health care provider" may be "trained and experienced in the same discipline or school of practice" as the defendant, and actively practicing in the same discipline or school of practice or engaged in the "teaching of medicine within the five-year period before the incident giving rise to the claim." The alleged negligent root canal procedure was performed on June 16, 2015. Hence, if Solomon's teaching qualifies him as a health care provider similar to the defendant, he had to have been teaching general dentistry at least from June 16, 2010 through June 16, 2015.

tions, teeth whitening, certain types of orthodontics, mouth guards, and some periodontal treatments. Daar stated that he performed the root canal treatment on the plaintiff's tooth in 2015 in his capacity as a general dentist. He further indicated that a quotation from Shoreline's website, on which the plaintiff relied in his complaint to support his allegations that Daar was holding himself out as a specialist in endodontics, was only a partial excerpt of a sentence, which stated in full: "[Daar] has completed hundreds of hours of training in [e]ndodontics, [o]rthodontics, [p]eriodontics, [d]ental [i]mplants, [s]leep [a]pnea and more."

In support of his allegation that Daar held himself out to be a specialist in endodontics, the plaintiff also relied on information found on the website related to Daar's practice, in particular, information related to endodontics that was accessed in a portion of the website related to "Patient Education" and "Services." In his affidavit, Daar attested that, in the same portion of the website, eleven additional links appeared. These included links to the following subjects: educational videos, cosmetic and general dentistry, emergency care, implant dentistry, oral health, oral hygiene, oral surgery, orthodontics, pediatric dentistry, periodontal therapy and technology.

The plaintiff filed an objection to the motion to dismiss on June 5, 2018.[5] The plaintiff continued to argue that, as alleged in his complaint and on the basis of the statements on Shoreline's website, Daar had held himself out to be a specialist in endodontics and, thus, Solomon, a specialist in endodontics, was a similar health care provider to Daar pursuant to § 52-184c (c). The plaintiff did not submit any evidence to dispute the facts set forth in Daar's affidavit, which sought to

[5] Although the plaintiff's objection to the motion to dismiss indicated that Solomon's curriculum vitae had been attached to the complaint, the complaint did not contain anyone's curriculum vitae. In fact, no curriculum vitae appears anywhere in the record.

establish that, at the time of the root canal procedure, Daar was a general dentist, not a specialist in endodontics or someone holding himself out to be a specialist in endodontics. The plaintiff did not request leave to amend his complaint to attach a new or amended opinion letter.[6] Instead, the plaintiff attempted to cure the alleged defects in the opinion letter, which the defendants claimed mandated a dismissal, by submitting, as an exhibit to his objection to the motion to dismiss, a supplemental affidavit, executed by Solomon on May 30, 2018, which further elaborated on his qualifications as a similar health care provider. In his supplemental affidavit, Solomon attested in relevant part that he is a clinical professor of dentistry at Columbia, served as the Director of the Division of Endodontics from 2009 and continued in that position to 2017, is a Diplomate of the American Board of Endodontics,[7] past President of the New York Section of the American College of Dentists and past President of the New York Academy of

[6] Practice Book § 10-60 provides in relevant part: "[A] party may amend his or her pleading . . . at any time subsequent [to the first thirty days after the return date if a complaint is being amended; see Practice Book §10-59] . . . (3) By filing a request for leave to file an amendment together with: (A) the amended pleading . . . and (B) an additional document showing the portion or portions of the original pleading . . . with the added language underlined and the deleted language stricken through or bracketed. . . . If no party files an objection to the request within fifteen days from the date it is filed, the amendment shall be deemed to have been filed by consent of the adverse party. If an opposing party shall have objection . . . such objection in writing . . . shall . . . be filed with the clerk within the time specified above and placed upon the next short calendar list."

Before the plaintiff's first action was dismissed, he had filed a request for leave to amend his complaint, which the court denied because the request had not been filed within the two year statute of limitations applicable to that action, General Statutes § 52-584.

[7] "It is well established, within the medical profession, that a 'diplomate' is a person who has received a diploma and has been certified by a board within the appropriate profession. See Webster's Third New International Dictionary (2002) p. 638 (defining diplomate as '[o]ne who holds a diploma; *esp*; a physician certified as qualified generally or as a specialist by an agency recognized as professionally competent to grant such certification'. . .) . . . ." (Emphasis in original.) *Lohnes* v. *Hospital of Saint Raphael*, 132 Conn. App. 68, 77, 31 A.3d 810 (2011), cert. denied, 303 Conn. 921, 34 A.3d 397 (2012).

Dentistry. He further attested that (1) he teaches both undergraduate and postgraduate students in endodontics at Columbia and that his "lectures to undergraduate students involve general dentistry and the performance of endodontic procedures, including root canals, by general dentists; (2) "[t]he present case involves an endodontic procedure performed by a general dentist"; (3) "the proper standards, procedures, and care to be followed is the subject of my teaching to undergraduate dental students and has been for more than the last five years"; and (4) "[t]he standard of care with respect to the treatment provided by a general dentist in the scenario presented in this case and an endodontist is the same."

The plaintiff did not withdraw the allegation in his complaint that, he maintained, alleged that Daar held himself out to be a specialist. On the basis of the opinion letter, alone or together with the supplemental affidavit, the plaintiff argued that, even if Daar is a nonspecialist, Solomon is a similar health care provider to Daar because, pursuant to § 52-184c (b), Solomon's teaching involved instruction in endodontics as it pertains to the practice of general dentistry, specifically relevant to root canals, during the requisite five year period.

Following oral argument on the motion to dismiss on July 30, 2018, the trial court issued a memorandum of decision dated September 7, 2018. The court first rejected the defendants' argument, first set forth in the defendants' reply to the plaintiff's objection to the motion to dismiss, that the plaintiff could not cure any deficiencies in the opinion letter attached to his complaint with Solomon's supplemental affidavit because it was filed after the statute of limitations had expired. The court, citing this court's decision in *Gonzales* v. *Langdon*, 161 Conn. App. 497, 510, 128 A.3d 562 (2015),[8]

[8] *Gonzales* v. *Landgon*, supra, 161 Conn. App. 497, was a case of first impression in which this court held that a plaintiff could cure a defective opinion letter by filing a request for leave to amend the complaint, pursuant to Practice Book § 10-60, *if* the request was filed within the applicable statute of limitations period. Id., 519.

noted that the defendants had argued that the plaintiff could not evade the clear limits set forth in *Gonzales* by submitting his opinion letter and Solomon's supplemental affidavit after the limitation period had expired. The court stated: "The defendant[s] [argue] that under the holding of [*Gonzales*], the court cannot consider the information contained in the [supplemental] affidavit because it has been filed after the expiration of the two year statute of limitations contained in . . . § 52-584. *Gonzales* established that amendments to legally insufficient opinion letters are permitted only if they are filed within the applicable statute of limitations. . . . The action in *Gonzales* was brought within the two year statute of limitations contained in § 52-584. . . . The present case is distinguishable from *Gonzales* since it was brought under the accidental failure of suit statute, § 52-592. Based upon Supreme Court precedent, this court concludes that the accidental failure of suit statute effectively modifies and extends the time limitations period imposed by § 52-584 by the period of time the plaintiff is allowed to bring a second action under § 52-592. . . . In this case, the statute of limitations contained in § 52-584 does not bar the filing of the affidavit by the author of an opinion letter. The original action was dismissed on October 11, 2017. This action, and the affidavit from the opinion author, have been filed within the time allowed under § 52-592."[9] (Citations omitted.) The court did not find any facts or provide any analysis as to why, under the circumstances of this case, the plaintiff was entitled to the benefit of the saving provisions of the accidental failure of suit statute, § 52-592.

The court next analyzed the sufficiency of the opinion letter as amended by the filing of the supplemental affidavit. It first concluded that the applicable definition of

[9] As noted previously, the supplemental affidavit was filed with the plaintiff's objection to the motion to dismiss on June 5, 2018.

a similar health care provider was the nonspecialist definition in subsection (b) of § 52-184c, rather than the specialist definition in subsection (c), as alleged by the plaintiff in his complaint.[10] The court found that, "[i]n the present case, in connection with his claim that the defendant is a specialist, the plaintiff has not utilized the specific language contained in § 52-184c (c) and has not alleged that the defendant is 'trained and experienced in a medical specialty, or holds himself out as a specialist' in endodontics. The plaintiff only alleged that the defendant 'held himself out as a *practitioner* of endodontics' and 'has completed hundreds of hours of training in endodontics.' " (Emphasis in original). The court, citing *Labissoniere* v. *Gaylord Hospital, Inc.*, 182 Conn. App. 445, 453, 185 A.3d 680 (2018), noted that the plaintiff had not provided an affidavit disputing the facts contained in the defendants' affidavit in support of their motion to dismiss and, that under such circumstances, the court "need not conclusively presume the validity of the allegations in the complaint." The court concluded that Daar was not a specialist as that term is defined in § 52-184c (c), and therefore any opinion from a similar health care provider must come from a general dentist.

The court next rejected the plaintiff's alternative argument that Solomon was qualified as a similar health care provider under the nonspecialist definition in § 52-184c (b), which requires a similar health care provider to be "trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine [general dentistry] within

[10] The plaintiff's complaint alleged that Daar "[a]t all times" presented himself as "duly qualified to render proper and adequate dental services to the public . . . specifically, with a specialty in dental treatment." He further alleged that, "[a]t all times herein, [Daar] held himself out as a practitioner of endodontics . . . ." In terms of whether a similar health care provider must be a specialist or nonspecialist, we are to be guided by the allegations of the plaintiff's complaint. See *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 23–24, 12 A.3d 865 (2011).

the five-year period before the incident giving rise to the claim." The court found that "[t]here is a lack of information to establish that [Solomon] has practiced general dentistry within the requisite five year period. Furthermore, there is a paucity of facts from which it can be found he has been teaching *general dentistry* during that period. From the information provided, the court finds that [Solomon] is a specialist in endodontics and he has training and experience as a result of the active teaching of endodontics. He is not, however, a similar health care provider to the defendant, who is a general dentist. The fact that [Solomon] teaches endodontics to undergraduate dental students does not equate to the teaching of general dentistry. If such were the case, any teaching specialist at a dental school or medical school would automatically be a similar health care provider to any nonspecialist dentist or medical doctor. Such an interpretation would vitiate the provisions of § 52-184c which requires different qualifications for a specialist and a nonspecialist health care provider."[11] (Emphasis in original.)

As a result, the court granted the motion to dismiss as to Daar. Because the alleged liability of Shoreline was derivative of the cause of action brought against Daar, the court also granted the motion as to that defendant as well, and rendered judgment in favor of both defendants. This appeal followed.

Before we turn to the claims raised by the plaintiff, we set forth relevant statutory provisions and legal principles pertaining to opinion letters in medical malpractice actions. Section 52-190a provides in relevant part:

[11] The court noted that the plaintiff in *Samsonenko* v. *Manchester Family Dental, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-17-6078556-S (January 30, 2018) (65 Conn. L. Rptr. 863, 863–64), alleged that Daar was medically negligent in administering orthodontic treatment to him. The plaintiff provided the opinion of a general dentist who was also a specialist in the field of orthodontics. Daar filed a motion to dismiss on the grounds that the opinion letter was not from a similar health care provider. The court granted Daar's motion to dismiss after finding that Daar was a

"(a) No civil action . . . shall be filed to recover damages resulting from personal injury or wrongful death . . . whether in tort or contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint . . . shall contain a certificate of the attorney or party filing the action . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney . . . shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. . . .

"(c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."

As this court has explained, "[t]he purpose of [§ 52-190a (a)] is to discourage frivolous lawsuits against health care providers. . . . One of the mechanisms introduced in the amendments to the statute of 2005 was the written opinion requirement. The ultimate pur-

general dentist and the orthodontic specialist who authored the opinion was not a similar health care provider.

pose of this requirement is to demonstrate the existence of the claimant's good faith in bringing the complaint by having a witness, qualified under . . . § 52-184c, state in written form that there appears to be evidence of a breach of the applicable standard of care. . . . The person rendering this opinion is not required by § 52-190a (a) to be the expert witness on medical negligence to be used at the time of trial by the plaintiff." (Citation omitted.) *Wilcox* v. *Schwartz*, 119 Conn. App. 808, 816, 990 A.2d 366 (2010), aff'd, 303 Conn. 630, 37 A.3d 133 (2012). The statutory condition that an opinion letter written by a similar health care provider be appended to the complaint was "implemented to prevent frivolous medical malpractice actions by requiring *a medical professional with expertise in the particular medical field involved in the claim* to offer his or her professional opinion that the standard of care was breached in a particular instance." (Emphasis added.) *Wilkins* v. *Connecticut Childbirth & Women's Center*, 314 Conn. 709, 730, 104 A.3d 671 (2014).

Section 52-184c provides in relevant part: "(b) If the defendant health care provider is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a 'similar health care provider' is one who: (1) Is licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications, and (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim.

"(c) If the defendant health care provider is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a 'similar health care pro-

vider' is one who: (1) Is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a 'similar health care provider.' "

Next, we set forth the standard of review applicable to a judgment rendered following the granting of a motion to dismiss. "[A] motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 350, 63 A.3d 940 (2013). "A motion to dismiss admits all facts well pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts." (Internal quotation marks omitted.) *Henriquez* v. *Allegre*, 68 Conn. App. 238, 242, 789 A.2d 1142 (2002). In a medical malpractice action, despite the allegations in the plaintiff's complaint, it is proper to consider undisputed facts contained in affidavits when deciding a motion to dismiss if the affidavits provide independent evidence of the nature of a defendant's medical practice. See *Labissoniere* v. *Gaylord Hospital, Inc.*, supra, 182 Conn. App. 453–54. "Where . . . the motion [to dismiss] is accompanied by supporting affidavits containing undisputed facts, the court may look to their content for determination of the jurisdictional issue and need not conclusively presume the validity of the allegations of the complaint." (Footnote omitted; internal quotation marks omitted.) *Ferreira* v. *Pringle*, 255 Conn. 330, 346–47, 766 A.2d 400 (2001). Generally, "[i]f affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to

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

"Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts." (Citations omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 652, 974 A.2d 669 (2009). "When the facts relevant to an issue are not in dispute, this court's task is limited to a determination of whether, on the basis of those facts, the trial court's conclusions of law are legally and logically correct." (Internal quotation marks omitted.) *Lucisano* v. *Bisson*, 132 Conn. App. 459, 463–64, 34 A.3d 983 (2011). "As a general matter, the burden is placed on the defendant to disprove personal jurisdiction." *Cogswell* v. *American Transit Ins. Co.*, 282 Conn. 505, 515, 923 A.2d 638 (2007).

As the foregoing cases reflect, generally, in ruling on a motion to dismiss, it may be appropriate for a court to consider more than the factual allegations of a complaint, including undisputed facts submitted for the court's consideration by way of affidavits and counteraffidavits. See, e.g., *Cuozzo* v. *Orange*, 315 Conn. 606, 615–16, 109 A.3d 903 (2015). Because, however, of the distinctive nature of opinion letters, which are part of process, it is imperative that they are not merely added to the record, but that they are properly made part of the pleadings, thus rectifying any defects in process. Thus, opinion letters necessarily are treated differently than affidavits and counteraffidavits submitted in support of and in opposition to a motion to dismiss in other types of civil actions.

When evaluating whether the author of the written opinion letter is a "similar health care provider," the court must examine the allegations of the complaint, keeping in mind that "the actual board certification of the defendant is not what matters; the appropriate similar health care provider is defined by the allegations of the complaint." *Gonzales* v. *Langdon*, supra, 161 Conn. App. 506.

The interpretation of § 52-190a is a question of law over which this court exercises plenary review. *Dias* v. *Grady*, 292 Conn. 350, 354, 972 A.2d 715 (2009). "Failure to comply with the statutory requirements of service renders a complaint subject to a motion to dismiss on the ground of lack of personal jurisdiction. . . . Facts showing the service of process in time, form, and manner sufficient to satisfy the requirements of mandatory statutes in that regard are essential to jurisdiction over the person." (Internal quotation marks omitted.) *Morgan* v. *Hartford Hospital*, 301 Conn. 388, 401, 21 A.3d 451 (2011).

I

We begin by addressing the defendants' first claim, which they label as an alternative ground for affirmance. The defendants claim, for the first time on appeal, that the court should not have considered the supplemental affidavit prepared by Solomon because it was obtained and submitted by the plaintiff after the two-year statute of limitations in § 52-584 had expired, and the court failed to state a factual basis to support the applicability of the accidental failure of suit statute, § 52-592, which would have extended the statute of limitations for an additional year from the date the judgment of dismissal was entered in the first action. See General Statutes § 52-592 (a). For the reasons that follow, we decline to afford the defendants relief with respect to this alternative ground for affirmance.

First, for the reasons that follow, if the court erred in failing to state a factual basis to support the applicability of § 52-592 before it addressed the sufficiency of the opinion letter and the affidavit, this would not be an alternative ground for affirmance but, rather, a ground for reversal, a remedy that the defendants do not seek, as they have filed no cross appeal. This court does not find facts, and this matter would have to be remanded for the court to hear evidence and make a factual determination on whether the accidental failure of suit statute may apply in this case. As a general rule, "[i]f an appellee wishes to change the judgment in any way, the party must file a cross appeal." (Internal quotation marks omitted.) *East Windsor* v. *East Windsor Housing, Ltd., LLC*, 150 Conn. App. 268, 270 n.1, 92 A.3d 955 (2014); id. (refusing appellee's request "to direct the trial court to remove costs of seven title searches and seven filing fees from the fees awarded to the plaintiff" because of failure to file cross appeal); see also *River Dock & Pile, Inc.* v. *O & G Industries, Inc.*, 219 Conn. 787, 792 n.5, 595 A.2d 839 (1991) (declining to reach alternative claims for relief raised by appellee because appellee failed to file cross appeal); *Farmers & Mechanics Savings Bank* v. *First Federal Savings & Loan Assn. of Meriden*, 167 Conn. 294, 303 n.4, 355 A.2d 260 (1974) (declining to consider briefed issue concerning validity of restrictive covenants because, although appellees "raised this issue at the trial level, the trial court did not find it necessary to rule thereon," and appellee did not "file a cross appeal assigning error in the court's failure to treat this issue"); *East Windsor* v. *East Windsor Housing, Ltd., LLC*, supra, 270 n.1. This rule is not, however, absolute, and the court may consider such a claim otherwise improperly raised in the appellee's brief in the absence of prejudice to the appellant. See *Akin* v. *Norwalk*, 163 Conn. 68, 70–71, 301 A.2d 258 (1972); *Rizzo* v. *Price*, 162 Conn. 504, 512–13, 294 A.2d 541 (1972); *DiSesa* v. *Hickey*, 160 Conn. 250, 262–63, 278 A.2d 785 (1971).

The following procedural history pertains to this claim. During oral argument before the trial court, the court inquired of counsel for the defendants how she could claim the opinion letter and the supplemental affidavit, dated May 30, 2018, had been submitted beyond the statute of limitations. As previously noted, the prior action was dismissed on October 11, 2017, and, pursuant to the accidental failure of suit statute, § 52-592, the plaintiff would have been entitled to commence the present action for up to one year following the dismissal of the prior action. Counsel for the defendants responded that the issue of whether this suit was brought properly under the accidental failure of suit statute was not an issue for a motion to dismiss, but that it could be an issue for a summary judgment motion "someday down the line." Counsel for the defendants indicated that, for purposes of the motion to dismiss, the court only had to consider § 52-190a (a) and whether the information in the opinion letter attached to the complaint was sufficient. The defendants argued that, if it was not, the court needed to determine whether the subsequently filed supplemental affidavit could even be considered and, if it could, whether it sufficiently amended the opinion letter.

We begin with the law pertaining to the applicability of the accidental failure of suit statute to medical malpractice actions dismissed for failure to supply an appropriate opinion letter from a similar health care provider. The accidental failure of suit statute is a saving statute that is intended to promote "the strong policy favoring the adjudication of cases on their merits rather than the disposal of them on the grounds enumerated in § 52-592 (a)." *Peabody N.E., Inc.* v. *Dept. of Transportation*, 250 Conn. 105, 127, 735 A.2d 782 (1999). Nevertheless, that "policy is not without limits. If it were, there would be no statutes of limitations. Even the saving statute does not guarantee that all plaintiffs have the opportunity to have their cases decided on the merits. It merely

allows them a limited opportunity to correct certain defects in their actions within a certain period of time." Id., 127–28.

In *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 12 A.3d 885 (2011), our Supreme Court held that "when a medical malpractice action has been dismissed pursuant to § 52-190a (c) for failure to supply an opinion letter by a similar health care provider required by § 52-190a (a), a plaintiff may commence an otherwise time barred new action pursuant to the matter of form provisions of § 52-592 (a) only if that failure was caused by a simple mistake or omission, rather than egregious conduct or gross negligence . . . ." Id., 46–47. The issue of whether § 52-592 (a) applies cannot be decided in a factual vacuum. "[T]o enable a plaintiff to meet the burden of establishing the right to avail himself or herself of the statute, a plaintiff must be afforded an opportunity to make a factual showing that the prior dismissal was a matter of form in the sense that the plaintiff's noncompliance with a court order occurred in circumstances such as mistake, inadvertence or excusable neglect." (Emphasis omitted; internal quotation marks omitted.) Id., 50.

The plaintiff's complaint does not allege any factual basis as to why, pursuant to § 52-592 (a), the circumstances leading to the dismissal of his first malpractice action constituted a matter of form and, therefore, warranted application of the saving statute. Thus, there was no basis on which the court, in hearing the motion to dismiss, could have found facts that supported applying § 52-592 on the basis of allegations in the complaint. We note, as well, that there was no discussion whatsoever in the record as to the reasons for the plaintiff's production of a noncompliant opinion letter in the first action.

The court, without providing either party the opportunity to present evidence as to whether the plaintiff's noncompliance with § 52-190a (a) in his first action

was the result of a mistake, inadvertence, or excusable neglect, concluded that the plaintiff could avail himself of the accidental failure of suit statute's saving provisions. The question raised by the defendants for the first time on appeal is whether the court should have made such a ruling in the absence of any factual findings to support it, because *Plante* requires that "a plaintiff may bring a subsequent medical malpractice action pursuant to the matter of form provision of § 52-592 (a) only when the trial court finds as a matter of fact that the failure in the first action to provide an opinion letter that satisfied § 52-190a (a) was the result of mistake, inadvertence or excusable neglect, rather than egregious conduct or gross negligence on the part of the plaintiff or his attorney." *Plante* v. *Charlotte Hungerford Hospital*, supra, 300 Conn. 56; see also *Santorso* v. *Bristol Hospital*, supra, 308 Conn. 358 (after plaintiff's counsel declined court's invitation to explain failure to comply with requirements of § 52-190a (a), no record existed to establish that failure to file good faith certificate and opinion letters in first action was result of mistake, inadvertence, or excusable neglect and therefore second action not saved by accidental failure of suit statute).[12] As a result, no allegations in the complaint, evidentiary facts or argument being presented to suggest otherwise, the court overlooked the directive in *Plante* that requires it to find a factual basis for allowing a plaintiff the benefit of the saving statute.[13]

This claim raises issues of fact, particularly with respect to the reasons the plaintiff or counsel for the

[12] In light of the holding in *Plante*, any court considering a motion to dismiss for noncompliance with § 52-190a in a medical malpractice action that has been filed pursuant to the accidental failure of suit statute should first determine whether the plaintiff is entitled to the benefit of the saving statute.

