CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

LONNIE ANDERSON *v.* COMMISSIONER OF CORRECTION (AC 42515)

Lavine, Bright and Beach, Js.*

Syllabus

The petitioner, who previously had been convicted of the crimes of assault in the first degree with a firearm and assault of a peace officer with a firearm, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel, B, rendered ineffective assistance by failing to present certain evidence to support his request that the trial court instruct the jury on self-defense. The petitioner's conviction stemmed from an incident in which state marshals, wearing police attire and badges, were attempting to serve a capias warrant on the petitioner at the front door of his residence. When the marshals informed him that they intended to take him into custody, the petitioner drew a firearm and began firing at the marshals. The marshals were unarmed and fled from the residence. The petitioner argued on appeal that B should have introduced the testimony of three individuals, J, H, and L, who had been present at various points in the confrontation and that, if he had done so, the trial court would have given the requested instruction on self-defense. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal; it was not debatable among jurists of reason that B's performance did not prejudice the petitioner as the petitioner failed to demonstrate that there was a

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

reasonable probability that the outcome of his criminal trial would have been different had B presented the testimony of J, H, and L, as the facts they would have testified to would not have justified a self-defense instruction, in light of the evidence that the marshals were readily identifiable, there was no evidence that any marshal unholstered or brandished a firearm while trying to take the petitioner into custody, and it was undisputed that at the time the petitioner was firing his gun, the marshals were fleeing from the petitioner.

Argued May 20—officially released October 20, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, and tried to the court, *Sferrazza, J.*; judgment in part denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

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

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, former state's attorney, and *Emily Dewey Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, J. The petitioner, Lonnie Anderson, appeals, following the denial of his petition for certification to appeal, from the judgment of the habeas court denying count one of his amended petition for a writ of habeas corpus.[1] On appeal, the petitioner contends that the

[1] The habeas court granted relief as to count two of the amended petition which alleged that the petitioner's constitutional right to the effective assistance of appellate counsel had been violated. The habeas court concluded that counsel had performed deficiently by withdrawing the appeal and that the petitioner was prejudiced by the withdrawal. Consequently, the habeas court reinstated the petitioner's right to directly appeal the underlying conviction. See *Kaddah* v. *Commissioner of Correction*, 299 Conn. 129, 133 n.7, 7 A.3d 911 (2010). This aspect of the habeas court's ruling is not at issue in this appeal.

habeas court abused its discretion by denying his petition for certification to appeal because he properly had established in his petition for a writ of habeas corpus that his constitutional right to the effective assistance of trial counsel had been violated during his criminal trial when a jury found him guilty of assault in the first degree with a firearm and assault of a peace officer with a firearm. We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal and, accordingly, dismiss the petitioner's appeal.

The record reveals the following relevant underlying facts, which the jury at the petitioner's criminal trial reasonably could have found, and procedural history that are relevant to our consideration of the petitioner's claim. On October 6, 2009, State Marshals Arthur Quinn, Charles Valentino, Joseph Butler, and Richard Krueger went to 434 Indian Avenue in Bridgeport to serve a capias warrant authorizing the marshals to take the petitioner into custody for failing to appear in a child support case. The marshals arrived at approximately 7:45 p.m. Butler and Krueger went to the rear of the address. Quinn and Valentino walked to the front door, and Valentino knocked on the door. Quinn and Valentino wore clothing that identified them as state marshals and displayed badges. Neither marshal carried a firearm. Valentino, who was wearing a marshal's hat, was in possession of the capias warrant and wore a utility belt on which were attached handcuffs, gloves, Mace, and a police baton.

An eight year old relative of the petitioner answered the door, and the marshals asked to speak with the petitioner. The child left and returned with Lyman Anderson, the petitioner's brother. Utilizing a photograph of the petitioner, Quinn and Valentino recognized that

Lyman Anderson was not the subject of the capias warrant. Lyman Anderson went back into the home, and the petitioner came to the front door.

The petitioner arrived at the front door armed with a nine millimeter, semiautomatic pistol that he kept concealed in his sweatpants. Upon inquiry about his identity, the petitioner falsely replied that he was John Anderson. Recognizing the petitioner, the marshals confronted him with the photograph, informed him that he had missed a court date, and stated that they intended to take him into custody. The petitioner took a step back, drew his pistol, and chambered a round. Valentino spotted the firearm and shouted "[g]un!" The marshals ran off the doorstep and headed in opposite directions.

Valentino heard five to six gunshots and perceived a bullet pass close by his head. As Valentino sought cover behind a parked van, he heard more shots. Valentino observed, through the vehicle's windows, the petitioner standing on the top step of the stoop and shooting toward Quinn. Valentino observed the petitioner discard an ammunition magazine and insert a second magazine into the pistol.

During his rapid retreat, Quinn also heard gunshots. Quinn realized that a bullet had struck his left foot. Quinn sustained a second gunshot wound to his right forearm. A neighbor emerged from his home with a towel to help stop the bleeding from Quinn's arm. Also hearing gunshots, Butler and Krueger ran toward the front of the residence from their position at the rear of the residence.

After shooting at Quinn and Valentino, the petitioner returned to the residence. Lyman Anderson attempted to calm the petitioner and suggested that he go outside with his hands raised to surrender. The petitioner, at first, told Lyman Anderson that he did not want to do

so because he was worried that the marshals would fire at him.

A few minutes later, Bridgeport Police Officer Hugo Stern received a call, via a police broadcast, about the incident. Stern arrived at the Indian Avenue residence and saw state marshals hiding near a red car. Stern drew his weapon and saw someone matching the description of the shooter. That person stood on the top step of the entryway. Stern aimed his gun at that person, who was the petitioner, and ordered the petitioner to raise his hands. The petitioner complied.

As Stern cautiously approached the petitioner, he noticed that the petitioner wore an empty holster on his right hip. Stern ordered the petitioner to lie slowly on the ground, and the petitioner complied. Stern then directed the petitioner to spread his arms and legs. The petitioner appeared to cooperate. After Stern holstered his own weapon and attempted to handcuff the petitioner, the petitioner resisted by rising into a crouch and becoming combative. Stern saw the petitioner reach into the waistband of his pants to retrieve an item. Bridgeport Police Officer Bobby Jones came to Stern's assistance, and the officers subdued the petitioner. As the officers rolled the petitioner over, they observed that the petitioner was lying on top of a semiautomatic handgun. The officers seized the weapon. Subsequent testing demonstrated that the weapon was the same gun from which several shots had been fired at the scene. Additionally, the weapon was loaded with a magazine full of cartridges.

The state charged the petitioner with two counts of attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a (a), one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (5), one count of assault of a peace officer in violation of General Statutes § 53a-167c and, for each count,

with the commission of a class A, B, or C felony with a firearm in violation of General Statutes § 53-202k.[2]

During the jury trial, the petitioner's trial counsel, J. Patten Brown III, filed a request to charge in which Brown asked the court to provide the pattern jury instruction on self-defense pursuant to General Statutes § 53a-19. The court declined Brown's request to charge the jury on self-defense on the ground that there was insufficient evidence to support the theory that the officers were approaching the petitioner in such a manner prior to the shooting that would justify a self-defense charge.

The jury found the petitioner guilty of assault in the first degree and assault of a peace officer, and his sentence was enhanced on each count pursuant to § 53-202k for the commission of a class A, B, or C felony with a firearm. The petitioner was acquitted of the remaining charges. The court sentenced the petitioner to a total effective sentence of eleven years of incarceration followed by five years of special parole.

On September 30, 2011, the petitioner filed an appeal to the Appellate Court. Brown represented the petitioner at the criminal trial and on direct appeal. On July 26, 2012, Brown withdrew the direct appeal after consulting with the petitioner. On March 10, 2015, the self-represented petitioner filed a petition for a writ of

[2] "[Section] 53-202k is a sentence enhancement provision and not a separate crime. . . . [Our Supreme Court] [has] interpreted § 53-202k to require that the jury, rather than the court, determine whether a firearm was used in the commission of the underlying felony." (Citation omitted.) *State* v. *Nash*, 316 Conn. 651, 656 n.6, 114 A.3d 128 (2015). General Statutes § 53-202k provides: "Any person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses any firearm, as defined in section 53a-3, except an assault weapon, as defined in section 53-202a, shall be imprisoned for a term of five years, which shall not be suspended or reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony."

habeas corpus and, on August 31, 2018, the petitioner filed the operative amended petition for a writ of habeas corpus. In the amended petition, the petitioner asserted the following claims: (1) his constitutional right to the effective assistance of trial counsel was violated and (2) his constitutional right to the effective assistance of appellate counsel was violated.

