STATE OF CONNECTICUT *v.* CHESTER J.*
(AC 41403)

Lavine, Moll and Sheldon, Js.**

Syllabus

The defendant, who had been convicted of various crimes in connection with the sexual assault of the victim, appealed, claiming, inter alia, that the trial court improperly denied his challenge to the jury panel, which he claimed did not represent a fair cross section of the community in violation of the sixth amendment and had been summoned under a process that violated his right to equal protection. The defendant further invited this court to exercise its supervisory authority to require the collection and/or maintenance of venire panel demographic data. During jury selection, the court conducted a hearing on the defendant's objection to the jury panel. Relying on census data, information from the prospective jurors' questionnaires and the testimony of an expert witness who used a Baysean probability model to predict the race of the prospective jurors, the defendant claimed that the state failed to engage in substantive changes to remedy the underrepresentation of minorities and overrepresentation of Caucasians in prospective jury pools and that the state failed to adopt measures to increase minority participation in jury pools. The questionnaires stated that prospective jurors had the option of providing information as to their race but that they need not do so if they found it objectionable. The defendant also provided testimony from eight witnesses about how venire pools were selected throughout the state and about the nonenforcement of civil penalties on nonappearing jurors. None of the witnesses testified that they or the state entities where they were employed compiled or maintained data as to the racial or ethnic composition of venire panels in the state. The defendant thus claimed that the Judicial Branch had seemingly demonstrated wilful blindness in regard to the statutory (§ 51-232 (c)) requirement that it assure that venire panels are nondiscriminatory. He also asserted that the state's failure to take action with jurors who did not report for duty led to underrepresentation of certain groups. The court ruled, inter alia, that the defendant had presented no evidence that the purported underrepresentation of African-Americans and Hispanics resulted from their systematic exclusion in the jury selection process, or that the jury selection process was susceptible to abuse or racial bias. *Held*:

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

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

1. The trial court did not err in denying the defendant's challenges to the venire panels in violation of his constitutional rights:

   a. The defendant did not establish a prima facie violation of the sixth amendment right that the venire pool represent a fair cross section of the community, as he failed to demonstrate that any underrepresentation of African-Americans and Hispanics resulted from their systematic exclusion in the jury selection process; although the state was generally aware of a lower response rate to jury summonses from certain minority groups, the uncontroverted evidence established that the process by which the Judicial Branch's jury administration summons jurors is accomplished without regard to race, and there was no evidence to support a finding that enforcement of civil penalties against nonappearing jurors would lead to greater responsiveness to juror summonses.

   b. The court correctly rejected the defendant's equal protection claim, as there was no evidence of a jury selection procedure that is susceptible to abuse or is not racially neutral; the defendant did not establish that the state systematically excluded African-Americans or Hispanics from the jury selection process, and the defendant did not provide any evidence of discriminatory intent with respect to excluding African-Americans or Hispanics, rather, the evidence presented by the defendant reflected that Judicial Branch officials were either unaware of the racial and ethnic characteristics of people summoned for jury duty or that such information was not retained or recorded.
2. This court declined to exercise its supervisory authority over the administration of justice to require the state to collect demographic data in accord with the directive of § 51-232 (c) to prevent discrimination in jury selection; the defendant's claims about the composition of jury panels at issue were unproven, and, as crafted by the legislature, the language of § 51-232 (c) explicitly makes the provision of racial and ethnic information discretionary rather than mandatory.
3. This court declined to review the defendant's claim that the trial court erred in prohibiting him from inquiring about certain Probate Court matters that he claimed were relevant to the victim's purported bias against him, the defendant having failed to raise that specific claim before the trial court and expressly abandoned it in his principal appellate brief.

Argued March 9, 2020—officially released April 27, 2021

Procedural History

Substitute information charging the defendant with two counts of the crime of sexual assault in the second degree, and with one count each of the crimes of sexual assault in the third degree, sexual assault in the fourth degree and risk of injury to a child, brought to the

Superior Court in the judicial district of Waterbury, where the court, *Alander*, *J.*, denied the defendant's objection to the composition of the venire panels; thereafter, the matter was tried to the jury before *Alander*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Trent A. LaLima, with whom, on the brief, was *Hubert J. Santos*, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Elena Pelermo*, senior assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Chester J., appeals from the judgment of conviction, rendered against him following a jury trial, of one count each of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1), sexual assault in the second degree in violation of § 53a-71 (a) (4), sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (2), sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A), and risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that (1) the trial court improperly denied his challenge to the jury panel on the grounds that (A) the panel did not reflect a fair cross section of the community in violation of the sixth amendment to the United States constitution[1] and (B) the process by which the panel was summoned violated his right to equal protection under the fourteenth amendment to the United States constitution,[2] (2) pursuant to our

[1] The sixth amendment's fair cross section requirement is enforceable against the states under the due process clause of the fourteenth amendment to the United States constitution. See *State* v. *McCarthy*, 197 Conn. 247, 249 n.1, 496 A.2d 513 (1985).

[2] We address the defendant's constitutional claims together. See parts I A and B of this opinion.

supervisory authority, this court should require the collection and/or maintenance of a jury panel's demographic data, and (3) the trial court erred in barring the defense from inquiring about certain Probate Court matters related to the victim's bias or motive in asserting the underlying allegations against the defendant.

While the defendant's appeal was pending, our Supreme Court issued its decision in *State* v. *Moore*, 334 Conn. 275, 278, 221 A.3d 40 (2019).[3] On the basis of that decision, this court ordered the parties to file simultaneous supplemental briefs addressing the impact of *Moore* on this appeal. After the parties submitted their supplemental briefs, this court heard oral argument. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The victim was born in Jamaica and, in 1995 or 1996, when she was seven or eight years old, arrived in the United States following her adoption by the defendant and his wife, H, who resided in Waterbury.[4] Shortly after the move, and for many years thereafter, the defendant sexually assaulted the victim. The incidents occurred frequently when the victim would sleep in her parents' bed during the winter months. The defendant would place his hand in her underwear and touch her clitoris.

The victim and her parents moved to another location in Waterbury in 1999. When the victim was thirteen years old, the defendant began having sexual intercourse with her, which continued until she was approximately twenty-one years of age. Throughout her high school years, the defendant forced the victim to have sexual intercourse with him approximately twice a week. In connection with the defendant's sexual advances, the defendant would threaten withholding from the victim basic necessities, such as clothing or money for participation in school activities, if she did not cooperate. The

[3] On November 15, 2019, this court granted the defendant's motion to stay this appeal pending our Supreme Court's disposition of *Moore*.

[4] We refer to the defendant and H as the victim's parents in this opinion.

victim's grades began to suffer during her sophomore year in high school, and she became suicidal. The defendant employed various measures to conceal his conduct from H.

Following her graduation from high school in 2007, the victim was accepted into a college in upstate New York, but the defendant refused to allow her to attend there, instead requiring that she enroll in a college closer to home. The defendant continued to have sexual intercourse with the victim until she married in 2009, and moved out of her parents' home. Shortly thereafter, the victim disclosed the abuse for the first time, initially to her mother, H, and several years later, in or about 2015, to her sister. After her disclosure to her sister, the victim eventually contacted the police.

Once the victim made an initial complaint to the police, she recorded two conversations between herself and the defendant regarding the abuse she had suffered. In the first conversation, the defendant expressed his sorrow and asked for forgiveness. In the second conversation, which took place in or about June, 2015, the defendant, after having been contacted by the police, shouted at the victim, repeatedly apologized, and expressed concern that his conduct would "shame the family" and would be "all over the news." The defendant also conveyed to the victim his desire to "get rid of this whole case" and asked her what she wanted in exchange for retracting her complaint. The victim explained that she wanted to be able to stay in the familial home and take care of H, who was suffering from dementia at the time, and she wanted the defendant out of the house. The defendant indicated he wanted H's pension. Amenable to the foregoing terms, the defendant reduced them to writing, and both he and the victim signed the document embodying the agreement. Unbeknownst to the defendant, the victim had no intention of withdrawing her

complaint, and she turned over the recordings to the police.

The defendant subsequently was arrested, and the state charged him by way of a substitute information with one count each of sexual assault in the second degree in violation of § 53a-71 (a) (1), sexual assault in the second degree in violation of § 53a-71 (a) (4), sexual assault in the third degree in violation of § 53a-72a (a) (2), sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A), and risk of injury to a child in violation of § 53-21 (a) (2). A jury thereafter convicted the defendant of all counts and, in accordance with the verdict, the trial court imposed a total effective sentence of thirty-three years of imprisonment, execution suspended after eighteen years, followed by fifteen years of probation. This appeal followed. We will set forth additional facts and procedural history where necessary.

I

The defendant first claims that the trial court improperly denied his challenge to the jury panel on the grounds that (1) the panel did not reflect a fair cross section of the community in violation of the sixth amendment to the United States constitution, and (2) the process by which the panel was summoned violated his right to equal protection under the fourteenth amendment to the United States constitution. Specifically, the defendant contends that there was an underrepresentation of African-Americans and Hispanics in the jury array. Although "[w]e recognize the importance of fairness in our judicial system, and particularly as to our jury selection procedures"; *State* v. *Gibbs*, 254 Conn. 578, 585, 758 A.2d 327 (2000); we conclude that the defendant's constitutional rights were not violated.

The following additional facts, as set forth in the trial court's memorandum of decision or as undisputed in the record, and procedural history are relevant to our

resolution of these claims. Jury selection took place over the course of three days, specifically, on November 7, 9, and 13, 2017. Six jurors, plus two alternates, were selected from three venire panels of thirty members each. On the second day of jury selection, the defendant orally objected to the composition of the venire panel. On the third day, November 13, 2017, the defendant filed a written objection to the racial and ethnic composition of the November 7 and 9 venire panels, contending that African-Americans and Hispanics were underrepresented. On November 16, 2017, the defendant filed a motion for the state and the defense to have immediate access to the jury lists and juror questionnaires, which the court granted that same day with respect to the panel assignment lists and the juror questionnaires for the three venire panels.

On November 20 and 30, 2017, the trial court held an evidentiary hearing on the defendant's objection to the venire panels. Eight witnesses testified. Among them, Attorney Philip Miller, as the duly authorized designee of then Attorney General George Jepsen, testified that, since December, 2012, the Office of the Attorney General had not initiated a civil enforcement proceeding, pursuant to General Statutes § 51-237,[5] to seek imposition of a fine against any nonappearing juror. He explained that the Judicial Branch provides a list of nonappearing jurors to the Office of the Attorney General either on a monthly or a quarterly basis. Those lists

[5] General Statutes § 51-237 provides: "Each juror, duly chosen, drawn and summoned, who fails to appear shall be subject to a civil penalty, the amount of which shall be established by the judges of the Superior Court, but the court may excuse such juror from the payment thereof. If a sufficient number of the jurors summoned do not appear, or if for any cause there is not a sufficient number of jurors to make up the panel, the court may order such number of persons who qualify for jury service under section 51-217 to be summoned as may be necessary, as talesmen, and any talesman so summoned who makes default of appearance without sufficient cause shall be subject to a civil penalty, the amount of which shall be established by the judges of the Superior Court. The provisions of this section shall be enforced by the Attorney General within available appropriations."

do not include, among other things, the race of the non-appearing jurors. When questioned about the lack of enforcement, Attorney Miller stated, in part, that the legislature had not provided any appropriations to accomplish that task. Attorney Miller also testified that, prior to pursuing a civil penalty against a nonappearing juror, the Office of the Attorney General would first have to investigate the reasons for the nonappearance.

Shari DeLuca, the jury outreach coordinator for the Judicial Branch, testified that she engages in community outreach for the purpose of educating the public about jury duty and that her goal is to increase public responsiveness to jury summonses. To effectuate that goal, she has given presentations at high schools, colleges, and community events. DeLuca also has appeared on Hispanic radio stations.

Girvan Dinnall, an information technology analyst for the Judicial Branch, testified that he compiles data from the Department of Revenue Services, the Department of Motor Vehicles, voter registration rolls, and the Department of Labor to create a master list for the purpose of summoning potential jurors. The information collected from those sources includes names, addresses, dates of birth, and social security numbers, if available. A compilation process—whereby the data, through a series of mostly computerized processes, are placed into a "clean," standardized master list—yields approximately 3.15 million records (i.e., individuals). The names on the list are separated by, and then randomized for, each of the state's thirteen judicial districts, and then all towns within those districts. Individuals are randomly selected to receive juror summonses on the basis of the proportional representation of the population of the town in which they reside in relation to that of their judicial district (based on United States Census Bureau data). Dinnall repeatedly explained that a prospective juror's race has no bearing on his work and that he does not have access to that information.

Esther Harris, the jury administrator for the Judicial Branch, is responsible for summoning jurors in Connecticut. Harris testified that the process of summoning jurors is governed by statute, is race blind, and is done randomly. See General Statutes § 51-219a et seq. During Harris' testimony, the parties stipulated that African-Americans and Hispanics respond to jury summonses at a lower rate than others, particularly within cities. Harris described how, in order to address the higher nonresponse rate among African-Americans and Hispanics, her office requested, and the Department of Motor Vehicles now provides, information relating to identification card holders, and not just to licensed drivers. When questioned about the Office of the Attorney General's nonenforcement of the civil penalty for failure to appear for jury duty, Harris responded as follows, referencing a period when enforcement was within the purview of the Office of the State's Attorney: "It's been difficult because you want to make sure that any enforcement that is done is effective. It's complicated. It has been tried before, and it did not turn out the way that we expected because what ended up happening, and this is years ago . . . there was a fine attached to it, and individuals felt as if, well, there is a fine, how much is it, I'll pay the fine rather than show. So, individuals looked at it as an alternative . . . . [T]hey were looking at it as, well, I would rather pay the fine than show up."

Finally, the defendant presented the testimony of Camille Seaberry, a research associate at Data Haven, who was called as an expert witness to opine, as a starting point, on the probable race of those individuals in the ninety person venire who did not provide their racial information on their individual questionnaires. Fifty-nine venirepersons filled out their racial information in their questionnaires, which Seaberry treated as definitive with respect to the venireperson's race. With respect

to the remaining venirepersons, who did not fill out such information, Seaberry used a Bayesian probability model based on surnames, addresses, and census data to predict their race. Out of the ninety venirepersons, she calculated that seventy-five were white, five were African-American, eight were Hispanic, and two were deemed "other," likely those of Asian descent. Seaberry drew the following conclusions with respect to the judicial district of Waterbury: (1) Caucasians made up 71.5 percent of its citizens, 68.9 percent of its population of adults aged eighteen to seventy-four, and 83.3 percent of the venire panel, (2) African-Americans made up 10.4 percent of its citizens, 11 percent of its population of adults aged eighteen to seventy-four, and 5.6 percent of the venire panel, and (3) Hispanics made up 15.5 percent of its citizens, 16.8 percent of its population of adults aged eighteen to seventy-four, and 8.9 percent of the venire panel. On the basis of the foregoing percentages, Seaberry calculated an absolute disparity, a comparative disparity, and a standard deviation for the relevant population of adults aged eighteen to seventy-four as follows: (1) with respect to African-Americans, 0.054, 0.494, and 1.644, respectively, and (2) with respect to Hispanics, 0.079, 0.471, and 2.008, respectively.[6] Seaberry explained that two standard deviations is "a pretty standard benchmark to use," meaning if

[6] In *State* v. *Gibbs*, supra, 254 Conn. 578, our Supreme Court described these measures. Absolute disparity "measures the difference between the percentage of the cognizable class in the population and the percentage of that group represented in the venire." (Internal quotation marks omitted.) Id., 589 n.12. Comparative disparity "subtract[s] the percentage of the cognizable group in the challenged jury pool from the percentage of the cognizable group in the relevant population, and then divid[es] that amount by the percentage of the cognizable group in the relevant population." Id., 589 n.13. Standard deviation is "the range within which the percentage of persons from the recognizable group selected for the jury array could vary and still be the product of random chance, with the likelihood of random chance being the source of the deviation decreasing as the number of standard deviations increases. From that standard deviation one may then calculate the chance that an actual disparate percentage occurred randomly." Id., 595 n.19.

"something . . . falls outside of this range . . . that makes us think that it's not totally random." She opined that the standard deviation for Hispanic adults was "just over that two standard deviations threshold," meaning outside the range that one would expect if the deviation were caused by random chance. According to Seaberry's findings, the standard deviation for Hispanics dropped below two standard deviations when comparing the venire panel to adult *citizens* in the relevant population.

Following the presentation of evidence, defense counsel addressed the court. In support of the defendant's objection to the venire panel on fair cross section grounds, defense counsel argued that the state had failed to engage in substantive changes to remedy the underrepresentation of minorities and overrepresentation of Caucasians in the jury pool. With regard to his equal protection claim, defense counsel argued that the state had demonstrated a wilful "institutional blindness" by failing to adopt measures to increase minority participation in jury pools. The state countered that the defendant failed to prove that it systematically had excluded jurors and, rather, the evidence demonstrated that it had engaged in methods to increase minority participation. In addition, the state explained that any underrepresentation of minorities and any lack of responsiveness to jury summonses were not attributable to the jury summoning system because the system is not responsible for the personal conduct of summoned individuals who fail to appear for jury duty.

In its memorandum of decision dated December 15, 2017, the trial court denied the defendant's challenge to the venire panels. First addressing the fair cross section claim, the court, applying the three part test set forth in *Duren* v. *Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), concluded that the defendant had failed to establish a prima facie violation of the sixth amendment's fair cross section requirement because the evidence did not demonstrate that the

purported underrepresentation of African-Americans and Hispanics resulted from their systematic exclusion in the jury selection process (i.e., the third prong of the *Duren* test).[7] The court observed that "[t]he only aspects of the jury selection process which the defendant points to as flaws leading to the underrepresentation of African-Americans and Hispanics are the state's failure to take any action against nonappearing individuals duly summoned for jury duty and its failure to conduct outreach efforts targeted at minority residents." Although the defendant presented evidence that (1) the Office of the Attorney General has not pursued civil enforcement against nonappearing jurors in the recent past, and (2) the Judicial Branch does not specifically focus its juror outreach efforts on the responsiveness of minorities to jury summonses, "the defendant did not present . . . any evidence that such enforcement or focused outreach efforts would lead to a material increase in the number of African-Americans and Hispanics appearing for jury service." In other words, the defendant's argument assumed, without evidence, that

[7] "In order to establish a prima facie violation of the [fair cross section] requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the [jury selection] process." *Duren* v. *Missouri*, supra, 439 U.S. 364.

Although the court concluded that the defendant's claim failed to satisfy the third prong of the *Duren* test, it briefly addressed the evidence elicited through Seaberry insofar as it was presented to satisfy the second prong thereof. The court stated that "[t]he established law in Connecticut rejects each of these three measures [absolute disparity, comparative disparity, and standard deviation] as an appropriate basis for determining underrepresentation with respect to a sixth amendment claim. See *State* v. *Castonguay*, 194 Conn. 416, 427–30, [481 A.2d 56] (1984); *State* v. *Gibbs*, supra, [254 Conn.] 590–91. 'Ultimately . . . the decision is not one of numbers but rather a subjective determination of whether the disparity is constitutionally significant.' *State* v. *Castonguay*, supra, 427." In light of its holding with respect to the third prong, the court declined to address further the second prong of *Duren* because the *Duren* requirements are stated in the conjunctive.

had the state engaged in the suggested activities, minority juror participation would increase. The court found, on the basis of the record before it, that "that assumption [was] unwarranted and unproven."

Turning to the equal protection claim, the court applied the three part test set forth in *State* v. *Gibbs*, supra, 254 Conn. 578, which requires, as proof of an equal protection violation in jury selection "(1) underrepresentation of a recognizable group; (2) substantial underrepresentation over a significant period of time; and (3) a selection procedure susceptible to abuse or not racially neutral." (Internal quotation marks omitted.) Id., 594, citing *Castaneda* v. *Partida*, 430 U.S. 482, 494, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977). The court concluded that the defendant's claim failed because, as in *Gibbs*, the defendant had not demonstrated that the jury selection process was susceptible to abuse or was racially biased. The court explained that "the defendant . . . failed to establish that the greater propensity of African-Americans and Hispanics to fail to respond to jury summons was due to anything other than external factors, such as poverty, residential mobility, linguistic isolation, or distrust of the legal system. The defendant certainly has not met his burden of showing that the failure to bring any legal action seeking the imposition of civil fines or to initiate focused outreach efforts is subject to abuse or not racially neutral." Therefore, the defendant's claim faltered on the third prong of the equal protection test, i.e., a selection procedure that is susceptible to abuse or that is not racially neutral.

In addition, the court determined that the defendant had failed to meet his burden with respect to the second prong of the equal protection test, requiring a showing of "substantial underrepresentation over a significant period of time." The court found that, at best, the defendant had shown an underrepresentation in the selection process for one trial. The court further noted that,

although Seaberry's analysis resulted in a standard deviation for Hispanics aged eighteen to seventy-four of 2.008, once it accounted for those *eligible* for jury service, i.e., native born and naturalized citizens (as only United States citizens presently can serve as jurors in Connecticut), the standard deviation dropped to 1.7394, "a number which the defendant admits is insufficient to establish a lack of randomness." On the basis of the foregoing, the court denied the defendant's challenge to the jury array.

Before addressing the merits of the defendant's constitutional and supervisory authority claims, we provide an overview of *State* v. *Moore*, 169 Conn. App. 470, 151 A.3d 412 (2016), appeal dismissed, 334 Conn. 275, 221 A.3d 40 (2019), which largely guides our resolution of those claims. In *Moore*, the defendant, convicted of murder, claimed that the trial court erred in denying his motion to strike the venire panel in violation of (1) his sixth amendment right to a panel drawn from a fair cross section of the community and (2) his fourteenth amendment right to equal protection. Id., 474–75. He also requested that this court exercise its supervisory authority " 'to mandate that the jury administrator collect demographic data so that it is able to follow the statutory directive to prevent [discrimination] in jury selection.' " Id., 475. During jury selection, the defendant filed an objection to the composition of the venire panel on the basis of defense counsel's observation that of the approximately 100 venirepersons, there were 2 African-American women, and, to his belief, 1 African-American man (even though that individual self-identified on his jury questionnaire as Hispanic and Latin American). Id., 476. At the evidentiary hearing on the defendant's objection, defense counsel orally amended his objection to move to strike the venire panel. Id., 477. The defense presented the testimony of six witnesses, including the information technology manager for jury administration, the jury administrator for the Judicial

Branch, and the jury clerk for the judicial district of New London. Id., 477–80. Following the hearing, defense counsel argued that the lack of diversity in the jury pools, and the absence of African-American men, established a fair cross section violation under the sixth amendment and an equal protection violation under the fourteenth amendment. Id., 480. Relying on census data, defense counsel also argued that African-Americans were underrepresented in the jury pool in light of statewide and New London county demographics. Id.