[13] Although the record is silent with respect to the court's rationale, we nonetheless observe that, perhaps the court, after being advised by counsel for the defendants that it did not need to decide this issue, may have determined that it could assume, arguendo, that the extension of the time limitation the saving statute provided could be applied, and considered the

plaintiff provided a deficient opinion letter in his first action against the defendants that would have been more properly considered by the trial judge in the first instance, particularly since this same trial judge ordered the dismissal of the plaintiff's first action. See *Gianetti* v. *Norwalk Hospital*, 266 Conn. 544, 560, 833 A.2d 891 (2003) ("[o]rdinarily it is not the function of this court or the Appellate Court to make factual findings, but rather to decide whether the decision of the trial court was clearly erroneous in light of the evidence . . . in the whole record" (internal quotation marks omitted)); *Rizzo* v. *Price*, supra, 162 Conn. 513 (declining to review appellee's challenge, raised for first time in brief, to trial court's failure to make certain factual conclusions as "clearly prejudicial to the appellant").

The defendants are not presently seeking to affirm the trial court's judgment, but are seeking to alter it to an extent that would require reversal. We decline to afford the defendants, who prevailed in the trial court and have not filed a cross appeal, relief with respect to this claim. Generally, a party who prevails in the lower court is unable to file a cross appeal. See, e.g., *Skakel* v. *Commissioner of Correction*, 325 Conn. 426, 528 n.35, 159 A.3d 109 (2016); *Sekor* v. *Board of Education*, 240 Conn. 119, 121 n.2, 689 A.2d 1112 (1997); *Greene* v. *Keating*, 197 Conn. App. 447, 449 n.2, A.3d (2020); *Brown* v. *Villano*, 49 Conn. App. 365, 372 n.6, 716 A.2d 111, cert. denied, 247 Conn. 904, 720 A.2d 513 (1998). We also believe such a course of action would be prejudicial to the plaintiff who already has repeatedly briefed and argued the merits of his claim that the opinion letter, with or without the supplemen-

opinion letter and the supplemental affidavit to be timely filed so that it could reach the defendants' main contention—their combined insufficiency under §§ 52-190a (a) and 52-184c. In the alternative, since the court, *Domnarski, J.*, hearing the motion to dismiss in the present action also had dismissed the first action, it may have impliedly decided that there was a mistake, inadvertence, or excusable neglect that had led to the dismissal of the first action.

tal affidavit, is compliant with § 52-190a (a), an issue he would not have been able to address had the court determined facts that would not have permitted him to avail himself of the accidental failure of suit statute. Not only did counsel for the defendants advise the court not to reach this issue, the defendants never sought reconsideration or articulation of the court's ruling that § 52-592 applied. Were we to reverse and remand this case for an evidentiary hearing on the applicability of § 52-592 pursuant to *Plante*, the parties might find themselves in the same position in which they both stand before us now should the court, on remand, make the not unlikely factual determination that the plaintiff could avail himself of the accidental failure of suit statute. Even with the extended time provided by the saving statute, the time limitation already has expired as of October 11, 2018, and, pursuant to the ruling in *Gonzales*, the plaintiff could not amend or supplement his opinion letter further during any reconsideration of the defendants' motion to dismiss on remand. Consequently, on remand, the trial court possibly would be faced with the same issue we have decided to address in this appeal—whether the plaintiff complied with the requirements of § 52-190a (a) based on the existing documentation the trial court reviewed during the hearing on the motion to dismiss on July 30, 2018. Thus, it is appropriate for us to turn our focus, instead, to the opinion letter and supplemental affidavit that are the primary subjects of this appeal.

II

We next address the defendants' first and third alternative grounds for affirmance because they are interrelated and, considered together, they are dispositive of this appeal.[14] We agree with the defendants' first alternative ground for affirmance that the plaintiff, in lieu of

[14] "[I]t is axiomatic that [we] may affirm a proper result of the trial court for a different reason." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 63 n.6, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011).

amending his complaint, cannot cure a § 52-190a (a) defect in the opinion letter attached to the complaint with information contained in a subsequently filed supplemental affidavit of the opinion author where the plaintiff continues to maintain that his complaint properly alleged that Daar was "holding himself out as a specialist," and the supplemental affidavit attempted to provide information that allegedly qualified Solomon as a "similar health care provider" pursuant to the nonspecialist definition set forth in § 52-184c (b). We conclude that such a material turnabout in what the plaintiff maintains his opinion letter purports to demonstrate as to the professional similarities between the defendant and the author of an opinion letter should be accomplished only by the filing of an amendment to the complaint. In other words, in order to potentially rely on the supplemental affidavit to avoid dismissal, the plaintiff first had to amend his complaint to allege that Daar was either a nonspecialist engaged in the practice of general dentistry or, alternatively, that he was holding himself out to be a specialist.

Furthermore, in addressing the defendants' third alternative ground for affirmance that the opinion letter attached to the complaint did not contain sufficient information to demonstrate that Solomon is a similar health care provider to Daar under the specialist definition of a similar health care provider in § 52-184c (c), we necessarily address and disagree with the plaintiff's claim that the court erred in determining that the author of the opinion letter was not a similar health care provider as defined in § 52-184c (c).[15] First, we disagree with the plaintiff's claim that the specialist definition in subsection § 52-184c (c) should apply in this case. Second, because we conclude it was error to consider the supplemental affidavit, we agree with the defen-

[15] A claim may be so inextricably linked to another that deciding one necessarily requires a resolution of both. *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 540–42, 198 A.3d 52 (2019).

dants that the opinion letter attached to the complaint was insufficient to establish that Solomon is a similar health care provider to Daar pursuant to § 52-184c (b).[16]

"The interpretation of § 52-190a is a question of law over which this court exercises plenary review. . . . Moreover, review of the trial court's ultimate legal conclusion and resulting [decision to] grant [a] motion to dismiss will be de novo."" (Citation omitted; internal quotation marks omitted.) *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 395. Our Supreme Court has "hewn very closely" to the legislature's specific articulation of a similar health care provider under subsections (b) and (c) of § 52-184c, expressly declining to expand or modify it in any way. See *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 15–16, 12 A.3d 865 (2011). As we observed previously, "[w]hen the facts relevant to an issue are not in dispute, this court's task is limited to a determination of whether, on the basis of those facts, the trial court's conclusions of law are legally and logically correct." (Internal quotation marks omitted.) *Lucisano* v. *Bisson*, supra, 132 Conn. App. 463–64.

We begin by determining whether the court properly found that Daar, at the time of the alleged negligent root canal procedure, was a nonspecialist practicing general dentistry rather than a specialist in endodontics because, as the plaintiff purports to have alleged, Daar was holding himself out as a specialist. This is necessary because such a determination makes either subsection (b) or subsection (c) of § 52-184c applicable to the type of health care provider who properly should have authored the opinion letter.

It is not disputed that Daar is not certified by the appropriate American board as a specialist, and he is

[16] We need not address whether the opinion letter, if properly supplemented by the affidavit, was compliant with § 52-190a (a), although the trial court held it was not.

not trained and experienced in a medical specialty.[17] The plaintiff's complaint failed to allege that Daar was "trained and experienced in a medical specialty, or holds himself out as a specialist" in endodontics, the specific language set forth in § 52-184c (c) for determining whether or not a defendant provider should be considered a specialist. The plaintiff only alleged that the defendant "held himself out as a practitioner of endodontics" and "has completed hundreds of hours of training in endodontics." The plaintiff also did not allege that in performing the root canal, Daar provided treatment for a condition not within his specialty, in which case, pursuant to an exception contained in § 52-184c (c), a specialist trained in the treatment or diagnosis for that condition shall be considered a similar health care provider. Indeed, both the plaintiff and the defendants acknowledge that dentists practicing general dentistry do perform root canals and other procedures also performed by specialists in dentistry, despite their lack of board certification in any specialty.

As the court found, the affidavit of Daar submitted in connection with the defendants' motion to dismiss supported the conclusion that he is a general dentist and that the root canal treatment he performed on the plaintiff was performed in his capacity as a general dentist. The "hundreds of hours" training alleged to be stated on Daar's website by the plaintiff, in the statement in which it is contained, did not modify only the word, "[e]ndodontics," it also modified "[o]rthodontics, [p]eriodontics, [d]ental [i]mplants, [s]leep [a]pnea," and

[17] Connecticut law does not permit a person to obtain some training and education and hold oneself out as practicing in a limited dental specialty. General Statutes § 20-106a, which is part of the Connecticut Dental Practice Act, provides in relevant part: "No licensed and registered dentist shall designate in any manner that he has limited his practice to one of the specialty areas of dentistry expressly approved by the American Dental Association unless such dentist has completed two years of advance or postgraduate education in the area of such specialty and has notified the Dental Commission of such limitation of practice. . . ."

more. It thus could not be read as any indication that Daar had hundreds of hours of training in endodontics and it cannot be specifically determined from this promotional website the exact amount of hours of training he may have had in endodontics. The allegation that there is a statement on the website that Daar completed hundreds of hours of training in endodontics, does not support a finding that Daar held himself out as an endodontic specialist. The website actually states that Daar "has completed hundreds of hours of training" in many subjects. There is a distinction between a general dentist's training and experience, including continuing education and a postdoctoral specialty resident program required to become a specialist in a recognized dental specialty. General Statutes § 20-106a prohibits any licensed or registered dentist from designating that his practice is limited to a specialty recognized by the American Dental Association unless the dentist has completed two or more years of advanced or postgraduate education in the area of the specialty. The completion of hours of continuing education over the years when Daar has been practicing as a general dentist in Connecticut since 1982, is not synonymous with being a specialist. Dentists in Connecticut are prohibited from renewing their practice licenses unless they take a requisite number of continuing education credits. See General Statutes § 20-126c (b) (requiring all licensed dentists to have minimum of twenty-four contact hours of continuing education within twenty-four months preceding their application for renewal). The plaintiff's theory that hours of continuing education contributes to holding oneself out as a specialist would result in treating all physicians and dentists, regardless of whether they are trained and experienced in a specialty, as health providers holding themselves out as specialists merely because they have completed required continuing education. "This construction would run afoul

of the basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions." (Internal quotation marks omitted.) *Bennett* v. *New Milford Hospital*, supra, 300 Conn. 23. We conclude that the defendants' informative and promotional website references did not equate to Daar's holding himself out as a specialist in endodontics.[18]

Moreover, the plaintiff took no steps to counter the contents of Daar's affidavit, which indicated that he has been engaged in the practice of general dentistry since 1982 and refuted the plaintiff's mischaracterization of the content of his website.

As we recently explained in *Labissoniere* v. *Gaylord Hospital, Inc.*, supra, 182 Conn. App. 445, Practice Book § 10-3 (c) allows either party to submit affidavits and/

[18] *Lohnes* v. *Hospital of Saint Raphael*, 132 Conn. App. 68, 31 A.3d 810 (2011), cert. denied, 303 Conn. 921, 34 A.3d 397 (2012), is informative on this point. The plaintiff in *Lohnes* brought a medical malpractice action against an emergency medical physician and the hospital at which he received treatment for pulmonary symptoms. Id., 71. In bringing the action, the plaintiff submitted an opinion letter from a pulmonologist. Id., 72. The defendants moved to dismiss the action on the ground that the treating physician was board certified in emergency medicine and the author of the opinion letter was not a similar health care provider within the meaning of §§ 52-190a and 52-184c. This court upheld the judgment dismissing the action and rejected the argument advanced by the plaintiff on appeal that, at the time he treated the plaintiff, the treating physician had been practicing outside of his specialty of emergency medicine. Id., 79. This court noted: "[I]n light of the fact that emergency medicine physicians are charged with rendering care to and treating patients with a potentially limitless variety of symptoms or injuries, the plaintiff's argument, namely that the defendant was acting outside his area of specialty, potentially could yield a situation where no condition or illness would be considered within the scope of emergency medicine. Accordingly, there is no basis for the claim that, in treating the plaintiff for his symptoms in the emergency department of the hospital, [the defendant] was acting outside his specialty of emergency medicine." Id., 79.

In the present case, it is undisputed that dentists engaged in the practice of general dentistry similarly treat patients for a variety of conditions that are also treated by dentists who are board certified in a dental specialty. There should be no basis, then, for the claim that in treating the plaintiff with a root canal procedure, a procedure commonly accepted as part of the practice of general dentistry, the defendant was holding himself out to be a specialist.

or other evidence in support of a motion to dismiss. "If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings." (Internal quotation marks omitted.) Id., 453.

The court was not bound to presume the validity of only the facts alleged in the complaint. Furthermore, it noted that the complaint itself failed to sufficiently allege Daar was holding himself out as a specialist. The indeterminate complaint, as well as the undisputed facts alleged in Daar's affidavit, justified the court's conclusion that Daar was neither a specialist, nor holding himself out to be one, and thus, pursuant to § 52-184c (b), any opinion from a similar health care provider must come from "someone who (1) is licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications; and (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim."[19]

Next, we must determine whether the opinion letter, consisting of the two letters from Solomon attached to the plaintiff's complaint as an exhibit in the present action, sufficiently established that Solomon qualified as a similar health care provider pursuant to §§ 52-190a (a) and 52-184c (b). The first letter is the same one that

[19] We conclude, as did the trial court, that, despite the plaintiff's contention that he properly alleged that Daar was holding himself out to be a specialist, a plain reading of the allegations in his complaint failed to properly invoke reliance upon the definition of a similar health care provider under the specialist definition in § 52-184c (c) but, rather, leaves one with the distinct impression that Daar was engaged only in the practice of general dentistry, a nonspecialty as defined in § 52-184c (b).

was attached to the plaintiff's complaint as the opinion letter in his first action, which the court dismissed because that letter, in and of itself, did not reflect Solomon's qualifications. The supplemental correspondence attached to the complaint, first produced in the present action, describes its author, Solomon, as a graduate of Columbia, licensed to practice dentistry in New York, with credentials that would satisfy the requirements of any other state. It further indicates that Solomon "received specialty [b]oards in [e]ndodontics in 1970 and practiced [e]ndodontics in New York City for over [forty] years [and that in] [t]he last [eight] years, [Solomon] [had] been a full-time clinical professor of [e]ndodontics at Columbia . . . teaching clinical and didactic [e]ndodontics."

The defendants claim that the two part opinion letter was insufficient because it unequivocally does not demonstrate that the author is a similar health care provider to Daar, a general dentist. The nonspecialist definition, set forth in § 52-184c (b), requires not only that the similar health care provider have the appropriate licensure but, also, that such provider have training and experience in the "same discipline or school of practice" and such training and experience must "be as a result of the active involvement in the practice or teaching of [general dentistry] within the five-year period before the incident giving rise to the claim." Although the second letter attached to the complaint indicates that the author taught endodontics for the past eight years, there plainly is no information in the opinion letter demonstrating that the author had any active involvement in the practice or teaching of *general dentistry* during the requisite five year period. Nowhere does the plaintiff argue that the opinion letter attached to his complaint, which makes no mention of the fact that Solomon had been teaching endodontics to students of general dentistry, is sufficient to qualify its author as a similar health care provider to Daar pursuant to § 52-184c (b). It is indisputable, therefore, that

unless the supplemental affidavit of Solomon attached to his objection to the motion to dismiss may be considered, the plaintiff's cause of action definitely fails for want of personal jurisdiction because the opinion letter alone is not compliant with § 52-190a.

The defendants argue that the plaintiff failed to properly amend his complaint to attach an amended or new opinion letter making the allegations in the supplemental affidavit part of the pleading process and thus failed to confer personal jurisdiction over the defendants under § 52-190a. In his reply brief, the plaintiff argues that the defendants did not preserve in the trial court the issue of whether he had to amend his complaint rather than simply file the supplemental affidavit, nor did they claim this as a proposed alternative ground for affirmance in their preliminary statement of issues dated October 15, 2019, and this court should refuse to consider the issue because the plaintiff was prejudiced in having been given only twenty days from the filing of the defendants' brief to consider the issue.[20] We note, however, that the defendants raised this claim to the trial court during oral argument on the motion to dismiss, although they did not address it in either their memorandum of law in support of their motion to dismiss or in their reply to the plaintiff's objection to the motion to dismiss. At oral argument on the motion to dismiss, counsel for the defendants stated: "This affidavit from [Solomon], it can't be considered by the court in the second action. If it had been attached to the complaint in the second action, then that would—I wouldn't be taking that position." As a result of the defendants' lack of emphasis on this point, the court did not address the precise issue. In the plaintiff's appellate brief, however, he anticipates this argument and cites to *Peters* v. *United Community & Family Services*,

[20] Practice Book § 67-3 provides in relevant part: "The appellant may within twenty days after the filing of the appellee's brief file a reply brief which shall not exceed fifteen pages. . . ."

Inc., 182 Conn. App 688, 181 A.3d 195 (2018), as authority for his ability to submit an affidavit with his objection to the motion to dismiss, in lieu of amending the complaint, to cure a deficient opinion letter. The plaintiff also was able to respond to the defendants' claim in his reply brief. If he felt he needed additional time to do so adequately, he could have sought an extension of time in which to file the reply brief, but he did not do so. In the exercise of our plenary review of this issue, which is one of law, and the fact that it was raised in the trial court and on appeal, and that both parties had sufficient opportunity to brief it, we will address it. See *Connecticut Ins. Guaranty Assn.* v. *Fontaine*, 278 Conn. 779, 784 n.4, 900 A.2d 18 (2006) (when alternative ground for affirmance was raised in trial court, failure to comply with Practice Book § 63-4 (a) (1) did not render claim unreviewable when all parties briefed claim); *Skuzinski* v. *Bouchard Fuels, Inc.*, 240 Conn. 694, 702–703, 694 A.2d 788 (1997) (reviewing alternative grounds for affirmance that were raised in trial court even though trial court failed to rule on claims); *Chotkowski* v. *State*, 240 Conn. 246, 256 and n.17, 690 A.2d 368 (1997) (reviewing alternative grounds for affirmance that were not included in preliminary statement of issues when claims were raised in trial court).

Both the plaintiff and the defendants correctly assert that no appellate court has yet decided whether a defective opinion letter may be cured with an affidavit if submitted with a plaintiff's objection to a motion to dismiss within the statute of limitations period. In *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 703, this court held that a plaintiff cannot evade the clear limits set forth in *Gonzales* v. *Langdon*, supra, 161 Conn. App. 519, by, in lieu of seeking to amend the complaint, submitting a clarifying or explanatory affidavit from the author of the opinion letter after the limitation period has expired. We declined, however, to decide whether the use of a *timely* filed affidavit from

the author of the opinion letter, submitted in lieu of amending the complaint, was procedurally appropriate. See *Peters* v. *United Community & Family Services, Inc.*, supra, 704.

In *Peters*, however, this court did reference two Supreme Court opinions, *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 1, and *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 388, that unequivocally state that an opinion letter is part of civil process. In *Morgan*, the court construed the term "process" to include both the summons, the complaint *and* any requisite attachments thereto and recognized that "the written opinion letter, prepared in accordance with the dictates of § 52-190a, like the good faith certificate, is akin to a *pleading* that must be attached to the complaint in order to commence properly the action." (Emphasis added.) *Morgan* v. *Hartford Hospital*, supra, 398. In *Bennett*, in which our Supreme Court decided that a motion to dismiss was the proper vehicle to attack a deficient opinion letter; *Bennett* v. *New Milford Hospital, Inc.*, supra, 29; the court declined to "permit the free amendment of challenged opinion letters to ensure their compliance with the statute."[21] Id., 24. The court also rejected an argument in the amicus brief of the Connecticut Trial Lawyers Association that the appropriate procedural vehicle for challenging an opinion letter that is

[21] As noted in *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 703–704, certain Superior Court decisions have permitted a plaintiff to cure a defective opinion letter by supplemental affidavit rather than by following the amendment procedures set forth in Practice Book §§ 10-59 and 10-60. These lower courts have relied on the theory that, if a plaintiff is permitted to correct a defective opinion letter by amending his complaint, it would be equally reasonable for a court to permit and consider an affidavit that clarifies a defect in an existing opinion letter, especially when a plaintiff is acting in response to a motion to dismiss, which is governed by Practice Book § 10-31 (a) and permits affidavits to establish facts necessary for the adjudication of the motion. Id. The persuasiveness of the Superior Court cases cited in *Peters*, however, is greatly discounted by the fact that they were decided before our Supreme Court issued its decisions in *Bennett* and *Morgan*, both of which emphasize that an insufficient opinion letter constitutes defective process.

not compliant with § 52-190a is the motion to strike, as that would provide the plaintiff with an opportunity to plead over and correct the deficiency as a matter of right, whereas the allowance of an amendment to the complaint lies in the discretion of the court. Id., 24–25. Rather, the court agreed with the defendant's position that when he filed a motion to dismiss, the plaintiff could have sought either to amend the complaint to include an appropriate opinion letter, or, because the statute of limitations had not yet run at the time of dismissal, to refile the action after dismissal with an appropriate opinion letter. Id., 25.[22]

Consequently, our Supreme Court has held that failure to comply with the statutory requirements of service, including attaching a proper opinion letter, renders a complaint in a medical malpractice action subject to a motion to dismiss on the ground of lack of personal jurisdiction. See *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 401. A challenge to the sufficiency of the opinion letter, which is required to be attached to the complaint, is a challenge to in personam jurisdiction, which a defendant can waive if a motion to dismiss is not filed within thirty days of the filing of an appearance. See Practice Book § 10-30; *Pitchell* v. *Hartford*, 247 Conn. 422, 433, 722 A.2d 797 (1999) ("[t]he rule specifically and unambiguously provides that any claim of lack of jurisdiction over the *person* as a result of an insufficiency of service of process *is waived* unless it is raised by a motion to dismiss filed within thirty days in the sequence required by Practice Book § 10-6" (emphasis in original)). It would not seem fair to deprive a defendant of the right to raise a claim of lack of personal jurisdiction based on a noncompliant opinion let-

[22] *Bennett* also discussed the fact that although the remedy of dismissal might lead to harsh results for plaintiffs, plaintiffs are not without recourse when facing dismissal, even in circumstances in which the statute of limitations has run, because they may be able to avail themselves of the relief available under the accidental failure of suit statute. *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 30–31.

ter beyond thirty days from the date of filing his or her appearance, but afford a plaintiff an unlimited time period to cure a defective opinion letter by the mere filing of an affidavit, which in most circumstances would not require the prior permission of the court.

