STATE OF CONNECTICUT *v.* JAMES MITCHELL (AC 41897)

DiPentima, C. J., and Elgo and Moll, Js.

Syllabus

The defendant, who previously had been convicted of the crimes of attempt to commit murder, conspiracy to commit murder, kidnapping in the first degree, conspiracy to commit kidnapping in the first degree, sexual assault in the first degree, conspiracy to commit sexual assault in the first degree, assault in the first degree, conspiracy to commit assault in the first degree and criminal possession of a firearm, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. The defendant claimed that the court improperly concluded that his convictions for sexual assault in the first degree and assault in the first degree, both predicated on liability under *Pinkerton* v. *United States* (328 U.S. 640), did not violate the prohibition against double jeopardy when considered in light of his conviction for conspiracy to commit kidnapping in the first degree. *Held* that the trial court properly denied the defendant's motion to correct an illegal sentence, as the double jeopardy claim advanced by the defendant was untenable: each of the crimes of sexual assault in the first degree, assault in the first degree and conspiracy to commit kidnapping in the first degree plainly required proof of a fact that the others did not, and they were not the same offense under the test enunciated in *Blockburger* v. *United States* (284 U.S. 299); moreover, this court could not conclude that the statutes in question evinced a clear legislative intent to prohibit a defendant from being punished for the offenses of conspiracy to commit kidnapping in the first degree, sexual assault in the first degree, and assault in the first degree when they arise from the same transaction, as the burden of demonstrating a contrary legislative intent rested with the defendant, and he made no attempt to demonstrate such contrary legislative intent; furthermore, like the defendants in *Pinkerton*, the defendant's convictions and subsequent punishments for the conspiracy count and the substantive counts that were predicated on *Pinkerton* liability did not violate the double jeopardy clause, as the commission of a substantive offense and a conspiracy to commit that offense are separate and distinct offenses, and such claims have been rejected by both federal courts and by our Supreme Court in *State* v. *Walton* (227 Conn. 32).

Argued October 9, 2019—officially released February 11, 2020

Procedural History

Substitute information charging the defendant with the crimes of attempt to commit murder, conspiracy to

commit murder, kidnapping in the first degree, conspiracy to commit kidnapping in the first degree, sexual assault in the first degree, conspiracy to commit sexual assault in the first degree, assault in the first degree, conspiracy to commit assault in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Mullarkey, J.*; verdict and judgment of guilty, from which the defendant appealed to this court, which affirmed the judgment; thereafter, the court, *Hon. Edward J. Mullarkey*, judge trial referee, granted in part the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

James E. Mortimer, assigned counsel, for the appellant (defendant).

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

Opinion

ELGO, J. The defendant, James Mitchell, appeals from the judgment of the trial court denying in part his motion to correct an illegal sentence. On appeal, the defendant argues that the court improperly rejected his claim that his conviction for two crimes predicated on *Pinkerton* liability[1] violates the constitutional prohibition against double jeopardy. We affirm the judgment of the trial court.

[1] See *Pinkerton* v. *United States*, 328 U.S. 640, 647–48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946); see also *State* v. *Walton*, 227 Conn. 32, 45–46, 630 A.2d 990 (1993) (adopting *Pinkerton* doctrine as matter of state law). Commonly referred to as a theory of vicarious liability; see, e.g., *State* v. *Apodaca*, 303 Conn. 378, 391, 33 A.3d 224 (2012); the *Pinkerton* doctrine holds that "a conspirator may be held liable for criminal offenses committed by a coconspirator that are within the scope of the conspiracy, are in furtherance of it, and are reasonably foreseeable as a necessary or natural consequence of the conspiracy. . . . The rationale for the principle is that, when the conspirator [has] played a necessary part in setting in motion a discrete

The facts underlying the defendant's criminal conviction were set forth in this court's decision on his direct appeal. "On August 23, 2003, following an evening at a nightclub, the victim was dropped off at a friend's house in East Hartford. Wanting to return home, and with her residence too distant to walk, the victim called the defendant for a ride. The victim chose to call the defendant because she knew that Denasha Sanders, the mother of one of the defendant's children, had lived in the same building as the victim and that the defendant was frequently in the vicinity. The defendant and the victim's brother had had a prior confrontation concerning the fact that the victim's brother had dated Sanders. Shortly before August 23, the victim's brother and Sanders had moved to North Carolina with the child of Sanders and the defendant.

"The defendant arrived driving a gold Nissan Altima accompanied by another man, unknown to the victim at the time, but later identified as Travis Hampton. The victim agreed to go with the defendant and Hampton to downtown Hartford to get something to eat. Upon leaving a restaurant, the defendant became violent with the victim, striking her with his cell phone and demanding to know the location of the victim's brother. Out of fear that the defendant would harm her, the victim lied to the defendant and told him that her brother was at her grandfather's house. The victim attempted to leave the car, but the defendant pulled her by the hair and locked the doors. During this time, Hampton remained in the backseat of the vehicle.

"The defendant subsequently determined that the victim's brother was not at her grandfather's house. He drove the victim and Hampton to his mother's house

course of criminal conduct, he should be held responsible, within appropriate limits, for the crimes committed as a natural and probable result of that course of conduct." (Internal quotation marks omitted.) *State* v. *Coward*, 292 Conn. 296, 307–308, 972 A.2d 691 (2009).

in Hartford and ordered the victim out of the car. The victim briefly complied and then returned to the vehicle while the defendant and Hampton entered the house. When the defendant and Hampton returned, the three proceeded to leave the area by car. The defendant apologized to the victim for hitting her and offered her marijuana, which she accepted. Instead of driving the victim home, however, the defendant drove to Market Street in Hartford and parked his vehicle. The defendant told the victim he wanted to have sex with her and proposed that they go to a hotel or to Sanders' house.

"The victim refused and got out of the car, intending to walk home. The defendant produced a shotgun, which he gave to Hampton, who pointed the weapon at the victim's face. The defendant and Hampton told the victim to remove her pants. The victim testified that the defendant raped her vaginally from behind. When the defendant was finished, he forced the victim to perform fellatio on Hampton. The victim complied briefly, and Hampton proceeded to rape her vaginally, while the defendant regained and held the shotgun. The victim grabbed her pants and yelled at the defendant to let her leave. The defendant told the victim she could get into a nearby dumpster or run. As the victim attempted to run, the defendant shot her in the side of the stomach. The victim continued her attempt to run away, followed by Hampton, who now had the shotgun. The defendant pursued the victim in the car and blocked her path. Hampton shot the victim again. He and the defendant then left the scene. Shortly thereafter, the defendant and Hampton returned briefly and then left the area again. The victim dragged herself to the street, where she was found by a passing driver. The police and paramedics were summoned, and the victim was taken to Hartford Hospital for treatment." *State* v. *Mitchell*, 110 Conn. App. 305, 308–10, 955 A.2d 84, cert. denied, 289 Conn. 946, 959 A.2d 1012 (2008).

The defendant subsequently was arrested and charged with attempt to commit murder as an accessory in violation of General Statutes §§ 53a-8, 53a-49 (a) and 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a (a), kidnapping in the first degree in violation of General Statutes §§ 53a-8 and 53a-92 (a) (2) (A), conspiracy to commit kidnapping in the first degree in violation of §§ 53a-48 and 53a-92 (a) (2) (A), sexual assault in the first degree in violation of General Statutes §§ 53a-8 and 53a-70 (a) (1), conspiracy to commit sexual assault in the first degree in violation of §§ 53a-48 and 53a-70 (a) (1), assault in the first degree in violation of General Statutes §§ 53a-8 and 53a-59 (a) (5), conspiracy to commit assault in the first degree in violation of §§ 53a-48 (a) and 53a-59 (a) (5), and criminal possession of a firearm in violation of General Statutes (Rev. to 2003) § 53a-217 (a) (1). Following a trial, the jury found the defendant guilty of all counts.[2]

At sentencing, the court vacated the defendant's sentences of conspiracy to commit murder, conspiracy to commit sexual assault in the first degree, and conspiracy to commit assault in the first degree. The court, at that time, explained that "[*s*]*ince the conspiracies merge*, [the] sentences [for those three offenses] are vacated to be renewed only if necessary on a resentencing should the conspiracy to [commit] kidnapping be found not to be a valid conviction." (Emphasis added.) The court then sentenced the defendant to a total effective term of fifty-seven years of incarceration.[3] From that judgment, the petitioner unsuccessfully

[2] In returning its verdict, the jury completed a special verdict form. That form indicates that the jury found the defendant guilty of both sexual assault in the first degree and assault in the first degree "by way of *Pinkerton* vicarious liability."

[3] The court sentenced the defendant to a term of twenty years on the count of conspiracy to commit kidnapping in the first degree count, which sentence was to run concurrently with a twenty-five year sentence on the count of kidnapping in the first degree. The court imposed a sentence of

appealed to this court. See *State* v. *Mitchell*, supra, 110 Conn. App. 305.

In 2014, the defendant filed a motion to correct an illegal sentence pursuant to Practice Book § 43-22.[4] The defendant subsequently was appointed counsel, who filed a memorandum of law in support of the defendant's motion. At a hearing held on August 29, 2016, the defendant clarified the twofold nature of his motion to correct. First, the defendant asserted that the conspiracy convictions that "were ordered merged" at sentencing "should have been vacated." Second, the defendant alleged that his convictions for sexual assault in the first degree and assault in the first degree on the basis of *Pinkerton* liability; see footnote 2 of this opinion; violate the double jeopardy prohibition against multiple punishments in light of his conviction for conspiracy to commit kidnapping in the first degree.

Following the submission of memoranda of law by the parties,[5] the court granted in part the defendant's

ten years of incarceration on the count of sexual assault in the first degree and two years of incarceration on the count of criminal possession of a firearm, both of which were to run consecutive to the twenty-five year sentence for kidnapping in the first degree. The court also sentenced the defendant to twenty year terms of incarceration on both the count of attempt to commit murder and the count of assault in the first degree, which the court ordered to run concurrently with each other, but consecutively to the defendant's other sentences.

[4] Practice Book § 43-22 provides that "[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

[5] Apart from the September 30, 2016 memorandum of law filed by his defense counsel, the defendant, on December 22, 2016, filed a document he prepared, titled "Defendant's Amended Memorandum of Law in Support of Motion to Correct Illegal Sentence." In that filing, the defendant alleged that Hampton, his sole coconspirator, had been acquitted in a separate criminal proceeding on the charge of sexual assault in the first degree. In light of that development, the defendant argued that his own conviction for sexual assault in the first degree pursuant to the *Pinkerton* doctrine was "invalid and must be vacated." After hearing further argument from the parties at a hearing held on September 18, 2017, the court summarily rejected

motion to correct. The court reviewed the transcript of the November 1, 2005 sentencing proceeding and noted that it had ordered the defendant's convictions for conspiracy to commit murder, conspiracy to commit sexual assault in the first degree, and conspiracy to commit assault in the first degree to be vacated in light of the fact that they had merged with the conviction of conspiracy to commit kidnapping in the first degree. In granting in part the defendant's motion to correct, the court vacated its November 1, 2005 order and, instead, ordered that the defendant's convictions for conspiracy to commit murder, conspiracy to commit sexual assault in the first degree, and conspiracy to commit assault in the first degree "are simply vacated." See *State* v. *Polanco*, 308 Conn. 242, 248, 61 A.3d 1084 (2013). At the same time, the court rejected the defendant's double jeopardy challenge and, accordingly, denied in part the motion to correct. From that judgment, the defendant now appeals.

On appeal, the defendant contends that the court improperly concluded that his convictions for sexual assault in the first degree and assault in the first degree, both of which were predicated on *Pinkerton* liability, do not violate the prohibition against double jeopardy when considered in light of his conviction for conspiracy to commit kidnapping in the first degree. On our plenary review of that question of law; see *State* v. *Burnell*, 290 Conn. 634, 642, 966 A.2d 168 (2009); we disagree.

The double jeopardy clause of the fifth amendment to the United States constitution provides that no person shall "be subject for the same offense to be twice

the defendant's claim. In this appeal, the defendant has not briefed any claim of error with respect to that determination. See *Commissioner* v. *Youth Challenge of Greater Hartford, Inc.*, 219 Conn. 657, 659 n.2, 594 A.2d 958 (1991) (deeming claims that were not briefed on appeal to be abandoned).

put in jeopardy of life or limb . . . .”[6] That constitutional provision is applicable to the states through the due process clause of the fourteenth amendment. *Benton* v. *Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). An alleged double jeopardy violation is a proper basis for a motion to correct an illegal sentence. See *State* v. *Wade*, 178 Conn. App. 459, 466, 175 A.3d 1284 (2017), cert. denied, 327 Conn. 1002, 176 A.3d 1194 (2018).

As the United States Supreme Court has observed, the double jeopardy clause has three functions: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. See *Brown* v. *Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). The third function is at issue in this appeal.

In the multiple punishments context, the interest protected by the double jeopardy clause “is limited to ensuring that the total punishment did not exceed that *authorized by the legislature*. . . . The purpose is to ensure that sentencing courts do not exceed, by the

[6] We recognize that the defendant also invoked the protections of the Connecticut constitution in his motion to correct. Unlike its federal counterpart, our state constitution does not contain an explicit double jeopardy provision. Our Supreme Court nonetheless has held that the due process guarantees found in article first, § 8, of the Connecticut constitution embody the protection afforded under the United States constitution. See *State* v. *Michael J.*, 274 Conn. 321, 350–51, 875 A.2d 510 (2005). At the same time, we note that “this court and our Supreme Court have held that with respect to the protection against double jeopardy, the state constitution does not afford greater protection than that afforded by its federal counterpart.” *State* v. *Hearl*, 182 Conn. App. 237, 271 n.28, 190 A.3d 42, cert. denied, 330 Conn. 903, 192 A.3d 425 (2018). On appeal, the defendant has not provided this court with an independent state constitutional analysis in accordance with *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), rendering any claim with respect to our state constitution abandoned. See *State* v. *Bennett*, 324 Conn. 744, 748 n.1, 155 A.3d 188 (2017).

device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." (Citations omitted; emphasis added; internal quotation marks omitted.) *Jones* v. *Thomas*, 491 U.S. 376, 381, 109 S. Ct. 2522, 105 L. Ed. 2d 322 (1989). Accordingly, the question of whether a court constitutionally may impose multiple punishments is resolved by "determining what punishments the [l]egislative [b]ranch has authorized." *Whalen* v. *United States*, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

That determination involves a two step process. "First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Internal quotation marks omitted.) *State* v. *Alvaro F.*, 291 Conn. 1, 6, 966 A.2d 712, cert. denied, 558 U.S. 882, 130 S. Ct. 200, 175 L. Ed. 2d 140 (2009). For purposes of the present analysis, we assume without deciding that the first prong of that analysis is met, as the state alleged in its operative information that the offenses in question were perpetrated at the same time and location.[7] Our focus, therefore, is on whether the defendant's convictions for sexual assault in the first degree and assault in the first degree, which were predicated on *Pinkerton* liability, constitute the same offense as his conviction on the charge of conspiracy to commit kidnapping in the first degree.

To answer that question, we apply the rule of statutory construction enunciated in *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306

[7] With respect to each of the three counts in question, the state alleged in its September 20, 2005 amended information that those offenses all transpired on "August 23, 2003, at approximately 5:30 a.m., in the vicinity of the Citgo Gas Station at 410 Market Street" in Hartford.

(1932), in which the United States Supreme Court explained: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." That test "is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial." (Internal quotation marks omitted.) *State* v. *Bernacki*, 307 Conn. 1, 14, 52 A.3d 605 (2012), cert. denied, 569 U.S. 918, 133 S. Ct. 1804, 185 L. Ed. 2d 811 (2013). "The question to be resolved is whether the . . . offenses charged are actually one." (Internal quotation marks omitted.) *State* v. *Santiago*, 145 Conn. App. 374, 380–81, 74 A.3d 571, cert. denied, 310 Conn. 942, 79 A.3d 893 (2013). As a result, "[t]he issue, though essentially constitutional, becomes one of statutory construction." (Internal quotation marks omitted.) *State* v. *Alvaro F.*, supra, 291 Conn. 7.

With that test in mind, we turn to the three offenses in question. The crime of sexual assault in the first degree, as set forth in § 53a-70 (a) (1), requires proof that the defendant (1) compelled another person to engage in sexual intercourse, (2) used or threatened force in so doing, and (3) reasonably caused the victim to fear physical injury. By contrast, the crime of assault in the first degree contained in § 53a-59 (a) (5) requires proof that (1) the defendant acted with the intent to cause physical injury, (2) the defendant caused physical injury, and (3) that injury occurred due to the discharge of a firearm. Lastly, to prove a conspiracy to commit kidnapping in the first degree in violation of §§ 53a-48 and 53a-92 (a) (2) (A), the state had to prove, inter alia, that the defendant (1) intended to agree or conspire with Hampton, (2) intended to commit the crime of kidnapping in the first degree, and (3) committed an

overt act in furtherance of that conspiracy. See generally *State* v. *Balbuena*, 168 Conn. App. 194, 200, 144 A.3d 540, cert. denied, 323 Conn. 936, 151 A.3d 384 (2016). Each of those three crimes plainly requires proof of a fact that the others do not, and the defendant has not argued otherwise in this appeal. They thus are not the same offense under *Blockburger*.

That conclusion does not end our inquiry, as the *Blockburger* test is simply a tool to divine legislative intent. See *United States* v. *Wylie*, 625 F.2d 1371, 1381 (9th Cir. 1980) ("*Blockburger* is merely a method for ascertaining the congressional intent to impose separate punishment for multiple offenses which arise during the course of a single act or transaction"), cert. denied, 449 U.S. 1080, 101 S. Ct. 863, 66 L. Ed. 2d 804 (1981); *State* v. *Greco*, 216 Conn. 282, 293, 579 A.2d 84 (1990) (*Blockburger* is rule of statutory construction to discern legislative purpose). For that reason, it "is not controlling when the legislative intent is clear from the face of the statute or the legislative history." *Garrett* v. *United States*, 471 U.S. 773, 779, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985). *Blockburger*, then, is best viewed as "a rebuttable presumption of legislative intent" that is overcome "when a contrary [legislative] intent is manifest." (Internal quotation marks omitted.) *State* v. *Wright*, 319 Conn. 684, 690, 127 A.3d 147 (2015).

The burden of demonstrating a contrary legislative intent rests with the defendant. See id. In the present case, the defendant has made no attempt to do so. He has presented no such argument in either his principal or reply brief and has not furnished this court with any legislative history of the statutes in question. Nor does our review of those statutes disclose any evidence of such intent. We therefore cannot conclude that the legislation in question evinces a clear legislative intent to prohibit a defendant from being punished for the offenses of conspiracy to commit kidnapping in the first

degree, sexual assault in the first degree, and assault in the first degree, when they arise from the same transaction. Accordingly, the defendant's claim fails the analysis traditionally employed by our courts in addressing double jeopardy claims.

The defendant nonetheless argues that a different analysis should control when *Pinkerton* liability is at issue. Because that liability is predicated on criminal offenses committed by a coconspirator; see, e.g., *State* v. *Coward*, 292 Conn. 296, 307–308, 972 A.2d 691 (2009); the defendant posits that such liability effectively renders his convictions for sexual assault in the first degree and assault in the first degree tantamount to additional conspiracy convictions in contravention of the double jeopardy rule articulated in *Braverman* v. *United States*, 317 U.S. 49, 63 S. Ct. 99, 87 L. Ed. 23 (1942). He is mistaken.

Unlike the present case, *Braverman* did not involve defendants convicted of both conspiracy and substantive criminal offenses. In *Braverman*, the petitioners were charged with "seven counts, *each charging a conspiracy* to violate a separate and distinct" penal statute. (Emphasis added.) Id., 50. Following a trial, the jury found the petitioners guilty of all seven conspiracy counts. Id., 51. On appeal, the United States Supreme Court held that a single agreement with multiple objectives involving separate substantive offenses is but a single conspiracy that is punishable only once under a single conspiracy statute.[8] Id., 54. At the same time, the court recognized that "[a] conspiracy is not the commission of the crime which it contemplates" and, thus, remains distinguishable from the underlying substantive crime. Id.

[8] In the present case, the trial court adhered to the *Braverman* rule following the jury's verdict at the defendant's criminal trial by setting aside his multiple conspiracy convictions.

The court reiterated that crucial distinction four years later in *Pinkerton* v. *United States*, 328 U.S. 640, 641, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946), which involved a defendant, Daniel Pinkerton, who had been convicted of one conspiracy count and six substantive counts. Although there was "no evidence to show that Daniel participated directly in the commission of the substantive offenses on which his conviction has been sustained . . . there was evidence to show that these substantive offenses were in fact committed by [his brother and coconspirator Walter Pinkerton] in furtherance of the unlawful agreement or conspiracy existing between the brothers." (Footnote omitted.) Id., 645. After the trial court furnished what has come to be known as a *Pinkerton* instruction in its charge; see, e.g., *United States* v. *Diaz*, 176 F.3d 52, 100 (2d Cir. 1999); *State* v. *Brown*, 299 Conn. 640, 657–59, 11 A.3d 663 (2011); "[t]he question was submitted to the jury on the theory that each [defendant] could be found guilty of the substantive offenses, if it was found at the time those offenses were committed [that the] [defendants] were parties to an unlawful conspiracy and the substantive offenses charged were in fact committed in furtherance of it." *Pinkerton* v. *United States*, supra, 645.

Like the defendant in the present case, the defendants in *Pinkerton* relied on *Braverman* for their contention that their convictions of the substantive offenses "became merged in the conspiracy count" and that, as a result, "only a single sentence for conspiracy could be imposed." Id., 642. The United States Supreme Court disagreed, noting that, unlike the case before it, the indictment in *Braverman* "charged no substantive offense." Id. The court then explained that "[i]t has been long and consistently recognized . . . that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of [the legislature] to separate the two and to

affix to each a different penalty is well established." Id., 643. Most significant, the court then held that "the plea of double jeopardy is no defense to a conviction for both offenses." Id. As a result, the defendants' convictions and subsequent punishments for the conspiracy count and the substantive counts that were predicated on *Pinkerton* liability did not violate the double jeopardy clause, and thus were affirmed. Id., 648.

Despite that precedent of this nation's highest court, defendants have continued to assert double jeopardy objections when convicted of both conspiracy and substantive criminal offenses based on *Pinkerton* liability in a single trial, albeit without success. For example, the defendants in one case claimed that "their convictions for conspiracy and for substantive acts taken in furtherance of the conspiracy under a theory of [*Pinkerton* liability] violate the [d]ouble [j]eopardy [c]lause . . . ." *United States* v. *Cerone*, 830 F.2d 938, 944 (8th Cir. 1987), cert. denied, 486 U.S. 1006, 108 S. Ct. 1730, 100 L. Ed. 2d 194 (1988), and cert. denied sub nom. *Aiuppa* v. *United States*, 486 U.S. 1006, 108 S. Ct. 1730, 100 L. Ed. 2d 194 (1988), and cert. denied sub nom. *LaPietra* v. *United States*, 486 U.S. 1006, 108 S. Ct. 1730, 100 L. Ed. 2d 194 (1988), and cert. denied sub nom. *Lombardo* v. *United States*, 486 U.S. 1006, 108 S. Ct. 1730, 100 L. Ed. 2d 194 (1988), and cert. denied sub nom. *Rockman* v. *United States*, 486 U.S. 1006, 108 S. Ct. 1730, 100 L. Ed. 2d 194 (1988). The United States Court of Appeals for the Eighth Circuit disagreed, stating: "It is well settled that no double jeopardy violation occurs when a person is convicted of conspiracy and a substantive overt act of the conspiracy. . . . That the substantive conviction was obtained through a *Pinkerton* instruction is irrelevant." (Citations omitted.) Id. The court continued: "*Pinkerton* itself disposed of their [double jeopardy] argument. The [c]ourt there held that

convictions for conspiracy and substantive acts committed in furtherance of the conspiracy do not violate the [d]ouble [j]eopardy [c]lause, even though the substantive conviction was obtained solely by means of participation in the conspiracy."[9] Id., 945. For that reason, the court concluded that the defendants' double jeopardy claim lacked merit.

The Connecticut Supreme Court too has rejected such a claim. In *State* v. *Walton*, 227 Conn. 32, 34, 630 A.2d 990 (1993), the named defendant appealed from the judgment of conviction of one count of conspiracy to distribute narcotics and one count of possession of narcotics with intent to sell by a person who is not drug-dependent. For purposes of its analysis of the defendant's claim, our Supreme Court expressly presumed "that the basis of the jury's verdict" on the latter offense was *Pinkerton* liability. Id., 43 n.10. The court then concluded that the defendant's claim "that application of [*Pinkerton* liability] . . . violates his federal double jeopardy right . . . not to be punished twice for the same offense in the same trial" was "without merit." (Citation omitted.) Id., 52. In so doing, the court expressly relied on both *Pinkerton* v. *United States*, supra, 328 U.S. 643, and *United States* v. *Cerone*, supra, 830 F.2d 944, which it described as "well

[9] The defendant's reliance on *United States* v. *Rosenberg*, 888 F.2d 1406 (D.C. Cir. 1989), is misplaced. As the United States Court of Appeals for the District of Columbia Circuit plainly indicated, that case—unlike *Pinkerton*—did not involve a double jeopardy claim predicated on multiple punishments stemming from a single prosecution. Id., 1414. Rather, *Rosenberg* involved "the unique problem caused by successive prosecutions of greater and lesser-included offenses . . . ." Id. On that basis, that federal court opined that the holding of *United States* v. *Cerone*, supra, 830 F.2d 944, was "inapposite to the issue we are confronting." *United States* v. *Rosenberg*, supra, 1414.

Unlike *Rosenberg*, the present case does not concern the double jeopardy clause's protection against successive prosecutions. Rather, it concerns the imposition of multiple punishments in a single prosecution, as did both *Pinkerton* and *Cerone*.

established double jeopardy law," and rejected the defendant's double jeopardy challenge. *State* v. *Walton*, supra, 53–54.

In light of the foregoing, we conclude that the double jeopardy claim advanced by the defendant is untenable. The court, therefore, properly denied in part the defendant's motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE BRIAN P.*
(AC 43032)

DiPentima, C. J., and Alvord and Moll, Js.

Syllabus

The respondent parents appealed from the judgment of the trial court terminating their parental rights with respect to their minor child, B. They claimed that the trial court improperly concluded that they had failed to achieve a sufficient degree of personal rehabilitation as required by the applicable statute (§ 17a-112). They further claimed that the court failed to determine the needs of B before deciding whether they had failed to rehabilitate, and improperly found that termination of their parental rights was in the best interest of B. *Held*:

1. The trial court properly found that the respondent parents had failed to achieve sufficient personal rehabilitation so as to encourage the belief that they could assume a responsible position in the life of B within a reasonable time: although the parents claimed that the court erred in terminating their parental rights solely on the basis of their drug use and addiction, even though their drug use never caused them to provide inadequate care for B and they had stopped using drugs, the court based its finding that the parents failed to rehabilitate on multiple factors, which this court could not conclude were clearly erroneous, including the parents' drug related arrests, their limited engagement in counseling and treatment, their lack of financial and housing independence, that

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

their progress in addressing their addiction was outweighed by their prior pattern of drug use and other instances of bad parental judgment, and its determination that the parents were not fully credible because their testimony conflicted with testimony presented by the petitioner, the Commissioner of Children and Families; furthermore, even though the parents claimed that drug use was an insufficient basis to terminate parental rights, B was adjudicated neglected after the parents filed pleas of nolo contendere to allegations that B was permitted to live under conditions injurious to well-being, leaving the court at the adjudicatory phase only to determine whether the parents failed to rehabilitate.

2. The respondent parents could not prevail on their claim that the trial court failed to determine the needs of B before deciding whether they had failed to rehabilitate: the court correctly noted that, under § 17a-112, it was required to analyze the parents' rehabilitative status as it related to the needs of B, and, thereafter, found that, after considering B's need for a secure, permanent placement, the totality of circumstances, and all statutory criteria, and having found by clear and convincing evidence that reasonable efforts at reunification with the parents were made and that the parents were unwilling to benefit from those efforts, that grounds existed to terminate their parental rights for a failure to rehabilitate, and that it was in B's best interest to terminate those rights, before terminating the parents' parental rights; while it may have been clearer for the court to have stated B's needs at the outset of the adjudicatory phase of its analysis, the court's findings did not suggest that it failed to determine B's needs before concluding that the parents failed to rehabilitate, particularly it is undisputed that, at times, some of the findings relevant to the analysis in the adjudicatory phase will be relevant and overlap with the dispositional phase.

3. The respondent parents' claim that the trial court improperly found that termination of their parental rights was in the best interest of B was unavailing: the court made required findings under the factors set forth in § 17a-112 (k) before determining that termination of the parents' parental rights was in the best interest of B; given B's age, the fact that B spent more than one-half of his life in foster care, and the court's findings as to the parents' failure to rehabilitate, this court could not conclude that the court's findings as to B's need for a permanent, safe and nurturing home and the parents' inability to meet that need were clearly erroneous; moreover, if, as the parents contended, there was no evidence that B's needs were not being met, credit belonged to the foster mother who was primarily responsible for meeting B's needs, and the court's finding that B's needs were met by his foster mother was consistent with its findings that B needed stability and that termination of the parents' parental rights was in B's best interest.

Argued December 10, 2019—officially released February 6, 2020**

** February 6, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, and tried to the court, *Driscoll*, *J.*; judgment terminating the respondents' parental rights, from which the respondents appealed to this court. *Affirmed.*

Benjamin M. Wattenmaker, for the appellants (respondents).

Sara Nadim, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

James W. Auwood, for the minor child.

Opinion

ALVORD, J. As the trial court aptly observed, "[t]his is another sad case involving opiates and their invidious harm to parents' lives and families." The respondents, Jennifer L. (mother) and Brian P. (father), appeal from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating their parental rights with respect to the minor child, Brian P.[1] On appeal, the respondents claim that the court improperly (1) found that they had failed to achieve a sufficient degree of personal rehabilitation, (2) failed to determine the needs of Brian P. before deciding whether they had failed to rehabilitate, and (3) found that termination of their parental rights was in the best interest of Brian P.[2] We affirm the judgment of the trial court.

[1] Brian P. is the name of both the father and the minor child. Throughout this opinion, only the minor child will be referred to as Brian P.

[2] Pursuant to Practice Book §§ 67-13 and 79a-6 (c), the attorney for Brian P. filed a statement adopting in its entirety the brief filed by the petitioner.

The following facts, which the court found by clear and convincing evidence, and procedural history, are relevant to this appeal. Brian P. was born to the respondents in February, 2016. The respondents have been in a relationship with one another since 2012, and were engaged to be married at the time of Brian P.'s birth. Prior to Brian P.'s birth, the father, a college graduate with honors, decided against pursuing graduate school to work, instead, full-time at a casino restaurant in New London county. The father's career initially was financially rewarding, enabling the respondents to purchase a home in Rhode Island, two cars, and an engagement ring for the mother. The father's employment also provided him with access to illicit drugs, a feature of what he labelled "the casino lifestyle." (Internal quotation marks omitted.) The father began with what he described as recreational use of opiates, which led to an addiction. The mother also became addicted to opiates. The respondents' addictions caused them to lose their home, a car, and the mother's engagement ring. Together, they moved into the paternal grandmother's home while the father continued to work in casino restaurants. Neither of the respondents sought treatment for their addictions prior to Brian P.'s birth.

During her pregnancy with Brian P., the mother tested positive for benzodiazepines, opiates, and marijuana. Upon his birth, Brian P.'s meconium tested positive for opiates, but no symptoms of withdrawal were noted. The Department of Children and Families (department) became involved on the day following Brian P.'s birth. The mother admitted her addiction to the department, but the respondents did not admit to the department that the father had substance abuse issues as well. The department, the respondents, and the paternal grandmother, collectively, entered into a voluntary service agreement. All parties agreed that Brian P. would remain in the respondents' custody while they resided

at the paternal grandmother's home, that the mother was not permitted to have any unsupervised contact with Brian P., and that the mother would participate in substance abuse treatment and counseling. No treatment was recommended for the father because, at that time, he had not admitted to having any substance abuse issues.

The mother's participation in substance abuse treatment was minimal and, after September, 2016, she received no counseling and refused all urine screens. On January 18, 2017, the department filed a neglect petition on behalf of Brian P. The respondents appeared in court on February 21, 2017, where they were advised of their rights and appointed counsel. Following their court appearance, between March and April, 2017, the respondents had no contact with the department. On April 25, 2017, the respondents entered pleas of nolo contendere, and Brian P. was adjudicated neglected. For the next six months, Brian P. remained in the respondents' custody under court-ordered protective supervision. The respondents were given specific steps to follow, including, inter alia, "that they engage in a substance abuse evaluation, cooperate with any recommended treatment, obtain and maintain sobriety, obey the law, maintain an adequate income, and, in the mother's case, cooperate with counseling."

Between May and early June, 2017, the respondents were unresponsive to the overtures of the department. On June 9, 2017,[3] Brian P.'s disposition was modified, and he was committed to the custody of the petitioner. Brian P. has been in the care and custody of the petitioner since then, living in the home of a nonrelative. The respondents consistently and appropriately have

[3] The trial court's memorandum of decision states that Brian P. had his disposition changed and was committed to the custody of the petitioner on June 19, 2017, but that date seems to have been a scrivener's error. Those developments occurred on June 9, 2017.

visited with Brian P. since his commitment to the custody of the petitioner. On June 14, 2017, the father admitted to the department and his family that he had been addicted to opiates for three years. At this time, the respondents' specific steps for reunification remained as set.

The mother was referred to the Connection Counseling Center (CCC) for regular, individual counseling in February, 2017. The mother failed to attend her intake appointment scheduled for March 7, 2017, and never engaged in counseling at CCC. The department unsuccessfully encouraged the mother to engage in individual counseling between August, 2017 and January, 2018. On January 19, 2018, the department referred the mother to Sound Community Services (SCS) for counseling. The mother did not schedule an intake appointment until February 27, 2018, and she failed to appear at the March 6, 2018 appointment that she had scheduled.

The mother did engage in limited treatment at The Journey to Hope, Health and Healing, Inc. (The Journey) in Rhode Island. The mother's therapist at The Journey provided a letter that reported that the mother was open and honest and committed to recovery, but the letter did not indicate that the mother was addressing any of her underlying mental health concerns, that she had made substantial progress in recovery or that she was in long-term or permanent remission. Between June 26, 2017 and February 19, 2018, the mother submitted to twenty-eight urine screens at The Journey. Ten tested positive for illicit substances, including six for the opiate fentanyl.

From August, 2017 to January, 2018, the department recommended to the father, as it had to the mother, that he attend regular, individual counseling. The father agreed with the department's recommendation and was provided with referrals to area providers, but he did

not schedule an intake appointment. On January 19, 2018, the department referred the father to SCS for counseling. The father, like the mother, did not schedule an appointment until February 27, 2018, and failed to appear at his appointment scheduled for March 6, 2018.

The father eventually began individual counseling on May 22, 2018. The father's therapist, Timothy Cormier, testified at trial that the father was making great progress on his substance abuse issues and that he was testing negative for drugs. The father reported to Cormier that he was overcoming his cravings. The father, however, misrepresented to Cormier that that he was working as a waiter. In actuality, in November, 2017, the father had been terminated from his restaurant employment due to substance abuse issues. After his firing, the father began working at another casino restaurant where he remained until he voluntarily left that employment in June, 2018. The father insisted that he could return to his previous employer if he so wished, but his employer testified that, while he would readily consider hiring the father again, there was no guarantee of employment. The father's employer provided a positive review of the father's work skills and motivation.

Between June 19, 2017 and February 23, 2018,[4] the father submitted to thirty-one drug screens. Sixteen of those screens were positive for illicit substances, including many for fentanyl. The father had multiple negative drug tests after he began individual counseling in May, 2018. The father, however, did test positive for marijuana in an August, 2018 drug screen. When explaining the positive drug test, the father claimed that he had last used marijuana in late April or on May 1, 2018. The father's own expert, however, cast doubt on

[4] The court's memorandum of decision states that the father submitted to drug tests "between June 19, 2017 and February 23, 2015 . . . ." Reference to the year 2015 appears to be a scrivener's error.

that claim by opining that, on the basis of the hair test, the father had last ingested marijuana no earlier than late June, 2018.

On September 25, 2017, the mother was arrested and charged with possession of heroin after a police officer in an unmarked police vehicle observed her engaging in a drug transaction in a commercial parking lot. The mother told police that she was buying the drugs for the father. The drugs purchased by the mother tested positive for fentanyl. As a resolution to the charges, the mother was given an opportunity to participate in a diversionary program by the criminal court, but, as of the date of trial on the termination petition, she had not satisfied her obligations under that program. The respondents did not tell the department about the mother's arrest. The department learned of it through a routine criminal background check in February, 2018. When the department approached the mother about the arrest, she acknowledged it but misrepresented the facts of the arrest in an effort to minimize its nature.

On March 29, 2018, the respondents were stopped by the police while driving the mother's car in Rhode Island because the father was not wearing a seatbelt. The respondents consented to a search of the vehicle, which led to the discovery of marijuana and prescription medicine for which neither of the respondents possessed a prescription. Narcotics also were discovered hidden on the mother's person. The father testified that he had told the police that all of the drugs found were his in an effort to protect the mother and because they had advised him that he would not be arrested if he agreed to assist them as a confidential informant. The respondents did not report the matter to the department for approximately one month, and, when the incident was reported to the department, the father stated that he had received a ticket for possession of marijuana but did not disclose that the mother was present and that

narcotics were found on her person. As of the date of the trial in this matter, felony drug charges were still pending against the father in Rhode Island.

On May 22, 2018, the petitioner filed a petition to terminate the respondents' parental rights pursuant to General Statutes § 17a-112 (j) (3) (B) (i) for their failure to achieve a degree of personal rehabilitation that would encourage the belief that, within a reasonable time, considering the age and needs of Brian P., they could assume a responsible position in the life of Brian P. A trial on the petition was held on December 13, 14, and 17, 2018, and January 3, 2019.

On May 3, 2019, the court, *Driscoll*, *J.*, issued a memorandum of decision terminating the respondents' parental rights. In the adjudicatory phase,[5] the court found by clear and convincing evidence that "the department ha[d] proven . . . that it made reasonable efforts to reunify the child with the [respondents], that the [respondents] [we]re unwilling or unable to benefit from those efforts, and [that] the [respondents] ha[d] failed to rehabilitate as alleged." Though the court found "laudatory the [respondents'] recent efforts to address their addiction, and their expressed desire to beat their addiction," it also found that those efforts were "too little and too late, and [that it could not] conclude that their most recent sobriety [was] long-term."

[5] "Proceedings to terminate parental rights are governed by § 17a-112. . . . Under § 17a-112, a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. . . . If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . The best interest determination also must be supported by clear and convincing evidence." (Citation omitted; internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 582–83 n.12, 122 A.3d 1247 (2015).

In the dispositional phase; see footnote 5 of this opinion; the court considered the seven statutory factors of § 17a-112 (k)[6] before finding "by clear and convincing evidence that termination of [the respondents'] parental rights [was] in Brian [P.'s] best interests." On May 3, 2019, the court terminated the respondents' parental rights and appointed the petitioner as Brian P.'s statutory parent. On June 7, 2019, the respondents filed this appeal. Additional facts will be set forth as necessary.

I

The respondents first claim that the court improperly concluded that they had failed to rehabilitate. Specifically, the respondents argue that it was error for the

[6] General Statutes § 17a-112 (k) states: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

court "to terminate [their] parental rights based solely on their drug use and addiction where, as here, their drug use has never caused [them] to provide inadequate care for [Brian P.], [Brian P.] has never suffered any harm, and [they] have stopped using drugs altogether." We disagree.

We begin by setting forth the established principles of law and the standard of review. "The trial court is required, pursuant to § 17a-112, to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time. . . . The statute does not require [a parent] to prove precisely when [he or she] will be able to assume a responsible position in [his or her] child's life. Nor does it require [him or her] to prove that [he or she] will be able to assume full responsibility for [his or her] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [he or she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he or she] can assume a responsible position in [his or her] child's life. (Citations omitted; internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 585–86, 122 A.3d 1247 (2015). "Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his or her] ability to manage [his or her] own life, but rather whether [he or she] has gained the ability to care for the particular needs of the child at issue." (Citations omitted; internal quotation marks omitted.) *In re Leilah W.*, 166 Conn. App. 48, 67–68, 141 A.3d 1000 (2016).

"[The] completion or noncompletion [of the specific steps], however, does not guarantee any outcome. . . .

Accordingly, successful completion of expressly articulated expectations is not sufficient to defeat a department claim that the parent has not achieved sufficient rehabilitation." (Citation omitted; internal quotation marks omitted.) *In re Shane M.*, supra, 318 Conn. 587. Whereas, during the adjudicatory phase of a termination proceeding, the court is generally "limited to considering events that precede the date of the filing of the petition or the latest amendment to the petition, also known as the adjudicatory date," it "may rely on events occurring after the [adjudicatory] date . . . when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Internal quotation marks omitted.) *In re Leilah W.*, supra, 166 Conn. App. 69.

"A conclusion of failure to rehabilitate is drawn from *both* the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Emphasis in original; internal quotation marks omitted.) *In re Shane M.*, supra, 318 Conn. 587–88. "We will not disturb the court's subordinate factual findings unless they are clearly erroneous. . . . A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Citation

omitted; internal quotation marks omitted.) *In re Bianca K.*, 188 Conn. App. 259, 268–69, 203 A.3d 1280 (2019).

The court, in its memorandum of decision, based its finding that the respondents had failed to rehabilitate on multiple factors and not, as the respondents argue, solely on the basis of their drug use and addiction. The court found relevant the respondents' drug related arrests, their limited engagement in counseling and treatment, their insufficient independence in their finances and housing, and their lack of credibility.

To be sure, the respondents' drug use was a primary focus of the court's analysis. The court detailed the respondents' many positive drug tests between June, 2017 and February, 2018. The court also noted the father's August, 2018 hair test that was positive for marijuana.[7] The respondents argue that despite testimony of the mother and the father that they stopped all drug use as of April, 2018, and June, 2018, respectively, the court, instead, "relie[d] heavily upon unconfirmed urine screens submitted by the [respondents] between June, 2017 and February, 2018."[8] Relatedly,

[7] The respondents argue that the court improperly relied on the father's marijuana use after he ceased using opiates because, in doing so, it "fail[ed] to recognize that General Statutes § 21-279a, which took effect in 2011, decriminalized the possession of small amounts of marijuana." We disagree. Although § 21-279a did decriminalize small amounts of marijuana, it remains illegal. See *State* v. *Dudley*, 332 Conn. 639, 650, 212 A.3d 1268 (2019). Section 21a-279a also did not proscribe a court from weighing an individual's marijuana use against that individual when considering a termination of parental rights petition, like the one in this case, that alleges a failure to rehabilitate from drug abuse issues. Moreover, there was nothing improper about the court considering the father's marijuana use because one of the specific steps that the respondents were required to follow for reunification was to "[n]ot use illegal drugs . . . ." See *In re Anaishaly C.*, 190 Conn. App. 667, 684, 213 A.3d 12 (2019).

[8] The respondents highlight the "uncontradicted expert testimony" of Ilie Saracovan, a drug testing expert, who testified that urine screens are not valid, final results for drug tests without additional confirmation tests, to argue that the court's "reliance on these unconfirmed drug screens, without more, is clearly erroneous." The respondents have not pointed to any author-

the respondents argue that the court "entirely ignore[d] all of the [respondents'] drug test results since February, 2018." We do not see any fault in the court considering the respondents' numerous positive urine screens prior to the filing of the termination of parental rights petition on May 22, 2018, and, thus, during the adjudicatory phase. See *In re Leilah W.*, supra, 166 Conn. App. 69. In addition, these tests, taken after the respondents were provided with specific steps for reunification, including a requirement to "[n]ot use illegal drugs," are relevant to whether those steps were followed. We also do not agree with the respondents' characterization that the court ignored their drug test results after February, 2018. The court acknowledged and found "laudatory the [respondents'] recent efforts to address their addiction" and "their most recent sobriety." This statement shows that the court considered the progress made by the respondents in their rehabilitation. That progress, however, was outweighed by the respondents' prior pattern of drug use, as evidenced by their positive urine screens, and their other instances of bad parental judgment, as described subsequently in this opinion, which led the court to conclude that the progress would not last "long-term." We cannot conclude that any of these findings were clearly erroneous. See *In re Shane M.*, supra, 318 Conn. 593 ("[a]lthough the respondent encourages us to focus on the positive aspects of his behavior and to ignore the negatives, we will not scrutinize the record to look for reasons supporting a different conclusion

ity to support their proposition that a court is barred from considering positive urine screens that have not been confirmed by what Saracovan described as "instrumental analysis where very, very sophisticated instrumentation is used." To the contrary, our case law is replete with myriad examples of courts relying on such urine screens in termination of parental rights cases. See, e.g., *In re Briana G.*, 183 Conn. App. 724, 731, 193 A.3d 1283 (2018); *In re Kaitlyn A.*, 118 Conn. App. 14, 19, 28, 982 A.2d 253 (2009); *In re Ryan R.*, 102 Conn. App. 608, 622, 624–25, 926 A.2d 690, cert. denied, 284 Conn. 923, 933 A.2d 724, and cert. denied, 284 Conn. 924, 933 A.2d 724 (2007).

than that reached by the trial court"); see also *In re Luis N.*, 175 Conn. App. 271, 304–305, 165 A.3d 1270 (trial court's conclusion that respondent failed to achieve sufficient personal rehabilitation affirmed on appeal because, despite six month period of sobriety prior to end of trial, respondent's pattern of substance abuse, including during termination proceedings, was supported by sufficient evidence), cert. denied, 327 Conn. 958, 172 A.3d 203 (2017).