The trial court denied the defendant's motion to strike the venire panel, finding that there was no systematic exclusion of jurors on the basis of race. Id., 481. With respect to the defendant's fair cross section claim, the court concluded that there was "insufficient evidence of the racial makeup of the jury pool or any statistical support for the claim that [African-Americans were] underrepresented in the pool." (Internal quotation marks omitted.) Id., 483. The court similarly rejected the defendant's equal protection claim, ruling that the defendant had failed to demonstrate discriminatory intent on the part of Connecticut's jury selection system. Id., 483–84.

On appeal, this court affirmed the judgment, first concluding with respect to the fair cross section claim that "[t]he defendant failed to present evidence to demonstrate that the representation of African-American males in venires from which juries are selected was not fair and reasonable in relation to the number of such persons eligible to serve as jurors in the community." Id., 485. This court explained that the census data on which the defendant relied was not probative evidence because it reflected the percentage of all African-Americans in Connecticut and New London county, rather than the percentage of African-American males eligible for jury service. Id. Addressing the equal protection claim, this court concluded that there was no

evidence that potential jurors systematically were excluded from jury service. Id., 486. Additionally, "[t]he undisputed evidence presented by the defendant reflected that Judicial Branch officials were unaware of the racial and ethnic characteristics of persons summoned for jury duty and that, to the extent that prospective jurors voluntarily provided information related to their race or ethnicity on their confidential juror questionnaire, such information was not retained or recorded." Id.

Finally, the defendant also argued on appeal in *Moore* that this court should, pursuant to its supervisory authority over the administration of justice, " 'enforce the collection of demographic data to permit analysis of the diversity of jury panels in Connecticut.' "[8] Id., 487. This court declined that request, reasoning: "As a preliminary matter, the defendant's request is supported by an unproven premise, namely, that the jury panels at issue in the present case reflected significant underrepresentation of a recognized group or were not representative of a fair cross section of the community. Moreover, it is difficult to discern how the relief sought by the defendant—the collection of information related to the race and ethnicity of *all* prospective jurors—would comport with the plain language of [General Statutes] § 51-232 (c), which expressly states that prospective jurors need not provide such information." (Emphasis in original.) Id., 488.

Our Supreme Court granted certification to appeal,[9] ultimately dismissing the appeal on the ground that certification was improvidently granted. See *State* v. *Moore*, supra, 334 Conn. 278. With respect to the defen-

[8] The defendant also claimed on appeal that the trial court erred in denying his motion to suppress identification evidence, with which this court disagreed. See *State* v. *Moore*, supra, 169 Conn. App. 489.

[9] Specifically, our Supreme Court granted certification, limited to the following issues: "In concluding that the defendant could not prevail on his motion to strike the voir dire panel on the ground that it failed to constitute a fair cross section of the community:

dant's supervisory authority claim regarding the collection of racial and demographic data of potential jurors, the court stated the following: "[T]he fact that the legislature has acted in this area by enacting § 51-232 (c)—which specifically makes the provision of racial and ethnic data optional for the juror—renders us reluctant to exercise our supervisory authority in the sweeping manner sought by the defendant . . . ." Id., 279.

Against this backdrop, we now consider the defendant's constitutional claims.

A

We begin with the defendant's fair cross section claim pursuant to the sixth amendment to the United States constitution.[10] "Fair cross section claims are governed by a well established set of constitutional principles. In order to establish a violation of his federal constitutional right to a jury drawn from a fair cross section of the community, the defendant must demonstrate the following: (1) that the group alleged to be excluded is a distinctive group in the community;[11] (2) that the representation of this group in venires from which juries

"1. Did the Appellate Court properly conclude that census data pertaining to the entire African-American population in Connecticut and New London county was not probative evidence with respect to the claimed underrepresentation of African-American males in the jury pool?

"2. Did the Appellate Court properly decline, in light of the provisions of . . . § 51-232 (c), to exercise its supervisory authority over the administration of justice to enforce the collection of demographic data to permit analysis of the diversity of jury panels in Connecticut?" (Internal quotation marks omitted.) *State* v. *Moore*, 324 Conn. 915, 915–16, 153 A.3d 1289 (2017).

[10] Although the defendant states in his principal appellate brief that his "claim regarding the jury panel is one of both state and federal constitutional magnitude," he has not provided an independent analysis of any state constitutional claim in accordance with *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992). Accordingly, we deem abandoned any such claim. See, e.g., *State* v. *Bennett*, 324 Conn. 744, 748 n.1, 155 A.3d 188 (2017).

[11] The parties agree that the defendant satisfied this first prong because African-Americans and Hispanics "clearly comprise . . . distinctive group[s]." *State* v. *Gibbs*, supra, 254 Conn. 588.

are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the [jury selection] process. *Duren* v. *Missouri*, [supra, 439 U.S. 364] . . . ." (Footnote added; internal quotation marks omitted.) *State* v. *Gibbs*, supra, 254 Conn. 588. "[I]n a fair cross section claim, the defendant need not prove intent. [S]ystematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section. The only remaining question is whether there is adequate justification for this infringement." (Internal quotation marks omitted.) Id. "[W]e review the [trial] court's factual determinations relevant to the defendant's [s]ixth [a]mendment . . . challenge for clear error . . . but we review de novo the court's legal determination whether a prima facie violation of the fair cross section requirement has occurred." (Internal quotation marks omitted.) *State* v. *Moore*, supra, 169 Conn. App. 484.

In support of his claim that the trial court improperly found that he had failed to demonstrate systematic exclusion of African-Americans and Hispanics in the jury selection process (i.e., the third prong of the *Duren* test), the defendant makes two contentions: (1) the state was aware that these minority groups were appearing for jury duty at a lower rate than other groups; and (2) the Office of the Attorney General has failed to enforce the civil penalty prescribed by § 51-237 against nonappearing jurors, the enforcement of which would have led to an increase in responsiveness. These arguments are unavailing.

First, there exists no basis to equate the state's general awareness of a lower response rate to jury summonses among certain minority groups with a finding that it has systematically excluded those groups in the jury selection process. As the United States Court of Appeals for the Second Circuit has explained, "the existence of systematic underrepresentation turns on the

process of selecting venires, not the outcome of that process in a particular case." *United States* v. *Jackman*, 46 F.3d 1240, 1248 (2d Cir. 1995). With regard to the *process* by which the Judicial Branch's jury administration summons potential jurors, the uncontroverted evidence established that it is accomplished without regard to race.

Second, as the trial court correctly explained, with respect to the Attorney General's nonenforcement of civil penalties on nonappearing jurors pursuant to § 51-237, there was no evidence to support a finding that such enforcement would lead to greater responsiveness to juror summonses. See *State* v. *Moore*, supra, 169 Conn. App. 481–85 (noting "correctness" of trial court's legal analysis of defendant's fair cross section claim, whereby court rejected claim because, among other things, there was no evidence that " 'representation of jurors from a distinctive group would be affected by enforcement action' "). Moreover, it is difficult to perceive how enforcement of civil penalties against nonappearing jurors would even be probative, for constitutional purposes, with respect to whether the state had systematically *excluded* individuals in the jury selection process. That is, any nonappearing juror was necessarily *included* in the juror summoning process but did not appear for any number of reasons external to the process by which he or she was summoned. See *State* v. *Gibbs*, supra, 254 Conn. 596–97.

In sum, we conclude that the defendant did not establish a prima facie violation of the sixth amendment's fair cross section requirement because he failed to demonstrate that any underrepresentation of African-Americans and Hispanics resulted from their systematic exclusion in the jury selection process.[12]

[12] Although we need not address the second prong of the defendant's fair cross section claim, we make the following observation. Through Seaberry, the defendant offered the following three statistical models to demonstrate underrepresentation of African-Americans and Hispanics: (1) absolute dis-

B

We now turn to the defendant's claim that the jury summoning process violated his fourteenth amendment right to equal protection. The defendant largely relies on the arguments made with respect to his sixth amendment claim. For the reasons that follow, this claim is similarly unavailing.

"An equal protection violation in jury selection procedures may be established by proof of (1) underrepresentation of a recognizable group; (2) substantial underrepresentation over a significant period of time; and (3) a selection procedure susceptible to abuse or not racially neutral. . . . Although the equal protection test is similar to the cross section test, the critical difference is that in an equal protection claim the defendant must prove discriminatory purpose." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Moore*, supra, 169 Conn. App. 486; see also *State* v. *Castonguay*, 194 Conn. 416, 421, 481 A.2d 56 (1984) (discriminatory intent required to prove equal protection violation).

By way of review, the trial court concluded that the defendant failed to establish an equal protection violation, finding a failure of proof as to each of the prongs of the equal protection test. We need focus our analysis only on the third prong.[13] Specifically, the trial court found, and we agree, that the defendant failed to demonstrate that Connecticut's jury selection procedure is susceptible to abuse or is not racially neutral. As our

parity; (2) comparative disparity; and (3) statistical decision theory. In *Gibbs*, our Supreme Court rejected each of these models, requiring instead that a defendant utilize the substantial impact test in establishing a fair cross section violation. *State* v. *Gibbs*, supra, 254 Conn. 589–91 (explaining differences among those statistical models and reasons for rejecting them). The defendant did not utilize the substantial impact test in the present case.

[13] Because the test for an equal protection violation in jury selection procedures is stated in the conjunctive, we need not address either of the other two prongs, as a failure of proof on any of the prongs defeats the claim.

Supreme Court explained in *Gibbs*, the third prong is satisfied when "a defendant [demonstrates] that the jury selection process is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable . . . or that the [s]tate [has] . . . deliberately and systematically [denied] to members of [a] race the right to participate as jurors in the administration of justice." (Citation omitted; internal quotation marks omitted.) *State* v. *Gibbs*, supra, 254 Conn. 596. As set forth in part I A of this opinion, the defendant has not established that the state systematically excluded African-Americans and/or Hispanics from the jury selection process. Furthermore, the defendant did not provide the court with any evidence of discriminatory intent with respect to excluding African-Americans or Hispanics. Here, as we found in *Moore*, "[t]he undisputed evidence presented by the defendant reflected that Judicial Branch officials were unaware of the racial and ethnic characteristics of persons summoned for jury duty and that, to the extent that prospective jurors voluntarily provided information related to their race or ethnicity on their confidential juror questionnaire, such information was not retained or recorded." *State* v. *Moore*, supra, 169 Conn. App. 486. As in *Gibbs*, the defendant has failed to establish how the higher rate of nonreporting in response to jury summonses among African-Americans and Hispanics is attributable to the state, rather than to *external* factors beyond the state's control. See *State* v. *Gibbs*, supra, 596–97 ("[a]s the trial court found, there is a greater occurrence of undeliverable jury summonses and failures to report for jury service in the Hispanic community than in the general population, not as a result of racial discrimination, but in the main because of residential mobility and linguistic isolation").

Mindful of the marked similarity between the unsuccessful equal protection claims made in *Gibbs* and

Moore and the claim asserted in the present case, we conclude that the court properly determined that the defendant failed to establish an equal protection violation because, at a minimum, there was no evidence of a jury selection procedure that is susceptible to abuse or that is not racially neutral.

II

The defendant next invites this court to exercise its supervisory authority over the administration of justice to require the collection and/or maintenance of venire panel demographic data in order to allow for analysis of underrepresentation claims. We decline the invitation.

"It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process. . . . The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Indeed, there is no principle that would bar us from exercising our supervisory authority to craft a remedy that might extend beyond the constitutional minimum because articulating a rule of policy and reversing a conviction under our supervisory powers is perfectly in line with the general principle that this court ordinarily invoke[s] [its] supervisory powers to enunciate a rule that is not constitutionally required but that [it] think[s] is preferable as a matter of policy." (Citations omitted; internal

quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 764–65, 91 A.3d 862 (2014).

Section 51-232 (c) provides in relevant part: "The Jury Administrator shall send to a prospective juror a juror confirmation form and a confidential juror questionnaire. Such questionnaire shall include questions eliciting the juror's name, age, race and ethnicity, occupation, education and information usually raised in voir dire examination. *The questionnaire shall inform the prospective juror that information concerning race and ethnicity is required solely to enforce nondiscrimination in jury selection, that the furnishing of such information is not a prerequisite to being qualified for jury service and that such information need not be furnished* if the prospective juror finds it objectionable to do so. . . ." (Emphasis added.)

At bottom, the defendant asks us to make mandatory what the legislature, in enacting § 51-232 (c), has made discretionary—the provision of information concerning race and ethnicity from a prospective juror in a confidential juror questionnaire. Beyond dismissing the appeal in *Moore*, in addressing a similar request, our Supreme Court voiced its reluctance, then its refusal, "to exercise [its] supervisory authority in the sweeping manner sought by the defendant . . . ." *State* v. *Moore*, supra, 334 Conn. 279. Here, the defendant asserts in his supplemental appellate brief, without citation to any authority, that "the Supreme Court's reluctance does not bar this [c]ourt's use of [supervisory] authority." We defer to the consideration of these issues by our Supreme Court's Jury Selection Task Force. See *State* v. *Holmes*, 334 Conn. 202, 250–52, 221 A.3d 407 (2019) (establishing Jury Selection Task Force to be appointed by Chief Justice); *State* v. *Moore*, supra, 334 Conn. 279 ("we anticipate these issues will be considered by the Jury Selection Task Force . . . to suggest those changes to court policies, rules, and legislation necessary to ensure

that our state court juries are representative of Connecticut's diverse population" (citation omitted)).[14]

Furthermore, in *Moore*, this court expressed concern with exercising its supervisory authority in a manner that would effectively rewrite the language of § 51-232 (c). *State* v. *Moore*, supra, 169 Conn. App. 488. Our Supreme Court voiced a similar concern in its opinion. *State* v. *Moore*, supra, 334 Conn. 279. In an attempt to alleviate the separation of powers concerns underlying the rationale for declining to invoke our supervisory power in *Moore*, the defendant asserts that we could direct the state to "maintain the data regarding prospective jurors who do fill out the questionnaire." As this court recognized in *Moore*, however, "the resulting data, reflecting information concerning some but not all prospective jurors, would not provide an accurate basis on which to assess the racial and ethnic characteristics of prospective jurors as a whole." *State* v. *Moore*, supra, 169 Conn. App. 489 n.6.

In light of the foregoing, we decline to exercise our supervisory authority and craft the extraordinary remedy requested by the defendant.

[14] The charge of the task force, whose work has been completed, was "[t]o propose meaningful changes to be implemented via court rule or legislation, including, but not limited to (1) proposing any necessary changes to . . . [§] 51-232 (c) which governs the confirmation form and questionnaire provided to prospective jurors, (2) improving the process by which we summon prospective jurors in order to ensure that venires are drawn from a fair cross section of the community that is representative of its diversity, (3) drafting model jury instructions about implicit bias, and (4) promulgating new substantive standards that would eliminate *Batson*'s requirement of purposeful discrimination." Connecticut Judicial Branch Jury Selection Task Force Charge, available at https://jud.ct.gov/Committees/jury taskforce/default.htm (last visited April 15, 2021).

On December 31, 2020, the task force issued its final report, containing recommendations for systemic jury reform in Connecticut. See Jury Selection Task Force, Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson (December 31, 2020), available at https://jud.ct.gov/Committees/jury taskforce/ReportJurySelectionTaskForce.pdf (last visited April 15, 2021).

III

The defendant's final claim is that the trial court erred in prohibiting him from inquiring about certain Probate Court matters that he claimed to be relevant to the victim's purported bias against him. The state contends, as an initial matter, that because the defendant raises a different claim on appeal than he did at trial, the claim is unreviewable. We agree with the state.

The scope of our appellate review of evidentiary issues on appeal is limited to those issues that were pursued at trial. "Appellate review of evidentiary rulings is ordinarily limited to the specific legal [ground] raised by the objection of trial counsel. . . . To permit a party to raise a different ground on appeal than [that] raised during trial would amount to trial by ambuscade, unfair both to the trial court and to the opposing party." (Internal quotation marks omitted.) *State* v. *Bennett*, 324 Conn. 744, 761, 155 A.3d 188 (2017).

The following additional background is relevant to our resolution of this claim. On December 6, 2017, during the defendant's case-in-chief, the defendant sought to call as a witness Attorney Bryan McEntee, who had been appointed by the Probate Court to represent H. On the state's request for an offer of proof as to Attorney McEntee's testimony, the defendant proffered three purposes, the second of which is in dispute on appeal.

First, the defendant sought to enter into evidence, through Attorney McEntee, a copy of H's passport to show that H was in Jamaica during a particular period of time. The state had no objection.

Second, the defendant sought to offer Attorney McEntee's "position about whether [the victim] should . . . be appointed . . . conservator of [H's] estate." When the court questioned the relevance of such evidence, the defendant responded that Attorney McEntee's "concern about [the victim's] misuse of funds" went to her "truthfulness and trustworthiness," which,

according to the defendant, supported his defense that the victim had fabricated the allegations against him in order to acquire H's money and the familial home. The court excluded Attorney McEntee's "opinion as to whether [the victim] was misusing funds" as irrelevant and, thus, inadmissible. Notwithstanding the defendant's statement in his principal appellate brief that he "is not pursuing the claim that . . . Attorney McEntee's opinions regarding [the victim] should have been admitted," this second category of evidence remains the subject of the defendant's evidentiary claim on appeal.

Third, the defendant sought to introduce a bank record indicating that the victim had already paid for H's nursing home care in Jamaica before the victim went to Jamaica. According to the defendant, this evidence would demonstrate that the victim lied under oath before the Probate Court when she testified there that her decision with respect to H's care was not made until after she visited Jamaica and consulted with her family. The court sustained the state's objection on relevance grounds. On appeal, the defendant has expressly abandoned any challenge to the exclusion of this evidence.

On appeal, the defendant claims that the court "wrongly sustained the objection to all evidence regarding the probate matter, wrongly deeming it 'collateral.' "[15] The defendant contends that the court "should have admitted evidence which pertained to the [victim's] bias or motive to lie about [the defendant]." The defendant further argues that "Attorney McEntee's recollection of 'what happened' at the probate proceeding (the [victim's] efforts to seek [H's] property), would be fact evidence rather than his opinion."

As our careful review of the trial transcript reveals, the fundamental flaw with the defendant's evidentiary

[15] We note that, in making this assertion, the defendant cites to the portion of the transcript in which the court was ruling on the *third* category of proposed evidence.

claim is that his proffer before the trial court, with respect to the second category of evidence, went no further than to seek Attorney McEntee's "*position* about whether or not [the victim] should also be appointed . . . conservator of the estate," and "his *concern* about [the victim's] misuse of funds."[16] (Emphasis added.) As stated previously in this opinion, the defendant expressly abandoned in his principal appellate brief "the claim that . . . Attorney McEntee's opinions regarding [the victim] should have been admitted." Accordingly, we conclude that the defendant's present claim, which attempts to cast a wider net than the proffer before the trial court, was not raised before the trial court and, therefore, we decline to review it. See *State* v. *Fernando V.*, 331 Conn. 201, 211–13, 202 A.3d 350 (2019).

The judgment is affirmed.

In this opinion the other judges concurred.

ATLANTIC ST. HERITAGE ASSOCIATES, LLC *v.* PAUL NICHOLAS BOLOGNA (AC 44441)

Prescott, Elgo and Suarez, Js.

Syllabus

The plaintiff sought, by way of summary process, to regain possession of certain premises occupied by the defendant. The trial court granted the plaintiff's motion for default for failure to plead and rendered a judgment of possession in favor of the plaintiff. The following day, the defendant filed a motion to open the judgment, which the court denied one week later. Notice of the court's decision denying the motion to open issued two days after that, and the defendant appealed that same day. Thereafter, the plaintiff filed a motion to terminate the appellate stay, which sought, in substance, a determination that there was not, in fact, an appellate stay in effect because the defendant had not filed his appeal within the five day statutory (§ 47a-35) appeal period in summary process

[16] The record also makes clear that, by its own comments, the court understood the defendant's proffer in this regard to be limited to Attorney McEntee's "opinion" as to whether the victim was misusing funds.

actions and that the filing of the motion to open did not extend the appeal period. The defendant filed an objection, arguing that the case was controlled by *Young* v. *Young* (249 Conn. 482). Following a hearing, the court determined that no appellate stay was in effect that would prevent the execution of the judgment of possession during the pendency of the appeal. The defendant thereafter filed a timely motion for review with this court. *Held* that the case was controlled by *Young*, and, therefore, the defendant's appeal was timely and, pursuant to § 47a-35 (b), execution of the judgment of possession was stayed until the final determination of the cause: because the defendant filed his motion to open well within the five day appeal period and, pursuant to the applicable rule of practice (§ 63-1 (c) (1)), a motion to open is a motion that, if granted, would render the judgment ineffective, a new five day appeal period arose when notice of the court's decision denying the motion to open issued, and the defendant filed his appeal on that same day, well within the new appeal period; accordingly, the defendant's motion for review and the relief requested therein were granted, and the trial court's order on the plaintiff's motion to terminate the appellate stay was vacated.

Considered March 17—officially released April 27, 2021

Procedural History

Summary process action brought to the Superior Court in the judicial district of Stamford-Norwalk, Housing Session at Norwalk, where the defendant was defaulted for failure to plead; thereafter, the court, *Spader, J.*, rendered a judgment of possession for the plaintiff; subsequently, the court denied the defendant's motion to open, and the defendant appealed to this court; thereafter, the court, *Spader, J.*, issued an order on the plaintiff's motion to terminate the appellate stay, and the defendant filed a motion for review with this court. *Motion for review granted*; *relief granted.*

Paul N. Bologna, self-represented, in support of the motion.

Kurosh L. Marjani and *Gessi Giarratana*, in opposition to the motion.

Opinion

PRESCOTT, J. In this commercial summary process action, the trial court determined that there was no automatic appellate stay that would prevent the execution of the judgment of possession during the pendency

of this appeal. Pursuant to Practice Book § 61-14, the defendant, Paul Nicholas Bologna, doing business as Paul N. Bologna & Associates, timely filed a motion for review of that decision. We agree with the defendant that the trial court misapplied our Supreme Court's decision in *Young* v. *Young*, 249 Conn. 482, 733 A.2d 835 (1999), in reaching the conclusion that there is no automatic stay in existence. By order dated March 17, 2021, we granted the defendant's motion for review, granted the relief requested, vacated the trial court's decision, and indicated that an opinion would follow. This opinion provides our reasons for that order.

The following procedural history is relevant to our review. The plaintiff, Atlantic St. Heritage Associates, LLC, is the owner of a commercial building located at 184 Atlantic Street in Stamford. The defendant occupies a portion of the basement of that building (premises). The plaintiff served a notice to quit on the defendant on October 14, 2020, for nonpayment of rent, lapse of time, and termination of whatever right or privilege he once had to occupy the premises. The defendant did not quit possession. The plaintiff then initiated this action by service of a summary process summons and a three count complaint on November 17, 2020.

On December 3, 2020, after the defendant had appeared, the plaintiff filed a motion for default for failure to plead and for a judgment of immediate possession to enter on the default. On December 7, 2020, the defendant filed an objection to that motion, but he did not file an answer to the complaint.