Thus, our decisional law reflects that an opinion letter is in the nature of a pleading that must be attached to the complaint. If an opinion letter is noncompliant with the statutory prerequisites set forth in §§ 52-190a and 52-184c, the plaintiff is faced with a problem of defective process because "the attachment of a written opinion letter that does not comply with § 52-190a, constitutes insufficient process and, thus, service of that insufficient process does not subject the defendant to the jurisdiction of the court. . . . [U]nless service of process is made as the statute prescribes, the court to which it is returnable does not acquire . . . jurisdiction over the person . . . ." (Citation omitted; internal quotation marks omitted.) *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 401–402.

Although Practice Book § 10-30, which governs motions to dismiss, provides for the submission of affidavits by either party in some circumstances, correcting deficiencies in process that lead to a lack of personal jurisdiction requires more than the filing of an affidavit. In *Gonzales* v. *Langdon*, supra, 161 Conn. App. 514, this court stated, "[p]resumably, because *Morgan* holds that a legally sufficient opinion letter is part of process, General Statutes § 52-72 (a) for amending process applies . . . ." Section 52-72 (a) provides: "Upon payment of taxable costs, any court shall allow a proper amendment to civil process which is for any reason defective." Section 52-72 (b) provides: "Such amended process shall be served in the same manner as other civil process and shall have the same effect, from the date of the service, as if originally proper in form." The statute provides for "amendment of otherwise incurable defects that go to the court's jurisdiction." *Hartford*

National Bank & Trust Co. v. *Tucker*, 178 Conn. 472, 478, 423 A.2d 141 (1979), cert. denied, 445 U.S. 904, 100 S. Ct. 1079, 63 L. Ed. 2d 319 (1980). The statute has been interpreted to allow for the granting of motions to amend defective process rather than requiring reservice of civil process. For example, in *Concept Associates, Ltd.* v. *Board of Tax Review*, 229 Conn. 618, 642 A.2d 1186 (1994), our Supreme Court reversed the trial court for failing to grant the plaintiff's motion to amend to correct a defective return date. Id., 619–20. In discussing § 52-72, the court noted that "the legislature has the power to authorize, by statute, the amendment of defects in process that would otherwise deprive the court of jurisdiction." Id., 622.[23] Likewise, in *Gonzales* v. *Langdon*, supra, 161 Conn. App. 510, this court sanctioned the use of rules of practice for amending complaints, Practice Book §§ 10-59 and 10-60, to cure a defective opinion letter pursuant to § 52-72.[24] Id., 517–18.

The plaintiff argues that this court's decision in *Peters*, decided subsequent to *Gonzales*, established that a plaintiff may use an explanatory affidavit to supplement an opinion letter if the affidavit is filed within the statute of limitations. After noting that "[n]o appellate court to date has sanctioned the use of an affidavit to cure a defective opinion letter," however, the court in *Peters* expressly stated that in light of what was necessary to its analysis in that appeal, it was leaving that issue "for another day." *Peters* v. *United Commu-*

[23] In *Hartford National Bank & Trust Co.* v. *Tucker*, supra, 178 Conn. 478–79, our Supreme Court stated: "The purpose of [§ 52-72] is to provide for amendment of otherwise incurable defects that go to the court's jurisdiction. . . . Those defects which are merely voidable may, in the trial court's discretion, be cured by amendment, and do not require new service and return date, so long as the defendant was not prejudiced." (Citation omitted.)

[24] The court in *Gonzales* also relied on General Statutes § 52-128, which provides in relevant part: "The plaintiff may amend any defect, mistake or informality in the writ, complaint declaration or petition . . . within the first thirty days after the return day and at any time afterwards on the payment of costs at the discretion of the court. . . ."

nity & Family Services, Inc., supra, 182 Conn. App. 704. Furthermore, the court cautioned in a footnote that, because it was not deciding whether a trial court has the authority to permit alternative procedures such as a clarifying affidavit to remedy a defective opinion letter, "it would seem prudent for a plaintiff to follow the corrective measures approved in *Gonzales* . . . ." Id., 704 n.10. Thus, *Peters* is not inconsistent with our present analysis.

We agree with the defendants that the plaintiff's position that a subsequently filed affidavit should be permitted to cure a defective opinion letter would circumvent the amendment procedures set forth in Practice Book §§ 10-59 and 10-60. An affidavit obtained from the author of the opinion letter after commencement of the action necessarily would not comply with the procedure for an amendment as of right in Practice Book § 10-59, because an affidavit obtained after the commencement of the action could not have been "originally inserted therein. . . ." Practice Book § 10-59. In addition, a trial court's determination whether to allow an amendment under Practice Book § 10-60 is discretionary and depends upon such factors as unreasonable delay, fairness to the opposing party, and negligence of the party offering the amendment. See *Gonzales* v. *Langdon*, supra, 161 Conn. App. 510. The filing of an affidavit, accomplished in an essentially unrestricted manner, avoids the limitations a court must consider before it allows the filing of an amendment to a complaint.

In enacting § 52-72, the legislature authorized amendments to cure defects in process. "[I]n the absence of ambiguity, courts cannot read into statutes, by construction, provisions which are not clearly stated." (Internal quotation marks omitted.) *Concept Associates, Ltd.* v. *Board of Tax Review*, supra, 229 Conn. 622. In enacting § 52-190a, the legislature also expressly provided in subsection (c) that the failure to obtain and

file the written opinion required under subsection (a), which must be attached to the attorney's good faith certificate, which, in turn, must be part of the complaint, shall be grounds for dismissal of the action. The legislature did not include any savings clause relative to defective opinion letters, which suggests that the statutory requirements must be more strictly construed. See, e.g., *Pratt* v. *Old Saybrook*, 225 Conn. 177, 183, 621 A.2d 1322 (1993) (notice requirement in statute providing for actions against state for highway defects, unlike statute providing for similar actions against municipalities, contains no savings clause and may not be as liberally construed). However much as courts generally strive to preserve parties' access to courts by construing remedial legislation liberally, we nonetheless are bound by the principle that it remains the province of the legislature, and not the courts, to determine what remedies other than those already provided by statute could be used to cure an opinion letter that does not comply with § 52-190a (a).

The plaintiff's supplemental affidavit deviated from the intended allegations in his complaint to establish that Solomon was a similar health care provider to Daar. In his complaint, the plaintiff was attempting to allege that Daar held himself out as a specialist, not that Daar was a general dentist and a nonspecialist, and the opinion letter was designed to establish that Solomon was a specialist in the specialty in which Daar purportedly held himself to be engaged—endodontics. In the face of the defendants' motion to dismiss, the supplemental affidavit was an attempt, in the alternative, to qualify Solomon as someone teaching in the *nonspecialty* field of general dentistry, the type of practitioner Daar claimed to be in his affidavit. Through Daar's factual affidavit, the defendants chose to attack the substance of the opinion letter as noncompliant with § 52-190a (a) in that it failed to establish Solomon as a similar

health care provider under §§ 52-184c (b) or (c). The court's fair reading of the complaint, however, led to its conclusion that the complaint did not allege that Daar was holding himself out to be a specialist but, rather, that Daar was engaged in the practice of general dentistry, which includes performing root canal treatment. Accordingly, the opinion letter, in the absence of the supplemental affidavit, had to establish that Solomon was engaged in the practice of general dentistry or in the teaching of general dentistry for the five years preceding the date the alleged malpractice took place. It did not.

Accordingly, due to a defective opinion letter, there was a defect in process. As the plaintiff never sought to amend the allegations in his complaint, including the opinion letter, from one supporting his initially intended claim that Daar was holding himself out to be a specialist pursuant to § 52-184c (c) to one supporting a claim that Daar was engaged in the practice of general dentistry, the additional, alternative credentialing information in the supplemental affidavit could not be used to correct the deficient opinion letter that was attached to, and part of, his complaint.[25]

We conclude that the court's dismissal of the complaint should be affirmed on the alternative ground that the court should not have considered the supplemental affidavit. The opinion letter failed to comply with § 52-190a (a) because it did not establish that Solomon was a similar health care provider to Daar pursuant to § 52-184c (b) or (c).

The judgment is affirmed.

In this opinion the other judges concurred.

[25] As previously noted, the plaintiff, when faced with a motion to dismiss based on a deficient opinion letter in his first action, attempted to amend his complaint, but the statute of limitations already had run. Thus, he was aware of the proper procedural route by which to rectify any defects related to the opinion letter in the present case.

JERRY LEWIS WHISTNANT *v.* COMMISSIONER OF CORRECTION (AC 42894)

DiPentima, C. J., and Moll and Flynn, Js.*

Syllabus

The petitioner, who had been convicted on a guilty plea in 2009, of the crime of robbery in the first degree in connection with a robbery he committed in 2008, sought a writ of habeas corpus, claiming, inter alia, a violation of the ex post facto clause of the United States constitution. In 2011, the legislature enacted a statute (§ 18-98e) that permitted certain inmates, including the petitioner, to earn risk reduction credit toward the reduction of their sentences, at the discretion of the respondent, the Commissioner of Correction, and amended the statute (§ 54-125a (b) (2)) governing parole eligibility to permit risk reduction credit to be applied to advance the parole eligibility date of inmates convicted of certain violent offenses. In 2013, the legislature enacted an amendment (P.A. 13-3, § 59) to § 54-125a (b) (2) that removed the language that permitted the risk reduction credit earned under § 18-98e to advance the parole eligibility date of violent offenders. The petitioner claimed, inter alia, that the 2013 amendment, as applied retroactively to him, violated the ex post facto clause of the federal constitution. The habeas court rendered judgment declining to issue a writ of habeas corpus pursuant to the applicable rule of practice (§ 23-24 (a) (1)) on the ground that it lacked subject matter jurisdiction. Thereafter, the habeas court denied the petitioner's petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal, as the petitioner failed to demonstrate that his claims were debatable among jurists of reason, that a court could have resolved the issues in a different manner or that the questions were adequate to deserve encouragement to proceed further.
2. The petitioner's claim that the habeas court improperly failed to conduct a hearing before declining to issue a writ of habeas corpus under Practice Book § 23-24 (a) (1) was outside the scope of this court's appellate review; pursuant to the applicable statute (§ 52-470 (g)), this court's review was confined to the issues presented in the petitioner's petition for certification to appeal, which incorporated two grounds for appeal, and, because neither ground indicated that the petitioner sought to challenge the habeas court's judgment on the basis that the court did not conduct a hearing, review pursuant to *State* v. *Golding* (213 Conn. 233) was unavailable because permitting a petitioner, in an appeal from

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

a habeas judgment following the denial of a petition for certification to appeal, to seek *Golding* review of a claim that was not raised in, or incorporated into, the petition for certification to appeal would circumvent the requirements of § 52-470 (g) and undermine the goals that the legislature sought to achieve in enacting it.

3. The petitioner could not prevail on his claim that the habeas court improperly concluded that it lacked subject matter over the claims in his habeas petition:

a. The habeas court lacked subject matter jurisdiction over the petitioner's claim that the retroactive application of the 2013 amendment to § 54-125a (b) (2) to him violated the ex post facto clause of the federal constitution, the petitioner having failed to raise a cognizable ex post facto claim in the habeas petition; the petitioner made no claim that legislation regarding eligibility for parole consideration became more onerous after the date of his criminal behavior but, rather, claimed that new legislation enacted in 2011, after his criminal conduct, conferred a benefit on him that was taken away in 2013, which did not implicate the ex post facto prohibition because the changes that occurred between 2011 and 2013 had no bearing on the punishment to which the petitioner's criminal conduct exposed him when he committed the robbery in 2008, and, with regard to parole eligibility, the 2013 amendment merely returned the petitioner to the same position that he was in at the time of his offense.

b. The habeas court lacked subject matter jurisdiction over the petitioner's claim that the retroactive application of the 2013 amendment to § 54-125a (b) (2) to him violated his right to due process, as the petitioner lacked a vested liberty interest in the risk reduction credit that he had earned that, following the enactment of the 2013 amendment, was no longer being applied to advance his parole eligibility date.

Argued March 12—officially released August 4, 2020

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Bhatt*, *J.*, rendered judgment declining to issue a writ of habeas corpus; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

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

Zenobia G. Graham-Days, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellee (respondent).

Opinion

MOLL, J. The petitioner, Jerry Lewis Whistnant, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court declining to issue a writ of habeas corpus for lack of subject matter jurisdiction pursuant to Practice Book § 23-24 (a) (1).[1] On appeal, the petitioner claims that the court improperly (1) denied his petition for certification to appeal, (2) declined to issue the writ of habeas corpus pursuant to § 23-24 (a) (1) without conducting a hearing, and (3) concluded that it lacked subject matter jurisdiction over the claims raised in his petition for a writ of habeas corpus. We conclude that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal, and, therefore, we dismiss the appeal.

The following facts, procedural history, and statutory history are relevant to our disposition of the appeal. On September 27, 2008, the petitioner was arrested and charged with robbery in the first degree in violation of General Statutes § 53a-134 (a) (4).[2] On May 8, 2009, after the petitioner pleaded guilty to the charge, the trial court, *Alexander*, *J.*, sentenced him to fifteen years of incarceration, followed by three years of special parole. The petitioner did not appeal from the judgment

[1] Practice Book § 23-24 provides: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that:

"(1) the court lacks jurisdiction;

"(2) the petition is wholly frivolous on its face; or

"(3) the relief sought is not available.

"(b) The judicial authority shall notify the petitioner if it declines to issue the writ pursuant to this rule."

[2] General Statutes § 53a-134 (a) provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . ."

of conviction. As a result of his conviction, the petitioner remains in the custody of the respondent, the Commissioner of Correction.

At the time that the petitioner committed the robbery on September 27, 2008, General Statutes (Rev. to 2007) § 54-125a (b) (2), as amended during a special session in January, 2008; see Public Acts, Spec. Sess., January, 2008, No. 08-1, § 5; provided in relevant part: "A person convicted of . . . (B) an offense, other than [certain parole ineligible offenses], where the underlying facts and circumstances of the offense involve the use, attempted use or threatened use of physical force against another person shall be ineligible for parole under subsection (a) of this section until such person has served not less than eighty-five per cent of the definite sentence imposed. . . ."[3] The crime of robbery in the first degree fell within this class of violent offenses. See *Holliday* v. *Commissioner of Correction*, 184 Conn. App. 228, 231 n.2, 194 A.3d 867 (2018) ("robbery in the first degree . . . involves the [use] or threaten[ed] . . . immediate use of physical force upon another person" (internal quotation marks omitted)), cert. granted on other grounds, 335 Conn. 901, 225 A.3d 960 (2020). Therefore, at the time that he had committed the robbery, the petitioner was ineligible for parole until he had served no less than 85 percent of his sentence.

In 2011, about three years after his commission of the robbery and long after his May 8, 2009 date of conviction, while the petitioner was incarcerated, the legislature enacted No. 11-51, § 22, of the 2011 Public Acts (P.A. 11-51), later codified in General Statutes § 18-98e. Pursuant to § 18-98e (a), certain inmates, includ ing the petitioner, convicted of crimes committed on or after October 1, 1994, "may be eligible to earn risk

[3] "[D]efinite sentence is the flat maximum to which a defendant is sentenced . . . ." *State* v. *Adam H.*, 54 Conn. App. 387, 393, 735 A.2d 839, cert. denied, 251 Conn. 905, 738 A.2d 1091 (1999).

reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, at the discretion of the [respondent]," for certain positive, statutorily described behavior. The respondent has the discretion to "cause the loss of" such credit, including credit yet to be earned, for good cause. General Statutes § 18-98e (b). Additionally, in 2011, the legislature amended § 54-125a (b) (2) to provide in relevant part: "A person convicted of . . . (B) an offense, other than [certain parole ineligible offenses], where the underlying facts and circumstances of the offense involve the use, attempted use or threatened use of physical force against another person shall be ineligible for parole under subsection (a) of this section until such person has served not less than eighty-five per cent of the definite sentence imposed *less any risk reduction credit earned under the provisions of section 18-98e.*" (Emphasis added.) General Statutes (Rev. to 2011) § 54-125a (b) (2), as amended by Public Acts 2011, No. 11-51, § 25. Thus, following the enactment of § 18-98e and the 2011 amendment to § 54-125a (b) (2), the petitioner was eligible to earn risk reduction credit to advance both the end date of his sentence and his parole eligibility date. See *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 364, 163 A.3d 597 (2017).

In 2013, the legislature enacted No. 13-3, § 59, of the 2013 Public Acts (P.A. 13-3), which amended, inter alia, § 54-125a (b) (2) by removing the language permitting risk reduction credit earned under § 18-98e to advance the parole eligibility date of violent offenders, such as the petitioner. Accordingly, following the enactment of P.A. 13-3, although risk reduction credit earned by the petitioner, and not subsequently revoked, could still be used to advance the end date of his sentence, the credit could not be applied to advance his parole eligibility date. See *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 365.

On February 19, 2019, the petitioner, acting as a self-represented party, filed a petition for a writ of habeas corpus using a state supplied form (petition). Therein, he alleged that the Department of Correction (department) was "not applying [his] [risk reduction credit] to [his] [p]arole [e]ligibility date." The petitioner requested that the habeas court provide the following relief: "Apply [his] [risk reduction credit] to [his] parole eligibility date."

The petitioner appended several exhibits to the petition, including a document titled "Habeas Corpus," in which he alleged additional facts in support of the petition.[4] Therein, the petitioner alleged that, prior to the enactment of P.A. 13-3, he had earned risk reduction credit that the respondent had applied to advance his parole eligibility date to November 24, 2020, but, following the enactment of P.A. 13-3, the respondent stopped applying the credit that he had earned to advance his parole eligibility date. On the basis of those allegations, the petitioner asserted that P.A. 13-3, as applied to him retroactively, violated the ex post facto clause of the United States constitution.[5] In addition, the petitioner raised an equal protection claim under the fifth and

[4] In box "6e" of the petition, which requested that the petitioner "[s]tate all facts and details regarding [his] claim," the petitioner wrote: "[S]ee attached."

"The purpose of the [petition for a writ of habeas corpus] is to put the [respondent] on notice of the claims made, to limit the issues to be decided, and to prevent surprise. . . . The petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint." (Citations omitted; internal quotation marks omitted.) *Lorthe* v. *Commissioner of Correction*, 103 Conn. App. 662, 668, 931 A.2d 348, cert. denied, 284 Conn. 939, 937 A.2d 696 (2007). "A complaint includes all exhibits attached to it. See Practice Book § 10-29; *Streicher* v. *Resch*, 20 Conn. App. 714, 716, 570 A.2d 230 (1990)." *Lorthe* v. *Commissioner of Correction*, supra, 668–69.

[5] Article one, § 10, of the United States constitution provides in relevant part: "No State shall . . . pass any . . . ex post facto Law . . . ."

fourteenth amendments to the United States constitution, in support of which he alleged "all persons similarly situated should be treated alike, and . . . there is no legitimate penological interest to justify the [department] and/or [the] [s]tate of Connecticut in cancelling provisional early release credits awarded to [him] that applies to his parole eligibility date." Under the heading of his equal protection claim, the petitioner also alleged that he "already received his [risk reduction credit] that applied to his parole eligibility date in 2011 until 2013. He already received the benefit from the [risk reduction credit] which created a liberty interest."

On March 4, 2019, the habeas court, *Bhatt*, *J.*, issued an order declining to issue the writ of habeas corpus[6] pursuant to Practice Book § 23-24 (a) (1). Specifically, the court stated: "Upon a review of the facts and allegations contained in the [petition], the court declines to issue the writ pursuant to [§ 23-24 (a) (1)]. This court is without jurisdiction to consider the claims raised in the petition, to wit: that the retroactive application of P.A. 13-3 violates the prohibition against ex post facto laws and the equal protection clause. The petitioner committed the instant offense in 2008, before the enactment of P.A. 11-51, which created the [risk reduction credit] program . . . .

[6] As our Supreme Court recently explained in *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 557 n.7, 223 A.3d 368 (2020), a petition for a writ of habeas corpus submitted to a habeas court for preliminary review under Practice Book § 23-24 (a) "is more accurately described as an application for issuance of the writ" and "that the 'writ' sought by the application, although called a 'writ of habeas corpus,' functions essentially as a writ of summons in that it commands the marshal to summon the respondent, who has custody of the petitioner, to appear and show cause why the petition should not be granted." Like our Supreme Court in *Gilchrist*, unless otherwise indicated, our use of the term "writ" in this opinion "refer[s] to the writ issued by the court to initiate the habeas proceeding rather than the ultimate relief sought by the great writ, i.e., the release of the prisoner from custody." Id.

"Our Supreme Court and Appellate Court have repeatedly held that this court lacks jurisdiction over claims involving an offense date that is prior to the enactment of the [risk reduction credit] statute. Specifically on point is *Perez* v. *Commissioner of Correction*, [supra, 326 Conn. 357], in which our Supreme Court rejected ex post facto, due process and equal protection challenges to the retroactive application of P.A. 13-3 in the case of a petitioner whose offense date was in 2010, prior to the enactment of [the risk reduction credit statute]. See also *Boria* v. *Commissioner of Correction*, 186 Conn. App. 332, 199 A.3d 1127 (2018), [cert. granted on other grounds, 335 Conn. 901, 225 A.3d 685 (2020)]; *Holliday* v. *Commissioner of Correction*, [supra, 184 Conn. App. 228].

"The holdings of those cases make clear that this court has no jurisdiction to consider the claims raised in the petition. If, however, the petitioner is claiming that credits that have already been earned and applied in the past have been unconstitutionally forfeited by the [department] . . . as opposed to [the department's] failure to allow the petitioner to continue to earn and apply new credits to his sentence, then the petitioner is invited to refile the petition."

Thereafter, the petitioner filed a petition for certification to appeal from the court's judgment, which the court denied.[7] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the petitioner's claim that the habeas court abused its discretion in denying his petition for certification to appeal from the court's judgment declining to issue the writ of habeas corpus under Practice Book § 23-24 (a) (1). We disagree.

[7] The petitioner applied for, and was granted, a waiver of fees, costs, and expenses and appointment of counsel on appeal.

General Statutes § 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies."

"As our Supreme Court has explained, one of the goals our legislature intended by enacting this statute was to limit the number of appeals filed in criminal cases and hasten the final conclusion of the criminal justice process . . . . [T]he legislature intended to discourage frivolous habeas appeals. . . . [Section] 52-470 (b)[8] acts as a limitation on the scope of review, and not the jurisdiction, of the appellate tribunal. . . .

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

[8] "Pursuant to No. 12-115, § 1, of the 2012 Public Acts, subsection (b) of § 52-470 was redesignated as subsection (g)." *Villafane* v. *Commissioner of Correction*, 190 Conn. App. 566, 572 n.1, 211 A.3d 72, cert. denied, 333 Conn. 902, 215 A.3d 160 (2019).

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Citations omitted; footnote in original; internal quotation marks omitted.) *Villafane* v. *Commissioner of Correction*, 190 Conn. App. 566, 572–73, 211 A.3d 72, cert. denied, 333 Conn. 902, 215 A.3d 160 (2019).