As to his claim of ineffective assistance of trial counsel, the petitioner argued that Brown failed to present evidence that was available to him to support his self-defense theory. Specifically, the petitioner argued that Brown's performance was deficient because he had failed to present the testimony of Bridgeport Police Officer Juan Hernandez, Bridgeport Police Officer Bobby Jones, and Lyman Anderson. The petitioner argued that he was prejudiced by Brown's failures because, had the evidence been presented, the trial court would have given the requested instruction on self-defense and it is reasonably probable that the jury would have concluded that the state failed to disprove self-defense beyond a reasonable doubt.

On November 8, 2018, the habeas court denied the amended petition with regard to the petitioner's claim that the petitioner's constitutional right to the effective assistance of trial counsel had been violated. In its memorandum of decision, the court discussed the testimony on which the petitioner's claim is based. "The petitioner contends that potential testimony could have been elicited from Lyman Anderson, Officer Jones, and Officer Juan Hernandez that at least one of the marshals at the scene was armed. Further, Lyman Anderson could have testified that [the petitioner] discharged his pistol toward Quinn and Valentino in response to one of the marshal's attempts to barge into the residence and grab the petitioner."

As to Lyman Anderson, the court found: "It was the prosecution that called Lyman Anderson to testify at

the criminal trial. Lyman related that, when he went to the front door that his young nephew had opened, he saw four uniformed marshals, one of whom carried a handgun on his person. This testimony, however, contrasted with the statement Lyman gave to the police on the evening of the shooting. In that recorded statement, given a few hours after the incident, Lyman reported that there were two marshals on the doorstep, neither of whom appeared armed with a gun.

"In that recording, Lyman apparently recounted that he saw the petitioner raise his gun and begin firing at the marshals. At the criminal trial, Lyman acknowledged that he had told this version to the police, but he now denied its accuracy. His trial testimony reflected that he was not present near the entryway and was elsewhere in the house when he heard gunfire.

"Both in his recorded statement to the police and in his testimony at the criminal trial, Lyman recalled overhearing his brother lie about his identity. Lyman agreed in that testimony that, once the marshals ascertained he was not Lonnie, he went upstairs, and the petitioner then came downstairs to speak with the marshals.

"At the habeas trial, Lyman testified that Attorney Brown and the defense investigator interviewed him before the criminal trial. He avows that he told them a version of the incident that contradicted both his statement to the police and his eventual trial testimony. He now swears that the marshals never mentioned that they were there to execute the capias; that he saw a marshal attempt to bull his way through the front door, which was only slightly open; that the marshal tried to grab for the petitioner; that four or five marshals were there and all were armed with handguns; and that the marshals initiated the physical conflict." (Emphasis omitted.)

The court then discussed the testimony of Jones and Hernandez. "Officers Bobby Jones and Juan Hernandez, Jr., also testified at the habeas trial. They stated that one of the four marshals had a firearm, but neither identified Quinn nor Valentino as that marshal. Importantly, no witness ever stated that a marshal brandished a handgun while at the doorstep. All witnesses concurred on every occasion that the petitioner began firing at the marshals as they fled, as fast as they could, upon seeing the petitioner's pistol."

On the basis of the evidence presented to it, the habeas court concluded the following: "Thus, even if the testimony of Officers Jones and Hernandez supported a finding that some, unidentified marshal had a handgun on his person, no evidence would have warranted a self-defense instruction under all the circumstances of this case. The jury necessarily determined by its verdict that the state had proved, beyond a reasonable doubt, that Marshals Quinn and Valentino were reasonably identifiable peace officers under . . . § 53a-167c (a) and that the petitioner *intended* to prevent [them] . . . from performing [their] duties . . . while such peace officer[s] [were] acting in the performance of [their] duties. Nor does the habeas testimony of Lyman Anderson assist the petitioner in that regard. As mentioned above, Lyman denied being present during the incident in his criminal trial testimony. His only contribution could be that one of the two marshals at the doorstep possessed a gun on his person but not that that marshal ever drew the weapon.

"It must be kept in mind that General Statutes § 53a-23 commands that a 'person is not justified in using physical force to resist an arrest by a reasonably identifiable peace officer . . . whether such arrest is legal or illegal.' While a person is justified in defending oneself from 'egregiously unlawful conduct—such as an unprovoked assault' by a peace officer, § 53a-23 'was

intended to require an arrestee to submit to an *arrest*, even though he believes . . . that the arrest was . . . unlawful.' *State* v. *Davis*, 261 Conn. 553, 568 [804 A.2d 781] (2002) . . . . General Statutes § 53a-3 (9) defines 'peace officer' to include state marshals.

"In the petitioner's case, there is no claim that taking him into custody under the capias was illegal. Nor is there any contention that the marshals were employing excessive force. Assuming, arguendo, that one of the marshals tried to grab hold of the petitioner's arm, § 53a-23 would negate the viability of a self-defense claim because every arrest entails some degree of physical restraint. Self-defense, in an arrest situation, only justifies the use of defensive force to ward off abusive violence; a claim which never arose in the petitioner's case. Consequently, the court determines that the petitioner has failed to meet his burden of proving either prong of the [*Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] standard with respect to Attorney Brown's trial assistance." (Emphasis in original.) On November 8, 2018, the habeas court denied the amended petition with regard to the petitioner's claim that his constitutional right to the effective assistance of trial counsel had been violated, and, on November 20, 2018, the habeas court denied the petitioner's petition for certification to appeal. This appeal followed.

The petitioner claims that the habeas court erred in concluding that he failed to show both that Brown's representation was deficient and that he was prejudiced by Brown's errors. In particular, he argues that the evidence presented at the habeas trial proved that Brown had evidence available to him to show that Valentino was armed and that Valentino and Quinn grabbed for the petitioner, which caused him reasonably to fear for his life, thereby entitling him to a self-defense instruction. We are not persuaded.

We first set forth the standard of review relevant to our resolution of this appeal. "Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . .

"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 this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed. . . .

"We examine the petitioner's underlying claim[s] of ineffective assistance of counsel in order to determine whether the habeas court abused its discretion in denying the petition for certification to appeal. Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by

the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington*, [supra, 466 U.S. 687], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"To satisfy the performance prong [of the *Strickland* test] the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Bagalloo* v. *Commissioner of Correction*, 195 Conn. App. 528, 533–34, 225 A.3d 1226, cert. denied, 335 Conn. 905, 226 A.3d 707 (2020). "To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 669, 159 A.3d 1112

(2017). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* v. *Washington*, supra, 466 U.S. 694. "In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Internal quotation marks omitted.) *Delvecchio* v. *Commissioner of Correction*, 149 Conn. App. 494, 500, 88 A.3d 610, cert. denied, 312 Conn. 904, 91 A.3d 906 (2014).

Accordingly, in order to determine whether the habeas court abused its discretion in denying the petition for certification to appeal, we must consider the merits of the petitioner's underlying claim that his criminal trial counsel provided ineffective assistance. With the foregoing principles in mind, we now address the petitioner's claim that Brown failed to present sufficient evidence that was available to him at the petitioner's criminal trial to support his request that the court instruct the jury on self-defense.

We first set forth the well settled substantive principles underlying a defendant's claim of self-defense. "[T]he fair opportunity to establish a defense is a fundamental element of due process of law . . . . This fundamental constitutional right includes proper jury instructions on the elements of self-defense so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the assault was not justified. . . . Thus, [i]f the defendant asserts [self-defense] and the evidence indicates the availability of that defense, such a charge is obligatory and the defendant is entitled, as a matter of law, to [an] . . . instruction [on self-defense]. . . . Before an instruction is warranted, however, [a] defendant bears the initial burden of producing sufficient evidence to inject self-defense into the case. . . . To meet that burden, the evidence adduced at trial, whether by the state or the defense, must be sufficient [if credited by the jury] to

raise a reasonable doubt in the mind of a rational juror as to whether the defendant acted in self-defense. . . . This burden is slight, however, and may be satisfied if there is any foundation in the evidence [for the defendant's claim], no matter how weak or incredible . . . ." (Internal quotation marks omitted.) *State* v. *Best*, 168 Conn. App. 675, 686, 146 A.3d 1020 (2016), cert. denied, 325 Conn. 908, 158 A.3d 319 (2017). "However low the evidentiary standard may be, it is nonetheless a threshold the defendant must cross. The defendant may not ask the court to boost him over the sill upon speculation and conjecture." (Internal quotation marks omitted.) *State* v. *Montanez*, 277 Conn. 735, 750, 894 A.2d 928 (2006).

