LILLY M. GIBSON *v.* JEFFERSON WOODS COMMUNITY, INC., ET AL.
(AC 43849)

Elgo, Cradle and DiPentima, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property, a condominium unit, owned by the defendant P. The defendant J Co. was the condominium association for the complex, which included the condominium unit at issue. The previous owner of the unit, T, had executed a note and mortgage in favor of M, which was recorded in the land records. J Co. thereafter recorded a lis pendens on the unit in the land records and commenced a foreclosure action against T and M in which it sought a judgment of strict foreclosure as to its condominium common charge lien on the property. The trial court in that prior foreclosure action rendered a judgment of strict foreclosure. M assigned to the plaintiff his rights, title and interest in the mortgage note and deed encumbering the property, and the plaintiff recorded in the land records the assignment of that interest five days before the law days were set to run. No party redeemed and no party appealed the judgment of strict foreclosure. J Co. then sold the unit to P. Several years later, the plaintiff brought this action against, inter alia, J Co. and P, in which she sought the foreclosure of the mortgage that M had assigned to her and damages for unjust enrichment. The trial court granted the motion to dismiss filed by J Co. on the ground that the plaintiff lacked standing. From the judgment rendered thereon, the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on her claim that the trial court improperly granted J Co.'s motion to dismiss count one of her complaint on the ground that she lacked standing, which was based on her claim that the mortgage that she sought to foreclose had not been extinguished in the prior foreclosure action: when the law day passed for the mortgage that M had assigned to the plaintiff, her right to redeem the property ended and, although the plaintiff had constructive notice of the prior action, she did not litigate the issue of subject matter jurisdiction in that prior action or file any motion or appearance, and she did not attempt to appeal from the judgment of strict foreclosure; moreover, there were no exceptional circumstances that existed to permit the plaintiff to collaterally attack the jurisdiction of the trial court in the prior foreclosure action, when the plaintiff commenced this action approximately three years after the conclusion of the prior action and after title to the property had absolutely vested in J Co., and the plaintiff's claim that the jurisdictional prerequisites to maintaining a foreclosure action on a common charge lien pursuant to the applicable statute (§ 47-258 (m) (1)) were not satisfied overlooked established law that a collateral attack on a final judgment is disfavored, and the question of

whether the jurisdictional requirements in § 47-258 (m) (1) were satisfied in the prior action were not obvious from the record.

2. The trial court properly granted J Co.'s motion to dismiss the unjust enrichment count of the plaintiff's complaint on the ground that she lacked standing: notwithstanding the plaintiff's claim that her interest in the mortgage was not extinguished in the prior foreclosure action because the trial court in that action lacked jurisdiction, the plaintiff could not prevail on this claim, as that mortgage was extinguished in the prior action when title to the property became absolute in J Co.

Argued May 12—officially released August 3, 2021

Procedural History

Action seeking to foreclose a mortgage on certain real property, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Baio*, *J.*, granted the named defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Joseph S. Elder, for the appellant (plaintiff).

Kristen Schultze Greene, for the appellee (named defendant).

Kenneth M. Rozich, with whom, on the brief, was *Kyle R. Barrett*, for the appellee (defendant Joseph R. Pagliaro).

Opinion

DiPENTIMA, J. The plaintiff, Lilly M. Gibson, appeals from the judgment of the trial court granting the motion of the defendant Jefferson Woods Community, Inc. (Jefferson Woods),[1] to dismiss the action. On appeal, Gibson claims that, in granting Jefferson Woods' motion

[1] The complaint also named as defendants the Department of Revenue Services, Priscilla B. Taylor, Samuel Miller, Mark Williams, Samuel Kearse and Joseph R. Pagliaro. The Department of Revenue Services, Taylor, Miller, Williams and Kearse did not participate in this appeal.

The present appeal was taken from the judgment of the court granting Jefferson Woods' motion to dismiss. Thereafter, the trial court granted Pagliaro's motion to dismiss, which raised arguments similar to those raised in Jefferson Woods' motion. No appeal was taken from that ruling. Gibson's appellate brief, however, raises claims as to both rulings, and Pagliaro filed a responsive appellate brief defending the merits of the ruling.

to dismiss, the court improperly determined that she lacked standing (1) to seek foreclosure and (2) to pursue her claim of unjust enrichment. We disagree and, accordingly, affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. Jefferson Woods was the condominium association for the complex that included the condominium unit at issue, unit number 23, located at 23 Monticello Drive in Branford (property). In 2009, the owner of the property, Priscilla B. Taylor, executed a note and mortgage in favor of Marvin Blassingdale in the amount of $150,000, which encumbered the property and which Blassingdale recorded in the Branford land records.

On February 6, 2015, Jefferson Woods recorded a lis pendens on the property in the Branford land records. Jefferson Woods commenced a foreclosure action, *Jefferson Woods Community, Inc.* v. *Taylor*, Superior Court, judicial district of New Haven, Docket No. CV-15-6052876-S, against, inter alia, Taylor and Blassingdale in which it sought a judgment of strict foreclosure as to its condominium common charge lien on the property (prior foreclosure action). Jefferson Woods listed in its complaint in that action the prior interests, which included the $150,000 mortgage from Taylor to Blassingdale, as well as subsequent interests. Blassingdale was defaulted for failure to appear. On May 21, 2016, Blassingdale assigned to Gibson all of his rights, title and interest in the $150,000 mortgage note and deed that encumbered the property, which Gibson recorded in the

This court lacks jurisdiction to review the ruling granting Pagliaro's motion to dismiss. See Practice Book § 61-9 ("[s]hould the trial court, subsequent to the filing of a pending appeal, make a decision that the appellant desires to have reviewed, the appellant shall file an amended appeal within twenty days from the issuance of notice of the decision"); see also *Juliano* v. *Juliano*, 96 Conn. App. 381, 386, 900 A.2d 557, cert. denied, 280 Conn. 921, 908 A.2d 544 (2006). We note, however, that in granting Pagliaro's motion to dismiss, the court explained that it was doing so "[o]n the same bases as set forth in the decision addressing [the] motion to dismiss [of Jefferson Woods]."

Branford land records on May 26, 2016. The trial court in the prior foreclosure action, *Hon. Anthony Avallone*, judge trial referee, rendered a judgment of strict foreclosure on April 11, 2016, with law days beginning on May 31, 2016. No party redeemed and no party appealed the judgment of strict foreclosure. In October, 2016, Jefferson Woods sold the property to Joseph R. Pagliaro.