As stated previously, the court also relied on the respondents' drug related arrests to find that they had failed to rehabilitate. The court found that the mother was arrested for possession of heroin on September, 25, 2017, and that the father faced felony drug charges as a result of the March 29, 2018 traffic stop. Not only did both of these incidents violate the respondents' specific step to "[n]ot get involved with the criminal justice system," but they both also involved illegal drugs, which the respondents were forbidden from using. Moreover, the court found that the respondents were not forthright with the department about these incidents and that, at trial, they "professed ignorance" or testified in "conflicting and implausible ways" that "cast grave doubts on their credibility."

The respondents argue that, "[i]f the law in this jurisdiction provides that the courts cannot terminate the respondents' parental right on the basis of incarceration, then the trial court may not do so on the basis of arrests where, as in this case, they have never been incarcerated." We first note that the court did not base its finding that the respondents failed to rehabilitate only on their drug related arrests. Instead, the respondents' arrests were one of the factors that the court deemed relevant. Because one of the respondents' specific steps for reunification was to "[n]ot get involved with the criminal justice system," we determine that the court properly relied on the respondents' arrests,

among other factors, to find that they had failed to rehabilitate.

The court also cited the respondents' limited engagement in regular, individual counseling and in treatment, and their lack of financial and housing independence to support its finding that the respondents had failed to rehabilitate. The court found that the mother had no counseling after September, 2016, and that her participation in treatment was limited. The court found that the father was slow to engage in individual counseling—not doing so until May 22, 2018—despite the department's encouragement to seek counseling since at least August, 2017. Furthermore, the court found that, due to the father's decision to leave work, the respondents lacked "adequate, independent, legal income." The court found that the respondents' housing was through the "good graces" of the paternal grandmother, where the respondents had lived for years while drug addicted, and that the respondents were contributing only some money toward that housing from an employment settlement received by the father.[9] These findings were not clearly erroneous.

[9] The respondents argue that the court impermissibly "appears to add several requirements to [their] specific steps that were not part of the original court order," including that (1) they "were required to find independent housing as a requirement for reunification," (2) they "had an obligation to challenge [the department's] right to reduce their visitation privileges," and (3) their "failure to enter a methadone program suggested by [the department] is evidence of their failure to rehabilitate." We disagree.

With respect to the alleged first additional step, given that the respondents were addicted to opiates while residing at the paternal grandmother's home, it was not clearly erroneous for the court to conclude that the respondents were not maintaining adequate housing, which was a previously ordered step for them to follow.

We do not agree that the court added an alleged second additional step when it stated that they had not contested the reduction of their visitation with Brian P. We read the court's statement as an explanation that, in light of the respondents' failure to challenge the department's decision to reduce their visitation, it could base its own findings on the department's underlying justification for that decision, namely, that Brian P. displayed adverse behavioral effects when the respondents' visits with him were more frequent.

Lastly, the court stated that its "conclusion is based in part upon the court's observation of the demeanor of the [respondents] while testifying. As noted, the court did not find them fully credible. They were evasive, or attempted to rationalize, or minimize their drug arrests, and any perceived negative behaviors." We do not disturb the court's credibility determinations on appeal. See, e.g., *In re Baciany R.*, 169 Conn. App. 212, 225, 150 A.3d 744 (2016) ("[w]e defer to the trier of fact's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude" [internal quotation marks omitted]). At oral argument before this court, counsel for the respondents argued that their credibility was not relevant to their failure to rehabilitate. There was nothing improper about the court factoring the respondents' credibility into its analysis because the respondents testified on their own behalf and did so in ways that conflicted with testimony presented by the petitioner. See *In re Santiago G.*, 154 Conn. App. 835, 857, 108 A.3d 1184 ("the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony" [internal quotation marks omitted]), aff'd, 318 Conn. 449, 121 A.3d 708 (2015).

The respondents argue that "evidence that [they] used drugs, standing alone, is insufficient to terminate their parental rights without an evidentiary showing that [they] failed to provide adequate care for [Brian P.], or that [Brian P.] has ever suffered physical or

Turning to the third specific step allegedly added, we do not agree that the court required the respondents to enter a methadone program selected by the department. Instead, the court's statement that the respondents "did not enter [a methadone] program to which [the department] referred them" appears to correspond with its expressed concerns about the respondents' inconsistent engagement in counseling and treatment, and their lack of credibility. Given the court's stated concerns, it was not clearly erroneous for it to view with disfavor the decision of the respondents to select their own methadone clinic in the first place.

psychological harm." We disagree. First, we reiterate that the respondents' drug use was not the sole basis on which the court found that they had failed to rehabilitate. Second, Brian P. already had been adjudicated neglected on April 25, 2017, after the respondents entered pleas of nolo contendere to allegations that he was "permitted to live under conditions, circumstances or associations injurious to well-being." See General Statutes § 46b-120 (4) (C). Thus, at the adjudicatory phase, the court was left only to determine whether the respondents had failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of Brian P., they could assume a responsible position in the life of Brian P." See General Statutes § 17a-112 (j) (3) (B); see also *In re Shane M.*, supra, 318 Conn. 585–86. For the reasons stated in part II of this opinion, we conclude that the court did consider the particular needs of Brian P. in its discussion of the adjudicatory phase of the petition.

We recognize, as did the trial court, that the respondents made efforts to address their addictions. We cannot, however, conclude that there was insufficient evidence to support the court's finding that they had failed to achieve sufficient personal rehabilitation so as to encourage the belief that the respondents could assume a responsible position in the life of Brian P. within a reasonable time.[10]

[10] The respondents argue that the court's finding that their efforts to rehabilitate were "too little and too late" was belied by the department's own statements in 2018. In particular, the respondents claim that on April 27, 2018, a department employee told them "that if they stayed clean of drugs and engaged in counseling, then they could 'actually reunify with Brian [P.].' " The respondents also claim that, on July 3, 2018, the father's therapist was told that the termination of parental rights petition could still be withdrawn and Brian P. could be returned to the respondents if they stopped using drugs. The court heard the testimony regarding both of these statements, but, nevertheless, concluded that, under the totality of the circumstances, the respondents had failed to rehabilitate. We conclude that there was sufficient evidence to support that finding.

II

The respondents next claim that the "court erred as a matter of law because its memorandum of decision failed to make a finding regarding the particular needs of the child in this case, Brian P., *before* it found that [the respondents] failed to rehabilitate within the meaning of . . . § 17a-112 (j)." (Emphasis in original.) We disagree.

We begin by setting forth the standard of review. "The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole. . . . If there is ambiguity in a court's memorandum of decision, we look to the articulations that the court provides." (Internal quotation marks omitted.) *In re James O.*, 322 Conn. 636, 649, 142 A.3d 1147 (2016).

Section 17a-112 (j) (3) (B) requires the court to find by clear and convincing evidence that a parent has "failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ." "Therefore, the trial court must first determine the needs of the particular child before determining whether a parent has achieved a sufficient rehabilitative status to meet those needs." *In re James O.*, supra, 322 Conn. 650. In its memorandum of decision, the court indicated that it did consider the needs of Brian P. before determining that the respondents had failed to rehabilitate.

First, the court correctly cited to *In re Shane M.*, supra, 318 Conn. 585–86, for the standard relevant to a termination of parental rights petition, stating that, under § 17a-112, it must "analyze the [respondents'] rehabilitative status as it relates to the needs of the particular child . . . ." Second, the court stated early in its memorandum of decision that Brian P.'s "meconium was positive for opiates, but no symptoms of withdrawal were noted," thereby implying that Brian P. had no unique needs stemming from his birth. Later in its opinion, the court made that point expressly by stating that Brian P. "is a happy, healthy child with no special needs or issues, other than those shared by all children, that is, the need for a permanent, safe, supportive, nurturing home."[11] Lastly, the court summarized its findings by stating that, "*after due consideration of* [*Brian P.'s*] *need for a secure, permanent placement*, and the totality of the circumstances, and having considered all statutory criteria, and having found by clear and convincing evidence that reasonable efforts at reunification with [the respondents] were made and that father and mother were unwilling to benefit from those efforts, and *that grounds exist to terminate* [*the respondents'*] *parental rights for a failure to rehabilitate as alleged*, and that is in the child's best interest do so," before ordering the respondents' parental rights terminated. (Emphasis added.)

The court's findings that Brian P. is a "happy, healthy child with no special needs or issues" and that he has a "need for a secure, permanent placement" were expressed in the dispositional phase of its analysis, which would support the respondents' contention that

[11] At oral argument before this court, the respondents' counsel argued that, because Brian P. did not have any special needs, the respondents would not need to be "as up to speed." We disagree. A child, particularly one of Brian P.'s age, invariably requires the attention of a sober and responsible parent regardless of whether that child has identified special needs.

the court did not consider the needs of Brian P. before concluding that they had failed to rehabilitate. While we acknowledge it may be more clear for a trial court to explicitly state the needs of the minor child at the outset of the adjudicatory phase of its analysis, we do not agree that the order of the court's findings in this case suggests that the court had failed to determine Brian P.'s needs before concluding that the respondents had failed to rehabilitate. It cannot be disputed that, at times, some of the findings relevant to the analysis in the adjudicatory phase will also be relevant to and overlap with the analysis of the dispositional phase, and vice versa. See *In re Malachi E.*, 188 Conn. App. 426, 437–38, 204 A.3d 810 (2019) (concluding that, in dispositional phase, trial court need not "blind itself to any parental deficiencies that also were considered during the adjudicatory phase" because "the determinations made in the adjudicatory and dispositional phases may often be so intertwined that the former leads almost inexorably to the latter" [internal quotation marks omitted]). This is a case in which the court found that Brian P. had no special needs in the dispositional phase of its analysis, which is a finding that would apply with equal force in the adjudicatory phase of its analysis. Accordingly, we conclude that the court was considerate of the needs of Brian P. as it determined whether the respondents had failed to rehabilitate. See *In re James O.*, supra, 322 Conn. 649 ("Effect must be given to that which is clearly implied as well as to that which is expressed. . . . If there is ambiguity in a court's memorandum of decision, we look to the articulations that the court provides." [Internal quotation marks omitted.]).

III

Lastly, the respondents claim that the court erroneously found that termination of their parental rights was in the best interest of Brian P. We disagree.

We first set forth the relevant principles and the standard of review. "In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the [respondents'] parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven statutory factors delineated in [§ 17a-112 (k)]. . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Footnote omitted; internal quotation marks omitted). *In re Joseph M.*, 158 Conn. App. 849, 868–69, 120 A.3d 1271 (2015).

The court considered and made findings under each of the seven statutory factors of § 17a-112 (k) before determining that, under the totality of the circumstances, a termination of the respondents' parental rights was in the best interest of Brian P. The respondents assert that a number of the court's findings made in its best interest of the child analysis were clearly erroneous. We are not convinced.

The respondents argue that the court's finding that they "did not provide Brian [P.] with a 'safe, supportive, nurturing home' " was clearly erroneous because "the

petitioner admitted at trial that there was never any concern that the [respondents] were unable to provide adequate care for their child." The respondents further contend that the court's finding that Brian P. "requires a 'permanent' home, and that denying him 'the permanency to which he is entitled would not be in his best interests,' " was clearly erroneous because the court "cite[d] to no evidence to show that the child felt that his current situation lacked permanency, or that the child would suffer adverse results should he remain in foster care for some additional period prior to reunification." The trial court found that "Brian [P.] is a happy, healthy child with no special needs or issues, other than those shared by all children, that is, the need for a permanent, safe supportive, nurturing home." The court also found that Brian P. had "been in foster care for over half his life, while [the respondents] struggled greatly with their addiction, and there is no reasonable foreseeability that their addiction will be addressed permanently." Given Brian P.'s age, the amount of time he has spent in foster care—more than one-half of his life—and the court's findings as to the respondents' failure to rehabilitate—as detailed in part I of this opinion—we cannot conclude that the court's findings as to Brian P.'s need for a "permanent, safe, supportive, nurturing home" and the respondents' inability to meet that need were clearly erroneous. See *In re Anthony H.*, 104 Conn. App. 744, 767, 936 A.2d 638 (2007) ("[o]ur appellate courts have recognized that long-term stability is critical to a child's future health and development" [internal quotation marks omitted]), cert. denied, 285 Conn. 920, 943 A.2d 1100 (2008); *In re Victoria B.*, 79 Conn. App. 245, 263, 829 A.2d 855 (2003) (trial court's findings as to best interest of child were not clearly erroneous when much of child's short life had been spent in custody of commissioner and child needed stability and permanency in her life).

The respondents contend that, because there is no evidence that Brian P.'s needs are not being met, the court's findings are clearly erroneous. This argument ignores the court's findings that Brian P. has lived more than one-half of his life in foster care and that "[Brian P.] looks to [his] foster mother to meet his needs . . . ." If there is no evidence that Brian P.'s needs are not being met, credit belongs to the foster mother who has been primarily responsible for meeting those needs. The court's finding that Brian P.'s needs are being met by his foster mother is consistent with both its finding that he is in need of stability and its conclusion that termination of the respondents' parental rights is in his best interest.

The respondents also argue that the court "completely failed to consider the detrimental effect of removing [Brian P.] from his parents and grandparents, with whom he shares a close bond." The court did not overlook the bond between Brian P. and the respondents. Rather, the court stated that Brian P. "knows and loves [the respondents], and is loved by them. Parental love does not equate with parental competence, which in this case requires complete sobriety." This statement reflects that the court appreciated the bond between Brian P. and the respondents but, nevertheless, concluded that it was in his best interest to terminate the respondents' parental rights. See *In re Anthony H.*, supra, 104 Conn. App. 765–66 ("[o]ur courts consistently have held that even when there is a finding of a bond between [a] parent and a child, it still may be in the child's best interest to terminate parental rights" [internal quotation marks omitted]).[12]

[12] The respondents state that the termination of the respondents' parental rights will also result in a permanent severance of Brian P.'s strong bond with his four grandparents, seeming to argue that this was a factor that the court should have considered. This bond is not a consideration that is encompassed in any of the seven statutory factors found in § 17a-112 (k). Therefore, the court's failure to consider it was not clearly erroneous.

We cannot conclude from our review of the record that this finding was clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE BRIAN P.*
(AC 43119)

DiPentima, C. J., and Alvord and Moll, Js.

Syllabus

The paternal grandmother, S, of the minor child, B, appealed to this court from the judgment of the trial court denying her motion to intervene, which was filed after the court granted the petition of the Commissioner of Children and Families to terminate the parental rights of the respondents, the mother and father of B. On appeal, S claimed that the court improperly denied her motion to intervene. *Held* that this court lacked subject matter jurisdiction and, accordingly, dismissed the appeal: S neither initiated the action nor was the action brought against her, and the trial court denied her motion to intervene, thus, S was never a party to the action, and lacked standing to appeal; moreover, S did not have a colorable claim to intervention as a matter of right pursuant to the applicable statute (§ 52-263), because S filed her motion to intervene more than two years after the commissioner filed the neglect petition, approximately two years after B was committed to the custody of the commissioner, more than one year after the commissioner filed a termination of parental rights petition, and nearly one month after the judgment was rendered terminating the respondents' parental rights; S was aware of the proceedings and waited to attempt to intervene until after the termination judgment was rendered, and, S's claim that she could not prevail on a motion for permanent guardianship pursuant to the applicable statute (§ 46b-129 (j) (6)) until after the court found that a statutory ground for termination existed was unavailing, as this claim misinterpreted the plain language of §46b-129 (j) (6), which sets forth findings that a court must make prior to issuing an order for permanent legal guardianship and does not address the issue of the timeliness of a motion to intervene and, furthermore, permanent guardianship

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

is intended to occur without the termination of parental rights; S's untimeliness was evident by the fact that the court had already appointed the commissioner as the statutory parent for purposes of securing adoption, thus, the opportunity had passed for S to present evidence concerning the viability of granting her permanent guardianship of B in lieu of terminating parental rights and, by her delay, S lost any colorable claim to intervene.

Argued December 10, 2019—officially released February 6, 2020**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, and tried to the court, *Driscoll*, *J.*; judgment terminating the respondents' parental rights; thereafter, the court denied the paternal grandmother's motion to intervene, and the paternal grandmother appealed to this court. *Appeal dismissed.*

Benjamin M. Wattenmaker, for the appellant (paternal grandmother).

Sara Nadim, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

James W. Auwood, for the minor child.

Opinion

DiPENTIMA, C. J. The paternal grandmother of the minor child and proposed intervenor, Susan P., appeals from the denial of her motion to intervene, which was filed following the judgment of the trial court granting the petition of the Commissioner of Children and Families (commissioner) to terminate the parental rights of Brian P. (father) and Jennifer L. (mother) with respect

** February 6, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

to the minor child, Brian P.[1] We conclude that we lack subject matter jurisdiction and, accordingly, dismiss the appeal.

The relevant facts are those that follow. Brian P. was born in February, 2016, and his meconium tested positive for opiates. Both parents had a history of opiate addiction, although initially only the mother admitted her addiction to the Department of Children and Families (department). The department became involved and entered into a voluntary agreement with Susan P. wherein Brian P. was placed under the parents' custody at Susan P.'s home, with the further agreement that the mother would have no unsupervised contact with Brian P. The mother was to engage in substance abuse treatment, and no treatment was recommended for the father because, according to the parents, he had no substance abuse issues.

On January 18, 2017, the commissioner filed a neglect petition. On April 25, 2017, the parents pleaded nolo contendere to the neglect allegations, the court accepted the pleas, and Brian P. was adjudicated neglected. The court ordered that Brian P. remain in the parents' custody at the parents' place of abode with six months of protective supervision. At that time, the parents' place of abode was at Susan P.'s house. On June 9, 2017, in response to an oral motion made by the commissioner, the court, *Hon. Michael A. Mack*, judge trial referee, modified the disposition and committed Brian P. to the care and custody of the commissioner.[2] On June 14, 2017, the father admitted to the department that he had been addicted to opiates for the past three years. On May 22, 2018, the commissioner filed a petition for termination of parental rights.

[1] Pursuant to Practice Book § 67-13, the attorney for the minor child filed a statement adopting in its entirety the brief filed by the commissioner.

[2] Brian P. has been in the care and custody of the commissioner since then, living in the home of a nonrelative.

On May 3, 2019, the court, *Driscoll*, *J.*, granted the petition for termination of parental rights.[3] The court found that no family member was available as a placement resource and that Brian P. had been placed in a foster home of a nonrelative.[4] The court first made its adjudicatory decision that a statutory basis for termination of parental rights existed pursuant to General Statutes § 17a-112 (j) because both parents had failed to achieve rehabilitation to such a degree as to be able to assume a responsible position in Brian P.'s life. The court concluded in the dispositional phase, after examining the seven factors in § 17a-112 (k), that termination of parental rights was in Brian P.'s best interests. The court granted the commissioner's petition to terminate the parental rights of Brian P.'s biological parents and appointed the commissioner as the statutory parent for the purpose of securing Brian P.'s adoption.

On May 31, 2019, approximately one month after the termination judgment, Susan P. filed a "motion to reopen judgment, intervene and request permanent transfer of guardianship of the minor." She filed an amended motion on June 3, 2019. The amended motion sought intervention as a matter of right and permissive intervention. In her amended motion, Susan P. alleged that she had a preexisting relationship with Brian P. and was actively involved in his care. She alleged that in September, 2016, Brian P. moved into her home and she cared for him until June, 2017. She claimed that the department informed her repeatedly that, "pending the parents' compliance," Brian P. would be returned

[3] Brian P.'s biological parents appealed from the judgment of the trial court terminating their parental rights. See *In re Brian P.*,195 Conn. App. 558, A.3d (2020). The same attorney who filed the appeal on behalf of Brian P.'s biological parents represents Susan P. in the present appeal.

[4] A social study dated May 14, 2018, stated that Susan P. was not a resource because both of the child's parents live with her, and Susan P. was part of the previous safety plan with the department during which time both parents continued to use drugs while in the home of Susan P.

to the care of his parents or family. She further alleged that the department did not discuss the case with her for confidentiality reasons and did not raise the fact that the parents resided at her home as an issue against her being a possible placement resource. On June 11, 2019, oral argument was held regarding Susan P.'s motion to intervene. The court, after considering several factors, denied Susan P.'s motion to intervene and stated that the motion was "very untimely filed and [Brian P. is] entitled to a determination as to his permanency." This appeal followed.

On appeal, Susan P. claims that the court improperly denied her motion to intervene. The commissioner contends that because Susan P. is not a party to the underlying action and because she does not have a colorable claim to intervene as a matter of right, the statute governing our jurisdiction, General Statutes § 52-263, deprives us of jurisdiction to hear this appeal. We first address this threshold issue and conclude that Susan P. does not have the party status necessary to invoke our appellate jurisdiction. "A threshold inquiry of this court upon every appeal presented to it is the question of appellate jurisdiction. . . . It is well established that the subject matter jurisdiction of the Appellate Court . . . is governed by . . . § 52-263 . . . . Section 52-263 provides: 'Upon the trial of all matters of fact in any cause or action in the Superior Court, whether to the court or jury, or before any judge thereof when the jurisdiction of any action or proceeding is vested in him, if either party is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial, including the denial of a motion to set aside a verdict, he may appeal to the court having jurisdiction from the final judgment of the court or of such judge, or from the decision of the court granting a motion to set aside a verdict, except in small claims cases, which shall not be appealable, and appeals as

provided in [General Statutes §§] 8-8 and 8-9.' . . . Thus, [o]n its face, [§ 52-263] explicitly sets out three criteria that must be met in order to establish subject matter jurisdiction for appellate review: (1) the appellant must be a party; (2) the appellant must be aggrieved by the trial court's decision; and (3) the appeal must be taken from a final judgment." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *In re Joshua S.*, 127 Conn. App. 723, 727–28, 14 A.3d 1076 (2011).

To determine whether we have subject matter jurisdiction over this appeal, we examine the question raised by the commissioner of whether Susan P. has party status.[5] Only a party to an underlying action is entitled to review by way of an appeal pursuant to § 52-263. *State* v. *Salmon*, 250 Conn. 147, 154, 735 A.2d 333 (1999). "Ordinarily, the word party has a technical legal meaning, referring to those by or against whom a legal suit is brought . . . the party plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons. . . . This definition of party, which we also have labeled party status in court . . . includes only those who are parties to the underlying action." (Citations omitted; internal quotation marks omitted.) Id.

In the present case, Susan P. did not initiate the action nor was the action brought against her; her motion to intervene was denied. Thus, she was never a party to the action. In order to determine, however, whether

[5] The typical appeal from a denial of a motion to intervene involves an interlocutory ruling. See, e.g., *BNY Western Trust* v. *Roman*, 295 Conn. 194, 202–206, 990 A.2d 853 (2010). In the unique procedural posture of the present case, Susan P. filed her motion to intervene after the court rendered its final judgment terminating parental rights to the child. Regardless of whether the question of our subject matter jurisdiction concerns the party status prong or the final judgment prong of § 52-263, our analysis turns on whether a colorable clam for intervention as a matter of right has been made. See *King* v. *Sultar*, 253 Conn. 429, 436, 754 A.2d 782 (2000).

Susan P. has satisfied the party status requirement of § 52-263, we look to whether she has a colorable claim to intervene as a matter of right.[6] "[I]f a would-be intervenor has a colorable claim to intervention as a matter of right . . . both the final judgment and party status prongs of our test for appellate jurisdiction are satisfied." (Citation omitted; internal quotation marks omitted.) *King* v. *Sultar*, 253 Conn. 429, 436, 754 A.2d 782 (2000). We conclude that Susan P. does not have a colorable claim to intervention as a matter of right and, therefore, lacks standing to appeal.

"A colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . . For a claim to be colorable, the [proposed intervenor] need not convince the trial court that [s]he necessarily will prevail; [s]he must demonstrate simply that [s]he might prevail. . . . In order for a proposed intervenor to establish that [she] is entitled to intervene as a matter of right, the proposed intervenor must satisfy a well established four element conjunctive test: [t]he motion to intervene must be timely, the movant must have a direct and substantial interest in the subject matter of the litigation, the movant's interest must be impaired by disposition of the litigation without the movant's involvement and the movant's interest must not be represented adequately by any party to the litigation. . . .

"[These] four factors of the intervention as of right test are viewed in a slightly different lens when

[6] There are "two types of intervention . . . [i]ntervention as of right provides a legal right to be a party to the proceeding that may not be properly denied by the exercise of judicial discretion. Permissive intervention means that, although the person may not have the legal right to intervene, the court may, in its discretion, permit him or her to intervene, depending on the circumstances." (Internal quotation marks omitted.) *Austin-Casares* v. *Safeco Ins. Co. of America*, 310 Conn. 640, 663–64, 81 A.3d 200 (2013).

determining the jurisdictional issue of whether the proposed intervenor has made a colorable claim to intervene as of right. . . . Consistent with the well established rule that every presumption is to be indulged in favor of jurisdiction, and the judicial policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court . . . our examination of whether a colorable claim exists focuses on the plausibility of the appellant's challenge to the denial of the motion to intervene when the pleadings and motion are viewed in light of the relevant legal principles." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *In re Santiago G.*, 325 Conn. 221, 231–33, 157 A.3d 60 (2017). "Failure to meet any one of the four elements, however, will preclude intervention as of right." *BNY Western Trust* v. *Roman*, 295 Conn. 194, 206, 990 A.2d 853 (2010).

We begin by addressing the dispositive issue of timeliness, viewing it through the lens of a colorable claim for intervention as of right. "[T]he necessity for showing that a would-be intervenor made a timely request for intervention involves a determination of how long the intervenor was aware of an interest before he or she tried to intervene, any prejudicial effect of intervention on the existing parties, any prejudicial effect of a denial on the applicant and consideration of any unusual circumstances either for or against timeliness. . . . Factors to consider also include the nature of the interest and the purpose for which the intervenor is seeking to be brought into the action." (Citation omitted; internal quotation marks omitted.) Id., 208–209.

Susan P**.** filed her motion to intervene on May 31, 2019, more than two years after the commissioner filed its January 18, 2017 neglect petition, approximately two years after Brian P. was committed to the custody of the commissioner on June 9, 2017, and more than one year after the commissioner filed a termination of

parental rights petition on May 22, 2018. Most notable, the motion was filed nearly one month after the judgment was rendered terminating the parental rights of the mother and father. Clearly, Susan P. was aware of the proceedings because Brian P. was placed in her home under the parents' custody until the June 9, 2017 commitment. Susan P.'s allegations in her motion to intervene that agents for the department failed to apprise her of the status of the case, inform her that Brian P. would be back with the parents pending compliance, or provide guidance on becoming a placement resource, do not negate the fact that she was aware of the proceedings and chose to wait to attempt to intervene until after the termination judgment was rendered.

In her amended motion, Susan P. sought "to intervene in the above captioned matter and asks the court to grant her permanent transfer of guardianship of the minor." Susan P. had an opportunity to attempt to intervene and to seek guardianship of Brian P. prior to the court's termination judgment, but did not do so. For instance, she could have timely moved to intervene in the dispositional phase of the neglect proceedings to seek to transfer guardianship to herself. See *In re Anthony A.*, 112 Conn. App. 643, 650–53, 963 A.2d 1057 (2009); see also *In re Shyliesh H.*, 56 Conn. App. 167, 172, 743 A.2d 165 (1999) (trial court granted coterminous petitions for neglect and termination of parental rights and denied paternal grandmother's request for transfer of guardianship). It was only after the conclusion of the termination proceedings that she filed her motion to intervene to seek permanent guardianship.

General Statutes § 46b-129, which concerns neglect proceedings, establishes in subdivision (4) of subsection (d) a right to file a motion to intervene for purposes of seeking permanent guardianship. General Statutes § 46b-129 (d) (4) provides in relevant part: "Any person

related to a child or youth may file a motion to intervene for purposes of seeking guardianship of a child or youth more than ninety days after the date of the preliminary hearing. The granting of such motion to intervene shall be solely in the court's discretion, except that such motion shall be granted absent good cause shown whenever the child's or youth's most recent placement has been disrupted or is about to be disrupted. . . ." This statute provides that if the motion to intervene is made more than ninety days after the date of the preliminary hearing, that the intervention is permissive and not as of right unless the child's most recent placement has been disrupted or is about to be disrupted. There is no allegation that the child's placement has been disrupted or is about to be disrupted, and, therefore, this statute does not afford Susan P. the ability to intervene as of right.

Susan P. argues that her motion to intervene was not untimely under the circumstances because she could not prevail on her motion for permanent guardianship pursuant to § 46b-129 (j) (6) until after the court found that a statutory ground for termination existed. This argument misinterprets the plain language of § 46b-129 (j) (6). That section provides in relevant part: "Prior to issuing an order for permanent legal guardianship . . . the court shall find by clear and convincing evidence that the permanent legal guardianship is in the best interests of the child or youth and that the following have been proven by clear and convincing evidence: (A) One of the statutory grounds for termination of parental rights exists . . . or the parents have voluntarily consented to the establishment of the permanent legal guardianship; (B) Adoption of the child or youth is not possible or appropriate . . . (D) The child or youth has resided with the proposed permanent legal guardian for at least a year; and (E) The proposed permanent legal guardian is (i) a suitable and worthy person, and (ii) committed to remaining the permanent

legal guardian and assuming the right and responsibilities for the child or youth until the child or youth attains the age of majority." General Statutes § 46b-129 (j) (6).

Section 46b-129 (j) (6) sets forth findings that a court must make prior to issuing an order for permanent legal guardianship and does not address the issue of timeliness of a motion to intervene. Section 46b-129 (j) (6) provides that, under one scenario, the court must find that a statutory ground for termination *exists*, which is not the same as requiring the court to terminate parental rights prior to granting a motion for permanent guardianship. Rather, a permanent guardianship is intended to occur without the termination of parental rights.[7] See General Statutes § 45a-604 (8) (defining permanent guardianship as guardianship "that is intended to endure until the minor reaches the age of majority without termination of the parental rights of the minor's parents . . . ."). Additionally, § 46b-129 (j) (6) provides that, prior to issuing an order for permanent legal guardianship, the court must find that adoption of the child or youth is not possible or appropriate. Adoption and permanent legal guardianship are different permanency plans that, under § 46b-129 (j) (6), cannot coexist. Susan P.'s lack of timeliness is also evident by the fact that the court already has appointed the commissioner as the statutory parent for purposes of securing adoption.

The present case proceeded to its ultimate conclusion and at no point during the proceedings was Susan P.'s motion to intervene before the court. Of the five permanency options provided for in our statutory scheme,[8]

[7] On rare occasions, a transfer of guardianship occurs with the termination of parental rights. See *In re Brayden E.-H.*, 309 Conn. 642, 644, 72 A.3d 1083 (2013).

[8] "Our statutory scheme provides five permanency options: (1) reunification with a parent; (2) long-term foster care; (3) permanent guardianship; (4) transfer of either guardianship or permanent guardianship; or (5) termination followed by adoption. General Statutes §§ 17a-111b (c) and 46b-129 (k) (2)." (Footnotes omitted; internal quotation marks omitted.) *In re Adelina A.*, 169 Conn. App. 111, 121, 148 A.3d 621, cert. denied, 323 Conn. 949, 169 A.3d 792 (2016).

the court granted the petition to terminate parental rights and appointed the commissioner as the statutory parent for purposes of securing adoption. By filing her motion to intervene seeking a transfer of permanent guardianship after the final judgment of the court, Susan P. seeks to undo what has already been done. The opportunity has passed for Susan P. to present evidence to the court concerning the viability of granting her permanent guardianship of Brian P. in lieu of terminating parental rights.[9] By her delay, Susan P. lost any colorable claim to a right to intervene. See *BNY Western Trust* v. *Roman*, supra, 295 Conn. 208–209 ("[a]s a case progresses toward its ultimate conclusion, the scrutiny attached to a request for intervention necessarily intensifies" [internal quotation marks omitted]); *Horton* v. *Meskill*, 187 Conn. 187, 194, 445 A.2d 579 (1982) ("[t]he right to intervene is lost, not merely weakened, if it is not exercised in a timely fashion"); 67A C.J.S. 658, Parties § 90 (2019) ("[i]ntervention presupposes the pendency of a suit"). Susan P. has not directed us to any compelling circumstances for her decision to wait until she was unsatisfied with the final disposition of the case before moving to intervene. In child protection proceedings, time is of the essence, and permitting intervention after the conclusion of the termination proceedings would unnecessarily delay permanency. See *In re Juvenile Appeal*, 187 Conn. 431, 439–40, 446 A.2d 808 (1982) (public policy in child protection cases is to protect best interest and welfare of children with notion that time is of essence).

Susan P.'s claim as to the timeliness of her motion is not well founded, and, accordingly, she has failed to make a colorable claim to intervention as of right. As a result, she is not a party to the underlying action and consequently does not have standing to appeal. See,

[9] We do not comment on whether Susan P. properly could have intervened in the termination proceedings prior to judgment.

e.g., *M.U.N. Capital, LLC* v. *National Hall Properties, LLC*, 163 Conn. App. 372, 376, 136 A.3d 665 (concluding that former defendant lacked standing to appeal because it was not party to underlying judgment), cert. denied, 321 Conn. 902, 136 A.3d 1272 (2016); *In re Joshua S.*, supra, 127 Conn. App. 730 (concluding that because foster parents did not have colorable claim to intervention as matter of right they were not parties entitled to appeal pursuant to § 52-263). Accordingly, we conclude that, pursuant to § 52-263, we lack subject matter jurisdiction over her appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

IN RE FAIZ SIDDIQUI
(AC 41023)

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

Syllabus

The petitioner filed a motion seeking the cancellation of an unserved arrest warrant pursuant to the rule of practice (§ 36-6) that governs the cancellation of arrest warrants. The trial court denied the petitioner's motion for cancellation on the ground that it lacked subject matter jurisdiction to consider the motion. Thereafter, the trial court denied two motions to reargue filed by the petitioner, and the petitioner appealed to this court. *Held*:

1. Contrary to the state's claim, this court had jurisdiction over the petitioner's appeal; the trial court's denial of the petitioner's motion for cancellation of the arrest warrant terminated a separate and distinct proceeding, and, therefore, it satisfied the first prong of the test set forth in *State* v. *Curcio* (191 Conn. 27) that governs when an interlocutory ruling is appealable.
2. The trial court properly determined that it lacked jurisdiction to consider the petitioner's motion for cancellation of the arrest warrant: because there was no pending criminal case before the trial court and the plain language of Practice Book § 36-6 provides that only the prosecuting authority and the judicial authority may act to cancel an arrest warrant and does not set forth an avenue for the petitioner to seek cancellation of the unserved arrest warrant, the trial court lacked jurisdiction to consider the merits of the petitioner's motion for cancellation; moreover,

because the trial court lacked jurisdiction, it should have dismissed the motion rather than denied it, and, therefore this court concluded that the form of the judgment was improper, reversed the judgment and remanded the case with direction to dismiss the motion.

Argued October 10, 2019—officially released February 11, 2020

Procedural History

Motion for cancellation of an arrest warrant, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, where the court, *Dewey*, *J.*, denied the motion; thereafter, the court denied the petitioner's motion to reargue, and the petitioner appealed to this court; subsequently, the court, *Dewey*, *J.*, denied the petitioner's motion to reargue, and the petitioner filed an amended appeal. *Improper form of judgment*; *judgment directed.*

John R. Williams, for the appellant (petitioner).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Robert Diaz*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The petitioner, Faiz Siddiqui, appeals from the judgment of the trial court denying his motion for cancellation of an unserved arrest warrant and denying his two motions to reargue. The petitioner claims that (1) his appeal is taken from a final judgment and, therefore, this court has jurisdiction to consider his appeal, (2) the trial court had jurisdiction to grant his motion for cancellation of the unserved arrest warrant, (3) the arrest warrant was not supported by probable cause, and (4) the fugitive felon disentitlement doctrine was inapplicable under the facts of this case. We conclude that this court has jurisdiction over the appeal and that the trial court properly determined that it lacked subject matter jurisdiction to rule

on the motion for cancellation of the unserved warrant and the motions to reargue.[1] We further conclude that the form of the judgment is improper, and, accordingly, we reverse the judgment and remand the case with direction to dismiss the petitioner's motions.

The record reveals the following facts and procedural history. In 2015, the West Hartford Police Department investigated a harassment complaint against the petitioner. After a three month investigation, a police officer filed an application for an arrest warrant. The court, *Mullarkey*, *J.*, signed the arrest warrant on May 29, 2015, on the charge of one count of harassment in the second degree in violation of General Statutes § 53a-183. The court indicated a $2500 cash only bail and imposed a no contact condition as to the complainant. The warrant was neither served on the petitioner, who resided in London, England, at that time, nor filed in court.

Approximately two years later, on March 31, 2017, the petitioner filed a motion for cancellation of the arrest warrant, citing, inter alia, Practice Book § 36-6.[2] At that time, neither the petitioner nor his counsel had obtained a copy of the arrest warrant. The court, *Dewey*, *J.*, held a hearing on April 20, 2017. At the outset, the petitioner's counsel acknowledged the atypical nature of the proceeding and requested that the court "extend [its] jurisdiction to do one of two things. Either compel the state to cancel an arrest warrant that we haven't seen or—one could argue [that] might be a bit of a reach—or, in the alternative, to compel the state to produce a copy of the warrant and to hold an evidentiary hearing

[1] As a result of this conclusion, we need not address the petitioner's third and fourth claims.

[2] Practice Book § 36-6 provides: "At the request of the prosecuting authority, any unserved arrest warrant shall be returned to a judicial authority for cancellation. A judicial authority also may direct that any unserved arrest warrant be returned for cancellation."

at some later date . . . .'' The prosecutor countered that the court lacked jurisdiction to award either form of relief requested by the petitioner. The prosecutor further argued that the unserved warrant was not a public document.

On July 28, 2017, the court issued a memorandum of decision denying the petitioner's motion for cancellation of the arrest warrant. After summarizing the petitioner's factual and legal arguments as to why the warrant should be cancelled,[3] the court turned to the question of jurisdiction. Specifically, it observed that ''[a] Superior Court's authority in a criminal case begins with the presentment of an information.'' It then turned to Practice Book § 36-6, noting that, although that provision provided authority for the court to direct the return of an unserved warrant, it did ''not provide any authority to secure a copy of that warrant for review by interested parties.'' Finally, the court stated that General Statutes § 54-2a (e) restricted the release of a warrant to the time of the arrest and that the warrant was not public information until the time of the arrest.

On August 30, 2017, the petitioner, representing himself, filed a motion to reargue pursuant to Practice Book § 11-11. A hearing was scheduled for October 17, 2017. The day before the scheduled hearing, the

[3] Specifically, the court stated: ''It is the petitioner's belief that the June, 2015 arrest warrant was based on the complainant's allegations that the petitioner had made several harassing phone calls from Chicago, Illinois. The petitioner denies these allegations. The petitioner also suggests that there is no evidence of the source of the alleged harassing phone calls. Further, the petitioner states that there was a decade long sparse history of nonharassing phone calls. He additionally suggests that the complainant has a motive for fabrication. The petitioner asserts that the investigating officers provided information in their affidavit that was contradicted by available information or if investigated, would have been easily refuted. The petitioner finally states that the investigating officers ignored exculpatory information, threatened the petitioner with legal and immigration reprisals, and refused to meet with the petitioner's counsel.''

petitioner, represented by counsel, filed a memorandum in support of the motion to reargue. After the petitioner's counsel presented his argument, the prosecutor repeated the state's position that the court lacked jurisdiction. At the conclusion of the hearing, the court determined that it lacked jurisdiction to consider the motion for cancellation and denied the petitioner's motion to reargue.

On November 6, 2017, the petitioner filed the present appeal, as well as a motion to reargue and for modification to which he attached a copy of the arrest warrant. On November 30, 2017, the trial court denied the relief requested by the petitioner. It noted that the petitioner had appealed the October 17, 2017 decision denying his motion to reargue. As a result of the pending appeal, the court concluded that it lacked jurisdiction to entertain the November 6, 2017 motion. The petitioner responded by filing a motion for order with this court requesting that it (1) vacate the November 30, 2017 decision, (2) direct the trial court to conduct an evidentiary hearing, and (3) issue a notice indicating that the trial court had jurisdiction to consider his motion for cancellation of the arrest warrant.

On January 24, 2018, in response to the petitioner's motion for order, this court concluded that the filing of the appeal did not divest the trial court of jurisdiction to consider the petitioner's motion to reargue and for modification. This court ordered the trial court "to reconsider its order, dated November 29, 2017, on the [petitioner's] motion to reargue and for modification."

The petitioner subsequently filed a memorandum in support of the motion to reargue, dated March 14, 2018. On March 28, 2018, the trial court issued another memorandum of decision in which it noted that the petitioner has been a citizen and resident of England throughout these proceedings and that the May, 2015

arrest warrant had not been served. The court again rejected the petitioner's efforts to have the arrest warrant cancelled. "In effect, the petitioner is attempting to argue a motion to dismiss before the initiation of criminal proceedings." The court also invoked the fugitive felon disentitlement doctrine,[4] noting that the petitioner had sought to invoke the jurisdiction of the court but had refused to submit to that same jurisdiction. The court stated: "As a fugitive, the petitioner should not be in a position to invoke the powers of the judiciary in an effort to avoid prosecution." Accordingly, the court denied the petitioner's motion to reargue and for modification. This appeal followed.[5] Additional facts will be set forth as necessary.

I

As an initial matter, we address the state's claim that this appeal was not taken from a final judgment, and, therefore, we should dismiss the appeal. Specifically, it contends that there is no final judgment in a criminal case until the imposition of sentence; see *State* v. *Rhoads*, 122 Conn. App. 238, 243, 999 A.2d 1, cert. denied, 298 Conn. 913, 4 A.3d 836 (2010); and that the present appeal fails to satisfy either prong of the test set forth in *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). We disagree that this court lacks jurisdiction to consider the merits of the petitioner's appeal.

"Before examining the [appellant's] claims on appeal, we must first determine whether we have jurisdiction. It is axiomatic that the jurisdiction of this court is restricted to appeals from judgments that are final. General Statutes §§ 51-197a and 52-263; Practice Book

[4] See, e.g., *State* v. *Brabham*, 301 Conn. 376, 379–83, 21 A.3d 800 (2011); *State* v. *Dayton*, 176 Conn. App. 858, 863–67, 171 A.3d 482 (2017).

[5] On June 20, 2018, we granted the petitioner's motion to file a late amended appeal to include the trial court's March 28, 2018 ruling. This court further ordered, sua sponte, the parties to address in their appellate briefs the matter of the trial court's jurisdiction.

§ 61-1 . . . . Thus, as a general matter, an interlocutory ruling may not be appealed pending the final disposition of a case." (Internal quotation marks omitted.) *Martowska* v. *White*, 183 Conn. App. 770, 774, 193 A.3d 1269 (2018). An otherwise interlocutory order is immediately appealable if "it [meets] at least one prong of the two prong test articulated by our Supreme Court in *State* v. *Curcio*, [supra, 191 Conn. 31]. Under *Curcio*, [a]n otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." (Internal quotation marks omitted.) *Martowska* v. *White*, supra, 775.

The motion filed by the petitioner, and the proceedings that followed, concerned only the petitioner's efforts to have the 2015 arrest warrant cancelled. Indeed, once the court denied the petitioner's request to act pursuant to Practice Book § 36-6, this unusual matter, separate and distinct from any future proceedings in the criminal court, terminated. Accordingly, we conclude that the first prong of *Curcio* has been met, and this court has jurisdiction over the petitioner's appeal.

II

Next, we turn to the issue of the whether the trial court had jurisdiction to rule on the petitioner's motion for cancellation of the arrest warrant. We conclude that the court properly determined that it lacked jurisdiction to consider the petitioner's motion, filed prior to the commencement of a criminal case. A remand is necessary, however, to change the form of the judgment from a denial to a dismissal of the petitioner's motion for cancellation of the unserved 2015 arrest warrant.

We begin with the observation that the Superior Court is a constitutional court of general jurisdiction. See

State v. *McCoy*, 331 Conn. 561, 576–77, 206 A.3d 725 (2019). "In the absence of statutory or constitutional provisions, the limits of [the Superior Court's] jurisdiction are delineated by the common law." (Internal quotation marks omitted.) Id., 577; see also *State* v. *Ward*, 193 Conn. App. 794, 801, 220 A.3d 68, cert. granted on other grounds, 334 Conn. 911, A.3d (2019). Additionally, we note that "[j]urisdiction of the subject-matter is the power [of the court] to hear and determine cases of the general class to which the proceedings in question belong. . . . A court has subject matter jurisdiction if it has the authority to adjudicate a particular type of legal controversy." (Internal quotation marks omitted.) *In re Shonna K.*, 77 Conn. App. 246, 250, 822 A.2d 1009 (2003); see also *State* v. *Carey*, 222 Conn. 299, 304–305, 610 A.2d 1147 (1992). A challenge to the subject matter jurisdiction of the trial court presents a legal question subject to plenary review by this court. See, e.g., *State* v. *Daly*, 111 Conn. App. 397, 401, 960 A.2d 1040 (2008), cert. denied, 292 Conn. 909, 973 A.2d 108 (2009).

Next, we consider the jurisdiction of the Superior Court in the context of a criminal case. Our Supreme Court has stated that "[t]he Superior Court's authority in a criminal case becomes established by the proper presentment of the information . . . which is essential to initiate a criminal proceeding." (Internal quotation marks omitted.) *State* v. *Carey*, supra, 222 Conn. 306; see *State* v. *Daly*, supra, 111 Conn. App. 401–402; see also *Reed* v. *Reincke*, 155 Conn. 591, 598, 236 A.2d 909 (1967) (proper presentment of information, rather than arrest, is essential to initiate criminal proceeding).