"[I]n order sufficiently to raise self-defense, a defendant must introduce evidence that the defendant reasonably believed his adversary's unlawful violence to be imminent or immediate. . . . Under . . . § 53a-19 (a), a person can, under appropriate circumstances, justifiably exercise repeated deadly force if he reasonably believes both that his attacker is using or about to use deadly force against him and that deadly force is necessary to repel such attack. . . . The Connecticut test for the degree of force in self-defense is a subjective-objective one. The jury must view the situation from the perspective of the defendant. Section 53a-19 (a) requires, however, that the defendant's belief ultimately must be found to be reasonable. . . . Moreover, the evidence must be such that the jury must not have to resort to speculation in order to find that the defendant acted in justifiable self-defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Lewis*, 245 Conn. 779, 811, 717 A.2d 1140 (1998).[3]

[3] General Statutes § 53a-19 (a) provides in relevant part: "[A] person is justified in using reasonable physical force upon another person to defend himself . . . from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person

On appeal, the petitioner argues that (1) Jones and Hernandez could have testified that they had observed a marshal carrying a gun, in contravention of the testimony of Quinn and Valentino that neither of them was armed, and (2) Lyman Anderson could have testified that the marshals attempted to barge through the door into the petitioner's apartment and attempted to grab the petitioner, an action that led to the petitioner shooting at the marshals.[4] The petitioner argues that the aforementioned evidence would have supported the theory of self-defense that Brown had pursued. The petitioner argues further that there is a reasonable probability that the outcome of the criminal trial would have been different and more favorable to the petitioner if Brown had presented such evidence. We disagree.

Although the habeas court concluded that the petitioner failed to establish both deficient performance and prejudice, it is clear to us that the focus of the court's analysis was on the prejudice prong. The court

is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm."

[4] The petitioner also asserts in his principal brief that, "although the marshals claimed to be identifiable as marshals, none of the other witnesses at the scene recognized them as marshals." This claim is without merit. As the habeas court noted, Lyman Anderson, both in his recorded statement to the police and in his testimony at the petitioner's criminal trial stated that Quinn and Valentino were recognizable as marshals from their clothing. At the habeas trial, he testified that they were clearly wearing police attire, had badges on, shirts that said police and one of the marshals had a shirt that said marshal. In addition, Lyman Anderson testified at the criminal trial that the petitioner did not want to go outside after firing his gun because he was worried that the *marshals* would fire back at him. Furthermore, the petitioner's reliance on Jones' statements at the criminal trial that after the shooting he only saw civilians and not marshals; see footnote 6 of this opinion; makes little sense. That testimony is inconsistent with and contradicted by the evidence from the habeas trial, on which the petitioner relies, that Jones saw a marshal with a gun. It is illogical to argue that the jury could rely both on Jones' testimony that he saw a marshal pointing a gun and also his testimony that he did not see any marshals. Thus, the habeas court's factual finding that Quinn and Valentino reasonably were identifiable as marshals was not clearly erroneous.

accepted that there was evidence before it that at least one of the marshals attempting to apprehend the petitioner was armed. Although the petitioner argues that the court was incorrect in concluding that it could not identify the armed marshal, that issue was not particularly germane to the court's analysis.[5] The court also accepted, for purpose of its analysis, Lyman Anderson's testimony that Quinn and Valentino attempted to grab the petitioner before the petitioner began firing. Nevertheless, the court concluded that the evidence from Jones, Hernandez, and Lyman Anderson not offered during the criminal trial would have made no difference because the facts to which they would have testified would not have justified a self-defense instruction or possibly affected the outcome of the criminal trial. The court reached this conclusion for three reasons. First, there was no evidence that any marshal unholstered or brandished a firearm while trying to take the petitioner into custody. Second, the evidence was clear, and the jury necessarily found, that Quinn and Valentino were clearly identifiable as marshals when they confronted the petitioner, and there was no evidence that they used excessive force when trying to detain the petitioner or that they were acting illegally in enforcing the capias. Third, Quinn and Valentino were both fleeing from the petitioner "as fast as they could," when he began firing at them.

The petitioner does not dispute that no marshal ever removed a gun from his holster. Nor does he dispute that Quinn and Valentino were fleeing from the petitioner when he fired at them. He also does not dispute

[5] The petitioner argues that because Valentino testified during the petitioner's criminal trial that he hid behind a red vehicle as the petitioner fired on him and Quinn, and Jones testified at the habeas trial that he saw a marshal pointing a gun while hiding behind a red vehicle, the marshal pointing the gun could only have been Valentino. At the criminal trial, Valentino testified that he initially ran toward the red vehicle and then ended up hiding behind a silver van.

Lyman Anderson's statements, to the police, at the petitioner's criminal trial, and at the habeas trial, that Quinn and Valentino were readily identifiable as marshals. He similarly does not dispute Lyman Anderson's testimony that the petitioner confirmed that he knew that the individuals at whom he fired his weapon were marshals. Furthermore, the petitioner conceded in his principal brief that "the jury accepted that the marshals were reasonably identifiable peace officers based on the criminal trial evidence . . . ."

The only argument raised by the petitioner in response to these facts is that had the jury heard the evidence presented at the habeas trial, it would have concluded that Quinn and Valentino were not identifiable as marshals. The problem with the petitioner's argument is that the only person who testified that he did not recognize marshals at the scene of the shooting was Jones, and that testimony occurred at the criminal trial.[6] In fact, Jones' testimony at the habeas trial undermines the petitioner's argument because he testified that he saw a marshal pointing a gun while hiding behind a parked vehicle after the shooting had occurred.[7] Similarly, Hernandez testified at the habeas trial that he saw a marshal with a gun when he arrived on the scene.[8]

[6] Jones provided the following relevant testimony at the petitioner's criminal trial. Jones saw an injured "male dressed civilian" near a tree and there were other people who appeared to be civilians with the individual, whom he could not recognize. Additionally, Jones did not see any state marshals while he was at the location of the incident.

[7] During the habeas proceeding, Jones testified to the accuracy of a police report, which stated that Jones personally observed a state marshal taking cover behind a red vehicle with a gun drawn and pointed at the 434 Indian Avenue residence. Jones testified that he did not know which marshal had the gun and that he could not recall anything about the person who had the gun. Upon inquiry about his prior statement at the criminal trial that everybody appeared to be civilians, Jones stated that, "under that level of stress, we can't distinguish between a civilian and a plainclothes state marshal."

[8] Hernandez swore to the accuracy of a supplemental report stating that he saw one of the marshals with a gun. Hernandez testified that he was unable to identify which marshal had the gun and that he could not recall

There simply was no evidence presented at the habeas trial to support a claim that Quinn and Valentino were not identifiable as marshals.

On the basis of the habeas court's factual findings, which are fully supported by the record, we agree with the habeas court's conclusion that the petitioner failed to prove any prejudice arising from Brown's failure to present evidence from Jones, Hernandez and Lyman Anderson as suggested by the petitioner. First, the habeas court was correct that, even assuming arguendo that one of the marshals tried to grab the petitioner's arm, because Quinn and Valentino were reasonably identified as peace officers and there was no evidence that they used excessive force, § 53a-23[9] would negate the viability of a self-defense claim.

The petitioner makes three arguments to the contrary, none of which we find persuasive. First, the petitioner argues that § 53a-23 does not necessarily preclude a self-defense instruction, even if the marshals were reasonably identifiable as peace officers, if there was evidence that they entered the petitioner's apartment without a warrant. In support of this argument, the petitioner relies on a single sentence in *In re Adalberto S.*, 27 Conn. App. 49, 58, 604 A.2d 822, cert. denied, 222 Conn. 903, 606 A.2d 1328 (1992), wherein this court stated: "[A]n unlawful warrantless intrusion into the home creates a privilege to resist arrest." The court in *In re Adalberto S.*, cited to our Supreme Court's holding in *State* v. *Gallagher*, 191 Conn. 433, 442, 465 A.2d 323 (1983), as support for this statement. The problem for the petitioner is that our Supreme Court later overruled *Gallagher* in part and held that "the right to challenge an illegal entry remains a privilege, provided no new crime is committed." *State* v. *Brocuglio*, 264 Conn. 778, 793, 826 A.2d 145 (2003). Furthermore, our Supreme

whether he was able to identify the people who were outside as marshals or whether he was able to identify anybody as marshals.

[9] General Statutes § 53a-23 provides in relevant part: "A person is not justified in using physical force to resist an arrest by a reasonably identifiable

Court noted in *Brocuglio* that, even under *Gallagher*, the right to resist a warrantless entry into one's home was limited: "Under *Gallagher*, the defendant here had a common-law right to resist, *short of committing an assault*, an illegal entry by the police into his home." (Emphasis added.) Id., 795. Consequently, any right the petitioner might have had to resist a warrantless entry into his home by the marshals unquestionably did not include firing on them.