On December 8, 2020, the court, *Spader, J.*, granted the plaintiff's motion for default and rendered a judgment of immediate possession in favor of the plaintiff. On December 9, 2020, the defendant filed a motion to open the judgment, which the court denied on December 16, 2020. Notice of the court's decision denying the motion to open issued on December 18, 2020, and the

defendant filed this appeal that day. The defendant's appeal form referenced both the date of the judgment of possession and the denial of the motion to open.[1]

On January 7, 2021, the plaintiff filed a motion to terminate the appellate stay pursuant to Practice Book § 61-11 (e). The substance of the motion, however, did not seek termination of the appellate stay but, instead, sought a determination that there was no appellate stay in effect because the defendant did not file his appeal within five days of the judgment of possession and that the filing of a motion to open does not extend the appeal period. The defendant filed an objection arguing that this matter was controlled by *Young* v. *Young*, supra, 249 Conn. 482. On January 26, 2021, the court heard the parties at a remote hearing on the record. On February 4, 2021, the court issued a four page memorandum of decision in which it determined that there was no appellate stay in effect and, therefore, no stay for it to terminate. This timely motion for review followed.[2]

We begin our discussion by acknowledging that "[s]ummary process is a special statutory procedure designed to provide an expeditious remedy. . . . It enable[s] landlords to obtain possession of leased premises without suffering the delay, loss and expense to which, under the common-law actions, they might be subjected by tenants wrongfully holding over their terms. . . . Summary process statutes secure a prompt hearing and final determination. . . . Therefore, the statutes relating to summary process must be narrowly construed and strictly followed." (Internal quotation marks omitted.) *Bayer* v. *Showmotion, Inc.*, 292 Conn. 381, 388, 973 A.2d 1229 (2009).

[1] The defendant included December 8, 2020, as the "[d]ate of judgment(s) or decision(s) being appealed"; December 18, 2020, as the "[d]ate of issuance of notice on any order on any motion that would render judgment ineffective"; and listed "[d]enial of motion to open" as the action that constitutes an appealable judgment or decision.

[2] Notice of the court's decision issued from the appellate clerk on February 11, 2021. The defendant filed this timely motion for review on February 17,

Appeals and stays of execution relating to summary process actions are governed by General Statutes § 47a-35.[3] In *HUD/Barbour-Waverly* v. *Wilson*, 235 Conn. 650, 656, 668 A.2d 1309 (1995), our Supreme Court determined that "the legislature intended to make the five day time limitation set forth in § 47a-35 a jurisdictional prerequisite to an appeal from a housing court ruling in a summary process eviction proceeding." Id., 656. In that case, the defendant filed her appeal "nineteen days after the expiration of the appeal period set forth in § 47a-35." Id., 655. Within the five day appeal period, however, she had filed a motion for an extension of time to appeal, which the trial court had granted. Id., 653–55. Our Supreme Court determined that the extension of time to appeal had no effect and held that this court had properly dismissed the defendant's appeal for lack of subject matter jurisdiction on the ground that it was untimely. Id., 659.

Four years later, in *Young* v. *Young*, supra, 249 Conn. 482, our Supreme Court considered the effect, if any, of a motion to reargue pursuant to Practice Book § 11-11 filed within the five day appeal period of § 47a-35. It held that the motion to reargue was unlike the motion for an extension of time to appeal that was at issue in *HUD/Barbour-Waverly*. Id., 489 n.15. Rather, the timely filing of the "motion to reargue suspended the five day

2021. See Practice Book § 66-6. The plaintiff filed a timely opposition to this motion.

[3] General Statutes § 47a-35 provides: "(a) Execution shall be stayed for five days from the date judgment has been rendered, provided any Sunday or legal holiday intervening shall be excluded in computing such five days.

"(b) No appeal shall be taken except within such five-day period. If an appeal is taken within such period, execution shall be stayed until the final determination of the cause, unless it appears to the judge who tried the case that the appeal was taken solely for the purpose of delay or unless the defendant fails to give bond, as provided in section 47a-35a. If execution has not been stayed, as provided in this subsection, execution may then issue, except as otherwise provided in sections 47a-36 to 47a-41, inclusive."

appeal period in § 47a-35 until the . . . denial of that motion." Id., 496.

The court in *Young* relied on our rules of practice, which "[do] not enlarge or modify the statutory appeal period, but, rather, [give] guidance in determining when the appeal period shall commence, and in the case of any motion, which, if granted, would allow the court to render a new judgment, when the new appeal period shall commence." Id., 495; see also Practice Book § 63-1 (c) (1).[4] The court reasoned that a motion to reargue pursuant to Practice Book § 11-11 is a motion that, if granted, could render the judgment or decision ineffective under Practice Book § 63-1. *Young* v. *Young*, supra, 249 Conn. 495. Our Supreme Court applied Practice Book § 63-1 and determined that the defendants' motion to reargue, which was filed within the five day appeal period, suspended that appeal period until the trial court resolved that motion. Id., 496. The defendants timely appealed following the denial of that motion, and, therefore, their "appeal of the underlying judgment was timely." Id.

[4] In its analysis, the court in *Young* refers to Practice Book § 63-1 (b). *Young* v. *Young*, supra, 249 Conn. 494. Practice Book § 63-1 has been amended several times since *Young* was decided, and the relevant language now resides in subsection (c).

Practice Book § 63-1 (c) (1) provides in relevant part: "If a motion is filed within the appeal period that, if granted, would render the judgment, decision or acceptance of the verdict ineffective, either a new twenty day period or applicable statutory time period for filing the appeal shall begin on the day that notice of the ruling is given on the last such outstanding motion . . . .

"Motions that, if granted, would render a judgment, decision or acceptance of the verdict ineffective include, but are not limited to, motions that seek: the opening or setting aside of the judgment; a new trial; the setting aside of the verdict; judgment notwithstanding the verdict; reargument of the judgment or decision; collateral source reduction; additur; remittitur; or any alteration of the terms of the judgment.

"Motions that do not give rise to a new appeal period include those that seek: clarification or articulation, as opposed to alteration, of the terms of the judgment or decision; a written or transcribed statement of the trial court's decision; or reargument of a motion listed in the previous paragraph. . . ."

In the present case, as noted by the trial court, the defendant did *not* file a motion to reargue pursuant to Practice Book § 11-11 within the five day appeal period. He instead filed a motion to open the judgment. Because, however, a motion to open is among the motions expressly included in Practice Book § 63-1 (c) (1), we are not persuaded that *Young* is distinguishable from the present case on that basis. We will nevertheless address the plaintiff's arguments to the contrary.

The plaintiff and the trial court relied on an older decision of the Appellate Session of the Superior Court for the proposition that "the filing of a motion to open a summary process judgment does not toll the [five day] appeal period." *Maccio* v. *Hundley*, 36 Conn. Supp. 623, 625, 422 A.2d 953 (App. Sess. 1980). The motion to open in *Maccio*, like the motion in this case, was filed one day after the judgment of possession was rendered. Id., 624. The defendant in *Maccio* appealed following the denial of the motion to open. Id. The court in *Maccio* rejected the defendant's argument concerning the applicability of the rule of practice equivalent to Practice Book § 63-1 (c) (1) that was then in effect[5] and dismissed the appeal as untimely as to the judgment of possession. Id., 624–25. To the extent that *Maccio* held that this rule of practice is inapplicable in the context of a summary process action, it is inconsistent with *Young* and is no longer good law.

The trial court here supports its reliance on *Maccio* with reference to this court's decision in *Lopez* v. *Livingston*, 53 Conn. App. 622, 731 A.2d 335 (1999), which was issued shortly before our Supreme Court officially

[5] Practice Book (1978) § 3007 provides in relevant part: "The party appealing shall, within twenty days, except where a different period is provided by statute, from the issuance of notice of the rendition of the judgment or decision from which the appeal is taken file an appeal . . . *but if within the appeal period any motion is filed which, if granted, would render the judgment or decision ineffective, as, for example, a motion to open the judgment . . . the period of time for filing an appeal shall commence*

released its decision in *Young*. In *Lopez*, the defendants conceded that they filed their motion to open "after the five day statutory appeal period set forth in . . . § 47a-35 (b) had expired." Id., 625. They appealed from the denial of that motion to open.[6] Relying on *Maccio*, this court rejected the defendants' argument that "the judgment of possession in favor of the plaintiff was suspended by the defendants' filing of the motion to open" and concluded that the "filing of a motion to open . . . does not stay execution of the judgment." *Lopez* v. *Livingston*, supra, 625 n.6. That statement in *Lopez* is correct when, as in *Lopez* itself, the motion to open is filed *outside* of the five day statutory appeal period from the judgment of possession. Under those circumstances, there is no stay of execution pursuant to § 47a-35 (b).

The present case is controlled by *Young*. The defendant here filed his motion to open one day after the court rendered the judgment of possession, well within the five day appeal period set forth in § 47a-35. A motion to open is a motion that, if granted, would render the judgment ineffective pursuant to Practice Book § 63-1 (c) (1). A new five day appeal period from the judgment of possession, including a new stay period, arose on December 18, 2020, when notice of the trial court's decision denying the motion to open issued. See *Young* v. *Young*, supra, 249 Conn. 496. The defendant filed this appeal on December 18, 2020, which was within that new five day appeal period. Accordingly, we conclude that this appeal is timely as to the underlying judgment of possession and the denial of the motion to open[7] and

from the issuance of notice of the decision upon the motion . . . ." (Emphasis added.)

[6] Although not stated in that opinion, a review of the record in *Lopez* indicates that the defendants filed their appeal within five days of the denial of their untimely motion to open. This court determined that it had jurisdiction to consider the appeal from the denial of the motion to open. *Lopez* v. *Livingston*, supra, 53 Conn. App. 623 n.1.

[7] See footnote 1 of this opinion.

"execution shall be stayed until the final determination of the cause" pursuant to § 47a-35 (b).

The defendant's motion for review is granted, the relief requested is granted, and the trial court's February 4, 2021 order on the plaintiff's motion to terminate the appellate stay is vacated.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GEORGE SILER (AC 43351)

Elgo, Suarez and DiPentima, Js.

Syllabus

The defendant, who had been convicted, on a conditional plea of nolo contendere, of the crimes of possession of narcotics with intent to sell and criminal possession of a firearm, appealed to this court, claiming that the trial court improperly denied his motion to suppress certain evidence that was seized from his residence by the police. Relying on information from a confidential informant, the police executed a search and seizure warrant at the defendant's residence, where they recovered drugs, firearms and other contraband. The police affidavit that accompanied the warrant application had described two controlled purchases of heroin and stated that the police surveilled the defendant's residence while the confidential informant contacted the defendant and arranged to meet him at a specific location to complete the transaction. The confidential informant had given the police a description of the defendant, whom he knew as G, and the car that he drove as well as G's telephone number and the location of his residence. The police thereafter identified the defendant as the person described by the confidential informant through a check of law enforcement databases and the Office of Adult Probation after the police learned that he was on probation in connection with a prior robbery. Prior to the controlled drug purchases, the police also conducted surveillance at the defendant's residence, where they saw a male who matched the description provided by the confidential informant enter the same type of vehicle that had been described by the confidential informant. Thereafter, when shown an unmarked photograph of the defendant by the police, the confidential informant immediately identified the individual in the photograph as G. On appeal, the defendant urged this court to overrule our Supreme Court's decision in *State* v. *Barton* (219 Conn. 529), in which the court adopted a totality of the circumstances analysis for the determination of probable cause under article first, § 7, of the Connecticut constitution

and rejected the rigid analytical standards previously required by *State* v. *Kimbro* (197 Conn. 219). The defendant further claimed that the police affidavit in support of the application for a search warrant did not establish probable cause because it lacked the necessary nexus between his residence and the criminal activity alleged in the warrant application. *Held*:

1. This court declined the defendant's invitation to overrule our Supreme Court's decision in *Barton* to adopt a totality of the circumstances analysis for the determination of probable cause under article first, § 7; this court, as an intermediate appellate tribunal, was not at liberty to modify, reconsider or overrule the precedent of our Supreme Court, a bedrock precept that the defendant misconstrued in arguing that this court nonetheless could conduct its own thoughtful review of *Kimbro* and *Barton*, and, apart from that fundamental deficiency, the defendant provided no federal or state precedent to support his contention that the test adopted in *Barton* should be overruled, and his failure to provide an independent state constitutional analysis in accordance with *State* v. *Geisler* (222 Conn. 672) rendered his claim with respect to the state constitution abandoned.
2. The trial court properly denied the defendant's motion to suppress, as the police warrant application contained sufficient information from which a judge reasonably could conclude that there was a fair probability that contraband or evidence of a crime would be found in the defendant's residence: the affidavit contained a detailed description of the alleged heroin dealer that matched the defendant's physical attributes, shared his home address and indicated that the heroin dealer drove the same type of vehicle as did the defendant, the affidavit indicated that the confidential informant positively identified the defendant immediately from a photograph he was shown of the alleged heroin dealer, and surveillance conducted at the defendant's residence confirmed that he and the vehicle at issue were at the residence prior to and after the controlled drug purchases; moreover, although the trial court acknowledged that the affidavit did not identify with any specificity the time period of the first controlled drug purchase, the court made a practical, commonsense decision in concluding that the affidavit's phrase, "prior to the buy taking place," could have been found by the court that issued the warrant to be a period of time in very close approximation to the arrangements made for the first controlled buy, and the affidavit's statement that surveillance showed that the defendant had arrived at his home just prior to the second buy permitted the inference that narcotics were stored at the residence.

Argued January 13—officially released April 27, 2021

Procedural History

Substitute information charging the defendant with two counts of the crime of criminal possession of a firearm, and with one count each of the crimes of possession of narcotics with intent to sell by a person who is

not drug-dependent and possession of narcotics with intent to sell within 1500 feet of a day care center, brought to the Superior Court in the judicial district of Fairfield, where the court, *Russo*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the state filed a substitute information charging the defendant with two counts of the crime of criminal possession of a firearm and with the crime of possession of narcotics with intent to sell; subsequently, the defendant was presented to the court, *Devlin*, *J.*, on a conditional plea of nolo contendere to the charges of criminal possession of a firearm and possession of narcotics with intent to sell; thereafter, the court, *Alexander*, *J.*, rendered judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

W. Theodore Koch III, assigned counsel, for the appellant (defendant).

C. Robert Satti, *Jr.*, supervisory assistant state's attorney, with whom were *Joseph T. Corradino*, state's attorney, and, on the brief, *John C. Smriga*, former state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, George Siler, appeals from the judgment of conviction rendered following a conditional plea of nolo contendere to two counts of criminal possession of a firearm in violation of General Statutes § 53a-217 (a), and to violating the state dependency producing drug laws; see General Statutes § 21a-277 (a); for possession of narcotics with intent to sell. On appeal, the defendant claims that the trial court improperly denied his motion to suppress certain evidence seized from his residence. We affirm the judgment of the trial court.

On December 12, 2017, members of the Stratford Police Department conducted a search of the residential property known as 943 Success Avenue in Stratford

(residence) pursuant to a search and seizure warrant signed by a judge of the Superior Court. They recovered, inter alia, 84.7 grams of suspected heroin, 5.8 grams of suspected marijuana, 188 wax paper folds secured by rubber bands, a digital scale, a ski mask, two firearms, 293 rounds of ammunition, an article of mail addressed to the defendant, and a credit card issued to the defendant. The defendant thereafter was arrested and charged with the aforementioned offenses.

On January 17, 2018, the defendant filed a motion to suppress all evidence discovered during the December 12, 2017 search for lack of probable cause. Following a hearing, the court denied that motion. The defendant then entered a conditional plea of nolo contendere to all charges, thereby preserving his right of appeal.[1] On July 31, 2019, the defendant was sentenced to a total effective term of fourteen years of incarceration, execution suspended after eight years, with five years of probation. This appeal followed.

On appeal, the defendant contends that the court improperly denied his motion to suppress. His claim is twofold in nature. First, he urges us to reconsider the precedent of our Supreme Court in *State* v. *Barton*, 219 Conn. 529, 544, 594 A.2d 917 (1991), in which the court adopted a totality of the circumstances test for determining whether an affidavit sufficiently establishes probable cause for the issuance of a warrant. The defendant then asks us to depart from that precedent and conclude that the affidavit submitted in support of the

[1] General Statutes § 54-94a provides in relevant part: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress or motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. . . ."

The trial court in this case made such a determination at the defendant's May 16, 2019 plea hearing.

search warrant in the present case did not provide the requisite probable cause. We address each claim in turn.

I

SUPREME COURT PRECEDENT

In this appeal, the defendant asks this court to revisit the precedent of our Supreme Court with respect to the legal standard applicable to probable cause determinations pursuant to article first, § 7, of the state constitution when a search warrant is requested by law enforcement.[2] As our Supreme Court has explained, article first, § 7, "like the fourth amendment to the federal constitution that it closely resembles, safeguards the privacy, the personal security, and the property of the individual against unjustified intrusions by agents of the government." (Footnote omitted.) *State* v. *Barton*, supra, 219 Conn. 540.

In *State* v. *Kimbro*, 197 Conn. 219, 236, 496 A.2d 498 (1985), overruled in part by *State* v. *Barton*, 219 Conn. 529, 594 A.2d 917 (1991), a divided Supreme Court[3] concluded, as a matter of state constitutional law, that article first, § 7, required application of "the more specific standards of the *Aguilar-Spinelli* test";[4] see

[2] Article first, § 7, of the Connecticut constitution provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

[3] Justices Dannehy and Santaniello joined Justice Healey's majority opinion. Justices Shea and Callahan issued dissenting opinions.

[4] "The *Aguilar-Spinelli* test provides a method for evaluating the existence of probable cause . . . when a search warrant affidavit is based upon information supplied to the police by a confidential informant. . . . Under the *Aguilar-Spinelli* test, [t]he issuing judge must be informed of (1) some of the underlying circumstances relied on by the informant in concluding that the facts are as he claims they are, and (2) some of the underlying circumstances from which the officer seeking the warrant concluded (a) that the informant, whose identity need not be disclosed, was credible, or (b) that the information was reliable. . . . When the information supplied by the informant fails to satisfy the *Aguilar-Spinelli* test, probable cause may still be found if the warrant application affidavit sets forth other circumstances—typically independent police corroboration of certain details provided by the informant—that bolster the deficiencies." (Citation omitted; internal

Aguilar v. *Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli* v. *United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); rather than "the amorphous [totality of the circumstances] standard" adopted by the United States Supreme Court in *Illinois* v. *Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). *State* v. *Kimbro*, supra, 236. In his dissenting opinion, Justice Callahan opined that "making *Aguilar* and *Spinelli* the test for determining probable cause under the state constitution is a step backward into that labyrinthine body of hypertechnical rules concerning the criminal law from which I thought we were gradually beginning to emerge." Id., 246 (*Callahan, J.*, dissenting).

The Supreme Court reconsidered that precedent six years later. In *State* v. *Barton*, supra, 219 Conn. 529, the court noted that "the case law applying the *Aguilar-Spinelli* test has come to be encrusted with an overlay of analytical rigidity that is inconsistent with the underlying proposition that it is the constitutional function of the magistrate issuing the warrant to exercise discretion in the determination of probable cause. That discretion must be controlled by constitutional principles and guided by the evidentiary standards developed in our prior cases, but it should not be so shackled by rigid analytical standards that it deprives the magistrate of the ability to draw reasonable inferences from the facts presented." Id., 534–35. The court further observed that "application of the standards mandated by *Kimbro* has resulted at times in unduly technical readings of warrant affidavits, and we reject such an inappropriate methodology." Id., 534.

The court also explained that a totality of the circumstances analysis is "more consistent with traditional assessments of probable cause. . . . [It] permits a

quotation marks omitted.) *State* v. *Respass*, 256 Conn. 164, 174 n.12, 770 A.2d 471, cert. denied, 534 U.S. 1002, 122 S. Ct. 478, 151 L. Ed. 2d 392 (2001).

judge issuing a warrant greater freedom to assess the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip. . . . [T]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." (Citation omitted; internal quotation marks omitted.) Id., 537. The court thus concluded, "upon careful reconsideration, that the totality of the circumstances analysis adopted [by the United States Supreme Court in] *Gates* will continue to guarantee the people of Connecticut the full panoply of rights that they have come to expect as their due. . . . We accordingly depart from the more rigid analytical structure imposed in *Kimbro* in order to restore the proper constitutional authority of magistrates to weigh the sufficiency of the information presented to them in warrant affidavits and to balance the legitimate needs of law enforcement officers against the highly prized rights of privacy and personal security afforded by our constitution." (Citations omitted; internal quotation marks omitted.) Id., 546. The appellate courts of this state have adhered to that precedent in the thirty years since *Barton* was decided. See, e.g., *State* v. *Nowell*, 262 Conn. 686, 697, 817 A.2d 76 (2003); *State* v. *Velasco*, 248 Conn. 183, 189–90, 728 A.2d 493 (1999); *State* v. *DiMeco*, 128 Conn. App. 198, 204, 15 A.3d 1204, cert. denied, 301 Conn. 928, 22 A.3d 1275, cert. denied, 565 U.S. 1015, 132 S. Ct. 559, 181 L. Ed. 2d 398 (2011); *State* v. *Cabezudo*, 92 Conn. App. 303, 305, 884 A.2d 1033 (2005), cert. denied, 277 Conn. 901, 891 A.2d 3 (2006).

The defendant now asks this court to reconsider the wisdom of the Supreme Court's decision in *Barton*.[5]

[5] In his principal appellate brief, the defendant insists that "our Supreme Court's rejection of *Kimbro* should be revisited"; that "*Kimbro* should be

We refuse to do so. As an intermediate appellate tribunal, this court is not at liberty to modify, reconsider, or overrule the precedent of our Supreme Court. See *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at Lloyd's & Cos. Collective*, 121 Conn. App. 31, 48–49, 994 A.2d 262, cert. denied, 297 Conn. 918, 996 A.2d 277 (2010). Whether to alter the applicable legal standard governing probable cause determinations when a search warrant is requested remains the prerogative of this state's highest court. See *Reville* v. *Reville*, 312 Conn. 428, 459 n.29, 93 A.3d 1076 (2014) ("once [the Connecticut Supreme Court] has finally determined an issue, for a lower court to reanalyze and revisit that issue is an improper and fruitless endeavor" (internal quotation marks omitted)); *State* v. *Fuller*, 56 Conn. App. 592, 609, 744 A.2d 931 ("[i]t is not within our function as an intermediate appellate court to overrule Supreme Court authority"), cert. denied, 252 Conn. 949, 748 A.2d 298, cert. denied, 531 U.S. 911, 121 S. Ct. 262, 148 L. Ed. 2d 190 (2000).