In 2019, Gibson brought the present action in which she sought the foreclosure of the $150,000 mortgage (count one) and damages for unjust enrichment (count two). Jefferson Woods filed a motion to dismiss on the ground that Gibson lacked standing as to both counts of the complaint. The court, *Baio*, *J.*, granted the motion, reasoning that Gibson lacked standing to pursue the foreclosure claim because the mortgage had been extinguished in the prior foreclosure action and that she also lacked standing to pursue her unjust enrichment claim. This appeal followed.

At the outset we note the following standards of review applicable to both claims raised on appeal. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting grant of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing

record and must be decided upon that alone. . . . [I]n determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.) *Hayes Family Ltd. Partnership* v. *Glastonbury*, 132 Conn. App. 218, 221–22, 31 A.3d 429 (2011).

I

Gibson first claims that the court improperly granted Jefferson Woods' motion to dismiss count one of her complaint on the ground that she lacked standing because the mortgage that she sought to foreclose had been extinguished in the prior foreclosure action. She contends that the judgment in the prior foreclosure action is null and void because the statutory jurisdictional prerequisites in General Statutes § 47-258 (m) (1) were not satisfied, thereby causing the trial court in the prior foreclosure action to lack jurisdiction. We disagree.

The mortgage that Gibson sought to foreclose was extinguished by virtue of the prior foreclosure action. In the prior foreclosure action, Jefferson Woods, as the mortgagee, sought to foreclose on its common charge lien on the property. When Blassingdale assigned to Gibson all of his rights, title and interest in the mortgage, those rights, title and interest were subject to Jefferson Woods' lis pendens and, thus, subject to the outcome of the prior foreclosure action. See, e.g., *Ghent* v. *Meadowhaven Condominium, Inc.*, 77 Conn. App. 276, 284–85, 823 A.2d 355 (2003) (lis pendens warns third parties that property is in litigation and causes them to be bound by proceedings).

When the law day passed for the mortgage that Blassingdale had assigned to Gibson, her right to redeem the property ended. See *Barclays Bank of New York* v. *Ivler*, 20 Conn. App. 163, 166–67, 565 A.2d 252, cert. denied, 213 Conn. 809, 568 A.2d 792 (1989). Because there was no appellate stay in effect when the law days began to run on May 31, 2016, absolute title to the property transferred

to Jefferson Woods as a matter of law after all law days expired. See, e.g., *Sovereign Bank* v. *Licata*, 178 Conn. App. 82, 100–101, 172 A.3d 1263 (2017). The final law day was June 6, 2016, and when none of the seven defendants in the prior foreclosure action redeemed, title vested in Jefferson Woods on June 7, 2016.

"Where a foreclosure decree has become absolute by the passing of the law days, the outstanding rights of redemption have been cut off and the title has become unconditional in the [redeeming encumbrancer] . . . . *The mortgagor has no remaining title or interest which he may convey*. . . . Provided that this vesting has occurred pursuant to an authorized exercise of jurisdiction by the trial court . . . it is not within the power of appellate courts to resuscitate the mortgagor's right of redemption or otherwise to disturb the absolute title of the redeeming encumbrancer." (Citations omitted; emphasis added; internal quotation marks omitted.) *Barclays Bank of New York* v. *Ivler*, supra, 20 Conn. App. 166–67.

Gibson did not file any motion or an appearance in the prior foreclosure action, nor did she attempt to appeal from the judgment of strict foreclosure. Rather, approximately three years after the conclusion of the prior foreclosure action and after title to the property had vested absolutely in Jefferson Woods, she commenced a *separate* action in which she collaterally attacked the jurisdiction of the trial court in the prior foreclosure action.

"[F]inal judgments are . . . presumptively valid . . . and collateral attacks on their validity are disfavored. . . . Unless it is *entirely invalid* and that fact is disclosed by an inspection of the record itself the judgment is invulnerable to indirect assaults upon it. . . . [I]t is now well settled that, [u]nless a litigant can show an absence of subject matter jurisdiction that makes the prior judgment of a tribunal *entirely invalid*,

he or she must resort to direct proceedings to correct perceived wrongs . . . . A collateral attack on a judgment is a procedurally impermissible substitute for an appeal. . . . [A]t least where the lack of jurisdiction is *not entirely obvious*, the critical considerations are whether the complaining party had the opportunity to litigate the question of jurisdiction in the original action, and, if [s]he did have such an opportunity, whether there are strong policy reasons for giving [her] a second opportunity to do so." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Sousa* v. *Sousa*, 322 Conn. 757, 771–72, 143 A.3d 578 (2016).

Gibson argues that the jurisdictional prerequisites to maintaining a foreclosure action on a common charge lien in § 47-258 (m) (1)[2] were not satisfied. She contends that "nowhere in [Jefferson Woods'] complaint did [it] allege or claim that it had satisfied the mandatory subject matter jurisdictional requirements set forth in . . . § 47-258 (m) (1) allowing it to commence the subject foreclosure action; there being nothing in its complaint alleging that [Jefferson Woods] had made demand for payment in a record and had simultaneously provided a copy of such record to the holder of a security interest described in subdivision (2) of subsection (b) of § 47-258, including Gibson's assignor . . . Blassingdale, and that the executive board had either voted to commence a foreclosure action specifically against the subject unit or had adopted a standard policy that provided

[2] General Statutes § 47-258 (m) (1) provides: "An association may not commence an action to foreclose a lien on a unit under this section unless: (A) The unit owner, at the time the action is commenced, owes a sum equal to at least two months of common expense assessments based on the periodic budget last adopted by the association pursuant to subsection (a) of section 47-257; (B) the association has made a demand for payment in a record and has simultaneously provided a copy of such record to the holder of a security interest described in subdivision (2) of subsection (b) of this section; and (C) the executive board has either voted to commence a foreclosure action specifically against that unit or has adopted a standard policy that provides for foreclosure against that unit."

for foreclosure against that unit." Gibson argues that, because jurisdictional prerequisites were lacking, the judgment in the prior foreclosure action is subject to collateral attack because the trial court in the prior foreclosure action lacked subject matter jurisdiction. We are not persuaded.

The Common Interest Ownership Act, General Statutes § 47-200 et seq., creates in § 47-258 (a) a statutory lien for delinquent common expense assessments, authorizes in § 47-258 (j) the foreclosure of that lien and provides in § 47-258 (m) (1) jurisdictional prerequisites for maintaining the statutorily created foreclosure action. Our Supreme Court has held that "[t]he statutory language [of § 47-258 (m) (1)] indicates that the legislature intended the three conditions necessary for commencing an action to foreclose a common charges lien to be jurisdictional prerequisites. [Section 47-258 (m) (1)] provides that '[a]n association *may not commence* an action to foreclose a lien on a unit owner under this section *unless*' it satisfies certain prescribed conditions. . . . The legislature could have phrased the requirement that a board adopt a policy or vote to commence proceedings as a limitation on a court's ability to grant relief. . . . Instead, it phrased the requirement as a condition precedent to the commencement of the action itself. Thus, the adoption of a standard foreclosure policy is a condition precedent to any right of action. Until [a vote is taken or a procedure is adopted] no such right exists." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Neighborhood Assn, Inc.* v. *Limberger*, 321 Conn. 29, 48–49, 136 A.3d 581 (2016).