The petitioner further argues that neither the state nor the court raised § 53a-23 as an issue at the petitioner's criminal trial, so there was no basis for the habeas court to rely on it in this case. We disagree. Because the court in the criminal trial concluded that the facts otherwise did not warrant a self-defense instruction, it was not required to consider the statutory bar in § 53a-23. Furthermore, there is nothing in the wording of the statute that makes its application optional.

Alternatively, the petitioner argues that had the jury seen the evidence presented at the habeas trial, it would have concluded that Quinn and Valentino were not reasonably identifiable as marshals. For the reasons previously discussed in this opinion, such an argument is contrary to the facts and without merit.

Additionally, the fact that Quinn and Valentino indisputably were fleeing, as fast as they could, from the petitioner when he fired on them precluded any claim of self-defense. The evidence presented at the petitioner's criminal trial, and not disputed before the habeas court, was that the marshals, who were in the process of trying to take the petitioner into lawful custody, immediately retreated from the petitioner when he pulled out his firearm, and they were in flight at the time the petitioner fired his gun at them. There simply is no basis for the court to give a self-defense instruction when the only evidence presented to the jury is that the marshals were

peace officer [or] special policeman appointed under section 29-18b . . . whether such arrest is legal or illegal."

fleeing from the petitioner when the petitioner fired the weapon. See, e.g., *State* v. *Erickson*, 297 Conn. 164, 197, 997 A.2d 480 (2010); *State* v. *Lewis*, 220 Conn. 602, 619–20, 600 A.2d 1330 (1991); *Commonwealth* v. *Miranda*, 484 Mass. 799, 811–13, 146 N.E.3d 435 (2020); *State* v. *Gonzalez*, 143 N.M. 25, 30, 172 P.3d 162 (2007); *State* v. *Niewiadowski*, 120 N.M. 361, 366, 901 P.2d 779 (App.), cert. denied, 120 N.M. 184, 899 P.2d 1138 (1995). Put another way, in light of the undisputed evidence that Valentino and Quinn were fleeing when the petitioner shot at them, there was insufficient evidence "to raise a reasonable doubt in the mind of a rational juror as to whether the defendant acted in self-defense." (Internal quotation marks omitted.) *State* v. *Best*, supra, 168 Conn. App. 686.

On the basis of the evidence presented at the petitioner's criminal trial, the jury, even if it had heard all of the evidence presented to the habeas court, reasonably could not have found that, at the time the petitioner fired his gun at the marshals, it was objectively reasonable for the petitioner to have believed both that the marshals were about to use deadly physical force or inflict great bodily harm on him, and that it was necessary for the petitioner to shoot at the marshals to prevent such conduct.

Accordingly, the petitioner has failed to prove that there is a reasonable probability that the outcome of his criminal trial would have been different had Brown performed as the petitioner claims he should have. Furthermore, we conclude that it is not debatable among jurists of reason that Brown's performance did not prejudice the petitioner and, thus, the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* LONNIE ANDERSON (AC 42703)

Lavine, Bright and Beach, Js.*

Syllabus

Convicted of the crimes of assault in the first degree by means of the discharge of a firearm and assault of a peace officer by means of the discharge of a firearm in connection with his actions in shooting at two state marshals, the defendant appealed to this court. State marshals Q and V arrived at the defendant's residence to serve a capias warrant and take the defendant into custody for failing to appear at a court proceeding. Q and V went to the front door of the defendant's residence and were wearing clothing that identified them as state marshals and they displayed badges. V was in possession of the capias warrant and also was wearing a state marshal's hat. When the defendant came to the door, he provided the marshals with a false name. When the marshals confronted him with his photograph and told him that they would be taking him into custody, the defendant reached back and pulled out a gun. V yelled "gun," and Q and V, who were unarmed, retreated, running in opposite directions. Q received gunshot wounds to his left foot and right forearm, while V was uninjured. Bridgeport police officers arrived on the scene and subdued the defendant. The defendant's brother, L, who was at the residence, testified at trial that Q and V were readily identifiable as state marshals and that he did not observe that the marshals were armed until one of them stepped into the doorway to grab the defendant. Q and V testified that they heard multiple gunshots as they sought cover. On appeal, the defendant claimed that the trial court improperly declined to instruct the jury on self-defense. *Held* that the trial court did not err in rejecting the defendant's request for a jury instruction on self-defense; there was insufficient evidence to raise a question in the mind of a rational juror as to whether the defendant shot at Q and V in self-defense, as Q and V were readily identifiable as state marshals and it was undisputed that, at the time of the shooting, the marshals were in flight away from the defendant and, therefore, the jury could not reasonably have found that it was objectively reasonable for the defendant to believe that Q and V were about to use deadly physical force or inflict great bodily harm and that it was necessary that he shoot at them to prevent such conduct.

Argued May 20—officially released October 20, 2020

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

Procedural History

Substitute information charging the defendant with two counts of the crime of attempt to commit murder, and with one count each of the crimes of assault in the first degree by means of the discharge of a firearm and assault of a peace officer by means of the discharge of a firearm, and with the commission of a class A, B or C felony with a firearm, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Devlin, J.*; verdict and judgment of guilty of assault in the first degree by means of the discharge of a firearm and assault of a peace officer by means of the discharge of a firearm, and the defendant's sentence was enhanced for the commission of a class A, B or C felony with a firearm, and the defendant appealed to this court. *Affirmed.*

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

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, former state's attorney, and *C. Robert Satti, Jr.*, supervisory assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Lonnie Anderson, appeals from the judgment of conviction, rendered after a jury trial, of assault in the first degree by means of the discharge of a firearm in violation of General Statutes § 53a-59 (a) (5)[1] and of assault of a peace officer by means of the discharge of a firearm in violation of

[1] General Statutes § 53a-59 (a) (5) provides that "[a] person is guilty of assault in the first degree when . . . with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm."

General Statutes § 53a-167c (a) (1);[2] his sentence was enhanced pursuant to General Statutes § 53-202k.[3] On appeal, the defendant claims that the trial court improperly declined to instruct the jury on self-defense. We disagree and affirm the judgment of the trial court.

The record reveals the relevant procedural history and facts, which the jury reasonably could have found. On the evening of October 6, 2009, State Marshals Arthur Quinn, Charles Valentino, Joseph Butler, and Richard Krueger went to 434 Indian Avenue in Bridgeport to serve a capias warrant authorizing the marshals to take the defendant into custody for failing to appear at a court proceeding. At approximately 7:45 p.m., the marshals arrived at the residence. Quinn and Valentino went to the front door, and Butler and Krueger went to the rear of the residence. Quinn and Valentino walked up to the residence and knocked on the door. Quinn and Valentino wore clothing that identified them as state marshals and displayed badges. Neither marshal carried a firearm. Valentino was in possession of the capias warrant and wore a utility belt on which were attached handcuffs, gloves, Mace, and a police baton.

[2] General Statutes § 53a-167c (a) (1) provides in relevant part that "[a] person is guilty of assault of public safety, emergency medical, public transit or health care personnel when, with intent to prevent a reasonably identifiable peace officer . . .from performing his or her duties, and while such peace officer . . . is acting in the performance of his or her duties . . . such person causes physical injury to such peace officer . . . ."

[3] "[Section] 53-202k is a sentence enhancement provision and not a separate crime. . . . [Our Supreme Court] [has] interpreted § 53-202k to require that the jury, rather than the court, determine whether a firearm was used in the commission of the underlying felony." (Citation omitted.) *State* v. *Nash*, 316 Conn. 651, 656 n.6, 114 A.3d 128 (2015). General Statutes § 53-202k provides that "[a]ny person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses any firearm, as defined insection 53a-3, except an assault weapon, as defined insection 53-202a, shall be imprisoned for a term of five years, which shall not be suspended or reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony."

An eight year old relative of the defendant answered the door, and the marshals asked to speak with the efendant. The child left and returned with Lyman Anderson, the defendant's brother. Utilizing a photograph of the defendant, Quinn and Valentino recognized that Lyman Anderson was not the subject of the capias. Lyman Anderson then went back into the home, and the defendant came to the front door.

The defendant arrived at the front door armed with a nine millimeter semiautomatic pistol that he kept concealed in his sweatpants. Upon inquiry about his identity, the defendant falsely replied that he was John Anderson. The marshals responded that he was Lonnie Anderson, informed him that he had missed a court date, and stated to him that they had a capias warrant for him. The marshals told the defendant that they intended to take him into custody. The defendant took a step back, drew his pistol, and chambered a round. Valentino spotted the firearm and shouted "[g]un!" The marshals ran off the doorstep and headed in opposite directions.