In his appellate reply brief, the defendant misconstrues that bedrock precept. The defendant argues that, although this court is bound by Supreme Court precedent, it "certainly may nonetheless conduct its own thoughtful review of *Kimbro* and its rationale, and of [*Barton*] and its results." He is mistaken. This court is not permitted to reconsider or reevaluate the precedent of our Supreme Court. See, e.g., *State* v. *Brown*, 73 Conn. App. 751, 756, 809 A.2d 546 (2002) ("Our Supreme Court is the ultimate arbiter of the law in this state. We, as an intermediate appellate court, cannot reconsider the decisions of our highest court."); *State* v. *Rodriguez*, 63 Conn. App. 529, 532, 777 A.2d 704 ("we, as an intermediate appellate court, do not reevaluate Supreme Court decisions and are bound by those deci-

revived"; that "[t]he "loosening of the *Aguilar-Spinelli* test was unnecessary"; and that, "[i]t is, therefore, now, more than ever, time to revisit" *Barton* . . . ."

sions''), cert. denied, 256 Conn. 936, 776 A.2d 1151 (2001).

Apart from that fundamental deficiency, the defendant has provided no federal or state precedent to support his contention that the totality of the circumstances test adopted by the United States Supreme Court in *Illinois* v. *Gates*, supra, 462 U.S. 213, and by our Supreme Court in *State* v. *Barton*, supra, 219 Conn. 529, should be overruled. Furthermore, although both *Kimbro* and *Barton* were predicated on the protections of article first, § 7, of the Connecticut constitution, the defendant has failed to provide 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). For all those reasons, we decline the defendant's invitation to revisit our Supreme Court's decision in *Barton*.

II

PROBABLE CAUSE

We next turn to the question of probable cause. The defendant claims that the court improperly denied his motion to suppress because the affidavit submitted in support of the search warrant did not establish probable cause. More specifically, he contends that the necessary nexus between the residence and the criminal activity alleged in the warrant application was lacking. We do not agree.

"The standards for upholding a search warrant are well established. We uphold the validity of [the] warrant . . . [if] the affidavit at issue presented a substantial factual basis for the magistrate's conclusion that probable cause existed." (Internal quotation marks omitted.) *State* v. *Batts*, 281 Conn. 682, 699–700, 916 A.2d 788, cert. denied, 552 U.S. 1047, 128 S. Ct. 667, 169 L. Ed.

2d 524 (2007). "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." (Internal quotation marks omitted.) *State* v. *Respass*, 256 Conn. 164, 173, 770 A.2d 471, cert. denied, 534 U.S. 1002, 122 S. Ct. 478, 151 L. Ed. 2d 392 (2001). "[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*, supra, 701.

Our determination of whether an affidavit sufficiently establishes probable cause is governed by the " 'totality of the circumstances' " test enunciated in *State* v. *Barton*, supra, 219 Conn. 544. That test requires the judge issuing the warrant "to make a practical, nontechnical decision whether there is a fair probability of finding contraband or evidence of a crime in a particular place. In coming to that decision, the [judge] must consider all the circumstances set forth in the affidavit, including the factual circumstances from which the 'veracity' and the 'basis of knowledge' of persons supplying hearsay information can be determined." Id., 552.

When the decision of a judge to issue a search and seizure warrant is challenged, the reviewing court "must determine [whether] the affidavit presented a substantial factual basis upon which the [judge] could conclude that probable cause existed. . . . Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." (Citations omitted; internal quotation marks omitted.) Id. "Whether the trial court properly found that the facts submitted were enough to support a finding of probable cause is a question of law. . . . The trial court's determination on the issue, therefore, is subject to plenary review on appeal." (Citation omitted; internal quotation marks omitted.) *State* v. *Batts*, supra, 281 Conn. 701. In conducting that review, "[w]e consider the four corners of the affidavit and, giving proper deference to the issuing [judge], determine whether the issuing [judge] reasonably could have concluded that probable cause existed." *State* v. *Rodriguez*, 163 Conn. App. 262, 266, 135 A.3d 740, cert. denied, 320 Conn. 934, 134 A.3d 622, cert. denied, U.S. , 137 S. Ct. 167, 196 L. Ed. 2d 140 (2016).

The warrant affidavit in the present case was executed by two detectives with the Stratford Police Department, who, at that time, were assigned to its narcotics, vice and intelligence unit. In that affidavit, the detectives averred that they had spoken with a confidential informant (informant) in October, 2017, who indicated that an individual known as "George" had been "supplying amounts of heroin within the town of Stratford for approximately [one] year." The informant described George as "a black male with dreads who is in his late twenties" who was selling "heroin to street level and mid-level narcotics dealers." The informant also provided George's telephone number, which the informant used to call or

text him. In addition, the informant stated that George "lives in the area of Success Avenue and operates a silver Nissan Maxima with Maine plates."

The detectives explained that they subsequently identified the defendant as the person described as George by the informant through a check of various law enforcement databases. They recited the defendant's criminal record and stated that the defendant currently was on probation for an incident that transpired in 2011, for which he was charged with robbery in the first degree with a deadly weapon and reckless endangerment. The detectives also stated that the residence was listed as the defendant's address on file with the Office of Adult Probation, and his phone number matched the one provided by the informant.

The detectives stated that they then conducted surveillance at the residence and observed a male who matched both (1) the description provided by the informant and (2) probation and booking photographs of the defendant. They also observed that male enter a silver Nissan Maxima with Maine license plates parked in the driveway of the residence. The informant thereafter was shown "a colored unmarked photo" of the defendant; the informant "immediately stated that the individual in the photograph was the person that he/she knows as 'George.' "

The affidavit then described two controlled purchases of heroin that were conducted "[d]uring the week ending [November 26, 2017]," and the "week ending [December 3, 2017]," respectively. On both occasions, the surveillance was conducted at the residence, where the defendant was observed operating the Nissan Maxima with a Maine license plate and then entering the residence. Each time, the informant contacted "George" by calling the defendant's phone number and arranged to meet at a specific location in Stratford to purchase heroin from him. The informant then met with "George"

to complete the narcotics transaction while under surveillance by law enforcement. When the transaction concluded, the informant "confirmed that the black male that sold him/her the heroin was the male that he/she knows as 'George' and was the person he/she [previously] identified in the photograph" provided by law enforcement. Furthermore, after both controlled purchases concluded, the detectives averred that "[s]urveillance showed that [the defendant] and the Nissan Maxima bearing [Maine license plates] were both at the residence immediately after the buy occurred."

The affidavit also indicated that "[s]urveillance shows that [the defendant] continues to reside at [the residence]" and that the defendant "has been seen at the aforementioned residence during various day, evening and night hours." The detectives further stated that, "based on training and experience, the affiants know that individuals who traffic illegal drugs will store their drugs in their homes, basements, garages, vehicles and other residences to avoid law enforcement detection. . . . They will use various weapons, including but not limited to firearms for protection. They will maintain a supply of bullets for those firearms. . . . These drug traffickers commonly retain these photographs and/or video. They utilize various materials including, but not limited to paper, plastic and glassine bags to package their illegal drugs for street sale. Various types of measuring devices are utilized by drug traffickers to measure the amount of illegal drugs that they are selling." The affidavit concluded by stating that, "based on the aforementioned facts and circumstances, the affiants have probable cause to believe that evidence of possession of heroin with intent to sell [in violation of General Statutes §] 21a-278 (b), is located within [the residence]."

On appeal, the defendant claims that the nexus between the residence and the criminal activity alleged

in the warrant application is lacking. We disagree. As our Supreme Court has explained, the ultimate question "is whether there was a fair probability that the contraband was within the place to be searched." *State* v. *Smith*, 257 Conn. 216, 223, 777 A.2d 182 (2001). The affidavit in the present case contains a detailed description of an alleged heroin dealer that matched the defendant's physical attributes, that shared the defendant's home address and telephone number, and who—like the defendant—drove a silver Nissan Maxima with Maine license plates. The affidavit also indicates that when the informant was shown a photograph of the alleged heroin dealer, the informant positively identified the defendant "immediately." Law enforcement observed the defendant at the residence, where a silver Nissan Maxima with Maine license plates was parked in the driveway. Surveillance conducted at the residence also confirmed that the defendant and that vehicle were at the residence "[p]rior" to the two controlled purchases and "immediately after the buy occurred."

On that basis, the issuing judge reasonably could have concluded that probable cause to search the residence existed. As our decisional law demonstrates, narcotics dealers commonly store evidence of that illegal activity in their homes. See, e.g., *State* v. *Couture*, 194 Conn. 530, 544, 482 A.2d 300 (1984) ("at the time of the issuance of the warrant it was reasonable for the [issuing judge] to infer that the defendant's residence was the logical place to conceal not only the fruits but also the instrumentalities of the crime"), cert. denied, 469 U.S. 1192, 105 S. Ct. 967, 83 L. Ed. 2d 971 (1985); *State* v. *Castano*, 25 Conn. App. 99, 104, 592 A.2d 977 (1991) ("[i]n the case of drug dealers, evidence is likely to be found where the dealers live" (internal quotation marks omitted)); *State* v. *Vallas*, 16 Conn. App. 245, 262, 547 A.2d 903 (1988) (noting that "it is reasonable to conclude that the participants [in the drug trade] will maintain . . . supplies in their homes" and that "[w]hen a suspect has been carrying on an illegal activity for an

extended period of time without detection, it is reasonable to conclude that evidence of his activity will be secreted in his home"), aff'd sub nom. *State* v. *Calash*, 212 Conn. 485, 563 A.2d 660 (1989).

Although the defendant relies on *State* v. *DeChamplain*, 179 Conn. 522, 427 A.2d 1338 (1980), for the proposition that a likely nexus between his residence and criminal activity did not exist, that case is readily distinguishable. Unlike the present case, in which the residence is described in the warrant application as a "[two-story, single-family] residence," *DeChamplain* involved an apartment building. More importantly, the court in *DeChamplain* "found a lack of probable cause to believe that drugs were located in [that] apartment, because the only [fact] establishing a nexus to the apartment was a *single telephone call* to the defendant at his apartment in which he received an order for the purchase of drugs." (Emphasis added.) *State* v. *Brown*, 14 Conn. App. 605, 619, 543 A.2d 750, cert. denied, 208 Conn. 816, 546 A.2d 283 (1988). By contrast, the affiants here observed multiple controlled narcotics transactions involving the defendant, and each time the defendant and his silver Nissan Maxima with Maine license plates were observed at the residence prior to the transactions and immediately thereafter.

In ruling on the defendant's motion to suppress, the court acknowledged that, in describing the first controlled purchase, the affidavit does not identify the time period with any specificity other than stating that the defendant was observed at the residence "prior to the buy taking place . . . ." (Internal quotation marks omitted.) As our precedent instructs, the task of the judge in issuing a search warrant "is simply to make a practical, commonsense decision" based on the totality of the circumstances presented in the warrant affidavit. *State* v. *Barton*, supra, 219 Conn. 537. Applying that precept, the court concluded that "[t]he logical and reasonable inference that could have been drawn by

the issuing court is that the language [in question] . . . helped explain when the surveillance may have been conducted. The practical and nontechnical translation of 'prior to the buy taking place' in terms of time, for purposes of probable cause analysis, could have been found to be a period of time in very close approximation to the arrangements made for the first controlled buy." We concur with that assessment. We further note that, with respect to the second controlled purchase, the affiants stated that "[s]urveillance showed that just prior to the buy taking place [the defendant] arrived at [the residence]," from which it may be inferred that narcotics were stored at the residence.

"Probable cause does not depend upon the incantation of certain magic words." *State* v. *Barton*, supra, 219 Conn. 549. Moreover, we are mindful of our obligation to "evaluate the information contained in the affidavit in the light most favorable to upholding the issuing judge's probable cause finding." *State* v. *Shields*, 308 Conn. 678, 691, 69 A.3d 293 (2013), cert. denied, 571 U.S. 1176, 134 S. Ct. 1040, 188 L. Ed. 2d 123 (2014). Having carefully examined the record before us, we conclude that the warrant application contained sufficient information from which the judge reasonably could infer that there was a fair probability that contraband or evidence of a crime would be found in the defendant's residence. For that reason, the court properly denied the defendant's motion to suppress.

The judgment is affirmed.

In this opinion the other judges concurred.

LAJEUNE POLLARD *v.* CITY OF BRIDGEPORT ET AL.
(AC 43260)

Lavine, Prescott and Elgo, Js.*

Syllabus

The plaintiff sought to recover damages from the defendants for injuries she sustained when she fell on a public sidewalk that was located in the defendant city of Bridgeport, adjacent to the property owned by the defendant S Co., a housing cooperative association. She alleged that her injuries were the result of the defective condition of the sidewalk, which was raised, uneven, and deteriorated. As part of the discovery process, S Co. hired an engineering firm to lift the sidewalk in the location of the incident and it was determined that its deteriorated condition was the result of a large tree root growing directly beneath the sidewalk. The root emanated from a tree growing on S Co.'s property. S Co. filed a motion for summary judgment, claiming that it could not be held liable for the plaintiff's alleged injuries, either by statute or under the common law. The trial court granted the motion and rendered judgment thereon, from which the plaintiff appealed to this court, claiming that the trial court improperly granted the motion because genuine issues of material fact existed as to whether S Co. was liable for her injuries due to its negligence or for maintaining a nuisance that caused the defect in the sidewalk. *Held* that the trial court properly rendered summary judgment in favor of S Co. because no genuine issue of material fact existed as to its liability for the plaintiff's injuries: the plaintiff could not prevail on her claim that her injuries were the result of S Co.'s negligence because S Co. did not owe a duty of care to the plaintiff, as the primary responsibility for maintaining public sidewalks in a reasonably safe condition falls to municipalities, not abutting landowners; moreover, neither of the exceptions to that general rule applied in this case because there was no statute or ordinance that shifted liability from the city to the landowner and the injury was not the result of an affirmative act of the landowner, as the growth of tree roots is not typically considered an affirmative act of the owner of the land on which a tree grows and there was no evidence that S Co., or any of its predecessors, planted the tree; furthermore, S Co. was not liable for maintaining a nuisance that caused the defect in the sidewalk because the sidewalk was not under its ownership or control, the plaintiff produced no evidence of any affirmative act by S Co. that caused the sidewalk to become uneven, and the presence of the tree on its property did not constitute an unreasonable or unlawful use of its land.

Argued November 30, 2020—officially released April 27, 2021

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

Procedural History

Action to recover damages for, inter alia, the alleged negligence of the defendants, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Radcliffe, J.*, granted the motion for summary judgment filed by the defendant Seaside Village Homes, Inc., and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

John T. Bochanis, for the appellant (plaintiff).

John P. Bonanno, for the appellee (defendant Seaside Village Homes, Inc.).

Opinion

LAVINE, J. "An abutting landowner is ordinarily under no duty to keep the sidewalk in front of his [or her] property in a reasonably safe condition for public travel. *Tenney* v. *Pleasant Realty Corp.*, 136 Conn. 325, 329, 70 A.2d 138 (1949). An abutting landowner can be held liable, however, in negligence or public nuisance for injuries resulting from the unsafe condition of a public sidewalk caused by the landowner's positive acts. See *Gambardella* v. *Kaoud*, 38 Conn. App. 355, 359, 660 A.2d 877 (1995)." *Abramczyk* v. *Abbey*, 64 Conn. App. 442, 446, 780 A.2d 957, cert. denied, 258 Conn. 933, 785 A.2d 229 (2001). In the present case, we conclude, as a matter of law, that the abutting landowner is not liable for the injuries sustained by a traveler on a public sidewalk who trips and falls over a defect in the sidewalk caused by the roots of a tree growing on the landowner's property, as the growth of tree roots is not a positive or affirmative act of the landowner.

In this trip and fall personal injury action, the plaintiff, LaJeune Pollard, appeals from the summary judgment rendered in favor of the defendant Seaside Village Homes, Inc. (Seaside). On appeal, the plaintiff claims that the trial court improperly granted summary judgment because genuine issues of material fact exist as

to whether Seaside is liable for her injuries (1) due to its negligence or (2) for maintaining a nuisance that caused the defect in the sidewalk. On the basis of our review of the record, we conclude that there is no genuine issue of material fact that Seaside undertook no positive or affirmative act that caused the defect in the sidewalk where the plaintiff alleged that she fell. We, therefore, affirm the judgment of the trial court.

The following facts as discerned from the record are relevant to our resolution of the plaintiff's appeal. On or about February 20, 2018, the plaintiff served a complaint on Seaside and the codefendant, the city of Bridgeport (city).[1] The complaint sounded in three counts: count one alleged negligence against the city; count two alleged negligence against Seaside; and count three alleged nuisance against Seaside. In all counts of the complaint, the plaintiff alleged that, at approximately 5 p.m. on September 29, 2017, she was walking on the sidewalk in front of 82 Cole Street in the city when she fell due to the uneven, raised and deteriorated condition of the sidewalk. As a result of her fall, the plaintiff alleged that she sustained serious injuries to her knees that required medical attention, including surgical repair of her right knee. As a further result of her fall, the plaintiff alleged that she lost time from her employment, incurred medical bills and damages, lost the enjoyment of life's activities, and experienced pain and suffering.

In count one, the plaintiff alleged that the city breached its duty to inspect, repair, maintain and keep its sidewalks in a reasonably safe condition, including the area where she fell, which is owned, controlled,

[1] The city did not file a brief or otherwise participate in the present appeal. At the time the court granted Seaside's motion for summary judgment, the plaintiff's case against the city was still pending. Nonetheless, this court has jurisdiction to hear the plaintiff's appeal as the rendering of summary judgment disposed of all of the plaintiff's causes of action against Seaside. See Practice Book § 61-3 (appeal of judgment on part of complaint).

and maintained by the city.[2] In count two, the plaintiff alleged that the premises or property "in front of 82 Cole Street . . . was owned, controlled and/or maintained by [Seaside] . . . ."[3] The plaintiff further alleged that Seaside "was charged with the duty to keep and maintain its property in a reasonably safe condition including the area" where she fell. She also alleged in paragraph 5 that her fall and resulting injuries were the direct result of the negligence of Seaside or its agents in one or more of the following ways, in that they (a) failed to inspect, correct or remedy the defective condition, (b) failed to use reasonable care to maintain the area where she fell in a reasonably safe condition, (c) failed to warn pedestrians of the defective condition, (d) allowed the area where she fell to deteriorate to a defective condition, (e) failed to have sufficient personnel to maintain, correct or remedy the defective conditions, and (f) actively caused or created the defective condition of the sidewalk. In count three, the plaintiff alleged that her injuries "were the result of a nuisance created by [Seaside, its agents or employees]" in that the "defective condition [of the sidewalk] was a continuing danger created by [Seaside]" or that "[t]he use of the . . . described premises permitted by [Seaside] was unreasonable and/or unlawful."[4]

[2] In its original answer to the complaint, the city denied that it owned and controlled the sidewalk. On March 14, 2019, the city amended its answer and admitted that the sidewalk in front of 82 Cole Street is within the city's right-of-way and that the city has a duty to repair sidewalks. On April 30, 2019, John Urquidi, the city engineer, testified at a deposition that the sidewalk where the plaintiff allegedly fell is within the city's right-of-way.

[3] Seaside is a housing cooperative association consisting of approximately 250 units.

[4] Nowhere in her complaint did the plaintiff allege how the sidewalk came to be uneven and in a defective condition or what Seaside actively did to cause the sidewalk to be uneven. The words "tree" and "root" do not appear in the complaint.

The record discloses that, on March 14, 2019, Geoffrey B. Wardman, a professional engineer, signed an affidavit in which he attested that on January 31, 2019, at Seaside's request, he was present at the sidewalk abutting 82 Cole Street when the sidewalk flag over which the plaintiff alleged that she fell was mechanically raised for the purpose of inspecting the flag and

On March 12, 2018, Seaside filed an answer in which it denied the material allegations of the complaint and asserted three special defenses.[5] On November 18, 2018, the city took the plaintiff's deposition, during which she testified that she "was walking and . . . was forced forward from the raised sidewalk . . . ." The plaintiff identified the raised sidewalk that allegedly caused her to fall in a photograph.

On April 15, 2019, Seaside filed a motion for summary judgment claiming that it was entitled to summary judgment as a matter of law because it cannot be held liable, either by statute or under common law, for the plaintiff's injuries allegedly arising from a defect in a public sidewalk.[6] The parties appeared before the trial court on June 24, 2019,[7] and July 15, 2019, to argue the motion

the ground beneath it. Wardman attested in part: "Upon lifting of the subject sidewalk flag, I observed the existence of a large tree root growing directly beneath the subject sidewalk flag. The roots emanated from a tree planted upon the nearby property. . . . It is my professional opinion, within a reasonable degree of engineering certainty, that the subject sidewalk flag was caused to be misleveled by the large tree root directly beneath said sidewalk flag."

A sidewalk flag is a section of the stone or concrete surface of the walk.

[5] Seaside's special defenses alleged that (1) if the plaintiff suffered any injuries and losses they were the result of her own carelessness and negligence, (2) the plaintiff assumed the risk of walking on the sidewalk, and (3) any injuries the plaintiff allegedly sustained were caused by the negligence of third parties over which Seaside had no control.

[6] The city filed an objection to the motion for summary judgment on the procedural ground that the motion had not been filed in accordance with the scheduling order. See Practice Book § 17-44 ("[i]n any action . . . any party may move for a summary judgment as to any claim or defense as a matter of right at any time if no scheduling order exists and the case has not been assigned for trial"). There is no indication in the record that the court ruled on the city's objection to the motion for summary judgment.

[7] On June 24, 2019, the court was thoroughly prepared to address Seaside's motion for summary judgment. The court asked the plaintiff's counsel many questions regarding the complaint's allegations of negligence as to Seaside, noting that Seaside had no duty to maintain, repair or warn about a defective sidewalk. The court particularly noted that the plaintiff had failed to allege how Seaside had used its property in a manner so as to injure travelers in lawful use of the highway, describing the allegation in subparagraph (f) as "a conclusion in search of an allegation . . . ."

Counsel for the plaintiff had not yet filed an objection to the motion for summary judgment and was unprepared to argue the substance of Seaside's

for summary judgment. On July 15, 2019, the court issued an order stating that it had considered the motion for summary judgment and granted it "[a]s to both counts [two] and [three]" because there was "[n]o breach of duty by the abutting landowner, and an inability to meet the test for nuisance (Count [Three]). Allowing a tree to grow does not breach a duty of care. Duty to keep the sidewalk in repair, by statute, rests with the city of Bridgeport."[8]

The plaintiff appealed, claiming that the court improperly had determined that (1) no genuine issues of material fact existed as to whether Seaside was negligent with respect to the defective condition of the sidewalk in front of 82 Cole Street and (2) no genuine issues of material fact existed as to whether Seaside maintained a nuisance that caused injuries to her. In response, Seaside contends that there is no genuine issue of material fact as to whether it is liable for the plaintiff's injuries because, as a matter of law, the duty to maintain and repair sidewalks belongs to the city and there are no genuine issues of material fact that Seaside did not undertake an affirmative or positive act that created the alleged defect in the sidewalk. We agree with Seaside.