In making this argument, Gibson overlooks our established law that a collateral attack on a final judgment is disfavored and permitted only in rare instances. "[T]o be entirely obvious and sustain a collateral attack on a judgment . . . a jurisdictional deficiency must

amount to a fundamental mistake that is so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority. . . . Indeed, the United States Supreme Court has observed that such collateral attack should be permitted only in rare instance[s], and only for the exceptional case in which the court that rendered judgment lacked even an arguable basis for jurisdiction." (Citations omitted; internal quotation marks omitted.) *Sousa* v. *Sousa*, supra, 322 Conn. 773. Here, the question of whether the jurisdictional requirements in § 47-258 (m) (1) were satisfied in the prior foreclosure action is not obvious from the record in the prior foreclosure action.

In that action, Gibson neither filed an appearance nor raised the issue of any lack of compliance with the jurisdictional requirements in § 47-258 (m) (1) on the part of Jefferson Woods. The record in the prior foreclosure action is silent as to whether the board voted to institute the particular action or to adopt a standard foreclosure policy. Therefore, because Gibson has not shown by an inspection of the record in the prior foreclosure action that the final judgment is "entirely invalid," that judgment "is invulnerable to indirect assaults upon it." (Emphasis omitted; internal quotation marks omitted.) Id., 771. "The reason for the rule against collateral attack is well stated in these words: The law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . Public policy requires that a term be put to litigation and that judgments, as solemn records upon which valuable rights rest, should not lightly be disturbed or overthrown. . . . [T]he law has established appropriate proceedings to which a judgment party may always resort when [s]he deems [herself] wronged by the court's decision. . . . If [s]he omits or neglects to test the soundness of the judgment by these or other direct methods available for that purpose, [s]he is in no position to urge its defective or erroneous character when it is pleaded

or produced in evidence against [her] in subsequent proceedings." (Internal quotation marks omitted.) Id.

Having determined that the lack of subject matter jurisdiction in the prior foreclosure action is not entirely obvious, we examine the "critical considerations," namely, "whether the complaining party had the opportunity to litigate the question of jurisdiction in the original action, and, if [s]he did have such an opportunity, whether there are strong policy reasons for giving [her] a second opportunity to do so." (Internal quotation marks omitted.) Id., 772.

Gibson had notice of the prior foreclosure action and had an opportunity to litigate the issue of subject matter jurisdiction in that action. As Gibson alleged in her complaint, Jefferson Woods recorded a lis pendens on the property in the Branford land records on February 6, 2015, and on May 26, 2016, she recorded in the Branford land records the interest in the mortgage and note that Blassingdale had assigned to her. When Gibson recorded her interest five days before the law days were set to run in the prior foreclosure action, she was placed on constructive notice of the then pending prior foreclosure action. "[A] notice of lis pendens . . . when properly recorded, warns third parties, such as prospective purchasers, that the title to the property is in litigation; [t]he doctrine underlying lis pendens is that a person who deals with property while it is in litigation does so at [her] peril . . . . An encumbrance is a burden on the title and, as such, impedes its transfer. . . . The sole purpose of the lis pendens in such an action is to give constructive notice to persons who may subsequently acquire an interest in the property, and cause them to be bound by the proceedings." (Citations omitted; internal quotation marks omitted.) *Ghent* v. *Meadowhaven Condominium, Inc.*, supra, 77 Conn. App. 284–85; see General Statutes § 52-325 (a) (notice of lis pendens from time of recording provides "notice to any person thereafter acquiring any interest in the property

of the pendency of the action; and each person whose conveyance or encumbrance is subsequently executed or subsequently recorded or whose interest is thereafter obtained . . . shall be deemed to be a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the recording of such notice, *to the same extent as if* [*s*]*he were made a party to the* action" (emphasis added)); see also *Goldberg* v. *Parker*, 87 Conn. 99, 108, 87 A. 555 (1913). Despite having constructive notice that her assigned interest in the mortgage note was subject to the outcome of the then pending prior foreclosure action, Gibson did not file any motion attacking the jurisdiction of the trial court in the prior foreclosure action

Moreover, no strong policy reasons exist for providing Gibson a second opportunity to litigate the issue.[3] Rather, there are strong policy reasons supporting the finality of foreclosure judgments. See, e.g., *Barclays Bank of New York* v. *Ivler*, supra, 20 Conn. App. 166–67. Moreover, we "are . . . [unaware] of any strong policy reason to allow [an] otherwise disfavored collateral attack on [a] foreclosure judgment." *Bank of New York Mellon* v. *Tope*, 202 Conn. App. 540, 552, 246 A.3d 4, cert. granted, 336 Conn. 950, 251 A.3d 618 (2021). For the foregoing reasons, we determine that exceptional circumstances do not exist to permit a collateral attack on the jurisdiction of the trial court in the prior foreclosure action.

When Gibson commenced the present action in 2019, she was not entitled to enforce the mortgage that had

[3] The policy reasons that are examined when determining whether to give a plaintiff a second bite at the apple include "whether the litigation is a collateral or direct attack on the judgment, whether the parties consented to the jurisdiction originally, the age of the original judgment, whether the parties had an opportunity originally to contest jurisdiction, the prevention of a miscarriage of justice, whether the subject matter is so far beyond the jurisdiction of the court as to constitute an abuse of authority, and the desirability of the finality of judgments." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, supra, 322 Conn. 784.

been extinguished in 2016. See *Property Asset Management, Inc.* v. *Lazarte*, 163 Conn. App. 737, 746, 138 A.3d 290 (2016) ("[g]enerally, in order to have standing to bring a foreclosure action the plaintiff must, at the time the action is commenced, be entitled to enforce the promissory note that is secured by the property" (emphasis omitted; internal quotation marks omitted)). Accordingly, we conclude that the court properly dismissed count one of the complaint for lack of standing.

II

Gibson next claims that the court improperly granted Jefferson Woods' motion to dismiss the unjust enrichment count of her complaint on the ground that she lacked standing to maintain such a claim. We disagree.

"Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment. . . . This doctrine is based upon the principle that one should not be permitted unjustly to enrich himself at the expense of another but should be required to make restitution of or for property received, retained or appropriated." (Internal quotation marks omitted.) *Schirmer* v. *Souza*, 126 Conn. App. 759, 763, 12 A.3d 1048 (2011).

In the second count of her complaint, Gibson alleged that the judgment in the prior foreclosure action was void because, in that case, Jefferson Woods had not established that it had satisfied the jurisdictional requirements of § 47-258 (m) (1). She alleged that Jefferson Woods benefitted unjustly as a result of the judgment of strict foreclosure in the prior foreclosure action to her detriment.

Gibson argues that the court improperly determined that she "lacked standing to maintain an action for unjust enrichment because her mortgage interest had

been extinguished by a statutorily sanctioned prior strict foreclosure action, despite [Gibson's] undisputed factual allegations that the prior judgment relied upon was null and void . . . the statutory jurisdictional conditions precedent required by . . . § 47-258 (m) (1) being absent." As she did in her first claim in this appeal, Gibson argues that her interest in the mortgage was not extinguished in the prior foreclosure action because the trial court lacked jurisdiction due to Jefferson Woods' failure to satisfy the jurisdictional prerequisites of § 47-258 (m) (1). Gibson cannot prevail on this argument for the reasons we set forth in part I of this opinion.[4]

Gibson bases her unjust enrichment claim on the right, title and interest in the note and mortgage Blassingdale assigned to her. That mortgage, however, was extinguished in the prior foreclosure action when title to the property became absolute in Jefferson Woods. See part I of this opinion. Accordingly, we conclude that the court properly dismissed the unjust enrichment count of the complaint for lack of standing.

The judgment is affirmed.

In this opinion the other judges concurred.

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[4] Jefferson Woods relies on *Hudson House Condominium Assn., Inc.* v. *Brooks*, 223 Conn. 610, 611 A.2d 862 (1992) (*Hudson*) to argue that Gibson lacks standing to pursue her unjust enrichment claim because the mortgage was extinguished by function of a statutory enactment.

This reliance on *Hudson* to argue a lack of standing is misplaced. In *Hudson*, our Supreme Court addressed the merits of the plaintiff's claim and held that the defendant could not be unjustly enriched by the clear statutory enactment of § 47-258. Id., 615. "The question of standing does not involve an inquiry into the merits of the case." (Internal quotation marks omitted.) *State* v. *Iban C.*, 275 Conn. 624, 664, 881 A.2d 1005 (2005).

YOUR MANSION REAL ESTATE, LLC *v.* RCN CAPITAL FUNDING, LLC
(AC 43922)

Bright, C. J., and Moll and Clark, Js.

Syllabus

The defendant, a mortgage servicing company, appealed from the trial court's judgment in favor of the plaintiff, a property owner, finding that the defendant violated the mortgage release statute (§ 49-8) by failing to provide a timely release of the plaintiff's mortgage. The defendant received a payoff of the mortgage from the plaintiff, along with a demand that specifically cited and quoted the statutory damages provisions of § 49-8 (c). *Held*:

1. The defendant could not prevail on its claim that the trial court erred in failing to dismiss the plaintiff's complaint on the ground that the plaintiff did not have standing because the plaintiff did not incur actual damages, and, therefore, was not aggrieved; the defendant acknowledged that it had received a proper demand under § 49-8 and failed to provide the required release to the plaintiff, the plaintiff was entitled to a release after satisfying the mortgage, it made the proper demand for the release, the defendant received that demand, and the defendant failed to provide the release within the statutory sixty days, and, pursuant to the plain language of the statute, the plaintiff was a statutorily aggrieved party.
2. The trial court did not abuse its discretion in sustaining the plaintiff's objection to certain questions the defendant asked of its corporate witness concerning whether there existed a common practice whereby borrowers recontact the defendant if they have not timely received a requested § 49-8 (c) release, as the trial court correctly determined that this evidence was not relevant; the defendant's attempt to shift the responsibility to the plaintiff for the defendants' own failure to comply with § 49-8 was unmoving, the fact that the defendant admitted that it customarily fails to comply with § 49-8 did not mean that its responsibility to comply then shifted to the mortgagor to repeatedly remind the defendant that it had a statutory obligation, and, whether others provided the defendant with such a reminder, was of no relevance to whether the defendant, in fact, had failed to meet its statutory obligation to fulfill its legal duty within sixty days of the plaintiff's proper request.
3. The defendant could not prevail on its claim that the trial court improperly rejected its special defense in which it alleged that the plaintiff had a duty to mitigate, but failed to mitigate its statutory damages, as the statutory damages provision of § 49-8 was enacted as a means to curb what the legislature considered to be a long-standing problem in the mortgage industry; § 49-8 is coercive and provided the mortgagee with an incentive to fully comply in a timely manner, and to require the plaintiff to "remind" the mortgagee that it had a legal obligation to

comply with § 49-8 (c) by providing the plaintiff with a release, after already properly requesting that it provide such a release, would run counter to the intent of the statute and would encourage the abuses the legislature sought to curb through its enactment.

4. There was no merit to the defendant's claim that § 49-8 (c) was unconstitutional as applied to this case on the ground that it permitted the court to levy an excessive and punitive fine that is grossly in excess of the plaintiff's actual damages, which were none: the excessive fines clause of the eighth amendment to the United States constitution did not apply to this civil case between private parties, and any income tax the plaintiff might owe on the statutory damages it received did not constitute a fine directly imposed on the defendant by the government; moreover, contrary to the defendant's claim, § 49-8 did not violate the due process clause of the fourteenth amendment in that it permitted a statutory award of "punitive" damages that was greatly in excess of the plaintiff's actual damages, as the legislative history of § 49-8 revealed that the purpose of the statute was to curb one of the abuses in the mortgage industry, namely, delays in providing timely releases of mortgages, the defendant had full control of its statutory liability because the statutory damages were assessed on a weekly basis for each week of noncompliance and the defendant knew exactly what its exposure was and the simple step it needed to take to limit its liability.

Argued April 12—officially released August 3, 2021

Procedural History

Action to recover damages for the defendant's failure to timely release a certain mortgage, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee; judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

Matthew B. Gunter, for the appellant (defendant).

Raymond G. Heche, for the appellee (plaintiff).