For the reasons set forth in parts II and III of this opinion, we conclude that the petitioner has failed to demonstrate that (1) his claims are debatable among jurists of reason, (2) a court could resolve the issues in a different manner, or (3) the questions are adequate to deserve encouragement to proceed further. Thus, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

II

Turning to the petitioner's first substantive claim on appeal, the petitioner asserts that the habeas court improperly failed to conduct a hearing before declining to issue the writ of habeas corpus under Practice Book § 23-24 (a) (1). For the reasons that follow, we conclude

that this claim is outside of the scope of our appellate review.

"As our standard of review set forth [in part I of this opinion] makes clear, an appeal following the denial of a petition for certification to appeal from the judgment [disposing of] a petition for a writ of habeas corpus is not the appellate equivalent of a direct appeal from a criminal conviction. Our limited task as a reviewing court is to determine whether the habeas court abused its discretion in concluding that the petitioner's appeal is frivolous. Thus, we review whether the issues for which certification to appeal was sought are debatable among jurists of reason, a court could resolve the issues differently or the issues are adequate to deserve encouragement to proceed further. . . . Because it is impossible to review an exercise of discretion that did not occur, we are confined to reviewing only those issues which were brought to the habeas court's attention in the petition for certification to appeal." (Citation omitted.) *Tutson* v. *Commissioner of Correction*, 144 Conn. App. 203, 216, 72 A.3d 1162, cert. denied, 310 Conn. 928, 78 A.3d 145 (2013).

"It is well established that a petitioner cannot demonstrate that the habeas court abused its discretion in denying a petition for certification to appeal if the issue raised on appeal was never raised before the court at the time that it considered the petition for certification to appeal as a ground on which certification should be granted. See, e.g., *Henderson* v. *Commissioner of Correction*, 181 Conn. App. 778, 792, 189 A.3d 135, cert. denied, 329 Conn. 911, 186 A.3d 707 (2018); *Tutson* v. *Commissioner of Correction*, [supra, 144 Conn. App. 216–17]; *Perry* v. *Commissioner of Correction*, 131 Conn. App. 792, 796–97, 28 A.3d 1015, cert. denied, 303 Conn. 913, 32 A.3d 966 (2011); *Mercado* v. *Commissioner of Correction*, 85 Conn. App. 869, 872, 860 A.2d 270 (2004), cert. denied, 273 Conn. 908, 870 A.2d 1079 (2005)." *Villafane* v. *Commissioner of Correction*, supra, 190 Conn. App. 573–74.

The petitioner did not set forth any grounds on which he proposed to appeal in his petition for certification to appeal; instead, he elected to incorporate by reference the grounds set forth in his application for a waiver of fees, costs, and expenses and appointment of counsel on appeal (application), filed on the same day as his petition for certification to appeal. In the application, the petitioner proposed to appeal on the following two grounds: (1) "[The] [t]rial judge incorrectly cited *Holliday* v. *Commissioner of Correction*, [supra, 184 Conn. App. 228] . . . which is still pending before the Connecticut Supreme Court"; and (2) "[c]laims involving an offense date that is prior to the enactment of the [risk reduction credit] statute, with emphasis on the equal protection challenges to the retroactive application of P.A. 13-3, are still pending in *Holliday* v. [*Commissioner*] *of Correction*, [supra, 228], which is before the Supreme Court." We construe those grounds as implicating the court's conclusion that it lacked subject matter jurisdiction to entertain the claims set forth in the petition. Neither of those grounds, however, indicates that the petitioner sought to challenge the court's judgment on the basis that the court did not conduct a hearing.[9] Therefore, the petitioner cannot demonstrate

[9] We note that in *Holliday*, in addition to concluding that the habeas court properly dismissed a petition for a writ of habeas corpus for lack of subject matter jurisdiction pursuant to Practice Book § 23-29 (1); *Holliday* v. *Commissioner of Correction*, supra, 184 Conn. App. 233–35; this court concluded that the court was not obligated to conduct a hearing before dismissing the petition at issue. Id., 235–38. We do not construe the petitioner's citation to *Holliday* in the application as suggesting that he sought to appeal on the ground that the court failed to hold a hearing before declining to issue the writ of habeas corpus. In its memorandum of decision, the court cited *Holliday* for the proposition that it did not have subject matter jurisdiction over the claims in the petition. The court did not consider whether it was obligated to conduct a hearing. Moreover, the issue in *Holliday* was whether a habeas petitioner was entitled to a hearing before a petition for a writ of habeas corpus could be dismissed pursuant to Practice Book § 23-29 (1), which is distinct from the petitioner's claim in this appeal that the habeas court was obligated to conduct a hearing before declining to issue the writ of habeas corpus pursuant to Practice Book § 23-24 (a) (1).

that the habeas court abused its discretion in denying the petition for certification to appeal on this ground.

The petitioner maintains that his claim is preserved, but, in the alternative, he seeks review of his claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[10] We conclude that *Golding* review is unavailable to the petitioner in this appeal. Section 52-470 (g) conscribes our appellate review to the issues presented in the petition for certification to appeal, which incorporated the grounds set forth in the application. Permitting a habeas petitioner,

We are mindful that the petitioner was self-represented when he filed the petition for certification to appeal and the application. "[I]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . The modern trend . . . is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . The courts adhere to this rule to ensure that [self-represented] litigants receive a full and fair opportunity to be heard, regardless of their lack of legal education and experience. . . . This rule of construction has limits, however. Although we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law. . . . A habeas court does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised. . . . In addition, while courts should not construe pleadings narrowly and technically, courts also cannot contort pleadings in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Henderson* v. *Commissioner of Correction*, supra, 181 Conn. App. 793. We conclude that the only reasonable explanation for the petitioner's citation to *Holliday* in the application is that he was addressing the court's reliance on *Holliday* to conclude that it lacked subject matter jurisdiction.

[10] "[The *Golding* doctrine] permits a [petitioner] to prevail on [an unpreserved] claim of constitutional error . . . only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [petitioner] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . [T]he first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the [petitioner] may prevail." (Internal quotation marks omitted.) *Cator* v. *Commissioner of Correction*, 181 Conn. App. 167, 177–78, 185 A.3d 601, cert. denied, 329 Conn. 902, 184 A.3d 1214 (2018).

in an appeal from a habeas judgment following the denial of a petition for certification to appeal, to seek *Golding* review of a claim that was not raised in, or incorporated into, the petition for certification to appeal would circumvent the requirements of § 52-470 (g) and undermine the goals that the legislature sought to achieve in enacting § 52-470 (g).[11] See *Villafane* v. *Commissioner of Correction*, supra, 190 Conn. App. 572. Accordingly, the petitioner's claim is not subject to *Golding* review.[12]

III

The petitioner's next substantive claim on appeal is that the habeas court improperly concluded that it

[11] We acknowledge that our Supreme Court has stated that *Golding* review is available to petitioners in habeas appeals "[i]nasmuch as [a] petitioner challenges the actions of the habeas court itself . . . ." *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 67 n.2, 967 A.2d 41 (2009); see also *Moye* v. *Commissioner of Correction*, 316 Conn. 779, 786–87, 114 A.3d 925 (2015) (citing *Mozell* to explain that, "[i]n 2009, [our Supreme Court] clarified that *Golding* review is not categorically unavailable in habeas appeals. In *Mozell* . . . [our Supreme Court] stated that *Golding* review is available on appeal '[i]nasmuch as [a] petitioner challenges the actions of the habeas court itself . . . .' "). Notably, in *Mozell* and *Moye*, the habeas courts granted the habeas petitioners' petitions for certification to appeal the judgments rendered in those cases. See *Mozell* v. *Commissioner of Correction*, supra, 67; *Moye* v. *Commissioner of Correction*, 147 Conn. App. 325, 328, 81 A.3d 1222 (2013), aff'd, 316 Conn. 779, 114 A.3d 925 (2015). In a habeas appeal following the granting of a petition for certification to appeal, in the absence of prejudice to the opposing party, appellate review is not limited to the issues presented in, or incorporated into, the petition for certification to appeal. See *Logan* v. *Commissioner of Correction*, 125 Conn. App. 744, 752 n.7, 9 A.3d 776 (2010), cert. denied, 300 Conn. 918, 14 A.3d 333 (2011). Thus, *Mozell* and *Moye* do not address the specific issue raised here—that is, whether *Golding* review is available on appeal to a habeas petitioner, following the denial of a petition for certification to appeal, when the claim at issue was not raised in, or incorporated into, the petition for certification to appeal.

[12] Even if the petitioner's claim were properly before us, it would be unavailing. See *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 81–84, 194 A.3d 857 (concluding that petitioner was not entitled to hearing before habeas court declined to issue writ of habeas corpus under Practice Book § 23-24 (a) (1)), cert. denied, 330 Conn. 933, 195 A.3d 383 (2018); see also *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 563, 223 A.3d 368 (2020) (concluding that habeas court should have declined to issue writ of habeas corpus under Practice Book § 23-24 (a) (1) rather than dismissing case under Practice Book § 23-29 (1) and stating, at conclusion of opinion,

lacked subject matter jurisdiction over the claims in the petition. Specifically, he asserts that the court had subject matter jurisdiction to entertain his claims that the retroactive application of P.A. 13-3 to him violated (1) the ex post facto clause of the United States constitution and (2) his federal constitutional right to due process.[13] We disagree.[14]

"[I]n order to invoke successfully the jurisdiction of the habeas court, a petitioner must allege an interest sufficient to give rise to habeas relief. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 368.

A

We first turn to the petitioner's assertion that the habeas court improperly concluded that it lacked sub-

"[b]ecause it is undisputed that the petitioner is not entitled to the appointment of counsel or *notice and an opportunity to be heard in connection with the* [*habeas*] *court's decision to decline to issue the writ*, this concludes [our Supreme Court's] review" (emphasis added)).

[13] The petitioner also asserts violations of his rights under our state constitution. The petitioner has failed to provide an independent analysis under our state constitution, and, therefore, we deem his state constitutional claims abandoned. See *Andrews* v. *Commissioner of Correction*, 194 Conn. App. 178, 179 n.1, 220 A.3d 229, cert. denied, 334 Conn. 907, 220 A.3d 36 (2019).

[14] In his appellate brief, the petitioner also makes a bare assertion that the retroactive application of P.A. 13-3 to him violated the "equal protection clauses of the [United States] and Connecticut [c]onstitutions." The petitioner has failed to provide any meaningful analysis of that claim, and, therefore, we decline to review it. See *Villafane* v. *Commissioner of Correction*, supra, 190 Conn. App. 578–79 ("Ordinarily, [c]laims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . . As a general matter, the dispositive question in determining whether a claim is adequately briefed is whether the claim is reasonably discernible [from] the record . . . . We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.)).

ject matter jurisdiction over the ex post facto claim raised in the petition. We are not persuaded.

"[F]or a law to violate the prohibition [against ex post facto laws], it must feature some change from the terms of a law in existence at the time of the criminal act. That feature is entirely sensible, as a core purpose in prohibiting ex post facto laws is to ensure fair notice to a person of the consequences of criminal behavior. . . . [L]aws that impose a greater punishment after the commission of a crime than annexed to the crime at the time of its commission run afoul of the ex post facto prohibition because such laws implicate the central concerns of the ex post facto clause: the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. . . . Thus, to determine whether a habeas court has subject matter jurisdiction over a petitioner's ex post facto claim, [t]he controlling inquiry . . . [is] whether retroactive application of the change in [the] law create[s] a sufficient risk of increasing the measure of punishment attached to the covered crimes. . . . [A] habeas petitioner need only make a colorable showing that the new law creates a genuine risk that he or she will be incarcerated longer under that new law than under the old law." (Citation omitted; internal quotation marks omitted.) *Byrd* v. *Commissioner of Correction*, 177 Conn. App. 71, 80, 171 A.3d 1103 (2017).

In the petition, the petitioner alleged in relevant part that, following the enactment of § 18-98e and the 2011 amendment to § 54-125a (b) (2), he earned risk reduction credit that the respondent applied to advance his parole eligibility date, but, following the enactment of P.A. 13-3, the respondent stopped applying the credit earned by him to advance his parole eligibility date. Critically, however, the petitioner made "no claim that legislation regarding eligibility for parole consideration became more onerous after the date of his criminal

behavior. Rather, he claim[ed] that new legislation enacted in 2011 . . . after his criminal conduct . . . conferred a benefit on him that was then taken away in 2013. Such a claim, however, does not implicate the ex post facto prohibition because the changes that occurred between 2011 and 2013 have no bearing on the punishment to which the petitioner's criminal conduct exposed him when he committed [the offense for which he is incarcerated]." *Petaway* v. *Commissioner of Correction*, 160 Conn. App. 727, 732, 125 A.3d 1053 (2015), cert. dismissed, 324 Conn. 912, 153 A.3d 1288 (2017). Indeed, with regard to his parole eligibility, P.A. 13-3 returned the petitioner to the same position that he was in at the time that he committed the robbery in 2008.

In light of the foregoing, we conclude that the petitioner failed to raise a cognizable ex post facto claim in the petition, and, therefore, the habeas court correctly concluded that it lacked subject matter jurisdiction over the ex post facto claim. See *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 378–80 (habeas court lacked subject matter jurisdiction over ex post facto claim predicated on retroactive application of P.A. 13-3 to petitioner when petitioner committed offense for which he was incarcerated before enactment of 2011 amendment to § 54-125a (b) (2)); see, e.g., *James E.* v. *Commissioner of Correction*, 326 Conn. 388, 394–95, 163 A.3d 593 (2017) (same); *Holliday* v. *Commissioner of Correction*, supra, 184 Conn. App. 233–35 (same); *Byrd* v. *Commissioner of Correction*, supra, 177 Conn. App. 81 (same); *Petaway* v. *Commissioner of Correction*, supra, 160 Conn. App. 732–34 (same); see also *Boria* v. *Commissioner of Correction*, supra, 186 Conn. App. 341–45 (habeas court properly dismissed, for lack of subject matter jurisdiction, claim that P.A. 13-3 and amendment to § 18-98e enacted in 2015 violated ex post facto clause when petitioner was in same position following amendments as he was in at time of commission of offense for which he was incarcerated); cf. *Breton*

v. *Commissioner of Correction*, 330 Conn. 462, 484–86, 196 A.3d 789 (2018) (retroactive application of P.A. 13-3 to petitioner who committed offenses between enactment of 2011 amendment to § 54-125a (b) (2) and enactment of P.A. 13-3 constituted violation of ex post facto clause, and, therefore, habeas court improperly dismissed petition for writ of habeas corpus).[15] Accordingly, we also conclude that the court did not abuse its discretion in denying the petition for certification to appeal as to this claim.

B

We next address the petitioner's assertion that the habeas court improperly concluded that it lacked subject matter jurisdiction to entertain the due process claim raised in the petition. Specifically, the petitioner contends that he had a vested liberty interest in the risk reduction credit that he had earned and that had been applied to advance his parole eligibility date, such that the retroactive application of P.A. 13-3 to him violated his right to due process. This claim is unavailing in light of our Supreme Court's decision in *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 357.

In *Perez*, similar to the petitioner in the present action, a habeas petitioner filed a petition for a writ of habeas corpus alleging that he "had been awarded risk reduction credit by the respondent and that prior to July 1, 2013,[16] the respondent had applied that credit to advance [his] parole eligibility date," such that the retroactive application of P.A. 13-3 to him, inter alia, violated his right to due process. (Footnote added.) Id., 365–66. The habeas court dismissed the petition, con-

[15] As our Supreme Court observed in *Breton*, "only a relatively small percentage of inmates—namely, those inmates who . . . are incarcerated for committing a violent crime between 2011 and 2013—will be affected by [its] holding [in *Breton*]." *Breton* v. *Commissioner of Correction*, supra, 330 Conn. 485.

[16] P.A. 13-3 became effective on July 1, 2013.

cluding that it lacked subject matter jurisdiction over the petition and that the petition failed to state a claim on which relief could be granted, and the petitioner appealed. Id., 366.

On appeal, our Supreme Court concluded that the habeas court lacked subject matter jurisdiction over the petitioner's due process claim.[17] Id., 374. The court began by stating that "[a]n essential predicate" to the due process claim "is a cognizable liberty interest. When a petitioner seeks habeas relief on the basis of a purported liberty interest in parole eligibility, he [or she] is invoking a liberty interest protected by the [d]ue [p]rocess [c]lause of the [f]ourteenth amendment which may not be terminated absent appropriate due process safeguards. . . . In order . . . to qualify as a constitutionally protected liberty, [however] the interest must be one that is *assured* either by statute, judicial decree, or regulation. . . . Evaluating whether a right has vested is important for claims under the . . . [d]ue [p]rocess [c]lause, which solely protect[s] pre-existing entitlements." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 370.

The court then stated: " 'The [United States] Supreme Court has recognized that, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. . . . A state may . . . establish a parole system, but it has no duty to do so." . . . *Greenholtz* v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979). Accordingly, whether and to what extent a state creates a liberty interest in parole by state statute is entirely at the discretion of the state.' " *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 370–71. In addition, the court noted that it "previously has held that parole eligibility

[17] Our Supreme Court also concluded that the habeas court lacked subject matter jurisdiction over the petitioner's related claim asserting a violation of his right to personal liberty pursuant to article first, § 9, of the Connecticut constitution. See *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 374.

under § 54-125a does not constitute a cognizable liberty interest sufficient to invoke habeas jurisdiction." (Internal quotation marks omitted.) Id., 371.

Turning to the petitioner's claim regarding the risk reduction credit previously granted to him, the court, citing § 18-98e (a) and (b) (2), determined that the petitioner "overlook[ed] the fact that such credit is not vested in him because it could be rescinded by the respondent at any time in the respondent's discretion for good cause during the petitioner's period of incarceration. . . . Although the legislature has provided guidance to the respondent as to how to exercise his discretion, the respondent still has broad discretion to award or revoke risk reduction credit. As such, the statute does not support an expectation that an inmate will automatically earn risk reduction credit or will necessarily retain such credit once it has been awarded." Id., 372. Then, observing that the petitioner was relying "on the monthly calculation of his parole eligibility date that he purportedly receives from the respondent, which included his earned risk reduction credit prior to July 1, 2013, as evidence that he has a vested interest in continuing to have that earned risk reduction credit reflected in his parole eligibility date," the court determined that "[t]he petitioner misapprehend[ed] the significance of the respondent's monthly parole eligibility date calculation. Under the scheme even prior to 2013, because the respondent could have rescinded any or all of that earned credit in his discretion, the monthly parole eligibility date is nothing more than an estimate of the inmate's parole eligibility date. As such, the monthly parole eligibility date calculation is simply an informational tool to allow the respondent and an inmate to know at any given time how close to parole eligibility the inmate would be if nothing changed. Accordingly, the petitioner lacked a vested right in the application of the risk reduction credit previously granted to advance his parole eligibility date." Id., 373.

Pursuant to *Perez*, the petitioner in the present action lacked a vested liberty interest in the risk reduction credit that he had earned that, following the enactment of P.A. 13-3, was no longer being applied to advance his parole eligibility date. Therefore, we conclude that the habeas court did not have subject matter jurisdiction over his due process claim.[18] See also *Holliday* v. *Commissioner of Correction*, supra, 184 Conn. App. 232, 235 (citing *Perez* to conclude that petitioner did not demonstrate liberty interest in risk reduction credit earned toward parole eligibility, and, therefore, habeas court lacked subject matter jurisdiction over petitioner's due process and equal protection claims challenging retroactive application of P.A. 13-3 to him). Accordingly, we also conclude that the court did not abuse its discretion in denying the petition for certification to appeal as to this claim.

The appeal is dismissed.

In this opinion the other judges concurred.

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[18] In his appellate brief, the petitioner repeatedly asserts that the risk reduction credit that he had earned was "forfeited" by the respondent following the enactment of P.A. 13-3. In the petition, however, the petitioner did not allege *forfeiture* of the credit that he had earned; instead, we construe, as did the habeas court, his allegations to be that the respondent stopped applying the credit that the petitioner had earned to advance his parole eligibility date. Thus, like our Supreme Court in *Perez*, "we need not decide whether a deprivation of [the petitioner's] actual earned risk reduction credit would violate due process. See *Abed* v. *Armstrong*, 209 F.3d 63, 66–67 (2d Cir. 2000) (inmates have liberty interest in good time credit they have already earned, but no liberty interest in opportunity to earn credit under discretionary scheme)." *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 369 n.5.

STATE OF CONNECTICUT *v.* ANTHONY D. ORR (AC 40886)

DiPentima, C. J., and Lavine and Elgo, Js.*

Syllabus

The defendant, who had been convicted of robbery in the first degree, appealed to this court from the judgment of the trial court, revoking his probation and sentencing him to five years of imprisonment. The defendant had signed a form that contained conditions of probation that required, inter alia, that he not violate any criminal law of this state, that he submit to urinalysis and that he report to the Office of Adult Probation as directed. The defendant thereafter was arrested on various drug charges and then was separately charged with violation of probation. In the affidavit that his probation officer, F, prepared as part of the warrant application for the defendant's arrest, F incorporated the facts that were stated in the police report concerning the drug charges and the crimes with which the defendant was charged. F also averred that the defendant had failed on eight occasions to report to the Office of Adult Probation as directed and that a urine sample the defendant provided had tested positive for the presence of marijuana. The state thereafter informed the defendant that it intended to try the violation of probation case before it tried the drug charges. When the probation violation case was called for trial, the state informed the court that it did not intend to offer facts from the drug case and that the basis of the probation violation case was going to be the urinalysis and the defendant's failure to report to the probation office. F then testified about the defendant's failure to keep the eight appointments with the probation office and the urine sample, and the defendant admitted in the hearing that he had smoked marijuana. After the state rested, it informed the court that it likely would present evidence as to the drug charges when that case began during the next court proceeding and moved to open the violation of probation hearing. The trial court granted the state's motion to open the violation of probation proceeding, during which the state provided the defendant with photographs of the scene of the drug crimes, and the state and the defendant thereafter presented evidence as to the drug charges, which the court dismissed at the end of the hearing. The court found that the defendant had violated the conditions of his probation that required that he report to the probation office as directed and that, in testing positive for the presence of marijuana, he had violated the law relative to possession of a controlled substance. The court further found that the defendant had violated the criminal laws of the state with regard to various drug offenses with which he had not been charged. *Held*:

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

1. The defendant's claim that the evidence was insufficient for the trial court to find that he violated his probation was moot and, thus, had to be dismissed, as there was no practical relief this court could grant him; the court found that the defendant violated the criminal laws of this state by possessing a controlled substance when he provided a urine sample that tested positive for the presence of marijuana, the defendant, who did not challenge that finding or his sentence on appeal, admitted during trial that he smoked marijuana, and, thus, this court disregarded the trial court's incorrect finding that he violated criminal laws that were not included in F's arrest warrant application.
2. The defendant could not prevail on his unpreserved claim that the state violated the rule of *Brady* v. *Maryland* (373 U.S. 83) by failing to disclose to him photographs of the scene of the drug crimes, as the defendant failed to demonstrate that the photographs were favorable to him and how he was harmed or prejudiced by their late disclosure; although the state disclosed to the defendant photographs of the crime scene after having previously stated in court that there were no such photographs in its file, the defendant failed to object to the admission of the photographs into evidence, the court made no finding that he was prejudiced by the late disclosure, and one of the photographs that was admitted was cumulative of other testimony.
3. This court found unavailing the defendant's unpreserved claim that he was denied due process and a fair trial, which was based on his assertion that the state failed to adhere to the trial court's order to file a motion to proceed with the probation violation case before it tried the drug charges; contrary to the defendant's claim that he did not know that the probation violation case was to be tried first, the court had informed him that it was to be tried first, the state had made known its intention to do so in his presence on several occasions in court, the court addressed the defendant's concerns about the timing of the proceedings, he did not explain how the trial of the probation violation case before the drug case harmed him or violated his constitutional rights, and, had he been convicted of the drug charges, he faced a sentence of more than forty years in prison.
4. The defendant had notice of the nature of the charges against him and, thus, he was not denied his constitutional right to notice of those charges: the conditions of probation that the defendant signed required that he not violate the laws of this state, he was informed in court of the drug charges and given a copy of the police report that listed the crimes with which he was charged after his arrest in the drug case, and he had a copy of F's arrest warrant application that averred that he tested positive for marijuana and failed to report as directed to the probation office, which he admitted to in court; moreover, the defendant's unpreserved claim that his rights were violated as a result of the state's failure to file a bill of particulars was meritless, the defendant having sought a bill of particulars in the drug case rather than in the probation violation case.