The Superior Court addressed a similar situation in *State* v. *Rodriguez*, Superior Court, judicial district of Windham, Docket No. CR-17-010112799-T (November 15, 2017) (65 Conn. L. Rptr. 499). In that case, the defendant filed a motion to dismiss and to vacate an unserved violation of probation arrest warrant pursuant to Prac-

tice Book § 41-8 (2) and (3). Id. The court first considered whether it had jurisdiction to consider the defendant's motion. Id. It noted that "[a] criminal proceeding is not initiated until the defendant has been formally presented before the court, notified of the charges, and the formal charging document, called the information here in Connecticut, has been filed with the court, which constitutes the initiation of adversary judicial criminal proceedings . . . ." (Internal quotation marks omitted.) Id., 500. The defendant had not been served or otherwise presented before the Superior Court, and, therefore, the court concluded that "there is no criminal proceeding currently pending over which this court has jurisdiction." Id.

The defendant argued that Practice Book § 36-6 provides a means to invoke the court's jurisdiction. Id. In rejecting this position, the court first noted the absence of any legal or statutory authority to support the defendant's position. Id. It also concluded that the plain language of Practice Book § 36-6 did not support the defendant's interpretation. Id. The court stated: "The text of this section references the 'prosecuting authority' in the first sentence and the 'judicial authority' in the second, but makes no direct reference or other inference to defendants or defense counsel." Id. The court also noted that although our rules of practice may explain and codify the jurisdiction of the Superior Court, they do not create or enlarge it. Id. For these reasons, the court dismissed the defendant's motion. Id., 501.

We are persuaded by the analysis set forth in *Rodriguez* and, applying it to the facts of the present case, conclude that the trial court properly determined that it lacked jurisdiction to consider the defendant's motion for cancellation of the unserved 2015 arrest warrant. As noted by the trial court, "at the present time and in the instant case, *there is no pending criminal proceeding*." (Emphasis added.) Additionally, the plain language of Practice Book § 36-6 provides that the "prosecuting authority" and the "judicial authority" are the

two entities that may act to cancel an unserved arrest warrant. It does not set forth an avenue for the petitioner to seek cancellation of the unserved warrant. We agree that there was no pending criminal case and that, therefore, the court lacked jurisdiction to consider the merits of the petitioner's motions regarding the unserved arrest warrant.[6]

The form of the judgment is improper, the judgment denying the petitioner's motions is reversed and the case is remanded with direction to render judgment dismissing the motions.

In this opinion the other judges concurred.

[6] In *State* v. *Damato-Kushel*, 327 Conn. 173, 175–77, 173 A.3d 357 (2017), a case relied on by the petitioner at oral argument before this court, the attorney for an alleged victim filed an appearance in a pending criminal matter and sought to attend any pretrial disposition conferences held in chambers. The criminal court sustained the defendant's objection. Id., 177. The alleged victim filed a writ of error, arguing that the in-chambers, pretrial dispositional conferences constituted court proceedings that the defendant had the right to attend, and, therefore, pursuant to article first, § 8, of the Connecticut constitution, as amended by articles seventeen and twenty-nine of the amendments (Conn. Const., amend. XXIX [b] [5]), he also had the right to attend due to his status as the victim. Id., 175–76. The defendants in error, the criminal defendant and Superior Court, judicial district of Fairfield, argued, inter alia, that the alleged victim was not aggrieved and lacked standing to bring the writ of error. Id., 179–80. Specifically, the defendants in error argued that the criminal court had not made any determination that the alleged victim was, in fact, a victim for purposes of amendment XXIX (b) (5) of the Connecticut constitution. Id., 180. Our Supreme Court rejected this argument, stating: "It is undisputed . . . that . . . the arrest warrant application clearly alleged that [the defendant's] criminal misconduct was perpetrated against [the alleged victim] specifically. In such circumstances, we agree with the [alleged victim] that the arrest warrant constitutes a sufficient determination of his status as a victim to trigger the rights afforded by amendment XXIX (b) of the Connecticut constitution." Id., 181.

The present case is distinguishable from *Damato-Kushel*. In that case, the criminal case against the defendant had been initiated by the proper presentment of an information in court. Further, our Supreme Court decided only that the arrest warrant amounted to a sufficient determination of the alleged victim's status, invoking the rights pursuant to amendment XXIX (b) of our state constitution for purposes of an aggrievement and standing for purposes of a determination regarding appellate jurisdiction to prosecute

IN RE WALKER C. III*
(AC 43068)

Lavine, Devlin and Bear, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor child. The trial court found, pursuant to statute (§ 17-112 (j) (3) (B) (i)), that the mother had failed to achieve a degree of personal rehabilitation as would encourage the belief that within a reasonable time she could assume a responsible position in the child's life. She claimed that the court, inter alia, erroneously found that the child's attorney argued in favor of the termination of the mother's parental rights and that such error was not harmless because there was insufficient evidence tending to support termination of parental rights rather than permanent transfer of guardianship. *Held*:

1. The respondent mother could not prevail on her claim that the trial court erroneously stated the position of the child's attorney and that such statement was not harmless error, as such claim did not challenge the court's underlying factual findings or its conclusion that the petitioner proved by clear and convincing evidence the adjudicatory ground of failure to rehabilitate; although the trial court did not accurately set forth the position of the child's attorney with respect to the termination of the mother's parental rights, and did not set forth such counsel's statements favoring a possible permanent transfer of guardianship as an alternative to termination, the court's erroneous one sentence summary of the final position of the child's attorney was not a finding by the trial court, as it was not based on evidence, instead, it was a statement made by counsel in argument to the court, and, even if the court's summary of such counsel's position was to be considered a finding, any error deriving from the finding was harmless as there was abundant evidence of the mother's multiyear history of alcohol and substance abuse and her lack of cooperation with rehabilitative services to provide support for the trial court's ultimate finding by clear and convincing

the writ of error. We conclude, therefore, the petitioner's reliance on to *Damato-Kushel* is misplaced.

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

evidence that termination of the mother's parental rights was in the best interest of the child.

2. The respondent mother could not prevail on her claim that the trial court erred by not ordering a permanent transfer of guardianship to the foster mother on the basis that there was considerable trial evidence tending to show that a permanent transfer of guardianship was in the child's best interest, as the mother's claim did not arise from anything she filed, offered into evidence, or argued during the trial; instead, the mother's claim arose from argument of the child's attorney that the foster mother preferred a permanent transfer of the child's guardianship rather than termination of the mother's rights, a claim that was contrary to the mother's position during trial that she had rehabilitated and, therefore, the petition to terminate her parental rights should have been denied, and this court does not looked favorably on a party's obvious, contradictory change of position on appeal and, accordingly, to allow the mother to reverse her trial court strategy and argue something completely different before this court on appeal would amount to sanctioning a trial where the representations to court and other counsel did not count.

Argued December 11, 2019—officially released February 6, 2020**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters and tried to the court, *Hoffman, J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Joshua Michtom, assistant public defender, for the appellant (respondent mother).

Stephen G. Vitelli, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Judith C. Dayner, for the minor child.

** February 6, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

BEAR, J. The respondent mother appeals from the judgment of the trial court terminating her parental rights with respect to her minor child, Walker C. III (child). In the termination of parental rights petition, the petitioner, the Commissioner of Children and Families (commissioner), alleged that the respondent had failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, she could assume a responsible position in the life of the child pursuant to General Statutes § 17a-112 (j) (3) (B) (i).[1] On appeal, the respondent claims that (1) the court's finding that the child's attorney argued in favor of the termination of the respondent's parental rights is clearly erroneous, (2) the court's error was not harmless because there was insufficient evidence tending to support termination of parental rights over permanent transfer of guardianship, and (3) there was considerable evidence tending to show that a permanent transfer of guardianship was in the child's best interest.[2] We affirm the judgment of the trial court.

The trial court found the following facts by clear and convincing evidence. The respondent is the mother of the child and one other child, an older female half-sibling (daughter). The respondent has been involved with the Department of Children and Families (department) since 2009.[3] Since that time, she continuously has denied that she has alcohol and substance abuse

[1] The court also terminated the parental rights of the child's father. Because the father has not appealed from the judgment of the trial court, we refer in this opinion to the respondent mother as the respondent. We refer, however, occasionally to the child's father as the respondent father.

[2] This appeal is the first time the respondent claims that the trial evidence demonstrated that a permanent transfer of guardianship was in the child's best interest, rather than a termination of her parental rights.

[3] The respondent's parental rights with regard to her daughter were addressed in separate proceedings.

problems, despite several mandated reporters having informed the department that they had observed her to be intoxicated while in the presence of one or both children and while driving with them in her vehicle, thus demonstrating unsafe and otherwise inadequate supervision of her children. More specifically, on February 12, 2015, a report was made stating that the respondent arrived at her daughter's school smelling of alcohol and marijuana. A few months later, on June 3, 2015, the Hartford Police Department investigated the respondent's allegation that her daughter's father was sexually abusing the daughter, and the officer who investigated the allegation observed that the respondent appeared to have been intoxicated. On May 31, 2016, employees from the daughter's school reported that the respondent was intoxicated, and that the child's diaper was leaking and filthy.[4] Again, a few months later, on September 16, 2016, the respondent arrived at the daughter's school in an intoxicated condition, reportedly slurring her words. School personnel observed that she had urinated on herself, and had left her car running while the child was hanging out of the window. The respondent, as a result, was arrested for risk of injury to a child and breach of the peace.

The respondent was arrested for a second time on May 11, 2017, after she left the scene of a motor vehicle crash. The police report stated that she "reeked" of alcohol, could barely stand up, and that one of her children was in the back seat of her vehicle. Additionally, she failed a field sobriety test.[5]

[4] In connection with that incident, the respondent reported to the department that she drank Hennessy cognac regularly and that, on May 31, 2016, she drank a cup of it before she went to the school.

[5] As a result of the respondent's arrest, she pleaded guilty to the charges in connection with the incident. She was sentenced on May 31, 2017, to six months of incarceration, execution suspended, and two years of probation.

Approximately one year later, the Hartford Police Department executed a search warrant on the respondent's home for evidence that the respondent father was a dealer of crack cocaine and marijuana, both of which were found in the home along with $3510 in cash and a Beretta 950BS .25 caliber semiautomatic pistol. The respondent father was arrested in connection with the incident, but the respondent was not. That same day, the department visited the respondent's home and reported that not only did she appear to be under the influence of alcohol, but she also did not disclose the earlier search of her home or the arrest of the respondent father.

Since its first contact with her in 2009, the department sought multiple times to engage the respondent in services aimed at treating her alcohol abuse and dependence and other issues. The respondent was referred to, among other things, group sessions at the Wheeler Clinic, parenting services at Radiance Innovative Services, therapy at the Community Renewal Team Behavioral Health Program, and therapy at My People's Clinical Services. The department received several reports from service providers that the respondent failed to understand how her alcohol abuse and behavior affected her and the safety of her children. The respondent missed or avoided many of the scheduled sessions. For example, over the course of one of her treatment programs, the respondent was scheduled to submit forty-five random urine screenings, but she completed only thirteen of them.

The following procedural history is relevant to the present appeal. On September 19, 2016, the commissioner filed a neglect petition on behalf of the child. On September 22, 2016, the commissioner sought an ex parte order of temporary custody of the child, which was granted. That order was sustained on October 7, 2016, after a hearing. On February 8, 2017, the court

found the child neglected, and returned the child to the care of the respondent under an order of protective supervision. The court issued specific steps for the respondent on February 8, 2017, including an order that she not consume alcohol or have alcohol in her home.

On May 16, 2017, the commissioner filed a second motion for temporary custody, which was granted and then sustained on May 26, 2017. The court modified the disposition from protective supervision to commitment. The court ordered new specific steps for the respondent. On September 14, 2017, the court adjudicated the child neglected. On June 7, 2018, the petitioner filed a petition for termination of the respondent's parental rights with respect to the child on the ground of her failure to rehabilitate as set forth in § 17a-112 (j) (3) (B) (i). The petitioner sought to be appointed statutory parent for the child after termination occurred. The petitioner did not check the box on the petition seeking an appointment as guardian of the person of the child. Therefore, the petitioner's sole prayer for relief in its petition was that the court terminate the parental rights of the respondent and appoint a statutory parent for the child.

On December 3, 2018, the trial commenced and concluded. On December 7, 2018, the respondent filed a motion to open the evidence to present testimony from an additional witness, which was granted by the court on December 20, 2018. On January 17, 2019, the respondent presented additional evidence, followed by closing argument. On January 31, 2019, pursuant to a request from the attorney for the child, the court heard testimony from a department worker, admitted into evidence a report relating to the position of the foster mother concerning a disposition of permanent transfer of guardianship of the child instead of the termination of the respondent's parental rights, and heard further arguments by the parties.

On March 20, 2019, the court issued its memorandum of decision. It concluded that the department had proved, by clear and convincing evidence, the ground for termination set forth in § 17a-112 (j) (3) (B) (i), that the respondent had failed to rehabilitate to such a level that would avoid the application of the statute to her, that her conduct was unlikely to change within a period sufficient to have the child safely returned to her and, that after consideration of the seven factors set forth in § 17a-112 (k), it was in the child's best interest for the court to terminate the respondent's parental rights. This appeal followed. Additional facts will be set forth as necessary.

I

The respondent claims that (1) the trial court's memorandum of decision contains a clearly erroneous finding that the child's attorney argued in favor of the termination of parental rights, and (2) that finding was not harmless.

"The standard for termination of parental rights in a child is well known. A hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights [under § 17a-112 (j) (3)] exists by clear and convincing evidence. If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase . . . [in which] the trial court determines whether termination is in the best interests of the child." (Internal quotation marks omitted.) *In re Quamaine K.*, 164 Conn. App. 775, 782, 137 A.3d 951, cert. denied, 321 Conn. 919, 136 A.3d 1276 (2016). On appeal, with respect to the dispositional phase, "we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] *only* if the court's findings

are clearly erroneous." (Emphasis added.) *In re Athena C.*, 181 Conn. App. 803, 811, 186 A.3d 1198, cert. denied, 329 Conn. 911, 186 A.3d 14 (2018).

With respect to the harmless error analysis, our Supreme Court has held "that not every error is harmful. . . . [B]efore a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful." *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, 267 Conn. 279, 295, 838 A.2d 135 (2004). "[T]he question is whether the trial court's error was so prejudicial as to deprive the [respondent] of a fair trial, or, stated another way, was the court's [finding], though erroneous, likely to affect the result?" (Internal quotation marks omitted.) *State* v. *Ramirez*, 101 Conn. App. 283, 287, 921 A.2d 702, cert. denied, 283 Conn. 909, 928 A.2d 539 (2007), cert. denied, 552 U.S. 1109, 128 S. Ct. 895, 169 L. Ed. 2d 747 (2008).

In this appeal, the respondent does not challenge the court's underlying factual findings or its conclusion that the petitioner proved by clear and convincing evidence the adjudicatory ground of failure to rehabilitate. Rather, the respondent claims that the trial court's statement in its memorandum of decision that the attorney for the child supported termination of the respondent's parental rights was clearly erroneous and that the error is not harmless. After reviewing the record, we conclude that the trial court did not accurately set forth the position of the attorney for the child with respect to the termination of the respondent's parental rights, and did not set forth such counsel's statements favoring a possible permanent transfer of guardianship as an alternative to termination. We further conclude, however, that the court's erroneous summary of such counsel's position was not a finding, because it was not based on any evidence,[6] but instead

[6] "The arguments of counsel are not evidence." *State* v. *Braswell*, 145 Conn. App. 617, 637 n.13, 76 A.3d 231 (2013), aff'd, 318 Conn. 815, 123 A.3d 835 (2015).

was a statement made by such counsel in argument to the court. In any event, even if the court's summary of such counsel's position is to be considered a finding, any error deriving from the finding was harmless as there was abundant clear and convincing evidence to warrant the termination of the respondent's parental rights.

"It is axiomatic that a trial court's factual findings are accorded great deference. Accordingly, an appellate tribunal will not disturb a trial court's finding [regarding the] termination of parental rights . . . unless that finding is clearly erroneous. . . . A finding is clearly erroneous when either there is no evidence in the record to support it, or the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . [Additionally] [o]n appeal, our function is to determine whether the trial court's conclusion was factually supported and legally correct. . . . In doing so, however, [g]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling." (Internal quotation marks omitted.) *In re Lukas K.*, 120 Conn. App. 465, 484–85, 992 A.2d 1142 (2010), aff'd, 300 Conn. 463, 14 A.3d 990 (2011).

The trial court wrote a thirty-four page memorandum of decision. In this appeal, the respondent challenges only one sentence in the court's memorandum: "At the conclusion of the trial, the attorney for the minor child requested the court to terminate the parental rights of [the respondent] in light of [her] failure to rehabilitate as it is in [the child's] best interest to do so." The

respondent argues that the court's "finding" is not supported by the record; rather, she asserts that the attorney for the child stated that she would not support termination of the respondent's parental rights over the permanent transfer of the child's guardianship.

At the conclusion of the second day of trial, counsel for the parties delivered their closing arguments. It was then that the attorney for the child stated: "[O]n behalf of [the child] I do believe the state has made [its] case as far as clear and convincing evidence in terms of the adjudicatory phase of the trial." The attorney for the child stated that the foster mother was interested in a permanent transfer of guardianship rather than a termination of parental rights.[7] The attorney then stated: "I would hesitate on behalf of [the child] to say strongly it is in his best interest to terminate the parental rights given the new information . . . ."

Approximately two weeks later, the court opened the evidence to hear the testimony of a department worker, allowed into evidence a report only for a limited purpose, and allowed additional argument regarding prior discussions with the foster mother about her views on a permanent transfer of guardianship. The reason for the additional hearing was to clarify the statements made by the child's attorney that the foster mother was interested in a permanent transfer of guardianship and not a termination of parental rights followed by adop-

[7] The attorney for the child seemingly based her recommendation to the court on what she appears to have believed were the foster mother's wishes. The petitioner claims that the position of the foster mother, as testified to by a department worker, was "that she would agree to a permanent transfer of guardianship but in the event that the court ruled that it was a [termination of parental rights] with adoption, she would adopt." Because the court granted the termination of parental rights as requested by the petitioner in the pending petition, the reasonable conclusion to be drawn from the testimony of the worker is that, despite what the child's attorney argued, the foster mother was willing to proceed with the adoption after the court determined that the termination of the respondent's parental rights was in the best interest of the child.

tion.[8] At the conclusion of the testimony, the attorney for the child argued to the court that a permanent transfer of guardianship was in the child's best interest instead of the respondent's termination of parental rights. Specifically, the attorney for the child argued: "I think that a permanent transfer of legal guardianship makes more sense. . . . I really feel that it's in . . . [the child's] best interest to honor [the foster mother's position] and not to pretty much force something on to her that isn't clearly what she prefers. And there's a reason why [General Statues § 46b-129] was enacted, the permanent transfer of guardianship . . . for situations . . . precisely like this where you have a family that's close and they do not want to disrupt the legal relationships of who is the parent and who isn't. And that is what we have here." We conclude that the court's one sentence summary of the final position of the attorney for the child in her closing argument concerning the attorney's preference for guardianship instead of termination is inaccurate and, thus, is erroneous, but it is not a finding. Even if we were to conclude that such summary statement constituted a clearly erroneous finding, the error is harmless error for the following reasons.

[8] The state called a social worker to testify as to her interactions with the foster mother. The social worker testified that members of the department had several conversations with the foster mother who did not object to a permanent transfer of guardianship. The petitioner, however, preferred termination of the respondent's parental rights, which was the sole focus of the petition and trial. The social worker's testimony and the report were the only evidence presented on the third day. No petition or motion for a permanent transfer of guardianship had been filed in the case by any party, and it was not referred to during the trial; therefore, the issue, as previously noted, was not properly before the court. See, e.g., *Connolly* v. *Connolly*, 191 Conn. 468, 475–78, 464 A.2d 837 (1983); see also *In re Nasia B.*, 98 Conn. App. 319, 329, 908 A.2d 1090 (2006) ("[t]he purpose of requiring written motions is not only to provide for the orderly administration of justice, but also to fulfill the fundamental requirement of due process of law"); *Berglass* v. *Berglass*, 71 Conn. App. 771, 783, 804 A.2d 889 (2002) (same). As previously noted, the petitioner's sole prayer for relief in its petition was that the court terminate the parental rights of the respondent and appoint a statutory

With respect to the dispositional phase, the court made the statutory findings required by § 17a-112 (k), which the respondent has not challenged on appeal, including that the respondent had made insufficient efforts or adjustments to her individual circumstances, conduct, or condition to make it in the best interest of the child to return to her care in the foreseeable future. The court also found that the respondent continued to have unresolved issues that impeded her ability to safely and appropriately provide care for the child. The court found that the respondent had failed to engage honestly in long-term substance abuse treatment, and to demonstrate her ability to maintain her sobriety by effectively engaging in treatment. In its best interests analysis, the court stated that it considered, inter alia, the child's interest in sustained growth, chance for development, his well-being, the continuity and stability of his environment, and his age and needs, the length and nature of his stage of foster care, his contact or lack thereof with the respondent, and his genetic bond with her. The court also balanced the child's intrinsic need for stability and permanency against the potential benefits of maintaining a connection with his biological parents.

The respondent's multiyear history of alcohol and substance abuse, and other issues, and her lack of cooperation with and benefit from multiple offers of therapeutic and rehabilitative services is relevant to, and provides overwhelming support for, the court's ultimate finding, by clear and convincing evidence, that the termination of her parental rights was in the best interest of the child.

II

The respondent next claims that the trial court erred by not ordering a permanent transfer of guardianship

parent for the child. The petitioner did not request the appointment of a guardian of the person of the child.

to the foster mother. Specifically, her claim is that the court improperly granted the termination of her parental rights when there was considerable trial evidence tending to show that a permanent transfer of guardianship was in the child's best interest. The petitioner responds that we should not consider the respondent's permanent transfer of guardianship claim because it does not arise from anything she filed, offered into evidence, or argued during the trial. Additionally, the petitioner contends that neither the petitioner nor the attorney for the child offered evidence, during trial, relating to a permanent transfer of guardianship of the child. The respondent's guardianship claim, thus, is based solely on the argument of the attorney for the child that the foster mother preferred a permanent transfer of the child's guardianship to her rather than termination of the respondent's rights to the child.[9] The petitioner argues that, contrary to the respondent's position in this appeal, her position during trial was that she had rehabilitated and, therefore, the termination of parental rights petition, which contained the sole ground of failure to rehabilitate pursuant to § 17a-112 (j) (3) (B) (i), should be denied. The petitioner asserts that the respondent also argued to the trial court that the department failed to satisfy the reasonable efforts prong of § 17a-112 (j) (1). The petitioner further asserts in its brief that the respondent did not file a motion for permanent transfer of guardianship, and that she specifically opposed the suggestion made by the child's attorney for a disposition of guardianship when it was raised on January 17, 2019.[10] Finally, the petitioner

[9] The attorney for the child agreed that the petitioner had proven the § 17a-112 (j) (3) (B) (i) failure to rehabilitate adjudicatory ground to terminate the respondent's parental rights. Her statements related to the child's best interest in the dispositional portion of the case.

[10] The respondent initially objected to an additional study by the department alleged to relate to the issue of guardianship, but eventually agreed to allow the exhibit to enter into evidence for the limited purpose of clarifying what the attorney for the child was referring to in her closing argument.

argues that the evidence during the first trial day on December 3, 2018, established that the foster mother was, in fact, willing to serve as the adoptive parent for the child and was willing to consider an "open adoption."[11]

This court has not looked favorably on a party's obvious, contradictory change of position on appeal. "As we have expressed on a number of occasions, we generally disfavor permitting an appellant to take one legal position at trial and then take a contradictory position on appeal." *Kirwan* v. *Kirwan*, 185 Conn. App. 713, 724 n.11, 197 A.3d 1000 (2018). "[A] party cannot be permitted to adopt one position at trial and then . . . adopt a different position on appeal." *Szymonik* v. *Szymonik*, 167 Conn. App. 641, 650, 144 A.3d 457, cert. denied, 323 Conn. 931, 150 A.3d 232 (2016). Similarly, this court has stated that "[o]rdinarily appellate review is not available to a party who follows one strategic path at trial and another on appeal, when the original strategy does not produce the desired result. . . . To allow the [party] to seek reversal now that [her] trial strategy has failed would amount to allowing [her] to induce potentially harmful error, and then ambush the [opposing party and the court] with that claim on appeal." (Internal quotation marks omitted.) *Nweeia* v. *Nweeia*, 142 Conn. App. 613, 620, 64 A.3d 1251 (2013); see also *Buxenbaum* v. *Jones*, 189 Conn. App. 790, 811–12, 209 A.3d 664 (2019); *In re Kyara H.*, 147 Conn. App. 829, 841 n.7, 83 A.3d 1249, cert. denied, 311 Conn. 923, 86 A.3d 466 (2014); *In re James L.*, 55 Conn. App. 336, 348–49, 738 A.2d 749, cert. denied, 252 Conn. 907, 743 A.2d 618 (1999). In the present case, to allow the respondent to

[11] A genetic parent may contract with adopting parents, prior to the adoption, for the continued right to visit the adopted child so long as visitation continues to be in the best interest of the child. See *Michaud* v. *Wawruck*, 209 Conn. 407, 414–15, 551 A.2d 738 (1988). Such agreements are often referred to as "open adoption agreements." See *In re Christopher G.*, 118 Conn. App. 569, 572 n.6, 984 A.2d 1111 (2009).

reverse her trial court strategy and to argue something completely different before us on appeal amounts to sanctioning a trial where representations to the court and other counsel do not count, which we will not permit.[12]

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANDRE D. WHITE (AC 42471)

Keller, Prescott and Moll, Js.

Syllabus

Convicted, after a jury trial, of the crimes of home invasion, robbery in the first degree, conspiracy to commit burglary in the first degree and tampering with a witness, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which he and two other men, D and L, pursuant to their plan to commit a home invasion and robbery, followed the victim to his residence, forced him into the residence at gunpoint and robbed him of various possessions, including his credit and ATM cards, two rifles, a box of shotgun shells, and a vase containing approximately $75 in coins. During their investigation, the police obtained a warrant to search the defendant's residence and to seize any items that were described in the warrant application and supporting affidavit as either having been removed from the victim's residence or used or worn by the defendant during the commission of the home invasion. Upon execution of the warrant, the police seized several items, including a box of 20 gauge shotgun shells and a black ski mask. Prior to trial, the defendant filed a motion to suppress any and all evidence that the police seized from his residence. The trial court denied the motion, concluding, inter alia, that the search warrant was supported by probable cause. During the trial, the state called D, who testified in detail about the events leading up to and including the home invasion, and the defendant's involvement therein. D also testified

[12] Additionally, because the respondent's new claim on appeal relating to a permanent transfer of guardianship was not raised by her during the trial, the respondent has failed to provide an adequate record for review by this court. Accordingly, this claim fails. See *In re Anthony L.*, 194 Conn. App. 111, 219 A.3d 979, cert. denied, 334 Conn. 914, A.3d (2019) (claim not reviewable because not raised during trial, resulting in inadequate record).

that he had entered into a plea agreement with the state, pursuant to which he pleaded guilty to the crime of burglary in the first degree and agreed to testify for the state in exchange for a sentence of between seven and nine years of imprisonment. The plea agreement, which was admitted into evidence without objection, expressly provided that the ultimate decision as to the sentence that D received would be decided by the judge who presided over the defendant's trial, after consideration of the credibility of D's testimony at trial, as well as other factors. On appeal, the defendant claimed that he was deprived of a fair trial as a result of prosecutorial impropriety and that the court improperly denied his motion to suppress the evidence that was seized pursuant to the search warrant. *Held*:

1. The defendant could not prevail on his unpreserved claim that prosecutorial impropriety that occurred during the state's examination of D and closing argument deprived him of a fair trial:

   a. Contrary to the defendant's claim, the prosecutor's inquiry during his redirect examination of D about D's reasons for entering into the plea agreement with the state, which elicited testimony from D that the prosecutor had not made an offer until he was satisfied that D was being truthful, was not improper; the prosecutor's inquiry was based on the evidence and did not suggest that the prosecutor was vouching for D's credibility on the basis of facts outside of the record.

   b. The defendant's claim that the prosecutor improperly vouched for D's credibility during the state's rebuttal closing argument was unavailing: the prosecutor's reference to the fact that D's plea agreement required the presiding judge to make a determination of D's credibility was based on the evidence and did not suggest to the jury either that the court already had found D to be credible or that the jury was not required to evaluate D's credibility because the court would do so; moreover, contrary to the defendant's assertion, certain challenged arguments of the prosecutor concerning D and the plea agreement were not an attempt by the prosecutor to inject his credibility into the trial or to ask the jury to trust his professional judgment and integrity when assessing D's credibility, as the arguments were properly limited to the evidence and the rational inferences to be drawn therefrom; furthermore, the prosecutor did not mischaracterize defense counsel's arguments that the state had "bought and sold" D's testimony and that the prosecutor was supporting perjury, the prosecutor having properly attempted to refute these challenges to D's testimony by arguing that because the plea agreement was contingent on D testifying credibly, it did not logically provide him with a motive to be untruthful, and there was no merit to the defendant's contention that the prosecutor vouched for D by suggesting that, by testifying, he risked being prosecuted for perjury.

2. The trial court properly denied the defendant's motion to suppress evidence that was seized pursuant to the search warrant, the warrant having been supported by probable cause: the defendant could not prevail on

his unpreserved claim that the facts set forth in the search warrant affidavit did not provide probable cause to believe that he would have retained the items sought to be seized in his residence four months after the home invasion, because the affidavit set forth facts that either implicated the defendant as a participant in the home invasion or as being in the company of L, who was known to be a participant, shortly after the home invasion occurred, it was reasonable to infer that the defendant may have possessed items taken from the victim's residence or that he possessed devices, such as a cell phone, that would have been used in the commission of the crime, and, on the basis of certain averments set forth in the affidavit, it was reasonable to infer that, four months after the home invasion, the defendant probably possessed a cell phone or a GPS device that he had possessed at the time that the crime occurred, that he still would have possessed the types of items that were stolen from the victim and that, in light of the variety of the items taken, one or more of the items would be kept by the defendant in his residence, and the judge who issued the search warrant reasonably could have relied on the training, experience and expertise of the detective affiants in this regard; moreover, the defendant's contention that the facts set forth in the affidavit were insufficient to demonstrate that he was a participant in the home invasion because the facts concerning his friendship with L and his presence with him at a supermarket on the morning following the home invasion reflected innocent behavior that did not give rise to a suspicion that he was a participant was unavailing, as it was reasonable to infer, in light of other facts in the affidavit, that the defendant's act of exchanging approximately $68 in coins by means of the supermarket's Coinstar machine, which was recorded by the store's surveillance camera, was suspicious and tended to give rise to probable cause that he possessed evidence related to the home invasion, and the affidavit reflected that, while the defendant was cashing in the receipt for the coins, L was at a cash register attempting to use the victim's stolen credit card; furthermore, the finding of probable cause to issue the search warrant did not depend on facts in the affidavit that tended to demonstrate that the defendant was a perpetrator of the home invasion, and the affiants presented facts that gave rise to a probability that the defendant was in possession of items connected with the home invasion not only due to his participation in the criminal endeavor but also due to his relationship with and activities with L, who was identified as a suspect in the crime within hours of its commission.

Argued September 9, 2019—officially released February 11, 2020

Procedural History

Substitute information charging the defendant with two counts of the crime of robbery in the first degree, and with the crimes of home invasion, conspiracy to

commit burglary in the first degree and tampering with a witness, brought to the Superior Court in the judicial district of Litchfield at Torrington, where the court, *Danaher*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the matter was tried to the jury before *Dooley*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *David S. Shepack*, former state's attorney, and *David R. Shannon*, senior assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Andre D. White, appeals from the judgment of conviction, rendered following a jury trial, of home invasion in violation of General Statutes § 53a-100aa (a) (1), robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), robbery in the first degree in violation of § 53a-134 (a) (2), conspiracy to commit burglary in the first degree in violation of General Statutes §§ 53a-48 and 53a-101 (a) (3), and tampering with a witness in violation of General Statutes § 53a-151.[1] The defendant claims that (1) prosecutorial impropriety that occurred during the prosecutor's examination of a witness, as well as during the state's closing argument, deprived him of his right to a fair trial, and (2) the court improperly denied his motion to suppress evidence that was seized pursuant

[1] By means of a special interrogatory submitted to the jury, the jury found that the defendant committed the crimes of home invasion and robbery with the use of a firearm in violation of General Statutes § 53-202k. The defendant received a total effective sentence of thirty years of incarceration, execution suspended after twenty years, followed by five years of probation.

to a search warrant that was not supported by probable cause. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. Early in 2013, the defendant, Henry Le, and Trayvon Dunning were serving time as inmates at the same correctional facility. During this time, the three men agreed to commit home invasions following their release from prison.[2] Following the release of the defendant and Le, Dunning was released on March 28, 2013. Thereafter, the defendant, Le, and Dunning refined their plan. The men agreed that they would identify a suitable victim in public, follow the victim home, and commit a robbery at his or her residence. In preparation to carry out their plan, in early April, 2013, they purchased items at a home improvement store, including masks, gloves, and zip ties.

Late in the day on April 7, 2013, Dunning was driving an automobile on Interstate 84 in Hartford, and the defendant and Le were his passengers. The three men observed the victim, Peter Brown, who was driving a BMW sport utility vehicle. The men decided to follow the victim after observing that he appeared to be alone, that he was a white male in his forties or fifties, and he was driving an expensive automobile. The men followed the victim from Hartford to his residence in New Hartford.

[2] In several telephone conversations, the defendant made statements while incarcerated that tended to implicate him in the home invasion. Two months prior to his release, the defendant had a telephone conversation with his mother in which they discussed financial matters. During the conversation, the defendant stated, "I'm coming across a bunch of money when I get out, that's why I gotta get out." In a telephone conversation with Le that took place on March 23, 2013, the defendant referred to his imminent release from prison. He stated that Dunning was going to be "ready" and that he would tell Dunning that Le had "everything set up." In a telephone conversation with his father that occurred on February 7, 2015, while he was incarcerated and awaiting trial, the defendant stated that he had his upcoming case "in the palm of his hand." The defendant, revealing his knowledge of the

The victim arrived at his residence at approximately 11:30 p.m. As the victim approached the back door of his residence, the defendant, Le, and Dunning, all of whom had their faces concealed, confronted him. The victim was approached first by two of the three men, one of whom was brandishing a gun. They ordered the victim to put his "hands up." The third man, with his face covered, then approached the victim from his right side. The men ordered the victim to give them his wallet and his cell phone. At gunpoint, the victim complied. The men then asked the victim whether anyone was inside his residence and whether he had a dog or an alarm system. After the victim informed them that nobody else was at home and that he did not have an alarm system, the men forced the victim inside his residence.

For the next forty-five to fifty minutes, the defendant, Dunning, and Le confined the victim to a chair in his kitchen. They searched the contents of an overnight bag that the victim had been carrying. They repeatedly asked the victim if he owned a safe, to which he replied, no. They removed a credit card and an automatic teller machine (ATM) card from his wallet. One of the men demanded the victim's ATM card's pin number. The victim replied that he was only able to remember the letters corresponding to his pin number, but not the number itself. Because he was terrified by the circumstances, the victim had difficulty converting the letters into a number. One of the men ripped a telephone off the wall and demanded that he provide them with the number. After the victim provided the pin number, Le demanded the keys to the victim's automobile, asked him where the nearest ATM was located, and left the residence. Le returned to the victim's residence a short

crime, also stated that Le, who had accepted a guilty plea, had "copped out" and was "the mastermind."

time later after having withdrawn funds from the victim's bank account at an ATM in New Hartford.[3]

While one of the three men held the victim at gunpoint in his kitchen, they each took turns ransacking every room of his residence in search of valuables. The men brought various items to the kitchen. Thereafter, Dunning parked his automobile in the victim's driveway. While the victim continued to be held at gunpoint, as he had been throughout the entire incident, the men carried several of the victim's possessions to Dunning's automobile. Among the possessions removed from the residence were an overnight bag, two long rifles, a box of shotgun shells,[4] camera equipment, a gold watch, a laptop computer, a hunting knife, and a large vase that contained approximately $75 in coins.[5]

After the victim was ordered to turn around, the defendant, Le, and Dunning exited the residence. They then quickly fled from the scene in Dunning's automobile.[6] The victim went to his neighbor's residence to

[3] Approximately one hour after the defendant, Le, and Dunning left the crime scene, Dunning used the victim's ATM card at an ATM in Hartford. At 2:20 a.m., on April 8, 2013, one of the perpetrators used the victim's credit card at a gas station in Manchester. Later in the morning of April 8, 2013, Le, who was accompanied by the defendant, attempted to use the victim's credit card at a supermarket in East Hartford.

[4] The shotgun shells, as well as a black ski mask, were discovered in the defendant's bedroom and seized by the police during a subsequent search of his residence in East Hartford.

[5] Surveillance video from a supermarket in East Hartford showed that, during the morning of April 8, 2013, the defendant, who was accompanied by Le, deposited approximately $68 in a coin exchange machine, resulting in a receipt in the amount of $62.01. During the police investigation of this case and police questioning of the defendant, the defendant initially "denied hanging out" with Le and told police investigators that he was not at the supermarket with Le on April 8, 2013. After the police told the defendant that witnesses had identified him as being at the supermarket at that time, the defendant told the police that, at Le's request, he had accompanied Le to the supermarket, Le had exchanged coins at the supermarket, and Le had given him some money.

[6] The police later found a pair of gloves in the victim's yard. DNA testing of the gloves supported a finding that they had been handled by Dunning

request help. The victim's neighbor called 911, and the police arrived on the scene quickly thereafter.

Following the defendant's arrest and while he was awaiting trial on the charges at issue in the present appeal, he had conversations with others in an attempt to persuade Dunning not to testify against him. During a recorded telephone conversation with the mother of Dunning's child, a person who was identified at trial as "Jasmine," the defendant explained that Dunning had provided the police with a statement that implicated him. The defendant asked Jasmine to pressure Dunning not to testify, stating that Jasmine "don't like no . . . snitches." He asked Jasmine to tell Dunning that testifying against the defendant would harm his relationship with her. He cautioned Jasmine not to let Dunning know that he called her and stated that, if Dunning knew about the call, he would "go back to the court and tell them."

The next day, the defendant attempted to speak with Jasmine a second time. Instead, he reached her boyfriend by telephone, and Jasmine's boyfriend did not permit the defendant to speak directly with her. The defendant told Jasmine's boyfriend that it was foolish for Dunning to cooperate with the prosecution and that he wanted Jasmine to prevent Dunning from testifying. He stated that the "best bet [was for Dunning] to not testify at all." He explained that if Dunning invoked his fifth amendment privilege against self-incrimination, then "they can't do shit to him." The defendant also stated that he would be offered a favorable plea deal if Dunning refused to testify. The defendant stated that he could have people "put hands on" Dunning, but he was "just trying to save [Dunning] from getting

and the defendant's brother, with whom the defendant resided at the time of the events underlying this appeal. Prior to the home invasion, the defendant purchased the gloves and provided them to Dunning.

touched . . . [as he was] not trying to go that route . . . .”[7] Dunning testified on behalf of the state at trial. Additional facts will be set forth as necessary.

I

First, the defendant claims that prosecutorial impropriety that occurred during the state’s examination of Dunning, as well as during the state’s closing argument, deprived him of his right to a fair trial. We disagree.

The defendant’s unpreserved claim[8] focuses on the prosecutor’s examination of Dunning, as well as arguments made by the prosecutor during the state’s rebuttal closing argument. With respect to the examination of Dunning during trial, the following additional facts are relevant to the present claim. Dunning was called as a witness by the state during its case-in-chief. Dunning appeared in prison garb and, at the very beginning of his direct examination by the state, the prosecutor elicited testimony that he was incarcerated as a result of the role he played in the incident giving rise to the charges that were brought against the defendant, namely, the 2013 home invasion that occurred in New Hartford. During his testimony, he stated that he had entered into a plea agreement with the state pursuant to which he pleaded guilty to a single criminal offense—burglary in the first degree—and he agreed to testify in the defendant’s case in exchange for a sentence of between seven to nine years of imprisonment. Dunning testified that, at the time of the defendant’s trial, he

[7] Donald Lavery, a correctional officer, testified that the phrase “putting hands [on]” is synonymous with assault.

[8] Although the defendant did not raise this claim before the trial court, we may review it because, “under settled law, a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test.” (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 560, 34 A.3d 370 (2012).

was awaiting sentencing. Without objection, a copy of the written plea agreement was admitted into evidence and read aloud by the courtroom clerk in the presence of the jury. In relevant part, it stated that "the ultimate decision regarding the sentence [Dunning] receives will be made by the sentencing judge, the Honorable Kari Dooley, after consideration of the credibility of his testimony" at the defendant's trial, as well as other factors.

Thereafter, during the state's case-in-chief, Dunning testified about the events leading up to and including the home invasion. In relevant part, he testified that while he was incarcerated with the defendant and Le, the three men planned to commit home invasions following their release. Shortly after Dunning was released on March 28, 2013, he, the defendant, and Le prepared to carry out their plan by purchasing items at a home improvement store. On April 7, 2013, accompanied by the defendant and Le as his passengers, Dunning drove behind the victim, following him to his residence in New Hartford. Dunning testified that when he arrived at the victim's residence, "we all jumped out . . . got on [the victim's] porch, searched his pockets, got his stuff, I opened his door, got him inside, sat him down and we all just searched the house for his stuff." He stated that, while the victim was held at gunpoint for approximately forty-five minutes to one hour, he, the defendant, and Le searched the residence for valuables.[9] During this period of time, Le left briefly to visit an ATM for the purpose of withdrawing money by means of the victim's card. Dunning testified that after many of the victim's possessions, including guns and camera equipment, were placed into the trunk of his automobile, he drove away from the scene with the defendant and Le.

[9] Initially, Dunning testified that he alone held the victim at gunpoint during the home invasion. Later, he testified, consistent with the victim's testimony, that he had joined Le and the defendant in searching the victim's residence for valuables.

Dunning testified that in July, 2013, he learned that the police were interested in speaking with him and that they had executed a search warrant at his residence. He voluntarily met with the police and, after they showed him photographs that incriminated him, the defendant, and Le, he provided a statement about the events at issue. Dunning provided the police with the names of the defendant and Le. He testified that, later, he met with the police once again, was transported to a police station, and provided the police with a second statement. He testified that he had "kind of lied a little bit" in his police statements with respect to whether he had entered the victim's residence. He testified that although he had accurately told the police that he was with the defendant and Le on the night of the home invasion and that he drove Le and the defendant to the victim's residence, he had inaccurately told the police in these statements that he had merely waited outside of the victim's residence during the commission of the home invasion. He said that he had been untruthful about the extent of his role in the crimes because he was trying to avoid more serious charges.

Defense counsel cross-examined Dunning. Dunning testified that he was arrested on August 9, 2013, and charged with several crimes, but that he did not enter into the plea agreement with the state until March 17, 2017. He testified that, pursuant to the agreement, several charges would not be pursued by the state.[10] Defense counsel asked Dunning why it took so long for him to enter a guilty plea. Dunning explained that he was looking for the best plea deal that he could obtain and that he "took the best option" that was made available to him. He stated: "I wanted to fight and see if I can get less than they were offering, but it didn't work.

[10] According to Dunning, he was charged initially with "home invasion, burglary one, robbery one, larceny one, threatening one, [and] kidnapping one."

They kept offering the same thing, so I took the best route I could."

Defense counsel also questioned Dunning about the two written statements that he had provided to the police. Dunning agreed with defense counsel that, in the statements, he had sworn to be truthful but, nevertheless, had misrepresented the extent of his role in the crimes that took place at the victim's residence. Defense counsel asked Dunning when he had first admitted to the police that he had entered the victim's residence. Dunning testified that he made this admission the month prior to the trial, when he had additional plea negotiations with the state.

During the state's redirect examination of Dunning, the prosecutor further questioned him about the circumstances surrounding his plea agreement with the state. In relevant part, Dunning testified that he was arrested approximately five months after the home invasion occurred. There was no objection and the following examination of Dunning then occurred:

"Q. Now . . . were there negotiations between your attorney and the prosecutor who was handling the case at that time, to your knowledge?

"A. No.

"Q. No negotiations. Was the state . . . either I or the other prosecutor who initially handled the case, willing to enter into an agreement if you weren't telling the truth?

"A. Could you repeat the question, please?

"Q. Is the agreement you entered into with the state . . . contingent upon you telling the truth?

"A. Yes.

"Q. And you never entered into an agreement with the state until last month, correct?

"A. Yes.

"Q. And is it correct that last month was the first time you told anyone from the state, police, prosecutor's office that you went into that house, correct?

"A. Yes.

"Q. So, the agreement wasn't entered into until you told the state you went into that house?

"A. Yes.

"Q. Are you aware or have you read some of the police reports about this case?

"A. Yes.

"Q. [D]o you know whether or not the victim was always claiming three people went in the house?

"A. As far as I know, he said three people were in the house."

Defense counsel did not object to this line of questioning by the prosecutor.

Because the defendant's claim of prosecutorial impropriety is based, in part, on the prosecutor's arguments during the state's rebuttal closing argument, we next set forth relevant portions of the arguments advanced before the jury. During the state's initial closing argument, the prosecutor did not comment on Dunning's plea agreement with the state. During the defendant's closing argument, defense counsel focused on the issue of Dunning's credibility, arguing in relevant part as follows: "Dunning testified and points the finger at [the defendant]. What we know is that . . . Dunning gave a statement early on, close in time to the crime.