As they were running away from the defendant's residence, Quinn and Valentino heard several gunshots and Valentino perceived a bullet passing near his head. Valentino heard additional gunshots as he sought cover behind a parked van. Valentino observed, through the vehicle's windows, the defendant standing on the top step of the stoop and shooting toward Quinn. Valentino also saw the defendant discard an ammunition magazine and reload a second magazine into the pistol.

As Quinn was running, he heard multiple gunshots and felt a bullet hit his left foot. Quinn also sustained a second gunshot wound to his right forearm. A neighbor emerged from his home with a towel to help stop the bleeding from Quinn's arm.

A few minutes later, Bridgeport Police Officer Hugo Stern received a call, via a police broadcast, about the incident. Stern arrived at the Indian Avenue residence and saw uniformed state marshals taking cover near a red vehicle. Stern also observed someone matching the description of the shooter. Stern aimed his gun at that person, who was the defendant, and ordered him to raise his hands. The defendant complied.

As Stern cautiously approached the defendant, he noticed that the defendant wore an empty holster on his right hip. Stern ordered the defendant to lie on the ground slowly, and the defendant complied. Stern directed the defendant to spread his arms and legs on the ground, and the defendant appeared cooperative. After Stern holstered his own weapon and attempted to handcuff the defendant, the defendant resisted by rising into a crouch and acting combative. Stern saw the defendant reach into the waistband of his pants and try to retrieve an item. Bridgeport Police Officer Bobby Jones arrived at the scene subsequent to Stern's arrival and came to Stern's assistance. Both officers subdued the defendant. As the officers rolled the defendant over, they observed that the defendant had been lying on top of a semiautomatic handgun. The officers seized the weapon, and later testing demonstrated that the weapon was the same gun from which several shots had been fired. Additionally, the weapon had been reloaded with a magazine full of cartridges.

In a substitute information, the state charged the defendant with two counts of attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a (a), one count of assault in the first degree by means of the discharge of a firearm, one count of assault of a peace officer by means of the discharge of a firearm, and with the commission of class A, B, or C felonies with a firearm in violation of § 53-202k.

On April 25, 2011, the first day of evidence in the defendant's trial, defense counsel filed the following request to charge on self-defense: "Criminal Jury Instructions 2.8-1 Self-Defense and Defense of Others—§ 53a-19. In addition to the language in the pattern instruction, we request the following: 'It is a matter of public interest that potential defenders be able to act without fear that they will be criminally liable if they guess wrong about the person they are defending's rights.' See *Commissioner* v. *Martin*, 369 Mass. 640, 649, 341 N.E.2d 885 (1976). The Connecticut constitution, article I, § 15, protects one's right to carry arms for his own defense and the defense of the State, and presumably for the defense of others. Should you believe that testimony, the fact that the accused might have brought a weapon to the conflict should not have been a factor in the trial court's analysis nor should it affect this court's analysis of the self-defense issue. Under the common law, the fact that a defendant arms himself after an altercation with an aggressor is consistent with self-defense. See, e.g., Bishop, Bishop on Criminal Law, 9th Ed. § 845 at 601 (1923)."

After both parties rested, the court held a charge conference that addressed the requested instruction on self-defense. During the conference, defense counsel, to support the requested charge, relied on the testimony of Lyman Anderson and Bridgeport Detective Mark Belinkie, who had interviewed Lyman Anderson following the defendant's arrest and who also had spoken to Valentino about what had occurred.

Lyman Anderson had provided the following trial testimony relevant to the defendant's requested self-defense charge. The defendant, Lyman Anderson, Lyman Anderson's fiancée, and several acquaintances were using phencyclidine (PCP) and marijuana on the evening of October 6, 2009. Later, in the same evening, Lyman Anderson was eating in the kitchen when he heard radio dispatches going off at the front door. He

went to the front door to get his young relative away from the door. Lyman Anderson identified several marshals by their uniforms; he also observed that a marshal was armed, and that the marshals were holding papers. At least one of the marshals was wearing a hat identifying him as a marshal. Lyman Anderson testified that he initially observed approximately four marshals at the front door. He also testified that he originally told the Bridgeport police during a police interview that he had initially observed only two marshals at the front door. He stated that he remembered seeing the defendant come down the stairs and hearing the marshals ask the defendant if he was Lonnie Anderson. Lyman Anderson testified that the defendant provided a false name to the marshals. He also testified that he did not observe that the marshals were armed until a marshal stepped in the door to grab the defendant and testified further that he did not observe the defendant fire a gun. He testified that, during the shooting, he took his nephew away from the gunfire and went to the basement of the residence. He also testified that, after firing at the marshals, the defendant did not want to go outside to surrender because he was concerned that the marshals would fire back at him.

Belinkie testified, relevant to the defendant's request to charge, that Valentino told him that Quinn tried to grab the defendant before the defendant drew his weapon and began firing.

Defense counsel argued that the testimony of Lyman Anderson and Belinkie was sufficient to support a self-defense charge because the jury reasonably could conclude that the defendant's drug use, coupled with armed men trying to grab him caused the defendant to fear for his life and defend himself with deadly force. Counsel further stated: "Now I—I'd be the first to admit that's not, you know, the strongest evidence out there that I've seen in cases. But I think with the slight standard

or no matter how slight, I think, is a language the [cases] . . . used, I would submit that's enough. And I'll just—with those comments, I'll of course—I object if it's not done, but obviously I don't have any further comments."

The state objected to the defendant's requested instruction on the ground of the absence of any evidence of self-defense, and it argued further that Belinkie's testimony was not proffered as substantive evidence, but was admitted solely as a prior inconsistent statement of Valentino. The state further argued that Lyman Anderson testified that he was taking his young relative to the basement and was hiding behind a wall when the shooting occurred and, therefore, there was no evidence as to what Lyman Anderson specifically observed, outside of his brother raising a firearm. The trial court then reviewed Lyman Anderson's trial testimony. After doing so, the trial court stated: "So, I've reviewed the testimony of Lyman Anderson, and my review does not indicate any testimony he gave which would indicate that the police officers were approaching Lonnie Anderson in a way that would, even under our low standard in Connecticut that would justify a self-defense charge. So—so the defense may have an exception, but the court does not intend to charge the jury on self-defense based [on] the present record." After the trial court delivered its jury instructions, defense counsel took exception to the charge and properly preserved the issue for appeal. See Practice Book § 42-16.

On April 29, 2011, the jury found the defendant guilty of the charges of assault in the first degree and assault of a peace officer, and found the defendant not guilty on the remaining charges. The court sentenced the defendant to a total effective sentence of eleven years of incarceration followed by five years of special parole.[4]

[4] On September 30, 2011, the defendant first appealed from the judgment of conviction. On July 26, 2012, the defendant withdrew that appeal. On March 10, 2015, the defendant filed a pro se petition for a writ of habeas

The defendant claims on appeal that the trial court improperly declined to provide a self-defense instruction to the jury.[5] The defendant argues that Lyman Anderson's testimony about a marshal stepping into the threshold of the residence and attempting to grab the defendant was sufficient to warrant a self-defense instruction, when considered in the context of the evidence at trial. The defendant argues further that there was substantial evidence from which the jury could

corpus and, on August 31, 2018, the defendant filed an amended petition for a writ of habeas corpus arising out of his judgment of conviction. In the amended petition, the defendant asserted the following claims: (1) his constitutional right to the effective assistance of trial counsel was violated and (2) his constitutional right to the effective assistance of appellate counsel was violated.

On November 8, 2018, the habeas court denied in part and dismissed in part the amended petition with regard to the defendant's claim that the defendant's constitutional right to the effective assistance of trial counsel had been violated. The habeas court granted, in part, the amended petition with regard to the defendant's claim that his constitutional right to the effective assistance of appellate counsel had been violated. The habeas court granted relief in the form of the reinstatement of the direct appeal of the underlying conviction. See *Kaddah* v. *Commissioner of Correction*, 299 Conn. 129, 133 n.7, 7 A.3d 911 (2010). The defendant then filed the present appeal.