Opinion

BRIGHT, C. J. Following a trial to the court, the defendant, RCN Capital Funding, LLC, appeals from the judgment of the trial court rendered in favor of the plaintiff, Your Mansion Real Estate, LLC, in an action brought pursuant to General Statutes § 49-8 (c). On appeal, the defendant claims that the trial court erred in (1) not

dismissing the plaintiff's complaint on the ground that the plaintiff did not have standing because it admitted that it had incurred no actual damages and, therefore, was not aggrieved, (2) not permitting the defendant to introduce testimony concerning whether it was common practice for borrowers to contact the defendant if they had not received a § 49-8 (c) release, (3) rejecting the defendant's first special defense in which it alleged that the plaintiff had failed to mitigate its damages, and (4) rejecting the defendant's second and third special defenses in which it claimed that § 49-8 (c) was unconstitutional because it allows for punitive damages and excessive fines in violation of the eighth and fourteenth amendments to the United States constitution. We affirm the judgment of the trial court.

The following facts, which were found by the trial court and which are uncontested on appeal, and procedural history inform our review. "Prior to November 4, 2015, the plaintiff . . . was and had been, since March 14, 2014, the owner of the premises known as 90 Reut Drive, Stratford, Connecticut 06614 ('premises'). The premises were encumbered by (1) a mortgage deed from the plaintiff to [the defendant] on March 14, 2014, in the original amount of $112,000 recorded in the Stratford land records . . . and (2) . . . a collateral assignment of leases and rentals from the plaintiff to the defendant dated March 14, 2014, recorded in the Stratford land records . . . . On November 4, 2015, the plaintiff sold and conveyed title to the premises to a new owner. On or about October 20, 2015, prior to [the] sale of the premises, the Law Offices of Raymond G. Heche, as counsel representing the plaintiff as seller, requested a payoff number of the mortgage from the defendant. On October 20, 2015, the defendant sent to . . . Heche's office a payoff letter stating that the payoff number of the mortgage through November 6, 2015, would be $118,911.96. On November 4, 2015, the date

of the closing of the sale of the premises . . . Heche, as counsel for the plaintiff as seller of the premises, remitted by overnight mail to the defendant at its office at 75 Gerber Road East, South Windsor, Connecticut 06074, a bank check . . . payable to the defendant in the payoff amount of $118,911.96 together with a copy of the October 20, 2015 payoff letter. [The] November 4, 2015 letter to the defendant also requested that the defendant 'upon receipt of said payoff provide to . . . Heche's office in proper form a release of the mortgage and a release of the collateral assignment.' [The] letter further advised:

" 'Kindly be advised that [§] 49-8 (c) of the . . . General Statutes states that a mortgagee who fails to deliver and release within [sixty] days from the request for the same, "shall be liable . . . at the rate of $200 for each week after the expiration of such [sixty] days or in an amount equal to the loss sustained, whichever is greater.'"

"On March 26, 2018, when the requested releases had not been provided . . . Heche sent a certified mail letter to the defendant . . . with another copy of his November 4, 2015 letter and the payoff check, advising the defendant that the requested releases had still not been provided, and reminding the defendant again of the [sixty] day deadline of . . . § 49-8 (c) which 'had long expired.' The March 26, 2018 letter, sent more than two years after the expiration of the original [sixty] day deadline from November 4, 2015, gave the [d]efendant ten days to provide the requested releases together with statutory damages of $5000 plus attorney's fees of $850 to avoid suit under [§] 49-8 (c). When the requested releases had still not been received, the plaintiff, through . . . Heche, commenced this action by complaint dated April 26, 2018, seeking statutory money damages under [§] 49-8 (c), plus costs and reasonable attorney's fees. . . .

"The defendant filed its amended answer and special defenses on July 28, 2019, admitting in the answer that it had received the full payoff of $118,911.26 with . . . Heche's transmittal letter of November 4, 2015, and that it had failed to provide a proper release of mortgage at the time this action was commenced, and leaving the plaintiff to its proof of the allegation that the plaintiff had sold the premises on November 4, 2015, and that the plaintiff was an aggrieved party entitled to damages under [§] 49-8 (c). . . . The plaintiff filed [a] reply . . . denying the allegations of all special defenses. The pleadings were closed on November 14, 2018, and the case was assigned for a nonjury trial . . . on September 11, 2019. . . .

"The parties at trial presented a corrected stipulation of fact dated September 12, 2019, by which they agreed that the court could find the following facts established without presentation of evidence:

" '1. On November 4, 2015, the plaintiff . . . sold the premises . . . .'

" '2. As of April 26, 2018, the defendant . . . had not furnished or recorded a release of mortgage related to [the premises].'

" '3. On June 8, 2018, the defendant recorded a release of mortgage to [the premises] as well as a termination of collateral assignment of leases and rents . . . .'

" '4. The plaintiff has not suffered any demonstrable loss with respect to [the] [d]efendant's delay in furnishing or recording the release of mortgage.'

" '5. The plaintiff, prior to sending its demand dated March 26, 2018, but after it had sent the payoff funds, had not, whether through its principal or its counsel, contacted the defendant by any medium of communication.'

" '6. An affidavit, through counsel, has not been filed on the land records of Stratford . . . pursuant to . . . § 49-8a, in order to release the mortgage on [the premises].'

"[On the basis of] the corrected stipulation, the court finds the facts recited therein to be proven."

On the basis of these facts, the court, in a thorough memorandum of decision, concluded, inter alia, that the plaintiff was statutorily aggrieved, that the defendant's amended special defenses had no merit, and that "the damages requested by the plaintiff in the amount of $5000, [were] authorized by [§] 49-8 (c) in that more than twenty-five weeks from the January 4, 2016 sixty day deadline flowing from the November 4, 2015 letter requesting a release of mortgage had passed without a release being provided. The statutory weekly damages of $200 per week therefore reached the maximum statutory damages of $5000." Accordingly, the court rendered judgment in favor of the plaintiff in the amount of $5000, plus costs and reasonable attorney's fees, as set forth in the statute. This appeal followed.

I

The defendant first claims that the trial court erred in not dismissing the plaintiff's complaint on the ground that the plaintiff did not have standing, as was demonstrated through its concession that it had incurred no actual damages; therefore, it was not aggrieved. The defendant argues that "§ 49-8 (c) requires the party bringing an action pursuant to it to be aggrieved. Only an aggrieved party, therefore, has standing to bring the claim." The plaintiff argues, inter alia, that it, without question, was statutorily aggrieved.[1] We agree with the plaintiff.

[1] The plaintiff further argues that the record establishes that it also was classically aggrieved. Because we conclude that the plaintiff was statutorily aggrieved, we need not consider this additional argument.

"If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . .

"Two broad yet distinct categories of aggrievement exist, classical and statutory. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the [alleged conduct] has specially and injuriously affected that specific personal or legal interest. . . . Statutory aggrievement [however] exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation. . . .