Gave a wonderful statement, minimizing his whole participation, basically telling an untruth to the police. In his second statement [he] still minimized his participation and wasn't truthful with the police . . . he told the police he never entered the house. Why did he do that? I think he said that . . . he thought it would be less onerous on him and wouldn't be as serious. If . . . Dunning admits to a crime in basically August of 2013, he enters a guilty plea in March of 2017. You remember I asked him why it took so long for him to enter a plea, and my interpretation of his body language is he froze. He didn't know what to say. . . . Dunning is a convicted felon. . . . Dunning basically told untruths to the police until he could work a good deal. And a deal he worked out. A deal that . . . makes Filene's Basement look like Macy's. He entered into an agreement that was entered into evidence with the state of Connecticut. And the first two words are 'in consideration.' This is a sales agreement. . . . The testimony changed hands. In my opinion . . . Dunning's testimony is completely suspect because it's purchased. He stole his testimony. He waived it. He wasn't stupid. He waited, knowing that [the state] needed his testimony. You heard me ask him how many charges he'd been charged with, and he listed a whole bunch of serious charges. They're all going away. In exchange for his testimony, he goes to jail for no less than seven or more than nine years. That's a bargain basement deal. A deal he made with the state, knowing that it was false, but it worked out for him. And as a defense lawyer, I say good for him. Well, as [the defendant's] lawyer, I say don't convict a man based on the testimony of a lie or someone who sells his testimony. He took . . . almost four years to enter a plea. . . .

"Dunning's whole testimony is suspect because . . . he doesn't tell the truth close in time to when he first was interrogated by the police, which was the closest

[point] in time to the crime. He waits . . . looking for a good deal, and he finally gets one, knowing that [the defendant], who wasn't part of the crime, is willing to go to trial, and they're going to need his testimony to convict him.

"[There was evidence that Le received a suspended sentence after fourteen years served.] Dunning knows that. He gets a deal of half that time—good for him. He gets home soon and all he had to do was wait, hold out and enter into a sales agreement with the state of Connecticut. They purchased his testimony, he sold it, and he gets the good deal. He gets the profit."

In the state's rebuttal closing argument, the prosecutor responded to these arguments, in relevant part, as follows: "[L]ook how vociferously . . . Dunning was criticized in this case. . . . Dunning's testimony, the state argues, is enough to convict [the defendant] . . . and [defense counsel] wants to say I bought and sold that testimony, that I'm supporting perjury. . . . And what motive does [Dunning] have to lie at this point? Why would he? [Defense counsel] wants to say it's because he's getting a sweetheart of a deal, this great deal. He's back in jail. He's going to be back in jail from anywhere from seven [to] nine years, and that's not up to me, it's not based on my recommendation, it's up to the judge, who heard his testimony. The judge is in the best position to evaluate his credibility, his truthfulness. So, why would he come in here and say it was [the defendant] . . . ? Why would he do that? And risk getting two more years in jail . . . getting nine years and seven or getting eight or getting charged with perjury, false statement? Yet, he did, when he gave his initial statement, he didn't tell the police that he went in the house, but he told the police he was there, he told the police he was the driver and he told the police who he was with. Did he minimize his role? Absolutely. Is that dishonest? Yep. . . . And then some months later,

when the police had him arrested, then he gave another statement . . . . Did he make a mistake in not telling 100 percent of the truth? Yep. Was that dishonest? Yes. But do you throw away his entire testimony because of that? No, you don't have to. The state's argument is you shouldn't, you shouldn't. . . . And you're being told to discredit totally what [Dunning] said, that that testimony has been bought and sold by the state. . . .

"Oh, the deal, the deal. [Dunning] waited and waited and waited until he struck this fabulous deal. . . . I think it came out and, you now, you guys have to connect the dots to a certain degree. You know you look at the facts and what reasonable inferences you can draw from the facts. But . . . Dunning testified . . . the first time he ever told anyone from law enforcement, the state's attorney's office, or the police that he did in fact go into that house, and we know that three people went into the house because that's what [the victim] said. The first time, it was only after that point in time that the deal was struck. So, in deciding whether or not the state cut some deal with him to lie [with respect to the defendant] and give false testimony, would you want the state of Connecticut to enter into and to deal with somebody who's assisting, aiding, [going] into that house, when all of the evidence makes it clear they did? And that deal that's in evidence is conditioned on him being 100 percent truthful. It says something to that effect. It's in evidence, you can read it. So, was it that he was waiting and waiting and waiting until the numbers were right, or is it that he had to come clean first, to tell the truth, 100 percent truth or some combination of the two?

"[Dunning], why would he, if he was going to lie, why would he come here . . . and he knows the judge is the one who decides whether he gets between seven and nine? Why would he come in and say, I was the one with the gun, holding on [the victim]? Why would

he admit to that? [The victim] can't . . . identify him through his gun. He's making himself look worse so, in evaluating his credibility, consider that."

Defense counsel did not object to the prosecutor's argument in this regard.

With respect to the prosecutor's redirect examination of Dunning, the defendant argues that, although it was proper for the prosecutor to disclose the existence of the plea agreement that the state had entered into with Dunning, it was a form of improper vouching for the witness for the prosecutor to have elicited testimony from Dunning that "the prosecutor had not made an offer until he was satisfied that Dunning was telling the truth." The defendant argues that the prosecutor's inquiry about the reasons for the plea agreement and Dunning's testimony in response impermissibly suggested that the state had "verified [Dunning's] veracity before reaching an agreement." According to the defendant, "[t]he state should not have implied or stated that it would not offer Dunning an agreement until it believed Dunning was being truthful."

With respect to the arguments made by the prosecutor during the state's rebuttal argument, the defendant asserts for the first time on appeal that the prosecutor improperly vouched for Dunning's credibility in several ways. The defendant correctly observes that the plea agreement that was admitted into evidence without any objection referred to the fact that Judge Dooley, the judge who presided over the defendant's trial, would determine whether Dunning testified credibly at the defendant's trial, and, thereafter, the court would make the ultimate decision regarding the sentence to be imposed on Dunning. The defendant argues that the prosecutor's references to the fact that the court, and not the prosecutor, would evaluate the credibility of Dunning's testimony and whether Dunning was entitled

to the benefit of the plea agreement were improper because they invoked the integrity of the court in support of Dunning's credibility. Moreover, the defendant argues that, although it would have been proper for the prosecutor to refer to the fact that *a* judge would determine whether Dunning had testified credibly, it was improper for the prosecutor to state that *the judge who was presiding over the defendant's trial* would make that determination. According to the defendant, "[t]o tell the jury that *this* judge, the judge presiding over the case before the jury, is evaluating [Dunning's] credibility undermine[d] the jury's role as sole judge of the facts" and implicitly suggested that it was not in the best position to evaluate Dunning's credibility. (Emphasis in original.)

The defendant argues that, in addition to bolstering Dunning's testimony by referring to the court's evaluation of his testimony, the prosecutor's arguments impermissibly suggested that the state would not have entered into the plea agreement with Dunning unless he, or the state, had determined that Dunning's testimony was credible. The defendant asserts that the prosecutor improperly referred to the fact that he had not supported perjury by presenting Dunning's testimony and improperly argued that Dunning was not offered the plea agreement until Dunning had "come clean first, [told] the truth, [and was] 100 percent" truthful. By these arguments, the defendant asserts, the prosecutor essentially turned an evaluation of Dunning's testimony or the defendant's innocence into a referendum on the integrity of the prosecutor. Thus, the defendant argues that the prosecutor "put his own credibility in issue, implicitly and expressly asking the jury to trust his professional judgment and integrity in deciding when to make an offer to Dunning. Although the prosecutor expressly referred only to when Dunning's testimony matched [the version of events to which the victim

testified], the jury may have inferred that his decision also derived from his or her secret knowledge of facts not in evidence."

Finally, the defendant argues that the prosecutor improperly vouched for Dunning's credibility by suggesting that Dunning was credible because he did not want to risk receiving a longer sentence for having committed perjury at the defendant's trial. The defendant argues that, although it would have been proper for the prosecutor to refer to the plea agreement and to ask Dunning if he understood the consequences of breaching the agreement by testifying untruthfully, the prosecutor's argument in the present case was improper because it suggested "that the prosecutor knows if the witness is telling the truth or [implied] that he possessed information not presented to the jury that would enable him to know if the witness were lying."

"In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . [T]he defendant has the burden to show both that the prosecutor's conduct was improper and that it caused prejudice to his defense. . . .

"In determining whether the defendant was deprived of his due process right to a fair trial, we are guided by the factors enumerated by [our Supreme Court] in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). These factors include [1] the extent to which the [impropriety] was invited by defense conduct or argument, [2] the severity of the [impropriety], [3] the frequency of the [impropriety], [4] the centrality of the [impropriety] to the critical issues in the case, [5] the strength of the curative measures adopted, and [6] the

strength of the state's case. . . . [A] reviewing court must apply the *Williams* factors to the entire trial, because there is no way to determine whether the defendant was deprived of his right to a fair trial unless the [impropriety] is viewed in light of the entire trial. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Citations omitted; internal quotation marks omitted.) *State* v. *Sinclair*, 332 Conn. 204, 236–37, 210 A.3d 509 (2019).

"We are mindful throughout this inquiry, however, of the unique responsibilities of the prosecutor in our judicial system. A prosecutor is not only an officer of the court, like every other attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his [or her] office, [the prosecutor] usually exercises great influence [on] jurors. [The prosecutor's] conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he [or she] represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice or resentment. . . . That is not to say, however, that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . . Indeed, this court give[s] the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand. The state's attorney should not be put in the rhetorical straitjacket of always using the passive voice, or continually emphasizing that he is simply saying I submit to

you that this is what the evidence shows, or the like." (Citations omitted; internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 435, 64 A.3d 91 (2013).

In addressing claims of improper vouching, our Supreme Court has explained that "it is improper for a prosecuting attorney to express his or her own opinion, directly or indirectly, as to the credibility of witnesses. . . . [H]owever . . . [i]t is not improper for the prosecutor to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Fauci*, 282 Conn. 23, 47, 917 A.2d 978 (2007). "In claims of improper vouching, our Supreme Court has noted that the degree to which a challenged statement is supported by the evidence is an important factor in determining the propriety of that statement. The Supreme Court [has] stated that [a] prosecutor may properly comment on the credibility of a witness where . . . the comment reflects reasonable inferences from the evidence adduced at trial." (Internal quotation marks omitted.) *State* v. *Luther*, 114 Conn. App. 799, 812, 971 A.2d 781, cert. denied, 293 Conn. 907, 978 A.2d 1112 (2009).

We reject the defendant's claim that the prosecutor's redirect examination of Dunning suggested to the jury that, while relying on facts outside of the evidence, the prosecutor had injected his personal belief that Dunning was truthful. In the portions of the redirect examination on which the defendant focuses, the prosecutor elicited testimony from Dunning that his plea agreement was contingent on his testifying truthfully, he did not enter into the plea agreement until the month prior to the defendant's trial, he did not tell anyone from the state or the prosecutor's office that he had entered the victim's residence until the month prior to the defendant's trial, and the plea agreement was not finalized

until he admitted that he had entered the victim's residence. We observe that this line of questioning directly followed the defendant's cross-examination of Dunning, during which defense counsel asked Dunning about the plea agreement and to explain why he had waited so long following his arrest to enter a guilty plea, and why, in his statements to the police, he had been untruthful about having entered the victim's residence with the defendant and Le.

Further, we conclude that there was an evidentiary basis for all of the prosecutor's questions. During Dunning's direct examination, without any objection, the plea agreement was admitted into evidence. It plainly stated that the consideration being promised to Dunning by the state was contingent on a finding by the sentencing judge that Dunning had testified truthfully. The timing of the plea agreement, which was signed on March 17, 2017, was readily apparent to the jury, as well. The agreement was not entered into until shortly before the defendant's trial, which began on March 29, 2017. The inquiries or testimony with respect to the fact that Dunning did not tell anyone from the state or the prosecutor's office that he had entered the victim's residence until the month prior to the defendant's trial and that the plea agreement was not finalized until he admitted that he had entered the victim's residence hardly suggested, as the defendant argues presently, that the prosecutor had "verified [Dunning's] veracity" by using a litmus test that was hidden from the jury. Instead, the reason for the state's willingness to enter into the agreement was readily apparent and based on the evidence. Specifically, during the victim's testimony, which preceded Dunning's testimony, he testified that three masked men had approached him as he was entering his residence, had held him at gunpoint, had ransacked his residence, and had left his residence with many of his possessions. Immediately after asking

Dunning about the timing of the agreement, the prosecutor asked him whether he was aware from the police reports in this case that "the victim was always claiming three people went in the house," to which Dunning replied, "[a]s far as I know he said three people were in the house."

The elicited testimony from the victim and Dunning strongly suggested that the state did not enter into the agreement until after Dunning's version of events was consistent with the victim's version of events. Because the prosecutor's inquiry was based on the evidence and did not suggest that the prosecutor was vouching for Dunning on the basis of facts that did not appear in the record, we conclude that the inquiry was not improper.

Next, we turn to the challenged remarks made by the prosecutor during the state's rebuttal closing arguments. To a great extent, the defendant challenges the propriety of the prosecutor's references to the terms of the plea agreement, which was admitted into evidence without any objection. Essentially, the defendant argues that, by referring to the fact that the plea agreement required Judge Dooley to make a determination of Dunning's credibility, the prosecutor either attempted to persuade the jury that the court already had found Dunning to be credible or that he suggested that the court, and not the jury, was the arbiter of Dunning's credibility. We conclude, however, that the challenged argument was based on the evidence. The plea agreement provides that Dunning "is to cooperate completely and truthfully in any investigations, hearings, or trials relating to [the defendant], including the giving of truthful sworn testimony." Additionally, the agreement provides that Dunning "understands that the ultimate decision regarding the sentence he receives will be made by the sentencing judge, the Honorable Kari Dooley, after consideration of the credibility of his testimony . . . ." Nothing about the prosecutor's arguments suggested

that, at the time of the trial, the court had made any type of finding concerning Dunning's credibility. Nor did the arguments suggest that the prosecutor had a personally held opinion concerning Dunning's credibility. To the contrary, the prosecutor did not stray from the terms of the plea agreement by informing the jury that, with respect to the issue of whether Dunning would be entitled to the benefit of the agreement he reached with the state, it was up to Judge Dooley to determine if he was credible and to impose an appropriate sentence.[11] The prosecutor explicitly stated, in accordance with the agreement, that these decisions with respect to Dunning were not based on his personal recommendation. Moreover, it belies a rational interpretation of the prosecutor's arguments concerning Dunning, which were an obvious attempt to persuade the jury *that it should conclude* that Dunning was a credible witness, to suggest that the prosecutor had attempted to persuade the jury that it was not required to evaluate Dunning's credibility because the court would do so.[12]

[11] Part of the defendant's claim on appeal is based on the fact that Judge Dooley's name appeared in the plea agreement, thereby reflecting that she would be required to determine whether Dunning had testified credibly. The defendant observes that "[t]he parties should have redacted the name of the sentencing judge from the plea agreement," but, nonetheless, states that he is not raising an independent claim related to their failure to do so. It suffices to observe that the prosecutor did not engage in improper argument by referring accurately to an agreement that was in evidence, nor did he invite the jury to draw an unreasonable inference from the agreement.

To the extent that the defendant urges this court, in the exercise of its supervisory powers over the administration of justice; see, e.g., *State* v. *Coward*, 292 Conn. 296, 315, 972 A.2d 691 (2009) (discussing supervisory authority); to require courts "to redact portions of a cooperation agreement to reduce any implicit vouching and provide appropriate guidance to future litigants and judges," we decline to do so. We are not persuaded that traditional protections afforded to defendants, which encompass the right to object to exhibits presented by the state and to request appropriate redactions, do not adequately protect a defendant's rights with respect to the issue raised in the present claim.

[12] We further observe that, in its jury charge, the court instructed the jury in relevant part that the court's role was to state the rules of law, the jurors were "the sole judges of the facts," and the jury must find facts solely on

The defendant's arguments also focus on what he considers to be an attempt by the prosecutor to inject the prosecutor's credibility into the trial. According to the defendant, the prosecutor's arguments concerning Dunning intertwined an assessment of Dunning's credibility with the prosecutor's own credibility and integrity. For the reasons we already have discussed, we interpret the prosecutor's arguments as properly limited to the evidence and the rational inferences to be drawn therefrom. At no point did the prosecutor ask the jury, as the defendant suggests, "to trust his professional judgment and integrity in deciding when to make an offer to Dunning." The argument with respect to the plea offer was based on the evidence and, in particular, the testimony that the offer was made only after Dunning presented the state with a version of events that was consistent with the victim's version of events and, thus, accurately reflected his involvement in the home invasion.

The prosecutor did not mischaracterize the arguments advanced by defense counsel that the state had "bought and sold" Dunning's testimony and that the prosecutor was "supporting perjury." The prosecutor properly attempted to refute these challenges to Dunning's testimony by arguing that because the plea agreement was contingent on his testifying credibly, it did not logically provide Dunning with a motive to be

the basis of the evidence. The court also stated: "The actions of the court during the trial and ruling on motions or objections by counsel or in comments to counsel or in setting forth the law in these instructions are not to be taken by you [as] any indication of the court's opinion as to how you should determine the issues of fact. If the court has expressed or intimated any opinion as to the facts, you are not bound by that opinion. What the verdict shall be is your sole and exclusive duty and responsibility." The court also provided the jury with lengthy instructions about assessing credibility. In relevant part, the court stated: "[Y]ou should size up the witnesses and *make your own judgment as to their credibility* and decide what portion . . . of any particular witness' testimony you will believe based on these principles." (Emphasis added.)

untruthful in this case. "[T]he state may argue that its witnesses testified credibly, if such an argument is based on reasonable inferences drawn from the evidence. . . . Specifically, the state may argue that a witness has no motive to lie." (Citation omitted.) *State* v. *Warholic*, 278 Conn. 354, 365, 897 A.2d 569 (2006). In addition, it was within the bounds of fair argument for the prosecutor to have attempted to refute defense counsel's arguments by referring in detail to the evidence that, in his view, supported a finding that Dunning had testified credibly. "A prosecutor may urge the jury to find *for stated reasons* that a witness was truthful or untruthful. . . . A prosecutor may also remark on the motives that a witness may have to lie, or not to lie, as the case may be. . . . The distinguishing characteristic of impropriety in this circumstance is whether the prosecutor asks the jury to believe the testimony of the state's witnesses because the state thinks it is true, on the one hand, or whether the prosecutor asks the jury to believe it because logic reasonably thus dictates." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Felix*, 111 Conn. App. 801, 811–12, 961 A.2d 458 (2008). At no point in his argument did the prosecutor either expressly or inferentially invite the jury to simply rely on his assessment of the evidence or to trust a personally held belief on his part that Dunning was credible. It is unreasonable to interpret the challenged arguments to suggest that the prosecutor invited the jury to rely on anything other than its own evaluation of Dunning's testimony based on the evidence and the rational inferences to be drawn therefrom.[13]

[13] The prosecutor expressly stated to the jury that he was not in any way relying on his personal beliefs or anything outside of the evidence presented at trial. He prefaced his rebuttal argument by stating, in relevant part, as follows: "[F]or a prosecutor or a defense attorney to stand up here and say 'in my opinion,' be careful. Because what they're asking you to do, indirectly, is to say, this person knows a lot. They might know some things that I'm not privy to—objections, you know, evidence that wasn't admitted or just the fact that they've been doing this for a long time. . . . And they're asking

Finally, the defendant argues that the prosecutor vouched for Dunning by suggesting that, by testifying, he risked being prosecuted for perjury. The defendant asserts that the argument was improper because the prosecutor suggested "that [he] knows if the witness is telling the truth or implie[d] that he possessed information not presented to the jury that would enable him to know if the witness were lying." This argument is not persuasive. For the reasons set forth previously in our analysis of the present claim, we disagree that the prosecutor's arguments concerning Dunning's testimony reasonably could be construed to suggest that they were based on anything other than the evidence before the jury, including but not limited to, the testimony of the victim that all three perpetrators had entered his residence.

The defendant's claim fails because he has not demonstrated that the prosecutor's redirect examination of Dunning or his rebuttal closing argument constituted impermissible vouching for Dunning. Accordingly, we need not engage in an analysis of the *Williams* factors to determine whether the alleged improprieties deprived him of a fair trial.

II

Next, the defendant claims that the court improperly denied his motion to suppress evidence that was seized pursuant to a search warrant that was not supported by probable cause. We disagree.

It is not in dispute that, on July 30, 2013, the court, *Ginocchio*, *J.*, granted an application for a warrant to

you to basically say, hey, trust me, in my opinion I know, that's not proper. If I got up here and said that—well, it would be a big problem for the state, big problem. So, if I ever accidentally say anything like that, disregard it. I try very hard not even to use the word 'I.' It's always the state argues, because I don't want your verdict to rest on that kind of thing. I want [it] to rest on the facts and the evidence, not on my opinions or beliefs."

search the defendant's residence[14] and to seize any of the items that were described in the warrant application as either having been removed from the victim's residence or used or worn by the defendant during the commission of the home invasion. As a result of the execution of the warrant, the police seized several items, including a box of 20 gauge shotgun shells and a black ski mask. In applying for an arrest warrant, the police relied, in part, on items that were seized from the defendant's residence, and evidence of the fact that the police had seized items from the defendant's residence, including the shotgun shells and the ski mask, was admitted at trial.

The defendant filed several motions before the trial court in which he challenged the validity of the search warrant. We will discuss these motions because the defendant asserts that they adequately preserved the claim at issue because the court, in its resolution of the motions, addressed the issue of whether the search warrant was supported by probable cause.

Prior to trial, the defendant, at that time a self-represented litigant, filed two motions for a *Franks* hearing[15]

[14] The affidavit that accompanied the warrant application stated that, according to postal service records, the East Hartford residence where the search occurred was registered to Yvette White, who was the defendant's mother. Additionally, the affidavit stated that the defendant's "Connecticut Identification Card" reflected this East Hartford residence as his address.

[15] "In *Franks* v. *Delaware*, [438 U.S. 154, 155–56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)], the United States Supreme Court held that where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the [f]ourth [a]mendment requires that a hearing be held at the defendant's request. . . . The court in *Franks* mentioned only a false statement . . . included . . . in the warrant affidavit; subsequent cases, however, have extended *Franks* to include material omissions from such an affidavit. . . . If the ensuing *Franks* hearing discloses either an intentional or reckless falsehood, the court must excise that material from the affidavit and judge the probable cause of the affidavit shorn of that material." (Citation omitted; internal quotation marks omitted.)

in which, in relevant part, he asked the court to suppress evidence seized from his residence on the ground that the affidavit submitted to the court in support of the search warrant application contained false or incomplete information.[16] On April 29, 2016, the court, *Danaher*, *J.*, held a hearing on the defendant's motions.

The court stated that, during oral argument in support of his motions, the defendant argued that the affidavit in support of the search warrant contained inaccurate statements. The defendant argued that (1) the allegation concerning the amount of cash taken from the victim was not accurate, (2) the allegation that he cashed stolen coins at the supermarket was false because, according to his review of the store surveillance video, he does not appear therein, (3) the allegation concerning the value of all items taken from the victim was, on the basis of his "findings," not accurate, and (4) the allegation that Le had used the victim's credit card at the store is not accurate because the alleged use of the card did not occur at "the exact time" reflected in the surveillance video.

The court observed: "The defendant further argued that the same misrepresentations appear in the arrest warrant, and in addition, paragraph 71 of that warrant is subject to challenge in that (1) the allegation that two people are friends on Facebook and that they entered and exited a store, does not constitute probable cause, and (2) the affiants were reckless in describing codefendant . . . Le's address as 29 Footpath Lane when, in fact, it was the defendant and not . . . Le who lived at that address."

State v. *Therrien*, 117 Conn. App. 256, 262, 978 A.2d 556, cert. denied, 294 Conn. 913, 983 A.2d 275 (2009).

[16] The motions stated in relevant part: "That the affidavit(s) in this case prepared and served by the constable . . . knowingly and intentionally, or with reckless disregard for the truth, made incomplete statements, half-truths, commissions, and dishonest innuendo concerning items necessary for the finding of probable cause for the issuance of the warrant."

The court referred to the fact that the defendant had submitted five exhibits, which included three reports that reflect Le's address; an inventory of items seized from the defendant's residence; a portion of the search warrant application being challenged; "a copy of e-mail traffic reflecting information about a 'denied credit card transaction,' apparently at a Stop [&] Shop store, on April 8, 2013, at approximately 10:46 a.m., for a credit card ending in 2561"; and a Coinstar machine[17] receipt from the Stop & Shop store in East Hartford showing that the coins deposited amounted to $68.75 and that a processing fee of $6.74 was deducted from this total amount, resulting in a cash value of $62.01.

After setting forth relevant legal principles, the court, in its written memorandum of decision, set forth the following analysis with respect to the defendant's *Franks* challenge to the search warrant:[18] "The defendant failed to offer either affidavits or sworn or otherwise reliable statements of witnesses in support of his motion, nor did he explain his failure to produce such evidence. He simply represented that certain allegations in [the] . . . search warrant affidavit were not correct. The defendant's representation that paragraph 36 [of the search warrant affidavit] does not accurately recount the amount of cash taken, and that the value of all items taken [is inaccurate] not only is an unsworn claim, but it is also insufficient to overturn the finding of probable cause, as is the unsworn claim that the

[17] The jury heard testimony from a state police detective that a Coinstar machine, which resembles an ATM, is located in some stores and, essentially, for a commission, exchanges coins for a receipt that may be exchanged for cash in other denominations. She testified that "[y]ou pour all your coins into it and [it] tallies up how much the coin is and then it spits out a receipt and then you take [the receipt] to a cashier or [to] customer service and you get reimbursed for the . . . cash value of the receipt."

[18] Because the defendant's appellate claim is limited to the issue of probable cause as it relates to the search warrant, we need not examine the court's analysis with respect to the arrest warrant.

'exact time' that a codefendant 'swiped a stolen credit card' is incorrect. Similarly, the defendant's claim that he was not one of the people depicted in a surveillance video is also an unsworn claim and so cannot serve to support the defendant's motion.

"The court also recognizes that even if the defendant were to make a substantial preliminary showing that the affidavits at issue include false statements, made knowingly and intentionally or with reckless disregard for the truth, the defendant cannot prevail on his motion if the statements at issue are not necessary to the finding of probable cause. . . .

"Even if the defendant had properly supported his motion with sworn affidavits *and* the court were to exclude the allegations challenged by the defendant, the court finds that there was ample alternative probable cause evidence. For example, the affidavit asserts that a vase containing loose change was taken [from the victim]. . . . The approximate amount of loose change taken in the robbery was thereafter allegedly deposited at a Stop [&] Shop store in a Coinstar machine, the amount deposited was consistent with the amount stolen, the Stop [&] Shop activity was recorded [by means of] a surveillance camera, and two educators from the Woodland School, where the defendant attended school, positively identified the defendant in the surveillance camera recording. . . . In addition, the affidavit alleges that the defendant is associated with two other individuals, Le and . . . Dunning, and that there is independent probable cause that Le and Dunning were involved in the home invasion. The foregoing allegations, alone, establish probable cause sufficient to issue the search warrant that the defendant challenges.

"The defendant also argued that the affiants were reckless in asserting that Le lived at 29 Footpath Lane,

East Hartford, the location to be searched. The defendant's representations are unsworn and, even if they were properly authenticated, they do not preclude a finding of probable cause. Even if the affiants had asserted that . . . Le lived elsewhere, the affiants set forth the basis for their assertion that the defendant resided at 29 Footpath Lane . . . and the independent evidence of the defendant's involvement in the robbery supports a finding of probable cause that there was evidence to be found at the location where the defendant resided, regardless of whether Le also lived at that same address." (Citations omitted; emphasis in original; footnote omitted.) Thereafter, the court denied the motion.

Following the court's ruling, the defendant, appearing as a self-represented litigant, filed a motion to suppress any and all evidence seized from his residence. Among the arguments raised therein, the defendant argued that "[t]here was no fair probability that contraband or evidence of a crime [would] be found at [his] residence," the facts stated in the warrant application were made "[falsely] and/or in reckless disregard for the truth knowingly and intentionally, for the purpose of misleading a judge," the property seized was not described in the warrant, and "there was no probable cause for believing the existence of the grounds on which the warrant was issued."

On June 28, 2016, the court, *Danaher*, *J.*, held a hearing on the motion. The court provided an oral ruling on the motion by observing that the substance of most of the arguments presented by the defendant were previously raised in the context of the defendant's motions for a *Franks* hearing, and the court relied on its earlier ruling denying those motions. The court observed, however, that the defendant raised an additional claim in the context of the motion to suppress, which was that the police had acted outside of the authority granted

to them by the search warrant by seizing from the residence "his safe." The court referred to various legal authorities for the proposition that, "when conducting a search pursuant to a valid warrant, police are entitled to search containers that could logically hold the item or items sought." The court stated: "In this case, the warrant permitted the officers to search for and seize small items such as $200 in cash, memory disks . . . for a digital camera, and a gold watch. Those items, which were contained in the warrant, could logically be concealed in the container/safe that was located on the defendant's property. And the police were entitled to search inside that container, particularly since the defendant's brothers identified the safe as belonging to this defendant.

"Once the safe was opened and was found to contain contraband specifically described in the warrant, in this case, stolen shotgun shells, the safe, itself, constituted evidence of consciousness of guilt and so was properly subject to seizure."

The court further explained its ruling, as follows: "Consistently throughout the defendant's argument, there is a disagreement with certain specific facts that are set forth in the [affidavit] at issue. Again, there's no factual basis that would permit me to conclude that the allegations in the affidavit are in error. But, beyond that . . . it's necessary for any judge, in reviewing a warrant and determining whether probable cause is present, to review the totality of the warrant. The warrant is reviewed within . . . the four corners. And, in putting all those facts together, the court makes a determination as to whether probable cause exists.

"One example, the defendant indicated . . . that [the allegation that he entered and left] a Stop [&] Shop is not probable cause of a crime, and that's true. But, those facts are not looked at in isolation; they're looked

at in conjunction with the fact that, not very long after the robbery . . . the defendant was [accompanying Le in the supermarket and] . . . there was substantial evidence [that Le] was involved in the robbery. And . . . Le [pleaded guilty] in connection with [the home invasion] . . . [a]nd has been convicted of . . . carrying out this home invasion. . . .

"I've reviewed the affidavit; I've read it in its entirety. And I have concluded, more than once, that there was probable cause to support the search." Relying on the foregoing reasons, the court denied the motion to suppress.[19]

Presently, the defendant claims that the search warrant was not based on probable cause for two broad

[19] In 2016, the defendant, appearing as a self-represented litigant, filed a motion in which he asked the court to compel the state to provide him with a copy of a search warrant application for his residence that, in his view, had been presented by the police to the judicial authority prior to the search warrant application that was presented to and granted by Judge Ginocchio in July, 2013. The defendant based his motion on a portion of the supporting affidavit that stated that the application "has been presented to the judicial authority previously." Another portion of the application states that the application "has not been presented . . . in any other court to any other judge or judge trial referee." On November 4, 2016, the court, *Schuman*, *J.*, held a hearing on the motion for disclosure during which it heard testimony from one of the affiants, Laura Kraus, a state police detective. In relevant part, Kraus testified that the reference to a prior application was simply a typographical error.

In denying the motion for disclosure, the court stated that it found Kraus' testimony to be credible and concluded that there was no prior application for the state to disclose. The court further noted that, because, in connection with the motion, the defendant, who was proceeding at that time as a self-represented litigant, believed that the inaccuracy in the application was a basis on which to suppress evidence seized incident to the search, it would also construe the motion as a *Franks* motion. Treating the motion as such, the court concluded that, without the inaccuracy in the application, there was probable cause to search the defendant's residence and that "there was no intentional or reckless disregard of the truth [or] an intentional misstatement . . . ." Accordingly, the court stated that the grounds set forth in the motion were not a sufficient basis on which to suppress evidence seized during the execution of the warrant at the defendant's residence.

reasons. First, the defendant argues that, even if there was probable cause to believe that he possessed some of the victim's belongings at the time that the robbery occurred, the facts presented in support of the search warrant were insufficient to demonstrate that he would have retained the victim's stolen property, for four months following the home invasion, in his residence that was searched. Second, the defendant argues that the facts set forth in the search warrant application were insufficient to demonstrate that he was a participant in the home invasion. The defendant argues that the facts presented merely demonstrated that he was a friend of Le on the social media website "Facebook" and that he and Le were at a supermarket together on the morning following the home invasion.

As we have discussed previously, the defendant raised several motions before the trial court in which he argued that the search warrant application contained false or incomplete information and asked the court to suppress evidence obtained as a result of the search of his residence. It appears that, in general terms, the court interpreted these motions as having raised issues concerning false or incomplete information in the warrant application and, in rejecting those claims, stated in general terms that the facts presented were sufficient to demonstrate probable cause to search the residence. It does not appear that the defendant distinctly presented or that the court squarely addressed the arguments presented here, which are unrelated to an allegation of false or incomplete information in the search warrant application. To the extent that the defendant's claim is unpreserved, we may review it pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), as the defendant requests in his appellate brief.[20] The record provides this court

[20] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met:

with an adequate basis to review the claim because it contains the materials presented to Judge Ginocchio when he granted the search warrant application. The claim is of constitutional magnitude in that it seeks to vindicate the defendant's fourth amendment right to be free from an unreasonable search.

"Whether the trial court properly found that the facts submitted were enough to support a finding of probable cause is a question of law. . . . Accordingly, [o]ur review of the question of whether an affidavit in support of an application for a search [and seizure] warrant provides probable cause for the issuance of the warrant is plenary. . . .

"Both the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution prescribe that a search warrant shall issue only upon a showing of probable cause. Probable cause to search exists if . . . (1) there is probable cause to believe that the particular items sought to be seized are connected with criminal activity or will assist in a particular apprehension or conviction . . . and (2) there is probable cause to believe that the items sought to be seized will be found in the place to be searched. . . . Although [p]roof of probable cause requires less than proof by a preponderance of the evidence . . . [f]indings of probable cause do not lend themselves to any uniform formula because probable cause is a fluid concept—turning on the assessment of probabilities in

(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. . . . Consequently, [i]n determining the existence of probable cause to search, the issuing [judge] assesses all of the information set forth in the warrant affidavit and should make a practical, nontechnical decision whether . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. . . . The determination of probable cause is reached by applying a totality of the circumstances test. . . .

"The role of an appellate court reviewing the validity of a warrant is to determine whether the affidavit at issue presented a substantial factual basis for the [issuing judge's] conclusion that probable cause existed. . . . [Our Supreme Court] has recognized that because of our constitutional preference for a judicial determination of probable cause, and mindful of the fact that [r]easonable minds may disagree as to whether a particular [set of facts] establishes probable cause . . . *we evaluate the information contained in the affidavit in the light most favorable to upholding the issuing judge's probable cause finding.* . . . We therefore review the issuance of a warrant with deference to the reasonable inferences that the issuing judge could have and did draw . . . . In evaluating whether the warrant was predicated on probable cause, a reviewing court may consider only the information set forth in the four corners of the affidavit that was presented to the issuing judge and the reasonable inferences to be drawn therefrom. . . .

"Of course, [t]he determination of probable cause to conduct a search depends in part on the finding of facts so closely related to the time of the issuance of the warrant as to justify a belief in the continued existence of probable cause at that time. . . . Although it is reasonable to infer that probable cause dwindles as time passes, no single rule can be applied to determine when

information has become too old to be reliable. . . . Consequently, whether a reasonable likelihood exists that evidence identified in the warrant affidavit will be found on the subject premises is a determination that must be made on a case-by-case basis. Accordingly, we have refused to adopt an arbitrary cutoff date, expressed either in days, weeks or months, beyond which probable cause ceases to exist. . . . The likelihood that the evidence sought is still in place depends on a number of variables, such as the nature of the crime, of the criminal, of the thing to be seized, and of the place to be searched. . . . [W]hen an activity is of a protracted and continuous nature the passage of time becomes less significant." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Hanisko*, 187 Conn. App. 237, 245–48, 202 A.3d 375 (2019).

"[T]he resolution of doubtful or marginal cases . . . should be largely determined by the preference to be accorded to warrants. . . . Furthermore, [a] reviewing court should not invalidate a warrant as long as the inferences drawn by the issuing magistrate are reasonable under all of the circumstances set forth in the affidavit regardless of whether that court would have drawn the same inferences." (Citation omitted; internal quotation marks omitted.) *State* v. *Martinez*, 51 Conn. App. 59, 66–67, 719 A.2d 1213, cert. denied, 247 Conn. 952, 723 A.2d 324 (1998).

First, we address the argument that the affidavit did not provide probable cause to believe that the items sought to be seized would be found in the defendant's residence four months following the commission of the home invasion. Among the averments in the thirty-seven paragraph affidavit, dated July 30, 2013, and sworn to and submitted by State Police Detectives Laura Kraus

and Jeremy Combes,[21] were facts concerning the home invasion, including the fact that the victim described three male perpetrators, all of whom were wearing dark clothing and dark knit caps during the incident. The affidavit detailed the items taken from the victim, including but not limited to his credit and ATM cards, camera equipment, a leather jacket, a large ceramic vase containing coins, firearms, ammunition, and a knife.

The affidavit further provided that the defendant, who had a criminal history involving firearms, was believed to reside at 29 Footpath Lane in East Hartford. He was identified in an East Hartford supermarket surveillance video from the morning of April 8, 2018. The officers averred that the defendant was accompanied by Le in the supermarket. The defendant was seen cashing a receipt for $62.01, which he obtained from a coin exchange machine. The officers averred that this amount and the $6.74 fee that is automatically deducted by the coin exchange machine was close to the estimate of the value of the coins taken during the home invasion. At the same time, Le was seen attempting to use the victim's stolen credit card at a cash register. Thereafter, before the two men left the store together, the video shows that the defendant and Le walked to the customer service desk, and the defendant handed a cashier a lottery ticket and exchanged a twenty dollar bill for smaller denomination currency. The affidavit also reflected that a review of the defendant's Facebook page indicated that he and Le were friends.

There were several averments concerning Le in the affidavit, including the fact that he had a criminal history and that, in June, 2013, an East Hartford police officer stopped Le in the course of investigating a motor

[21] Kraus and Combes averred that they had been members of the Department of Emergency Services and Public Protection, Division of State Police, since January, 2006.

vehicle complaint. During a search of the vehicle Le was operating, the police found shotgun rounds and a hunting knife, all of which the victim readily identified as having been taken from him during the home invasion. Le's arrest for crimes related to the home invasion followed.

Additionally, the affidavit provided as follows: "[B]ased upon the affiants' training and experience, the affiants know that it is common for people traveling to other locations, potentially unfamiliar to them, to utilize a GPS device in order to obtain directions to that location. Suspects involved in the planning, coordination and execution of a conspiracy utilize cell phones to communicate their plans and activities either through voice contact or SMS (text) messaging. Your [a]ffiants know that many people carry and use cellular phones as a part of daily life while traveling, including victims and suspects. The affiants know that crimes involving multiple suspects would necessitate communication between them, and that it is reasonable to believe that such communication would take place prior to the crime (pre-planning stage), during the crime (execution stage), and after the crime (cover-up/flight stage). It is also reasonable that the suspects may have used cellular devices to contact each other in order the execute the details of the crime."

The affidavit further stated: "[B]ased upon the affiants' training and experience, the affiants know that persons involved in criminal activity will often elicit the aid of an accomplice to facilitate the commission of a crime. That dependent upon the complexity of the criminal endeavor, pre-planning, and after the execution of the crime(s) persons will frequently change their place of residence to inhibit the discovery of their activity or . . . use multiple addresses, particularly of their families, to secret[e] evidence of the crimes they are involved in, including firearms/weapons and burglary

tools used in the crime. That persons involved in criminal activity who steal large quantities of items will often hold onto the stolen items for a long period of time. Persons involved in criminal activity are aware that police officers check pawn shops for stolen items frequently and will often sell, pawn, and/or disperse the stolen items in small quantities over a long period of time in an attempt to inhibit the discovery of evidence of their crimes. Persons involved in criminal activity will often keep stolen items as a trophy of their crimes for days, months, and even years. Persons involved in criminal activities also give stolen items to close friends and/or family members as gifts. That based on the patterns of conduct exhibited by . . . Le as it is known to the affiants it is likely . . . Le was engaged in similar actions that are intended to inhibit efforts of law enforcement to discover him or evidence to support his role in criminal activity. . . .

"[B]ased upon the aforementioned facts and circumstances, the affiants have probable cause to believe that . . . Le did participate in a home [invasion at the victim's residence] . . . . That the total estimated value of items taken including cash from the victim's bank accounts, wallet, and loose coin total approximately $29,163.52. That [the defendant] and . . . Le are friends on Facebook. That Stop & Shop surveillance video shows that [the defendant] and . . . Le enter and exit the store together. That . . . Le attempted to use [the victim's] stolen Bank of America card in Stop & Shop in East Hartford on [April 8, 2013], at approximately 10:46 a.m. That [the defendant] cashed in coins in the Stop & Shop Coinstar machine. That evidence of this will be found at [the defendant's residence], which will establish probable cause for the crimes of home invasion . . . kidnapping in the first degree . . . threatening . . . robbery in the first degree . . . larceny in the first degree . . . [and] burglary in the first degree . . . ." Among the items that were the subject

of the search warrant were the victim's belongings that were taken from his residence, articles of clothing that were consistent with those worn by the suspects, and "cell phones and GPS devices."

On the basis of the foregoing facts as set forth in the affidavit, as well as the reasonable inferences to be drawn therefrom, there was probable cause to conclude that items connected with the invasion of the victim's residence would be found in the defendant's residence on July 30, 2013. The defendant argues that the affidavit lacked any averments to support a finding that he had a personal interest in the items taken from the victim's residence or whether or how the suspects divided the items taken during the home invasion. Likewise, he argues that there were no facts alleged to support a finding that he would keep any items related to the home invasion for four months.

Because the affidavit set forth facts that either implicated the defendant as a participant in the commission of the home invasion or as being connected to Le, who was a participant in the home invasion, shortly after the home invasion occurred, it was reasonable to infer that the defendant may have possessed items taken from the victim or that he possessed devices, such as a cell phone, that would have been used in the commission of the crime.

Furthermore, on the basis of the averments set forth in the affidavit, it was reasonable to believe that the defendant would have possessed these items four months following the commission of the crime. In light of the averments concerning the use of cell phones or GPS devices by criminals, as well as the reasonable inference that these types of devices typically are retained and used for months or years, it was not unreasonable to infer that, four months after the home invasion, the defendant probably possessed a cell phone or a GPS device that he had possessed at the time that

the crime occurred. It was also reasonable to believe that, at the time that the warrant application was presented to Judge Ginocchio, the defendant still would have possessed the types of items that were removed at gunpoint from the victim's residence. The affiants stated that criminals who steal many items divide them among themselves, may retain them for "days, months, and even years" following the crime, and may transfer possession of items to friends and family members. The issuing judge reasonably could have relied on the training, experience, and expertise of the affiants in this regard. In light of the variety of items taken, it was reasonable to suspect that one or more of them would be kept by the defendant in his residence. In light of the averments set forth in the warrant application, probable cause was not dependent on a showing that the defendant was engaged in a continuing criminal enterprise. Accordingly, we are not persuaded that probable cause was lacking due to the four months that transpired between the commission of the crime and the issuance of the search warrant.

Finally, we address the defendant's contention that "[t]he affidavit . . . did not show a nexus between Le and [him] to suggest that [he] was a participant in the robbery." The defendant attempts to persuade us that the facts in the affidavit concerning his friendship with Le and his presence with Le at the supermarket on the morning following the home invasion reflected innocent behavior that did not give rise to a suspicion that he was a participant in the home invasion. Moreover, the defendant attempts to downplay the significance of the fact that the surveillance video from the supermarket depicted him cashing in a coin exchange machine receipt. As the defendant argues, "[c]oins are fungible items. Many people collect spare change in containers and cash it in in large quantities . . . . Nor does the

affidavit make any representation about whether $68 worth of coins is an unusual sum at a Coinstar machine."

The defendant's arguments are not persuasive. "[I]t is axiomatic that [a] significantly lower quant[um] of proof is required to establish probable cause [rather] than guilt. . . . [P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to sub silentio impose a drastically more rigorous definition of probable cause than the security of our [citizens] . . . demands. . . . In making a determination of probable cause the relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts." (Citation omitted; internal quotation marks omitted.) *State* v. *Batts*, 281 Conn. 682, 701, 916 A.2d 788, cert. denied, 552 U.S. 1047, 128 S. Ct. 667, 169 L. Ed. 2d 524 (2007). In light of other facts set forth in the affidavit, it was reasonable to infer that the defendant's act of exchanging coins by means of the Coinstar machine was suspicious and tended to give rise to probable cause that he possessed evidence related to the home invasion. The affidavit reflected that the defendant was accompanied in the supermarket by Le, a person who was identified as a suspect in the home invasion. The video supported a finding that the defendant had cashed approximately $68 in coins. The victim reported that, only hours earlier, between $75 and $100 in coins was taken from his residence by three men, all of whom had concealed their identity from him. While the defendant was cashing in the receipt for the coins, Le was at a cash register attempting to use the victim's stolen credit card.

Additionally, it suffices to observe that the premise of the defendant's argument is unsound. At issue is the

validity of a search warrant, not an arrest warrant. A finding of probable cause to search did not depend on facts in the affidavit that tended to demonstrate that the defendant was a perpetrator of the home invasion. The affiants presented facts that gave rise to a probability of his being in possession of items connected with the home invasion due to his participation in the criminal endeavor *or* due to his relationship with and his activities with Le, who was portrayed as a suspect in the crime, within hours of the commission of the crime. On the basis of our review of all of the facts in the affidavit, we disagree that probable cause was lacking. Accordingly, the defendant's claim fails under *Golding*'s third prong because he has failed to demonstrate that a constitutional violation exists and that it deprived him of a fair trial.[22]

The judgment is affirmed.