(*One judge concurring separately*)

5. The trial court's comments during the proceedings did not violate the Code of Judicial Conduct, and the court did not abuse its discretion when it granted the state's motion to open the violation of probation case to present evidence of the drug charges:

a. The trial court did not violate the rule (2.10 (a)) of the Code of Judicial Conduct applicable to public statements by a judge when it commented during the probation violation proceeding about the state's options regarding the drug charges; rule 2.10 (a) pertains to extrajudicial comments, not to statements made by the court during a proceeding before it, and the statements the court made affected the time that it heard the evidence and did not affect the outcome of the violation of probation proceedings.

b. The defendant did not demonstrate that he was prejudiced when the trial court permitted the state to open the evidence, as he did not move to dismiss the violation of probation charge, he was afforded time to subpoena and call witnesses and to cross-examine the state's witnesses, and the court stated that he was on notice that he was charged with violating the condition of his probation that he not violate any law of this state and that the court could consider evidence presented at the criminal trial when determining his sentence.

Argued February 19—officially released August 4, 2020

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Fairfield and transferred to the judicial district of Waterbury, where the matter was tried to the court, *K. Murphy, J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Appeal dismissed in part; affirmed.*

Anthony D. Orr, self-represented, the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Terence D. Mariani*, senior assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. In this violation of probation case, the self-represented defendant, Anthony D. Orr,[1] appeals from the judgment rendered by the trial court after it found him in violation of his probation pursuant to General Statutes § 53a-32. On appeal, the defendant claims that his state and federal constitutional rights to due process, to a fair trial, and to be convicted upon sufficient evidence were violated.[2] Specifically, he claims that (1) there was insufficient evidence pursuant to which the court could find by a preponderance of the evidence that he had violated the terms of his probation; (2) the court found that he had violated state laws with which he had not been charged; (3) the state suppressed evidence in violation of *Brady*;[3] (4) the trial court abused its discretion by permitting the state to try the violation of probation case before it tried a criminal case that was then pending against him; (5) he was denied due process because he did not know the nature of the charges against him; and (6) the court violated the Code of Judicial Conduct. With respect to each of his claims, the defendant has requested that we review them pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015),[4]

[1] The defendant also represented himself in the trial court in both the violation of probation case and the criminal charges that gave rise to his violation of probation.

[2] The defendant did not analyze his state constitutional claims. Where the defendant does not advance a separate state constitutional argument, "we will limit our analysis to federal constitutional grounds." *State* v. *Guess*, 39 Conn. App. 224, 231, 665 A.2d 126, cert. denied, 235 Conn. 924, 666 A.2d 1187 (1995).

[3] See *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[4] "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a

the plain error doctrine,[5] or for abuse of discretion. On the basis of our review of the record, the briefs, and arguments of the parties, we conclude that the defendant's claim of insufficient evidence is moot and his purported constitutional claims fail under the third prong of *Golding* because the claimed constitutional violations did not exist and the defendant was not denied due process or a fair trial. We, therefore, dismiss the defendant's claim of insufficient evidence and otherwise affirm the judgment of the trial court.

A summary of the facts underlying the defendant's appeal follows. On February 19, 2009, the defendant, who had been found guilty of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), was sentenced to twelve years of incarceration, execution suspended after seven years, and five years of probation. In August, 2014, the defendant completed the incarceration portion of his sentence and was released on probation. On September 4, 2014, the defendant met with his probation officer, Timothy Fenn, and signed conditions of probation that required him, among other things, (1) not to violate any criminal law of this state, (2) to submit to urinalysis, (3) to report to the Office

fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

Although he requested *Golding* review, the defendant has failed entirely to provide a *Golding* analysis of any of his claims in his appellate brief. Generally, this court does not review claims that are not adequately briefed. Our "Supreme Court has often observed [that] [w]e are not obligated to consider issues that are not adequately briefed. . . . Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. . . . In addition, mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice." (Internal quotation marks omitted.) *State* v. *Wahab*, 122 Conn. App. 537, 545, 2 A.3d 7, cert. denied, 298 Conn. 918, 4 A.3d 1230 (2010). In the present case, we nonetheless review the defendant's claims, although they are lacking legal analysis, because the self-represented defendant provided a detailed recitation of facts that elucidate his claims that he was denied his federal constitutional rights.

[5] See Practice Book § 60-5.

of Adult Probation as directed, and (4) to inform his probation officer if he were arrested.

On October 6, 2016, the defendant was arrested in Waterbury and charged with two counts of possession of narcotics with intent to sell, operation of a drug factory, possession of less than four ounces of marijuana, and interfering with a search. The defendant's arrest resulted from an investigation undertaken by the Waterbury police into the sale of narcotics by Jermaine Robinson and an apartment at 119 Angel Drive in Waterbury (apartment). Following the defendant's arrest, Fenn applied for a warrant for his separate arrest on the ground that the defendant had violated his probation. The defendant was arrested in November, 2016, and charged with violation of probation pursuant to § 53a-32. The defendant's violation of probation hearing was held in June, 2017. After the court, *K. Murphy, J.*, found that the defendant had violated the conditions of his probation and that his rehabilitation level was minimal, the court revoked his probation and sentenced the defendant to five years of imprisonment.[6] The defendant appealed.

In the section of his brief concerning the nature of the proceedings, the defendant stated: "On June 16, 2017, the court found the defendant violated condition #1 of probation, and based on that finding sentenced the defendant to [five years of] imprisonment." The defendant's statement is inaccurate. Although the court first had to determine whether the defendant had violated the conditions of his probation, the court sentenced the defendant to five years of incarceration because, during the dispositional phase of the proceeding, the court

[6] After the defendant was sentenced for violation of probation, the state declined to try the drug charges under which the defendant faced potential incarceration in excess of forty years. Judge Murphy subsequently dismissed the drug charges.

found that the defendant's rehabilitation level was minimal and the beneficial purposes of probation were no longer being met. In view of the defendant's lack of understanding regarding the violation of probation process, we set forth, in general and in detail, the law regarding violation of probation proceedings before we address his specific claims.

Section 53a-32, the probation violation statute, provides in relevant part: "(a) At any time during the period of probation . . . the court or any judge thereof may issue a warrant for the arrest of a defendant for violation of any of the conditions of probation . . . . (c) [U]pon an arrest by warrant . . . the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charges. At such hearing the defendant shall be informed of the manner in which such defendant is alleged to have violated the conditions of such defendant's probation . . . . (d) If such violation is established, the court may . . . extend the period of probation . . . . No such revocation shall be ordered, except upon consideration of the whole record and unless such violation is established by the introduction of reliable and probative evidence and by a preponderance of the evidence."

"All that is required for revocation of probation is that the court be satisfied that the probationer has abused the opportunity given him to avoid incarceration. . . . Moreover, even though revocation is based upon [criminal] conduct, the [c]onstitution does not require that proof of such conduct be sufficient to sustain a criminal conviction." (Citations omitted.) *Roberson* v. *Connecticut*, 501 F.2d 305, 308 (2d Cir. 1974). A probationer whose condition of probation requires that the probationer not violate any criminal law *may violate that condition without being convicted of a crime.* See id.

"The *primary purpose of a probation proceeding* is to determine whether the defendant is complying with the terms of his probation. . . . Appellate review distills to a review of the reasonableness of two findings, whether there was a violation of a condition of probation, and whether probation should be revoked because its rehabilitative purposes are no longer being served." (Citation omitted; emphasis added.) *State* v. *Baxter*, 19 Conn. App. 304, 321, 563 A.2d 721 (1989). "While the defendant is on probation, he remains in the legal custody and under the control of the [Commissioner] of [C]orrection. A [probation] revocation proceeding is concerned not only with protecting society, but also, and most importantly, with rehabilitating and restoring to useful lives those placed in the custody of the [Commissioner of Correction]." (Internal quotation marks omitted.) *Payne* v. *Robinson*, 10 Conn. App. 395, 401, 523 A.2d 917 (1987), aff'd, 207 Conn. 565, 541 A.2d 504, cert. denied, 488 U.S. 898, 109 S. Ct. 242, 102 L. Ed. 2d 230 (1988).

Practice Book § 43-29 provides in relevant part that, unless the revocation of probation is based upon a conviction for a new offense, "proceedings for revocation of probation shall be initiated by an arrest warrant supported by an affidavit . . . showing probable cause to believe that the defendant has violated any of the conditions of the defendant's probation . . . . At the revocation hearing, the prosecuting authority and the defendant may offer evidence and cross-examine witnesses. *If the defendant admits the violation or the judicial authority finds from the evidence that the defendant committed the violation, the judicial authority may make any disposition authorized by law. . . .*" (Emphasis added.)

"Probation revocation proceedings fall within the protections guaranteed by the due process clause of the fourteenth amendment to the federal constitution. . . . Probation itself is a conditional liberty and a privilege that, once granted, is a constitutionally protected

interest. . . . The revocation proceeding must comport with the basic requirements of due process because termination of that privilege results in a loss of liberty. . . . [T]he minimum due process requirements of revocation of [probation] include written notice of the claimed [probation] violation, disclosure to the [probationer] of the evidence against him, the opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses in most instances, a neutral hearing body, and a written statement as to the evidence for and reasons for [probation] violation." (Citations omitted; internal quotation marks omitted.) *State* v. *Gauthier*, 73 Conn. App. 781, 789, 809 A.2d 1132 (2002), cert. denied, 262 Conn. 937, 815 A.2d 137 (2003).

"Due process requires, at a minimum, that an individual receive notice of probation conditions . . . to ensure that the probationer understands the precise terms of his obligations and that he risks termination of his probation if he fails to meet those obligations. Written conditions of probation formally imposed by a court order usually provide notice sufficient to satisfy due process. . . . Where criminal activity forms the basis for the revocation of probation, the law imputes to the probationer the knowledge that further criminal transgressions will result in a condition violation and the due process notice requirement is similarly met. An inherent condition of any probation is that the probationer not commit further violations of the criminal law while on probation." (Footnote omitted; internal quotation marks omitted.) *State* v. *Reilly*, 60 Conn. App. 716, 728, 760 A.2d 1001 (2000). Recitation of the particular charges, both before and during the probation violation hearing, is sufficient notice to the defendant. *State* v. *Hooks*, 80 Conn. App. 75, 79, 832 A.2d 690, cert. denied, 267 Conn. 908, 840 A.2d 1171 (2003); see also *State* v. *Pierce*, 64 Conn. App. 208, 215, 779 A.2d 233 (2001) (at

probation violation hearing, in which testimony was offered concerning entire incident, defendant was made aware, both before and during hearing, of evidence in support of charges).

"[U]nder § 53a-32, a probation revocation hearing has two distinct components. . . . The trial court must first conduct an adversarial evidentiary hearing to determine whether the defendant has in fact violated a condition of probation. . . . If the trial court determines that the evidence has established a violation of a condition of probation, then it proceeds to the second component of probation revocation, the determination of whether the defendant's probationary status should be revoked. On the basis of its consideration of the whole record, the trial court may continue or revoke the sentence of probation . . . and, if such sentence is revoked, require the defendant to serve the sentence imposed or impose any lesser sentence. . . . In making this second determination, the trial court is vested with broad discretion." (Internal quotation marks omitted.) *State* v. *Corringham*, 155 Conn. App. 830, 837–38, 110 A.3d 535 (2015).

"The standard of review in violation of probation matters is well settled. To support a finding of probation violation, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. . . . In making its factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . This court may reverse the trial court's initial factual determination that a condition of probation has been violated only if we determine that such a finding was clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake

has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) Id., 838. "A fact is more probable than not when it is supported by a fair preponderance of the evidence." (Internal quotation marks omitted.) *State* v. *Repetti*, 60 Conn. App. 614, 619, 760 A.2d 964, cert. denied, 255 Conn. 923, 763 A.2d 1043 (2000).

"Our law does not require the state to prove that *all* conditions alleged were violated; *it is sufficient to prove that one was violated.*" (Emphasis added.) *State* v. *Widlak*, 74 Conn. App. 364, 370, 812 A.2d 134 (2002), cert. denied, 264 Conn. 902, 823 A.2d 1222 (2003). "It is clear that a finding of a conviction or *the commission of the act is sufficient to support a revocation of probation.*" (Emphasis added.) *Payne* v. *Robinson*, supra, 10 Conn. App. 403.

"The standard of review of the trial court's decision at the sentencing phase of the revocation of probation hearing is whether the trial court exercised its discretion properly by reinstating the original sentence and ordering incarceration. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . . In determining whether to revoke probation, the trial court shall consider the beneficial purposes of probation, namely rehabilitation of the offender . . . . The important interests in the probationer's liberty and rehabilitation must be balanced, however, against the need to protect the public." (Citation omitted; internal quotation marks omitted.) *State* v. *Altajir*, 123 Conn. App. 674, 688, 2 A.3d 1024 (2010), aff'd, 303 Conn. 304, 33 A.3d 193 (2012). "[A] defendant who seeks to reverse the exercise of judicial discretion . . . assumes a heavy burden . . . ." (Internal quotation marks omitted.) *State* v. *Repetti*, supra, 60 Conn. App. 620.

A detailed recitation of the facts is necessary to place in context the claims that the defendant has raised on appeal.[7] When the defendant was arrested by the Waterbury police on October 6, 2016, he was charged with operation of a drug factory in violation of General Statutes § 21a-277 (c), possession of narcotics with intent to sell in violation of General Statutes § 21a-278 (a), possession of narcotics with intent to sell in violation of General Statutes § 21a-278 (b), possession of less than four ounces of marijuana in violation of General Statutes § 21a-279 (a) (1), and interfering with a search in violation of General Statutes § 54-33d (drug charges). After the defendant's arrest on the drug charges, Fenn filed an application for the defendant's arrest for violation of probation that included an affidavit in which Fenn incorporated the facts stated in the police report and the drug crimes with which the defendant had been charged.[8] The defendant was arrested for violation of probation in November, 2016.

[7] The defendant's appellate claims focus on the procedural aspects of the violation of probation proceedings and the court's finding that he possessed narcotics with intent to sell. The defendant has not raised a claim with respect to the dispositional portion of the proceedings. In other words, the defendant does not claim that the court abused its discretion by revoking his probation and sentencing him to serve five years in prison.

[8] Fenn averred in his affidavit in relevant part:

"3. That [the defendant's] probationary period started on 8/27/2014 upon his discharge from the Department of Correction and is scheduled to end on 8/27/2019. To date, [the defendant] has served approximately [two] years and [one] month of his [five] year probationary period.

"4. That on 9/4/2014, [the defendant] did review and sign his Standard and Special Conditions of Probation.

"5. That on 8/11/2015 and again on 12/15/2015, [the defendant] failed to report to the Office of Adult Probation as directed.

"6. That on 1/20/2015, [the defendant] rendered a urine sample at the Office of Adult Probation which tested positive for the presence of THC.

"7. That on 2/9/2016, 2/23/2016, 3/3/2016, 6/21/2016, 7/26/2016 and 9/20/2016 [the defendant] failed to report to the Office of Adult Probation as directed.

"8. That on 10/06/2016, [the defendant] was arrested by the Waterbury Police Department and charged with Possession with Intent to Sell (§ 21a-278) (a)+, Operation of Drug Factory (§ 21a-277 (c), Interfering with Search (§ 54-33d), Possession with Intent (§ 21a-278 (b)*+ and Possession of Marijuana less than 4 oz. (§ 21a-279 (a) (1st). After having personally reviewed the arrest warrant a summary is as follows: On 10/6/2016, Waterbury Police Department's Vice and Intelligence Division and Violent Crimes Unit (VCU)

The drug charges were filed in the judicial district of Waterbury; the probation violation charge was filed in Bridgeport in the judicial district of Fairfield. On January 19, 2017, the court, *Fasano*, *J.*, canvassed the defendant and granted his request to represent himself on the drug charges. At that hearing, Maureen Platt, the state's attorney, informed the defendant of the state's intention to try the violation of probation charge before it tried the drug charges. On March 1, 2017, in Bridgeport, the defendant appeared before the court, *Devlin*,

were granted a search and seizure warrant for 119 Angel Drive, apartment E and the person of Jermaine Robinson. Surveillance was set up at this location and officers observed a male identified as Jermaine Robinson exit the rear of the above address and [approach] a parked vehicle. An exchange was made between Robinson and the vehicle's occupant. Officers recognized this activity as narcotics sales. A short time later, officers observed a male, later identified as [the defendant] exit the above address followed by Robinson. [The defendant] was directed by Robinson to approach two recently parked vehicles. He had a short conversation with the occupants of both vehicles and then exchanged an item for an item with both. Both vehicles then left the area. Officers recognized this activity as narcotics sales. At this time, the determination was made to execute the search and seizure warrant on the above address. Officers gained entry through the front door. Upon entering the apartment . . . [o]fficers observed [the defendant] on the couch and he attempted to move towards the front door. He was shoved to the ground and handcuffed after continuing to move towards the door. . . . Officers located $1,680.00 in US currency, one thousand nine hundred sixty (1960) white glassine bags stamped 'KING' containing a brown powder like substance, a plastic sandwich bag containing a white rock like substance (3.0 grams), a glass jar containing a green plant like substance (9.5 grams, one burnt glass smoking pile on [the defendant's] person . . . . All parties in the apartment were arrested. [The defendant] was charged with Possession with Intent to Sell (§ 21a-278) (a)+, Operation of Drug Factory (§ 21a-277 (c), Interfering with Search (§ 54-33d), Possession with Intent (§ 21a-278 (b)*+ and Possession of Marijuana less than 4 oz. (§ 21a-279 (a) (1st). This matter is currently pending in the Waterbury Judicial District under Docket Number UWY-CR16-441054-T. [The defendant] is currently held on bond.

"9. That based on the above facts and circumstances, this affiant feels that Probable Cause exists to believe that the accused has violated:

"Standard Condition(s) of Probation:

"#1 Do not violate any criminal law of the United States, this state or any other state or territory.

"#2 Report as the Probation Officer tells you, tell your probation officer immediately if you are arrested and, if you are incarcerated, report to the Probation Officer immediately after you are released.

"10. It is therefore requested that a warrant for the arrest of [the defendant] be issued and that he be charged with Violation of Probation (§ 53a-32)."

J., on the state's motion to transfer the violation of probation charge to Waterbury. Initially, the defendant opposed the transfer, but following a colloquy with Judge Devlin,[9] the defendant agreed to the transfer.

On March 27, 2017, in Waterbury, Judge Fasano again canvassed the defendant and granted his request to represent himself in the violation of probation case. The defendant again stated that he wanted the drug charges to be tried before the violation of probation charge. The court ordered the state to file a motion to proceed with the probation of violation case before the drug charges and put both cases on the trial list. On June 5, 2017, the defendant filed a motion for a speedy trial.[10]

The probation violation case was called for trial on June 14, 2017. At that time, the defendant represented to Judge Murphy that he had not been able to reach his witnesses. Terence D. Mariani, senior assistant state's attorney,[11] then stated: "The basis for the violation

[9] The transcript of the colloquy between Judge Devlin and the defendant discloses the following:

"[The Defendant]: I have a quick question. In this situation, say I beat my criminal charges right now; can [there] still be a violation of probation?

"The Court: Yeah. Different standard. And one has a standard of proof beyond a reasonable doubt. Another has a standard of preponderance of evidence. And generally the exclusionary rule which prevents the admission of certain . . . evidence illegally seized by the police is not applicable in violation of probation cases. So although the cases are very similar in terms of the underlying conduct, resolution of one would not necessarily mean the other one goes away.

"[The Defendant]: All right. I understand that. All right. In conclusion with that, in my situation, the evidence can be held against me. What if it's not my evidence at all? Because there's not nothing that pertain[s] to me.

"The Court: That's a question of fact.

"[The Defendant]: Question of fact. All right, I understand.

"The Court: I guess that's what it'll be all about."

[10] The defendant claims that he filed the speedy trial motion in the criminal case but that the courthouse clerk placed it in the violation of probation file. The defendant has not identified any evidence or finding to substantiate that claim.

[11] Mariani represented to the court that the assistant state's attorney who had been handling the violation of probation case was ill on June 14, 2017, and Mariani was substituting for him.

included a new arrest. I think those witnesses [the defendant] mentioned may be relevant to that. The state at the violation of probation hearing does not intend to put on facts from [the drug] case. . . .

"The Court: So, you're withdrawing that as a potential violation of his probation, are you?

"[Mariani]: Yes. It's in the warrant. So, I'm not technically withdrawing it. I'm highlighting for the fact the basis of the violation is going to be dirty urines and failure to report, which are also mentioned in the warrant."

When the presentation of evidence commenced, the state presented testimony from Fenn that the defendant failed to keep eight appointments at the Office of Adult Probation as directed and that his January 20, 2015 urine sample tested positive for the presence of marijuana. When confronted with the results of the urine analysis, the defendant admitted that he had smoked marijuana. The state then rested. Prior to that day, the defendant had not been able to locate his witnesses, but with the assistance of his standby counsel, Tashun Bowden-Lewis, he issued subpoenas that morning. The court informed the defendant that the subpoenas had not been issued eighteen hours in advance of the time for the person summoned to appear[12] and that the subpoenas were not yet binding, and, therefore, the witnesses would not appear that day. The court then adjourned for the luncheon recess.

When the hearing reconvened, the court stated: "Let me just throw something out. We are in the process of this hearing. It could be reopened. I will indicate on the record that, based on the evidence I've heard thus far, I would be inclined to find that [the defendant]

[12] See General Statutes § 52-143 (a), which governs the service of subpoenas for witnesses.

violated his probation, but I would also be disinclined to actually sentence him to any jail time. I'm just telling you. And the reason I say that is because, to me, if this is the extent of the state's violation, this is not a five-years-to-serve violation. On the other hand, if I were convinced by the preponderance of the evidence that the defendant was committing crimes while he was on probation, then I would probably give him the maximum."