"In order to determine whether a party has standing to make a claim under a statute, a court must determine the interests and the parties that the statute was designed to protect. . . . Essentially the standing question in such cases is whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. . . . [Stated differently, the] plaintiff must be within the zone of interests protected by the statute." (Citation omitted; internal quotation marks omitted.) *McKay* v. *Longman*, 332 Conn. 394, 409–10, 211 A.3d 20 (2019).

Additionally, we are mindful that matters of statutory construction are governed by General Statutes § 1-2z, which provides: "The meaning of a statute shall, in the

first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." Matters concerning statutory construction are reviewed de novo. See *Connecticut Housing Finance Authority* v. *Alfaro*, 328 Conn. 134, 140–41, 176 A.3d 1146 (2018) (questions of statutory construction present issues of law subject to de novo review).

Section 49-8 provides: "(a) The mortgagee or a person authorized by law to release the mortgage shall execute and deliver a release to the extent of the satisfaction tendered before or against receipt of the release: (1) Upon the satisfaction of the mortgage; (2) upon a bona fide offer to satisfy the mortgage in accordance with the terms of the mortgage deed upon the execution of a release; (3) when the parties in interest have agreed in writing to a partial release of the mortgage where that part of the property securing the partially satisfied mortgage is sufficiently definite and certain; or (4) when the mortgagor has made a bona fide offer in accordance with the terms of the mortgage deed for such partial satisfaction on the execution of such partial release.

"(b) The plaintiff or the plaintiff's attorney shall execute and deliver a release when an attachment has become of no effect pursuant to section 52-322 or section 52-324 or when a lis pendens or other lien has become of no effect pursuant to section 52-326.

"(c) The mortgagee or plaintiff or the plaintiff's attorney, as the case may be, shall execute and deliver a release within sixty days from the date a written request for a release of such encumbrance (1) was sent to such mortgagee, plaintiff or plaintiff's attorney at the person's last-known address by registered or certified mail,

postage prepaid, return receipt requested, or (2) was received by such mortgagee, plaintiff or plaintiff's attorney from a private messenger or courier service or through any means of communication, including electronic communication, reasonably calculated to give the person the written request or a copy of it. The mortgagee or plaintiff shall be liable for damages to any person aggrieved at the rate of two hundred dollars for each week after the expiration of such sixty days up to a maximum of five thousand dollars or in an amount equal to the loss sustained by such aggrieved person as a result of the failure of the mortgagee or plaintiff or the plaintiff's attorney to execute and deliver a release, whichever is greater, plus costs and reasonable attorney's fees."

In this case, the plaintiff contends that our consideration of whether it was aggrieved should be guided by the plain language of § 49-8 as analyzed by this court in *Bellemare* v. *Wachovia Mortgage Corp.*, 94 Conn. App. 593, 602, 894 A.2d 335 (2006), aff'd, 284 Conn. 193, 931 A.2d 916 (2007). The defendant, although acknowledging that *Bellemare* runs counter to its claim that the plaintiff is not aggrieved because it did not suffer actual damages, argues that this court's discussion of aggrievement in *Bellemare* is mere dicta. We agree with the plaintiff.

In *Bellemare*, this court discussed whether the plaintiff's § 49-8 claim sounded in contract or in tort for statute of limitations purposes. Id., 597–605. As part of its analysis, this court considered that the plaintiff in that case had sought to recover damages for violation of "a duty annexed to the mortgage by law . . . ." Id., 601. We held that, "even though § 49-8 allows the aggrieved party to recover actual damages, the statute does not require that the aggrieved party suffer actual damages in order to recover. . . . [I]t is apparent that the right vested in mortgagors by § 49-8 is to exact a

penalty on a mortgagee who fails, on proper demand, to provide a release of mortgage within the statutorily prescribed time. Because the wronged party is entitled to an award of damages irrespective of whether there has been a showing of actual damages, the statute best can be understood as a coercive means to penalize those who violate its prescriptions. . . . Because § 49-8 authorizes the court to compensate a plaintiff for the breach of this legal duty through an award of either actual or punitive damages, it fits squarely within the general definition of a tort action, as one founded on the violation of a statutory duty." Id., 602; see also *Jackson* v. *Pennymac Loan Services, LLC*, 205 Conn. App. 189, 200–201, A.3d (2021) (allegation that defendant failed to provide release of mortgage within sixty day statutory time period following plaintiff's proper demand is sufficient to demonstrate plaintiff's standing for purposes of § 48-9 (c)). Because this court's conclusion in *Bellemare* that the statute did not require a showing of actual damages was central to its holding that a claim under § 48-9 (c) sounds in tort, the conclusion was not dicta, and it is binding in the present case.

The defendant in the present case acknowledges that it received a proper demand under § 49-8 and that it failed to provide the required release to the plaintiff. Under the statute, that is all that is required for the plaintiff to establish statutory aggrievement: it was entitled to a release after satisfying the mortgage, it made proper demand for the release, the defendant received that demand, and the defendant failed to provide the release within the statutory sixty days. See *Jackson* v. *Pennymac Loan Services, LLC*, supra, 205 Conn. App. 205. Pursuant to the plain language of the statute, as already interpreted by this court in *Bellemare* and in *Jackson*, the plaintiff is a statutorily aggrieved party. See *Jackson* v. *Pennymac Loan Services, LLC*, supra, 205; *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 94 Conn. App. 602.

II

The defendant next claims that the trial court erred in sustaining the plaintiff's objection to questions asked of the defendant's corporate witness, Angelica Mako, concerning whether there exists a common practice whereby borrowers recontact the defendant if they have not timely received a requested § 49-8 (c) release. The defendant argues that we should employ a plenary standard of review to its claim because "[t]he trial court's conclusion that 'whether something is commonly done or not doesn't import legal obligation' is simply wrong" and that this ruling had an adverse impact on its special defense regarding the plaintiff's failure to mitigate damages. The plaintiff argues that the court properly exercised its discretion when it sustained the plaintiff's objection, and that any alleged error was harmless because, as the defendant acknowledges, the sought-after testimony came in through other witnesses.[2] We conclude that the court did not abuse its discretion in sustaining the plaintiff's objection on the ground that the sought-after testimony had no relevancy.

The defendant cites to the following colloquy:

"[The Defendant's Counsel]: In the event that a mortgage release had not been done when it should have, was it common or routine for like a borrower or an attorney or a title company or somebody to call—

"[The Plaintiff's Counsel]: Objection, Your Honor.

"The Court: Let him finish the question. . . .

[2] In its appellate brief, the defendant acknowledges that the court allowed testimony of a similar nature from other witnesses: "Incongruously, the trial court allowed testimony, over [the plaintiff's] objection, which established that borrowers, title companies, or attorneys would make the further requests. . . . The trial court's exclusion of evidence as to how often or how routine such requests were made was incorrect and such testimonial evidence must be admitted and considered."