In this opinion the other judges concurred.

[22] Alternatively, we also conclude that the defendant's claim fails under *Golding*'s fourth prong. "Whether a constitutional violation is harmless in a particular case depends upon the totality of the evidence presented at trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . Whether such error is harmless in a particular case depends upon a number of factors, such as the importance of the [evidence] in the prosecution's case, whether the [evidence] was cumulative, the presence or absence of evidence corroborating or contradicting the [evidence] . . . and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . The state bears the burden of proving that the error is harmless beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Smith*, 156 Conn. App. 537, 560–62, 113 A.3d 103, cert. denied, 317 Conn. 910, 115 A.3d 1106 (2015).

Although the state introduced evidence seized from the defendant's residence, including shotgun shells and a ski mask, the state has demonstrated that, in light of the strength of its overall case apart from this evidence, it is unlikely that this evidence significantly contributed to the verdict reached by the jury. Relying on our previous discussion of the facts supported by the evidence, we observe that the state presented testimony from one of the three perpetrators of the home invasion, Dunning, that the defendant was one of the perpetrators. The state presented evidence that, prior to his release from prison, the defendant made statements to his mother that he

MICHAEL ERVIN *v.* COMMISSIONER OF CORRECTION (AC 41763)

Elgo, Devlin and Sheldon, Js.

Syllabus

The petitioner, who had been convicted of the crime of murder in connection with the death of his wife, sought a writ of habeas corpus. He claimed, inter alia, that his trial counsel, M, rendered ineffective assistance to him by failing to present the testimony of an independent defense forensic pathologist to rebut the testimony of the state's chief medical examiner, C, as to the cause of the victim's death, and by presenting an inadequate argument in support of his posttrial motion for a judgment of acquittal. C determined that the cause of the victim's death was traumatic asphyxia due to neck compression, and C testified at trial that the cause of death was consistent with a certain type of wrestling hold previously used by the petitioner. M hired as a defense consultant a forensic pathologist, T, who previously had concluded that the victim's injuries were consistent with a choke hold neck compression, although T could not rule out choking on food as a cause of death. In subsequent discussions, C and T each explained to M that the presence of food in the victim's mouth was probably the result of agonal regurgitation, i.e., vomit expelled as the body ceases to function. T also informed M that he believed that

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would acquire "a bunch of money" once he was released. These statements strongly corroborated the evidence that the defendant had participated in the planning and the commission of the home invasion. The state presented video surveillance evidence that depicted the defendant's presence with Le, another person identified as a perpetrator, hours following the home invasion. The surveillance video strongly supported a finding that the defendant exchanged coins that were stolen from the victim at the same time that Le was attempting to use the victim's stolen credit card. Finally, the state presented evidence of the defendant's consciousness of guilt by means of his evasiveness concerning his relationship with Le, his misrepresentations with respect to cashing coins at the supermarket, and the content of his telephone conversations with multiple persons during his incarceration while awaiting trial. As we have discussed previously, in these telephone conversations, the defendant attempted to threaten Dunning to dissuade him from testifying against him and made statements concerning Le that suggested he had knowledge of the planned home invasion. In light of this other evidence that was not tainted by any alleged impropriety with respect to the search warrant, we conclude that the admission of the evidence that was the fruit of the search at issue was harmless beyond a reasonable doubt.

his testimony would be unhelpful for the defense and suggested that the petitioner consider a plea disposition. The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The petitioner's claim that M rendered ineffective assistance of counsel to him by failing to present expert testimony from an independent forensic pathologist to refute C's testimony as to the cause of the victim's death was unavailing; M sought out the opinion of a highly trained and experienced forensic pathologist, T, on which he was entitled to rely, and, although M made the strategic decision not to call T as a defense witness after T told M that he would not be helpful as a trial witness because he agreed with the opinion of C, M did request and receive valuable information from T, which he used in his cross-examination of C, and M was not required to search for a different, more favorable expert than T to contradict C's testimony at trial.
2. The petitioner could not prevail on his claim that M rendered ineffective assistance of counsel at his criminal trial by presenting an inadequate argument in support of his motion for a judgment of acquittal and, specifically, that M failed to argue that, on the basis of the evidence presented at trial, the state could not prove the essential element of intent to kill because it could not disprove an alternative hypothesis, that he had caused the victim's death inadvertently by applying compression to her neck without intending to cause her death: M's decision not to base the petitioner's defense on the theory of inadvertent death by neck compression without intent to kill was neither professionally inappropriate nor constitutionally deficient under the circumstances, as there was no physical evidence at the crime scene of any physical struggle between the petitioner and the victim, and M raised that theory with the petitioner for the purpose of having him consider relying on it but the petitioner adamantly refused to do so, for he was aware that by raising that defense he would have to admit and argue certain important and highly incriminating facts that he vehemently denied, and M, faced with the petitioner's denial, understandably avoided any mention of that theory when he argued the petitioner's posttrial motion for a judgment of acquittal, which also avoided the possibility that the jury might be instructed on, and thus might find the petitioner guilty of, a lesser included offense instead of acquitting him entirely if it had reasonable doubt as to his alleged intent to kill; moreover, the petitioner could not prevail on his claim that he was prejudiced because a properly argued motion for a judgment of acquittal would probably have led the trial court to grant the motion on the theory that there was insufficient evidence before the jury to prove that he had acted with the intent to kill the victim, as there was more than ample evidence in the record to support the inference that the petitioner had intentionally killed the victim, and such evidence supported the complementary inferences that

the petitioner had the motive, the means and the opportunity to kill the victim.

Argued October 8, 2019—officially released February 11, 2020

Procedural History

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

James J. Ruane, assigned counsel, for the appellant (petitioner).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Paul J. Narducci*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SHELDON, J. In this certified appeal from the habeas court's denial of his amended petition for a writ of habeas corpus, the petitioner, Michael Ervin, claims that the court erred in rejecting his claim that his trial counsel rendered ineffective assistance to him in his criminal trial for the murder of his wife (victim)[1] (1) by failing to call a defense pathologist to rebut the testimony of the state's chief medical examiner, Harold Wayne Carver, as to the cause of the victim's death and/or (2) by presenting an inadequate argument in support of his motion for a judgment of acquittal. We affirm the judgment of the habeas court.

In reviewing the petitioner's claims on direct appeal from his conviction, this court set forth the following facts, which were adopted by the habeas court. "On

[1] In accordance with our policy of protecting the privacy interests of victims of family violence, we decline to use the victim's name.

March 14, 2002, at approximately 10 p.m., Norwich police and emergency personnel, who had been dispatched to [the petitioner's home], discovered the unresponsive body of the victim . . . on the kitchen floor. Measures to revive the victim were unsuccessful. The victim had no visible signs of injury, no cuts or abrasions and no pulse. The [petitioner] was kneeling on the floor next to the victim, and he had no external injuries on him. Police found no signs of a forced entry or struggle. A paramedic had difficulty opening the victim's airway because there was a substantial amount of vomit as well as particles of food in her mouth. Eventually, the victim was transported to a hospital where she was pronounced dead at approximately 11 p.m.

"The medical examiner determined the cause of death to be traumatic asphyxia due to neck compression. During the trial, the medical examiner viewed a demonstration videotape showing a certain type of wrestling hold once used by the [petitioner] and testified that the cause of death was consistent with such a hold. The [petitioner] stated to the police that the victim had been fine when he left her earlier in the evening. He returned to the home with his occasional fishing companion, Michael Hancin, and found the victim on the floor where he attempted to revive her." *State* v. *Ervin*, 105 Conn. App. 34, 36–37, 936 A.2d 290 (2007), cert. denied, 285 Conn. 918, 943 A.2d 475 (2008). The jury found the petitioner guilty of murder in violation of General Statutes § 53a-54a (a), for which the trial court sentenced him to a term of sixty years incarceration. Thereafter, this court affirmed the petitioner's conviction on direct appeal. Id., 36.

On July 24, 2014, the petitioner filed a petition for a writ of habeas corpus. By way of an amended petition filed on November 28, 2017, the petitioner claimed, inter alia, that his trial counsel, Bruce McIntyre, rendered

ineffective assistance to him in two ways: first, by failing to present the testimony of an independent defense pathologist to rebut the testimony of Carver as to the cause of the victim's death; and second, by presenting an inadequate argument in support of his posttrial motion for a judgment of acquittal.

On April 24, 2018, after a multiday trial, the habeas court issued a memorandum of decision denying the petitioner's petition. As to each claim, the court found that the petitioner had failed to prove either that his trial counsel's performance was constitutionally deficient or that he had been prejudiced by such allegedly deficient performance. The habeas court made the following relevant factual findings in its memorandum of decision. "Attorney McIntyre was the third attorney appointed to represent the petitioner, having been preceded by public defenders Elizabeth Inkster and Kevin Barrs. His predecessors had consulted and retained a forensic pathologist, Dr. Mark Taff. Dr. Taff was a highly trained and experienced forensic pathologist who had been a medical examiner for Wayne County, Michigan, which includes the city of Detroit. Both Attorneys Inkster and Barrs had employed Dr. Taff as a defense consultant in the past, as had Attorney McIntyre.

"When consulted by Attorney Inkster in 2003, Dr. Taff reviewed the materials pertinent to the petitioner's case. Dr. Taff concurred with Dr. Carver that the victim's injuries were consistent with choke hold neck compression, although Dr. Taff could not rule out choking on food as a cause of death. Attorney McIntyre reviewed Dr. Taff's report and rehired Dr. Taff as a defense consultant on behalf of the petitioner.

"Attorney McIntyre also discussed the petitioner's case with Dr. Carver on two occasions, including one discussion that took several hours. Attorney McIntyre

also spoke with Dr. Taff a few days before the petitioner's trial began. Dr. Taff explained that, while he found the evidence as to cause of death equivocal, it was consistent with application of a sleeper hold. Dr. Taff also informed Attorney McIntyre that he believed [that] his testimony would be unhelpful for the defense and suggested that the petitioner consider a plea disposition.

"Attorney McIntyre possessed an advantage over most defense lawyers because he had been a military policeman, a Hartford police officer, and a Connecticut state trooper for twenty years. With all three law enforcement agencies, he received specialized training in restraint holds and understood that one had to release a subject to such a hold within seven seconds to avoid serious harm.

"Soon after receiving assignment of the petitioner's case, Attorney McIntyre reviewed all the material connected with the case, including Dr. Carver's autopsy report. Attorney McIntyre educated himself in the area of neck compression asphyxia by [reading] salient portions of [a forensic pathology text] and conducting internet research. As a result, Attorney McIntyre rehired Dr. Taff.

"In his discussions with Dr. Carver, Attorney McIntyre inquired about the significance of the absence of forced entry and the warmth of the victim's body. Dr. Carver explained that the presence of food in the victim's mouth was probably the result of agonal regurgitation, i.e., vomit expelled as the body ceases to function.

"When he consulted Dr. Taff, Attorney McIntyre revisited these topics. They explored the viability of possible alternative explanations for Dr. Carver's observations. Dr. Taff agreed with Dr. Carver's assessment of agonal regurgitation and with the presence and significance of petechial hemorrhages on the victim's body.

"Attorney McIntyre also conferred with Dr. Taff on occasion during the petitioner's criminal trial. Attorney McIntyre was impressed by Dr. Taff's abilities and considered his opinions and advice to be very competent, direct, and useful. Attorney McIntyre has retained Dr. Taff on other cases since the petitioner's trial. Dr. Taff suggested to Attorney McIntyre several areas for cross-examination of Dr. Carver, which information Attorney McIntyre explored in the examination, including the fact that female tissue will often display injury when subjected to less force than needed to produce that effect in males, that the injuries that Dr. Carver detected were very subtle, that these injuries are not diagnostic for neck compression, that Dr. Carver never examined the victim's soft tissue microscopically, and that vigorous CPR can, itself, cause petechial hemorrhaging."

On the basis of the foregoing factual findings and credibility determinations, the habeas court, in addressing the petitioner's ineffective assistance claim regarding the failure to call an expert pathologist, stated that trial counsel "was entitled to rely on the opinion of Dr. Taff because that reliance was reasonable" and cited to Dr. Taff's credentials. The court further stated that even if counsel had presented "expert testimony . . . the jury would still have had the opportunity to assess whether the other evidence in the case . . . supported the opinion of the chief medical examiner . . . . [I]mportantly, the petitioner grossly downplays the devastating evidence [introduced at trial]." The court summarized such "devastating evidence" as follows: "[E]vidence of the petitioner's intense desire to remove the victim from his life, his wish to make [Dee Anne] Champlin the 'next mother' of his children, his ability to execute the sleeper hold, and his peculiarly deceitful and evasive behavior on the night of the victim's death and the following day. The fact that . . . Champlin began staying at the petitioner's home within a few

weeks of the victim's death belies the petitioner's statements to [the] police that he never intended to live with Champlin."[2]

In addressing the petitioner's claim that counsel presented inadequate argument on the motion for a judgment of acquittal, the habeas court concluded that the state had presented sufficient evidence, apart from Dr. Carver's expert opinion as to the cause of the victim's death, to establish that the petitioner had caused her death while acting with the intent to kill. It summarized such evidence, more particularly, as follows:

"As to the identity of the perpetrator, the crime scene contained no evidence of forced entry or signs of a struggle. The petitioner had locked the door to the home when he left for the marina and needed to unlock the door when he returned with Hancin. . . .

"[As to the petitioner's alleged intent to kill, the] jury could have determined that the petitioner engaged in several peculiar actions the evening of [the victim's] demise and the following day that comprised indicia of guilt. He was supposed to join [Champlin] at her home around 6:30 p.m., and reiterated his intent to do so, while simultaneously arranging to meet with Hancin at 5:30 p.m., to fish at the marina. When he finally arrived at the marina, at 9:30 p.m., he had no fishing gear. The petitioner then proceeded to badger Hancin to go to the petitioner's house to practice shooting darts, despite Hancin's vocal and obvious disinclination to do so because he needed to return to his home by 11 p.m. The petitioner's agitated insistence led Hancin to accede to the petitioner's demands.

"The petitioner then drives home, followed by Hancin, in an inordinately slow fashion. They enter the petitioner's house, and Hancin sits in the living room preparing his three darts for throwing, which preparation takes approximately one minute per dart. Through-

[2] A detailed description of the evidence is set forth in part II of this opinion.

out this time, the petitioner was in the kitchen, where [the] unconscious and nonresponsive [victim] lay sprawled on the floor. Hancin thought it strange that the petitioner took minutes, rather than seconds, to summon his assistance.

"Upon seeing the victim on the floor, Hancin urged the petitioner to call 911 several times, but each time the petitioner failed to do so. Hancin ended up using the petitioner's house phone to call 911. When Hancin asked the petitioner for the address, again the petitioner appeared to stall. When Hancin attempted to revive the victim, the petitioner pushed him away and took over and immediately stuck his fingers into the victim's mouth and extracted a large quantity of food. The jury could reasonably infer that the petitioner had engaged in procuring Hancin's presence at the house to stage the scene for when the petitioner first seemed to discover [the victim's] body.

"Also, the petitioner lied to the police about several matters when the police interviewed him the next day. He denied ever having plans to meet with . . . Champlin the evening before. He stated [that] his marriage was 'very good' and that he and [the victim] 'got along great.' He claimed that he asked Hancin to call 911 and that he was the first person to initiate CPR. He acknowledged having had an affair but one that only lasted a couple of months and had ended about a year earlier. He claimed that he never intended to live with Champlin and had merely agreed to help her move into her new apartment.

"The jury also heard evidence from multiple witnesses that his relationship with Champlin had never ceased; that he was supposed to meet with her on the evening of [the victim's] death; that Champlin had been pressuring him to fulfill his repeated promises to leave [the victim] so that the petitioner and Champlin could live together; that the petitioner had recently opened a

joint checking account and savings account with Champlin; that he and Champlin applied for rental of an apartment together; that he and Champlin were scheduled to move to that apartment two days after [the victim's] death; and that the apartment was chosen because it was large enough to accommodate the petitioner's two children. Most significantly, the petitioner had made statements to Hancin that he intended to live with Champlin, who would be his children's next mother, and that he had to get rid of [the victim]."

On the basis of that evidence, the habeas court concluded that "the jury had before it abundant evidence, in *conjunction* with Dr. Carver's testimony, to find, beyond a reasonable doubt, that the victim's death resulted from the petitioner's intentional acts to produce that outcome." (Emphasis in original.) It therefore denied the petitioner's amended petition for a writ of habeas corpus. The petitioner timely filed a petition for certification to appeal, which was granted. This appeal followed. Additional facts and procedural history will be set forth as necessary.

On appeal, the petitioner claims that the habeas court erred in determining that he had failed to prove that his trial counsel's performance was constitutionally deficient either in failing to present expert testimony from an independent pathologist to rebut the medical examiner's testimony as to the cause of the victim's death or in presenting an inadequate argument in support of his motion for a judgment of acquittal. We disagree.

We begin our review of the habeas court's rulings by setting forth the standard of review applicable to and the substantive law governing the petitioner's underlying claims. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous.

. . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

"[I]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland* v. *Washington*, [466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* . . . this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . 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. . . . 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. . . . The claim will succeed only if both prongs are satisfied. . . . *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677–78, 51 A.3d 948 (2012). A court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong, whichever is easier. *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 832–33, 950 A.2d 1220 (2008)." (Internal quotation marks omitted.) *Thomas* v. *Commissioner of Correction*, 141

Conn. App. 465, 470–71, 62 A.3d 534, cert. denied, 308 Conn. 939, 66 A.3d 881 (2013).

I

The petitioner first claims that his trial counsel rendered ineffective assistance to him by failing to present expert testimony from an independent pathologist to refute Dr. Carver's testimony as to the cause of the victim's death. Specifically, the petitioner contends that counsel should have presented an expert pathologist to testify that the victim's death was caused by choking on food, not by traumatic asphyxia due to neck compression. The respondent, the Commissioner of Correction, disagrees, contending that counsel reasonably relied on his consultation with Dr. Taff to cross-examine Dr. Carver, and that he was not required to search for a different, more favorable expert than Dr. Taff to contradict Dr. Carver's testimony at trial. We agree with the respondent.

"A trial attorney is entitled to rely reasonably on the opinion of an expert witness; see *Doehrer* v. *Commissioner of Correction*, 68 Conn. App. 774, 783, 795 A.2d 548, cert. denied, 260 Conn. 924, 797 A.2d 520 (2002); and is not required to continue searching for a different expert [or for multiple experts once he has done so]." *Stephen S.* v. *Commissioner of Correction*, 134 Conn. App. 801, 816, 40 A.3d 796, cert. denied, 304 Conn. 932, 43 A.3d 660 (2012); see id., 816–17 ("[w]e cannot conclude that [counsel's] performance was deficient when he consulted with an expert witness regarding the victim's physical examination, yet reasonably concluded not to use the expert witness at trial after determining that such testimony would not benefit the petitioner's defense"); see also *Santiago* v. *Commissioner of Correction*, 90 Conn. App. 420, 426, 876 A.2d 1277, cert. denied, 275 Conn. 930, 883 A.2d 1246 (2005),

cert. denied sub nom. *Santiago* v. *Lantz*, 547 U.S. 1007, 126 S. Ct. 1472, 164 L. Ed. 2d 254 (2006).

Furthermore, "[t]here is no per se rule that requires a trial attorney to seek out an expert witness. . . . Where trial counsel has consulted with such experts, however, but made the tactical decision not to produce them at trial, such decisions properly may be considered strategic choices." (Citation omitted; internal quotation marks omitted.) *Santos* v. *Commissioner of Correction*, 151 Conn. App. 776, 785, 96 A.3d 616 (2014).

In the present matter, trial counsel sought out Dr. Taff's opinion, on which he was entitled to rely. Dr. Taff was a "highly trained and experienced forensic pathologist . . . ." After discussing the matter with counsel, Dr. Taff told counsel that he would not be helpful as a trial witness because he agreed with the opinion of Dr. Carver. On that basis, counsel made the strategic decision not to call Dr. Taff as a defense witness. Even so, he did request and receive valuable information from Dr. Taff, which he used in his cross-examination of Dr. Carver. The fact that it took the jury five days to deliberate before returning a verdict speaks to the effectiveness of counsel's cross-examination.

On the basis of this evidence as to counsel's efforts to contest the cause of the victim's death at trial, the petitioner failed to demonstrate deficient performance on the part of counsel based on his decision not to recruit or present the testimony of another expert pathologist.

II

The petitioner next claims that his counsel rendered ineffective assistance at his criminal trial by presenting an inadequate argument in support of his motion for a judgment of acquittal. In his appellate brief, he argues that trial counsel's performance in arguing the motion

was constitutionally deficient because counsel failed to argue that, on the basis of the evidence presented at trial, the state could not prove the essential element of intent to kill because it could not disprove an alternative hypothesis, also assertedly raised by the evidence, that he had caused the victim's death inadvertently by applying compression to her neck without intending to cause her death.[3] The petitioner claims that if counsel had argued his motion on that basis, the trial court "likely" would have granted the motion, and thereby ordered his acquittal on the charge of murder.[4] The respondent contends that the petitioner's argument is completely devoid of merit, both because counsel's performance in basing his argument solely on the only defense theory approved by the petitioner and presented at trial—that the victim had died from accidentally choking on food—was professionally appropriate,

[3] In his principal brief, the petitioner argues that trial counsel should have argued that the evidence presented at trial was insufficient to prove him guilty of murder because it did not disprove beyond a reasonable doubt that the victim had suffered an "inadvertent death" by neck compression. The brief explains that inadvertent death by neck compression means "neck compression without intent to kill." (Internal quotation marks omitted.) To put this language into context, the brief argues more specifically that trial counsel should have argued that the petitioner choked the victim and caused her death but did not do so with the intent to cause her death.

During oral argument, however, the petitioner's appellate counsel abandoned the foregoing argument and contended, instead, that, on the facts of this case, as presented by the state at trial, defense counsel had two ways of defending this case: (1) offering an alibi, which he admittedly did not have, or (2) arguing that the victim's death had not been caused by criminal means but had, instead, been accidental. When asked what he meant by the term "accidental," appellate counsel stated that "accidental" means "choking."

We elect to address the merits of the petitioner's claim based on the theory argued in his principal brief: "neck compression without intent to kill." (Internal quotation marks omitted.)

[4] The petitioner also argues that trial counsel was ineffective in failing to request a jury instruction on the lesser included offense of manslaughter. However, this issue was not raised in the habeas court, and, therefore, it cannot be raised for the first time on appeal. See *Lewis* v. *Commissioner of Correction*, 165 Conn. App. 441, 444 n.2, 139 A.3d 759, cert. denied, 322 Conn. 901, 138 A.3d 931 (2016).

and because such performance could not have prejudiced the petitioner due to the abundance of other evidence before the jury supporting the inference that the petitioner had the intent to kill the victim. We agree with the respondent that the petitioner failed to prove either the performance prong or the prejudice prong of this aspect of his ineffective assistance of counsel claim.

Practice Book § 42-40 provides in relevant part: "After the close of the prosecution's case-in-chief or at the close of all the evidence, upon motion of the defendant or upon its own motion, the judicial authority shall order the entry of a judgment of acquittal as to any principal offense charged and as to any lesser included offense for which the evidence would not reasonably permit a finding of guilty. Such judgment of acquittal shall not apply to any lesser included offense for which the evidence would reasonably permit a finding of guilty." On a motion for a judgment of acquittal, "[t]he issue to be determined is whether the jury could have reasonably concluded, from the facts established and the reasonable inferences which could be drawn from those facts, that the cumulative effect was to establish guilt beyond a reasonable doubt . . . ." (Internal quotation marks omitted.) *State* v. *Balbuena*, 168 Conn. App. 194, 199, 144 A.3d 540, cert. denied, 323 Conn. 936, 151 A.3d 384 (2016).

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defen-

dant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 503–504, 180 A.3d 882 (2018).

It is important to note that, "[i]n evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Balbuena*, supra, 168 Conn. App. 199.

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

Here, the petitioner argues that trial counsel should have argued inadvertent death by neck compression

and emphasized the lack of evidence to establish the element of intent. He asserts that he was prejudiced by counsel's failure to so argue the motion because, had the motion been so argued, it is likely that the trial court would have granted it, and thereby acquitted him of murder. We disagree.

To prove the performance prong of this second aspect of his ineffective assistance of counsel claim, the petitioner claims, impliedly, that whenever the evidence presented at trial raises doubt as to an essential element of a charged offense, it is unprofessional for counsel not to take advantage of that insufficiency by pointing it out to the trial court and arguing it as a basis for ordering a judgment of acquittal. This case, however, provides an excellent example of why that otherwise logical proposition is not invariably true. Here, defense counsel was well aware of the inadvertent death by neck compression theory of the defense and, in fact, had raised it with the petitioner for the purpose of having him consider relying on it. The petitioner, however, adamantly refused to do so, for he was aware that by raising that defense he would have to admit and argue two important and highly incriminating facts that he vehemently denied: first, that he was present in the family home when the victim died; and second, that her death had resulted from his application of a sleeper hold to her neck, albeit without the intent to cause her death. Counsel, faced with his client's denial, understandably avoided any mention of that theory of the case when he argued the petitioner's posttrial motion for a judgment of acquittal. In so doing, moreover, he also avoided the possibility that the jury might be instructed on and thus might find the petitioner guilty of a lesser included offense, such as manslaughter or negligent homicide, instead of acquitting him entirely if it had reasonable doubt as to his alleged intent to kill. For these reasons, and because there was no physical

evidence at the crime scene of any physical struggle between the petitioner and the victim, we conclude that counsel's decision not to base the petitioner's defense or his motion for a judgment of acquittal on the theory of inadvertent death by neck compression without intent to kill was neither professionally inappropriate nor constitutionally deficient.

On this second aspect of the petitioner's ineffective assistance of counsel claim, as on the first, we are not required to address the issue of prejudice in light of our determination that the petitioner failed to prove the performance prong of the claim. *Strickland* v. *Washington*, supra, 466 U.S. 687. We will do so, however, to clarify two matters. First, since the gravamen of the petitioner's claim of prejudice is that a properly argued motion for a judgment of acquittal would probably have led the trial court to grant the motion on the theory that there was insufficient evidence before the jury to prove that he had acted with the intent to kill the victim, we agree with the habeas court that there was more than ample evidence in the record to support the inference that the petitioner had intentionally killed the victim. Such evidence, more particularly, supports complementary inferences that the petitioner had the motive, the means, and the opportunity to kill the victim. As to motive, the jury was presented with witness testimony that the petitioner had wanted to "get rid of his wife," and that his girlfriend, Champlin, "would be his children's next mother . . . ." Multiple witnesses testified that the petitioner had stated that he intended to leave the victim, and, shortly after the victim's death, the petitioner and Champlin moved in together. Moreover, prior to the victim's death, the petitioner and Champlin had confirmed their intent to live together by signing a joint lease and opening a joint bank account. This alone was overwhelming circumstantial evidence of the

petitioner's motive, and thus of his intent, to murder the victim.

As to means, the evidence showed that the petitioner could easily have applied a sleeper hold to the victim because he knew how to apply such a hold and had been seen doing so to another person at least once in the past. As to opportunity, the jury had heard testimony that there were several hours of time that were unaccounted for between when the petitioner was supposed to have joined his friend, Hancin, at the marina to go fishing and the time he actually arrived there, unprepared to go fishing and unaccountably insistent on returning to his home for the stated purpose of playing darts. Such evidence, coupled with the petitioner's unusual behavior in Hancin's presence after persuading Hancin to return with him to his home—including delaying both the giving of first aid and the summoning of rescue personnel despite the victim's obviously distressed condition, which showed a degree of unconcern about her condition and ultimate fate—well supported the inference that he wanted and expected the victim to die. In light of this evidence, the petitioner failed to prove that there was a reasonable likelihood that his motion for a judgment of acquittal would have been granted had his trial counsel argued it differently.

In light of the facts presented at trial, summarized as aforesaid, trial counsel performed well within the bounds of competent representation and did not need to argue inadvertent death as a theory in support of the petitioner's motion for a judgment of acquittal.

For the foregoing reasons, we conclude that the habeas court properly denied the petitioner's amended petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

DONNA KRAUSMAN *v.* LIBERTY MUTUAL INSURANCE COMPANY (AC 42240)

Keller, Prescott and Bishop, Js.

Syllabus

The plaintiff, who had been operating her motor vehicle when it collided with a vehicle operated by a third party, sought to recover underinsured motorist benefits allegedly due under a policy of automobile insurance issued to the plaintiff by the defendant insurance company. The trial court granted the defendant's motion to bifurcate the plaintiff's underinsured motorist claim from her two other claims, alleging violations of the Connecticut Unfair Insurance Practices Act and the Connecticut Unfair Trade Practices Act, and subsequently referred the underinsured motorist claim to an arbitrator. The arbitrator issued a decision for the plaintiff, awarding her $19,500, which became a judgment on the underinsured motorist claim after the defendant did not move for a trial de novo. The plaintiff, pursuant to statute (§ 52-351b), thereafter served the defendant with interrogatories, seeking discovery as to the defendant's assets. After the defendant failed to respond to the interrogatories in a timely manner, the plaintiff filed a motion for an order of compliance, asking the court to compel the defendant to respond, which the court denied. On appeal, the plaintiff claimed that the court improperly denied her motion for an order of compliance with her postjudgment interrogatories. *Held* that the appeal was premature and jurisdictionally defective; the trial court's denial of the plaintiff's motion to compel was an interlocutory order in an ongoing civil action that was not immediately appealable because it neither terminated a separate and distinct proceeding nor deprived the plaintiff of a presently held statutory or constitutional right that would be irretrievably lost in the absence of immediate appellate review, the judgment on the underinsured motorist claim did not dispose of all the causes of action in the plaintiff's complaint brought against a particular party; moreover, the plaintiff was not deprived of her right to enforce at some later time the monetary judgment, which she retains, but merely her right to compel the defendant's present response to her interrogatories, a right she does not presently hold and one that is subject to the discretion of the court, and the discovery dispute remained enmeshed and intertwined with the adjudication of the issues remaining in the action.

Argued November 19, 2019—officially released February 11, 2020

Procedural History

Action to recover underinsured motorist benefits allegedly due pursuant to an automobile insurance policy issued by the defendant, and for other relief, brought to the Superior Court in the judicial district of Stamford, where the court, *Jacobs*, *J.*, granted the defendant's motion to bifurcate; thereafter, the underinsured motorist claim was referred to an arbitrator, who issued a decision for the plaintiff; subsequently, the court granted the plaintiff's motion for judgment in accordance with the arbitrator's award; thereafter, the court, *Hernandez*, *J.*, denied the plaintiff's motion for an order of compliance, and the plaintiff filed an appeal to this court. *Appeal dismissed.*

Alan Scott Pickel, with whom, on the brief, was *Steven A. Landis*, for the appellant (plaintiff).

Patrick T. Uiterwyk, with whom, on the brief, was *Kevin P. Polansky*, for the appellee (defendant).

Opinion

PRESCOTT, J. The plaintiff, Donna Krausman, filed this interlocutory appeal from the trial court's denial of her motion for an order compelling the defendant, Liberty Mutual Insurance Company, to respond to interrogatories that she served pursuant to General Statutes § 52-351b.[1] The plaintiff claims on appeal that the defendant was required by statute to answer the interrogatories and that the court improperly failed, as a matter

[1] General Statutes § 52-351b provides in relevant part: "(a) A judgment creditor may obtain discovery from the judgment debtor . . . of any matters relevant to satisfaction of the money judgment. The judgment creditor shall commence any discovery proceeding by serving an initial set of interrogatories . . . on the person from whom discovery is sought. . . . Such person shall answer the interrogatories and return them to the judgment creditor within thirty days of the date of service. . . .

* * *

"(c) On failure of a person served with interrogatories to return, within the thirty days, a sufficient answer or disclose sufficient assets for execution, or on objection by such person to the interrogatories, the judgment creditor may move the court for such supplemental discovery orders as may be

of law, to grant her motion to compel. The defendant, in addition to disputing the merits of the plaintiff's claim, argues that the appeal should be dismissed for lack of a final judgment.[2] We agree with the defendant that the court's ruling was an interlocutory discovery order in an ongoing civil action that is not immediately appealable because it neither terminated a separate and distinct proceeding nor deprived the plaintiff of a presently held statutory or constitutional right that would be irretrievably lost in the absence of immediate appellate review. See *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983); see also *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, 279 Conn. 220, 226–27, 901 A.2d 1164 (2006). Accordingly, we dismiss the appeal for lack of subject matter jurisdiction.

The record reveals the following facts and procedural history. In April, 2015, the plaintiff was involved in a motor vehicle accident in which her vehicle collided with a vehicle operated by a third party, Anne Neilson. After exhausting the limits of Neilson's automobile liability policy, the plaintiff, on January 12, 2017, commenced the underlying action to recover, among other things, underinsured motorist benefits from the defendant, her own automobile liability insurer. The operative amended complaint contained three counts. Count one alleged that the parties were "unable to agree as to the amount of damages to which the plaintiff is entitled" under the underinsured motorist provisions of her automobile liability policy issued by the defendant. Count two alleged that the defendant had engaged in unfair

necessary to ensure disclosure including . . . an order for compliance with the interrogatories . . . ."

[2] The defendant did not file a motion to dismiss the appeal. The final judgment issue was raised and addressed by the parties for the first time in their appellate briefs. Nonetheless, because the lack of a final judgment is a jurisdictional defect, we must address the issue, regardless of whether it was raised by a motion to dismiss, in a brief, at oral argument, or by this court sua sponte. See *Mac's Car City, Inc.* v. *DiLoreto*, 33 Conn. App. 131, 132, 634 A.2d 1187 (1993).

and deceptive insurance practices, including misrepresenting the benefits payable to the plaintiff, in violation of the Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes § 38a-815 et seq. Count three alleged that the same conduct violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.

On April 17, 2017, the defendant filed a motion, pursuant to General Statutes § 52-205, seeking to bifurcate the plaintiff's underinsured motorist claim from her CUIPA and CUTPA claims, and to adjudicate the underinsured motorist claim prior to hearing the CUIPA and CUTPA claims. On June 24, 2017, the court, *Jacobs*, *J.*, granted the motion to bifurcate. The court subsequently referred count one of the complaint, the underinsured motorist claim, to an arbitrator pursuant to General Statutes § 52-549u.[3]

On January 17, 2018, the arbitrator, Attorney John R. Downey, issued a decision finding for the plaintiff on her underinsured motorist claim and awarding her $19,500 in damages. On February 23, 2018, the plaintiff filed a motion asking the court to render judgment with respect to count one of the complaint in accordance with the arbitrator's decision. In the motion, the plaintiff asserted that the defendant had failed to demand a trial de novo pursuant to General Statutes § 52-549z (a).[4] On

[3] Section 52-549u authorizes the court, "in its discretion, [to] refer to an arbitrator, for proceedings authorized pursuant to this chapter, any civil action in which in the discretion of the court, the reasonable expectation of a judgment is less than fifty thousand dollars exclusive of legal interest and costs and in which a claim for a trial by jury and a certificate of closed pleadings have been filed. . . ." General Statutes § 52-549u.

[4] General Statutes § 52-549z provides in relevant part: "(a) A decision of the arbitrator shall become a judgment of the court if no appeal from the arbitrator's decision by way of a demand for a trial de novo is filed in accordance with subsection (d) of this section.

* * *

"(d) An appeal by way of a demand for a trial de novo must be filed with the court clerk within twenty days after the deposit of the arbitrator's decision in the United States mail, as evidenced by the postmark . . . ."

March 12, 2018, the court granted the plaintiff's motion for judgment.[5]

Thereafter, pursuant to § 52-351b, the plaintiff served the defendant with interrogatories dated June 7, 2018, seeking discovery as to the defendant's assets. After the defendant failed to respond to the interrogatories within the thirty day period provided by statute, the plaintiff filed a motion for order of compliance pursuant to § 52-351b (c), asking the court to compel the defendant to respond to her interrogatories. The defendant filed an objection to the plaintiff's motion, arguing that it was not required to respond to the interrogatories because the court had not yet disposed of the remaining two counts of the complaint and the plaintiff must wait until a final judgment was rendered in the case before seeking postjudgment discovery pursuant to § 52-351b.

On October 5, 2018, following a hearing, the trial court, *Hernandez*, *J.*, issued orders sustaining the defendant's objection and denying the plaintiff's motion for an order of compliance. This appeal followed.

On appeal, the plaintiff claims that the trial court improperly denied her motion for an order of compliance regarding her postjudgment interrogatories. In response, the defendant argues, inter alia, that the appeal should be dismissed for lack of subject matter jurisdiction because a final judgment has not yet been rendered in the underlying action. According to the defendant, the court's order denying the plaintiff's motion for compliance is an interlocutory discovery order that satisfies neither prong of the test set forth in *State* v. *Curcio*, supra, 191 Conn. 31, for establishing whether an interlocutory order is final for purposes of appellate jurisdiction. The defendant argues that the

[5] Because an arbitrator's decision automatically becomes a judgment of the court if no timely demand for a trial de novo is made, the plaintiff's motion for judgment was unnecessary. General Statutes § 52-549z (a).

plaintiff must wait to appeal until after the trial court has disposed of the remaining two counts of her complaint. In her reply brief, the plaintiff responds that the challenged order is a final judgment and that both prongs of the *Curcio* test are satisfied because the defendant's failure to seek a trial de novo with respect to the arbitration decision effectively terminated a separate and distinct proceeding with respect to the underinsured motorist claim and the court's order precludes her right to obtain the discovery she needs to execute on the judgment. We agree with the defendant.

Unless otherwise provided by law, the jurisdiction of our appellate courts is restricted to appeals from final judgments. See General Statutes §§ 51-197a and 52-263; Practice Book § 61-1; *Cheryl Terry Enterprises, Ltd.* v. *Hartford*, 262 Conn. 240, 245, 811 A.2d 1272 (2002). "The policy concerns underlying the final judgment rule are to discourage piecemeal appeals and to facilitate the speedy and orderly disposition of cases at the trial court level. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear." (Internal quotation marks omitted.) *Tyler* v. *Tyler*, 151 Conn. App. 98, 103, 93 A.3d 1179 (2014). Accordingly, a final judgment issue is a threshold matter that must always be resolved prior to addressing the merits of an appeal. See *State* v. *Curcio*, supra, 191 Conn. 30. Whether an appealable final judgment has occurred is a question of law over which our review is plenary. See, e.g., *Hylton* v. *Gunter*, 313 Conn. 472, 478, 97 A.3d 970 (2014).

It is axiomatic that "[a] judgment that disposes of only a part of a complaint is not a final judgment." *Cheryl Terry Enterprises, Ltd.* v. *Hartford*, supra, 262 Conn. 246. Accordingly, an appeal challenging an order issued during the pendency of a civil action ordinarily must wait until there has been a final disposition as to all counts of the underlying complaint. "Our rules of

practice, however, set forth certain circumstances under which a party may appeal from a judgment disposing of less than all of the counts of a complaint. Thus, a party may appeal if the partial judgment disposes of all causes of action against a particular party or parties; see Practice Book § 61-3; or if the trial court makes a written determination regarding the significance of the issues resolved by the judgment and the chief justice or chief judge of the court having appellate jurisdiction concurs. See Practice Book § 61-4 (a)."[6] (Footnote omitted.) *Cheryl Terry Enterprises, Ltd.* v. *Hartford*, supra, 246. In the present case, neither of these exceptions is applicable.

The complaint in the underlying civil action contains three counts, all of which the plaintiff brought against the sole defendant. The court granted the defendant's motion to resolve count one before turning to the remaining counts of the complaint.[7] Count one subsequently was referred to an arbitrator for resolution

[6] Practice Book § 61-3 provides in relevant part: "A judgment disposing of only a part of a complaint, counterclaim, or cross complaint is a final judgment if that judgment disposes of all causes of action in that complaint, counterclaim, or cross complaint brought by or against a particular party or parties. . . ."

Practice Book § 61-4 (a) provides in relevant part: "This section applies to a trial court judgment that disposes of at least one cause of action where the judgment does not dispose of either of the following: (1) an entire complaint, counterclaim, or cross complaint, or (2) all the causes of action in a complaint, counterclaim or cross complaint brought by or against a party. . . .

* * *

"When the trial court renders a judgment to which this section applies, such judgment shall not ordinarily constitute an appealable final judgment. Such a judgment shall be considered an appealable final judgment *only if* the trial court makes a written determination that the issues resolved by the judgment are of such significance to the determination of the outcome of the case that the delay incident to the appeal would be justified, and the chief justice or chief judge of the court having appellate jurisdiction concurs. . . ." (Emphasis altered.)

[7] There is no dispute that the court, at its discretion, had the authority to proceed in this manner. See General Statutes § 52-205 ("[i]n all cases, whether entered upon the docket as jury cases or court cases, the court

under the court's "nonbinding arbitration program." *Allstate Ins. Co.* v. *Mottolese*, 261 Conn. 521, 529, 803 A.2d 311 (2002); see also Practice Book §§ 23-61 through 23-66. The arbitrator issued a decision that became the judgment of the trial court with respect to count one after the defendant failed to make a claim for a trial de novo. See Practice Book § 23-66 (a). Even assuming without deciding that this fully resolved count one and that the defendant effectively has waived any challenge to the merits of the arbitrator's decision or its obligation to satisfy the judgment rendered on that count, the court nonetheless has not yet resolved the remaining two counts of the complaint. Because the judgment on count one does not dispose of all causes of action in the complaint brought by or against a particular party, the judgment rendered on count one is not final under Practice Book § 61-3. Instead, the judgment with respect to count one falls squarely within the type of judgment addressed in Practice Book § 61-4.

Our determination that the court's denial of the motion to compel compliance with the plaintiff's interrogatories was an interlocutory order does not end our inquiry into whether that ruling was immediately appealable. "In both criminal and civil cases . . . we have determined certain interlocutory orders and rulings of the Superior Court to be final judgments for purposes of appeal. [As set forth in *State* v. *Curcio*, supra, 191 Conn. 30–31, an] otherwise interlocutory order is appealable in two circumstances: (1) [if] the order or action terminates a separate and distinct proceeding, [and] (2) [if] the order or action so concludes the rights of the parties that further proceedings cannot affect them. . . . The first prong of the *Curcio* test

may order that one or more of the issues joined be tried before the others"). In so doing, however, the matter remained under a single docket number and the court signaled no intent to sever the case and create two separate and distinct civil actions.

. . . requires that the order being appealed from be severable from the central cause of action so that the main action can proceed independent of the ancillary proceeding. . . . If the interlocutory ruling is merely a step along the road to final judgment then it does not satisfy the first prong of *Curcio*. . . . Obviously a ruling affecting the merits of the controversy would not pass the first part of the *Curcio* test. The fact, however, that the interlocutory ruling does not implicate the merits of the principal issue at the trial . . . does not necessarily render that ruling appealable. It must appear that the interlocutory ruling will not impact directly on any aspect of the [action]. . . .

"The second prong of the *Curcio* test focuses on the nature of the right involved. It requires the parties seeking to appeal to establish that the trial court's order threatens the preservation of a right already secured to them and that that right will be irretrievably lost and the [parties] irreparably harmed unless they may immediately appeal. . . . Thus, a bald assertion that [the appellant] will be irreparably harmed if appellate review is delayed until final adjudication . . . is insufficient to make an otherwise interlocutory order a final judgment. One must make at least a colorable claim that some recognized statutory or constitutional right is at risk. . . . In other words, the [appellant] must do more than show that the trial court's decision threatens him with irreparable harm. The [appellant] must show that that decision threatens to abrogate a right that he or she then holds. . . . Moreover, when a statute vests the trial court with discretion to determine if a particular [party] is to be accorded a certain status, the [party] may not invoke the rights that attend the status as a basis for claiming that the court's decision not to confer that status deprives the [party] of protections to which [it] . . . is entitled. For an interlocutory order to be an

appealable final judgment it must threaten the preservation of a right that the [party] already holds. The right itself must exist independently of the order from which the appeal is taken. [If] a [discretionary] decision has the effect of not granting a particular right, that decision, even if erroneous, does not threaten the [party's] already existing rights." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, supra, 279 Conn. 225–27; see also *U.S. Bank National Assn.* v. *Crawford*, 333 Conn. 731, 738, 219 A.3d 744 (2019) (discussing second prong of *Curcio* test).

The plaintiff's claim in the present case that the second prong of the *Curcio* test is satisfied does not merit much discussion. The plaintiff argues that she would suffer an irretrievable deprivation of her rights if she were precluded from immediately appealing the court's denial of her motion to compel because she "has no other way to enforce the $19,500 judgment." That argument, however, lacks merit. First, the statutory right denied to the plaintiff by the court's order was not her right to enforce at some later time the monetary judgment, which she retains. Rather, the right that is implicated is her right to compel the defendant to respond to interrogatories at this time, a right that she does not presently hold and one that is subject to the discretion of the court. See General Statutes § 52-351b (granting trial court discretion with respect to imposing remedy for noncompliance). Second, although the court's ruling temporarily impedes her efforts to collect the judgment, it does not threaten to irretrievably deny her a statutory or constitutional right because, even if we dismiss this appeal for lack of jurisdiction, the plaintiff will be able to vindicate her claim, if it remains necessary to do so, in an appeal taken from a subsequent final judgment disposing of the remaining counts or a

later denial of her right to conduct postjudgment discovery.

In asserting that the court's order satisfies the first prong of *Curcio*, the plaintiff principally relies on our Supreme Court's opinion in *Presidential Capital Corp.* v. *Reale*, 240 Conn. 623, 633, 692 A.2d 794 (1997). In that case, our Supreme Court characterized the postjudgment discovery procedures under § 52-351b as "separate and distinct" from the underlying action. Id. The plaintiff's reliance on *Presidential Capital Corp.* fails for a number of reasons.