[5] We note that the defendant stated in his appellate brief that "it is worth noting that the trial court's decision not to instruct the jury was premised on its belief that Lyman Anderson had not testified that an armed marshal had reached into the home to grab the defendant during the altercation." Our review of the record reveals that the trial court did not premise its ruling on the belief that Lyman Anderson had not testified about an armed marshal reaching into the residence to grab the defendant. During the charge conference, defense counsel stated that he believed that Lyman Anderson testified that "they somehow went to get [the defendant] . . . ." In response, the trial court provided the following statement: "Well, that's important. If Lyman Anderson had testified that there was a—one of the marshals had advanced for his brother *prior to the shots going off*?" (Emphasis added.) The trial court then replayed Lyman Anderson's testimony and ruled that its review of his testimony did not indicate any testimony that would suggest that the marshals were approaching the defendant in a manner that would justify a self-defense charge. Thus, the court considered the entirety of Lyman Anderson's testimony, in particular the timing of the marshals' interactions with the defendant and the shots being fired, and not simply whether, at some point, the marshals attempted to apprehend the defendant.

have concluded that the marshals were not readily identifiable, had entered the residence without permission, and were armed. The defendant argues that the jury reasonably could have concluded that the evidence supported the defendant's belief that deadly physical force was necessary to protect himself because he was confronted by two armed individuals in his home. The defendant also argues that the jury reasonably could have concluded from the evidence that the marshal, who was reaching in to grab him, was about to use deadly physical force because the marshals were armed with a variety of weapons, including handcuffs, batons, and Mace, and at least one of the marshals was armed with a firearm.

The state argues, in response, that the evidence did not warrant an instruction on self-defense because the evidence at trial could not have supported a finding that the defendant did not know that Valentino and Quinn were state marshals, none of the witnesses testified that either marshal brandished a weapon during his interaction with the defendant, and the marshals were fleeing the residence at the time the defendant fired at them. We agree with the state.

The following legal principles are relevant to our analysis of the defendant's claim. "In determining whether the defendant is entitled to an instruction of self-defense . . . we must view the evidence most favorably to giving such an instruction." (Internal quotation marks omitted.) *State* v. *Terwilliger*, 294 Conn. 399, 408–409, 984 A.2d 721 (2009). "[T]he fair opportunity to establish a defense is a fundamental element of due process of law . . . . This fundamental constitutional right includes proper jury instructions on the elements of self-defense so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the assault was not justified. . . . Thus,

[i]f the defendant asserts [self-defense] and the evidence indicates the availability of that defense, such a charge is obligatory and the defendant is entitled, as a matter of law, to [an] . . . instruction [on self-defense]. . . . Before an instruction is warranted, however, [a] defendant bears the initial burden of producing sufficient evidence to inject self-defense into the case. . . . To meet that burden, the evidence adduced at trial, whether by the state or the defense, must be sufficient [if credited by the jury] to raise a reasonable doubt in the mind of a rational juror as to whether the defendant acted in self-defense. . . . This burden is slight, however, and may be satisfied if there is any foundation in the evidence [for the defendant's claim], no matter how weak or incredible . . . ." (Internal quotation marks omitted.) *State* v. *Best*, 168 Conn. App. 675, 686, 146 A.3d 1020 (2016), cert. denied, 325 Conn. 908, 158 A.3d 319 (2017). "However low the evidentiary standard may be, it is nonetheless a threshold the defendant must cross. The defendant may not ask the court to boost him over the sill upon speculation and conjecture." (Internal quotation marks omitted.) *State* v. *Montanez*, 277 Conn. 735, 750, 894 A.2d 928 (2006).

To raise a claim of self-defense sufficiently to warant an instruction, "a defendant must introduce evidence that the defendant reasonably believed his adversary's unlawful violence to be imminent or immediate. . . . Under General Statutes § 53a-19 (a), a person can, under appropriate circumstances, justifiably exercise repeated deadly force if he reasonably believes both that his attacker is using or about to use deadly force against him and that deadly force is necessary to repel such attack. . . . The Connecticut test for the degree of force in self-defense is a subjective-objective one. The jury must view the situation from the perspective of the defendant. Section 53a-19 (a) requires, however, that the defendant's belief ultimately must be found to

be reasonable. . . . Moreover, the evidence must be such that the jury must not have to resort to speculation in order to find that the defendant acted in justifiable self-defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Lewis*, 245 Conn. 779, 811, 717 A.2d 1140 (1998).[6]

The following additional facts are relevant to our analysis. At the defendant's trial, Quinn provided the following testimony. Quinn, Valentino, Butler, and Krueger arrived at 434 Indian Avenue in Bridgeport to serve a capias warrant and drove to the residence in two state vehicles. Quinn and Valentino were unarmed and wore their state marshal uniforms with identifiable markers on the sleeves and back of their shirts. Quinn and Valentino went to the front door of the residence, while Butler and Krueger went to the rear of the residence. After knocking on the door, a young child answered the door. The marshals asked for an adult and told the child that they were seeking the defendant. Lyman Anderson arrived at the door and the marshals informed him that he did not match the picture attached to the warrant paperwork that they were carrying. Shortly thereafter, the defendant arrived at the front door and provided a false name to the marshals after he was informed that they had a warrant for his arrest. After providing a false name, the defendant took a step back and pulled out a firearm. Valentino yelled "[g]un" and both marshals immediately retreated down the stairs and ran for cover in opposite directions. Quinn testified that neither he

[6] In Connecticut, self-defense is codified in § 53a-19. General Statutes § 53a-19 (a) provides: "Except as provided in subsections (b) and (c) of this section, a person is justified in using reasonable physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm."

nor Valentino attempted to grab the defendant or take him into custody because the young child was back at the door. As Quinn was running for cover, he heard multiple gunshots and felt a bullet hit his left foot. As Quinn sought cover, he realized that he was also shot in his right forearm.

Valentino provided the following testimony. Valentino arrived at the 434 Indian Avenue residence to serve a capias warrant along with Quinn, Butler, and Krueger. Valentino and Quinn wore their state marshal uniforms with identifiable markers and were unarmed. In particular, Valentino wore a hat that identified him as a marshal. Valentino also wore a utility belt with handcuffs, Mace, gloves, and a baton. After knocking on the front door of the residence, a young child answered the door. The marshals informed the child that they were seeking the defendant, and the young child returned with Lyman Anderson. Valentino, who had the capias warrant and a photograph of the defendant, told Lyman Anderson that he was seeking the defendant. Valentino testified that the young child remained at the door during the entire encounter. Valentino stated that Lyman Anderson and the defendant arrived at the front door. Valentino informed the defendant that he was looking for Lonnie Anderson and the defendant provided a false name in response. Valentino testified that he informed the defendant that he identified him as the subject of the capias warrant, informed him that he missed a court date, and stated that the marshals intended to take him into custody. Valentino testified that the defendant denied that he was Lonnie Anderson, Valentino showed him the photograph, and then the defendant reached back and pulled out a firearm. Upon observing the defendant pull out a weapon, Valentino yelled "[g]un" and slammed the door as he retreated away from the stairs. Valentino and Quinn ran in opposite directions away from the door. As Valentino was running away from

the door, he heard gunshots in his direction. While running away from the defendant's residence, Valentino's marshal's hat blew off. Valentino sought cover behind a van and observed the defendant shooting at Quinn. On cross-examination, defense counsel asked Valentino whether he had told the Bridgeport police that "everything kind of hit the fan when . . . Quinn went to grab [the defendant]." Valentino denied that he provided that statement. Defense counsel showed Valentino a document, which was marked for identification purposes only, to refresh Valentino's recollection about the statement that he provided to the Bridgeport police. Valentino responded that he could not recall providing the statement.

Jones, who arrived on the scene after the shooting and assisted in apprehending the defendant, testified on direct examination that he drove to the scene after receiving a report on his radio of an officer being shot. Upon arriving at the scene, he saw an injured male dressed as a civilian standing near a tree. He testified that he did not recall what clothes the male was wearing. He noticed that the male was bleeding. He did not spend any time with the injured man. Jones further testified: "Everything right now seems—seems a blur as to the particulars. . . . Because I was focused on possibly another threat coming from inside that location." On cross-examination, Jones testified that the injured male was not a uniformed officer. On redirect examination, Jones testified that at no point while on the scene of the shooting did he see any state marshals.

After viewing the facts in the light most favorable to the defendant, we conclude that the trial court properly declined to instruct the jury on self-defense. The evidence presented at trial was undisputed that, *at the time of the shooting*, the marshals were readily identifiable to the defendant and that the marshals were in flight at the time the defendant fired his gun.

As to the defendant identifying Quinn and Valentino as marshals, Lyman Anderson testified that he identified the individuals at the door as marshals, one of the marshals was carrying papers, and, at one point, he spoke to the marshals alone because he believed that the marshals were there for him due to his recent release from incarceration. Furthermore, he testified that the defendant told him, after the defendant fired his gun, that he did not want to step outside because he was concerned that *the marshals* would fire back at him. Moreover, Quinn and Valentino both testified that they wore their state marshal uniforms with identifiable markers on the sleeves and back of their shirts, and Valentino wore a utility belt with handcuffs, Mace, gloves, and a baton as the marshals went to the front of the residence and knocked on the door. Valentino also testified that he was wearing a marshal's hat and Lyman Anderson testified that at least one marshal was wearing such a hat. Quinn and Valentino both testified that the defendant arrived at the front door and provided a false name to the marshals after he was informed that they had a warrant for his arrest. Valentino testified that the defendant denied that he was Lonnie Anderson, Valentino presented the photograph of the defendant, and then the defendant reached back and pulled out a firearm.