Mariani then stated: "[M]aybe I should have said this earlier. The state's intention was to present the violation evidence, which I have done, and then return the probation officer—some judges do it in a bifurcated hearing—whether or not probation serves any useful purpose at this point. There is evidence that I would like to present and argue whether or not probation serves any useful purpose through the probation officer."

The court then stated: "I'm being honest [with] both sides. If I were to rule right now, I told you what my ruling would be on the violation, and I told you what my position would be regarding the appropriate sentence. *Now, this hearing is not over yet. And there still is a pending case.* I'm aware of that. But I don't know the details of that case. So, Mr. Orr, I've given you a little indication. Ordinarily, I wouldn't do that on the record, but you're representing yourself. We can only communicate on the record. So, I'm just sort of telling you what I'm thinking. That doesn't mean that after, if you put on a witness, you could convince me that you didn't violate your probation. I don't know that you could, but you might. . . . [W]hat I'm saying is, I think there is sufficient evidence to believe you violated the probation, but from what I understand, based on what I've heard, this was your first violation. And so, I probably, at this point now, as I said, when we first started, the state has the opportunity at the time of the sentencing, as you do, to convince me that probation would not

serve any useful purpose and that a jail sentence is appropriate. . . . So, anyway, do you still wish to be able to put on the witness[es] in regard to whether you violated your probation or not?" (Emphasis added.) The defendant stated: "No, Your Honor."

The court continued, stating: "Okay. Here's how I would leave it: We're supposed to start jury selection [on the criminal charges] on Friday. The state has rested on the VOP[13] hearing. I would give them leave to reopen the VOP hearing if they wanted to include evidence of another crime. *It has happened that the court . . . presiding over a jury trial would listen to the evidence during the jury trial and then also make findings regarding whether you violated your probation or not.* So, I guess I'm leaving that out as a possibility. Okay. . . . I think we are right now, since the state had preliminarily rested and you wanted to present some evidence, I think the best procedure is to plan on starting jury selection on Friday." (Emphasis added; footnote added.) Thereafter, the court instructed the defendant and the state with respect to pretrial motions and the schedule for jury selection two days hence. The court also advised the defendant to consult with Bowden-Lewis.

Mariani thereafter stated: "The court knows the situation, that I came into the file this morning when [Senior Assistant State's] Attorney [Don E.] Therkildsen [Jr.] went home, or to the doctor, ill. I had originally indicated [that] we were just going to proceed on the technical violations. Given the fact I have until Friday and given the court's comments, I think the defendant should be aware he should have any witnesses available Friday morning that he thinks are necessary to dispute the facts of the underlying case because I think it is likely, given the time and the court's comments, that I

[13] VOP is an expression commonly used with reference to a violation of probation hearing.

will present evidence as to the allegations in the drug file."

The court stated to the defendant that the state was moving to open the violation of probation hearing and asked the defendant his position in that regard. The defendant objected to the state's opening its case. The court asked the defendant the basis of his objection, to which the defendant responded: "The state has said that they were—they rested their case on the violation, on the technical violations, and they were not pursuing the underlying [drug] charge. In pursing the underlying charge, I will have to be found guilty of violation a criminal statute." The court explained to the defendant the difference between the state's burden of proof at a criminal trial and a violation of probation hearing. The court asked the defendant whether there was any prejudice to him if the state opened the violation of probation hearing. The defendant stated: "Yes . . . I won't be able to get in contact with any witnesses. I have no legal research to defend myself against the claim of violation of probation for whatever reason they want to reopen." The court overruled the defendant's objection, stating to the defendant that, "before you got here today at 10 or 11:15 this morning, you were under the impression this was a violation of probation hearing on everything that's indicated in the violation of probation warrant, which I understand includes both the technical violations, as well as the new crime. . . . There was an issue whether you could get a witness. Your witness was not subpoenaed for today, anyway. You were going to ask for a continuance anyway in order to present those witnesses. And really nothing has—I don't see any prejudice to you for allowing the state to reopen the file. I will say, you were aware of the nature of the violations alleged by the state prior to today, which included that you violated the laws of the state of Connecticut."

The violation of probation hearing continued on Friday, June 16, 2017, when the state presented evidence

on the drug charges, including testimony from Detective Eric Medina of the Waterbury Police Department, who observed both Robinson and the defendant selling heroin in the parking lot of the apartment, and Officer Keith Shea, who arrested the defendant at the apartment soon thereafter. Shea also testified that he found on the defendant's person a glass smoking pipe used for smoking crack. Officer Mark Santopietro testified that 1960 packages of heroin were found on a coffee table adjacent to where the defendant had been sitting in the apartment. The defendant testified on his own behalf and presented testimony from two witnesses, Alexander Epps, the operator of one of the vehicles, to whom the defendant sold narcotics, and Markesha Dennis, a friend of the defendant, who leased the apartment.

At the conclusion of the adjudicatory portion of the violation of probation proceeding, the court found that the defendant had violated the conditions of his probation. The court stated that there are "really two sections of your probation conditions that are applicable here. And I'm drawing this from state's exhibit 3. One is, do not violate any criminal laws of the United States, any other state and the state of Connecticut. And, secondly, report as the probation officer tells you. I find that you did violate the report as the probation officer tells you. [Fenn] testified to a number of occasions where you had an appointment to be at the probation office and you did not show. I find that . . . was very credible."[14]

In addition, the court stated: "I also find that, in testing positive for marijuana, THC, there is circumstantial evidence that the *defendant violated the law as far as possession of* [*a*] *controlled substance*. The state has put less weight on that type of violation of the law, but *it is still against the law in the state of Connecticut to possess marijuana*. So, I find by a fair preponderance

[14] There were eight occasions from August 11, 2015, through September 20, 2016, that the defendant did not show up for his appointment.

of the evidence that the defendant has violated that portion. [The defendant] has admitted to violating that law, as far as possession of cocaine, but that was not alleged as a basis. So, while I do believe that the state's proved that, I'm not really relying on that as a basis for my findings.[15]

"I think the biggest finding I had here, though, is, I do find that the defendant has violated the criminal law of the state of Connecticut in regard to conspiracy to sell narcotics, § 53a—I want to say 48. *I should have written down the statute.*[16] And, by way of § 21a-277 (a), he has violated conspiracy to possess with intent to sell in violation of Connecticut 53a-48 and 21a-277 (a). He has violated the statute charging him with possession with intent to sell, violation of § 21a-277 (a). He has violated the statute for 21a-267 (a), possession of drug paraphernalia."[17] (Emphasis added; footnotes added.)

[15] The defendant has not challenged the court's finding that he failed to report to the Office of Adult Probation as directed or that he was in possession of marijuana.

[16] The trial court's self-admonishment should be noted by all judges to avoid the claim raised by the defendant in the present appeal, i.e., the court found the defendant had violated Connecticut laws with which he had not been charged. On the basis of the court's admonition and its decision not to find that the defendant had violated the laws of Connecticut on the basis of cocaine possession, we do not believe that the court intended to find the defendant had violated a law of Connecticut on the basis of a statute with which he had not been charged.

[17] The court further stated that, in concluding that the defendant violated that portion of his conditions of probation that he not violate the laws of the state, that it had to make some further findings regarding what happened. The court stated: "I credit the testimony of . . . Medina. I watched him testify. I found him to be extremely credible. He was very professional, very precise. There is no animosity, no bias shown. He had—if he really wanted to hang [the defendant], he could have easily said he saw the items exchanged. His testimony was that he had a clear, unobstructed view, that he was able to see [the defendant]—well, I have to back up because it is important to my ruling. The testimony against [the defendant] is not just that he was observed in a hand-to-hand type of transaction for two different cars. The testimony is much more substantial. The testimony is that . . . Medina observed . . . Robinson basically serve another vehicle, that he observed that drug transaction and that shortly thereafter, after that car left, that . . . Medina was within really just feet of the two cars that pulled up, he said he observed both cars, people on the phone and cell phones

and waiting, which is significant. It's not just that somebody pulls up and someone comes up to the door. The testimony is that they get on the phone and then within minutes, if not seconds after that, [the defendant] came out of the rear of the building where the heroin was later found, 119 E Angel Drive, and followed closely by . . . Robinson, who is on the phone. And that . . . Robinson directed the defendant to each of the cars. That the defendant then proceeded to go to the car to have a quick exchange with the occupants of each of those two cars, then come back into the house afterwards. When he got back in the house, the testimony is, I think, fifteen to twenty-five minutes later, the search warrant was executed and the defendant was within two feet of 1960 bags of heroin that were sitting out on the table in front of [the defendant].

"The state's theory of the case is not that [the defendant is] the main guy here; obviously . . . Robinson is the main guy. But the state's theory is that [the defendant] was assisting . . . Robinson in his drug operation. I find that the state has proved beyond—well, I believe beyond reasonable doubt that the defendant has been proved to be involved with conspiracy to sell narcotics, conspiracy to possess with intent to sell narcotics, that he is in possession of drug paraphernalia, and he's in possession of narcotics with intent to sell. The quantity of narcotics is not consistent with personal use. It's a huge amount of narcotics. There's corroboration that these were sales, the recovery of the money.

"So I will say I've heard testimony of . . . Epps. I did not find him credible at all. I had a chance to watch . . . Epps. He ultimately really did not know when it was that he had this conversation with the defendant.

"I, also, as much as I have a great deal of respect for [the defendant], I think [that he has] been a gentleman to me here and seem[s] to be very intelligent. . . . I did not find [his] testimony credible. To me, in some portions, it was very rehearsed. In other ways there was not much detail. I had a chance to observe [the defendant] as well as . . . Medina. I think . . . Medina's testimony is obviously critical to the state's case. I find that he was credible beyond a reasonable doubt. He was extremely credible. And so I rely on his testimony and find the defendant violated those statutes of the Connecticut General Statutes.

"*So I make a finding based on the whole record. And I make a finding that the violation of those two sections, the section the defendant is required to report as the probation officer tells you and that you also—that you do not violate any criminal laws of the state of Connecticut. Those have been established by reliable and probative evidence. And by that, I mean that those violations have been established by the fair preponderance of the evidence.*" (Emphasis added.)

The court stated that it had reviewed the law with respect to possession and specifically found that the defendant had violated the charge of possession of narcotics with intent to sell. The court further stated: "Possession is defined by the Connecticut General Statutes as to have physical possession or otherwise to exercise dominion or control over tangible property. And possession means you either have the substance, in this case the nineteen hundred bags of heroin on your person, which there's no evidence that you had it on your person or otherwise having control over the substance, knowing where it is and being able to access it, and the evidence establishes, I think, beyond a reasonable doubt, that you did have possession of that nineteen hundred bags, but, again, the standard here is whether the state's

With respect to the dispositional portion of the proceedings, Mariani argued that, given the defendant's criminal record, continued probation would serve no useful purpose. In 2005, the defendant was convicted of assault in the first degree and given a six year jail sentence, suspended after thirty months. The defendant violated his probation and was discharged from it unsuccessfully. On February 19, 2009, while on probation for assault in the first degree, the defendant was arrested and convicted of possession of a pistol without a permit. He was given a five year prison sentence. The defendant was convicted of robbery in the first degree, which was the sentence under which he was then being held. Mariani argued that the defendant had a significant criminal history but was given the benefit of probation. During his probation, however, the defendant failed to report to his probation officer, used crack cocaine, and became involved in the selling of narcotics. Mariani concluded that the defendant was not a person who should be on probation any longer, noting that overdoses were becoming the primary cause of death among young people in Waterbury. For the defendant to be involved in that kind of activity while he was on probation indicated to Mariani that the defendant was not the kind of person who should be on probation. Mariani further argued that the state was trying to rehabilitate the defendant and give him opportunities to help himself, but primarily the state was protecting the community.

proven this by a fair preponderance of the evidence, and I will make that finding.

"I will refer to the entire § 2.11-1 which refers to constructive possession. Possession does not mean one must have the illegal object upon one's person. Rather, a person, although not in actual possession, knowingly has the power and the intention at a given time to exercise control over a thing is deemed to be in constructive possession of the item. As long as the substance was in a place where the defendant, if he wishes, can go and get it, it's in his possession. I think that evidence proves that. I think the evidence proves, as I indicated before, that, with intent to—with intent to sell, the defendant agreed with one or more persons, obviously . . . Robinson and

The court revoked the defendant's probation, stating to the defendant: "Based on your . . . one prior violation of probation, two very serious felonies, [and] now being involved in what I view as also a very serious felony, I feel like the rehabilitation level is minimal. And, I think, with your record and with the violations that have been established, the appropriate sentence is you are now . . . committed to the custody of the Commissioner of Correction for a period of five years to serve." The defendant appealed.

I

The defendant claims that there was insufficient evidence by which the court could find that he had "violated condition # 1 of probation," i.e., that he not violate the laws of this state.[18] Specifically the defendant claims that there was insufficient evidence by which the court could find "by the reliable and probative evidence standard and the fair preponderance of the evidence that he was selling narcotics," citing *State* v. *Davis*, 84 Conn. App. 505, 854 A.2d 67, cert. denied, 271 Conn. 922, 859 A.2d 581 (2004). We need not address the defendant's claim regarding the possession and sale of narcotics because we agree with the defendant's separate second claim that the court found that he violated state narcotics laws with which he had not been charged. Moreover, the defendant cannot prevail because the court found that he possessed marijuana, as charged, and thus violated the laws of the state. We, therefore, dismiss the

maybe others, and that any one of them did an act in furtherance of that conspiracy." The court also found that the state had proved that there was probable cause to believe that the narcotic substance was heroin.

[18] Although defendant raised the sufficiency of the evidence claim last in his brief, we review it first because "any defendant found [to have violated his probation] on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of *Golding*." (Internal quotation marks omitted.) *State* v. *Revels*, 313 Conn. 762, 777, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015).

defendant's claim of insufficient evidence as moot, as there is no relief that we can grant him.

The following facts inform our decision. When the defendant met with Fenn on September 4, 2014, he signed conditions of probation. "Condition 1" provided: "Do not violate any criminal law of the United States, this state or any other state or territory." On October 6, 2016, the defendant was arrested in Waterbury and charged with violations of §§ 21a-277 (c), 21a-278 (a), 21a-278 (b), 21a-279 (a) (1) and 54-33d. Fenn set forth those charges in the application for the defendant's arrest for violation of probation. The trial court found that the defendant violated §§ 53a-48 and 21a-277 (a), and §§ 21a-277 (a) and 21a-267 (a), which were not included in the application for the arrest warrant.[19] "[A] defendant cannot be found in violation of probation on grounds other than those with which he is charged . . . ." *State* v. *Carey*, 30 Conn. App. 346, 349, 620 A.2d 201 (1993), rev'd on other grounds, 228 Conn. 487, 636 A.2d 840 (1994). We, therefore, will disregard the court's

[19] The text of two of the relevant statutes is provided as follows for purposes of comparison:

General Statutes § 21a-277 (a) provides: "(1) No person may manufacture, distribute, sell, prescribe, dispense, compound, transport with the intent to sell or dispense, possess with the intent to sell or dispense, offer, give or administer to another person, except as authorized in this chapter, any controlled substance that is a (A) narcotic substance, or (B) hallucinogenic substance."

This is one of the statutes the court found that the defendant violated.

General Statutes § 21a-278 (a) provides in relevant part: "(1) No person may manufacture, distribute, sell, prescribe, dispense, compound, transport with the intent to sell or dispense, possess with the intent to sell or dispense, offer, give or administer to another person, except as authorized in this chapter, (A) one or more preparations, compounds, mixtures or substances containing an aggregate weight of (i) one ounce or more of heroin or methadone, or (ii) one-half ounce or more of cocaine or cocaine in a free-base form, or (B) a substance containing five milligrams or more of lysergic acid diethylamide. The provisions of this subdivision shall not apply to a person who is, at the time of the commission of the offense, a drug-dependent person."

This is one of the statutes with which the defendant was charged by the police.

findings on the drug charges, as this court did in *Carey*, where the trial court made a similar error in finding that the probationer had violated a condition of probation that was not alleged.[20] See id.

The application for the defendant's arrest for violation of probation also alleged that the defendant rendered a urine sample that tested positive for the presence of THC. The court found that in testing positive for marijuana, THC, there was circumstantial evidence that the defendant violated the law because he possessed a controlled substance. The court therefore found that that the defendant violated "condition 1" of his conditions of probation. "Our law does not require the state to prove that all conditions alleged were violated; it is sufficient to prove that one was violated." *State* v. *Widlak*, supra, 74 Conn. App. 370. "It is clear that a finding of . . . the commission of the act is sufficient to support a revocation of probation." *Payne* v. *Robinson*, supra, 10 Conn. App. 403.

In his affidavit in support of the violation of probation arrest warrant, Fenn alleged that the defendant produced a urine sample that tested positive for the presence of marijuana, a controlled substance. The defendant admitted that he smoked marijuana. The court found that the defendant violated condition 1 of his probation on the basis of his having possessed a controlled substance. The defendant has not challenged that finding on appeal. The defendant, therefore, stands in violation of the first condition of his probation on the basis of possession of a controlled substance.

[20] We, however, *do not conclude* that it was improper for Judge Murphy to consider the evidence of the defendant's drug dealing during the dispositional portion of the violation of probation hearing. The evidence presented at the violation of probation proceeding was clearly spelled out in the police report and in Fenn's application for a violation of probation arrest warrant. A trial court may consider the evidence in the *whole record* when deciding whether to continue or revoke the sentence of probation. *State* v. *Corringham*, supra, 155 Conn. App. 837.

Mootness implicates this court's subject matter and raises a question of law subject to plenary review. See *St. Juste* v. *Commissioner of Correction*, 328 Conn. 198, 208, 177 A.3d 1144 (2018). Jurisdiction is a threshold matter and may be raised at any time, including sua sponte by the court. See *In re Shawn S.*, 66 Conn. App. 305, 309, 784 A.2d 405 (2001), aff'd, 262 Conn. 155, 810 A.2d 799 (2002). "It is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." (Internal quotation marks omitted.) *Burbank* v. *Board of Education*, 299 Conn. 833, 839, 11 A.3d 658 (2011). "The test for determining mootness of an [issue on] appeal is whether there is any practical relief this court can grant the appellant. . . . If no practical relief can be afforded to the parties, the appeal must be dismissed." (Citation omitted; internal quotation marks omitted.) *Edgewood Village, Inc.* v. *Housing Authority*, 54 Conn. App. 164, 167, 734 A.2d 589 (1999). In the present case, the court found that the defendant violated the laws of the state by possessing a controlled substance, a finding the defendant has not challenged. He also has not challenged his sentence on appeal. The defendant, therefore, stands in violation of the conditions of his probation by his own admission and there is no relief that can be granted to him. The claim of insufficient evidence is moot and, therefore, must be dismissed.

II

The defendant's third claim is that the state violated *Brady* v. *Maryland*, supra, 373 U.S. 83, by failing to disclose to him photographs of the crime scene and contraband.[21] We do not agree.

[21] In his brief, the defendant stated that "prosecutorial impropriety" deprived him of his right to due process, and he asks this court to take

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id., 87. "To prevail on a *Brady* claim, the defendant bears a heavy burden to establish: (1) that the prosecution suppressed evidence; (2) that the evidence was *favorable to the defense*; and (3) that it was material." (Emphasis added; internal quotation marks omitted.) *State* v. *Guerrera*, 167 Conn. App. 74, 87, 142 A.3d 447 (2016), aff'd, 331 Conn. 628, 206 A.3d 160 (2019). "If . . . the [defendant] has failed to meet his burden as to one of the three prongs of the *Brady* test, then we must conclude that a *Brady* violation has not occurred." *Morant* v. *Commissioner of Correction*, 117 Conn. App. 279, 296, 979 A.2d 507, cert. denied, 294 Conn. 906, 982 A.2d 1080 (2009). In the present case, the defendant has failed to carry his burden because he did not claim or demonstrate that the evidence at issue was favorable to him.

The following procedural history is relevant to the defendant's claim. On March 27, 2017, Judge Fasano held a hearing on a number of the defendant's pretrial motions in the criminal case, including a motion for discovery. Bowden-Lewis informed the court that she had given the defendant a copy of everything that was in her file, including the search and seizure warrant, the police report, and the arrest warrant. Platt represented that the defendant did not have a copy of his arrest record, which could not be given to him without a court order. Judge Fasano ordered the state to provide the defendant with a copy of his criminal history, which Platt agreed to do. The court stated that it appeared that everything that the defendant was entitled to had

notice of "the plain error of the state's [attorneys]" for failure to comply with disclosure that prejudiced the defendant. Because we conclude that there was no *Brady* violation, the defendant's claim of prosecutorial impropriety fails.

been given to him, but the defendant argued that "they said I was in possession of heroin. I don't have photocopies of the heroin or anything else." The court explained to the defendant that he would not get "copies of heroin" and that evidence "would be offered to the extent [that the] state deems it appropriate" at the time of trial. The defendant requested "a picture," and Platt represented that "[t]here were no photos. My inspector talked to the Waterbury Police Department on October twenty-fifth. According to the notes in the file, there were no photos."

On June 16, 2017, the second day of the violation of probation hearing, Mariani stated that he had given the defendant, through Bowden-Lewis, "some photographs and . . . one police report."[22] Bowden-Lewis represented that she had given the documents to the defendant. The defendant did not challenge the timeliness of the disclosure, nor did he claim that the state was in violation of *Brady*. When the state presented its evidence, it introduced four photographs: a Google aerial photograph of the apartment complex, the front door of the apartment, the living room, and the white bag containing the packages of heroin. The defendant did not object to the admission of the evidence on either timeliness or *Brady* grounds. Because the defendant did not object to the photographs being placed into evidence, Judge Murphy did not make a factual finding that the defendant was prejudiced by the delayed disclosure of the photographs. The defendant's claim, therefore, was not preserved for appeal. The defendant seeks *Golding* review of his claim. We will review the claim because the record is adequate for review and the claim is of constitutional magnitude. The defendant, however,

[22] The police report in question concerned a search of a motor vehicle, the key to which the police found in the apartment. The state did not present evidence related to the key or the motor vehicle or to connect the defendant to the motor vehicle during the violation of probation hearing.

cannot prevail because his claim fails to satisfy the third prong of *Golding*.

On appeal, the defendant argues that the " 'state' lied about the photos and then deprived [him] of his rights when they used the photos to secure his conviction." The state has responded that "there were no photographs of the evidence seized, and no such photographs were introduced into evidence." The record indicates otherwise. On March 27, 2017, Platt represented that the state's investigator obtained no photographs from the Waterbury Police Department, but on June 14, 2017, Mariani gave the defendant photographs. The defendant did not object to the disclosure of the photographs at that time and did not ask for a continuance to examine the photographs. The court made no finding that the defendant was prejudiced by the state's late disclosure of the photographs. Although the photographs may not have come into the state's possession until the time of trial, the record discloses that the state's representation on appeal that no photographs of the evidence seized were placed into evidence is inaccurate. The state placed a photograph of the white bag with the heroin into evidence. The defendant, however, cannot prevail on his *Brady* claim for two reasons. First, he has failed to demonstrate that the photographs were favorable to him. Second, he has failed to explain how he was harmed or prejudiced by the late disclosure of the photographs.