First, although the plaintiff insists on describing the discovery dispute underlying this appeal as "postjudgment discovery," such nomenclature is not entirely accurate because, as already discussed, the action below remains partially unresolved at this time. Instead, we view the ruling on appeal to be more akin to a ruling regarding an interlocutory discovery dispute. As indicated in *Presidential Capital Corp.*, our Supreme Court routinely has held that there is no right to an immediate appeal from an interlocutory order issued relating to discovery. *Presidential Capital Corp.* v. *Reale*, supra, 240 Conn. 628, citing *Melia* v. *Hartford Fire Ins. Co.*, 202 Conn. 252, 255, 520 A.2d 605 (1987); *State* v. *Grotton*, 180 Conn. 290, 292, 429 A.2d 871 (1980); and *Chrysler Credit Corp.* v. *Fairfield Chrysler-Plymouth, Inc.*, 180 Conn. 223, 226, 429 A.2d 478 (1980).

Second, the plaintiff's reliance on *Presidential Capital Corp.* is misplaced because our Supreme Court concluded that the trial court's postjudgment discovery order in that case was *not* immediately appealable. See *Presidential Capital Corp.* v. *Reale*, supra, 240 Conn. 625–27. Accordingly, it is difficult to divine how that case supports a conclusion that the discovery order in the present case is immediately appealable.

Third, the procedural posture of the present case readily distinguishes it from the final judgment issue decided in *Presidential Capital Corp.* In that case, the plaintiff was attempting to collect the unpaid balance of a final judgment it had obtained against the defendant following a jury trial on a breach of contract claim for failure to pay a commission. Id., 626. After the judgment had been affirmed on appeal, the plaintiff, hoping to unearth undisclosed assets of the defendant, served the defendant's wife and son, who were not parties to the action, with postjudgment interrogatories pursuant to § 52-351b. Id. Although the wife and son answered the interrogatories, they subsequently sought a protective order, pursuant to § 52-351b (d), to preclude a deposition that the plaintiff had sought. Id. The trial court sustained the plaintiff's objection to the issuance of a protective order "and ordered the appellants to submit to an examination by the plaintiff to be conducted before the court." Id.

The wife and son appealed the court's decision, and the Appellate Court dismissed the appeal for lack of a final judgment. Id., 627. The Supreme Court granted certification and affirmed the Appellate Court's judgment, concluding that, "although § 52-351b creates a proceeding that is separate and distinct from the prior adjudication leading to the judgment debt, the denial of a protective order pursuant to § 52-351b (d) does not terminate this statutory proceeding," and, thus, was not a final judgment for purposes of appeal. Id., 633. Thus, *Presidential Capital Corp.* stands for the proposition that an order that permits postjudgment discovery efforts does not *terminate* a separate and distinct postjudgment proceeding.

Unlike the present case, however, the underlying civil action in *Presidential Capital Corp.* had been fully resolved at the time of the appeal and thus the *only* proceeding before the trial court with respect to the

parties was the adjudication of an objection to the plaintiff's attempt to conduct further postjudgment discovery. See id., 625–27. In the present case, two counts of the plaintiff's complaint remain pending. Indeed, a resolution of those counts may have significant impact on the size of the plaintiff's ultimate judgment against the defendant, and, in turn, affect the degree and nature of the postjudgment discovery. In other words, unlike in *Presidential Capital Corp.*, the present discovery dispute remains enmeshed or intertwined with the unadjudicated issues remaining in the action.

Our Supreme Court's decision in *Pease* v. *Charlotte Hungerford Hospital*, 325 Conn. 363, 157 A.3d 1125 (2017), is further illustrative of why the distinction between the present case and the procedural posture of *Presidential Capital Corp.* is important. In *Pease*, the plaintiff brought a medical malpractice action, and a judgment was rendered in favor of the defendant hospital. Id., 365. The hospital was awarded $5965 in expert fees and costs. Id. Months after the judgment was rendered, the hospital filed a motion for contempt, claiming that the plaintiff had not paid the award of costs. Id. The trial court denied the motion for contempt, and the hospital appealed. Id., 366. The plaintiff argued that the appeal should be dismissed for lack of a final judgment. Id., 366–67. The Supreme Court, in rejecting that claim and affirming the judgment, ruled that the challenged order satisfied the first prong of *Curcio*, noting that "both *the underlying litigation* and the ancillary contempt proceedings have terminated [and that] [*t*]*here is no ongoing proceeding or litigation the completion of which the parties must await* . . . ." (Emphasis added.) Id., 368–69. If no additional litigation with respect to the remaining counts of the complaint remained in the present case, then the court's refusal to compel the defendant to respond to the interrogatories arguably would have terminated the only proceeding currently pending before the court. That, however, simply is not the case here.

The plaintiff argues, as she did before the trial court, that § 52-351b, which authorizes a judgment creditor to serve interrogatories on a judgment debtor, only requires the existence of a "money judgment"; there is no express requirement of a "final judgment" in the statute. Even assuming that we agree with the plaintiff's statutory construction, and that a party who has obtained an uncontested monetary judgment on one count of a multicount complaint properly may utilize the discovery procedures set forth in § 52-351b in such circumstances, such a construction simply does not help to resolve whether or when a party that is dissatisfied with the results of such procedures may seek appellate review. Our law is abundantly clear that appellate review must wait until there is a final judgment in the underlying action *as to all counts of a complaint*, which undisputedly has not yet occurred in the present case. Because the appeal was taken prior to the court rendering a final judgment on all counts of the plaintiff's complaint, the appeal is premature and jurisdictionally defective.

The appeal is dismissed.

In this opinion the other judges concurred.

SEMAC ELECTRIC COMPANY, INC. *v.* SKANSKA USA BUILDING, INC.
(AC 41054)

Alvord, Devlin and Norcott, Js.

Syllabus

The plaintiff subcontractor, E Co., sought to recover damages from the defendant, S Co., for, inter alia, breach of contract in connection with a dispute arising from a project relating to the expansion and renovation of a hospital. Pursuant to its contract with S Co., E Co. agreed to perform all electrical work for the project. The contract provided that E Co. had a duty to coordinate with S Co., that E Co. had made allowances for all hindrances and delays to its work, and that E Co. would work within

S Co.'s schedule, which S Co. may revise from time to time. S Co. had the right to direct a change in E Co.'s work on written notice and, during the course of the project, thirty-eight change orders were issued. After several months, E Co. sent S Co. a notice, alleging a cardinal change to the contract due to issues that arose during the preceding months and asserting that it could only continue to perform under the contract if S Co. agreed to additional financial terms. S Co. responded that E Co.'s refusal to proceed under the contract constituted default and, the next day, S Co. terminated E Co. E Co. alleged that S Co. had breached the contract by its wrongful termination of E Co., and S Co. filed a counterclaim, alleging, inter alia, breach of contract. S Co. also filed a third-party complaint against K and T, the chief financial officer and president of E Co., respectively, alleging, inter alia, fraudulent conduct. The case was tried to the court, which rendered judgment in part for S Co. on its counterclaim, and in favor of K and T on the third-party complaint. On S Co.'s appeal and E Co.'s cross appeal to this court, *held:*

1. The trial court properly rejected E Co.'s claim that there had been a cardinal change in the contract terms and properly concluded that E Co. breached the contract by abandoning the project: the court properly focused on the nature and impact of the delays on the work expected of and performed by E Co., which were not extraordinary in a project of this magnitude, and neither the character nor the nature of the work expected of or performed by E Co. was altered in any way, and E Co. was compensated for the changes in its work up until the time that it issued its notice of cardinal change to S Co., E Co. was required to anticipate unforeseen modifications to E Co.'s sequence of construction and the schedule parameters of the contract when it signed the contract, as the contract language demonstrated that the parties contemplated the possibility of scheduling delays and changes; moreover, there was no evidence that the change orders altered the nature of E Co.'s work, and, in executing each change order, E Co. attested that it was compensated for associated costs and delays, and it was clear that the changes were not so profound that they were not redressable under the contract, as they were, in fact, redressed via the change orders.
2. The trial court properly concluded that S Co. materially breached its contract with E Co. by failing to provide E Co. with a forty-eight hour cure period before terminating its contract with E Co.: even though S Co. claimed that the court erred in assuming that it had terminated E Co. pursuant to the contract provision requiring it to give E Co. forty-eight hours to cure its breach, because S Co. pleaded in its counterclaim that it had declared E Co. in default pursuant to the contract, the court properly held the parties to their contractual obligations; moreover, S Co.'s reliance on certain common-law principles overlooked the clear contractual language requiring a cure period, which did not include any exceptions, and which outlined the procedure if E Co. abandoned the project or defaulted on its obligations and the court correctly determined

that S Co. should be held to the contract provisions because to hold otherwise would excuse S Co.'s noncompliance with the contract and would create a new and different agreement, which courts cannot do; furthermore, the court's enforcement of the cure period did not render meaningless another provision of the contract stating that S Co.'s contractual remedies were not exclusive, because S Co. could not turn to the common law to avoid an express contractual obligation.

3. The trial court's award of damages was not erroneous: this court disagreed with S Co.'s claim that, due to E Co.'s material breach, S Co. was excused from further performance of its contractual obligations and was entitled to expectation damages, because S Co. also breached the contract by failing to afford E Co. a forty-eight hour cure period, transforming its termination for cause of E Co. into a termination for convenience and, accordingly, S Co. could not claim entitlement to a common-law remedy after forfeiting its right to a contractual remedy as a result of its own breach; moreover, E Co. could not prevail on its claim that the court erred in not awarding a termination payment pursuant to the contract, because, although the court concluded that E Co. was entitled to a termination payment, the court found that E Co.'s billing practices were too irregular to award damages on the basis of its invoices, which the contract had provided for, and, instead, calculated the payment by determining the percentage of the project E Co. had completed and multiplying that percentage by the contract price; although potentially imprecise, it could not reasonably be argued that this method ran afoul of the contract or was unfair to E Co.

4. The trial court did not err in finding that K and T did not commit fraud when they swore under oath to the accuracy of invoices submitted to S Co. for goods and services they represented to S Co. that they had paid to other subcontractors, but actually never did pay; K's and T's conduct strained the bounds of fraud, revealing, at best, gross incompetence, but the court nevertheless found that, on the basis of its observation of K's and T's demeanor and attitude, neither K nor T acted with fraudulent intent, and this court does not second-guess the court's credibility assessments.

Argued October 16, 2019—officially released February 11, 2020

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, Complex Litigation Docket, where the defendant filed a counterclaim; thereafter, the court, *Young*, *J.*, granted the defendant's motion to implead Kevin Pope et al. as

third-party defendants, and the defendant filed a third-party complaint against the third-party defendants; subsequently, the court, *Moukawsher*, *J.*, dismissed the defendant's claims of defamation and tortious interference, and the matter was tried to the court, *Moukawsher*, *J.*; judgment in part for the defendant on the counterclaim and judgment for the third-party defendants on the third-party complaint; thereafter, the court granted the defendant's motion for prejudgment interest, and the defendant appealed and the plaintiff cross appealed to this court. *Affirmed.*

Bruce Meller, pro hac vice, with whom were *Michael J. Donnelly*, *Kevin W. Munn* and, on the brief, *Eric B. Miller*, for the appellant-cross appellee (named defendant).

Louis R. Pepe, with whom was *Laura W. Ray*, for the appellee-cross appellant (plaintiff).

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellees (defendant Kevin Pope et al.).

Opinion

DEVLIN, J. In this action arising from the expansion and renovation of Stamford Hospital (hospital), both parties, the plaintiff, Semac Electric Company, Inc. (Semac), and the defendant, Skanska USA Building, Inc. (Skanska), appeal from the judgment of the trial court, challenging the court's determinations that they both breached the contract between them, and awarding Skanska damages in the amount of $3,857,130.77,[1] as reimbursement for funds that Skanska had overpaid to Semac for work that Semac had not performed.

[1] The court also awarded prejudgment interest in the amount of $405,259.79, for a total due to Skanska of $4,262,390.56. Neither party has challenged the court's award of prejudgment interest.

Skanska also claims that the trial court erred in finding that the individual third-party defendants, Kevin Pope and Thomas Scanlon, the chief financial officer of Semac and the president of Semac, respectively, did not engage in fraudulent conduct when they signed, under oath, invoices misrepresenting that Semac had paid other subcontractors for certain goods and services. We affirm the judgment of the trial court.

The trial court set forth the following relevant facts. As the general contractor retained by the hospital to serve as the construction manager for the construction of a new building on its existing campus (project), Skanska entered into a subcontract with Semac, dated March 5, 2014, pursuant to which Semac agreed to perform all necessary electrical work on the project for the sum of $14,785,462. On October 19, 2015, after working for several months on the project, Scanlon delivered to Skanska a "Notice of Cardinal Change and Material Breach of Subcontract" (Notice of Cardinal Change), wherein Semac stated: "[T]here has been a cardinal change to our subcontract due to the drastic and unforeseen modifications and changes that have been made to Semac's sequence of construction and the schedule parameters set forth in the subcontract, which has unreasonably altered the character of the work and unduly increased its cost." In the multipage letter, Semac identified several specific issues that arose during the preceding months of construction, and asserted: "As a result of the cumulative effect and the severe magnitude and quality of the scheduling and sequencing delays and disruptions and other assumptions contemplated by the subcontract, the entire nature of the electrical work for this [p]roject is something totally different than anyone reasonably anticipated or contemplated at the time of entering into a subcontract." Semac asserted that it could continue to perform under the subcontract only if Skanska agreed to an increase

in the contract price, and to certain additional financial terms. Semac concluded: "We trust that . . . Skanska will work with us to reach this equitable solution. Otherwise, Semac will be excused from further performance and cease work as of October 23, 2015, in which case we would seek compensation for all work performed through that date."

In response, on October 21, 2015, Skanska advised Semac that its refusal to proceed under the terms of the subcontract constituted a default under that contract, and that, if Semac failed to cure the default, Skanska would pursue its contractual rights.

The next day, on October 22, 2015, Skanska terminated Semac, and notified Semac that it was taking possession of Semac's "materials, tools, appliances, equipment and other items." (Internal quotation marks omitted.) In turn, Semac accused Skanska of material breach of the subcontract on the ground of wrongful termination.

On October 23, 2015, Semac commenced this action. In its second amended complaint, Semac alleged that Skanska had materially breached the contract by virtue of the cardinal changes of which it had given Skanska notice on October 19, 2015, failing to make monthly progress payments for work completed by Semac, failing to compensate Semac for additional work that was performed by Semac and was not required by the original contract, and failing to pay the overtime premium required by Semac to complete that work. Semac claimed that Skanska had wrongfully terminated it and confiscated its tools and equipment. In addition to the breach of contract and wrongful termination counts, Semac alleged causes of action sounding in quantum meruit, breach of the implied covenant of good faith and fair dealing, violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et. seq.,

conversion, and civil theft. Semac sought monetary damages, including statutory interest and attorney's fees pursuant to General Statutes § 42-158j, and declaratory relief.

Skanska essentially denied all of Semac's allegations, and asserted multiple special defenses, asserting that Semac waived many of its claims by, inter alia, failing to submit claims for overtime premiums and accepting payment for the work completed and failing to comply with the dispute resolution provisions of the contract. Skanska also filed a counterclaim alleging that Semac breached the contract by failing to perform and complete the work and effectively abandoning performance, and committed fraud and civil theft by submitting billing to Skanska for work that it had not performed and goods that it had not procured.[2] Finally, Skanska claimed a "setoff," alleging: "To the extent that Semac is entitled to damages from Skanska, Skanska is entitled to set off for the amount of loss or damages sustained as a result of Semac's actions."

Semac denied all of Skanska's special defenses and the essential allegations of Skanska's counterclaim. Semac asserted multiple special defenses to Skanska's counterclaim, the most pertinent of which was its allegation that Skanska's claims were barred by its own material breach of the contract. Like Skanska, Semac alleged: "To the extent that Skanska is entitled to damages from Semac, Semac is entitled to a setoff for the amount of loss or damage sustained as a result of Skanska's actions, as alleged in Semac's [second] amended complaint."

Skanska denied all of Semac's special defenses. Skanska also filed a third-party complaint against Pope and

[2] Skanska also alleged defamation and tortious interference, but those claims were dismissed for lack of subject matter jurisdiction.

Scanlon, alleging fraudulent misrepresentation regarding Semac's billing for services and goods that it never performed or purchased. Pope and Scanlon denied the allegations of the third-party complaint and asserted seven special defenses to the claims against them. Skanska denied all of Pope and Scanlon's special defenses to its third-party complaint.

The parties tried this case to the court over a period of several days. Semac sought damages for Skanska's wrongful termination, in the amount of the unpaid portion of the contract price. Skanska sought damages from Semac for the $28,754,711.81 that Skanska had to pay for other subcontractors and suppliers to complete the electrical work that Semac failed to complete under the contract[3] and for the reimbursement of funds that Semac had overbilled Skanska and which Skanska had paid.

On August 23, 2017, the court issued a memorandum of decision wherein it concluded that both Semac and Skanska breached the contract. The court rejected Semac's claim of cardinal change and concluded that Semac breached the contract when it refused to continue to perform its contractual obligations. The court further found, however, that Skanska breached the contract by terminating Semac without affording it forty-eight hours to cure its breach in accordance with the contract. The court concluded that, because Skanska failed to afford Semac the contractual forty-eight hours to cure its breach, it was required to pay Semac for the work it had performed, and it was not entitled to recover damages to complete the project. The court determined that Semac had completed 65 percent of the work that it had contracted to complete, and multiplied the revised

[3] Prior to trial, the parties stipulated to the fact that Skanska spent $28,754,711.81 for other subcontractors and suppliers to complete Semac's subcontract scope of work.

contract price of $19,114,535, which was determined by multiple change orders agreed to and executed by the parties, by that percentage to determine the amount to which Semac was entitled for the work it had performed, $12,424,447. Because, however, Semac had already billed Skanska $14,785,764.36 for the work it had performed, and Skanska had paid that amount, the court concluded that Skanska was entitled to be reimbursed $2,361,317.36. The court further found that Skanska paid Semac for materials and labor allegedly provided by two separate additional subcontractors, but were never actually paid for by Semac. The court concluded that Skanska was entitled to reimbursement for those amounts—$769,790.93 and $252,273.51, respectively. Finally, the court determined that Semac had improperly marked up its labor cost and ordered that it reimburse Skanska in the amount of $473,748.97 for this misrepresentation. The court thus awarded Skanska a total of $3,857,130.77. The court found that Skanska failed to prove that Pope and Scanlon engaged in fraudulent conduct, and rejected the parties' remaining claims.

Semac thereafter filed a motion for reconsideration and correction of the court's award of damages on the grounds that the court allegedly omitted an undisputed credit due to Semac for certain work it had performed on the project and that certain portions of the court's damages award that compensated Skanska for overpayments resulted in double recovery. The court granted reargument, but rejected Semac's arguments and affirmed its earlier decision.

By way of an additional memorandum of decision dated November 6, 2017, the trial court granted, over Semac's objection, Skanska's motion for prejudgment interest, increasing the total amount of damages to $4,262,390.56. This appeal, filed by Skanska, and, cross appeal, filed by Semac, followed.

The following general principles are pertinent to the parties' claims on appeal. "It is axiomatic that [t]he scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. [If], however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . .

"In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . It is within the province of the trial court, as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . .

"[I]n private disputes, a court must enforce the contract as drafted by the parties and may not relieve a contracting party from anticipated or actual difficulties undertaken pursuant to the contract, unless the contract is voidable on grounds such as mistake, fraud or unconscionability. . . . [C]ourts do not unmake bargains unwisely made. . . . Although parties might prefer to have the court decide the plain effect of their contract contrary to the agreement, it is not within its power to make a new and different agreement; contracts voluntarily and fairly made should be held valid and enforced in the courts. . . . In construing an unambiguous contract, the controlling factor is the intent expressed in the contract, not the intent which the parties may have had or which the court believes they ought to have had. . . . [If] . . . there is clear and definitive contract language, the scope and meaning of that language is not a question of fact but a question of law. . . .

"The required elements necessary to sustain an action for breach of contract are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages. . . . The existence of a contract is a question of fact to be determined by the trier on the basis of all of the evidence." (Citations omitted; internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 157 Conn. App. 139, 158–60, 117 A.3d 876, cert. denied, 318 Conn. 902, 122 A.3d 631 (2015), and cert. denied, 318 Conn. 902, 123 A.3d 882 (2015).

"We often have stated that whether a contract has been breached is a question of fact . . . and that this court lacks the authority to make findings of facts or draw conclusions from primary facts found. . . . Factual conclusions may be drawn on appeal, however, if the subordinate facts found [by the trial court] make such a conclusion inevitable as a matter of law . . . or [if] the undisputed facts [as they appear] in the record make the factual conclusion so obvious as to be inherent in the trial court's decision." (Citations omitted; internal quotation marks omitted.) Id., 171–72. With these principles in mind, we turn to the parties' claims on appeal.

I

We begin with Semac's assertion that the trial court erred in rejecting its claim of cardinal change. Although this claim is raised by way of Semac's cross appeal, and is thus not chronologically first in the procedural posture of this appeal, it is the first of a chain of events that gave rise to this litigation. We agree with the trial court that there was not a cardinal change in the terms of the contract and, therefore, that Semac breached the contract by abandoning the project.

In addressing Semac's claim of cardinal change, the trial court set forth the following relevant facts. The

court first addressed the issue of "whether radical changes were made to the character and timing of the work." The court found: "The job was building a twelve floor hospital loaded with specialty wiring needs and equipment. Three unanticipated events threw off the detailed schedule adopted at the beginning of the job. First, the steel frame of the building took longer than expected. Second, the building's glass siding—its curtain wall—took far longer than expected, leaving large parts of the building open to the weather. Third, Skanska had to scrap its planned approach to coordinating trades—the BIM (building information management) coordination—and start over, imposing that duty on the trades themselves." (Internal quotation marks omitted.) The court determined that "[t]he cumulative effect of these delays meant that by the summer of 2015, Skanska had lost months to these delays and was fighting to recover its schedule."

Through its project manager, Mark Miller, Skanska aggressively sought to make up for the time lost as a result of the aforementioned delays to complete the project by April, 2016, so that the hospital could open in September, 2016. The court noted: "Miller pushed his subcontractors pretty hard. From Semac he demanded—and paid for—overtime work and pressed the company to reach quickly, and then exceed, the peak of its promised manpower—without any additional money. Miller's plans also required Semac to increase its flexibility in working around other trades and working between various sections of the building. Doubtless all this put a strain on Semac. It was a big job; it was behind schedule, and everyone was required to hustle to make the whole thing work."

The court considered the expert testimony offered by the parties and found that Skanska's witnesses were more convincing in their testimony that "in large proj-

ects, changes and strains are routine" over the testimony of Semac's expert, who "dismissed even the court's suggestion that some delays on big projects are routine." The court reasoned: "This was no routine project. . . . And as for time delays—assuming they matter—as much as Skanska can't pretend the job was routine, Semac can't ignore that the job was completed close to on time, in addition to never changing its basic character. There was no year of delay; no surprise second tower to erect. Indeed, Skanska credibly claims that—for matters under its control—it would have met the preopening substantial completion date described in the schedule but for Semac bailing out at a critical moment. It also rightly emphasizes that, out of sixty-seven subcontractors, nobody bailed out but Semac."

The court found that Semac had made a profit every month of the job, right up until October, 2015, when it issued the Notice of Cardinal Change. The court found: "In fact, Skanska demanded—and got sworn declarations with every change order saying that Semac had been fully paid for any 'delays, acceleration, or loss of efficiency encountered by [Semac] in the performance of the [w]ork through the date of this [c]hange order . . . .' "

The court noted the "many irregularities" in Semac's billing to Skanska, and found that "[s]ome of Semac's bid calculations are indecipherable and even misleading to a degree. Its internal paper seems to equivocate about profit. It shows a profit in one place and then takes it away in another. Semac got paid by Skanska for some goods and services without telling Skanska that it was pocketing the money and not paying for the labor and materials because of a claimed dispute. It hid payments to its owner in its billing records by sending them to a shell company for nonexistent materials for the job. It changed managers on the job three times, suffered significant employee turnover rates, and employed far

more than an ordinary number of cheaper and less productive apprentices on the job. It told Skanska that it was billing Skanska its actual costs for labor on contract change jobs when it was instead pocketing a profit on every hour worked. It swore in payment documents that it had been paid for delays on the job and then pulled the rug out from under Skanska by claiming the opposite. It never adequately tied its alleged losses from delays to particular parts of the job. And the written records of communications before the [issuance to Skanska of the Notice of Cardinal Change] do not nearly reflect the kind of urgency that would suggest that things happening on the site were at a critical juncture requiring Skanska's urgent financial intervention. Instead, one day in October, 2015, there was a blunt letter from Semac to Skanska demanding money and—within several days—there was this lawsuit."

The court concluded: "This case doesn't meet contemporary views in commercial cases of what is a radical or cardinal change. . . . In October, 2015, [Semac] wrote to Skanska saying that it would leave if it did [not] get the extra money that it asked for. When Skanska refused to pay or even parley, Semac affirmed in telephone calls that it would pick up its tools and go home. The day after Semac affirmed this, Skanska found that Semac had dismissed its own subcontracted labor for the day and was busying its own men with removing their equipment and tools from the site. Semac insists that some men were somewhere still working on the actual job, but the evidence supporting this claim is vague and the evidence against it is better. Skanska officials searched the site and found nobody from Semac working anywhere. Semac never said who was doing what, [or] where, that supposedly meant they were still on the job. It has not proved it was carrying on with the work while merely trying to negotiate.

"Semac temporarily or permanently abandoned working, and under Section 12.1 of the contract abandoning the work—even temporarily—is a material breach of the contract. Thus, Semac materially breached its contract with Skanska."

On appeal, Semac claims[4] that "[s]ignificant delays in the coordination work, the steel construction and installation of the curtain wall—all Skanska's responsibilities—contributed to the cardinal change." We are unpersuaded.

Although our case law has not addressed an issue of cardinal change per se, it has addressed an analogous situation in which the final plans for a certain project differed so substantially from the original plans for which the parties had contracted that the initial contract was rendered a nullity. *Randolph Construction Co.* v. *Kings East Corp.*, 165 Conn. 269, 334 A.2d 464 (1973).

[4] In its brief to this court, Semac claims: "The gravamen of this lawsuit . . . centers on whether the original $19.1 million construction contract, which the trial court found to be 65 percent complete when Skanska wrongfully terminated Semac, but which cost an *additional* $28.7 million to finish after Semac left, is a fundamentally different contract than the one Semac agreed to perform. In the original contract Semac bargained for about 119,000 hours of work, but by the time the contract was complete, the nature of the work and conditions of performance had changed so dramatically that the total labor hours required for completion of the electrical work exceeded 430,000." (Emphasis in original.) Semac argues that the trial court erred in rejecting its claim of cardinal change because it had "agreed to perform electrical work for Skanska for $19.1 million, [but c]hanges to Semac's working conditions . . . increased the total cost of the electrical work to $45.6 million, [and] thus constituted a cardinal change as a matter of law." Semac contends: "The $45.6 million contract Skanska demanded was simply not the $19.1 million electrical contract for which Semac bargained."

As explained herein, and conceded by counsel, this argument is not factually accurate. The cardinal change upon which Semac relied on October 22, 2015, did not, and, obviously, could not have contemplated the amount of money and hours that Skanska would be required to expend to complete the electrical work on the project several months after Semac refused to continue to its work on the project. Indeed, much of the additional cost is attributable to the fact that the substitute electrical contractors presented exorbitant bills that Skanska had to pay in order to finish the project on time.

In *Randolph Construction Co.*, our Supreme Court held: "In dealing with contract provisions allowing alterations or modifications, an appropriate standard for substantiality is whether such changes unreasonably alter the character of the work or unduly increase its cost, or effect such a material change as to constitute a radical departure from the original contract." Id., 274. "The issue of substantiality, a determination of whether the enumerated differences in the final plans were substantial, is a question of fact which depends on a consideration of the circumstances. . . . The factual issue includes . . . the total undertaking covered by the writing, the amount of work affected by the alterations and the net change in the cost of performance." (Citations omitted.) Id.

Consistent with the court's ruling in *Randolph Construction Co.*, other jurisdictions have explained that "[a] cardinal change is a drastic modification beyond the scope of the contract that altered the nature of the thing to be constructed." (Internal quotation marks omitted.) *Pellerin Construction, Inc.* v. *Witco Corp.*, 169 F. Supp. 2d 568, 587 (E.D.La. 2001). "By definition, a cardinal change is so profound that it is not redressable under the contract." (Internal quotation marks omitted.) Id. A cardinal change thus constitutes a breach of contract. Id.

The standard courts look to in deciding whether a cardinal change is present is "whether the modified job was essentially the same work as the parties bargained for when the contract was awarded." (Internal quotation marks omitted.) *Air-A-Plane Corp.* v. *United States*, 408 F.2d 1030, 1033 (Ct. Cl. 1969). "[T]here is a cardinal change if the ordered deviations altered the nature of the thing to be constructed." (Internal quotation marks omitted.) Id. "[T]he problem is a matter of degree varying from one contract to another and can be resolved only by considering the totality of the

change and this requires recourse to its magnitude as well as its quality." (Internal quotation marks omitted.) Id. "There is no exact formula . . . . Each case must be analyzed on its own facts and in light of its own circumstances, giving just consideration to the magnitude and quality of the changes ordered and their cumulative effect upon the project as a whole." (Internal quotation marks omitted.) Id.

Here, Skanska and Semac entered into a 241 page contract, pursuant to which Semac agreed to perform all of the electrical work for the project. Section 2.4 of exhibit E to the contract addressed the duty of Semac to coordinate its work with Skanska, the hospital and other subcontractors, and provided that Semac "shall not be entitled to an adjustment of the [s]ubcontract [a]mount or an extension of time for its field coordination activities as [Semac] shall anticipate and provide for such activities in the [s]ubcontract [a]mount and agreed time for performance." Section 3.1 provided that Semac represented that it had "taken into consideration and made allowances for all hindrances and delays incident to its [w]ork as provided in Sections 2.2 and 2.4" Section 3.2 provided that Semac would perform its work in accordance with the schedule set by Skanska "as it may be revised and amended from time to time by [Skanska], including in Section 9.2." Section 9.2 provided that Skanska "shall be entitled to decide the time, order and priority for performance of the various portions of [Semac's] [w]ork" and that Semac would "not be entitled to an adjustment of the [s]ubcontract [a]mount or an extension of time in connection with any such direction by [Skanska] as [Semac] shall anticipate and provide for such activities in the [s]ubcontract [a]mount and agreed time for performance." Section 9.3 provided that Skanska could require Semac to "increase its labor force, number of shifts and/or overtime operations, days of work, or to provide additional equipment or materials."

Additionally, article 10 of exhibit E specifically addressed, "Changes and Impacts." Section 10.1 provided that Skanska had the right, in its discretion, to direct a change upon written notice to Semac. The contract set forth a detailed procedure for the implementation of change orders. Section 10.3 provided Skanska with the sole discretion to determine whether different pricing was required as a result of a change order, and, if so, Skanska had the sole discretion to determine the amount of additional compensation. Sections 10.3 through 10.9 specifically set forth the procedure that Semac was required to follow to claim additional compensation for the change orders, and provided that a failure to follow those procedures would result in a waiver of any such claim. Section 11.3 provided that, in agreeing to the contract amount, Semac had assessed its ability to recover additional compensation in connection with a work delay or interference.

Despite the comprehensive and unequivocal contract language cited in the preceding paragraphs, Semac claimed that there had been a cardinal change "to the planned method and sequence of construction for the electrical work" that it had contracted to perform. Semac claimed that there had been a cardinal change "due to the drastic and unforeseen modifications and changes that have been made to Semac's sequence of construction and the schedule parameters set forth in the subcontract, which has unreasonably altered the character of the work and unduly increased its cost." Specifically, Semac stated that due to the failure to provide a weathertight building on schedule, the sequence of its work was different than originally contemplated, and Semac was required to work faster and under conditions that were not covered in the contract, thus resulting in increased costs that were not anticipated by Semac.

Semac's claim fails because, as aptly found by the trial court, Semac was required to anticipate issues of this nature when it submitted its bid for and signed the contract. The explicit language of the contract demonstrated clearly that the parties contemplated the possibility, and even the likelihood, of delays and changes in the originally planned schedule, and required Semac to anticipate those possibilities. Although the project experienced multiple delays, some of which were significant and some that resulted in the resequencing of Semac's work and a change of the time of the year during which its workers were required to work, Semac was still performing the same work that it had contracted to perform. Although Skanska and Semac executed thirty-eight change orders, there was no evidence presented that the change orders altered the character or nature of the work that Semac had originally contracted to perform. In executing each change order, Semac attested that it had been fully compensated "for all costs, claims, markups, and expenses, direct or indirect, attributable to this or any other prior [c]hange [o]rders" and "for any delays, acceleration, or loss of efficiency encountered by [Semac] in the performance of the [w]ork through the date of this [c]hange [o]rder, and the performance of this and any prior [c]hange [o]rders by or before the date of [s]ubstantial [c]ompletion." It is clear that the changes in the project were not so profound that they were not redressable under the contract, as they were, in fact, redressed via the change orders executed by the parties. The final change order, to which Semac agreed and for which it was compensated, was dated October 12, 2015, less than two weeks prior to Semac's issuance to Skanska of the Notice of Cardinal Change.

Moreover, despite representing to Skanska that it was billing for actual costs of labor, Semac was actually inflating its bills to make a profit ''on every hour

worked."[5] This fact alone belies Semac's claim that the changes to the project so materially affected its costs that it had no choice but to abandon it and supports the trial court's determination that the situation leading up to the claim of cardinal change could not have been so urgent as to justify Semac's demand for further funds.

Although the trial court employed colorful hyperbole to demonstrate that the character of the final product, the hospital, had not changed, Semac is correct in its assertion that the end result does not dictate the existence of a cardinal change. That was not, however, the focal point of the trial court's reasoning. The trial court focused, and properly so, on the nature and impact of the delays on the work expected of and performed by Semac. Those delays were not extraordinary in a project of this magnitude and complexity. Neither the character nor the nature of the work expected of or performed by Semac was ever altered in any way, never mind in a way that could be construed as substantial or radical. Moreover, the delays were contemplated in the contract between Semac and Skanska, and Semac was compensated for them right up until it issued its Notice of Cardinal Change to Skanska. On the basis of the foregoing, we agree with the trial court's determination that Semac failed to prove that there was a cardinal change in the terms of its contract with Skanska and with its conclusion that Semac materially breached the contract.

II

We next address Skanska's challenge to the trial court's conclusion that it also materially breached its

[5] Although not necessarily relevant to our review of the trial court's rejection of Semac's claim of cardinal change, we note the likely validity of the court's speculation of Semac's true reason for abandoning the project: because it had front-loaded its billing, it realized that it was running out of funds in the fixed price contract against which it could bill Skanska.

contract with Semac by failing to provide Semac with a full forty-eight hour cure period before terminating its contract. Skanska does not dispute that it waited only twenty-four hours from the time that it rejected Semac's Notice of Cardinal Change to terminate Semac. Skanska argues, however, that, for various reasons, Semac was not entitled to a forty-eight hour cure period. We disagree.

"Although it is generally accepted that contracting parties may reserve the right to terminate a contract for convenience or cause upon a specified period of notice . . . [i]f a party who has a power of termination by notice fails to give the notice in the form and at the time required by the agreement, it is ineffective as a termination. . . . One who deviates from the terms and the circumstances specified in the agreement for giving notice . . . may be regarded as having repudiated the contract, with all the effects of repudiation including giving the injured party a right to damages . . . ." (Citations omitted; internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, supra, 157 Conn. App. 169. "[A] party's failure to comply with the notice provision in a termination clause . . . amounts to a material breach of the contract." Id., 172.

Here, the trial court concluded that Skanska "violated the contract terms when it responded to Semac's moves by declaring that it was terminating Semac for cause" without affording Semac forty-eight hours to cure its default under the contract. The court noted that Skanska's rush to terminate Semac was likely "motivated by the contract clause that allowed Skanska to seize Semac's equipment following a for-cause termination." The court reasoned: "Under the contract, Skanska had the right to terminate Semac anytime it wanted with cause or without. But for Skanska to terminate Semac for cause as it said it was and grab Semac's equipment,

the contract provides that it had to give Semac forty-eight hours to cure its breach and get back on the job. The contract doesn't name any exception or qualify this rule in any way. It doesn't say that the provision doesn't apply when the other party breaches first. It doesn't say it doesn't apply when the other party isn't likely to make use of the forty-eight hour period to cure. Elsewhere in the contract it does say that Skanska may seek any other remedies available at law outside the contract, but it doesn't say anything about rewriting explicit provisions already contained in the contract to make them easier on Skanska. So the forty-eight hour notice that was not given had to be given for Skanska to terminate Semac for cause.

"In pressing a strict application of the contract, Skanska must suffer the consequences of its own handiwork. We will never know what might have happened during that forty-eight hour period. Semac was facing ruin by continuing on the same terms, so absent some change it almost certainly would have left. But maybe Miller's call for negotiations would have prevailed after everyone cooled down, and some sort of compromise might have been reached. It would have been tough, but the notice period might have achieved something. What is clear is that by giving no warning of its intention to terminate Semac, Skanska didn't give the required forty-eight hours' notice required by its contract."

On the basis of the foregoing, and relying on this court's decision in *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, supra, 157 Conn. App. 169, in which we held that failing to give a required termination notice at the required time is a material contract breach, the court concluded that both Semac and Skanska materially breached the contract.

In challenging the trial court's determination that it breached its contract with Semac, Skanska does not

dispute that it did not afford Semac forty-eight hours to cure its default. Skanska argues, however, that, for several reasons, Semac was not entitled to that cure period. Skanska first claims that the court erred in assuming that it terminated Semac pursuant to § 12.1 of the contract, the provision that required it to give Semac forty-eight hours to cure its breach. Because Skanska actually pleaded in its counterclaim that it had "declared Semac in default . . . pursuant to exhibit E, article 12 of the subcontract," the court properly held the parties to their obligations under that section of the contract. Moreover, Skanska's reliance on § 12.1 can be inferred from its communications to Semac following its receipt of the Notice of Cardinal Change wherein it threatened to exercise its rights under the contract if Semac did not rescind its repudiation of the contract, specifically its right to seize all of Semac's tools and equipment, a right afforded under § 12.1.

Skanska also argues that Semac's material breach and repudiation of the contract and its abandonment of the project absolved Skanska of its obligation to afford Semac a forty-eight hour cure period. In support of this claim, Skanska argues for the application of multiple common-law principles that are often applicable to contract disputes, namely, the principles of first breach, repudiation, anticipatory breach, and waiver. Skanska's argument for the application of these principles overlooks the clear language of § 12.1 of the contract that outlined the procedure to be followed if Semac abandoned the project or otherwise defaulted on its contractual obligations. Section 12.1 explicitly and comprehensively sets forth the parties' rights and responsibilities in the event Semac was terminated for its abandonment of the project, the very basis for Skanska's termination. We agree with the trial court's determination that Skanska should be held to the words of the contract, just as Semac had been, and was thus not

excused from affording Semac a forty-eight hour cure period. To hold otherwise would excuse Skanska's noncompliance with a contractual requirement, and "would create a new and different agreement, which courts cannot do." *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, supra, 157 Conn. App. 171, citing *Collins* v. *Sears, Roebuck & Co.*, 164 Conn. 369, 374, 321 A.2d 444 (1973) (in construing contract, court cannot disregard words used by parties or revise, add to, or create new agreement).

Skanska also claims that, "[i]n light of Semac's conduct, verbal, and written statements from October 19, 2015 through October 22, 2015, it is uncontroverted that Semac would not perform under the subcontract and that waiting an additional [twenty-four] hours for a reconciliation that was not coming would have been futile." Skanska argues that Semac told it "in at least six different ways that it would be leaving" the project, and thus affording Semac an additional twenty-four hours to cure its breach would have been futile. As noted, the contract expressly provided that Semac was afforded a forty-eight hour cure period, and did not provide for any exceptions or qualifications to that requirement. Additionally, we agree with the trial court that it cannot be known for certain, despite Semac's repeated and unwavering representations that it would not continue to work on the project unless Skanska met its monetary demands, what the parties may have worked out. The trial court found that "[w]e will never know what might have happened during that forty-eight hour period." We decline to speculate that waiting the additional hours required under the contract would have been futile.

Skanska finally contends that the trial court's enforcement of § 12.1 of the contract, and its rejection of Skanska's assertion of various common-law doctrines to defend its failure to abide by the express contract language of § 12.1 requiring the forty-eight hour

cure period rendered meaningless § 19.5 of the contract, which provided that the remedies outlined in the contract were not the exclusive remedies available to Skanska. Although § 19.5 provides that the remedies set forth under the contract are not the exclusive remedies of the parties, we do not agree with Skanska's contention that it can turn to the common law to avoid an obligation contained expressly in the contract.

In sum, we agree with the trial court's conclusion that, just as Semac was bound by the express language of the contract that contemplated the potential of delays and changes of sequencing, Skanska is bound by the language of the contract that expressly set forth the procedure that Skanska was required to follow if Skanska wanted to terminate Semac for abandonment of the project. Skanska cannot use the common law to excuse it from abiding by the language of the contract that it drafted. As the trial court noted, the contract very heavily favored Skanska, and Skanska failed to afford Semac one of the few protections afforded to Semac under the contract. In so doing, the trial court properly found that Skanska breached the contract.[6]

III

Both parties also challenge the court's award of damages to Skanska in the amount of $3,857,130.77.[7] "It is axiomatic that the sum of damages awarded as compensation in a breach of contract action should place the injured party in the same position as he would have been in had the contract been performed. . . . The injured party, however, is entitled to retain nothing in excess of that sum which compensates him for the

[6] Semac asserts that Skanska's failure to allow it the full forty-eight hours to cure had the legal effect of maintaining Semac's conduct in the status of a default and not a breach. We do not agree. While Skanska's failure to afford the required cure period breached the contract, it in no way exonerated Semac for its own material breach.

[7] This amount does not include the court's award of prejudgment interest.

loss of his bargain. . . . Guarding against excessive compensation, the law of contract damages limits the injured party to damages based on his actual loss caused by the breach. . . . The concept of actual loss accounts for the possibility that the breach itself may result in a saving of some cost that the injured party would have incurred if he had had to perform. . . . In such circumstances, the amount of the cost saved will be credited in favor of the wrongdoer . . . that is, subtracted from the loss . . . caused by the breach in calculating [the injured party's] damages. . . . The plaintiff has the burden of proving the extent of the damages suffered." (Citation omitted; internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, supra, 157 Conn. App. 162.

"[W]e review [a] trial court's damages award under the clearly erroneous standard, under which we overturn a finding of fact when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id., 176.

With the previously cited principles in mind, we begin by reviewing the factual and legal bases underlying the trial court's award of damages. The court noted that "Semac said it was due around $3.6 million for work completed to date when it left the job and wants an order for this money among other things. Skanska's counterclaim seeks some $26 million, almost all of it for the cost of completing the work using replacement subcontractors. Because they both assume a breach of contract only by their adversary, both parties' claims for damages are wrong."

The court reasoned: "[B]oth parties here breached. Semac can't fairly claim expectation damages as its

reward for temporarily or permanently abandoning the contract. . . . Skanska, by contrast, had the right to terminate Semac for convenience without any grace period at all. . . . Indeed, the Skanska contract says that an erroneous termination for cause converts automatically to a termination for convenience. That contract also says termination for convenience means Skanska must pay—not expectation damages—but the money due for the work performed to date. That money is the right measure here, but as we will see, it doesn't matter. The damages would be the same as expectation damages.

"In calculating what was due [to] Semac for work up to the date of its departure, Semac points out that it had several bills to Skanska outstanding when it left the job. It claims [that] Skanska's breach means it had the right to stop work and, more important, Skanska had commanded it to cease performing. The latter fact certainly means Semac didn't have to complete the job under the contract terms. After all, Skanska can't have it both ways. Given that the contract terms mean that Skanska terminated Semac for its own convenience, Skanska can't contradictorily claim that Semac should have kept working or pay for the cost of replacement subcontractors. It might have been different with a proper termination for cause based on Semac temporarily or permanently abandoning the job, but that's not what the contract says happened here.

"So Semac didn't need to complete the job, isn't liable for the costs of replacement subcontractors, and is due the money that was owed to it at the time it left." In so finding, the court determined that Semac was entitled to a termination payment under § 12.4 of its contract with Skanska. The court nevertheless concluded that Semac "wasn't due any money at the time it left and actually had money the contract required it to return to Skanska."

To determine the amount of the termination payment to which Semac was entitled, the trial court found that it could not simply rely upon the amounts billed by Semac due to its billing "irregularities and its incentive to inflate its bills . . . ." The court thus determined that the best way to determine the amount to which Semac was entitled was to ascertain the percentage of the entire contract that Semac had fulfilled and multiply that percentage by the total amount of the contract. Both parties presented testimony as to their respective views as to the percentage of the job that had been completed when Semac was terminated, but the court found that the most persuasive testimony in this regard was offered by Miller, Skanska's project manager, who opined that Semac had completed 65 percent of the job. The court adopted Miller's position and calculated that Semac was entitled to $12,424,447, which was 65 percent of the revised contract price of $19,114,535. Because Semac had already billed and been paid $14,785,764.36 from Skanska, Semac had received $2,361,317.36 more than it should have for the work that it had completed. To that amount, the trial court added funds that Semac had collected from Skanska for overpayments to two of Semac's subcontractors and overpayment for labor rates on which Semac improperly had added a profit, for a total additional amount of $1,495,813.41. The court thus concluded that Semac owed Skanska a total of $3,857,130.77.[8]

On appeal, Skanska argues that, "[d]ue to Semac's material breach, Skanska was excused from further performance of its obligations under the contract, and was entitled to expectation damages." Skanska claims, "as a result of the trial court's incorrect determination

[8] Semac subsequently moved for reconsideration of the amount of damages based on an alleged miscalculation of certain of the credits applied to the termination payment. The court granted reargument, but affirmed its decision. This is not relevant to the claims on appeal.

that Skanska also breached the subcontract, it improperly failed to award its expectation damages." Because we disagree with Skanska's argument that it did not breach the contract, as discussed herein, we also reject its claim that it was entitled to expectation damages.