"[The Defendant's Counsel]: Was it—was it common or routine for somebody such as a borrower or a title company or an attorney to call or contact [the defendant] in some way—

"A: Yes.

"[The Defendant's Counsel]: —to ask for a release?

"The Court: Don't answer, please.

"[The Plaintiff's Counsel]: Too vague. It's vague.

"The Court: I'll sustain the objection. Whether something is commonly done or not doesn't import legal obligation. Sustained."

"A trial court's ruling on the admissibility of evidence is entitled to great deference. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence . . . [and its] ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling. . . . Moreover, evidentiary rulings will be overturned on appeal only where there was . . . a showing by the defendant of substantial prejudice or injustice." (Internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 786, 43 A.3d 567 (2012).

"[E]vidence is admissible only if it is relevant. . . . Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue." (Internal quotation marks omitted.) *Wahba* v. *JPMorgan Chase Bank, N.A.*, 200 Conn. App. 852, 864, 241 A.3d 706 (2020), cert. denied, 336 Conn. 909, 244 A.3d 562 (2021). "Evidence is relevant when it has any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence.

. . . As it is used in our code,[3] relevance encompasses two distinct concepts, namely, probative value and materiality. . . . [M]ateriality turns upon what is at issue in the case, which generally will be determined by the pleadings and the applicable substantive law. . . . What is in issue is determined by the pleadings . . . . Once the pleadings have been filed, the evidence proffered must be relevant to the issues raised therein." (Citation omitted; footnote added; internal quotation marks omitted.) *Johnson* v. *Board of Education*, 130 Conn. App. 191, 198, 23 A.3d 68 (2011), appeal dismissed, 310 Conn. 302, 77 A.3d 137 (2013).

In the present case, the plaintiff alleged that the defendant failed to comply with the mandate set forth in § 49-8 (c) that it timely provide to the plaintiff a release. Whether other similarly situated individuals or companies frequently ask the defendant a second time, or a third time for that matter, to perform its *statutory obligation* is irrelevant to whether it, in this instance, had performed its statutory obligation. The defendant's attempt to shift the responsibility to the plaintiff for the defendant's own failure to comply with our law is unmoving. The fact that the defendant admits that it customarily fails to comply with § 49-8 does not mean that its responsibility to comply with the law then shifts to the mortgagor to repeatedly remind the defendant that it has a statutory obligation. Whether others provide the defendant with such a reminder is of no relevance to whether the defendant, in fact, had failed to meet its statutory obligation to fulfill its legal duty within sixty days of the plaintiff's proper request.

[3] As provided in our Code of Evidence: "All *relevant* evidence is admissible . . . . Evidence that is not relevant is inadmissible." (Emphasis added.) Conn. Code Evid. § 4-2. Additionally, " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1.

Accordingly, we agree with the trial court that this evidence was not relevant.

III

The defendant also claims that the trial court erred in rejecting its first special defense in which it alleged that the plaintiff had a duty to mitigate, but failed to mitigate its statutory damages. It argues that the court improperly ruled that the plaintiff had no "legal duty to remind [the defendant] to issue a release of the mortgage." The plaintiff argues that the court properly held that § 49-8 (c) does not require that the plaintiff attempt to mitigate its damages by reminding the defendant that it has failed to comply with the statutory mandate to provide a timely release. The plaintiff further argues that "[§] 49-8 (c) *is* the reminder to the defendant . . . ." (Emphasis in original.) We wholeheartedly agree with the plaintiff.

Whether a plaintiff has a duty to mitigate statutory damages to which it is entitled pursuant to § 49-8 (c) presents a legal question. Accordingly, our review is plenary. See *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 94 Conn. App. 598.

In *Bellemare*, this court explained that the statutory damages set forth in § 49-8 (c), although sounding in tort rather than contract, are similar to a penalty, enacted by our legislature against a mortgagee, who, on proper demand, fails to comply with the statute by providing a release of mortgage. Id., 600–601. Section 49-8 "best can be understood as a coercive means to penalize those who violate its prescriptions." Id., 602. As this court further explained in *Bellemare*, "in 1986, during the hearings to amend § 49-8a, the cousin of § 49-8, Representative William L. Wollenberg noted the 'constant problem in the real estate [world] with mortgage releases . . . . When it comes time to sell a house or any real estate a release of that mortgage is necessary. . . . What has developed is an extreme difficulty

in getting out of state mortgage companies and financial people . . . . [t]o . . . give you the pay off, let alone a formal release of the mortgage for the land records.' 29 H.R. Proc., Pt. 11, 1986 Sess., pp. 416768.

"In 1989, § 49-8 was amended in Public Acts 1989, No. 347, § 18, 'An Act Concerning Mortgage Brokers and Mortgages Servicers and Establishing a Home Buyer's Bill of Rights,' which, inter alia, increased the penalty due from a mortgagee who failed to provide a timely release of mortgage to a mortgagor. See 32 H.R. Proc., Pt. 29, 1989 Sess., pp. 10,312–20; 32 H.R. Proc., Pt. 30, 1989 Sess., pp. 10,408–39. Then, in 1995, § 49-8 was amended as part of 'An Act Concerning Release or Satisfaction of a Mortgage Lien.' Public Acts 1995, No. 95-102, § 1. The stated purpose of 'An Act Concerning Release or Satisfaction of a Mortgage Lien' was to 'revise the procedure for the release or satisfaction of a mortgage lien by increasing incentives to assure lenders comply with laws requiring releases and by enhancing the remedies and options available to mortgagors and attorneys when lenders fail to comply.' . . . Raised Committee Bill No. 990, January Sess. 1995, p. 9. Accordingly, the legislative history and *statutory scheme of § 49-8 establish that the statute was enacted and continues not only to protect property owners, but it has a more general purpose of enhancing the marketability of titles and facilitating economic intercourse in deeded transactions*. See id.; Conn. Joint Standing Committee Hearings, Banks, 1979 Sess., pp. 283–84; 29 H.R. Proc., Pt. 11, 1986 Sess., pp. 4166–68." (Emphasis altered.) *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 94 Conn. App. 604–605.

The statutory damages provision of § 49-8 was enacted as a means to curb what the legislature considered to be a longstanding problem in the mortgage industry. See id. The statute is coercive and provides the mortgagee with an incentive to fully comply in a timely

manner. See id. We conclude that to require the plaintiff to "remind" the mortgagee that it has a legal obligation to comply with § 49-8 (c) by providing the plaintiff with a release, after already properly requesting that it provide such a release, would run counter to the intent of the statute and would encourage the abuses the legislature sought to curb through its enactment.[4] Accordingly, we conclude that this claim is without merit.