"Our standard of review of a trial court's decision to grant a motion for summary judgment is well established. Practice Book § [17-49] provides that summary

motion, believing that the court was to consider the city's objection to the motion for summary judgment that day. After addressing the infirmities of the plaintiff's complaint, the court ordered the plaintiff to file an objection, if any, within one week.

The plaintiff filed an objection to the motion for summary judgement on July 1, 2019, to which she attached an affidavit that she had signed that day. The plaintiff attested that within seven days of having fallen, she took photographs of the uneven sidewalk and that the raised sidewalk was four inches high, that the property adjacent to the sidewalk is owned by Seaside and that there is a large tree on the adjacent property. The photographs taken by the plaintiff were attached as exhibits to her objection to Seaside's motion for summary judgment.

[8] The plaintiff did not seek an articulation of the court's ruling. We nevertheless are able to discern the court's reasoning from its rulings from the bench.

judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Dreher* v. *Joseph*, 60 Conn. App. 257, 259–60, 759 A.2d 114 (2000). "The test is whether a party would be entitled to a directed verdict on the same facts." *Batick* v. *Seymour*, 186 Conn. 632, 647, 443 A.2d 471 (1982).

"The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Citation omitted; internal quotation marks omitted.) *Doty* v. *Mucci*, 238 Conn. 800, 805–806, 679 A.2d 945 (1996). A fact is material when it will make a difference in the outcome of a case. *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 116, 49 A.3d 951 (2012). "The issue must be one which the party opposing the motion is entitled to litigate under [its] pleadings and the mere existence of a factual dispute apart from the pleadings is not enough to preclude summary judgment." (Internal quotation marks omitted.) *Trotta* v. *Branford*, 26 Conn. App. 407, 412–13, 601 A.2d 1036 (1992). "The facts at issue are those alleged in the pleadings. . . . The purpose of [a] complaint is to limit the issues to be decided at the trial of a case and [it] is calculated to prevent surprise." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Vaillancourt* v. *Latifi*, 81 Conn. App. 541, 545, 840 A.2d 1209 (2004).

"On appeal . . . [b]ecause the trial court rendered judgment . . . as a matter of law, our review is plenary

and we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Dreher* v. *Joseph*, supra, 60 Conn. App. 260.

I

The plaintiff's first claim is that the trial court improperly granted the motion for summary judgment because material questions of fact exist as to whether Seaside is liable in negligence for the defective sidewalk. We do not agree.

During the course of the July 15, 2019 hearing, the court granted the motion for summary judgment with respect to count two stating: "While there is a duty of an abutting landowner to conduct his affairs so as not to injure a traveler in the lawful use of the highway, the allegations of duty in paragraph 5 of the complaint clearly do not apply. There is no duty on the part of an abutting landowner to inspect a highway, which is the duty of the municipality, to repair or to maintain it or to warn . . . [of] the dangerous [or] defective condition. The only thing that the abutting landowner has an obligation to do is to conduct its affairs so as not to injure travelers, and that duty is not breached by a tree growing on the property creating a defect, which it is the duty of the municipality to repair, which is under the jurisdiction of the tree warden by statute, and which does not impose liability for essentially nonfeasance, not misfeasance on the . . . homeowner or the abutting property owner. The claim here in this complaint is that the defect is a raised, uneven, deteriorated condition of the sidewalk, that's the obligation of the city, not the abutting landowner."

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." *R.K. Constructors, Inc.* v. *Fusco Corp.*, 231 Conn. 381, 384, 650 A.2d 153 (1994).

We need only address the first element of negligence because it is dispositive of the plaintiff's claim. "The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant violated that duty in the particular situation at hand. . . . Because the court's determination of whether the defendant owed a duty of care to the plaintiff is a question of law, our standard of review is plenary. . . . Our Supreme Court has stated that the test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case. . . . The first part of the test invokes the question of foreseeability, and the second part invokes the question of policy." (Internal quotation marks omitted.) *McFarline* v. *Mickens*, 177 Conn. App. 83, 92, 173 A.3d 417 (2017), cert. denied, 327 Conn. 997, 176 A.3d 557 (2018).

"It has long been established that municipalities have the primary duty to maintain public sidewalks in a reasonably safe condition. . . . General Statutes § 13a-99 further provides in relevant part that [t]owns[9] shall, within their respective limits, build and repair all necessary highways and bridges . . . except when such duty belongs to some particular person. . . . When a sidewalk along a public street in a city [has] been constructed and thrown open for public use, and used in connection with the rest of the street, [it] must, as a part of the street, be maintained by the city, and kept in such repair as to be reasonably safe and convenient

[9] The word "towns," as used in the statute, includes cities. See General Statutes § 13a-1 (b).

for . . . travelers . . . .'' (Citation omitted; footnote added; internal quotation marks omitted.) Id., 93. A town or city has a duty to keep highways in good repair, including the sidewalks. See *Ryszkiewicz* v. *New Britain*, 193 Conn. 589, 594 and n.5, 479 A.2d 793 (1984). ''An abutting landowner, in the absence of statute or ordinance, ordinarily is under no duty to keep the public sidewalk in front of his property in a reasonably safe condition for travel.'' *Wilson* v. *New Haven*, 213 Conn. 277, 280, 567 A.2d 829 (1989). As a general rule, owners of land are not liable for injuries caused by defects on public sidewalks abutting their property. *Robinson* v. *Cianfarani*, 314 Conn. 521, 529, 107 A.3d 375 (2014).

The plaintiff argues, however, that an exception to the general rule applies in the present case, as an abutting property owner can be held liable in negligence or public nuisance for injuries resulting from the unsafe condition of a public sidewalk caused by the positive acts of the abutting property owner. *Hanlon* v. *Waterbury*, 108 Conn. 197, 200–201, 142 A. 681 (1928) (negligence to allow gasoline from pump to spill onto sidewalk); *Gambardella* v. *Kaoud*, supra, 38 Conn. App. 359, citing *Perkins* v. *Weibel*, 132 Conn. 50, 52, 42 A.2d 360 (1945) (public nuisance created by grease emanating from premises onto sidewalk). Indeed, the law of Connecticut holds that ''an owner of property abutting on a highway rests under an obligation to use reasonable care to keep his premises in such condition as not to endanger travelers in their lawful use of the highway; and that if he fails to do so, and thereby renders the highway unsafe for travel, he makes himself liable.'' (Internal quotation marks omitted.) *Kane* v. *New Idea Realty Co.*, 104 Conn. 508, 515, 133 A. 686 (1926), quoting *Ruocco* v. *United Advertising Corp.*, 98 Conn. 241, 247, 119 A. 48 (1922). In *Kane*, the defendant was found liable for the injuries sustained by a pedestrian who slipped and fell on a patch of ice created by water that flowed from the

defendant's business onto a sidewalk. *Kane* v. *New Idea Realty Co.*, supra, 509. In that case, our Supreme Court held that by permitting water to flow from one's premises onto the land of another, the defendant engaged in an affirmative act that gave rise to potential liability. Id., 515–16. We conclude that the growth of tree roots is not an affirmative act of the owner of the land on which the tree grows.

The plaintiff alleges that Seaside was negligent in that it actively caused the defective condition of the sidewalk where the plaintiff fell, but she failed to specify what Seaside did to create the defect. On appeal, however, the plaintiff argues that a tree growing on Seaside's property caused the sidewalk to become uneven. The plaintiff, therefore, argues that there is a genuine issue of material fact as to whether Seaside was negligent by causing the defective condition of the sidewalk. The plaintiff's argument is unavailing. In opposing the motion for summary judgment, she failed to present evidence of an affirmative act by Seaside that raises a genuine issue of material fact that would bring this case within the exception to the rule that adjacent landowners are not liable for injuries sustained by travelers on a sidewalk.

In the absence of evidence supporting an affirmative act by the defendant, the plaintiff urges us to adopt the rule stated in § 363 of the Restatement (Second) of Torts, which provides: "A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway." 2 Restatement (Second), Torts § 363 (2), p. 258 (1965). The plaintiff contends that the Restatement rule is applicable to the present case because the tree whose roots caused the sidewalk to be uneven was on Seaside's property. We decline the

plaintiff's request to apply the Restatement rule in the present case.

As a general rule, Connecticut law holds that an abutting landowner is not liable for injuries sustained by a traveler on the highway that were caused by the defective condition of a public sidewalk. *Wilson* v. *New Haven*, supra, 213 Conn. 280. There are two exceptions to the general rule: (1) where a statute or ordinance shifts liability to the landowner to keep the sidewalk in a safe condition; see *Dreher* v. *Joseph*, supra, 60 Conn. App. 261; and (2) where the affirmative or positive act of the landowner causes the defect in the sidewalk. *Abramczyk* v. *Abbey*, supra, 64 Conn. App. 446; *Gambardella* v. *Kaoud*, supra, 38 Conn. App. 359.

The plaintiff has cited no Connecticut case that holds that a landowner is liable for damages caused by the natural growth of a tree on its property *or* that the natural growth of tree roots is a positive act of the owner of the land where the tree is growing. Our trial courts have held that the growth of tree roots is not a positive act of the owner of the land on which the tree grows. See, e.g., *Maida* v. *Hiatt*, Superior Court, judicial district of Fairfield, Docket No. CV-08-5014786-S (April 8, 2009) (47 Conn. L. Rptr. 552); *Herrera* v. *Bridgeport*, Superior Court, judicial district of Fairfield, Docket No. CV-387059 (July 30, 2004) (37 Conn. L. Rptr. 568); *Coyle* v. *Waterbury*, Superior Court, judicial district of Waterbury, Docket No. CV-096884 (December 6, 1991) (5 Conn. L. Rptr. 342). As this court stated in *McFarline* with respect to grass that was alleged to have caused the plaintiff in that case to fall, "grass grows by itself." (Internal quotation marks omitted.) *McFarline* v. *Mickens*, supra, 177 Conn. App. 98. So, too, do a tree and its roots grow by themselves. We agree with the trial courts that the growth of tree roots is not caused by a positive or affirmative act of the owner of the land where the tree is growing.

The plaintiff urges this court to follow the reasoning of the trial court in *Toomey* v. *State*, Docket No. CV-91-57183-S, 1994 WL 75815, *6, 13 (Conn. Super. February 17, 1994), which applied § 363 (2) of the Restatement (Second) of Torts to find the state of Connecticut liable for the deaths and injuries that resulted when an extremely large branch of a red maple tree fell on a passing motor vehicle during an October snowstorm. The facts of *Toomey* are distinguishable from the facts of the case before us, which does not involve a limb or tree falling onto the highway or sidewalk.

In *Toomey*, the trial court recognized that Connecticut has established that "an owner of property abutting on a highway rests under an obligation to use reasonable care to keep his premises in such condition as not to endanger travelers in their lawful use of the highway; and that if he fails to do so, and thereby renders the highway unsafe for travel, he makes himself liable." (Internal quotation marks omitted.) *Toomey* v. *State*, supra, 1994 WL 75815, *5, quoting *Kane* v. *New Idea Realty Co.*, supra, 104 Conn. 515. It also stated that "Connecticut courts are in harmony with the many jurisdictions which generally state that an owner of land abutting a highway may be held liable on negligence principles under certain circumstances for injuries or damages resulting from a tree or limb falling onto the highway from such property." *Toomey* v. *State*, supra, *6; see *Hewison* v. *New Haven*, 37 Conn. 475, 483 (1871) (recognizing that owners of trees standing on highway are liable at common law for injuries occurring due to their neglect to trim and keep trees safe). "The duty is identified by the nature of the locality, the seriousness of the danger, and the ease with which it may be prevented. [W. Prosser, Torts (4th Ed. 1971) § 57, p. 356.]" (Internal quotation marks omitted.) *Toomey* v. *State*, supra, *5.

The court determined that the state had stepped "into the shoes of a private landowner in a similar situation"; id., *4; and had a duty to inspect the trees along the highway on the basis of foreseeability. Id., citing *Coburn* v. *Lenox Homes, Inc.*, 186 Conn. 370, 375, 441 A.2d 620 (1982) (duty to use care arises under circumstances in which reasonable person should have known harm of risk imposed by failure to act). The evidence in *Toomey* demonstrated that the state arborist, who was charged with the duty to inspect trees on state property, admitted that he had not inspected the trees along Route 7. *Toomey* v. *State*, supra, 1994 WL 75815, *10. The signs of decay on the red maple that fell were obvious by visual inspection and experts described the tree as a hazard tree. Id., *11. The risk the tree posed to travelers on Route 7 was foreseeable if only the state's arborist had inspected it. Id., *12. The risks posed by a decaying tree limb overhanging a state highway are distinguishable from the present case where the limbs of the trees were not in danger of falling on the sidewalk. Moreover, the roots of the tree were subterranean and not obvious from a visual inspection.

The Connecticut rule that the owner of property abutting on a highway has an obligation to use reasonable care to keep his premises in such a condition as not to endanger travelers was followed in *McDermott* v. *Calvary Baptist Church*, 263 Conn. 378, 819 A.2d 795 (2003), where a tree fell from a church yard onto a visitor in an adjacent parking lot. Id., 383, 388. Our Supreme Court stated that the trial court did not err by instructing the jury that the plaintiff "bore the burden of establishing that there were visible signs of decay or weakness of structure . . . that the church failed to observe . . . [and that] reasonable care would have resulted in those signs being seen." (Emphasis omitted; internal quotation marks omitted.) Id., 388.

In *Toomey* and *McDermott*, the courts applied the rule that "a legal duty of care entails . . . a determination of whether an ordinary person in the defendant's

position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result . . . ." (Internal quotation marks omitted.) *McFarline* v. *Mickens*, supra, 177 Conn. App. 92; see also *McDermott* v. *Calvary Baptist Church*, supra, 263 Conn. 388; *Toomey* v. *State*, supra, 1994 WL 75815, *4. Those cases teach that the owner of land abutting a public highway has a duty to inspect his or her trees for signs of damage or decay that might cause the tree or a branch to fall.

In the present case, the plaintiff presented no evidence that reasonable care would have revealed the cause of the raised sidewalk. No one knew the reason why the sidewalk was uneven until an engineering firm retained by Seaside during the discovery phase of the litigation lifted the sidewalk revealing the root of the tree. See footnote 4 of this opinion.

The plaintiff also suggests that we follow the New Jersey case of *Deberjeois* v. *Schneider*, 254 N.J. Super. 694, 604 A.2d 210 (1991), aff'd, 260 N.J. Super. 518, 617 A.2d 265 (App. Div. 1992), to resolve the appeal in her favor. We decline to follow the New Jersey case, as it is not binding on this court, is inconsistent with Connecticut law and is factually distinguishable from the present case.

In *Deberjeois*, the plaintiff sustained injuries "when she fell on a raised sidewalk slab caused by tree roots emanating from a tree located on the defendants', [Schneiders'], property." Id., 696. The tree was growing in the Schneiders' front lawn, four and one-half feet from the sidewalk. Id., 703 n.3. The Schneiders filed a motion for summary judgment claiming that they were exempt from liability. Id., 697. In ruling on the motion for summary judgment, the New Jersey trial court stated that the Schneiders' liability turned "on whether the defect in the sidewalk was caused by a natural condition of the land or by an artificial one." Id., 698. An artificial

condition is one that comes about as a result of the landowner's affirmative act. Id., 699.

Comment (b) to § 363 of the Restatement (Second) of Torts provides: " 'Natural condition of the land' is used to indicate that the condition of land has not been changed by any act of a human being, whether the possessor or any of his predecessors in possession, or a third person dealing with the land either with or without the consent of the then possessor. It is also used to include the natural growth of trees, weeds, and other vegetation upon land not artificially made receptive to them. On the other hand, a structure erected upon land is a non-natural or artificial condition, as are trees or plants planted or preserved, and changes in the surface by excavation or filling, irrespective of whether they are harmful in themselves or become so only because of the subsequent operation of natural forces." 2 Restatement (Second), supra, § 363, comment (b), p. 258; see also *Deberjeois* v. *Schneider*, supra, 254 N.J. Super. 700, quoting 2 Restatement (Second), supra, comment (b), p 258.

The New Jersey court stated that "a property owner would be liable where he plants a tree at a location which he could readily foresee might result in the roots of the tree extending underneath the sidewalk causing it to be elevated. The rational for the [Schneiders'] liability . . . is not because of the natural process of the growth of the tree roots. Instead it is the positive act—the affirmative act—of the property owner in the actual planting of the tree which instigated the process. The fact that the affirmative act is helped along by a natural process does not thereby make the condition a natural one within the meaning of the traditional rule." (Footnote omitted.) *Deberjeois* v. *Schneider*, supra, 254 N.J. Super. 703–704. The court, therefore, denied the motion for summary judgment. Id., 704.

In the present case, there is no evidence as to how the tree, the roots of which caused the sidewalk in front

of 82 Cole Street to become uneven, came to grow on Seaside's property. Consequently, this case is similar to *Cagnassola* v. *Mansfield*, Docket No. A-1145-18T3, 2019 WL 4696142 (N.J. Super. App. Div. September 26, 2019), a personal injury case in which the plaintiffs' minor child sustained injuries when she rode her bicycle over an elevated and cracked sidewalk in front of the defendants' home. Id., *1. The plaintiffs alleged that the defendants were liable due to the dangerous condition created by a tree adjacent to the sidewalk. Id. On appeal, the New Jersey Appellate Division affirmed the trial court's granting of summary judgment in favor of the defendants and distinguished *Deberjeois*. Id., *4. The *Cagnassola* plaintiffs surmised that the original developer of the neighborhood had planted the tree; the defendants asserted that it had grown naturally. Id. Despite the plaintiffs' discovery efforts, they were unable to offer "proof of any affirmative act by the [defendants], nor by any other identified party in privity with the [defendants], creating the hazard abutting the sidewalk." Id. Unlike *Deberjeois*, there was no proof that the defendants, the prior owners, or the developer had planted the tree to create an artificial condition. Id. Such is the situation in the present case. Even if we were to adopt the position taken by the *Deberjeois* court, which we have not, the plaintiff presented no evidence to oppose Seaside's motion for summary judgment to demonstrate that Seaside had undertaken an affirmative act to plant the tree. The record does not disclose whether the tree in question was planted or grew of its own accord from an acorn or other seed.

In opposing a motion for summary judgment, an adverse party "shall file and serve a response to the motion for summary judgment . . . including opposing affidavits and other available documentary evidence." Practice Book § 17-45 (b). "Once the moving party has presented evidence in support of the motion for summary judgment, the opposing party must present

evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue." (Citations omitted; internal quotation marks omitted.) *Inwood Condominium Assn.* v. *Winer*, 49 Conn. App. 694, 697, 716 A.2d 139 (1998).

Viewing the pleadings and facts of the present case in the light most favorable to the plaintiff, we conclude that the court properly determined that Seaside owed the plaintiff no duty of care under the circumstances and, thus, properly granted Seaside's motion for summary judgment with respect to count two, alleging negligence.

II

The plaintiff's second claim is that questions of material fact exist as to whether Seaside maintained a nuisance. We disagree.

In count three of her complaint, the plaintiff alleged in relevant part that the defective sidewalk was a continuing danger created by Seaside and that its use of the premises was unreasonable. On July 15, 2019, during the hearing on the motion for summary judgment, the court ruled from the bench with regard to count three stating: "The motion [for summary judgment] as to count three is also granted. A . . . creation of a nuisance involves four elements: it involves the creation of a dangerous and/or defective condition; it requires that it had been there for a sufficient period of time; it requires proof by a fair preponderance of the evidence that the use of the property was unreasonable; and [it requires] that the dangerous or defective condition was a proximate cause of the injury. If, in fact, the . . . use of the property, in this case the third element, is the abutting landowner's property and the defect is on another piece of property, which it is the duty of the city to keep and repair, it appears to the court that the elements of nuisance cannot be met as a matter of law

and, therefore, the defendant is entitled to judgment. So the motion for summary judgment as to counts two and three of the [complaint] dated April 15 is granted." We agree with the trial court.

As previously stated, although "an abutting owner ordinarily is under no duty to keep the sidewalk in front of his property in a reasonably safe condition for public travel, he is liable in damages for a nuisance maintained by him upon it." *Perkins* v. *Weibel*, supra, 132 Conn. 52. An abutting "owner [is] liable for an injury to a traveler upon a sidewalk injured through his premises being in such condition as to endanger travelers in their lawful use of the walk." *Hanlon* v. *Waterbury*, supra, 108 Conn. 200.

"It is well settled that to prevail on a cause of action for private nuisance, a plaintiff must prove four elements: (1) the condition complained of had a natural tendency to create danger and inflict injury upon person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; [and] (4) the existence of the nuisance was the proximate cause of the plaintiffs' injuries and damages." (Emphasis omitted; internal quotation marks omitted.) *Walsh* v. *Stonington Water Pollution Control Authority*, 250 Conn. 443, 449 n.4, 736 A.2d 811 (1999). "To constitute a nuisance in the use of land, it must appear not only that a certain condition by its very nature is likely to cause injury but also that the use is unreasonable or unlawful." *Beckwith* v. *Stratford*, 129 Conn. 506, 508, 29 A.2d 775 (1942); see also *Fisk* v. *Redding*, Conn. , , A.3d (2020) (third element requires showing that defendant's use of land was unreasonable or unlawful).

As the trial court pointed out, the defective condition the plaintiff complained of is the raised portion of the sidewalk. The sidewalk was not under Seaside's owner-

ship or control. As previously stated, the plaintiff produced no evidence of any affirmative act on the part of Seaside that caused the sidewalk to become uneven. The plaintiff has argued that Seaside knew of the raised sidewalk for at least a year before the plaintiff fell and was injured.[10] That fact is of no moment as Seaside had no duty to maintain or repair the sidewalk; the city is responsible for the maintenance and repair of sidewalks. Moreover, the tree on Seaside's property did not constitute an unreasonable or unlawful use of its land. We therefore conclude that the trial court properly granted Seaside's motion for summary judgment as to count three.

For the foregoing reasons, we conclude that the trial court properly granted Seaside's motion for summary judgment.[11]

The judgment is affirmed.

In this opinion the other judges concurred.

---

[10] Although the plaintiff argues that the condition of the sidewalk was brought to Seaside's attention one year before the plaintiff fell, it is undisputed that Seaside did not know what caused the sidewalk to be uneven until it retained an engineering firm to lift the uneven portion of sidewalk several months prior to filing its motion for summary judgment.

[11] If we were to accept the plaintiff's position that the owner of land abutting a public sidewalk is liable for the injuries sustained by a traveler due to defects in the sidewalk caused by the hidden roots of a tree growing on the owner's property, it would impose an unreasonable burden on property owners. Such owners would be obligated to expose tree roots to see where they extend and to elevate sidewalks to determine if the roots were, in fact, the source of unevenness.