Skanska also claims that it is entitled to expectation damages under the common law because § 19.5 provided that its contractual remedies were not its exclusive remedies. We disagree. As stated previously, § 12.1 of the contract explicitly provided for the procedure to be followed by Skanska in the event of a breach by Semac. Skanska failed to abide by the express requirement that it afford Semac a forty-eight hour cure period and, thus, also breached the contract, and its termination for cause of Semac was transformed into a termination for convenience. Skanska cannot now claim entitlement to a common-law remedy after it forfeited its right to a contractual remedy as a result of its own breach.

Semac argues that the court erred in not awarding it a termination payment under § 12.4 of the contract, which was triggered when Skanska failed to afford Semac a forty-eight hour cure period, transforming the termination for cause into a termination for convenience. Semac's challenge in this regard is misplaced in that the trial court expressly did conclude that Semac was entitled to the termination payment when it concluded that Semac "didn't need to complete the job, isn't liable for the costs of replacement subcontractors, and is due the money that was owed to it at the time it left." The court further found, however, that Semac's billing practices were too irregular to confidently award damages based upon Semac's invoices, as contemplated by § 12.4 of the contract, which provided that the termination payment "shall be comprised of: (i) amounts invoiced and due for [w]ork performed but not yet paid; (ii) payment for [w]ork satisfactorily completed but not yet invoiced by [Semac] prior to the termination;

(iii) retainage held by [Skanska] at the date of termination; and (iv) all reasonable, actual termination costs incurred by [Semac] in terminating the [w]ork . . . ."

The court therefore employed an alternative method of calculating the termination payment by determining the percentage of the project that Semac had completed and multiplying that percentage by the total contract price. Although potentially somewhat imprecise, it cannot reasonably be argued that this method of calculating the termination payment ran afoul of § 12.4 of the contract, or that it was unfair to Semac. Indeed, it is consistent with Semac's claim that it be paid for the work that it completed and its theory of quantum meruit.[9] If Semac had not front-loaded its invoices, ensuring that it made a profit for every month that it billed Skanska, it would not have been in the position of having its termination payment credited by monies that it should not have prematurely collected from Skanska. In light of the foregoing, we conclude that the trial court's award of damages was not erroneous.

IV

Finally, Skanska claims that the trial court erred in failing to find that Pope and Scanlon committed fraud when they swore under oath to the accuracy of invoices submitted to Skanska for a total of $1,022,064.44 for goods and services that it represented it had paid, but actually never did pay, to other subcontractors, Gexpro and TPC Associates, Inc. We are not persuaded.

"[I]t is well settled that the essential elements of fraud are: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by

[9] Semac claims in its brief to this court that it was entitled to a termination payment under § 12.4 of the contract in the amount of $2,108,290.87. As Semac explains, this is the same amount that it would be entitled to under a theory of quantum meruit for the value of the work that it had completed. This is the very basis upon which the court calculated its award of damages.

the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury. . . . All of these ingredients must be found to exist. . . . Additionally, [t]he party asserting such a cause of action must prove the existence of the first three of [the] elements by a standard higher than the usual fair preponderance of the evidence, which . . . we have described as clear and satisfactory or clear, precise and unequivocal. . . . Finally, [t]he party claiming fraud . . . has the burden of proof. . . . Whether that burden has been met is a question of fact that will not be overturned unless it is clearly erroneous." (Internal quotation marks omitted.) *Trumbull* v. *Palmer*, 123 Conn. App. 244, 257, 1 A.3d 1121, cert. denied, 299 Conn. 907, 10 A.3d 526 (2010).

"A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . [A]s a reviewing court [w]e must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude. . . . The weight to be given to the evidence and to the credibility of witnesses is solely within the determination of the trier of fact. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *McLeod* v. *A Better Way Wholesale Autos, Inc.*, 177 Conn. App. 423, 450, 172 A.3d 802 (2017).

Here, in rejecting Skanska's claim that Pope and Scanlon engaged in fraudulent conduct, the trial court

reasoned: "The court had ample time to judge what Scanlon and Pope said and how they said it. The court can't find they clearly and convincingly committed fraud when they overcharged Skanska. Pope's approach to being [chief financial officer], as he explained it, made some sense. His job was to sign for Semac after other people at the company were presumed to have vetted what he was to sign. He didn't do their jobs for them; he signed on behalf of his company in reliance on what his company told him. Skanska may find it unconvincing, but Pope's rationale about the Gexpro advanced billing of material isn't clearly and convincingly fraudulent either. It was supported by documents directly noting that material being charged for had not yet been received. At a minimum, he seemed to have sincerely and not heedlessly believed the advance billing was a reasonable practice and that is enough to avoid culpability given the applicable standard.

"Like Pope, Scanlon never bothered to read the entire contract or the waivers being signed. But as we have seen, it almost didn't matter what they said anyway. Semac had to agree or lose the contract to the next bidder or, after signing the main contract, get no pay for the work it did. Given the relative positions of the parties, Semac had no choice, and the court does not believe Skanska's suggestions that it should assume it would have agreed to material changes to the bargain if asked. As commercial and consumer contracts become increasingly intricate and the bargains increasingly unbalanced, it is a sad truth that hardly anyone reads them anymore while the courts and the lawyers keep on reading them and the courts almost always enforce them. This predictable form of neglect can't form the basis for fraud since in this context Scanlon's neglect was more pragmatic than reckless. This and some of his arguably inconsistent and inadequate efforts may

have put his company on the hook for breach of contract, but they don't support a finding that Scanlon committed fraud.

"Fraud is something beyond Semac stretching things concerning the materials and the money it withheld for instance from subcontractor TPC. About TPC, Semac interpreted things in the light most favorable to itself, including its view that because the payments weren't due to TPC, in its view it is protected by the language in the waivers about having paid all money 'due' to subcontractors. But this doesn't amount to a lie or reckless misstatement or, at least in light of the court's credibility judgments there isn't clear and convincing evidence of intent or recklessness: merely strained and self-interested interpretations. None of them amount to good reasons to impose massive financial liabilities on Scanlon or Pope."

On appeal, Skanska argues that the record clearly showed that Pope and Scanlon acted fraudulently by not reading or verifying the accuracy of the content of the invoices to which they swore under oath. To be sure, that conduct, even as described by the trial court, strains the bounds of fraud, and reveals, at best, gross incompetence displayed by Pope and Scanlon. The trial court nevertheless found that, based upon its observation of the demeanor and attitude of Pope and Scanlon, neither of them acted with fraudulent intent. Because we cannot second-guess the trial court's credibility assessments, its rejection of Skanska's fraud claim must stand.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DOUGLAS C., JR.* (AC 41245)

Alvord, Prescott and Sullivan, Js.

Syllabus

Convicted, after a jury trial, of five counts of the crime of risk of injury to a child, the defendant appealed to this court. The defendant's conviction stemmed from his alleged sexual abuse of five female victims, including C, on various dates while they were under the age of sixteen. The minor victims were often in the presence of the defendant in his home, where the defendant had contact with their intimate parts on multiple occasions. Specifically, the defendant grabbed C's breasts over her shirt on multiple occasions from September, 2005 to September, 2006. After the close of the state's case, the defendant moved for a judgment of acquittal, which the trial court granted as to a count alleging sexual assault in the second degree but denied as to the five remaining counts that charged the defendant with the crime of risk of injury to a child. Subsequently, the defendant requested that the court provide a specific unanimity instruction to the jury on the remaining five counts, which the court granted only as to one of those counts. On appeal, the defendant claimed, inter alia, that the court improperly denied his motion for a judgment of acquittal because there was insufficient evidence for the jury to convict him on the count involving C, as the three factor test used by our Supreme Court in *State* v. *Stephen J. R.* (309 Conn. 586) to determine whether a child victim's general or nonspecific testimony is sufficient to sustain a conviction in a sexual abuse case was inapplicable to the present case because C was not a very young child at the time she was abused by the defendant and when she testified at trial. *Held*:

1. The defendant's claim that the trial court improperly denied his motion for a judgment of acquittal was unavailing:

   a. The defendant could not prevail on his claim that the test used by our Supreme Court in *Stephen J. R.* was inapplicable to the present case because the leniency with respect to proof that has been formulated to apply in such cases involving very young children should not be

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

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

applied with equal force in the present case: although C was older than the child victim in *Stephen J. R.* when she was sexually abused by the defendant and when she testified at trial, the test articulated by our Supreme Court in *Stephen J. R.* was not dependent on the child's age and was applicable to the present case to assess whether C's testimony was sufficient to sustain the defendant's conviction because, according to C's testimony at trial, the defendant had access to her on multiple occasions at his home between September, 2005, and her sixteenth birthday in September, 2006, and the test used in *Stephen J. R.* applies to cases, such as the present case, where an alleged abuser has ongoing access to the child victim and, as a result, the victim testifies to repeated acts of abuse occurring over a period of time but, lacking any meaningful point of reference, is unable to furnish many specific details, dates or distinguishing characteristics as to individual acts or assaults; moreover, the exact number of times that the defendant had contact with C's breasts and the specific dates on which these acts occurred are not elements of committing the offense of risk of injury to a child, and the state was only required to prove that the defendant had contact with C's intimate parts on one occasion before her sixteenth birthday.

b. The defendant could not prevail on his claim that, even if the three factor test articulated in *Stephen J. R.* applied to the present case, there was insufficient evidence to convict him on the count involving C because C's testimony failed to satisfy the second and third factors of the test and, thus, that it was unreasonable for the jury to conclude from the evidence presented and the inferences drawn therefrom that the defendant had contact with C's intimate parts before she was sixteen years old: the defendant could not prevail on his claim with respect to the second factor of the test, that C's testimony failed to establish sufficiently the number of times that the defendant had contact with her intimate parts because her testimony was inconsistent, as that claim merely attacked the credibility of C's testimony and did not undermine the sufficiency of the evidence on which the jury based its guilty verdict, and C satisfied the second factor by testifying with sufficient specificity that the defendant, who was charged with one count of risk of injury to a child for having contact with C's intimate parts in a sexual and indecent manner, touched her breasts at least once; moreover, with respect to the third factor of the test, which requires a child victim to describe the general time period in which the illegal acts occurred to assure that those acts were committed within the applicable limitation period, the state did not need to prove the time period during which each incident occurred because the defendant failed to claim that any of the conduct for which he was charged occurred outside the limitation period and, although the third factor was, nevertheless, applicable to the present case because the state was obligated to prove that the defendant had contact with C's intimate parts on one or more occasions before her sixteenth birthday, C's testimony was sufficient in this regard

because it tended to demonstrate that the defendant's conduct occurred after he moved to Connecticut in September, 2005, but before she turned sixteen years old in September, 2006, and the jury could have reasonably found that C's testimony regarding the general time period during which the defendant had contact with her intimate parts was corroborated by other testimony at trial, including the testimony of the defendant's wife, who testified that C was in the defendant's home on multiple occasions before her sixteenth birthday.

2. The defendant's claim that he was deprived of his constitutional right to a unanimous jury verdict because the trial court improperly denied his request for a specific unanimity instruction as to four of the counts in violation of his rights under the federal and state constitutions, which prohibit the conviction of a criminal defendant by a jury unless it is unanimous as to the defendant's guilt, was unavailing; although the defendant was charged in four counts with having violated one statutory subdivision (§ 53-21 (a) (2)) by touching the intimate parts of each child victim on one occasion, and, at trial, the state proffered evidence that the defendant had contact with each child's intimate parts on multiple occasions, there was no requirement for the jury to be unanimous as to the specific occasion on which the prohibited contact occurred and the court was not required to provide a specific unanimity instruction, unlike the situation in which the jury must decide whether the defendant violated one of multiple statutory subsections, subdivisions or elements.

Argued October 10, 2019—officially released February 11, 2020

Procedural History

Substitute information charging the defendant with five counts of the crime of risk of injury to a child, and with the crime of sexual assault in the second degree, brought to the Superior Court in the judicial district of New London and tried to the jury before *Jongbloed, J.*; thereafter, the court granted the defendant's motion for a judgment of acquittal as to the charge of sexual assault in the second degree; subsequently, the court denied the defendant's motion for a judgment of acquittal; verdict of guilty of the remaining charges; thereafter, the court denied the defendant's motions for judgment notwithstanding the verdict and for a new trial, and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Dina S. Fisher, assigned counsel, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Theresa Ferryman*, senior assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Douglas C., Jr., appeals from the judgment of conviction, rendered after a jury trial, of five counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[1] The defendant claims on appeal that the trial court improperly (1) denied his motion for a judgment of acquittal because there was insufficient evidence for the jury to find the defendant guilty on count three, and (2) denied his request for a specific unanimity instruction with respect to counts one, three, five, and six. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The defendant had sexual and indecent contact with the intimate parts of five female children—N, C, O, S, and T—on various dates while they were under the age of sixteen years old. These five children would often be in the presence of the defendant at the numerous gatherings he had at his home in Lisbon, after moving there in September, 2005. At these gatherings, the

[1] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony for a violation of subdivision (2) of this subsection . . . ." Although § 53-21 (a) has been amended by the legislature since the events underlying the present appeal, those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

" 'Intimate parts' " are defined as "the genital area . . . groin, anus . . . inner thighs, buttocks or breasts." General Statutes § 53a-65 (8). Section 53a-65 (8) was amended by No. 06-11, § 1, of the 2006 Public Acts, which

defendant would serve alcohol, including to those who were under the legal age to consume alcoholic beverages. The children would also be in the defendant's presence when babysitting his children at his home or on other occasions.

When the defendant was in the company of the children, he had contact with their intimate parts on multiple occasions. Specifically, the defendant touched the breasts of N on multiple occasions and performed oral sex on her on various occasions between 2005 and January 8, 2007; the defendant grabbed C's breasts over her shirt on multiple occasions from 2005 to September 22, 2006; the defendant placed O's hands in his pants, resulting in her making contact with his penis, placed his hands in her pants and made contact with her vagina, and touched her breasts on multiple occasions between 2005 and August 7, 2010; the defendant touched S's vagina on more than one occasion and made contact with her breasts on one occasion between 2005 through September 15, 2008; and the defendant touched T's breasts on multiple occasions between 2005 through October 23, 2007.[2]

On May 15, 2017, before the trial commenced, the defendant moved for a bill of particulars that "specif[ied] as far as reasonable the date, time, and place of the commission of the crimes alleged . . . ." The state responded by filing its substitute information on July 5, 2017, in which it provided some of these details in greater specificity for each count.

At the close of the state's case, the defendant moved for a judgment of acquittal. The state conceded that it

made changes to the statute that are not relevant to this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] The allegations in count one pertain to N; count three pertains to the allegations regarding C; count four pertains to the allegations regarding O; count five pertains to the allegations regarding S.; and count six pertains to the allegations regarding T.

had failed to meet its burden of proof with respect to count two and that the motion for a judgment of acquittal should be granted as to that count.[3] The state otherwise opposed the motion. The court granted the motion as to count two and denied it as to all other counts.

After the charging conference, the defendant requested that the court provide a specific unanimity instruction to the jury on the remaining counts. The state agreed that a specific unanimity instruction should be given as to count four[4] but objected to the court giving a specific unanimity instruction on the other remaining counts. The court agreed with the state and stated that it would provide a specific unanimity instruction as to count four but not as to the other remaining counts.

[3] Count two charged the defendant with sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (3). Regarding the court's granting of the defendant's motion for a judgment of acquittal as to this count, the state, in its appellate brief, notes that "the state was required to present evidence that at the time the defendant subjected . . . [N] . . . to cunnilingus . . . she was physically helpless." (Internal quotation marks omitted.) N, however, did not testify that she was physically unable to resist the defendant's conduct. Thus, the state "conceded that the defendant's motion for a judgment of acquittal should be granted . . . as to count two."

[4] In count four of the amended substitute information, the state alleged that the defendant "had contact with the intimate parts of a child under the age of sixteen years . . . *and* subjected said minor female to contact with his intimate parts . . . ." (Emphasis added.) The defendant requested, and the state did not object to, the court providing a specific unanimity instruction as to this count. The court provided the following instruction as to count four to the jury: "As to count four, the state has also alleged that the defendant subjected the child or specific minor female alleged . . . to contact with the defendant's intimate parts. Again, it is sufficient if the contact is with any one of the intimate parts. Now, the state has alleged that the defendant committed this element of the offense in *two different ways* on count four. You may find this element established only if you all unanimously agree that the state has proved beyond a reasonable doubt that the defendant had contact with the intimate parts of [the minor female] *or* you all agree that the state has proved beyond a reasonable doubt that the defendant subjected [the minor female] to contact with his intimate parts *or* both." (Emphasis added.)

The defendant then made a second motion for a judgment of acquittal. He reiterated his concerns about the "pervasive pattern of unreliability as to the testimony of each [child]" that he raised in the first motion. The defendant also argued, in part, that there was insufficient evidence for the jury to return a guilty verdict as to count three. The court denied this motion and instructed the jury. The jury returned a guilty verdict on counts one, three, four, five, and six.

After the jury returned its verdict but before sentencing, the defendant moved for judgment notwithstanding the verdict and for a new trial, citing the reasons stated in his prior motions for judgment of acquittal as support for granting these motions. The court denied the defendant's motions.

The court subsequently imposed on the defendant a total effective sentence of eighteen years incarceration, with execution suspended after serving ten years, followed by ten years of probation. This appeal followed.

I

We first address the defendant's claim that the court improperly denied his motion for a judgment of acquittal because there was insufficient evidence for the jury to convict him on count three.[5] In support of this claim, the defendant makes two arguments: (1) the test used by our Supreme Court in *State* v. *Stephen J. R.*, 309 Conn. 586, 597–98, 72 A.3d 379 (2013), to determine whether a child victim's general or nonspecific testimony is sufficient to sustain a conviction in a sexual

[5] Count three charged the defendant with risk of injury to a child in violation of § 53-21 (a) (2) for having contact with the intimate parts of C while she was under sixteen years of age. We consider the defendant's insufficiency of the evidence claim first because, if successful, the defendant would be entitled to a judgment of acquittal as to count three. See *State* v. *Reed*, 176 Conn. App. 537, 540 n.3, 169 A.3d 326, cert. denied, 327 Conn. 974, 174 A.3d 194 (2017).

abuse case is inapplicable to the present case because C, the child victim identified in count three, was not a very young child at the time she was abused by the defendant and when she testified at trial; and (2) even if the test articulated in *Stephen J. R.* applies to the present case, C's testimony was, nevertheless, insufficient under that test to sustain his conviction under count three. We disagree with both of the defendant's arguments.

We begin with the well settled standard governing our review of the defendant's claim that his conviction was predicated on insufficient evidence. "In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"While the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether

there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) Id., 593–94.

Furthermore, we are mindful that "[w]e do not sit as a thirteenth juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. We have not had the jury's opportunity to observe the conduct, demeanor, and attitude of the witnesses and to gauge their credibility." *State* v. *Stepney*, 191 Conn. 233, 255, 464 A.2d 758 (1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1455, 79 L. Ed. 2d 772 (1984).

In addition to these general principles, our Supreme Court has established a three factor test in cases in which the defendant is charged with sexually abusing a child to determine whether "generic" testimony by a complaining witness "about largely undifferentiated, but distinct, occurrences" is nonetheless sufficient to convict the defendant. *State* v. *Stephen J. R.*, supra, 309 Conn. 595. "[I]n order to accommodate both the realities of child victims of repeated abuse and the due process interests of the defendant . . . [t]he victim, of course, must describe the *kind of act or acts committed with sufficient specificity*, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim *must describe the number of acts committed with sufficient certainty* to support each of the counts alleged in the information or indictment (e.g., twice a month or every time we went camping). Finally, the victim *must be able to describe the general time period in which these acts occurred* (e.g., the summer before my fourth grade, or during each Sunday morning after he came to live with us), to assure the acts were committed within the applicable limitation period.

Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (Emphasis altered; internal quotation marks omitted.) Id., 597–98. In establishing this test, the court weighed two competing considerations, namely, "[o]n the one hand, prosecutions based on generic testimony could deprive a defendant of his due process right to fair notice in order to effectively defend himself . . . [and] [o]n the other hand, testimony from a child victim describing a series of indistinguishable acts by an abuser who has ongoing access to the child is often the only evidence that the child is able to provide." Id., 595–96.

A

The defendant first argues that the test articulated in *Stephen J. R.* applies only to cases involving very young children. The child victim testifying in *Stephen J. R.* was approximately seven years old at the time the abuse occurred and was at least thirteen years old when she testified. See id., 592, 601; see also *Stephen J. R.* v. *Commissioner of Correction*, 178 Conn. App. 1, 4–5, 173 A.3d 984 (2017), cert. denied, 327 Conn. 995, 175 A.3d 1246 (2018).[6] C, on the other hand, was fourteen or fifteen years old at the time the defendant allegedly had contact with her intimate parts and was twenty-six years old when she testified at trial. Because the child in *Stephen J. R.* was considerably younger than C at the time the abuse occurred and when testifying, the defendant asserts that "[t]he leniency with respect to proof that has been formulated to apply in such cases involving very young children should not be applied

[6] The victim initially described this abuse in a videotaped diagnostic interview with a clinical child interview supervisor when she was approximately thirteen years old. See *State* v. *Stephen J. R.*, supra, 309 Conn. 592, 601; see also *Stephen J. R.* v. *Commissioner of Correction*, supra, 178 Conn. App. 4–5.

with equal force [in the present case]." We are not persuaded.

This court has, in fact, recently applied the three factor test used in *Stephen J. R.* in a case in which a defendant had sexual contact with a child for the first time when the child was approximately eleven years old and on multiple occasions thereafter until the child was fifteen years old. See *State* v. *Anthony L.*, 179 Conn. App. 512, 514–15, 179 A.3d 1278, cert. denied, 328 Conn. 918, 181 A.3d 91 (2018). In *Anthony L.*, a complaint describing the sexual abuse that had occurred was not filed until ten years after the child was abused, meaning that the child would have been at least twenty-five years old when she testified. See id., 515. Similarly, in the present case, C was approximately fifteen years old when the defendant had contact with her intimate parts, and she was twenty-six years old when she testified.

Moreover, our Supreme Court's decision to apply the three factor test in *Stephen J. R.* was not dependent on the child's age at the time the abuse occurred or when she testified; rather, the court used the test in that case to consider the sufficiency of generic or nonspecific testimony that "typically arises in cases in which an alleged abuser either lives with the child victim or has ongoing access to the child and, as a result, the victim testifies to repeated acts of abuse occurring over a period of time but, lacking any meaningful point of reference, is unable to furnish many specific details, dates or distinguishing characteristics as to individual acts or assaults." (Internal quotation marks omitted.) *State* v. *Stephen J. R.*, supra, 309 Conn. 588.

Indeed, our Supreme Court in *Stephen J. R.* adopted the three factor test used by the California Supreme Court in *People* v. *Jones*, 51 Cal. 3d 294, 316, 792 P.2d 643, 270 Cal. Rptr. 611 (1990). See *State* v. *Stephen J. R.*, supra, 309 Conn. 588, 597–601. In *Jones*, the California

Supreme Court, in determining the sufficiency of the child victim's generic and nonspecific testimony, considered factors *other than* the age of the child. See *People* v. *Jones*, supra, 315.[7] The court in that case further stated that "the victim's failure to specify [a] precise date, time, place or circumstance [does not] render generic testimony insufficient . . . [because] the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction." Id. The court, having decided not to depend on the age of the child as a factor, concluded that a child victim's generic testimony is sufficient to sustain a conviction if the child is able to "describe the kind of act or acts committed with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct . . . the number of acts committed with sufficient certainty to support each of the counts alleged in the information or indictment . . . [and] the general time period in which these acts occurred . . . to assure the acts were committed within the applicable limitation period." (Emphasis omitted.) Id., 316. Indeed, the California Supreme Court acknowledged that "even a mature victim might understandably be hard pressed to separate particular incidents of repetitive molestations by time, place or circumstance." Id., 305.

Although C was older than the child victim in *Stephen J. R.* when she was sexually abused by the defendant and when she testified at trial, the test articulated by our Supreme Court in that case is nevertheless applicable

[7] In declining to consider age as a factor when developing the three factor test, the court in *Jones* noted that the California legislature adopted a statute that, in a criminal trial in which a child who is testifying is ten years old or younger, the court, upon request of a party, must instruct the jury that it may not discredit a child's testimony simply because of his or her age. See *People* v. *Jones*, supra, 51 Cal. 3d 315; see also Cal. Penal Code § 1127f (West 1986).

to the present case for two reasons. First, according to C's testimony at trial, the defendant had access to her on multiple occasions at his home between September, 2005, and September 22, 2006, her sixteenth birthday. See *State* v. *Stephen J. R.*, supra, 309 Conn. 588 (applying three factor test in case in which "an alleged abuser . . . has ongoing access to the child and, as a result, the victim testifies to repeated acts of abuse occurring over a period of time but, lacking any meaningful point of reference, is unable to furnish many specific details, dates or distinguishing characteristics as to individual acts or assaults" (internal quotation marks omitted)).

Second, like the sexual assault charge in *Jones*, the exact number of times that the defendant in the present case had contact with C's breasts and the specific dates on which these acts occurred are not elements of committing the offense of risk of injury to a child. Indeed, the state was only required to prove that the defendant had contact with C's intimate parts on *one occasion before her sixteenth birthday*. For the reasons stated, although C was older than the child victim in *Stephen J. R.* at the time the sexual abuse occurred and when she testified, it is appropriate for this court to use the three factor test articulated by our Supreme Court in *Stephen J. R.* to assess whether C's testimony was sufficient to sustain the defendant's conviction under count three.

B

Turning to the defendant's second argument, he asserts that, even if the test articulated in *Stephen J. R.* applies to the present case, there was nevertheless insufficient evidence to convict him on count three. The defendant concedes that C sufficiently specified the manner in which the defendant had contact with her intimate parts to satisfy the first factor of the test.

He asserts, however, that her testimony failed to satisfy the second and third factors of the test because "[s]he ultimately was unable to provide any information sufficient to establish how many times the alleged conduct occurred, or even the necessary time period." Thus, the defendant contends that it was unreasonable for the jury to conclude from the evidence presented and the inferences drawn therefrom that the defendant had contact with C's intimate parts before she was sixteen years old. We disagree with the defendant's arguments regarding the second and third factors.

With respect to the second factor, the defendant argues that C's testimony was inconsistent and, because of its inconsistency, failed to establish sufficiently the number of times that the defendant had contact with her intimate parts. This argument, however, merely attacks the *credibility* of C's testimony; it does not undermine the *sufficiency* of the evidence on which the jury based its guilty verdict. Our Supreme Court has determined that a child's inconsistent testimony as to the number of times a defendant abused him or her does not mean that the child's testimony necessarily fails the second factor of the test. See *State* v. *Stephen J. R.*, supra, 309 Conn. 599–600. Rather, the court concluded that "[i]t is axiomatic that evidentiary inconsistencies are for the jury to resolve, and it is within the province of the jury to believe all or only part of a witness' testimony . . . [and that the] jury [is] free to credit one version of events over the other, even from the same witnesses." (Citation omitted; internal quotation marks omitted.) Id., 600. In *Stephen J. R.*, although the child testified at trial that the defendant sexually abused her on three to four occasions but stated in her videotaped diagnostic interview later introduced at trial that "these same acts occurred five to six times, perhaps as many as ten times," our Supreme Court nevertheless concluded that "the cumulative evidence, read in the

light most favorable to sustaining the verdict, established that the defendant [sexually abused the child] on at least four occasions." Id., 599–600.

Turning to the present case, the defendant was charged with one count of risk of injury to a child in violation of § 53-21 (a) (2) for having contact with C's intimate parts in a sexual and indecent manner. That means the state was required to prove beyond a reasonable doubt *only* that on *one* occasion the defendant had "contact with the intimate parts" of C when she was "under the age of sixteen years . . . in a sexual and indecent manner likely to impair the health or morals of such child . . . ." General Statutes § 53-21 (a) (2). Thus, to satisfy the second factor of *Stephen J. R.*, C was required to testify with sufficient certainty that the defendant had contact with her breasts on at least one occasion. See *State* v. *Stephen J. R.*, supra, 309 Conn. 597 (holding that "the victim must describe the number of acts committed with sufficient certainty *to support each of the counts alleged in the information*" (emphasis altered; internal quotation marks omitted)); *State* v. *Anthony L.*, supra, 179 Conn. App. 522 (concluding that "[the child's] testimony was sufficient for the jury reasonably to conclude that the state had proven the elements of one count of sexual assault in the first degree and one count of risk of injury to a child, beyond a reasonable doubt," when "[t]he [child] testified that . . . the defendant digitally penetrated her vagina *more than once*" (emphasis added)).

In the present case, the allegation in count three that the defendant had contact with C's intimate parts was based on C's testimony at trial that the defendant touched her breasts on more than one occasion. At trial, C testified that "there would be times when [the defendant] would grab [her] and the other cousins inappropriately." She then described the defendant's touching her inappropriately, stating that "it was always a

quick, like, boob grab, kind of like a tweak. It wasn't like he was feeling around to check anything or he didn't go under the shirt. It was always over the shirt, quick grab. . . . I saw him grab [N] and [O] quite frequently. He did so less to me and my sister, but . . . it did still happen." On cross-examination, C reiterated the frequency of the defendant's touching her breasts, stating that "[i]t was a frequent occurrence . . . . It happened on multiple occasions." She further testified that "[i]t happened consistently. It happened every year. It happened almost every time we were over [at the defendant's home]. I just don't remember dates." Because C testified with sufficient specificity that the defendant touched her breasts at least once, we conclude that her testimony satisfied the second factor.

With respect to the third factor, the defendant similarly takes issue with C's inability to recall specifics, namely, her inability to state the exact dates on which the defendant touched her breasts. The third factor requires a child to describe "the general time period in which these acts occurred . . . *to assure the acts were committed within the applicable limitation period*." (Emphasis altered; internal quotation marks omitted.) *State* v. *Stephen J. R.*, supra, 309 Conn. 597. Thus, to satisfy the third factor, the state is required to prove the general time period during which the abuse took place *only* if a "statute of limitations concern [is] implicated . . . ." (Citation omitted.) Id., 600. On appeal, however, the defendant in the present case does not assert that there was insufficient evidence for a jury to conclude that the defendant's contact with C's intimate parts occurred *within the limitation period.* Thus, like the decision in *Stephen J. R.*, because the defendant failed to invoke that any of the conduct for which he was charged occurred outside the limitation period, "the state [did] not need to prove the time period during which each incident occurred . . . ." (Citation omitted.) Id.

Nevertheless, because the state was obligated to prove that the defendant had contact with C's intimate parts on one or more occasions before her sixteenth birthday, we conclude that the third factor is applicable under the circumstances of this case. C's testimony, however, was sufficient in this regard because it tended to demonstrate that the defendant touched her breasts after he moved to Connecticut in September, 2005, but before she turned sixteen years old on September 22, 2006. In her cross-examination, C testified that the defendant grabbed her breasts when he lived in Cranston, Rhode Island, and that this conduct continued when the defendant moved to Connecticut in September, 2005. Furthermore, she testified that, prior to her sixteenth birthday, she visited the defendant's home "almost monthly."[8] She also stated that the defendant "definitely" grabbed her breasts in 2006, and that it happened "frequently . . . [and] consistently over time." In addition, she stated that "[i]t happened every year . . . [and that] [i]t happened almost every time [she] went over [to the defendant's home]."

Indeed, the jury could have reasonably found that C's testimony regarding the general time period during which the defendant had contact with her intimate parts was corroborated by other testimony at trial. For example, the defendant's wife testified that C attended a birthday party at the defendant's home in the fall of 2005, which was the first time C visited the defendant's home in Lisbon; C would attend birthday parties at the defendant's home and the Ultimate Fighting Championship (UFC) watch parties that would take place thereafter; and C attended a creamed corn eating contest at the defendant's home in summer, 2006, and visited the

[8] In her direct examination, C testified that she would have been fifteen years old when the defendant moved to Lisbon in September, 2005. In addition to testifying to the frequency with which she visited the defendant's home in Lisbon, C testified to being there "[w]henever a UFC game was on," and that she was there "a lot for birthday parties" and at one point for "a creamed corn eating contest . . . with a band."

home during summer and school vacations. Therefore, on the basis of her testimony at trial, we conclude that C testified with sufficient specificity as to the general time period during which the defendant touched her intimate parts and, thus, satisfied the third factor.

On the basis of C's testimony, the jury could have reasonably concluded or inferred that the defendant touched her intimate parts at least one time between September, 2005, and her sixteenth birthday. Accordingly, the cumulative evidence, read in the light most favorable to sustaining the verdict, was sufficient for the jury to find beyond a reasonable doubt that the defendant committed the offense charged in count three.

II

The defendant next claims that he was deprived of his constitutional right to a unanimous jury verdict because the court improperly denied his request for a specific unanimity instruction as to counts one, three, five, and six, in violation of his rights under the sixth amendment to the United States constitution and article first, § 8, of the Connecticut constitution. We disagree.

The principles concerning a criminal defendant's constitutional right to be convicted only if the jury unanimously agrees that the defendant is guilty of the crime for which he or she is charged are well settled. The sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution prohibit the conviction of a criminal defendant by a jury unless it is unanimous as to the defendant's guilt. See *Burch* v. *Louisiana*, 441 U.S. 130, 134, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979) (holding that "conviction by a nonunanimous six-member jury in a state criminal trial for a nonpetty offense deprives an accused of his constitutional right to trial by jury"); *State* v. *Pare*, 253 Conn. 611, 624, 755 A.2d 180 (2000) (stating that criminal defendant's "right to unanimous

verdict [is] protected by article first, § 8, of [the] Connecticut constitution"). To ensure that a defendant's constitutional right to a unanimous verdict is protected, our Supreme Court has concluded that "the unanimity requirement . . . requires the jury to agree on the factual basis of the offense. The rationale underlying [this] requirement is that a jury cannot be deemed to be unanimous if it applies inconsistent factual conclusions to alternative theories of criminal liability." *State* v. *Bailey*, 209 Conn. 322, 334, 551 A.2d 1206 (1988).

This court has enforced the unanimity requirement in cases like *State* v. *Benite*, 6 Conn. App. 667, 669–70, 507 A.2d 478 (1986), in which a defendant's criminal liability is premised on his or her having violated one of multiple statutory subsections, subdivisions or elements. In *Benite*, because the defendant's criminal liability was contingent on his having violated one of two statutory subdivisions, and the jury was required to be unanimous beyond a reasonable doubt as to which subdivision he violated, this court held that the trial court should have provided a specific unanimity instruction.[9] Id., 670, 675–76.

Our Supreme Court, however, has "not required a specific unanimity charge to be given in every case [like *Benite*] in which criminal liability may be premised on the violation of one of several alternative subsections [or subdivisions] of a statute." *State* v. *Famiglietti*, 219 Conn. 605, 619, 595 A.2d 306 (1991). Instead, an appellate court "invoke[s] a multipartite test to review a trial court's omission of such an instruction. [An appellate court] first review[s] the instruction that was given to determine whether the trial court has sanctioned a nonunanimous verdict. If such an instruction has not been given, that ends the matter. Even if the instructions at

[9] Ultimately, in *Benite*, this court held that there was no reversible error because, although "this case present[ed] a close call, [this court held] that because of [the] facts, there is no reasonable possibility that the jurors were misled by the charge." *State* v. *Benite*, supra, 6 Conn. App. 676–77.

trial can be read to have sanctioned such a nonunanimous verdict, however, [an appellate court] will remand for a new trial only if (1) there is a conceptual distinction between the alternative acts with which the defendant has been charged, and (2) the state has presented evidence to support each alternative act with which the defendant has been charged." Id., 619–20.

The requirement that a court provide a specific unanimity instruction generally is limited to cases, like *Benite*, in which multiple factual allegations amount to the defendant having violated multiple statutory subsections or subdivisions. See *State* v. *Mancinone*, 15 Conn. App. 251, 274, 545 A.2d 1131, cert. denied, 209 Conn. 818, 551 A.2d 757 (1988), cert. denied, 489 U.S. 1017, 109 S. Ct. 1132, 103 L. Ed. 2d 194 (1989). Indeed, this court has held that a "fact-specific and closely focused unanimity instruction . . . [is necessary only if] the particular count under consideration by the jury is based on multiple factual allegations which amount to multiple statutory subsections or multiple statutory elements of the offense involved." Id. Therefore, the requirement does not apply in cases, such as the present case, in which the state charges a defendant with having violated a single statutory subdivision one time, and the evidence proffered by the state at trial amounts to the defendant having violated that statutory subdivision on multiple occasions.[10]

Moreover, the test used by our Supreme Court in *State* v. *Famiglietti*, supra, 219 Conn. 619–20, to determine whether a trial court was required to provide a

[10] We consider the phrase "multiple factual allegations," as used in our prior cases, to encompass either different descriptions of the manner in which the prohibited act was committed *or* differing statements as to the specific time at which the proscribed act occurred. Furthermore, we construe this phrase to include specific acts *identified in the information* that form the basis for the state's charge under each count *or evidence of specific acts presented at trial* that are the basis for the state having charged the defendant with having violated a statutory subsection. See *State* v. *Mancinone*, supra, 15 Conn. App. 275–76.

specific unanimity instruction, does not apply in cases in which the multiple factual allegations do not amount to multiple statutory subsections, subdivisions or elements having been violated. The *Famiglietti* test examines, in part, whether there is a conceptual distinction between the *alternative statutory subsections, subdivisions or elements* which the defendant has been charged with violating. See id. (assessing whether two statutory subdivisions are conceptually distinct). Indeed, such a test would be of little utility in a case in which a defendant is charged with violating only *one* statutory subsection, subdivision or element. Therefore, the *Famiglietti* test is generally limited to those cases in which a trial court does not provide a specific unanimity instruction, even though the multiple factual allegations amount to the defendant having violated multiple statutory subsections or subdivisions.

This court engages in plenary review of a trial court's decision in a criminal trial to decline to give a specific unanimity instruction that the defendant had requested. See *State* v. *Jennings*, 216 Conn. 647, 663–64, 583 A.2d 915 (1990); see also *State* v. *Brodia*, 129 Conn. App. 391, 400–401, 20 A.3d 726, cert. denied, 302 Conn. 913, 27 A.3d 373 (2011); *State* v. *Scribner*, 72 Conn. App. 736, 740, 805 A.2d 812 (2002).

In the present case, the defendant was charged[11] with five separate counts under § 53-21 (a) (2), each involving a different child.[12] Counts one, three, five, and six

[11] Although counts one, three, five, and six do not specify the number of times that the defendant had contact with the intimate parts of each child, we interpret each count as charging the defendant with having violated § 53-21 (a) (2) on one occasion with respect to the child identified in that count. For example, count three alleged that "in or about 2005 through September 22, 2006, [the defendant] did [violate § 53-21 (a) (2)] in that he had contact with the intimate parts of a child under the age of sixteen years . . . in a sexual and indecent manner likely to impair the health and morals of said child . . . ."

[12] In count four, the defendant was charged with violating § 53-21 (a) (2) because he "had contact with the intimate parts of a child under the age of sixteen years . . . *and* subjected said minor female to contact with his

charged the defendant with having violated a *single* statutory subdivision—subdivision (2) of subsection (a) of § 53-21—the basis of which was evidence presented at trial that, on *multiple occasions*, the defendant had contact with the intimate parts of the child identified in each of those counts.[13]

In similar cases, in which a defendant was charged with having had contact with the intimate parts of a child in violation of § 53-21 based on the defendant having committed proscribed acts on *multiple* occasions, our courts have held that a specific unanimity instruction was not required to preserve a defendant's

intimate parts . . . .'' (Emphasis added.) We do not address count four, however, because the court provided a specific unanimity instruction as to this count.

[13] The defendant cites *State* v. *Snook*, 210 Conn. 244, 262, 555 A.2d 390, cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989), and *State* v. *Dennis*, 150 Conn. 245, 250, 188 A.2d 65 (1963), as support for the proposition that, as he states, ''separate and distinct acts in violation of [§ 53-21] are separate crimes, each to be proven.'' The defendant then argues that, because each violation of § 53-21 constitutes a separate offense, the state, in the present case, was required to charge *each* of the defendant's violations of § 53-21 in separate counts and prove each count beyond a reasonable doubt. Thus, the defendant asserts that the manner in which the state charged and prosecuted its case—charging the defendant with one violation of § 53-21 (a) (2) for each child and providing evidence of multiple violations per child—contravenes the decisions concerning § 53-21 in *Snook* and *Dennis*.

The defendant, however, misconstrues the conclusions of our Supreme Court in *Snook* and *Dennis* concerning the divisibility of acts alleged to be in violation of § 53-21. Contrary to what the defendant contends, neither of the decisions in these cases held that, when alleging that a defendant has violated § 53-21 multiple times, the state *must* charge the defendant under separate counts for each violation. Rather, we construe these cases to mean that the state *may, but is not required to*, charge each violation in a separate count, even though ''[a] distinct repetition of an act prohibited by § 53-21 constitutes a second offense.'' *State* v. *Snook*, supra, 210 Conn. 262. Indeed, in *Snook*, the court decided that distinct repetitions of acts in violation of § 53-21 constituted separate offenses, in part, to prevent ''a person who has committed one sexual assault upon a victim to commit with impunity many other such acts during the same encounter.'' (Internal quotation marks omitted.) Id. Thus, we are not persuaded by the defendant's reading of *Snook* and *Dennis*.

right to a unanimous verdict. See *State* v. *Spigarolo*, 210 Conn. 359, 391–92, 556 A.2d 112 (determining that defendant's right to unanimous verdict was not violated in absence of specific unanimity instruction, even though six specific acts of sexual activity were alleged in two counts), cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989); *State* v. *Michael D.*, 153 Conn. App. 296, 321–27, 101 A.3d 298 (concluding that, even though evidence of three specific acts of sexual misconduct was presented at trial, "there was no risk that the jury's verdict was not unanimous"), cert. denied, 314 Conn. 951, 103 A.3d 978 (2014).[14]

The defendant in the present case nevertheless argues that, although he was charged in counts one, three, five, and six with having violated *one statutory subdivision* by touching the intimate parts of each child on one occasion, the court improperly denied his request for a specific unanimity instruction because, at trial, the state proffered evidence that the defendant had contact with each child's intimate parts on *multiple*

[14] In the present case, the court did provide a general unanimity instruction as to counts one, three, five, and six. With respect to these counts, the court charged the jury as follows:

"As to each count, if you unanimously find that the state has proved beyond a reasonable doubt each of the elements of the crime of risk of injury to a minor, then you shall find the defendant guilty. On the other hand, if you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements, you shall then find the defendant not guilty. . . .

"The defendant is entitled to and must be given by you a separate and independent determination of whether he is guilty or not guilty as to each of the counts in the information. Each of the counts charged is a separate crime. The state is required to prove each element in each count beyond a reasonable doubt. Each count must be deliberated upon separately. . . . You may find that some evidence applies to more than one count. The evidence, however, must be considered separately as to each element in each count. Each count is a separate entity. You must consider each count separately and return a separate verdict for each count. This means that you may reach opposite verdicts on different counts. A decision on one count does not bind your decision on another count. . . .

"When you reach a verdict, it must be unanimous."

occasions. Because of the way in which the state prosecuted its case, and in the absence of a specific unanimity instruction, the defendant argues that the jury may not have been unanimous as to the *occasion* on which the defendant had contact with the intimate parts of each child. In other words, the defendant contends that, with respect to counts one, three, five, and six, the federal and state constitutions required the jury to unanimously agree as to the occasion on which the illegal conduct occurred. We are not persuaded.

We first set forth the standard for determining whether a trial court was required to provide a specific unanimity instruction when an information charges a defendant with having violated one statutory subsection on one occasion and the state presents evidence at trial that the defendant violated that single statutory subsection on multiple occasions.[15] "[I]f the actions necessary to constitute a violation of one statute or subsection of a statute are distinct from those necessary to constitute a violation of another, then jurors who disagree on which one the state proves cannot be deemed to agree on the actus reus: the conduct the defendant committed. Where the evidence presented supports both alternatives, the possibility that the jurors may actually disagree on which alternative, if either, the defendant violated is the highest. Under such circumstances, the jurors should be told that they must unanimously agree on the same alternative. . . . [S]uch a charge is required only where a trial court charges a jury that the commission of any one of several alternative

[15] The defendant and the state agree that the test used by our Supreme Court in *State* v. *Famiglietti*, supra, 219 Conn. 619–20, to determine whether a trial court was required to provide a specific unanimity instruction does not apply to the present case. Because the present case is one in which the evidence presented at trial amounts to the defendant's having violated a *single statutory subdivision on multiple occasions*, we agree with the defendant and the state that the *Famiglietti* test does not apply in this case. See *State* v. *Mancinone*, supra, 15 Conn. App. 274.

actions would subject a defendant to criminal liability, and those actions are conceptually distinct from each other, and the state has presented some evidence supporting each alternative. The determination of whether actions are conceptually distinct must be made with reference to the purpose behind the proposed charge: to [e]nsure that the jurors are in unanimous agreement as to what conduct the defendant committed. . . .