"Evidence is not suppressed within the meaning of *Brady* . . . if it is disclosed at trial as it was here." (Internal quotation marks omitted.) *State* v. *Stinson*, 33 Conn. App. 116, 120, 633 A.2d 728 (1993). A "defendant must demonstrate that the timing of the disclosure prejudiced him to the extent that he was deprived of a fair trial. . . . The central issue in this claim, therefore, is whether the evidence was disclosed in sufficient time for the defendant to have effectively used it at trial. . . . This is essentially a factual determination for

the trial court." (Citations omitted; internal quotation marks omitted.) Id. In the present case, the defendant failed to object to the admission of the photographs on any ground, and the trial court made no finding that the defendant was prejudiced by the late disclosure. On appeal, the defendant has not demonstrated that he was harmed by the late disclosure of the photographs. In addition, the photograph of the white bag containing the packages of heroin was cumulative of Shea's testimony. For the foregoing reasons, the defendant's claim regarding the photographs fails.

III

The defendant's fourth claim is that he was deprived of due process and the right to a fair trial because the state failed to file a motion to proceed with the violation of probation case before it tried the drug charges. We disagree.

The following procedural history is relevant to the defendant's claim. On January 19, 2017, Platt appeared before Judge Fasano and stated in the defendant's presence that the state intended to have the violation of probation case transferred to Waterbury from Bridgeport. Platt also stated that the state intended to proceed to trial on the violation of probation case before trying the drug charges.

On March 27, 2017, the parties appeared before Judge Fasano to address the pretrial motions that the defendant had filed. The court first canvassed the defendant, who wanted to represent himself in the violation of probation case. During the canvass, the court stated to the defendant that the state often "would proceed on the violation of probation before [the criminal case] because the exposure is there, and it's a lot easier to do; it is not proof beyond a reasonable doubt. . . . [I]t's proof by a preponderance of the evidence." The defendant stated that he understood the preponderance

of the evidence standard, but he also stated that, "the violation of probation being heard first, due process requires that I not be punished before I have the chance to . . . argue my case. So, violation of probation is a punishment." The court explained that a violation of probation proceeding was a hearing, not a full trial. The defendant stated that he understood. The court explained the challenges facing the defendant if he represented himself, and the court found that the defendant understood the nature of the proceedings and the sentence that could be imposed on the drug charges. The court also found that the defendant knowingly, intelligently, and with full awareness of the consequences, had waived his right to counsel.

The court noted that the defendant had pleaded not guilty to the violation of probation charge on December 14, 2016. Platt inquired whether the defendant had waived the rule that violation of probation hearings be held within 120 days of the filing of charges. See General Statutes § 53a–32 (c). The defendant was not willing to have the violation of probation hearing set down immediately and waived the 120 day requirement. The court heard the defendant's motion to reduce his bail and denied it. Following some colloquy, the defendant stated that he wanted his cases to go on the trial docket. Platt stated that the state is "going to ask to do the violation of probation first." The court then stated: "It's pretty clear it's going to be a trial case, so I'll place the matter on trial. . . . Because it's a [self-represented] situation, if [the state is] moving to have the violation of probation first, I want a motion filed so he can address it." In response, Platt stated: "Yes."[23]

On June 5, 2017, the defendant filed a motion for a speedy trial in the drug case, but he claims that on June

[23] We have reviewed the file and are unable to find that the state filed a motion to proceed with the violation of probation hearing before the trial on the drug charges as ordered.

8, 2017, the courthouse clerk filed the motion for a speedy trial in the violation of probation file. Judge Fasano held a hearing on the defendant's speedy trial motion on June 8, 2017. The court granted the motion for a speedy trial and stated that all matters were being set down for trial, including the violation of probation, which would be held before Judge Murphy starting on June 14, 2017. The defendant stated: "Okay." When he appeared before Judge Murphy on June 14, 2017, the defendant did not object to proceeding with the violation of probation hearing but stated that he needed help to call witnesses. Judge Murphy addressed the defendant's concerns regarding subpoenas for his witnesses.

On appeal, the defendant claims that the courthouse clerk filed his speedy trial motion under the wrong docket number and that the state's failure to file a motion to proceed with the violation of probation hearing before the trial on the drug charges violated his constitutional rights. He argues that the trial on the drug charges, rather than the violation of probation proceeding, should have started on June 14, 2017, and that he did not know that the violation of probation hearing was to be held on that date. As to his claim that he did not know that the violation of probation proceeding was to take place on June 14, 2017, the record is to the contrary. On June 8, 2017, Judge Fasano informed the defendant that the violation of probation hearing was going to be held on June 14, 2017, before Judge Murphy. When Judge Murphy permitted the state to open its case, he stated that the defendant knew when he appeared in court on June 14, 2017, that he was there for the violation of probation hearing.

"[T]here is no requirement that entitles the defendant to choose the order of his proceedings." *State* v. *Easton*, 111 Conn. App. 538, 542, 959 A.2d 1085 (2008), cert. denied, 290 Conn. 916, 965 A.2d 555 (2009). The law does

not require that a violation of probation proceeding be deferred until after the disposition of the new criminal charges. See *Payne* v. *Robinson*, supra, 10 Conn. App. 403.

We do not condone the state's failure to obey the court's order that it file a motion to proceed with the violation of probation hearing before trying the drug case. The state, however, had made known its intention to do so in the defendant's presence on several occasions. Despite his claim that his constitutional rights were violated, the defendant has not explained how he was harmed or how his constitutional rights were violated by trying the violation of probation case before the drug charges. When Judge Fasano ordered the state to file a motion to proceed with the violation of probation case first, he stated that the defendant was representing himself and should be able to address the issue. The defendant was then given the opportunity to address the timing of the probation violation and drug case proceedings. The court heard the defendant's reasons why he wanted the drug charges to be tried first and addressed the defendant's concerns. The court explained that the state generally will proceed on a violation of probation case before trying the criminal charges because the charge of probation violation is easier to prove. The court also explained to the defendant the burdens of proof that apply in probation violation proceedings and criminal trials.[24]

[24] Judges Devlin, Fasano and Murphy explained to the defendant that the state's burden of proof in a violation of probation case was less stringent than in a criminal case. It appears from the defendant's arguments in the trial court and his claim of insufficient evidence regarding possession of narcotics on appeal that the defendant is under the misguided impression that if he went to trial on the drug charges first and was found not guilty that he could not be found guilty of violating his probation. The defendant appears not to comprehend that, theoretically, he could have been tried on both the violation of probation and criminal charges no matter which proceeding was held first.

As we concluded in part I of this opinion, there was substantial evidence that the defendant violated the terms of his probation by failing to report to the Office of Adult Probation as directed, and violating the criminal law of the state by possessing a controlled substance. Judge Murphy also found that the beneficial aspects of the defendant's probation were not being met. The defendant was sentenced to serve five years of incarceration, the balance of the sentence imposed in 2009 when he was found guilty of robbery in the first degree. Had the defendant been tried on the drug charges, he potentially faced a sentence of more than forty years in prison; see part IV of this opinion; and revocation of his probation. As things turned out, after the court sentenced the defendant, the state indicated that it would enter a nolle prosequi on the drug charges that were scheduled to be tried that week. The defendant moved that the drug charges be dismissed; the state did not object. Judge Murphy granted the defendant's motion to dismiss the drug charges, resulting in a significant benefit to the defendant. Thus, the defendant's claim that his constitutional rights to due process and a fair trial were violated because the state failed to file a motion to proceed with the violation of probation hearing before it tried the drug charges cannot succeed.

IV

The defendant's fifth claim is that he did not have notice of the nature of the charges against him, thereby denying him of the constitutional right to be informed of the nature of the charges against him. This is so, the defendant claims, because (1) the state failed to file a bill of particulars as ordered by the court on March 27, 2017, and (2) the police report and violation of probation warrant were vague. We do not agree.

The following procedural history is relevant to the defendant's claim. On January 19, 2017, when the defendant was in court on the drug charges, Judge Fasano

asked Platt to inform the defendant of "the total exposure," or potential incarceration, he faced on the drug charges. Platt placed on the record in the defendant's presence the crimes with which the defendant was charged and the potential incarceration under each charge. The court then summarized the defendant's maximum exposure as approximately forty-three years in prison, in addition to possible fines. Bowden-Lewis stated on the record that she would give the defendant the contents of her file, including the police report and the search warrant in the drug case. The defendant also had a copy of Fenn's detailed application for an arrest warrant for violation of probation. At the state's request, the court ordered that the defendant be given a copy of his criminal record.

The defendant's claim that his rights were violated by the state's failure to file a bill of particulars in the present matter is without merit. The defendant filed a motion for a bill of particulars in the drug case, and on March 27, 2017, Judge Fasano ordered the state to file a bill of particulars in the drug case, not the present violation of probation case. The defendant was representing himself in the drug case and would have received the bill of particulars in that case.

In his brief, the defendant states that the "police report and [violation of probation] warrant are so vague, there is not language describing any [Connecticut General Statutes] criminal violation for the [self-represented] defendant to prepare his defense." Our review of the record discloses that the documents were, in fact, quite detailed. The police report of the defendant's arrest on October 6, 2016, is nine pages in length, and it identifies the defendant as an arrestee charged with operation of a drug factory, possession with intent to sell/dispense, possession with intent to sell, possession of fewer than four ounces of marijuana, and interfering

with a search. Each charge included its codification in the General Statutes. The report describes in detail the defendant's sale of drugs to the operators of two vehicles in the parking lot of the apartment and the events that transpired when the police executed the search warrant on the apartment. Fenn's application for an arrest warrant is a three page, single-spaced document describing the defendant's probation, the conditions of his probation, his failure to report to the Office of Adult Probation as directed, the defendant's urine sample that tested positive for marijuana, and a detailed recitation of the facts contained in the police report that resulted in the defendant's arrest in Waterbury on October 6, 2016.

"Where criminal activity forms the basis for the revocation of probation, the law imputes to the probationer the knowledge that further criminal transgressions will result in a condition violation and the due process notice requirement is similarly met." *State* v. *Reilly*, supra, 60 Conn. App. 728. Section 53a-32 (c) requires that "[u]pon notification by the probation officer of the arrest of the defendant or upon an arrest by warrant . . . the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charges. At such hearing the defendant shall be informed of the manner in which such defendant is alleged to have violated the conditions of such defendant's probation . . . ." The state can fulfill the requirement to inform the probationer by providing him with the arrest warrant and supporting affidavits, the information, and the state's recitation of the underlying criminal charge in open court. See, e.g., *State* v. *Iovanna*, 80 Conn. App. 220, 221–22, 834 A.2d 742 (2003). A probationer receives notice of the underlying charges when the violation of probation warrant fully describes the incident on which the criminal charges were based and ultimately is the basis of the court's

finding of a violation of probation. *State* v. *Repetti*, supra, 60 Conn. App. 619.[25]

The record in the present case discloses that the defendant signed conditions of probation that, in part, required that he not violate the laws of this state. He was informed in open court of the drug charges against him, he was given a copy of the police report that listed the crimes with which he was charged following his arrest on October 6, 2016, and he had a copy of Fenn's application for an arrest warrant for violation of probation that averred that the defendant failed to report to the Office of Adult Probation as directed and that his urine sample tested positive for THC. Furthermore, the defendant admitted that he failed to report as required and smoked marijuana. On this record, we conclude that the defendant had notice of the nature of the charges against him, particularly that he not violate the laws of this state.

V

The defendant's last claim is that he was denied due process when the state was permitted to open its case to present evidence related to the drug charges. More specifically, the defendant claims that the court (1) violated rule 2.10 of the Code of Judicial Conduct and (2) abused its discretion by granting the state's motion to open the evidence. We disagree.

The following procedural history is relevant to the defendant's claims. The violation of probation hearing

[25] This case is unlike *State* v. *Repetti*, supra, 60 Conn. App. 614, in which the violation of probation warrant application recited the facts and the charge of burglary in the second degree, as stated in the police report. Id., 616–17. The state later withdrew the burglary charge for lack of probable cause and filed a substitute information alleging two different crimes at the beginning of the violation of probation hearing. Id. The warrant application, however, contained a recitation of the facts of the underlying incident that formed the basis of the court's ultimate finding that the probationer violated his probation and, thus, provided the defendant with adequate notice of the ways in which he was found to have violated his probation. Id., 618.

was to begin on June 14, 2017, a Wednesday. At the beginning of the proceeding, the defendant stated to Judge Murphy that he wished to call Dennis and Epps as witnesses but that he had been unable to reach them. Mariani stated that those witnesses may not be necessary at this point in the probation hearing because the state intended to present evidence only of the defendant's failure to report to Fenn as required and that the defendant had rendered a urine sample that tested positive for marijuana. In response to Judge Murphy's question about whether the state was withdrawing the defendant's new arrest as a violation of probation, Mariani stated: "I'm not technically withdrawing it." The defendant stated that he was under the impression that the violation of probation was going to be based on the "new arrest." He requested that there be a plea discussion.

The court responded: "Here's what's going to happen, Mr. Orr: Today [the] state's going forward on a portion of that violation of probation. I've seen many of these violation of probation warrants. They usually list what is known as technical violations first, then they list any new arrests. Apparently, what the state is saying [is], they're only proceeding today on what's known as the technical violations. *And those are legitimate bases to violate someone's probation. If they don't present evidence of the new arrest in the violation portion of the hearing, they can still say, hey, okay, now you've already found him in violation, but when you decide the appropriate sentence, we want to tell you a little bit more about the* [*defendant*]. We want to tell you about some pending criminal cases. The state has the ability to do that during the sentencing portion of the violation of probation hearing.

"So, there are *two portions of the violation of probation hearing*: the first portion is, are you in violation of your probation. Then, once I make a decision on that,

then I have to determine what the appropriate sentence is, and then I can consider things, even though . . . *the state may not have presented the evidence of the new criminal activity during the violation proceeding*; *they can still present evidence of other acts of misconduct, of any crimes in the sentencing proceeding. I want you to be aware of that.*" (Emphasis added.) The court then took a recess to enable the defendant to meet with Bowden-Lewis.

Following the recess, the state presented testimony from Fenn. See part I of this opinion. At the conclusion of Fenn's testimony, the state rested and the court recessed for lunch. When court reconvened, the court addressed the parties, stating: "Let me just throw something out. We are in the process of this hearing. It could be reopened. I will indicate on the record that, based on the evidence I've heard thus far, I would be inclined to find that [the defendant] violated his probation, but I would also be disinclined to actually sentence him to any jail time. I'm just telling you. And the reason I say that is because, to me, if this is the extent of the state's violation, this is not a five-year-to-serve violation. On the other hand, if I were convinced by a preponderance of the evidence that the defendant was committing crimes while he was on probation, then I would probably give him the maximum. So it's sort of an all or nothing thing for me. So you know, I'm throwing that out because, I guess what I'm saying is, I don't think that this violation of probation hearing, unless there is going to be some significant evidence the defendant was committing a crime, I don't see this as a jail case."

Mariani indicated that it was the state's intention to present the violation of probation evidence, which it had done, and later bring the probation officer back to testify as to whether the defendant's probation was serving any useful purpose. The court informed the defendant that the state has the opportunity at the time

of sentencing to convince the court that probation would not serve any useful purpose and that a jail sentence is appropriate. The court informed the parties that jury selection in the drug case was to begin on Friday. "The state has rested on the [violation of probation] hearing. I would give them leave to reopen the [violation of probation] hearing if they wanted to include evidence of another crime. It has happened that the court . . . presiding over a jury trial would listen to the evidence during the jury trial and then also make findings regarding whether you violated your probation or not. So, I guess I'm leaving that out as a possibility."

Mariani moved to open the state's case to present evidence on the drug charges. He explained that the case had just been assigned to him that morning when the prosecutor originally assigned to the case was taken ill. Mariani stated that he had "indicated that [the state was] just going to proceed on the technical violations. Given the fact [that he] had until Friday and given the court's comments," he intended to present evidence of the underlying drug charges. The court construed Mariani's comments as a request to open the evidence. The defendant objected to the request, stating that the state had rested in the violation of probation case on the technical violations and had not pursued the underlying criminal charges. He claimed that he would be prejudiced because he would not be able to contact witnesses and had no legal research to defend himself "against the claim of violation of probation for whatever reason [the state wants] to reopen."

The court overruled the defendant's objection, stating that, "before you got here today at 10 or 11:15 this morning, you were under the impression this was a violation of probation hearing on everything that's indicated in the violation of probation warrant, which I understand includes both the technical violations, as

well as the new crime. Then at 11:30 [a.m.] . . . whatever time it was, the state notified you they were not going to proceed on the criminal offense, but there really was no down time between then and when the state started their case at 12:30. There was an issue whether you could get a witness. Your witness was not subpoenaed for today, anyway. You were going to ask for a continuance anyway, in order to present those witnesses. . . . I don't see any prejudice to you for allowing the state to reopen the file. I will say you were aware of the nature of the violations alleged by the state prior to today, which included that you violated the laws of the state of Connecticut." The court informed the defendant that he would be given an opportunity to subpoena witnesses for Friday and recessed to permit the defendant to meet with Bowden-Lewis. On Friday, the state presented evidence regarding the underlying drug charges. The defendant presented his case, during which he testified and presented two witnesses.

A

The defendant claims that the court violated canon 2 of the Code of Judicial Conduct. He quotes rule 2.10 (a) of the code, which states in relevant part: "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending . . . ." The defendant argues that the court "made a comment at the close of the state's case that caused the state to move to reopen the hearing," which rule 2.10 (a) prohibits. The defendant misunderstands the scope of the rule. Rule 2.10 (a) pertains to extrajudicial comments, not to statements made by the court during a trial, hearing or other proceeding before it. Rule 2.10 (d) provides in relevant part: "Notwithstanding the restrictions in subsection (a), a judge may make public statements in the course of official duties, may explain court procedures . . . ."

Although the defendant complains of the statements that the court made during the violation of probation proceeding, he did not distinctly set forth the explicit words or statements the court made to which he takes exception. Presumably, he takes exception to the statement: "I will indicate on the record that, based on the evidence I've heard thus far, I would be inclined to find that [the defendant] violated his probation, but I would also be disinclined to actually sentence him to any jail time. I'm just telling you. And the reason I say that is because, to me, if this is the extent of the state's violation, this is not a five-year-to-serve violation. On the other hand, if I were convinced by a preponderance of the evidence that the defendant was committing crimes while he was on probation, then I would probably give him the maximum." The court made the statement to the self-represented defendant after it explained to him that a violation of probation proceeding consists of two parts: an adjudicatory stage and a dispositional phase. The court also explained to the defendant that it could consider the evidence that it heard during the criminal trial when it turned to the dispositional stage of the violation of probation proceeding.

The court, in managing the proceeding, presented the state with options: it could hear evidence on the drug charges at that time or during the criminal trial. The court also was aware that the prosecutor who had been handling the defendant's case had been taken ill and that the adjudicatory portion of the proceedings was being tried by a substitute. The state elected to move to open the evidence in the violation of probation hearing and later opted to nolle the drug charges. The court provided the defendant with additional time to locate witnesses and to prepare for trial. The court was the fact finder, and the statements it made after the state rested did not affect the outcome of the violation of probation proceedings. The court was going to hear the

evidence related to the drug charges during the violation of probation proceeding or during the criminal trial. The court's statement affected the time that it heard the evidence, not whether it heard the evidence. The court, therefore, did not violate rule 2.10 (a) of the Code of Judicial Conduct and deny the defendant a fair trial.

B

The defendant also claims that the court abused its discretion by permitting the state to open its case and present evidence of the drug charges. We are not persuaded.

"The decision to reopen a criminal case to add further testimony lies within the sound discretion of the court, which should be exercised in conformity with the spirit of the law and in a manner to subserve and not to impeded or defeat the ends of substantial justice. . . . The purpose . . . is to preserve the fundamental integrity of the trial's truth-finding function." (Internal quotation marks omitted.) *State* v. *Meikle*, 60 Conn. App. 802, 817, 761 A.2d 247 (2000), cert. denied, 255 Conn. 947, 769 A.2d 63 (2001). "Unless the state's offer seeks to fill an evidentiary gap in its prima facie case that was specifically called to the state's attention by the defendant's motion for acquittal . . . the trial court may permit additional evidence to be presented even though that evidence strengthens the case against the defendant." (Citation omitted; internal quotation marks omitted.) *State* v. *Jones*, 96 Conn. App. 634, 643, 902 A.2d 17, cert. denied, 280 Conn. 919, 908 A.2d 544 (2006). "In determining whether the court abused its discretion, we must make every reasonable presumption in favor of its action." (Internal quotation marks omitted.) Id.

On the basis of our review of the record, we conclude that the court did not abuse its discretion by permitting the state to open the violation of probation case to present evidence of the underlying drug charges against

the defendant. After the state rested, the defendant did not move to have the violation of probation charge dismissed. The court found that the defendant was in technical violation of his probation but that it was not inclined to sentence him to jail. The court explicitly cautioned, however, that, although the state had not presented evidence of the drug charges during the adjudicatory portion of the proceedings, the court could consider new criminal activity and misconduct presented during the dispositional phase of the proceedings. Mariani indicated that the state intended to present evidence of the drug charges at the time the court sentenced the defendant for violation of probation. In granting the state's motion to open the evidence, the court stated to the defendant that he was on notice that he was charged with violating the condition of probation that he not violate the laws of this state. When the defendant arrived in court on June 14, 2016, he was under the impression that the state was going to proceed on all of the allegations in the warrant application. The court explained that it could consider the evidence presented at the criminal trial when determining the sentence, that is, whether the defendant's violation of the laws of the state was serious and whether the benefits of probation were being met. The issue, therefore, is one of timing, not substance. The defendant has not demonstrated that he was prejudiced by the court's permitting the state to open the evidence. During the violation of probation proceeding, the defendant was afforded time to subpoena and call his own witnesses and to cross-examine the state's witnesses. Rather than prejudicing the defendant by permitting the state to open the evidence, the defendant received a significant benefit. When the drug charges were called for trial, Therkildsen stated that the state would enter a nolle prosequi on the drug charges.[26] For the foregoing

[26] Therkildsen noted that the defendant had been sentenced to five years of incarceration in the violation of probation case on the basis of his conduct under the drug charges. "Based on that sentence, and based on the facts,

reasons, we conclude that the court did not abuse its discretion by permitting the state to open the evidence.[27]

The appeal is dismissed with respect to the claim of insufficient evidence; the judgment is affirmed in all other respects.

In this opinion DiPENTIMA, C. J., concurred.