STATE OF CONNECTICUT *v.* OSCAR H.*
(AC 43622)

Lavine, Prescott and Suarez, Js.**

Syllabus

The defendant, who had been convicted of several crimes, including murder, as a result of the stabbing death of N, appealed, claiming that the trial court improperly admitted into evidence the deposition testimony of B, whom the defendant also stabbed during the same incident, after having improperly determined pursuant to the former testimony exception to the rule against hearsay in the applicable provision (§ 8-6 (1)) of the Connecticut Code of Evidence that B, an undocumented immigrant, who had returned to her native Guatemala prior to trial, was unavailable to testify. The defendant also claimed that his conviction of attempt to commit murder and assault in the first degree as to B violated the constitutional prohibition against double jeopardy because each crime was predicated on the same act against B. Prior to trial, the court granted the state's motion to issue a subpoena for B to be deposed, as her return to Guatemala would put her beyond the state's subpoena power. At the judicially supervised deposition, which was video-recorded and transcribed, the defendant had an opportunity to cross-examine B without any restrictions by the court. B, who spoke no English, thereafter left for Guatemala. At trial, P, a director of an immigrant services organization, testified that she had spoken with B at least once a month after B returned to Guatemala and that, at the state's request, she spoke to B by phone three days before the trial and B indicated that she would not voluntarily return to Connecticut to testify. The defendant argued that the state had failed to establish B's unavailability because, inter alia, P spoke with B only by phone and did not testify that she had seen B in Guatemala, there was no evidence that B had been forced to leave the United States and because the state should have advised B not to return to Guatemala. The trial court admitted the videotaped deposition, concluding that the state had met its burden of establishing B's unavailability pursuant to § 8-6 (1). *Held*:

1. The trial court properly determined that B was unavailable to testify and admitted her deposition testimony at trial, the state having acted in good faith and with due diligence to procure her attendance: under

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

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

the totality of the circumstances presented, the defendant's rights to confrontation and due process were not violated, as the state made sufficient efforts to establish B's unavailability, the defendant provided no legal authority that required the state to take additional steps beyond those it pursued to procure B's attendance at trial, the state was aware of her immigration status and desire to return to Guatemala, it kept in touch with her throughout the pretrial proceedings through P, who maintained contact with B after she left the United States and, at the state's request, contacted B three days before trial to inquire if she would be willing to return, and, as it was highly unlikely that any additional efforts by the state would have succeeded in convincing B to return voluntarily, this court was not convinced that the state was required to expend any and all available resources to eliminate the complex challenges posed by her immigration status or to extend logistical and financial incentives to induce her return to Connecticut; moreover, despite the defendant's unavailing assertion that, even if B had been properly found to be unavailable, the admission of the deposition transcript violated his rights to confrontation and due process, the defendant had an unfettered opportunity to confront B at the deposition, which was taken under agreed upon parameters and the direct supervision of a judge who did nothing to restrict the defendant's cross-examination of her, B was under oath and subject to the penalty of perjury, the videotape of the deposition reflected her demeanor, the state made no objections to her testimony, and, to the extent that impeachment evidence existed, the defendant declined to present it at trial when given the opportunity to do so; furthermore, any potential that B's examination at trial might have differed from her deposition testimony or that the defendant might later have become privy to additional information to utilize during cross-examination was speculative and not a basis on which to conclude that his confrontation rights were violated.

2. The defendant could not prevail on his unpreserved claim that his conviction of attempted murder and assault in the first degree violated the constitutional prohibition against double jeopardy, which was based on his assertion that he was punished twice on the same evidence for the same offense against the same victim, B: because attempted murder requires intent to cause the death of the victim, which is not an element of assault in the first degree, and assault in the first degree requires serious injury to the victim with a deadly instrument, which are not elements of attempted murder, those crimes are not the same offense for purposes of double jeopardy, nor can assault in the first degree be a lesser offense included within attempted murder; moreover, although the operative information charged attempted murder and assault in the first degree in separate and distinct counts, nothing in the language of those counts could be construed as evincing any intent by the state to charge the defendant in the alternative, as the charges were not pursued by the state in an alternative manner, nor was such a theory discussed

in closing argument, and the defendant requested no instruction, nor did the court give any instruction to the jury, indicating that it should consider the charges only as standing in a greater-lesser relationship; furthermore, the defendant's failure to raise his double jeopardy claim at trial belied any indication that the double jeopardy claim was obvious on the face of the information or in the manner in which the case was charged, and the defendant advanced nothing from which to discern any legislative intent to preclude the prosecution of a criminal defendant for both attempted murder and assault in the first degree.

Argued October 20, 2020—officially released April 27, 2021

Procedural History

Substitute information charging the defendant with the crimes of murder, attempt to commit murder, assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Russo*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Naomi T. Fetterman, assigned counsel, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, *John C. Smriga*, former state's attorney, and *Emily D. Trudeau*, assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Oscar H., appeals from the judgment of conviction, rendered following a jury trial, of murder in violation of General Statutes § 53a-54a (a), attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a (a), assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and risk of injury to a child in violation of General Statutes § 53-21 (a) (1). The defendant claims that (1) the trial court improperly determined that the surviving

assault victim, B, was unavailable to testify at trial and, on the basis of that determination, admitted B's prior deposition testimony into evidence in violation of our rules of evidence and his constitutional rights to confrontation and due process, and (2) his conviction of both attempted murder and assault in the first degree violated the constitutional prohibition against double jeopardy because each crime was predicated on the same act and against the same victim, B.[1] We disagree with both claims and, accordingly, affirm the judgment of the court.

The jury reasonably could have found the following facts on the basis of the evidence admitted at trial. The defendant and N began a romantic relationship sometime in 2006 or 2007. In 2010, they had a child together, S. The defendant, N, and S lived together in a small basement apartment in Bridgeport.

In January, 2017, approximately one month before the events at issue, N spoke to her mother, L, about problems in her relationship with the defendant. Specifically, she complained that the defendant had been increasingly acting jealous and was following her. N asked L to speak with the defendant on her behalf. N told her mother, "I can't stand him anymore," and that she wanted to leave him. When L spoke to the defendant soon thereafter, he told L that S had been saying things to him about N that led him to believe that N was cheating on him with another man.

On February 10, 2017, N's friend and coworker, B, who recently had broken up with a boyfriend with whom she had been living, moved into the Bridgeport apartment with N and the defendant. B and N worked together cleaning houses in Fairfield and Westport. B, like N, had been born in Guatemala, and she had come

[1] For clarity, we discuss the defendant's claims in the reverse order in which they were briefed.

to the United States in 2013 as an undocumented immigrant.

On February 16, 2017, N, N's sister, the defendant, and B attended a baby shower for one of the defendant's relatives. During the shower, N's sister had a private conversation with the defendant. The defendant told N's sister that N wanted "to split from him" but that "he could not be separated from [N] because [N] was the love of his life."

On February 23, 2017, after they had finished work for the day, N and B picked up S from her school. The three of them then picked up the defendant from his place of work in Norwalk. The defendant told them that he needed to visit one of his sons,[2] who was in a hospital in Greenwich. The defendant dropped off N, B, and S at L's house in Stamford while he went to visit with his son. When the defendant picked them up to return to Bridgeport, he had "a bag with beer in it." He drank one beer while he drove back to the Bridgeport apartment. Once at the apartment, the defendant drank three or four more beers, and N and B drank "Micheladas," a mixture of beer and Clamato juice.

Later in the evening, N saw a posting on Facebook indicating that a female friend was at a local club, and N and B discussed joining her. After N obtained "permission" from the defendant to go, N and B left, still dressed in the clothes they had worn to work that day. At least three other female friends were at the club when B and N arrived, and N bought "a bucket of beers," which amounted to one beer for each of the women. The women danced and sang karaoke. While they were at the club, the defendant made at least two video calls to N, asking her to move her phone around so that he could see who was with her at the club. B and N stayed at the

[2] In addition to being the father of S, the defendant was the father of three other children from relationships with two different women.

club for between one and one and one-half hours before returning to the apartment at about 1 a.m.

Although the defendant and N seemed to be getting along at first, while B was in the bathroom getting ready for bed, she heard N scream for her help. She came out of the bathroom to find the defendant holding N by her hair with a knife to her neck.[3] After cutting N's throat, the defendant attacked B, stabbing her in the lower back. B begged the defendant not to kill her because she had children who needed her support, but the defendant stabbed her in the neck. B held her breath while the defendant kicked her and N to see if they were alive. Convinced that neither was breathing, he went into the bathroom to wash the victims' blood off himself in the shower.

After showering and changing his clothes, the defendant retrieved S, who was asleep in her bedroom, and fled the apartment, necessarily passing through the bloody crime scene in the living area. When she heard the door of the apartment close, B, who was still alive, dragged herself toward the door so that she could yell for help from the landlords who lived upstairs. The landlords heard B calling out and came downstairs to investigate.[4] They observed N's body lying on the floor and called 911.

Officer Phillip Norris arrived on the scene at approximately 2:55 a.m. in response to a dispatch call. He observed N and B lying on the floor, both badly injured. N was not visibly breathing, but B was moving. When

[3] B testified that she remembered asking the defendant what he was doing but that she had no further memories of what transpired immediately after she came upon the defendant and N. Her next recollection of events was being on the floor with the defendant thrusting something into her lower back.

[4] One of the landlords testified at trial that she was awoken at about 2 a.m. by noises and heard B saying, "Oscar, no, she's my friend." She also reported later hearing the shower running.

paramedics arrived several minutes later, they determined that N was deceased.[5] They transported B to a hospital by ambulance. B told one of the paramedics that she had been "stabbed with a kitchen knife."[6]

As part of their investigation to locate the defendant, the police learned from N's sister that the defendant had mentioned to her that he might go to his sister's house in Texas if he and N ever separated. The police issued an Amber Alert for the defendant and S that included a description of the defendant's Hyundai Sonata, its license plate number, and an indication that the defendant might be heading south out of the state.[7] Pennsylvania State Police received the Amber Alert as well as information that the defendant's cell phone had been found in Altoona, Pennsylvania. Officers were directed to take up positions along several of Pennsylvania's interstate highways. At approximately 11 a.m., Pennsylvania police observed a vehicle matching the description of the vehicle described in the Amber Alert and initiated a traffic stop. The defendant initially complied with orders given by the police via their vehicle's public address system to open his car door and put his hands through the window. He did not comply, however, with their subsequent order that he exit the vehicle. Rather,

[5] According to the autopsy report admitted at trial, N was stabbed seven times in the neck. Her carotid artery was completely severed, causing her death. The toxicology report showed that she had a blood alcohol content of 0.142.

[6] B suffered substantial injuries to both her neck and abdomen. Many of the muscles and nerves on the left side of her neck were completely severed. Her abdominal wound ran from her right kidney past her spine and into her liver. When she arrived at the hospital, she had lost between 40 and 50 percent of her blood and was in shock. According to her treating physician, she had a number of severe defensive wounds on both of her hands. The doctor described her left thumb as "dangling" and her right pinkie finger as having been "nearly amputated . . . ."

[7] Norris had removed a photograph of the defendant and S from the bedroom of the apartment, which was used as part of the information provided for the Amber Alert.

he abruptly closed his door and sped away. A high speed chase ensued for approximately five miles, ending with the defendant crashing his car into the back end of a tractor trailer. The defendant was rendered unconscious by the crash. S was found crying in the backseat of the vehicle. The police took the defendant into custody and transported him to a hospital via ambulance.

As part of their investigation of the crime scene, the police found two knives in the Bridgeport apartment. One of the knives was located underneath N's hand. Although she was not holding the knife, her thumb was resting on the knife's handle.[8] A forensic analysis of the knives revealed that the defendant's DNA profile was included in a sample taken from the hilt of one knife and could not be eliminated as a contributor to a sample collected from the handle of the other knife.

The state charged the defendant in a four count amended information.[9] Count one charged the defendant with murdering N. Counts two and three were directed at the defendant's acts against B, accusing him of attempted murder and assault in the first degree with a dangerous instrument. Specifically, count two of the information alleged that the defendant, "with intent to cause the death of [B], did stab and attempt to cause the death of [B] . . . ." Count three alleged that, on the same date, time, and location referred to in count two, the defendant, "with intent to cause serious physical injury to [B], did cause serious physical injury to [B] with a dangerous instrument, to wit: a knife . . . ." Count four accused the defendant of risk of injury to a child.[10]

[8] The police observed that a chair also had been placed over N's body.

[9] We note that, although the defendant filed a pretrial motion to dismiss, he did not raise double jeopardy as an issue in that motion or in his later oral motions for a judgment of acquittal.

[10] The state charged the defendant under the situational prong of the risk of injury statute. Its theory with respect to that charge was that, given the bloody and violent incident that transpired in the living area of the small apartment, there was a grave risk that, if S had awoken and walked out into the room, she would have been exposed to and potentially endangered

The defendant testified on his own behalf at trial, essentially claiming that the two women had been intoxicated, they had attacked each other with knives, and he had not intentionally harmed either woman but had struggled to take a knife from B after she had attacked him. He also claimed that he had fled with S from the apartment to shield her from the bloody aftermath of the event.[11] The jury apparently did not credit the defendant's version of events, finding him guilty of all charges.

by the defendant's violent conduct. In addition, by later removing S from the apartment, the defendant necessarily would have carried her through the bloody crime scene, exposing her to the risk of psychic harm.

[11] According to the defendant's testimony, N and B were both intoxicated when they picked him up from work. When they returned to the Bridgeport apartment after he visited his son, B had initiated the plan to go out and, although N asked him to join them, he chose to stay home to watch S. The defendant testified that, when N and B returned from the club, he declined N's invitation to drink more beer with them, choosing to listen to music on his phone in the bedroom. He claimed that, at some point, N called him into the living room and told him that B had accused him of breaking her cell phone. He claimed that the three began to argue. When the argument began "escalating," N purportedly grabbed his hand to take him to the bathroom to speak to him away from B, at which point she referred to B as a slut and accused B of being ungrateful for them allowing her to move in with them. B allegedly overheard this, including the reference to her being a slut, and responded that at least she was single whereas N was also a slut despite living with the defendant. Although the defendant stated that he construed B's statement as a confirmation of his belief that N was cheating on him, he claimed that he saw no point in discussing this with N at that time because she was intoxicated and, instead, he chose to return to the bedroom and resume listening to music.

At some point, he claimed, he heard bottles crashing in the living room, and, when he came out of the bedroom to investigate, he found N "holding a knife, she was all bloody—and she was leaning on the stove holding a knife . . . ." According to the defendant, B was standing by the refrigerator also covered in blood. Despite this purported evidence of a brutal fight between the two women, the defendant maintained that he never heard any shouts or screams, only the sound of the bottles crashing. According to the defendant, he moved toward N to take away the knife but slipped in blood that was all over the floor. When he fell to the floor, B supposedly first struck him in the back of the head with a plate or bottle, and then "threw herself on top" of him. He claims that it was at this point that he realized that B also had a knife. He allegedly was able to get the knife from B, who continued to hit him in an effort to get the knife back. According to the

The court sentenced the defendant to a total effective term of seventy-five years of incarceration.[12] This appeal followed. Additional facts and procedural history will be set forth as needed.

I

The defendant first claims that the court improperly admitted into evidence a videotape and transcript of the pretrial deposition testimony of B, who did not testify at trial. Specifically, the defendant argues that the court improperly determined that B was unavailable, a foundational prerequisite for the admission of former testimony under our rules of evidence and to comport with constitutional rights of confrontation and due process. We are not persuaded by the defendant's arguments.[13]

defendant, he was eventually able to repel B, and, when he got to his feet, he saw N lying on the floor, unresponsive. When he returned his attention back to B, she also was on the floor and unresponsive. At that time, the defendant claimed, he looked in on S, who was still sleeping. He claimed that, when he returned to the living room and found the women still unconscious, he contemplated calling the police but feared they would blame him. Instead, he decided to take a shower, so that his daughter would not have to see him covered in blood when he woke her up, and thereafter fled the apartment. In sum, the defendant denied ever stabbing N, or intentionally stabbing B, insisting that B had "injured herself when she was attacking [him], when [he] had a knife in [his] hand."

[12] Specifically, the court sentenced the defendant as follows: fifty years for the murder conviction with a concurrent twenty year sentence on the attempted murder count; twenty years for the assault conviction, five of which was a mandatory minimum, to run consecutively to the other sentences; and an additional five year consecutive sentence on the risk of injury count.

[13] The state contends that we should decline to review this claim because, although the defendant challenged the admission of B's deposition at trial, he did so on a different basis than the one advanced on appeal, and, therefore, the defendant's claim is unpreserved. According to the state, the defendant's objection at trial was limited to the state's alleged failure to establish that B actually was in Guatemala. Our review of the trial transcript convinces us, however, that the defendant's argument was not so narrowly confined. Part of the objection raised by the defendant at trial more broadly encompassed the state's general failure to exercise due diligence in securing B's trial testimony, which certainly included allegedly doing nothing to verify

The following additional facts and procedural history are relevant to this claim. On June 19, 2017, the defendant entered a plea of not guilty and elected a jury trial. On September 27, 2017, the state filed a motion to advance the time of trial. The state argued in its motion, inter alia, that B, who was the sole living eyewitness to the charged crimes, was not a citizen of the United States and had expressed a desire to return to her home country, which would put her beyond the reach of the state's subpoena power.[14] The state asserted that the advancement of the trial would "not work an unfair hardship on the defendant and [would be] in the interest of justice" because B's unavailability as a witness would "work a substantial hardship upon the state and result in a miscarriage of justice." At a hearing on the state's motion, the defendant objected on the grounds that he had not had sufficient time to meet with his defense attorney and the defense lacked information regarding tests being performed on evidence at the state laboratory. The court, *Devlin, J.*, granted the motion on October 4, 2017, but indicated that the trial date would not be set until after all relevant laboratory tests were completed.

On October 17, 2017, the state filed a motion pursuant to Practice Book § 40-44 asking the court to issue a subpoena for B to appear for a deposition. In that request, the state indicated that B's testimony would be necessary at trial. It further stated that B was not a citizen of the United States, but a native of Guatemala, and that she had "expressed an intention of imminent return

her whereabouts. For example, part of the defendant's argument to the trial court was that, "[w]hen the state's attorney's office wants individuals to come back and testify, as the court knows, they can be fairly persuasive . . . ." We construe this as an argument that the state could have done more to entice B to return voluntarily. Accordingly, we are satisfied that the present claim was adequately preserved for appellate review.

[14] The court concluded that the state lacked the legal authority to subpoena an individual residing in Guatemala, and the defendant does not challenge this determination on appeal.

there, thus rendering herself beyond the reach of the state's subpoena power." According to the state, B was unable to work due to the serious nature of the injuries she had sustained. Furthermore, B purportedly was the mother of four children in Guatemala "who have previously been cared for by her father, who is no longer capable of doing so." Initially, the defendant did not oppose the taking of the deposition but later raised a number of objections, primarily concerning difficulties pertaining to defense counsel's schedule in other matters and the need for Spanish speaking interpreters for both the defendant and B. The court nevertheless granted the state's motion and scheduled the deposition.

The court, *Pavia, J.*, judicially supervised the taking of B's deposition, which was conducted in court on November 21, 2017. The deposition was videotaped in accordance with agreed upon procedures and recorded for transcription by a court monitor. During the deposition, B testified that the defendant had stabbed her and N. The court, at the request of the defendant, took a recess after B's direct testimony to provide defense counsel with an opportunity to discuss B's testimony with the defendant. Following the recess, the defendant had an opportunity to thoroughly cross-examine B about her direct testimony. The court did not place any restrictions on the cross-examination.

At trial, the state presented testimony from Lorely Peche, a family and school services director at Building One Community, an organization that provides immigrant support services. Peche had acted as a conduit for B with both the state's attorney's office and the Office of the Victim Advocate because B spoke no English. According to Peche, at the state's request, she had spoken with B about the trial three days prior. Peche stated that B was in Guatemala and that she spoke with B about her willingness to return to testify. B indicated

to Peche that she did not have the ability to get documentation to return to the United States and that she would not voluntarily return to Connecticut to testify.

On cross-examination, Peche stated that she had spoken with B at least once a month since she had left the country, which was shortly after her deposition, and that B had left voluntarily. When asked by defense counsel if she was aware of any program that allowed undocumented immigrants to remain in the country because of their status as a crime victim, Peche answered that she did not know of any such program. She stated that she had B's current phone number in Guatemala and had provided that information to the Office of the Victim Advocate.

The following day, the state offered B's videotaped deposition testimony as a full exhibit under the former testimony exception to the hearsay rule. It asked the court to find, on the basis of Peche's testimony, that B was unavailable because she was in Guatemala and there was no compulsory process available to the state to bring her to Connecticut, noting that the out-of-state subpoena statute applied only to individuals in the United States. The prosecutor represented to the court that B had left the United States because she could no longer work and because she had family in Guatemala who could support and care for her. The state took the legal position that, because B had stated on more than one occasion that she would not return to the United States, and the state had no legal means to compel her to do so, she was unavailable.

The defendant argued that the state had failed to establish B's unavailability because it had failed to offer a witness who could represent to the court, "yes, I know where [B] is, I have seen her, she is in Guatemala." According to the defendant, Peche was not such a witness because she had spoken with B only by phone.

The defendant also argued that there was no evidence that she was forced to leave the country and that "she should have been advised [by the state] that she could not go back [to Guatemala]." The defendant provided no authority that the state had a duty or the power to keep B from returning to Guatemala.[15] Although the defendant conceded that he had had an opportunity to cross-examine B at the time she gave her deposition testimony, the defendant also argued that, "due process-wise," his cross-examination of B would have been different if he had had the benefit of other witnesses' trial testimony at the time of the deposition.

After reviewing the deposition, the court granted the state's request to admit B's videotaped deposition. The court expressly found Peche's testimony credible and sufficient to establish the fact that B had returned to Guatemala. The court continued: "[T]he Connecticut Code of Evidence is basically leaving unavailability to each court on a case-by-case basis. And the court, after hearing from [the state], does make the reasonable inference that she returned to Guatemala, not because she was uncooperative in any degree; in fact, the court does believe she was somewhat cooperative, but she had left for different reasons—different personal reasons other than the advancement of the prosecution of this case. So, the court does find that her having been returned to Guatemala voluntarily, and the fact that she's beyond the state's subpoena power and had cooperated in part, the court does find that the state has

[15] The state responded as follows to the defendant's argument: "[W]e actually moved for deposition because we had a reasonable belief, but nothing firm, that she might not have been—I don't—I never saw any documents, is what I'm saying—that she might not have been a citizen of the United States. In which case, there would have been a possibility that she could have been made unavailable by some other process. Also, there's no obligation for a witness to stay in the country. You know, unless we secured a material witness warrant against them, and—and lodged them in jail. And that would be the—the only way that we would do that. And that's an unusual procedure."

met its burden of demonstrating unavailability." The court also found that the state had met its burden of establishing the two additional foundational elements necessary under § 8-6 of the Connecticut Code of Evidence,[16] concluding that B was deposed on substantially the same issues as those in the trial, and that the defendant had had a fair opportunity to develop the testimony being offered.[17]

[16] Section 8-6 of the Connecticut Code of Evidence provides in relevant part:

"The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

"(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, provided (A) the issues in the former hearing are the same or substantially similar to those in the hearing in which the testimony is being offered, and (B) the party against whom the testimony is now offered had an opportunity to develop the testimony in the former hearing. . . ."