"[This rule, however, is] limited to a case in which the actions necessary to constitute a violation of one statute or subsection of a statute are distinct from those necessary to constitute a violation of another . . . . Thus, [this] rule, which requires the trial court in appropriate circumstances to give, even in the absence of a proper request or exception, a fact-specific and closely focused unanimity instruction, *only applies where the particular count under consideration by the jury is based on multiple factual allegations which amount to multiple statutory subsections or multiple statutory elements of the offense involved. It does not apply, and such an instruction is not required of the court, where the multiple factual allegations do not amount to multiple statutory subsections or to multiple statutory elements of the offense.* . . .

"[The] limitation on [this] rule, moreover, comports with common sense and sound principles by which to view jury verdicts. In most criminal trials, the evidence will allow to one degree or another differing but reasonable views regarding what specific conduct the defendant engaged in which formed the basis of the jury's verdict of guilt. For example, different witnesses may present different versions of the defendant's conduct; and the same witness may testify inconsistently in his description of that conduct, and thus present differing versions of that conduct. In such cases, it is a familiar principle that the jury is free to accept or reject all or any part of the evidence. . . . *In such cases, however,*

there is nothing in the constitutional requirement of jury unanimity that requires a specific instruction that the jury must be unanimous with regard to any one of those varying factual versions. As long as the jurors are properly instructed on the legal elements of the crime which must be proved beyond a reasonable doubt, they need not be further instructed that they all must agree that the exact same conduct constituted the proscribed act. In such cases, we safely rely on the presumption that the jury understands and properly follows the court's instruction that its verdict be unanimous . . . and we do not attempt to divine whether that presumption is valid.

"Where, however, the jury is presented with alternative, conceptually distinct statutory subsections, or with alternative, conceptually distinct elements of the same statute, as possible bases for guilt, the principles of [this rule concerning specific unanimity instructions] come into play, because it is in those situations that the possibility that the jurors may actually disagree on which alternative, if either, the defendant violated is the highest. . . . In those situations, therefore, we require a specific unanimity instruction as an additional corollary to the usual unanimity instruction." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Mancinone*, supra, 15 Conn. App. 273–76. In *State* v. *Scott*, 11 Conn. App. 102, 119–22, 525 A.2d 1364, cert. denied, 204 Conn. 811, 528 A.2d 1157 (1987), we applied these principles and declined to review in full a defendant's claim that he was deprived of his constitutional right to a unanimous verdict. In that case, although "the court . . . submitt[ed] to the jury *two alternative factual bases* for the larceny charge, one of which was factually insufficient"; (emphasis added) id., 119; "[the] information charged only one way of committing the crime of larceny in the third degree, namely, that the defendant wrongfully

took property from the person of the victim, and the jury was not presented with any *statutory alternative ways* of committing this offense." (Emphasis added; internal quotation marks omitted.) Id., 121.

In other words, a trial court may be required to provide a specific unanimity instruction when, to find a defendant guilty under a count of an information, the jury must decide whether the defendant violated one of multiple statutory subsections or elements. The court is not required, however, to provide a specific unanimity instruction when the state charges a defendant with having violated one statutory subsection one time and proffers evidence at trial that amounts to the defendant having violated that single statutory subsection on multiple occasions. Thus, to convict a defendant under a count of an information alleging that the defendant violated § 53-21 (a) (2) once, the basis of which is evidence presented at trial amounting to the defendant having violated that statutory subdivision multiple times, the jury is required to unanimously agree *only* that on *one occasion* the defendant had contact with the intimate parts of the child identified in that count while that child was under sixteen years of age in a manner that was sexual and indecent and likely to impair that child's health or morals.[16] There is no

[16] If a defendant allegedly violates the same statutory subsection multiple times, the state may charge the defendant in different ways. For example, the state may charge the defendant in one count with having violated the statute *once*, the basis of which is evidence that the defendant violated the statute multiple times that is presented at trial, *or* the state may charge the defendant for *each* violation under separate counts. Indeed, the United States Court of Appeals for the Second Circuit has recognized that there is a difference between, for example, when a defendant is charged under one count with having committed a crime by engaging in a criminal act ten times and when a defendant is charged in ten separate counts for having committed the same crime ten times. See *United States* v. *Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981) ("With the mailings on which the [g]overnment will rely now reduced to a manageable number, their placement in a single count achieves the obvious benefit of limiting the maximum penalties [the] defendant may face if convicted of mail fraud and also avoids the unfairness of portraying the defendant to the jury as the perpetrator of [fifty] crimes. We anticipate

requirement, however, for the jury to be unanimous as to the specific occasion on which that prohibited contact occurred.[17]

In making his assertion that the court was required to give a specific unanimity instruction as to counts one, three, five, and six, the defendant relies primarily on our decision in *State* v. *Benite*, supra, 6 Conn. App. 669–77, and the decision of the United States Court of Appeals for the Fifth Circuit in *United States* v. *Gipson*, 553 F.2d 453, 456–59 (5th Cir. 1977). He argues that these cases require the jury to be unanimous as to the specific act on which it based its verdict on each count.

no unfairness to the defendant if the jury, properly instructed, is permitted to convict on [c]ount [o]ne upon finding all of the elements of mail fraud established, including the mailing of at least one item in furtherance of the scheme to defraud.").

[17] In counts one, three, five, and six, the state described neither the specific act that constituted the defendant's violation of § 53-21 (a) (2), nor alleged the specific date on which this violation occurred. The state, however, was under no obligation to allege this information because the date of the offense is not an element of committing an offense under § 53-21 (a) (2), except that the violation must have occurred before the child's sixteenth birthday. See *State* v. *Hauck*, 172 Conn. 140, 150, 374 A.2d 150 (1976) (stating that "[t]he general rule is that where time is not of the essence or gist of the offense, the precise time at which it is charged to have been committed is not material"); *State* v. *Minor*, 80 Conn. App. 87, 92, 832 A.2d 697 (concluding that "[t]he state . . . is not usually required to plead and to prove an exact time when an offense allegedly occurred if the information is sufficiently precise as to the time frame involved"), cert. denied, 267 Conn. 907, 840 A.2d 1172 (2003); *State* v. *Saraceno*, 15 Conn. App. 222, 237, 545 A.2d 1116 (concluding that "as long as the information provides a time frame which has a distinct beginning and an equally clear end, within which the crimes are alleged to have been committed, it is sufficiently definite to satisfy the [constitutional] requirements"), cert. denied, 209 Conn. 823, 552 A.2d 431 (1988), and cert. denied, 209 Conn. 824, 552 A.2d 432 (1988); see also General Statutes § 53-21 (a) (2). Thus, such an omission by itself is not fatal to the state's case. See *State* v. *Marcelino S.*, 118 Conn. App. 589, 596, 984 A.2d 1148 (2009) ("The state has a duty to inform a defendant, within reasonable limits, of the time when the offense charged was alleged to have been committed. The state does not have a duty, however, to disclose information which the state does not have." (Emphasis omitted; internal quotation marks omitted.)), cert. denied, 295 Conn. 904, 988 A.2d 879 (2010); see also *State* v. *Mancinone*, supra, 15 Conn. App. 259.

The decisions in *Benite* and *Gipson*, however, are inapposite to the present case.

In *Benite*, the defendant was charged with burglary in the first degree. *State* v. *Benite*, supra, 6 Conn. App. 670. As this court noted, "[t]o obtain a conviction for burglary in the first degree, the state must prove beyond a reasonable doubt that the individual charged committed burglary, and it must also prove one of two aggravating factors: (1) that the individual committed the burglary armed with explosives or a deadly weapon or dangerous instrument; General Statutes § 53a-101 (a) (1); or (2) that he committed burglary and in the course of committing the offense, he intentionally, knowingly or recklessly inflict[ed] . . . bodily injury on anyone. General Statutes § 53a-101 (a) (2)." (Footnote omitted; internal quotation marks omitted.) *State* v. *Benite*, supra, 670. This court held that a specific unanimity instruction was required because "the two kinds of conduct which expose an individual to punishment for burglary in the first degree are conceptually different from one another." Id., 675.

Similarly, in *Gipson*, the defendant was charged with selling *or* receiving a stolen vehicle in violation of 18 U.S.C. § 2313 (1976). See *United States* v. *Gipson*, supra, 553 F.2d 455. The statute under which the defendant was charged in *Gipson* proscribed six different acts. Id., 455 n.1.[18] At trial, "the prosecution presented evidence tending to show that [the defendant] performed each of the . . . acts prohibited by [the statute]." Id., 459.

To find that the defendant had violated 18 U.S.C. § 2313 (1976) beyond a reasonable doubt, the jury had

[18] At the time that *Gipson* was decided, the statute under which the defendant was charged stated as follows: "Whoever *receives*, *conceals*, *stores*, *barters*, *sells*, *or disposes* of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both." (Emphasis added.) 18 U.S.C. § 2313 (1976).

to conclude that the defendant had violated one of the six proscribed acts enumerated in that statute. See id., 455, 458. The trial court in *Gipson*, however, "charged the [jurors] that in order to convict the defendant they need not agree on which of the six statutorily prohibited acts the defendant had committed, as long as they were each convinced beyond a reasonable doubt that he had committed one or another of the acts proscribed. . . . The [C]ourt of [A]ppeals reversed the defendant's conviction on the ground that the instruction had violated his right to a unanimous jury verdict. . . . The court reasoned that the statute prohibited six acts in two distinct conceptual categories: (1) receiving, concealing and storing; and (2) bartering, selling and disposing. The challenged charge violated the defendant's right to a unanimous jury verdict because it authorized the jury to return a guilty verdict despite the fact that some jurors may have believed that [the defendant] engaged in conduct only characterizable as receiving, concealing, or storing while other jurors were convinced that he committed acts only constituting bartering, selling, or disposing." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Jones*, 193 Conn. 70, 75–76, 475 A.2d 1087 (1984); see also *United States* v. *Gipson*, supra, 455–59. Thus, the court in *Gipson* determined that a specific unanimity instruction should have been given "[b]ecause it is impossible to determine whether all of the jurors agreed that the defendant committed acts falling within one of the two conceptual groupings . . . ." (Citation omitted.) *United States* v. *Gipson*, supra, 459.

Neither the circumstances of *Benite* nor *Gipson*, however, are analogous to the way in which the defendant was charged in the present case.[19] Under counts

[19] Indeed, count four in the present case illustrates a circumstance similar to the way in which, in *Gipson*, the defendant's criminal liability under a count of the indictment was based on multiple statutory elements. See *United States* v. *Gipson*, supra, 553 F.2d 455, 458. In count four, the state alleged that the defendant "had contact with the intimate parts of a child

one, three, five, and six, the defendant in the present case was charged with having violated *a single statutory subdivision* once, the basis for which was evidence presented at trial that the defendant had engaged in conduct prohibited by that singular statutory provision *on multiple occasions*.

This court has distinguished between cases like *Benite* and *Gipson*, in which the defendant's criminal liability under a criminal count was predicated on his or her having violated multiple statutory subsections or elements, and the situation in the present case, in which the defendant is charged with having violated a single statutory subdivision one time with each child, and the evidence offered at trial amounts to the defendant having engaged in proscribed conduct with each child on multiple occasions. See *State* v. *Mancinone*, supra, 15 Conn. App. 274. In making this distinction, this court has stated that "a fact-specific and closely focused unanimity instruction, [*is necessary only if*] *the particular count under consideration by the jury is based on multiple factual allegations which amount to multiple statutory subsections or multiple statutory elements of the offense involved. It does not apply, and such an instruction is not required of the court, where the multiple factual allegations do not amount to multiple statutory subsections or to multiple statutory elements of the offense*." (Emphasis added.) Id.[20] Thus, the

under the age of sixteen years . . . *and* subjected said minor female to contact with his intimate parts . . . ." (Emphasis added.) Unlike counts one, three, five, and six, the defendant could face criminal liability under count four if a jury found beyond a reasonable doubt that he engaged in *either* element of conduct proscribed by § 53-21 (a) (2); that is, the defendant either had contact with the child's intimate parts while she was under sixteen years of age *or* he subjected the child to contact with his intimate parts while she was under sixteen. Accordingly, the court provided a specific unanimity instruction as to this count. See footnote 4 of this opinion.

[20] The defendant argues that the trial court was required to apply the conceptual distinction analysis used in *State* v. *Benite*, supra, 6 Conn. App. 675–76, and *United States* v. *Gipson*, supra, 553 F.2d 458. We disagree because our courts usually apply that analysis in circumstances in which

holdings in *Benite* and *Gipson* concerning whether a trial court was required to provide a specific unanimity instruction that the defendant recites are inapplicable to this case.

In the present case, the trial court was not required to provide a specific unanimity instruction because the evidence proffered by the state at trial—that the defendant had contact with each child's intimate parts on multiple occasions—*did not* amount to the defendant's having violated multiple statutory subsections or elements.[21] Accordingly, having reviewed the trial court's charge in its entirety, we conclude that the trial court did not improperly deny the defendant's request for a specific unanimity instruction with respect to counts one, three, five, and six.

The judgment is affirmed.

In this opinion the other judges concurred.

the factual allegations made against a defendant under a criminal count amount to his or her having violated multiple statutory subsections, subdivisions or elements. See, e.g., *State* v. *Reddick*, 224 Conn. 445, 451–54, 619 A.2d 453 (1993); *State* v. *Reyes*, 19 Conn. App. 695, 705, 564 A.2d 309, cert. denied, 213 Conn. 803, 567 A.2d 833 (1989); *State* v. *Delgado*, 19 Conn. App. 245, 247–48, 562 A.2d 539 (1989).

Even if a conceptual distinction analysis was required, our Supreme Court has determined that multiple acts of having contact with the intimate parts of a child are not conceptually distinct. See *State* v. *Spigarolo*, supra, 210 Conn. 391–92. Therefore, the court concluded that "[t]he defendant's right to a unanimous verdict . . . was not violated by the trial court's failure to provide a specific unanimity instruction . . . ." Id., 392. Thus, we conclude that the defendant's argument that the individual occasions on which he had contact with the intimate parts of the children were conceptually distinct acts entitling him to a specific unanimity instruction is unavailing.

[21] The defendant claims on appeal that the risk of a nonunanimous verdict in this case was exacerbated by the substantial amount of uncharged misconduct evidence that was admitted against the defendant at trial. In the defendant's view, this uncharged misconduct evidence could have been relied on by jurors as the "actus reus" of the crimes for which the defendant was convicted. This claim was not preserved in the trial court. Even if we were to address it on the merits, it fails because the defendant conceded that the court properly instructed the jury regarding the proper use of the uncharged misconduct evidence.

GEORGE BERKA *v.* CITY OF MIDDLETOWN (AC 41902) GEORGE BERKA *v.* CITY OF MIDDLETOWN (AC 42138) GEORGE BERKA *v.* CITY OF MIDDLETOWN (AC 42139) GEORGE BERKA *v.* CITY OF MIDDLETOWN ET AL. (AC 42206)

Lavine, Elgo and Bear, Js.

Syllabus

The plaintiff filed four separate appeals against the defendant city of Middletown, challenging, inter alia, the issuance of blight orders against certain of the plaintiff's real property, and the rejection of his application for a special exception to operate a sober house at the same property. The trial court granted the defendant's motions to dismiss the four complaints for lack of subject matter jurisdiction, from which the plaintiff filed separate appeals to this court. *Held*:

1. In the appeal in Docket No. AC 41902, the plaintiff could not prevail on his claim that the city's blight ordinance violated, inter alia, his due process rights, as the trial court did not err in dismissing the plaintiff's appeal for lack of subject matter jurisdiction; the plaintiff had failed to exhaust his administrative remedies when he prematurely filed the appeal directly from the issuance of the blight citation, and prior to the defendant issuing a failure to pay fines notice in violation of the procedure as set forth by statute (§ 7-152c), and, therefore, there was no ruling by a hearing officer from which the plaintiff could have properly appealed to the trial court.
2. In the appeal in Docket No. AC 42138, this court lacked subject matter jurisdiction over the appeal, as the plaintiff failed to timely seek from this court certification for review of the judgment of dismissal, pursuant to statute (§ 8-8 (o)); the plaintiff never received the requisite affirmative vote of two judges that would have allowed him to appeal to this court and, accordingly, this appeal was dismissed.
3. In the appeal in Docket No. AC 42139, the trial court improperly granted the defendant's motion to dismiss the appeal for lack of an actual controversy with respect to the plaintiff's assertion of constitutional claims in an individual capacity challenging the defendant's blight ordinance; the defendant submitted uncontroverted evidence that it had issued blight citations and fines to the plaintiff pursuant to the challenged ordinance

with respect to the plaintiff's property, and the trial court, having failed to construe the self-represented plaintiff's complaint in the broad and realistic manner as required by our case law, did not conduct an examination of the plaintiff's individual constitutional claims as required and, although this court offered no view as to the merits of the plaintiff's individual constitutional claims, the trial court could afford practical relief to the plaintiff if he ultimately proves that some or all of the provisions of the applicable statute (§ 7-152c) establishing a citation hearing procedure or the city's blight ordinance violated his constitutional rights.

4. In the appeal in Docket No. AC 42206, the trial court did not err in granting the defendant's motion to dismiss the plaintiff's complaint, as the defendant's withdrawal of the blight citation issued to the plaintiff on May 27, 2016, rendered moot the claims in the action he filed on May 8, 2018; no action had been taken against the plaintiff pursuant to the May 27, 2016 citation, and there was no practical relief that the court could grant the plaintiff.

Argued October 23, 2019—officially released February 11, 2020

Procedural History

Action, in the first case, challenging, inter alia, the defendant's issuance of a blight citation on certain of the plaintiff's real property, and action, in the second case, challenging a certain zoning decision made by the defendant's planning and zoning commission, and action, in a third case, seeking to invalidate a certain ordinance of the defendant, and action, in a fourth case, challenging the issuance of a blight citation by the named defendant on certain of the plaintiff's real property, brought to the Superior Court in the district of Middletown, where the trial court, *Aurigemma*, *J.*, granted the defendant's motion to dismiss in the first case and rendered judgment thereon, from which the plaintiff appealed; thereafter, the trial court, *Domnarsks*, *J.*, granted the defendant's motions to dismiss in the second and third cases and rendered judgment thereon, from which the plaintiff filed separate appeals; subsequently, the court, *Domnarski*, *J.*, granted the named defendant's motion to dismiss in the fourth case and rendered judgment thereon, from which the plaintiff appealed. *Judgments in Docket Nos. AC 41902 and*

AC 42206 affirmed; appeal in Docket No. AC 42138 dismissed; judgment in Docket No. AC 42139 affirmed in part; reversed in part; further proceedings.

George Berka, self-represented, the appellant in each case (plaintiff).

Brig Smith, for the appellee (defendant in first, second and third cases and named defendant in fourth case).

Opinion

BEAR, J. These four appeals pertain to certain real property in Middletown owned by the self-represented plaintiff, George Berka, and rented by him to multiple individuals. Although neither the cases nor the appeals have been officially consolidated, we write one opinion for the purpose of judicial economy and assess the claims made in each appeal.

The plaintiff appeals from four judgments of the Superior Court granting the motions of the defendant the city of Middletown[1] to dismiss the complaints in four cases for lack of subject matter jurisdiction. In two of his appeals to this court—Docket Nos. AC 41902 and AC 42206—the plaintiff's claims relate either to a citation issued to him in 2016 for conditions on his property alleged to have violated the Middletown blight ordinance, which citation subsequently was unilaterally withdrawn by the defendant, or to a subsequent citation issued to him in 2018 concerning essentially the same alleged violations. In his appeal in Docket No. AC 42138, the plaintiff challenges the denial of his application for a special exception to operate a sober house. The appeal in Docket No. AC 42139 concerns the propriety of the

[1] Linda S.K. Reed was also named as a defendant in the action that is the subject of the appeal in Docket No. AC 42206. She is not a party to that appeal and all references herein to the defendant are to the city of Middletown.

court's dismissal of the plaintiff's petition to have the blight ordinance invalidated on constitutional and other grounds. We affirm the judgments of the court with respect to the plaintiff's claims asserted in Docket Nos. AC 41902 and AC 42206. We dismiss Docket No. AC 42138 for lack of subject matter jurisdiction. We affirm the court's judgment in Docket No. AC 42139 with respect to its dismissal of the plaintiff's petition insofar as it (1) asks the court to amend the Middletown blight ordinance, and (2) is predicated on nonconstitutional grounds but we reverse the judgment of the trial court with respect to its dismissal of the plaintiff's constitutional claims asserted in an individual capacity.

The following undisputed facts and procedural history provide context for the plaintiff's four appeals. The plaintiff owns real property located at 5 Maple Place in Middletown (property) and rents rooms in the house on the property to individuals. The first appeal, Docket No. AC 41902, relates to the plaintiff's premature appeal to the trial court from the 2018 blight notice and subsequent citation. On January 10, 2018, the plaintiff was issued a notice of blight pursuant to chapter 120, article 11, § 120-25A of the City of Middletown Code of Ordinances (ordinance),[2] which was enacted in accordance with General Statutes § 7-152c (a). On February 14, 2018, after the plaintiff failed to remedy the alleged blighted conditions specified in the notice, the defendant issued a blight citation to the plaintiff. The citation provided the plaintiff fifteen days to pay the fines that had been assessed for the violations listed in the notice of blight. The plaintiff, however, brought an action in the trial court on March 22, 2018, prior to the issuance of a failure to pay fines notice in accordance with § 7-152c and the ordinance, and prior to any administrative

[2] The City of Middletown Code of Ordinances, Chapter 120, Article II, § 120-25A provides the city's procedure for issuing and appealing blight citations.

hearing or assessment of fines as provided for by § 7-152c and the ordinance. The defendant filed a motion to dismiss the complaint in that action on May 24, 2018, which was granted by the court on July 20, 2018. The court concluded that it lacked subject matter jurisdiction over the plaintiff's claim because the plaintiff had failed to exhaust his administrative remedies and, accordingly, his claim was not ripe for judicial review.[3]

The second appeal to this court, Docket No. AC 42138, relates to the plaintiff's request to the Middletown Planning and Zoning Commission (commission) for a special exception to operate a sober house on his property. The commission denied the application without prejudice on the basis that the property was not in compliance with a number of Middletown local health and safety ordinances, for which the plaintiff previously had been cited in 2016. The denial of the application was published in the Hartford Courant on February 22, 2018.[4] Forty days later, on April 3, 2018,

[3] The defendant issued to the plaintiff a failure to pay fines notice on March 28, 2018, six days after the plaintiff initiated the action challenging such fines. Section 7-152c provides that, following the issuance of a failure to pay fines notice, the party to whom the notice has been issued has ten days to appeal to an administrative hearing officer. The plaintiff timely sought an administrative appeal. A hearing officer was assigned, and a hearing was held on May 2, 2018. After the hearing, the hearing officer issued a decision sustaining the city's blight citation and denying the plaintiff's claims. The plaintiff appealed this decision two days later on May 4, 2018, initiating an action currently pending in the trial court. On May 7, 2018, the hearing officer issued an amended hearing decision, again denying the plaintiff's claims.

[4] The publication states in relevant part: "Notice of decision by the Middletown Planning and Zoning Commission at its regular meeting of February 14, 2018: 1. Denied without prejudice a proposed [s]pecial [e]xception to Section 60.02.24 under the Americans with Disabilities Act to operate a recovery home (sober house) at 5 Maple Place, Applicant/agent George Berka SE 2017-7."

Additionally, during oral argument on the appeals, the defendant's counsel was questioned about whether the defendant also had sent to the plaintiff by certified mail individual notice of its decision. See General Statutes § 8-26e. The attorney for the defendant was unable to answer that question at oral argument, but he subsequently sent to this court, with a copy to the

the plaintiff appealed the denial to the trial court. The defendant filed a motion to dismiss that appeal on June 29, 2018, which was granted by the court on September 18, 2018, for lack of subject matter jurisdiction.

The plaintiff's third appeal to this court, Docket No. AC 42139, is from the dismissal of his petition to have the court invalidate or, in the alternative, amend the blight ordinance. On May 8, 2018, the plaintiff filed a "petition to overturn blight ordinance." On June 28, 2018, the defendant filed a motion to dismiss the plaintiff's petition, which the court granted on nonjusticiability grounds on September 18, 2018.

The fourth matter on appeal, Docket No. AC 42206, involves the defendant's unilateral withdrawal of the 2016 citation to the defendant. The plaintiff was issued a citation on May 27, 2016, for essentially the same underlying blight and city health code violations contained in the subsequent January 10, 2018, blight notice to him. The plaintiff was in the process of appealing that citation when the defendant unilaterally withdrew it on July 22, 2016.[5] The plaintiff thereafter withdrew his 2016 appeal. Almost two years later, on May 8, 2018, the plaintiff served a complaint alleging that the defendant had attempted to deprive him of his constitutional rights by issuing the 2016 blight citation. At oral argument in the trial court, and in his brief on appeal, he

plaintiff, who did not object to the submission, a copy of the certified mail notice to the defendant at his home address in Waterbury. If it is necessary to do so, we take judicial notice of the certified mail to the plaintiff. See *Gamez-Reyes* v. *Biagi*, 136 Conn. App. 258, 261 n.4, 44 A.3d 197, cert. denied, 306 Conn. 905, 52 A.3d 731 (2012).

[5] In its brief and at oral argument in Docket No. AC 42206, the defendant explained that, at the same time it had issued the blight citation to the plaintiff, the state's attorney's office had brought a case against the plaintiff for the same violations set forth in its blight citation. The defendant stated that it withdrew the 2016 blight citation because of the duplicative nature of the claims against the plaintiff set forth in the blight citation and the claims against him being pursued by the state's attorney.

claims that the defendant's withdrawal of the citation was evidence of its consciousness of guilt. The defendant filed a motion to dismiss that complaint on July 2, 2018. On October 17, 2018, the court granted the defendant's motion to dismiss the plaintiff's complaint for lack of subject matter jurisdiction on the basis of mootness.

We first set forth the applicable standard of review when considering a trial court's granting of a motion to dismiss. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting grant of the motion to dismiss will be de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous. . . . The applicable standard of review for the denial of a motion to dismiss, therefore, generally turns on whether the appellant seeks to challenge the legal conclusions of the trial court or its factual determinations. . . .

"When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . [I]n determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.)

Hayes Family Ltd. Partnership v. *Glastonbury*, 132 Conn. App. 218, 221–22, 31 A.3d 429 (2011).

We address each appeal separately. Additional facts will be set forth as necessary.

I

AC 41902

In Docket No. AC 41902, the plaintiff appeals from the court's granting of the defendant's motion to dismiss the plaintiff's appeal for lack of subject matter jurisdiction. On appeal to this court, the plaintiff claims that the Middletown blight ordinance, as applied to him, violates his due process and other rights. Specifically, he claims, inter alia, that the ordinance is difficult for an ordinary person to understand, that the appeal process is overly complicated, and that the fines imposed for violations are oppressively high. The following facts are relevant to this appeal.

The defendant issued to the plaintiff a notice of blight on January 10, 2018, and, on February 14, 2018, the defendant issued to the plaintiff a blight citation. The defendant issued a failure to pay fines notice to the plaintiff on March 28, 2018. Under § 120-25A of the ordinance, the plaintiff may seek a hearing in front of a citation hearing officer within ten days of the issuance of a failure to pay fines notice. There is no provision either in § 7-152c or the ordinance permitting an administrative appeal from the notice of blight or the blight citation. The plaintiff, moreover, filed an appeal from the issuance of the citation directly to the Superior Court on March 22, 2018—six days before the failure to pay fines notice was issued, and before he had filed any administrative appeal. At the time of filing his appeal to the court, the plaintiff did not have the right, pursuant either to § 7-152c or the ordinance, to seek administrative review by a Middletown administrative

hearing officer. The plaintiff's first opportunity for an administrative hearing arose, pursuant to § 7-152c and the ordinance, only after the failure to pay fines notice was issued by the defendant on March 28, 2018.

"It is a settled principle of administrative law that, if an adequate administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter. . . . The exhaustion doctrine reflects the legislative intent that such issues be handled in the first instance by local administrative officials in order to provide aggrieved persons with full and adequate administrative relief, and to give the reviewing court the benefit of the local board's judgment. . . . It also relieves courts of the burden of prematurely deciding questions that, entrusted to an agency, may receive a satisfactory administrative disposition and avoid the need for judicial review." (Citations omitted; internal quotation marks omitted.) *Simko* v. *Ervin*, 234 Conn. 498, 503–504, 661 A.2d 1018 (1995).

In the present case, the plaintiff was required to receive a failure to pay fines notice in order for his right to an administrative review by a hearing officer to arise. The plaintiff, however, filed his appeal to the Superior Court prior to receiving a failure to pay fines notice. Therefore, at the time the plaintiff appealed to the court, he did not have the right to an administrative remedy by an appeal to a hearing officer. No administrative hearing had occurred, and there was no ruling by a hearing officer from which the plaintiff could appeal to the court. Accordingly, the court did not err in dismissing the plaintiff's appeal for lack of subject matter jurisdiction. Therefore, we affirm the judgment of the court dismissing the plaintiff's administrative appeal in Docket No. AC 41902.

II

AC 42138

In Docket No. AC 42138, the plaintiff appeals from the court's granting of the defendant's motion to dismiss the plaintiff's zoning appeal on the basis that his appeal to the court was untimely. Specifically, the plaintiff claims that, although the denial of his application to operate a sober house was published in the Hartford Courant on February 22, 2018, the actual date of denial should be recognized as being March 22, 2018, because that is the date the plaintiff actually became aware of the denial. The plaintiff did not seek permission from this court to file the present appeal and, accordingly, we lack subject matter jurisdiction to hear this claim.

General Statutes § 8-8 (o) governs Superior Court and Appellate Court review of zoning commission decisions. On September 24, 2018, the date of the plaintiff's zoning appeal to this court, § 8-8 (o) provided: "There shall be no right to further review [of judgments rendered by the Superior Court] except to the Appellate Court *by certification for review*, on the vote of two judges of the Appellate Court so to certify and under such other rules as the judges of the Appellate Court establish. . . ." (Emphasis added.)

It is undisputed that, in the present appeal, the plaintiff did not timely seek from this court certification for review of the judgment of dismissal. He, therefore, never received the requisite affirmative vote of two judges that would have allowed him, in September or October, 2018, to appeal to this court. Accordingly, because no such certification was granted in this case, this court lacks subject matter jurisdiction over the appeal.[6] Therefore, we dismiss the plaintiff's appeal in Docket No. AC 42138.

[6] We also note that, even if this appeal properly were before this court, the plaintiff filed his appeal in the trial court on April 3, 2018—forty days after the decision of the commission was published. General Statutes § 8-

III

AC 42139

In Docket No. AC 42139, the plaintiff appeals from the court's granting of the defendant's motion to dismiss his "petition to overturn blight ordinance" on nonjusticiability grounds. We reverse the decision of the court only with respect to the constitutional challenges alleged by the plaintiff in that petition in his individual capacity.

Before considering the merits of the plaintiff's claim, we first review the state of the record before us and the facts contained therein. It is undisputed that, on February 14, 2018, the defendant issued a blight citation to the plaintiff regarding the property.[7] It also is undisputed that, on March 22, 2018, the plaintiff commenced an appeal of that blight citation in the Superior Court for the judicial district of Middlesex.

On May 8, 2018, the plaintiff initiated an action seeking to invalidate the blight ordinance. The plaintiff commenced a third civil action that same day, which is the

8 (b) states in relevant part: "[A]ny person aggrieved by any decision of a board, including . . . a special permit or special exception pursuant to section 8-3c, may take an appeal to the superior court for the judicial district in which the municipality is located. . . . The appeal shall be commenced by service of process . . . within fifteen days from the date that notice of the decision was published as required by the general statutes." The plaintiff's appeal was not filed within fifteen days of the date of publication and, therefore, the trial court lacked subject matter jurisdiction over the claim. See, e.g., *Bridgeport Bowl-O-Rama, Inc.* v. *Zoning Board of Appeals*, 195 Conn. 276, 283, 487 A.2d 559 (1985) (holding that court properly dismissed plaintiff's appeal when plaintiff failed to bring its appeal of zoning board of appeals decision within fifteen days after publication of adequate notice of decision as required by § 8-8). The plaintiff did not challenge the adequacy of the published notice. See, e.g., id., 281–82.

[7] Copies of that blight citation, as well as the failure to pay fines notice and the assessment of fines notice issued by the defendant, all accompanied the defendant's motion to dismiss and, thus, properly were before the court when the issue of justiciability was raised.

subject of Docket No. AC 42206; see part IV of this opinion; and which alleged due process violations stemming from a blight citation issued to the plaintiff by the defendant in 2016. The record thus unequivocally indicates, and the defendant on appeal concedes, that two related actions regarding the propriety of blight citations issued to the plaintiff regarding his property were pending in the same courthouse at the time that his "petition to overturn blight ordinance" was commenced.

His petition admittedly was not in the form of a complaint in accordance with the rules of practice. See Practice Book § 10-1.[8] The plaintiff's self-styled petition sets forth general allegations regarding the defendant's blight ordinance without any reference to particular properties or property owners. More specifically, the petitioner alleged that "(1) in its current form, [the blight ordinance] does not allow accused parties to contest the charges before being fined, (2) it does not grant accused parties the right to a speedy trial, (3) the fines are excessive relative to the minor nature of the infractions, (4) it does not adequately safeguard the rights of property owners, (5) it has the potential to unjustly inflict financial ruin, (6) it may be prejudicial against property owners in certain cases, and (7) it potentially violates many important constitutional safeguards, such as the rights to privacy, freedom of self-expression, security in one's possessions, and the prohibition against the taking of one's property without due process of law."

In response, the defendant moved to dismiss the petition for lack of subject matter jurisdiction, arguing that

[8] Practice Book § 10-1 provides in relevant part: "Each pleading shall contain a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved, such statement to be divided into paragraphs numbered consecutively, each containing as nearly as may be a separate allegation. . . ."

(1) no actual controversy existed between the parties, (2) the plaintiff was purporting to bring the action on behalf of all residents of the defendant municipality, and (3) the controversy was nonjusticiable, in that it properly was the prerogative of the defendant's legislative body to provide redress of the alleged infirmities in the blight ordinance. Significantly, the defendant appended five exhibits to its memorandum of law in support of that motion, including copies of the blight citation, the failure to pay fines notice, and the assessment of fines notice that the defendant issued to the plaintiff in 2018, regarding the property. Those materials thus were properly before the court when the issue of justiciability was raised, as the substance of those materials was not contested by the plaintiff.[9]

The plaintiff filed an objection to the motion to dismiss, in which he argued that "he absolutely does have standing" because "[t]he determination of the controversy will result in practical relief to [him by prohibiting the defendant] from imposing this unjust ordinance on him and his fellow property owners in the future." The plaintiff further averred that an actual controversy existed "between or among the parties to the dispute [because] the people of the [defendant municipality], inclusive of the plaintiff, are in a real danger of losing their homes without due process of law or just compensation, in direct violation of their [fifth and fourteenth] amendment rights."

By order dated September 18, 2018, the trial court, *Domnarski*, *J.*, granted the motion to dismiss. In that

[9] We recognize that, as our precedent instructs, a court cannot decide a motion to dismiss on the basis of "factual and legal memoranda of the parties" when issues of fact are disputed. *Bradley's Appeal from Probate*, 19 Conn. App. 456, 466, 563 A.2d 1358 (1989). Here, the materials furnished to the court by the defendant are not disputed and demonstrate that the plaintiff has been subject to actions to enforce the blight ordinance against his property.

order, the court concluded that (1) "[t]here is no actual controversy between the parties," and (2) the plaintiff's claims are not justiciable because "the court cannot give practical relief to the plaintiff. Any repeal or amendment of the blight ordinance must be done by municipal action, not by the court." On appeal, the plaintiff challenges the propriety of both determinations.

A

We first consider the actual controversy question. In so doing, we are mindful that, in deciding a motion to dismiss, the "court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, *construing them in a manner most favorable to the pleader*." (Emphasis added.) *Pamela B.* v. *Ment*, 244 Conn. 296, 308, 709 A.2d 1089 (1998). "[I]n determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Connecticut Energy Marketers Assn.* v. *Dept. of Energy & Environmental Protection*, 324 Conn. 362, 385, 152 A.3d 509 (2016). Furthermore, it is "the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . The courts adhere to this rule to ensure that [self-represented] litigants receive a full and fair opportunity to be heard, regardless of their lack of legal education and experience . . . . This rule of construction has limits, however." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 549, 911 A.2d 712 (2006). "The modern trend . . . is to construe pleadings broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 569, 877 A.2d

761 (2005). "[W]hile courts should not construe pleadings narrowly and technically, courts also cannot contort pleadings in such a way so as to strain the bounds of rational comprehension." *Henderson* v. *Commissioner of Correction*, 181 Conn. App. 778, 793, 189 A.3d 135, cert. denied, 329 Conn. 911, 186 A.3d 707 (2018).

In the present case, the plaintiff brought an action challenging the validity of the defendant's blight ordinance, claiming, inter alia, that it violates certain constitutional guarantees. In moving to dismiss that action, the defendant submitted uncontroverted evidence indicating that it had issued blight citations and fines to the plaintiff pursuant to the ordinance with respect to his property. The defendant likewise concedes, in its appellate brief before this court, that the plaintiff's action to invalidate the blight ordinance arises "out of the same underlying enforcement actions against his rental property at 5 Maple Place." In light of that concession, it is not surprising that the plaintiff, in objecting to the defendant's motion to dismiss, represented to the court that this action was brought because "the people of the [defendant municipality], *inclusive of the* [*p*]*laintiff*, are in a real danger of losing their homes without due process of law or just compensation." (Emphasis added.)

In the proceedings in the trial court, the plaintiff, the defendant, and the trial judge all were aware of the multiple actions pending in that court regarding the application of the blight ordinance to the plaintiff's property.[10] The interrelatedness of those actions, which the defendant on appeal expressly concedes, is borne out by the pleadings in those related proceedings. Like

[10] The record indicates that Judge Domnarski ruled on the present action concerning the validity of the blight ordinance and the plaintiff's appeal from the denial of his application for a special exception to operate a sober house on the property on September 18, 2018; on October 17, 2018, he dismissed the plaintiff's action regarding the 2016 blight citation.

the trial court, this court properly may take judicial notice of the filings in those related proceedings, which unequivocally indicate that the plaintiff was contesting the enforcement of the blight ordinance on his property.[11] See *Wasson* v. *Wasson*, 91 Conn. App. 149, 151 n.1, 881 A.2d 356 ("[t]he Appellate Court, like the trial court, may take judicial notice of files of the Superior Court in the same or other cases" [internal quotation marks omitted]), cert. denied, 276 Conn. 932, 890 A.2d 574 (2005); see also *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 527, 294 A.2d 633 (1972) ("[t]here is no question [of] our power to take judicial notice of files of the Superior Court, whether the file is from the case at bar or otherwise"); *Folsom* v. *Zoning Board of Appeals*, 160 Conn. App. 1, 3 n.3, 124 A.3d 928 (2015) (taking "judicial notice of the plaintiff's Superior Court filings in . . . related actions filed by the plaintiff").

Cognizant of our obligation to indulge every presumption favoring subject matter jurisdiction, as well as to provide reasonable latitude to self-represented parties; see *Maresca* v. *Allen*, 181 Conn. 521, 521 n.1, 436 A.2d 14 (1980); we disagree with the court's conclusion that the plaintiff's petition does not pertain to an actual controversy between the parties. The court improperly granted the motion to dismiss for lack of an actual controversy.

B

We next consider the question of practical relief. In dismissing the plaintiff's action to invalidate the blight ordinance, the court concluded that it "cannot give

[11] We view the defendant's representation in its appellate brief that the present action arises "out of the same underlying enforcement actions against [the] property at 5 Maple Place" as the plaintiff's other civil actions filed against the defendant in 2018, as an invitation to take judicial notice of those related proceedings, if not a judicial admission. See, e.g., *Rodia* v. *Tesco Corp.*, 11 Conn. App. 391, 395, 527 A.2d 721 (1987) ("[w]e view this statement by the plaintiffs in their [appellate] brief as analogous to a judicial admission and therefore binding on the plaintiffs").

practical relief to the plaintiff [because] any repeal or amendment . . . must be done by municipal action, not by the court." To the extent that the plaintiff has asserted constitutional claims in an individual capacity, we disagree with the court.

"[W]hen a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." *State* v. *Long*, 268 Conn. 508, 521, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004). To the extent that the self-represented plaintiff in the present case attempts to assert constitutional violations on behalf of the citizens of Middletown generally, the plaintiff does not have standing to do so. "The authorization to appear [as a self-represented litigant] is limited to representing one's own cause, and does not permit individuals to appear [as a self-represented litigant] in a representative capacity." *Expressway Associates II* v. *Friendly Ice Cream Corp. of Connecticut*, 34 Conn. App. 543, 546, 642 A.2d 62, cert. denied, 230 Conn. 915, 645 A.2d 1018 (1994). Insofar as the plaintiff in his petition has asserted claims on behalf of the Middletown citizenry generally, the court properly granted the motion to dismiss such claims.

The plaintiff nonetheless was free to assert claims in an individual capacity. Although not in the form required under our rules of practice, the plaintiff provided ample notice that his petition was predicated, in part, on constitutional grounds. Specifically, the plaintiff alleged, in relevant part, that the blight ordinance "violates many important constitutional safeguards, such as the rights to privacy, freedom of self-expression, security in one's possessions, and the prohibition against the taking of one's property without due process of law." The petitioner also expressly invoked the first amendment in that pleading.

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy." *Gladstein* v. *Goldfield*, 325 Conn. 418, 421 n.3, 159 A.3d 661 (2017). Construing the plaintiff's petition in accordance with the broad and realistic framework through which Connecticut courts are instructed to consider the pleadings of self-represented litigants, we conclude that it contains allegations of a constitutional dimension. It does not "strain the bounds of rational comprehension"; *Henderson* v. *Commissioner of Correction*, supra, 181 Conn. App. 793; to acknowledge that at least some of the plaintiff's constitutional allegations are intended to directly apply to him.

As a result, we disagree with the court's conclusion that it could not afford any practical relief to the plaintiff. It is well established that both this court and the trial court have the jurisdiction to overturn state and municipal legislation and ordinances that violate federal and state constitutional protections.[12] Because the defendant filed a motion to dismiss the plaintiff's petition, the structure of the petition as a complaint was not challenged by the defendant. With our reversal of the court's judgment of dismissal insofar as it relates to the plaintiff's allegations of violations of his individual constitutional rights, those allegations in the petition, on remand, are before the court. The court could afford practical relief to him if the plaintiff ultimately proves

[12] This court may exercise concurrent jurisdiction with the federal courts in cases arising under the federal constitution. See, e.g., *Stratford* v. *Bridgeport*, 173 Conn. 303, 311, 377 A.2d 327 (1977) ("[a]lthough it is true that where the supremacy of federal law exists it requires that state courts apply that law, the mere fact of such supremacy does not oust a state court from jurisdiction").

that some or all of the provisions of § 7-152c or the blight ordinance violated his constitutional rights.

In summary, on the basis of our thorough review of the record and relevant case law, we conclude that the court failed to construe the self-represented plaintiff's petition in the broad and realistic manner required by our case law and, as a result, it did not conduct the examination of the plaintiff's individual constitutional claims that our case law further requires. Accordingly, we reverse the judgment of the court granting the defendant's motion to dismiss the plaintiff's petition in Docket No. AC 42139 with respect to the plaintiff's individual constitutional claims. In so doing, we offer no view whatsoever as to the merits of those claims.[13]

IV

AC 42206

In Docket No. AC 42206, the plaintiff appeals from the judgment of the court granting the defendant's motion to dismiss his complaint filed on May 8, 2018, which challenged a blight citation issued by the defendant on May 27, 2016, on the ground of mootness. The defendant moved to dismiss the plaintiff's complaint on July 2, 2018, on the basis that the defendant had withdrawn that blight citation on July 22, 2016, and that no action had been taken against the plaintiff pursuant to that citation, rendering the plaintiff's appeal moot

[13] We likewise reiterate the procedural posture of this case, which is a dismissal on jurisdictional grounds. The question of whether the plaintiff's operative pleading can survive a motion to strike, therefore, is not presently before us.

We further note that Practice Book § 10-60 (a) (1) provides in relevant part that "[e]xcept as provided in Section 10-66, a party may amend his or her pleadings or other parts of the record or proceedings at any time subsequent to that stated in the preceding section . . . [b]y order of judicial authority. . . ." Whether to permit the plaintiff to amend his pleading pursuant to that rule of practice "rests within the discretion of the trial court." *Martinez* v. *New Haven*, 328 Conn. 1, 15 n.13, 176 A.3d 531 (2018).

because there was no practical relief that the court could grant. On October 17, 2018, the court granted the defendant's motion to dismiss on the basis that the withdrawal of the citation mooted the plaintiff's claims, and, therefore, the court lacked subject matter jurisdiction over the appeal. We agree with the court.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates this court's subject matter jurisdiction. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citations omitted; internal quotation marks omitted.) *Renaissance Management Co.* v. *Barnes*, 175 Conn. App. 681, 685–86, 168 A.3d 530 (2017).

Because the defendant's withdrawal of the blight citation issued to the plaintiff on May 27, 2016, rendered moot the claims in the complaint he filed on May 8, 2018, with respect to the citation, we conclude that the court did not err in granting the defendant's motion to dismiss the plaintiff's complaint.

The judgments in Docket Nos. AC 41902 and AC 42206 are affirmed; the appeal in Docket No. AC 42138 is dismissed for lack of jurisdiction; the judgment in Docket No. AC 42139 is reversed in part and the case is remanded to the trial court for further proceedings consistent with this opinion.

In this opinion the other judges concurred.