ELGO, J., concurring. I agree with the majority's decision to affirm the judgment of the trial court. I write separately, however, because I believe the constitutional claim of the defendant, Anthony D. Orr, warrants deeper examination as to whether he received sufficient notice of the basis of the violation of probation proceeding prior to its commencement. In this appeal, the defendant contends that his right to due process was violated when the trial court found that he had violated certain criminal laws that were not alleged in either the violation of probation warrant or the accompanying affidavit. I agree with the defendant that this discrepancy offends basic constitutional principles of due process and thus satisfies the third prong of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). I nonetheless would conclude, under the particular facts of this case, that this constitutional violation was harmless under *Golding*'s fourth prong. I therefore respectfully concur with the

it's the state's position, as it was at the violation of probation, that [the defendant] was a minor player in the drug business while he was participating in it. The operation of the drug business was, in the state's position . . . Robinson, and it was the state's position, as well, that [the defendant] was employed or worked somehow for . . . Robinson. And the five years [of] punishment is sufficient for this matter." Pursuant to the defendant's motion, Judge Murphy dismissed the drug charges against the defendant.

[27] Our review of the record leads us to conclude that Judge Murphy went out of his way to explain patiently to the self-represented defendant the procedures in a violation of probation proceeding.

majority's decision to affirm the judgment of the trial court.[1]

The following facts are relevant to my review of the defendant's due process claim. On August 27, 2014, the defendant was released from incarceration for his February 19, 2009 conviction of first degree robbery and began his five year term of probation. On September 4, 2014, the defendant agreed to conditions of probation that included, inter alia, that he (1) not violate any criminal law of this state, (2) submits to urine testing, and (3) reports to the Office of Adult Probation when directed to do so.

On October 6, 2016, the defendant was arrested and charged with possession of narcotics with intent to sell in violation of General Statutes § 21a-278 (a), operation of a drug factory in violation of General Statutes § 21a-277 (c), interfering with a search in violation of General Statutes § 54-33d, possession of narcotics with intent to sell in violation of § 21a-278 (b), and possession of marijuana in violation of General Statutes § 21a-279 (a) (1). The defendant's probation officer, Timothy Fenn, thereafter applied for a violation of probation arrest warrant, in which he alleged that the defendant (1) failed to report to the Office of Adult Probation on August 11 and December 15, 2015, (2) provided a urine sample that tested positive for the presence of marijuana, and (3) violated the aforementioned criminal laws underlying his October 6, 2016 arrest. The defendant was arrested in November, 2016, and charged with violation of probation under General Statutes § 53a-32.

During the probation revocation proceedings, the state informed the court that, although it did not "intend to put on facts from [the drug] case," it was "not technically withdrawing" that portion of the violation of probation charge. The state represented that it was pursuing the charges that the defendant failed to report and

[1] I agree with and join the majority opinion in all other respects.

that he provided a dirty urine sample (technical violations). The state, therefore, subsequently presented evidence that the defendant failed to keep eight appointments with the Office of Adult Probation when directed and provided a January 20, 2015 urine sample that tested positive for the presence of marijuana. In response, the defendant admitted to having used marijuana. The state thereafter rested, and the evidentiary stage of the proceeding concluded.

Upon reconvening from a recess, the court stated that, at that time, it "would be inclined to find that [the defendant] violated his probation, but I also would be disinclined to actually sentence him to any jail time." The court further explained that, "if this is the extent of the state's violation, this is not a five-years-to-serve violation. On the other hand, if I were convinced by a preponderance of the evidence that the defendant was committing crimes while he was on probation, then I would probably give him the maximum." The state responded that it intended to present evidence during the dispositional phase of the probation proceeding.[2] The court acknowledged that it was not aware of the details of the charges stemming from the defendant's October 6, 2016 arrest. It further explained that it would provide the state with leave to open the violation of probation hearing "if they wanted to include evidence of another crime." Senior Assistant State's Attorney Terence D. Mariani responded that, "given the court's comments," the defendant should make his witnesses

[2] As the majority opinion explains, "revocation of probation hearings, pursuant to § 53a-32, are comprised of two distinct phases, each with a distinct purpose. . . . In the evidentiary phase, [a] factual determination by a trial court as to whether a probationer has violated a condition of probation must first be made. . . . In the dispositional phase, [i]f a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served." (Internal quotation marks omitted.) *State* v. *Maurice M.*, 303 Conn. 18, 25–26, 31 A.3d 1063 (2011).

available "to dispute the facts of the [case concerning the October 6, 2016 drug charges]." Mariani stated that, given the time and the court's comments, the state intended to present evidence concerning the defendant's October 6, 2016 arrest. The court thereafter granted the state's motion to open the evidentiary stage of the proceeding over the defendant's objection.

On June 16, 2017, the state presented evidence of the drug charges underlying the defendant's arrest on October 6, 2016. The defendant testified in his own defense and presented testimony from two witnesses. Following the close of evidence, the court found that the defendant had violated the condition of his probation that he report to the Office of Adult Probation. It further found that the defendant had violated the condition that he not violate any criminal laws. In making the latter finding, the court noted that, "in testing positive for marijuana, THC, there is circumstantial evidence that the defendant violated the law as far as possession of [a] controlled substance." The court also stated that, "the biggest finding I had here, though, is [that] I do find that the defendant has violated the criminal law . . . in regard to conspiracy to sell narcotics, § 53a—I want to say 48 . . . ." The court further found that the defendant violated § 21a-277 (a) for conspiracy to possess with intent to sell and General Statutes § 21a-267 (a) for possession of drug paraphernalia.[3] The court thus revoked the defendant's probation and sentenced him to five years of incarceration.

On appeal, the defendant claims that his right to fair notice under the due process clause of the fourteenth amendment to the federal constitution was violated

[3] The court additionally noted that the defendant "has admitted to violating [§ 21-279 (a)] as far as possession of cocaine, but that was not alleged as a basis [for his violation of the condition that he not violate any criminal law]. So, while I do believe the [state has] proved that, I'm not really relying on that as a basis for my findings."

when the court found that he had violated criminal laws that were not cited in the violation of probation warrant. See *State* v. *Andaz*, 181 Conn. App. 228, 232–33, 186 A.3d 66, cert. denied, 329 Conn. 901, 184 A.3d 1214 (2018). In so arguing, the defendant emphasizes that the violation of probation warrant charged him with violations of §§ 21a-277 (c), 21a-278 (a) and (b), 21a-279 (a) (1) and 54-33d. The defendant essentially contends that the court was restricted to those alleged violations during the probation revocation proceeding. Because the court went beyond those violations and, instead, found violations of other criminal statutes—namely, §§ 21a-267 (a), 21a-277 (a) and 53a-48—the defendant submits that his fourteenth amendment right to fair notice was violated.

The majority sidesteps this thorny issue by disregarding the trial court's explicit findings with respect to §§ 21a-267 (a), 21a-277 (a) and 53a-48. Instead, because the violation of probation warrant also alleged a violation of § 21-279 (a), the majority concludes that the court properly found that the defendant violated that criminal law.[4] See part I of the majority opinion. While I do not disagree with that conclusion, I believe that the defendant's claim nevertheless merits fuller consideration and analysis. On the facts of this case, I respectfully would conclude that the defendant did not receive constitutionally adequate notice with respect to the court's finding that he violated §§ 21a-267 (a), 21a-277 (a) and 53a-48.[5]

[4] In addition, the majority opinion determines that the court properly found the defendant to have violated the condition that he report to the Office of Adult Probation when requested and that he provide a clean urine test.

[5] As noted by the majority, the defendant seeks review of this unpreserved claim under *State* v. *Golding*, supra, 213 Conn. 213, which holds that "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial;

"It is well established that [a] defendant is entitled to due process rights in a probation violation proceeding. Probation revocation proceedings fall within the protections guaranteed by the due process clause of the fourteenth amendment to the federal constitution. . . . Probation itself is a conditional liberty and a privilege that, once granted, is a constitutionally protected interest. . . . The revocation proceeding must comport with the basic requirements of due process because termination of that privilege results in a loss of liberty." (Internal quotation marks omitted.) *State* v. *Andaz*, supra, 181 Conn. App. 232–33. "[T]he minimum due process requirements for revocation of [probation] include written notice of the claimed [probation] violation, disclosure to the [probationer] of the evidence against him, the opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses in most instances, a neutral hearing body, and a written statement as to the evidence for and reasons for [probation] violation." (Internal quotation marks omitted.) *State* v. *Tucker*, 179 Conn. App. 270, 280, 178 A.3d 1103, cert. denied, 328 Conn. 917, 180 A.3d 963 (2018). "Although the due process requirements in a probation revocation hearing are less demanding than those in a full criminal proceeding, they include the provision of written notice of the claimed violations to the defendant." (Footnote omitted; internal quotation marks omitted.) *State* v. *Andaz*, supra, 233.

and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) Id., 239–40. Thus, my analysis focuses on the third and fourth prongs of *Golding*. See *State* v. *Ayala*, 324 Conn. 571, 598–99, 153 A.3d 588 (2017) (noting that when defendant's constitutional right to notice is violated, state must prove constitutional error is harmless beyond reasonable doubt); *State* v. *Jordan*, 132 Conn. App. 817, 826, 33 A.3d 307 (due process violation for improper notice of charges is of constitutional magnitude, requiring state to prove harmlessness beyond reasonable doubt), cert. denied, 304 Conn. 909, 39 A.3d 1119 (2012).

Our courts have provided some, albeit not comprehensive, guidance for evaluating whether a probationer is afforded sufficient notice to pass constitutional muster. For instance, this court has stated that, when a defendant is charged on one ground, i.e., a no contact provision, the defendant cannot be found in violation of probation on other uncharged grounds, including criminal violations. See *State* v. *Carey*, 30 Conn. App. 346, 349, 620 A.2d 201 (1993) ("[b]ecause a defendant cannot be found in violation of probation on grounds other than those with which he is charged, we will disregard the [trial court's] second finding [which was that the defendant violated a criminal law as basis for the revocation of his probation]"), rev'd on other grounds, 228 Conn. 487, 636 A.2d 840 (1994); see also *State* v. *Pierce*, 64 Conn. App. 208, 215, 779 A.2d 233 (2001) ("[t]he defendant rightly asserts that he cannot be found in violation of probation on grounds other than those with which he is charged").

This court also has concluded that, as in criminal proceedings, a defendant receives sufficient notice of the underlying charges when they are included in a substitute information before the proceedings begin. See *State* v. *Hooks*, 80 Conn. App. 75, 79–80, 832 A.2d 690 (defendant received sufficient notice because violation of probation warrant "specified the condition of probation *and the particular charges* that formed the basis of the charge of violation of probation" (emphasis added)), cert. denied, 267 Conn. 908, 840 A.2d 1171 (2003); *State* v. *Repetti*, 60 Conn. App. 614, 618, 760 A.2d 964 (defendant received constitutionally sufficient notice where substitute information was filed before violation of probation hearing and specified particular criminal law defendant was found to have violated), cert. denied, 255 Conn. 923, 763 A.2d 1043 (2000).

Our courts have yet to directly address the question of whether a defendant is provided constitutionally sufficient notice when he or she is found to have violated

particular criminal laws that were not alleged in the violation of probation warrant. Despite a lack of pointed discussion on this issue, I believe that this question must be answered in the negative.

In *State* v. *Pierce*, supra, 64 Conn. App. 211–12, the defendant was arrested while on probation for burglary and possession of burglar's tools near a residence that he attempted to burglarize. Id., 211. Two months later, the defendant was arrested on a warrant for violating the terms of his probation. Id. The affidavit in that warrant application referred to the defendant's arrest for burglary and possession of burglar's tools. Id. In appealing from the revocation of his probation, the defendant argued, in part, that he did not receive notice of any basis for the revocation of probation other than the burglary charge. Id., 214. This court rejected that argument. In doing so, it noted "the fact that [the defendant] had been arrested on a warrant charging both burglary and the misdemeanor possession of burglar's tools." Id., 215. It further emphasized that, between the two charges highlighted in the warrant and the testimony offered at trial concerning the entire incident, "the defendant was made aware, both before and during the hearing, of the evidence that he had been in possession of burglar's tools." Id. In reaching that determination, the court acknowledged that the defendant could not "be found in violation of probation on grounds other than those with which he is charged. . . . The defendant, however, clearly had been charged with both burglary and possession of burglar's tools and, thus, he had notice of the charges both before and during the hearing." (Citation omitted.) Id. Therefore, *Pierce* stands for the proposition that a defendant receives constitutionally sufficient notice when the specific crimes underlying the violation of probation charge are contained in the warrant for violation of probation.

Similarly, in *Hooks*, the defendant claimed that he received constitutionally deficient notice because the state failed to specify the manner in which he violated the condition of his probation that he not violate a criminal law. *State* v. *Hooks*, supra, 80 Conn. App. 79. In rejecting that claim, this court noted that "the condition of the defendant's probation was that he would not violate any criminal law; the manner in which he violated that condition was through the commission of criminal offenses. Section 53a-32 (a) requires the state to inform the defendant of those charges once before the court. The arrest warrant application . . . specified the condition of probation *and the particular charges that formed the basis* of the charge of violation of probation. At both the defendant's arraignment . . . and the probation revocation hearing . . . the state reiterated those charges. Those recitations satisfied the demands of § 53a-32 (a)." (Emphasis added.) Id., 80.

Accordingly, both *Pierce* and *Hooks* strongly suggest that a defendant receives adequate notice prior to a probation revocation hearing when the state provides notice of both the condition he is alleged to have violated *and* the particular charges that form the basis of that condition's violation.[6] That precedent indicates that it is not enough for the state to apprise a defendant that he or she is alleged to have violated the condition to not violate any criminal law. Instead, the defendant must be afforded notice of the specific crime that he

[6] As the District Court of Appeal of Florida recently held, "the circuit court found [the defendant] in violation of condition five of his probation for committing the new law offense of assault. However, the [s]tate's affidavit of violation of probation did not allege that [the defendant] had committed an assault. A trial court is not permitted to revoke probation on conduct not charged in the affidavit of revocation. [R]evoking an individual's probation for conduct not alleged in the charging document deprives the individual of due process and constitutes fundamental error." (Internal quotation marks omitted.) *Jackson* v. *State*, 290 So. 3d 1037, 1038 (Fla. App. 2020) (per curiam).

or she allegedly has transgressed and which forms the basis of the revocation of his or her probation.[7]

That conclusion comports with fundamental principles of due process. Although probation revocation proceedings are "akin to a civil proceeding"; *State* v. *Davis*, 229 Conn. 285, 295, 641 A.2d 370 (1994); I believe that probationers, like defendants in criminal proceedings, must receive notice of the particular criminal offenses that he or she is alleged to have violated if the warrant is predicated on the charge that the defendant violated the condition to not break any criminal law. See *Cole* v. *Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948) ("[n]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding, in all courts, state or federal"). Otherwise, a defendant is stripped of the ability to proffer evidence or assert any affirmative defenses in his or her effort to challenge the state's burden of establishing by a preponderance of the evidence all elements of the particular crime. Without knowledge of the precise offenses he or she is alleged to have committed, a defendant is left with no meaningful opportunity to defend and is precluded from adducing evidence that would conclude the case in his or her favor.[8] See *Jackson* v. *Virginia*, 443 U.S.

[7] Indeed, it appears that the trial court in this case also understood that the defendant could not be found to have violated a particular criminal statute that was not alleged in the violation of probation warrant. As noted previously, the court declined to find that the defendant violated § 21-279 (a) for possessing cocaine—despite the defendant's having admitted to that offense—because that allegation was not made in the violation of probation warrant. See footnote 3 of this concurring opinion. As such, this explicit acknowledgment supports the majority's belief that the court did not intend to find the defendant in violation of criminal laws that were not alleged in the violation of probation warrant. See footnote 16 of the majority opinion.

[8] A simple hypothetical highlights my concerns. For instance, assume the warrant in the present case failed to allege that the defendant had violated § 21a-278 (a)—which proscribes the sale of drugs by a person who is not

307, 314, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("[a] meaningful opportunity to defend, if not the right to trial itself, presumes . . . that a total want of evidence to support a charge will conclude the case in favor of the accused").

In the present case, it is evident that the defendant did not receive adequate notice of the specific crimes that formed, in part, the basis of the court's determination that he violated the condition to not break any criminal law. The violation of probation warrant did not allege that the defendant violated §§ 21a-267 (a), 21a-277 (a)[9] and 53a-48, yet the court found him to have

drug-dependent—in violation of the condition that he not violate any criminal law. If the court were to subsequently find that the defendant violated that statute, the defendant would not have been on notice to proffer evidence in his defense that he was a drug-dependent person and, therefore, was incapable of breaching that criminal law. This scenario illustrates why a failure to give notice of the specific criminal laws a probationer is alleged to have violated contravenes the fundamental principles of the right to notice under the due process clause.

[9] It is worth noting the similarities between §§ 21a-277 (a) (1) and 21a-278 (a) (1). The former statute provides in relevant part: "No person may manufacture, distribute, sell, prescribe, dispense, compound, transport with the intent to sell or dispense, possess with the intent to sell or dispense, offer, give or administer to another person, except as authorized in this chapter, any controlled substance that is a (A) narcotic substance, or (B) hallucinogenic substance." General Statutes § 21a-277 (a) (1).

General Statutes § 21a-278 (a) (1) provides that "[n]o person may manufacture, distribute, sell, prescribe, dispense, compound, transport with the intent to sell or dispense, possess with the intent to sell or dispense, offer, give or administer to another person, except as authorized in this chapter, (A) one or more preparations, compounds, mixtures or substances containing an aggregate weight of (i) one ounce or more of heroin or methadone, or (ii) one-half ounce or more of cocaine or cocaine in a free-base form, or (B) a substance containing five milligrams or more of lysergic acid diethylamide. The provisions of this subdivision shall not apply to a person who is, at the time of the commission of the offense, a drug-dependent person."

Both statutes proscribe the possession of narcotic substances with the intent to sell. Section 21a-278 (a) (1), however, requires that the defendant be in possession of particular narcotics and in threshold amounts. It further allows a defendant to assert his or her drug-dependent status at the time of commission as an affirmative defense to avoid liability under the statute. See, e.g., *State* v. *Ray*, 290 Conn. 602, 623–24, 966 A.2d 148 (2009) (holding

violated those provisions.[10] The court thus found the defendant in violation of his probation due to criminal offenses for which he never was provided notice by the state. See *Jackson* v. *Virginia*, supra, 443 U.S. 314. At the very least, as in all administrative proceedings, the defendant was entitled to be on notice of the particular legal theory that would jeopardize his continued probation. See *Pennsylvania Board of Probation & Parole* v. *Scott*, 524 U.S. 357, 364, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998) (noting the "administrative nature of parole revocation proceedings"); *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 823, 955 A.2d 15 (2008) ("[d]ue process [in the administrative hearing context] requires that the notice given must . . . fairly indicate the legal theory under which such facts are claimed to constitute a violation of the law"). For that reason, I would conclude that the defendant's right to receive notice, as guaranteed by the due process clause of the fourteenth amendment to the United States constitution, was violated in the present case. See *State* v. *Davis*, supra, 229 Conn. 294.

Notwithstanding this conclusion, I would further conclude that the constitutional violation was harmless under the particular facts of this case. Although the warrant did not specify §§ 21a-267 (a), 21a-277 (a) and

that drug dependency language in § 21a-278 (b) "effectively functions as an affirmative defense"). In contrast, § 21a-277 (a) (1) does not require specificity of the narcotic substance, a threshold amount of that narcotic substance, or provide for a drug-dependency affirmative defense.

[10] Nothing in the record indicates that the state ever filed a substitute information alleging violations of §§ 21a-267 (a), 21a-277 (a) and 53a-48. Cf. *State* v. *Repetti*, supra, 60 Conn. App. 618. In addition, although the state ultimately elicited from the defendant on cross-examination that he had a daily cocaine habit, it does not appear that the defendant asserted his drug dependency as a defense to his drug charges. Ironically, the court, observing that the defendant "admitted to violating [§ 21-279 (a)] as far as possession of cocaine," concluded that, because it "was not alleged as a basis [for his violation of the condition that he not violate any criminal law]," it made clear it would not rely on that evidence as a basis for the violation. See footnote 3 of this concurring opinion.

53a-48 as underlying the charge that the defendant violated the condition that he not violate any criminal law, it did allege that the defendant possessed marijuana in violation of § 21a-279 (a) (1). The court expressly found that the defendant violated this criminal statute, citing evidence that he tested positive for THC as circumstantial evidence of his possession of marijuana. As the majority opinion notes, this specific charge was detailed in the warrant and was sufficient to support the court's finding that the defendant violated the condition of his probation that he not violate a criminal law. See parts I and IV of the majority opinion. Thus, having found that the defendant violated a condition of his probation, the court was entitled to revoke the defendant's probation on this basis alone.

Furthermore, the court was required to consider "the *whole record*" in deciding in the second stage dispositional factors of whether to "continue or revoke the sentence of probation . . . [and] . . . require the defendant to serve the sentence imposed or impose any lesser sentence." (Emphasis added; internal quotation marks omitted.) *State* v. *Megos*, 176 Conn. App. 133, 148, 170 A.3d 120 (2017); see also General Statutes § 53a-32 (d) ("[n]o such revocation [of probation] shall be ordered, *except upon consideration of the whole record*" (emphasis added)). The court, therefore, was entitled to consider not only the defendant's violation of the conditions of his probation but the entire record in revoking his probation and sentencing him to incarceration. See *State* v. *Miller*, 83 Conn. App. 789, 802–803, 851 A.2d 367 (in holding that trial court did not abuse its discretion when it revoked defendant's probation, reviewing court noted that trial court "had before it the defendant's long criminal history" and evidence of "his cavalier attitude about his probation"), cert. denied, 271 Conn. 911, 859 A.2d 573 (2004). Here, the court had before it evidence of the facts underlying the defendant's arrest on October 6, 2016, including testimony

from Detective Eric Medina, Officer Keith Shea, and Officer Mark Santopietro, all of whom were involved in his arrest on that date.[11] The defendant's rebuttal evidence, which included testimony from himself and two of his witnesses, was not credited by the court. Although it is the state's obligation to prove the harmlessness of a constitutional violation; see *State* v. *Golding*, supra, 213 Conn. 240; that burden is satisfied in light of the record before us. I, therefore, respectfully agree with the majority that the judgment of the trial court should be affirmed.

[11] That the court indicated it would not sentence the defendant to incarceration on the basis of the technical violations alone is ultimately of no consequence because evidence of the defendant's criminal activity was clearly relevant to the court in considering whether the beneficial aspects of probation were being served. Initially, the court acknowledged that it did not know the details of the defendant's criminal case. The state explained that evidence of the defendant's possession and sale of narcotics—coupled with his criminal history—indicates "that [he is] not the kind of person who should be on probation. . . . [The defendant] goes out, commits a robbery, does a substantial jail sentence, gets out, starts using drugs and starts selling drugs. That's not a person who belongs on probation anymore, unfortunately for [the defendant]." The court ultimately "agree[d] with the state" on this point. Thus, whether the state offered the evidence concerning the defendant's October 6, 2016 arrest for purposes of proving the violation or in support of the disposition as it originally intended, the court's remarks make clear that it considered the evidence for disposition.