The commentary to § 8-6 provides in relevant part: "The proponent of evidence offered under Section 8-6 carries the burden of proving the declarant's unavailability. . . . To satisfy this burden, the proponent must show that a good faith, genuine effort was made to procure the declarant's attendance by process or other reasonable means. . . . [S]ubstantial diligence is required . . . but the proponent is not required to do everything conceivable to secure the witness' presence. . . . A trial court is not precluded from relying on the representations of counsel regarding efforts made to procure the witness' attendance at trial if those representations are based on counsel's personal knowledge. . . ." (Citations omitted; internal quotation marks omitted.) Conn. Code Evid. § 8-6, commentary.

[17] At the time B was deposed, the parties had agreed that B's deposition testimony would be subject to impeachment at trial to the same degree as if it were live testimony. The state brought this to the trial court's attention at the time it ruled on the admissibility of B's videotaped deposition, stating as follows:

"[The Prosecutor]: I just would note in passing, for the record, that, under [§] 8-8 of the Code of Evidence, that impeachment and supporting credibility of a hearsay declarant may be done to the same extent as if it was live testimony. So that, for example, inconsistent statements—

"The Court: Inconsistent statement.

"[The Prosecutor]: —and extrinsic impeachment for bias, motive, interest in the outcome of the case, et cetera, can still be introduced against her; even though there's no opportunity to confront her with it, it can be introduced.

"The Court: For the jury's consideration of that witness.

"[The Prosecutor]: Yes."

The defendant did not indicate to the court at that time that he intended to introduce any impeachment evidence and expressly declined an invitation to do so after the videotaped testimony was played for the jury.

We now turn to our discussion of the defendant's claim. We begin with pertinent legal principles. Under our rules of evidence, former testimony by a witness is not excluded under the hearsay rule if the witness is unavailable to testify at trial, the former testimony and current proceedings involve substantially similar issues, and the opposing party had an opportunity to question the witness when the former testimony was elicited. See Conn. Code Evid. § 8-6 (1). Even if this evidentiary standard is met, however, in a criminal prosecution, the testimony must also pass constitutional muster.

The right to confront a witness through cross-examination is fundamental and essential to a fair trial; see *Pointer* v. *Texas*, 380 U.S. 400, 405, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); but courts recognize an exception to confrontation rights if a witness is (1) unavailable at trial and has (2) provided testimony at a prior judicial proceeding that was subject to cross-examination by the defendant. See *Crawford* v. *Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) ("[w]here testimonial evidence is at issue . . . the [s]ixth [a]mendment demands what the common law required: unavailability and a prior opportunity for cross-examination"). Under such circumstances, the former testimony may be admitted without violating the confrontation clause. In other words, a twofold approach is proper in analyzing an alleged denial of the right to confrontation by the admission of former testimony; first, a threshold inquiry into the unavailability of the witness and, second, an inquiry into the adequacy of cross-examination of the witness at the first proceeding. It is the unavailability determination of the court that the defendant challenges in the present appeal.

In *State* v. *Lebrick*, 334 Conn. 492, 506–507, 223 A.3d 333 (2020), our Supreme Court recently had the opportunity to evaluate the reasonableness of the state's efforts to produce a witness for trial and, in so doing,

clarified the appellate standard of review applicable to the present claim. "[T]he issues of the unavailability of the witness and the reasonableness of the [s]tate's efforts to produce the witness [under] the [c]onfrontation [c]lause [of] the [s]ixth [a]mendment . . . are mixed questions of law and fact . . . ." (Internal quotation marks omitted.) Id., 506. Accordingly, "[a]lthough we are bound to accept the factual findings of the trial court unless they are clearly erroneous . . . the ultimate determination of whether a witness is unavailable for purposes of the confrontation clause is reviewed de novo." (Citation omitted; internal quotation marks omitted.) Id., 507.

The court in *Lebrick* reiterated that "[f]ormer testimony . . . is inadmissible under both our rules of evidence and the confrontation clause unless the state has made a reasonable, diligent, and good faith effort to procure the absent witness' attendance at trial. This showing necessarily requires substantial diligence. In determining whether the proponent of the declaration has satisfied this burden of making reasonable efforts, the court must consider what steps were taken to secure the presence of the witness and the timing of efforts to procure the declarant's attendance. . . . A proponent's burden is to demonstrate a diligent and reasonable effort, not to do everything conceivable, to secure the witness' presence. . . . Indeed, it is always possible, in hindsight, to think of some additional steps that the prosecution might have taken to secure the witness' presence, but the [s]ixth [a]mendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising. . . . But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 508–509.

Although recognizing that any number of factors may be relevant to a reasonableness inquiry in a particular case, our Supreme Court considered the following four factors, adopted from federal case law,[18] in assessing the reasonableness of the state's efforts to produce a missing witness in the context of a criminal trial. See id., 511–12; id., 513 n.11 (noting that consideration of other factors relevant to reasonableness inquiry is not precluded in any particular case). "First, the more crucial the witness, the greater the effort required to secure his attendance. . . . Second, the more serious the crime for which the defendant is being tried, the greater the effort the [state] should put forth to produce the witness at trial. . . . Third, [if] a witness has special reason to favor the prosecution, such as an immunity arrangement in exchange for cooperation, the defendant's interest in confronting the witness is stronger. . . . Fourth, a good measure of reasonableness is to require the [s]tate to make the same sort of effort to locate and secure the witness for trial that it would have made if it did not have the prior testimony available." (Internal quotation marks omitted.) Id., 512.

In *Lebrick*, the issue before the Supreme Court was whether the trial court improperly had determined that a key state's witness in a felony murder-home invasion prosecution was unavailable for trial because she had not been located and, thus, also improperly admitted her former preliminary hearing testimony in violation of the defendant's confrontation clause rights. Id., 503–504. The defendant in *Lebrick* had argued at trial that the state's efforts to procure the witness' in-court testimony were insufficient to meet the evidentiary and constitutional unavailability standard because the state had conducted a far too restrictive electronic search for the

[18] In *Lebrick*, our Supreme Court instructed that courts in this state, in considering whether a witness is "unavailable" for purposes of the former testimony exception to the hearsay rule under our Code of Evidence, should follow the definition of "unavailable" used by federal courts in the Federal Rules of Evidence. *State* v. *Lebrick*, supra, 334 Conn. 507.

witness' then current address and phone number, and had failed to contact relatives, friends, or landlords who might have had helpful information as to her whereabouts.[19] Id., 503. The trial court had disagreed with the defendant and implicitly found that the state's efforts to locate the witness were sufficient to establish her unavailability for both evidentiary and constitutional purposes. Id. This court rejected the defendant's claim and affirmed the trial court's judgment of conviction, but our Supreme Court, after adopting and applying a less deferential standard of review than that employed by this court, agreed with the claim and reversed this court's judgment. Id., 504–507, 521.

A majority of the Supreme Court concluded that the vigor of the state's efforts to locate the witness was seriously lacking. Id., 518. The court took issue with the fact that the state knew it was dealing with a "crucial and reluctant witness whose testimony at the probable cause hearing had to be procured by court order but

[19] The state knew that the witness was a New York City resident, but when it tried to contact her at about the time that jury selection had begun to secure her testimony at trial, it was unable to reach her at her last known address and telephone number. *State* v. *Lebrick*, supra, 334 Conn. 500–501. An investigator for the state unsuccessfully searched several state and federal databases for a current address or phone number, eventually discovering two addresses associated with the witness in New York and several phone numbers. Id. The investigator called the phone numbers, "but two were not in service, and one was not receiving phone calls." Id., 501. The state nonetheless prepared an interstate summons that was sent by e-mail to the Kings County District Attorney's Office in New York City. Id. The e-mail contained the addresses the state had discovered in its electronic search as well as the last known address of the witness' mother in Brooklyn, New York. Id. An investigator with the district attorney's office attempted to serve the summons at the addresses provided; he was not tasked with conducting an independent investigation into the witness' whereabouts and did not undertake such a task on his own initiative. Id. The investigator visited the addresses he was provided, including twice visiting the address for the witness' mother but was unable to locate the witness. Id., 501–502. He also never encountered anyone whom he was able to question regarding the witness' location. Id., 502. His attempts to contact the witness by phone at the numbers provided by the state also proved unsuccessful. Id., 501–502.

nonetheless did not keep apprised of her whereabouts or begin searching for her until . . . shortly before jury selection began.'' Id., 515. The court also was critical of the efforts of the state's investigator, noting that, ''[a]lthough [he] knew that [the witness] was a New York resident, he did not search any New York state governmental databases to look for routine information, such as motor vehicle, social service, housing court, family court, or child support records. He did not use the information in his possession about [the witness'] last known addresses to learn whether she owned her own home or had a landlord who might have knowledge of her whereabouts. Nor did he ever ask anyone else to pursue any of these basic avenues of inquiry.'' Id. The court also stated that the state's investigator unnecessarily limited his electronic search to databases that contained ''relatively narrow categories of information'' rather than a more expansive ''basic Google search engine'' or ''any of the most popular social media sites, such as Facebook.'' Id.

The court also took issue with the state's ''ground efforts,'' describing them as ''equally anemic.'' Id., 517. Specifically, the court noted that the state's investigator, after forwarding the addresses he had found to the district attorney's office in New York City to facilitate service of an interstate summons, never spoke with the district attorney's office or requested that anyone in New York ''undertake any investigative efforts, knock on doors, talk with neighbors, locate a landlord, follow any leads, or conduct the most minimal surveillance.'' Id. The court further criticized the efforts of the district attorney's investigator, noting that his visits all had occurred during ''normal working hours, when most people with a nine-to-five job would not be expected to be at home.'' Id. The state's investigator never requested that the district attorney's investigator do any follow-up visits after he reported his initial lack of success. Id., 518.

Finally, in evaluating the reasonableness of the state's efforts to locate the witness in light of the four factors relevant in criminal cases, our Supreme Court concluded that all but one favored the defendant, noting that (1) the witness' prior testimony had provided the state with "crucial, inculpatory evidence regarding the defen dant's role in the commission of the crimes," (2) the crimes for which the defendant was charged were extremely serious, especially the charge of felony murder, which carried a potential sentence of imprisonment for twenty-five years to life; id., 514; and (3) it was unable to "conclude that the state's efforts to locate [the witness] were as vigorous as they would have been if it [had] no preliminary hearing testimony to rely [on] in the event of unavailability." (Internal quotation marks omitted.) Id., 515. Only the third of the four factors favored the state because the witness had no particular reason to favor the prosecution. Id.

In arguing the present claim, the defendant leans into the *Lebrick* decision as generally requiring significant vigor on the part of the state to procure the attendance of a witness at trial before the state may rely on that witness' unavailability as a basis for admitting the witness' former testimony. The *Lebrick* decision, however, primarily concerned the scope of the state's efforts to obtain the current contact information for a witness who was living in a neighboring state and whose attendance readily and legally could have been compelled by way of an interstate warrant if the state had made reasonably diligent efforts to find her. By contrast, the present case is concerned with what efforts the state must take to secure the attendance at trial of a witness whose whereabouts are known, but who has indicated a refusal to voluntarily appear and is outside the subpoena powers of the prosecuting authority. Courts that have considered what constitutes due diligence on the part of the state under these latter circumstances have

not required the state to go beyond a good faith inquiry as to the witness' intentions to attend trial in order to establish a witness' unavailability.

More directly on point with the facts of the present case is this court's decision in *State* v. *Morquecho*, 138 Conn. App. 841, 54 A.3d 609, cert. denied, 307 Conn. 941, 56 A.3d 948 (2012). In *Morquecho*, this court affirmed the trial court's determination regarding the unavailability of a witness located in Ecuador and its conclusion that the state had made reasonable efforts to secure the witness' attendance at trial.[20] Id., 862. As in the present case, the defendant in *Morquecho* was facing a murder charge. Id., 842. A key witness had returned to Ecuador. Id., 856. At trial, the state sought to admit the witness' former testimony from a probable cause hearing. Id., 855. To establish that the witness was unavailable for trial and that the state had made reasonable efforts to procure the witness' attendance, the state presented the testimony of an investigator with the Office of the State's Attorney who testified on the basis of her search that the witness was in Ecuador, although she did not testify that the state had either a current address or telephone number for the witness. Id., 855–56. The state also called a police detective who testified that, "to his knowledge, sometime after [the witness] testified at the probable cause hearing, he returned to Ecuador and remained in that country. . . . [A]pproximately six months earlier, in connection with [an] earlier trial, he obtained [the witness'] telephone number in Ecuador from [his] mother and that he spoke with [the witness]. . . . [H]e told [the witness] that his testimony at trial was crucial and asked [him] to return to Connecticut but [the witness] indicated that '[h]e

[20] We are cognizant that the court in *Morquecho* applied the now defunct abuse of discretion standard; see *State* v. *Morquecho*, supra, 138 Conn. App. 862; rather than the more exacting plenary review established by our Supreme Court in *Lebrick*. See *State* v. *Lebrick*, supra, 334 Conn. 507. Nonetheless, the court's discussion in *Morquecho* remains instructive in evaluating the state's efforts in the present case.

was not going to come back' and that 'he had no interest in coming back . . . .' Nonetheless, [the witness] asked [the detective] to advise him as to the outcome of the trial." Id., 856. The detective also testified that "he did not speak to [the witness] after that conversation and did not speak to him in connection with the present trial." Id. Finally, the detective testified that "the state provided transportation and immigration assistance to two other witnesses who were living abroad . . . to ensure their presence at the trial." Id.

After the court initially ruled that the state had failed to establish the witness' unavailability, the state called the witness' mother to testify. She testified that "[the witness] was in Ecuador, she spoke with [him] two weeks earlier and [he] did not want to return to Connecticut. . . . [H]e did not want to return to Connecticut because of concerns about what the defendant would do to him if he was released from prison." Id., 857. The state also presented testimony from a different police detective who stated that, "two weeks earlier, with the assistance of a Spanish speaking police officer, he contacted [the witness] in Ecuador and tried to convince him to return to Connecticut. [The witness] refused. . . . [I]n the weeks prior to trial, the police left several messages for [the witness], but he did not respond to these messages." Id.

The prosecutor renewed his request to admit the former testimony of the witness. In arguing that the state had made reasonable efforts to procure the witness' in-court testimony, the prosecutor made a representation to the court that, "although the state had provided travel assistance to two other witnesses *after they had expressed a willingness to return to Connecticut for the trial*, [this witness] had not expressed such willingness. The prosecutor [further] represented: 'I don't think there's any reason to presume that, had . . . [the witness] wanted to come back, that the state would

not have [arranged for his transportation to and accommodations in Connecticut].'' (Emphasis added.) Id., 858. The trial court ruled that the state had met its burden of demonstrating the unavailability of the witness and admitted the testimony from the probable cause hearing. Id.

On appeal, the defendant in *Morquecho* argued that the state's efforts to procure the witness for trial was ''less than diligent'' because ''the state merely located [the witness] and took at 'face value' his representation that he would not return to testify.'' Id., 858–59. In affirming the trial court's ruling that the state had made diligent and reasonable efforts, this court noted that the record established ''that persons, on behalf of the state, determined [the witness'] whereabouts, conducted research to ensure that he was not in the United States, spoke with him about the importance of his presence at trial and directly inquired if he would return to testify. These efforts were made until the eve of trial.'' Id., 861. This court expressly rejected the defendant's arguments that ''the state conceivably could have done more to secure [the witness'] attendance by providing travel and immigration assistance to [the witness], taking steps to ensure that [the witness] did not leave the country prior to trial and providing protection to [the witness] during his stay in Connecticut,'' and that ''the state undertook greater efforts to secure the presence of other state witnesses who were living abroad.'' Id.

The United States Supreme Court also has considered for purposes of establishing the unavailability of a witness in a criminal trial what constitutes reasonable and diligent efforts to procure the attendance of a witness whose location may be known but who is purportedly outside the jurisdiction of the prosecuting authority's subpoena powers. See *Barber* v. *Page*, 390 U.S. 719, 724–25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968); see also

Mancusi v. *Stubbs*, 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972). We believe a discussion of these cases is instructive.

In *Barber* v. *Page*, supra, 390 U.S. 719, a habeas corpus petitioner who had been convicted in Oklahoma of armed robbery claimed that his constitutional right to confrontation had been violated at his criminal trial because the evidence establishing his guilt primarily consisted of former testimony by a witness at a preliminary hearing that was admitted despite the fact that the witness did not testify in person at trial because he was not within the jurisdiction of the state but in a federal prison in Texas. Id., 720. The Supreme Court indicated that the only effort made by the state to obtain the witness' presence at trial was "to ascertain that he was in a federal prison outside Oklahoma." Id., 723. The court recognized that "various courts and commentators have heretofore assumed that the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation on the theory that it is impossible to compel his attendance, because the process of the trial [c]ourt is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless." (Footnotes omitted; internal quotation marks omitted.) Id. The Supreme Court, however, rejected the "accuracy of that theory," because "it is clear that at the present time increased cooperation between the [s]tates themselves and between the [s]tates and the [f]ederal [g]overnment has largely deprived it of any continuing validity in the criminal law." The court noted that federal courts could issue appropriate writs at the request of state prosecutorial authorities and that the United States Bureau of Prisons had a policy to allow federal prisoners "to testify in state court criminal proceedings pursuant to writs of habeas corpus ad testificandum issued out of state courts." Id., 724. Because the state in *Barber* had made

absolutely no effort to obtain the witness' attendance at trial by means of legal procedures and processes available to the state, the Supreme Court held that the prosecution had failed to establish the incarcerated witness' unavailability. Id., 725; id. ("[S]o far as this record reveals, the sole reason why [the witness] was not present to testify in person was because the [s]tate did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly.").

Four years later, in *Mancusi* v. *Stubbs*, supra, 408 U.S. 204, the Supreme Court discussed its holding in *Barber* v. *Page*, supra, 390 U.S. 719, distinguishing its holding in the context of a witness who was not simply in another state but, rather, was a foreign citizen living outside the United States. Specifically, in *Mancusi*, the habeas corpus petitioner had claimed that his murder conviction following a retrial in Tennessee was obtained in violation of his confrontation rights and thus should not have been considered for sentencing purposes in a subsequent criminal proceeding in New York. *Mancusi* v. *Stubbs*, supra, 205. At the petitioner's retrial on the murder charges, the prosecution had sought to have a key prosecution witness who had testified at the petitioner's first trial declared unavailable in order to admit the witness' former testimony. To demonstrate unavailability, the state offered the testimony of the witness' son that the witness, a naturalized American citizen, had left the country and become a permanent resident of Sweden. The trial court granted the state's request, and the witness' former testimony was read to the jury. The petitioner was convicted of murder a second time. Id., 207–209.

The United States Supreme Court concluded that the petitioner's right of confrontation was not violated by the admission of the witness' former testimony because the witness was unavailable. The Supreme Court distinguished the present situation from *Barber*, in which it

had concluded that the state had failed to demonstrate reasonable efforts to secure the witness' attendance by simply relying on his absence from the boundaries of the prosecuting state without any effort to use appropriate federal writs or other legal means. Id., 212. Unlike in *Barber*, the witness in *Mancusi* was not just outside the state but was a resident of another country. Id., 211. Whereas, in *Barber*, the state had available legal procedures to secure the witness' attendance, the court in *Mancusi* noted that "[t]here have been . . . no corresponding developments in the area of obtaining witnesses between this country and foreign nations." Id., 212. The court also noted that, under existing case law and federal statutes, there was no right to subpoena a United States citizen residing in a foreign country for testimony in a state felony trial. Id., 211–12. The Supreme Court did not indicate that, to meet its burden of establishing unavailability, the state was required to make any additional efforts either to coerce or to incentivize the witness' return to the United States. Rather, the court stated: "Upon discovering that [the witness] resided in a foreign nation, the [s]tate of Tennessee, so far as this record shows, was powerless to compel his attendance at the second trial, either through its own process or through established procedures depending on the voluntary assistance of another government."[21] Id., 212.

[21] The Supreme Court in *Mancusi* granted certiorari from a ruling by the United States Court of Appeals for the Second Circuit. *Mancusi* v. *Stubbs*, 404 U.S. 1014, 92 S. Ct. 671, 30 L. Ed. 2d 661 (1972). The Second Circuit had stated that the witness' absence from the United States was not "per se a sufficient reason to broaden the exception to the [c]onfrontation [c]lause allowing the admission of prior testimony of a presently unavailable witness. Although there is a much greater chance that it will not be possible to bring before the court a witness residing abroad, the possibility of a refusal is not the equivalent of asking and receiving a rebuff." (Internal quotation marks omitted.) *United States ex rel. Stubbs* v. *Mancusi*, 442 F.2d 561, 563 (2d Cir. 1971), rev'd, *Mancusi* v. *Stubbs*, 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972). The Second Circuit's conclusion that the state had failed to meet its burden of establishing due diligence appears to have turned on the fact that the record contained no evidence that the state ever asked the

As observed by the Supreme Court of California in discussing the *Mancusi* holding: "Subsequent to *Mancusi*, the Supreme Court stated in *Ohio* v. *Roberts*, [448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), overruled in part by *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)], that 'if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation.' . . . This statement did not alter or detract from *Mancusi*'s analysis that when the prosecution discovers the desired witness resides in a foreign nation, and the state is powerless to obtain the [witness'] attendance, either through its own process or through established procedures, *the prosecution need do no more to establish the* [*witness'*] *unavailability*." (Citation omitted; emphasis altered.) *People* v. *Herrera*, 49 Cal. 4th 613, 625, 232 P.3d 710, 110 Cal. Rptr. 3d 729, cert. denied, 562 U.S. 942, 131 S. Ct. 361, 178 L. Ed. 2d 233 (2010). We agree with this assessment.[22]

Under existing United States Supreme Court precedent and precedents of other jurisdictions, for purposes

witness whether he would be willing to voluntarily return and testify. In reversing the judgment of the Second Circuit, the Supreme Court's decision implicitly rejected the Second Circuit's reasoning that, to establish due diligence in procuring the attendance of a witness located outside of the United States, a state cannot solely rely on the witness' absence but must, at a minimum, also produce evidence demonstrating that it sought the witness' voluntary attendance and that that request was rejected. Nevertheless, in the present case, there was testimony presented at trial that the state had asked Peche to determine on its behalf whether B would be willing to return and that B had indicated that she would not be willing to return to the jurisdiction. Accordingly, even the more exacting standard applied by the Second Circuit would be met in the present case.