In response, the defendant relies on Jones' testimony that the injured man he saw was in civilian clothes and that he never saw state marshals at the scene. There are several problems with the defendant's reliance on Jones' testimony. First, Jones did not arrive on the scene until after the shooting occurred. Thus, he could not testify as to what Quinn and Valentino were wearing when they confronted the defendant before the defendant started shooting. For example, Valentino testified that the marshal's hat he was wearing while standing at the defendant's apartment door blew off when he

fled after the defendant pulled his gun. Second, Jones testified that he was responding to a report of an officer shooting, that the injured male was not a uniformed officer, and that he did not pay attention to what the male was wearing. Third, the defendant, at trial, did not rely on Jones' testimony as a basis for his self-defense instruction.

As to whether the defendant was in imminent danger when he fired his gun, Quinn and Valentino both testified that when the defendant pulled out the firearm, they immediately retreated away from the defendant, ran down the stairs, and fled in opposite directions. Quinn and Valentino both testified that they heard multiple gunshots as they ran for cover. Additionally, Valentino testified that, as he sought cover behind a van, he observed the defendant shooting at Quinn. The defendant failed to present any evidence to the contrary.

Thus, the evidence adduced at trial indicates that the marshals immediately retreated from the defendant and away from the front door of the residence when the defendant pulled out his firearm and also indicates that the marshals were in flight, away from the defendant, at the time the defendant fired his gun. The fact that Valentino and Quinn were identifiable to the defendant as state marshals and, more importantly, indisputably were in flight away from the defendant when he fired the shots that were the basis for his conviction distinguishes this case from the following cases on which the defendant relies.

In *State* v. *Deptula*, 31 Conn. App. 140, 142, 623 A.2d 525 (1993), appeal dismissed, 228 Conn. 852, 635 A.2d 812 (1994), this court addressed the issue of whether the trial court improperly failed to instruct the jury on self-defense. At the defendant's trial, the state had relied on the defendant's statement to the police in which the defendant stated that his wife had struck him before

he physically attacked his wife. Id., 148. Neither the defendant nor the victim testified at the criminal proceeding. Id. Therefore, we concluded that the trial court improperly refused to instruct the jury on the issue of self-defense because the evidence suggested that the victim was the initial aggressor and there was no duty for the defendant to retreat because he and his wife were in their apartment. Id.

Similarly, in *State* v. *Darrow*, 107 Conn. App. 144, 145, 944 A.2d 984 (2008), this court addressed the defendant's claim that the trial court improperly declined to instruct the jury on self-defense. The evidence adduced at the defendant's trial included two written confessions and one oral confession from the defendant. Id., 148. In the oral confession, the defendant stated that he caught the victim stealing items from his house and, in the process of catching the victim in the act, the victim was killed in the basement as the victim and the defendant engaged in a physical altercation. Id., 150. The state's chief medical examiner testified that it might have been possible that the victim sustained his mortal injury when his head struck a hard piece of wood on the basement's cement floor. Id. On appeal, this court concluded that the evidence that the defendant killed the victim in his house during the altercation was sufficient to entitle the defendant to a self-defense instruction as a matter of law. Id., 151.

In *State* v. *Best*, supra, 168 Conn. App. 677–79, the underlying criminal proceeding arose out of the defendant's shooting of a mother, her daughter and her daughter's acquaintance. On appeal, the defendant claimed that the trial court improperly failed to provide the jury an instruction on self-defense with regard to certain charges. Id., 676–77. This court concluded that the defendant was entitled to an instruction on self-defense as to the shooting of the daughter and her acquaintance because they did not have permission to

enter the defendant's apartment, pounded on the defendant's door with an object, threatened to harm the defendant, and warned the defendant that they " 'had backup.' " Id., 686–87. This court noted that the defendant was faced with an unknown number of intruders who were pounding on his door and leveling threats. Id. This court also concluded that the defendant was not entitled to a jury instruction on self-defense for his conduct toward the mother because, although there was no dispute that the defendant and the mother were arguing during the events leading up to the shooting, none of the evidence adduced at trial indicated that she posed a threat to the defendant. Id., 688.

In each of the cases relied on by the defendant, sufficient evidence was presented that could have raised a reasonable doubt in the mind of a rational juror as to whether the defendant acted in self-defense. In contrast, the evidence presented at trial, in the present case, was that the marshals, who were in the process of trying to take the defendant into lawful custody, immediately retreated from the defendant when he pulled out his firearm and were in flight at the time the defendant fired his gun at them. There simply was no basis for the court to give a self-defense charge when the only evidence presented to the jury was that the marshals were fleeing from the defendant when the defendant fired his firearm. See, e.g., *State* v. *Erickson*, 297 Conn. 164, 197, 997 A.2d 480 (2010); *State* v. *Lewis*, 220 Conn. 602, 619–20, 600 A.2d 1330 (1991); *Commonwealth* v. *Miranda*, 484 Mass. 799, 811–13, 146 N.E.3d 435 (2020); *State* v. *Gonzalez*, 143 N.M. 25, 30, 172 P.3d 162 (2007); *State* v. *Niewiadowski*, 120 N.M. 361, 366, 901 P.2d 779 (App.), cert. denied, 120 N.M. 184, 899 P.2d 1138 (1995). Put another way, in light of the undisputed evidence that Valentino and Quinn were fleeing when the defendant shot at them, there was insufficient evidence "to raise a reasonable doubt in the mind of a rational juror

as to whether the defendant acted in self-defense." (Internal quotation marks omitted.) *State* v. *Best*, supra, 168 Conn. App. 686. On the basis of the evidence presented at trial, the jury reasonably could not have found, that at the time the defendant fired the gun at the marshals, it was objectively reasonable for the defendant to have believed both that the marshals were about to use deadly physical force or inflict great bodily harm and that it was necessary for him to shoot at the marshals to prevent such conduct. The court, therefore, did not err in refusing to give the defendant's proposed self-defense instruction.

The judgment is affirmed.

In this opinion the other judges concurred.

NATIONSTAR MORTGAGE, LLC *v.* ROBERT GABRIEL ET AL. (AC 42747)

Moll, Suarez and DiPentima, Js.

Syllabus

The plaintiff mortgage company brought a summary process action against the defendants, tenants of residential property, seeking immediate possession of the premises on the ground that the defendants' rights to occupy had terminated. According to the return of service, each defendant was served with a copy of the notice to quit by abode service. Following the defendants' failure to plead, the trial court granted the plaintiff's motion for default and rendered judgment of possession in favor of the plaintiff. The defendants thereafter filed a motion to dismiss for lack of subject matter jurisdiction, claiming that the notice to quit was not served on all of the designated occupants of the property, as required by statute (§ 47a-23). The defendants filed an affidavit of one of the occupants in support thereof and also filed a motion to open the judgment of possession. The trial court denied both of the defendants' motions. On appeal, the defendants claim that the trial court erred in denying their request for an evidentiary hearing despite their having raised a disputed issue of fact and that the absence of an evidentiary hearing led to clearly erroneous findings by the trial court. *Held* that the trial court properly denied the defendants' motion to dismiss, as

there was ample evidence to support the court's finding that the defendants were served with the notice to quit; the marshal's return of service was prima facie evidence that each defendant had been served by abode service, the affidavit submitted by the defendants, which was the only evidence submitted in support of their motion, did nothing to create a genuine dispute as to any pertinent jurisdictional fact, as it merely acknowledged that the affiant was serviced and made no statement based on the personal knowledge that the other defendants were not served, and there was no affidavit or other documentation from any other defendant to demonstrate that he or she had not been served in any manner, and, therefore, the court was not required to hold an evidentiary hearing before ruling on the motion to dismiss.

Argued September 10—officially released October 20, 2020

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Stamford-Norwalk, Housing Session at Norwalk, and tried to the court, *Spader, J.*; judgment for the plaintiff, from which the defendants appealed to this court. *Affirmed.*

Harold R. Burke, for the appellants (defendants).

Peter A. Ventre, with whom, on the brief, was *Crystal L. Cooke*, for the appellee (plaintiff).

Opinion

MOLL, J. In this summary process action, the defendants, Robert Gabriel, Pamela P. Gabriel, Elizabeth Gabriel, John Doe I, John Doe II, Jane Doe I, and Jane Doe II, appeal from the judgment of possession rendered by the trial court in favor of the plaintiff, Nationstar Mortgage, LLC, as well as from the court's denials of their postjudgment motions to open and to dismiss for lack of subject matter jurisdiction. On appeal, the defendants limit their challenge to the court's denial of their motion to dismiss. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. In February, 2019,

the plaintiff brought the underlying summary process action to evict the defendants from residential real property located at 21 Richmond Hill Road in Greenwich (property), after several years of protracted foreclosure proceedings.[1] The notice to quit, dated January 16, 2019, directed the defendants to quit possession or occupancy of the property on or before January 30, 2019 (notice to quit), on the ground that they originally had the right or privilege to occupy the property but that such right or privilege had terminated. According to the return of service completed by the state marshal in connection with the notice to quit (return of service), each defendant was served on January 21, 2019, with a copy thereof by way of abode service at the address of the subject property and "afterwards, in Bridgeport, on the 21st of January, 2019" (this latter language did not appear in the return of service with respect to Jane Doe II). The defendants, through their attorney, filed an appearance on February 25, 2019, but failed to file an answer or other responsive pleading. On March 14, 2019, the plaintiff filed a motion for default for failure to plead and for judgment of possession. See General Statutes § 47a-26a.[2] On March 20, 2019, following the defendants' failure to plead within three days,[3] the trial court granted

[1] In a previous foreclosure action filed in 2010 against Robert Gabriel and Pamela P. Gabriel, a judgment of foreclosure entered in favor of the plaintiff in 2013, and in October, 2018, the plaintiff obtained title to the subject property. See *Aurora Loan Services, LLC* v. *Gabriel*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-10-6004581-S (April 24, 2018).

[2] General Statutes § 47a-26a provides: "If the defendant appears but does not plead within two days after the return day, the complainant may file a motion for judgment for failure to plead, served upon the defendant in the manner provided in the rules adopted by the judges of the Superior Court for the service of pleadings. If the defendant fails to plead within three days after receipt of such motion by the clerk, the court shall forthwith enter judgment that the complainant recover possession or occupancy with his costs."

[3] Practice Book § 17-30 (b) provides: "If the defendant in a summary process action appears but does not plead within two days after the return day or within three days after the filing of the preceding pleading or motion, the plaintiff may file a motion for judgment for failure to plead, served in

the plaintiff's motion for default and rendered a judgment of possession in favor of the plaintiff.

On March 25, 2019, the defendants filed a postjudgment motion to dismiss for lack of subject matter jurisdiction, claiming that the notice to quit was not served on all designated occupants of the property, as required by General Statutes § 47a-23 (a) and (c).[4] In support of their motion to dismiss, the defendants submitted the affidavit of Stephen Gabriel,[5] in which he acknowledged residing at the property and accepting service on January 21, 2019, of one copy of the notice to quit. Additionally, on March 25, 2019, the defendants filed a motion to open the judgment of possession predicated on the jurisdictional claim raised in their motion to dismiss. On March 27, 2019, the trial court denied both of the defendants' motions without a hearing and issued an accompanying memorandum of decision. This appeal followed. Additional facts will be set forth as necessary.

The defendants claim on appeal that (1) the trial court improperly denied their request for an evidentiary hearing despite their having raised a disputed issue of fact and (2) the absence of an evidentiary hearing led

accordance with Sections 10-12 through 10-17. If the defendant fails to plead within three days after receipt of such motion by the clerk, the judicial authority shall forthwith enter judgment that the plaintiff recover possession or occupancy with costs."

[4] General Statutes § 47a-23 provides in relevant part: "(a) When the owner . . . desires to obtain possession or occupancy of any land or building . . . and . . . (3) when one originally had the right or privilege to occupy such premises but such right or privilege has terminated . . . such owner . . . shall give notice to each . . . occupant to quit possession or occupancy of such land, building, apartment or dwelling unit . . . before the time specified in the notice for the lessee or occupant to quit possession or occupancy.

* * *

"(c) A copy of such notice shall be delivered to each . . . occupant or left at such . . . occupant's place of residence . . . . Delivery of such notice may be made on any day of the week. . . ."

[5] Stephen Gabriel is one of the Doe defendants.

to clearly erroneous factual findings by the trial court.[6] These arguments, which we address together, are unavailing.[7]

"Our standard of review of a trial court's findings of fact and conclusions of law in connection with a motion to dismiss is well settled. A finding of fact will not be disturbed unless it is clearly erroneous. . . . [If] the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts. . . . Thus, our review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *JPMorgan Chase Bank National Assn.* v. *Simoulidis*, 161 Conn. App. 133, 135–36, 126 A.3d 1098 (2015), cert. denied, 320 Conn. 913, 130 A.3d 266 (2016).

"Service of a valid notice to quit . . . is a condition precedent to a summary process action under § 47a-23 that implicates the trial court's subject matter jurisdiction over that action." (Internal quotation marks omitted.) *Lyons* v. *Citron*, 182 Conn. App. 725, 731, 191 A.3d 239 (2018). Service of a notice to quit must comply with § 47a-23 (c), which provides in relevant part: "A copy of such notice shall be delivered to each lessee or occupant or left at such lessee's or occupant's place of residence . . . ." "The failure to comply with the statutory

[6] The defendants do not challenge on appeal the contents of the notice to quit, the granting of the motion for default for failure to plead, or the entry of judgment of possession. Their sole claim relates to the denial of their motion to dismiss on the ground of lack of service of the notice to quit on all defendants.

[7] We pause to note that, although the defendants failed to analyze in their appellate brief the court's denial of their motion to open the judgment, we nonetheless address the merits of their claim that the trial court improperly denied their motion to dismiss. We do so because the motions, which were based on nearly identical grounds and sought the same basic relief, were inextricably intertwined and, under the circumstances of the present case, to dispose of the defendants' appeal on the basis of an overly technical application of mootness principles would exalt form over substance.

requirements deprives a court of jurisdiction to hear the summary process action." *Bridgeport* v. *Barbour-Daniel Electronics, Inc.*, 16 Conn. App. 574, 582, 548 A.2d 744, cert. denied, 209 Conn. 826, 552 A.2d 432 (1988).

"Due process does not mandate full evidentiary hearings on all matters, and not all situations calling for procedural safeguards call for the same kind of procedure. . . . So long as the procedure afforded adequately protects the individual interests at stake, there is no reason to impose substantially greater burdens . . . under the guise of due process." (Internal quotation marks omitted.) *Property Asset Management, Inc.* v. *Lazarte*, 163 Conn. App. 737, 748, 138 A.3d 290 (2016). "[If] 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." *Conboy* v. *State*, 292 Conn. 642, 652, 974 A.2d 669 (2009); see also *Property Asset Management, Inc.* v. *Lazarte*, supra, 749 ("[a] court is required to hold an evidentiary hearing before adjudicating a motion to dismiss only if there is a genuine dispute as to some pertinent jurisdictional fact").

In the present case, there was no genuine dispute as to any jurisdictional fact necessary to find that the defendants had been served with the notice to quit. The record before the court revealed that all defendants had been served. First, the marshal's return of service was prima facie evidence that each defendant had been served, at a minimum, by abode service. See *Jenkins* v. *Bishop Apartments, Inc.*, 144 Conn. 389, 390, 132 A.2d 573 (1957) ("[t]he return is prima facie evidence of the facts stated therein"). Second, as a result of the entry of default against the defendants for their failure to plead, all material facts in the complaint were deemed admitted. See *Catalina* v. *Nicolelli*, 90 Conn. App. 219,

221, 876 A.2d 588 (2005). Such allegations included the following: "On January 21, 2019, the plaintiff caused a notice to be duly served on the defendants to quit possession of the premises on or before January 30, 2019, as required by law. The original notice to quit is attached hereto and marked [as] exhibit A." As the trial court correctly observed, the affidavit of Stephen Gabriel, which was the only evidence that the defendants submitted in support of their motion to dismiss, did nothing to create a genuine dispute as to any pertinent jurisdictional fact. The affidavit merely acknowledges that Stephen Gabriel was in fact served and makes no statement based on any personal knowledge that the other defendants were not served. The averment in the affidavit stating that Stephen Gabriel received only one copy has little, if any, probative value, as only one copy of the notice to quit was necessary to effect service on him, and there was no representation made in the marshal's return of service that seven copies were left with Stephen Gabriel. Finally, and perhaps most notably, there was no affidavit or other documentation from any defendant to demonstrate that he or she had not been served in any manner. In light of the foregoing, the court was not required to hold an evidentiary hearing before ruling on the defendants' motion to dismiss. Because there was ample evidence to support the court's finding that the defendants were served with the notice to quit, the court properly denied the motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.