[22] We note that, since *Mancusi* was decided, relevant federal statutes have been amended and now permit a state to seek a subpoena of a *United States citizen* residing abroad. See 28 U.S.C. § 1783 (a) (2018). These changes do not affect *Mancusi*'s holding, however, with respect to a foreign national, such as in the present case. In the absence of a treaty or federal statute, a foreign citizen is simply outside the subpoena power of the state.

of establishing unavailability, it is sufficient for the state to demonstrate that a foreign national is outside of any reasonable legal means to compel attendance, provided that the state makes inquiry, either itself or through a reliable third party, as to whether the witness will voluntarily return to the jurisdiction for trial. See *Mancusi* v. *Stubbs*, supra, 408 U.S. 204; see also *Commonwealth* v. *Hunt*, 38 Mass. App. 291, 295, 647 N.E.2d 433 (relying on *Mancusi* for proposition that "[w]hen a witness is outside of the borders of the United States and declines to honor a request to appear as a witness, the unavailability of that witness has been conceded because a [s]tate of the United States has no authority to compel a resident of a foreign country to attend a trial here"), review denied, 420 Mass. 1103, 651 N.E.2d 409 (1995). We agree with the defendant that the state does not meet its burden of demonstrating due diligence to procure the attendance of a witness for trial simply by establishing that the witness is a noncitizen who is not in the United States and outside the state's subpoena powers. Rather, the state has a duty to make some effort to discern whether the witness might voluntarily appear. See *Barber* v. *Page*, supra, 390 U.S. 724 (noting that "possibility of a refusal is not the equivalent of asking and receiving a rebuff" (internal quotation marks omitted)).

We now turn to the present case, in which the record reflects that the state's efforts to procure B's attendance at trial were neither comprehensive nor exhaustive. That, however, is not the standard that we must apply. Rather, the question is whether, in light of all the circumstances known, the state acted in good faith and with due diligence to procure B's attendance. Our plenary review of the record, viewed in light of the relevant legal precedent we have discussed, leads us to conclude that the court properly concluded that B was unavailable for both evidentiary and constitutional purposes.

We begin by noting that all four factors of the nonexhaustive test cited to and utilized by our Supreme Court in *Lebrick* favor the defendant's position that the state was required to make all *reasonable and good faith* efforts to procure B's attendance at trial. See *State* v. *Lebrick*, supra, 334 Conn. 511–12. First, B was a crucial witness for the state because she was the sole eyewitness to the events at issue. Second, the defendant was charged with extremely serious crimes, including murder and attempted murder. Third, as one of the victims of the defendant's crimes, B had a special reason to favor the prosecution in order to obtain justice for herself and her close friend, N. Finally, if B had left the country prior to the state's securing her deposition testimony, something that the state took efforts to ensure did not happen, it is reasonable to presume that the state would have exhausted available efforts to secure her attendance at trial. Nonetheless, the defendant has not provided this court with persuasive legal authority that reasonable and good faith efforts under the circumstances presented necessarily *required* the state to take any additional steps beyond those that it pursued.

The record shows that the state was aware of B's whereabouts and her immigration status and had kept in contact with her through Peche throughout the pretrial proceedings. It was aware of her desire to return to Guatemala as reflected in its motion to advance the trial date and to notice her deposition. After she left the country, Peche maintained contact with B and contacted her at the request of the state to inquire if she would be willing to return for the trial. The most recent contact was three days prior to Peche testifying, at which point she testified that B remained in Guatemala and, although interested in the outcome of the trial, refused to return to testify. The court found Peche's testimony to be credible.

It is reasonable to infer from the record before the court that, in the absence of some legal means to compel

B's attendance, it was highly unlikely that *any* additional efforts on the part of the state would have been successful in convincing B to return voluntarily. She could no longer do the work she had been doing in the United States because of her injuries, and she needed to be in Guatemala both to obtain the support of her family and to take care of her children. Furthermore, it is well settled that the state need not exhaust all possibilities in order to satisfy its burden of establishing the unavailability of a witness, and "[t]he law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists . . . 'good faith' demands nothing of the prosecution." *Ohio* v. *Roberts*, supra, 448 U.S. 74. Accordingly, we are not convinced that the state was required to expend any and all resources available to it to eliminate the obvious and complex challenges posed by B's immigration status or to extend logistical and financial incentives to induce her return to Connecticut. All indications were that such efforts would have been fruitless.

We conclude that, in light of B's status as a foreign citizen located outside the United States, with no indication in the record or argument by the defendant that the state had available any legal means to coerce her return or the cooperation of her home country, and, under the totality of the circumstances presented, the state made sufficient efforts in this case, including discerning whether she would return voluntarily, to establish B's unavailability.

To the extent that the defendant makes the additional claim that, even if the witness were properly found to be unavailable, admission of the deposition transcript was nonetheless violative of his confrontation rights because he did not have an adequate opportunity to cross-examine B at the time her deposition was taken, we summarily reject that claim. "The central concern of the [c]onfrontation [c]lause is to ensure the reliability of the evidence against a criminal defendant by sub-

jecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. . . . The right of confrontation includes (1) the physical presence of the witness, (2) the administration of an oath to impress upon the witness the seriousness of the matter and to guard against the lie by the possibility of a penalty for perjury, (3) cross-examination of the witness to aid in the discovery of truth, and (4) the opportunity for the jury to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." (Citation omitted; internal quotation marks omitted.) *State* v. *Lebrick*, supra, 334 Conn. 510.

As argued by the state, we believe that the circumstances of B's deposition testimony reflect that the defendant had an unfettered opportunity to confront B that satisfied all the aforementioned elements. B's deposition was taken under agreed upon parameters, in court, under oath, subject to the penalty of perjury, and with the direct supervision of a judge. The deposition was videotaped and thus reflected B's demeanor while answering questions. The trial court did nothing to restrict the defendant's cross-examination of B about her direct examination, and the state never objected to a single question or avenue of inquiry. Although the record reflects that the defendant chose not to use a potential prior inconsistent statement of B during his cross-examination, he did so with the understanding that he would be permitted to use any impeachment evidence available in the event that the deposition was admitted at trial due to B's unavailability. To the extent that any impeachment evidence existed, however, the defendant declined to present it when he was given an opportunity to do so at trial.

Finally, we agree with the state that any potential that B's examination at trial might have differed from her deposition testimony or that the defendant might later have become privy to additional information to

utilize during his cross-examination is speculative and not a basis to conclude that his rights of confrontation were violated. See *State* v. *Crump*, 43 Conn. App. 252, 264, 683 A.2d 402 ("[There is] no authority, under either [the federal or state] constitution, for the proposition that any particular type of cross-examination, as to duration or content, is a requirement that must be satisfied before that prior testimony may be admissible. Neither the state nor federal guarantees of the right of confrontation require that a witness be present at trial for an actual cross-examination in order to admit prior testimony given under oath. . . . The test is the opportunity for a full and complete cross-examination rather than the use made of that opportunity." (Internal quotation marks omitted.)), cert. denied, 239 Conn. 941, 684 A.2d 712 (1996).

For the foregoing reasons, we reject the defendant's claim that the court improperly admitted B's prior deposition testimony into evidence in violation of our rules of evidence and his constitutional rights to confrontation and due process.

II

The defendant also claims that his dual conviction of attempted murder and assault in the first degree, each of which was factually predicated on his having stabbed B, violated the constitutional prohibition against double jeopardy because, as a result of the court's having permitted his conviction of both charges to stand, he effectively has been punished twice on the same evidence for the same offense. Although the defendant acknowledges that this claim was never raised before the trial court and, thus, is unpreserved, he nevertheless seeks appellate review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified in *In re*

Yasiel R., 317 Conn. 773, 781, 120 A.3d 1188 (2015).[23] We conclude that the claim is reviewable under *Golding* because it is of constitutional magnitude and the record is adequate for review. We conclude, however, that the defendant cannot demonstrate the existence of a constitutional violation, and, thus, his claim fails under the third prong of the *Golding* analysis.[24]

[23] *Golding* provides that "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781 (eliminating *Golding*'s use of "clearly" in describing requirements under third prong of test).

[24] Although, in its appellate brief, the state primarily responds to the merits of the defendant's double jeopardy claim, in a lengthy footnote at the end of its double jeopardy analysis, the state also argues that we should treat the defendant's failure to raise his double jeopardy claim at trial as an implied waiver of any double jeopardy protection. In support of that argument, the state notes that appellate courts in this state have relied on waiver to resolve unpreserved double jeopardy claims arising in the context of a successive prosecution; see, e.g., *State* v. *Ledbetter*, 240 Conn. 317, 325–26, 692 A.2d 713 (1997); *State* v. *Belcher*, 51 Conn. App. 117, 122–23, 721 A.2d 899 (1998); but nonetheless have afforded *Golding* review to unpreserved double jeopardy claims arising in the course of a single trial without providing any analysis to explain this apparently disparate treatment of similar claims. See, e.g., *State* v. *Chicano*, 216 Conn. 699, 704, 584 A.2d 425 (1990), overruled in part on other grounds by *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013); see also *State* v. *Barber*, 64 Conn. App. 659, 671, 781 A.2d 464 ("[i]f double jeopardy claims arising in the context of a single trial are raised for the first time on appeal, these claims are reviewable" (internal quotation marks omitted)), cert. denied, 258 Conn. 925, 783 A.2d 1030 (2001).

The state also argues in the same footnote that the defendant's failure to raise his double jeopardy concern at trial unfairly prejudiced the state and potentially resulted in an inadequate record for review on appeal because, if the state had known of the double jeopardy claim at trial, it might have marshaled the evidence differently or made additional arguments to the jury. Specifically, the state notes that, given the multiple injuries to B, it could have argued that "the defendant initially attacked B with an intent to inflict serious physical injury and then, prior to thrusting an object in her neck after she came to on the floor and begged for her life, engaged in a separate act of attempted murder."

As discussed in this part of the opinion, the defendant's claim fails on its merits under established precedent and, therefore, he cannot demonstrate

"The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . . This constitutional provision is applicable to the states through the due process clause of the fourteenth amendment. . . . The Connecticut constitution provides coextensive protection, with the federal constitution, against double jeopardy. . . .[25] This constitutional guarantee serves three separate 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. [3] And it protects against multiple punishments for the same offense [in a single trial]." (Citations omitted; footnote added; footnote omitted; internal quotation marks omitted.) *State* v. *Ferguson*, 260 Conn. 339, 360–61, 796 A.2d 1118 (2002). In the present appeal, the defendant's claim implicates the last of these three functions.

"The double jeopardy analysis in the context of a single trial is a two part 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*. . . . With respect to cumulative sentences imposed in a single trial, the [d]ouble [j]eopardy [c]lause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. . . . [T]he role of the constitutional guarantee [against double jeopardy] is limited to

the existence of a constitutional violation as alleged on the basis of the facts in the record on which he relies. Consequently, we elect not to resolve these alternative arguments advanced by the state.

[25] The Connecticut constitution does not contain an express prohibition against double jeopardy, but the due process guarantees of article first, § 8, of the constitution of Connecticut have been interpreted to include a protection against double jeopardy. See *State* v. *Michael J.*, 274 Conn. 321, 349–50, 875 A.2d 510 (2005). The scope of this state constitutional protection consistently has been construed to mirror, rather than to exceed, the protection afforded under the federal constitution. Id.

assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. . . . On appeal, the defendant bears the burden of proving that the prosecutions are for the same offense in law and fact." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 361.

With respect to the first part of this two part process, "it is not uncommon that we look to the evidence at trial and to the state's theory of the case . . . in addition to the information against the defendant, as amplified by the bill of particulars. . . . If it is determined that the charges arise out of the same act or transaction, then the court proceeds to [part two of the analysis], where it must be determined whether the charged crimes are the same offense. . . . At this second step, we [t]raditionally . . . have applied the *Blockburger* test[26] to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [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 [that] the other does not.[27] . . . In applying the *Blockburger* test, we

[26] See *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

[27] Both our Supreme Court and the United States Supreme Court have clarified that the *Blockburger* test, which also is referred to as the "*same-elements*" test, "inquires whether each offense contains *an element* not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." (Emphasis added.) *United States* v. *Dixon*, 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). In *State* v. *Bernacki*, 307 Conn. 1, 21–22, 52 A.3d 605 (2012), cert. denied, 569 U.S. 918, 133 S. Ct. 1804, 185 L. Ed. 2d 811 (2013), our Supreme Court emphasized that it is irrelevant for purposes of a *Blockburger* analysis "that the state may have relied on the same evidence to prove that the elements of both statutes were satisfied"; id., 21; and that proper application of the *Blockburger* test looks at whether "each statute contains a different *statutory element* requiring proof of a fact that the other does not . . . ." (Emphasis added.) Id., 22. The court further noted that "emphasis on the conduct at issue, rather than purely on the statutory language and charging instruments, is not consistent with our well established case law holding

look only to the information and bill of particulars—as opposed to the evidence presented at trial—to determine what constitutes a lesser included offense of the offense charged." (Citations omitted; footnotes added; internal quotation marks omitted.) *State* v. *Porter*, 328 Conn. 648, 662, 182 A.3d 625 (2018).[28] Stated differently, only "[i]f the elements of one offense as defined by the statute include the elements of a lesser offense; or if one offense is merely nominally distinct from the other" will double jeopardy attach. *State* v. *McCall*, 187 Conn. 73, 91, 444 A.2d 896 (1982).

The state does not dispute seriously the defendant's assertion that his conviction of both counts arose from the same act or transaction.[29] As the defendant correctly notes, with respect to the charges of attempted murder and assault in the first degree, the information alleged that those crimes involved the same victim, B, and had occurred on the same date, at the same time and at the same location. For purposes of our analysis, we will assume without deciding that the first step of the double jeopardy analysis is met and proceed directly to the

that the *Blockburger* analysis is theoretical in nature and not dependent on the actual evidence adduced at trial." Id., 21 n.16.

[28] As our Supreme Court has stated, the *Blockburger* test is, at its core, a rule of statutory construction, and "because it serves as a means of discerning [legislative] purpose the rule should not be controlling [if], for example, there is a clear indication of contrary legislative intent. . . . Thus, the *Blockburger* test creates only a rebuttable presumption of legislative intent, [and] the test is not controlling [if] a contrary intent is manifest. . . . [If] the conclusion reached under *Blockburger* is that the two crimes do not constitute the same offense, the burden remains on the defendant to demonstrate a clear legislative intent to the contrary." (Citations omitted; internal quotation marks omitted.) *State* v. *Alvaro F.*, 291 Conn. 1, 12–13, 966 A.2d 712, cert. denied, 558 U.S. 882, 130 S. Ct. 200, 175 L. Ed. 2d 140 (2009).

[29] To the extent that the state suggests in a footnote in its brief that the jury reasonably could have viewed the evidence at trial as supporting a conclusion that the defendant engaged in separate acts for which separate punishment would be permissible; see footnote 24 of this opinion; without additional briefing of the issue, the state's brief is inadequate to raise any challenge to whether the defendant's double jeopardy claim fails under the " 'same act or transaction' " prong of double jeopardy analysis. See *State* v. *Ferguson*, supra, 260 Conn. 361.

second step of the analysis to determine if the charged crimes each contain a statutory element that the other does not. The state asserts that they do and cites to *State* v. *Sharpe*, 195 Conn. 651, 655, 491 A.2d 345 (1985), as controlling precedent holding that punishment for both assault in the first degree and attempted murder in the same prosecution does not violate double jeopardy. We agree with the state.

We begin by comparing the statutory elements of attempted murder and assault in the first degree to determine if each offense contains an element not contained in the other. Section 53a-49 provides in relevant part: "(a) A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does . . . anything . . . constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. . . ." Section 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person . . . ." Accordingly, "[a] conviction for attempted murder requires proof of intentional conduct constituting a substantial step toward intentionally causing the death of another person." *State* v. *Sharpe*, supra, 195 Conn. 655.

By comparison, § 53a-59 (a) provides in relevant part: "A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a . . . dangerous instrument . . . ." Looking at the elements of the two crimes, attempted murder requires proof that the defendant intended to cause the death of the victim, which is not an element of assault in the first degree, which requires only the intent to cause serious physical injury. Conviction for assault in the first degree requires proof that the defendant (1) seriously injured the victim (2) with a dangerous instrument. The state is not required to

prove either of those elements to obtain a conviction for attempted murder. Mindful that a *Blockburger* analysis is technical in nature in that it requires us to focus only on the statutory elements and not on the evidence adduced at trial to prove those elements, we are compelled to conclude that attempted murder and assault in the first degree are not the same offense for purposes of double jeopardy.

Our conclusion is consistent with and controlled by our Supreme Court's decision in *State* v. *Sharpe*, supra, 195 Conn. 651. In *Sharpe*, the victim was in a vehicle, backing out of the driveway of his house, when the defendant approached the front of the vehicle, carrying a gun. Id., 653. He first fired a shot into the front of the vehicle that hit the victim, and then moved around to the driver's side of the car and fired five or six additional shots, further injuring the victim. Id., 653–54. The defendant was charged with both attempted murder in violation of §§ 53a-49 and 53a-54a (a) and with assault in the first degree in violation of § 53a-59 (a) (1), each predicated on his shooting of the victim. Id., 652. The court denied the defendant's pretrial motion that sought the dismissal of either the attempted murder charge or the assault charge on the grounds that they rose out of the same transaction and, thus, were "multiplicitous" and violated his right to be free from double jeopardy. Id., 654, 656 n.3.

On appeal, our Supreme Court rejected the defendant's double jeopardy claim, holding that it failed under the *Blockburger* test. Id., 655–56. The court stated: "A conviction for attempted murder requires proof of intentional conduct constituting a substantial step toward intentionally causing the death of another person. . . . No showing of actual injury is required. Conversely, a conviction for assault in the first degree requires proof that the defendant actually caused serious physical injury to another person. No showing of intent to cause

death is necessary. Therefore, each offense requires proof of a fact which the other does not. Consequently, the statutory violations charged, attempted murder and assault in the first degree, are not the same offense for double jeopardy purposes. This conclusion disposes of the defendant's argument that he was subjected to double jeopardy by being punished twice upon the same evidence and essentially the same offense. He was not twice punished for the same crime." (Citation omitted; footnote omitted.) Id.

This court previously has relied on the holding in *Sharpe* to reject a claim that charges of attempted murder and assault in the first degree by means of a dangerous instrument with respect to the actions of a single defendant against a single victim in the same transaction are the same offense for double jeopardy purposes under the *Blockburger* test. See *State* v. *Glover*, 40 Conn. App. 387, 391–92, 671 A.2d 384, cert. denied, 236 Conn. 918, 673 A.2d 1145 (1996). In *Glover*, as in *Sharpe* and the present case, "the information charged the defendant with committing both crimes in the same place at the same time." Id., 391.

Although the defendant attempts to distinguish the outcome in *Sharpe* from the present action, his arguments are unavailing. *Sharpe* remains good law and is binding authority under the facts of the present case as it pertains to the defendant's double jeopardy claim. The defendant argues that the holding in *Sharpe* "cannot be baldly applied to every double jeopardy claim premised on concomitant convictions of attempted murder and assault in the first degree." In support of this argument, the defendant attempts to attach far too great significance to language from another case that relied on *Sharpe*, suggesting that the outcome of the *Blockburger* analysis in that case turned on the defendant's concession that the attempted murder and assault were charged as separate offenses rather than

as "offenses standing in a greater-lesser relationship." *State* v. *Gilchrist*, 24 Conn. App. 624, 629, 591 A.2d 131, cert. denied, 219 Conn. 905, 593 A.2d 131 (1991); see also *State* v. *McCall*, 187 Conn. 73, 91, 444 A.2d 896 (1982) (similar concession made by defendant). The defendant clarifies that, in the present case, he is expressly asserting that "the [two] charges . . . stand in the relation of greater to lesser included offenses."

By definition, however, "[a] lesser included offense is one that does not require proof of elements beyond those required by the greater offense." (Internal quotation marks omitted.) *State* v. *Johnson*, 316 Conn. 34, 44, 111 A.3d 447 (2015). Because, as we already have explained, a conviction for assault in the first degree requires proof of actual serious physical injury whereas attempted murder requires no such proof, by definition, assault in the first degree cannot be a lesser included offense of attempted murder.

Furthermore, the defendant has pointed us to nothing in the present record that would support the novel legal theory he advances, which stands counter to traditional *Blockburger* analysis. The operative information in this case charged attempted murder and assault in the first degree by way of two separate and distinct counts. Despite the allegations that the crimes were committed contemporaneously, nothing in the language of those counts reasonably can be construed as evincing any intent on the part of the state to charge the defendant in the alternative. The counts were not pursued by the state at trial in an alternative manner nor was such a theory discussed in closing argument. No instruction was requested by the defendant, nor was any instruction given to the jury, indicating that it should consider the charges only "as standing in a greater-lesser relationship."[30] Although certainly not dispositive by itself, the

[30] The defendant relies on this court's analysis in *State* v. *Tinsley*, 197 Conn. App. 302, 232 A.3d 86, cert. granted, 335 Conn. 927, 234 A.3d 979 (2020), to support his insistence that assault in the first degree should be

defendant's failure to raise the double jeopardy claim that he now advances either by way of a pretrial motion to dismiss or postconviction belies any implication that the double jeopardy claim was obvious on the face of the information or the manner in which the case was charged.

Because we have concluded that attempted murder and assault in the first degree are not the same offense under a traditional *Blockburger* analysis, the defendant can only prevail on his double jeopardy claim by making a showing that the legislature intended to preclude multiple punishments for those crimes. The defendant, who has the burden of proof on that issue; *State* v. *Alvaro F.*, 291 Conn. 1, 13, 966 A.2d 712, cert. denied, 558 U.S. 882, 130 S. Ct. 200, 175 L. Ed. 2d 140 (2009); has advanced nothing from which to discern any legislative intent to preclude prosecution of a criminal defendant for both assault in the first degree and attempted murder. The defendant has not directed us to any statutory

treated as a lesser included offense of attempted murder. In *Tinsley*, the defendant was convicted of both manslaughter in the first degree and risk of injury to a child on the basis of his having brutally beaten a fifteen month old child, who later died of his injuries. Id., 304–306. This court found that each of those statutes contained an element that the other does not and thus were not the same offense under a traditional *Blockburger* analysis. Id., 323. Nevertheless, the court agreed with the position advanced by the defendant that the dual convictions still violated double jeopardy if it was not possible to commit the greater offense in the manner described in the information without having first committed the lesser offense. Id., 324–25. The court determined that, "one cannot cause the death of another in the manner described in the information, without first inflicting trauma to the victim's body, which is an act likely to impair the health of the minor victim." Id., 323. The court in *Tinsley* held, on the basis of that determination, that "risk of injury to a child is a lesser included offense and, thus, the same offense for purposes of double jeopardy, as manslaughter in the first degree." Id.

To the extent that the defendant asks us to follow the alternative analytical path utilized by this court in *Tinsley*, we decline to expand *Tinsley*'s holding beyond the precise circumstances of that case. Whereas our Supreme Court's analysis in *Sharpe* is essentially "on all fours" with the present case because the same statutory crimes were at issue, the court in *Tinsley* was comparing simultaneous convictions of charges of risk of injury and manslaughter, neither of which is implicated in the present case.

language or other evidence from which we could discern a clear legislative intent to preclude a conviction as occurred in the present case. Accordingly, the defendant's double jeopardy claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.