IV

The defendant's final claim is that the trial court erred in rejecting its second and third special defenses in which it claimed that § 49-8 (c) was unconstitutional as applied in this case because it allowed for *excessive fines and punitive damages* that are grossly in excess of actual damages, in violation of the eighth and fourteenth amendments to the United States constitution. The defendant's argument, set forth in its appellate brief, is not a model of clarity. At times, the defendant appears to argue that the statutory damages provision of § 49-8 (c) is unconstitutional on its face and, at other times, it specifically states that it is claiming that § 49-8 (c) is unconstitutional *only* as applied to this particular case. Nevertheless, the defendant's special defenses clearly allege that § 49-8 (c) is unconstitutional only as applied in this case. We conclude that the defendant's claim is without merit.

"Determining the constitutionality of a statute presents a question of law over which our review is plenary. . . . It [also] is well established that a validly enacted statute carries with it a strong presumption of constitutionality, [and that] those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. . . .

[4] We express no opinion at this time as to whether a plaintiff has a duty to mitigate its damages when it makes a claim for actual monetary losses under § 49-8 (c).

The court will indulge in every presumption in favor of the statute's constitutionality . . . . Therefore, [w]hen a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear. . . . In evaluating the constitutionality of a statute, moreover, we will construe the statute in such a manner as to save its constitutionality, rather than to destroy it. . . . In doing so, we may also add interpretative gloss to a challenged statute in order to render it constitutional. In construing a statute, the court must search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent." (Citations omitted; internal quotation marks omitted.) *Boisvert* v. *Gavis*, 332 Conn. 115, 143–44, 210 A.3d 1 (2019).

The defendant first argues that § 49-8 (c) is unconstitutional as applied to this case because it permitted the court to levy, what essentially amounts to, an excessive and punitive fine that is grossly in excess of the plaintiff's actual damages, which were none. The defendant contends that the United States Supreme Court "wrongly decided" *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989) (*Browning-Ferris*), a case in which the court firmly held that the excessive fines clause of the eighth amendment was meant to limit the sovereign from improperly employing its prosecutorial power and that it "does not apply to awards of punitive damages in cases between private parties." Id., 259–60. The defendant requests that we not follow *Browning-Ferris*. Alternatively, the defendant argues that "to the extent [*Browning-Ferris*] requires the government to be a recipient or at least share in the proceeds of a penalty award . . . then the requirement *is* met by the state of Connecticut's (like the federal government's) collection of income tax on any punitive damages award." (Emphasis in original.) We conclude that the defendant's arguments border on frivolity.

The eighth amendment to the Unites States constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." In *Browning-Ferris*, the United States Supreme Court held that "the [e]xcessive [f]ines [c]lause was intended to limit only those fines directly imposed by, *and payable to*, the government." (Emphasis added.) *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, supra, 492 U.S. 268; see also *Paroline* v. *United States*, 572 U.S. 434, 456, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014). We are bound by these decisions and conclude that the excessive fines clause of the eighth amendment does not apply to this civil case between private parties. Furthermore, any income taxes the plaintiff might owe on the statutory damages it receives do not constitute a fine *directly imposed* on the defendant by the government. In fact, a holding to the contrary would render *Browning-Ferris* meaningless because, as the defendant notes, all such awards are taxable.[5]

The defendant also argues that, under the facts of this case, § 49-8 (c) violated the due process clause of the fourteenth amendment to the United States constitution because it permitted a statutory award of "punitive damages" that was greatly in excess of the plaintiff's actual damages. The defendant urges the application of the *Gore* factors, which is the test employed by the trial court in this case. See *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) (directing courts to consider three guideposts when reviewing punitive damage awards: "[1] the degree of reprehensibility of the [defendant's misconduct]; [2] the disparity between the harm or

[5] We further note that, even if the penalty were paid directly to the state, it would not constitute a fine for eighth amendment purposes. See *Seramonte Associates, LLC* v. *Hamden*, 202 Conn. App. 467, 482–83, 246 A.3d 513, cert. granted, 336 Conn. 923, 246 A.3d 492 (2021) (10 percent penalty for failing to file tax forms in timely manner not fine subject to eighth amendment).

potential harm suffered by [the plaintiff] and [the] punitive damages award; and [3] the difference between [the punitive damages awarded by the jury] and the civil penalties authorized or imposed in comparable cases''). We conclude that *Gore* is not applicable to this case because the statutory damages available under § 49-8 are not punitive damages for purposes of *Gore*. See generally *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 91 n.10, 93–97, 881 A.2d 139 (2005) (when legislature has not expressly provided for award of punitive damages, provision allowing for statutory double damages is not equivalent to punitive damages); see also *In re Marriage of Chen*, 354 Ill. App. 3d 1004, 1022, 820 N.E.2d 1136 (2004) ("Unlike the inherent uncertainty associated with punitive damages, [the relevant statute at issue] provides employers with exact notice of the [$100 per day] penalty they will face for failing to comply with a support order. Indeed, employers receive personal notice of their duties to withhold and pay over income, as well as the penalty for failing to do so, through service of the income withholding order. While [the employer] characterizes the penalty as 'excessive' compared to the amount actually owed, the penalty complained of is $100 per day, and it is the employer that controls the extent of the fine."). We further conclude that, although our analysis differs from that of the trial court, the court correctly held that the application of the statutory damages provision of § 49-8 (c) did not violate the defendant's right to due process of law.

As explained in Class Action Reports: "Punitive damages and statutory damages are fundamentally different. In *Gertz* v. *Robert Welch, Inc.*, [418 U.S. 323, 350, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)] the United States Supreme Court explained that punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible con-

duct and to deter its future occurrence.' Statutory damages, on the other hand, not only are subject to limits established by the legislature, but they are at least partly (if not principally) designed to provide compensation to individuals where actual damages are difficult or impossible to determine. Because of these differences, two of the *Gore* guideposts—the disparity between the harm and potential harm suffered and the damages awarded, and the difference between the damages and the civil penalties authorized or imposed in comparable cases—cannot even be assessed. Statutory damages are awarded in lieu of actual damages, and the damages already reflect the legislative judgment of the appropriate amount of damages for the prohibited conduct.

"Moreover, the underlying constitutional concerns articulated in *Gore* . . . and related cases, are essentially procedural; i.e., that the defendant must have fair notice of the potential damages that could be assessed, and that the jury's discretion in awarding punitive damages is not unlimited. In the case of statutory damages, the terms of the statute put potential defendants on notice of the conduct triggering the right to statutory damages, and of the potential exposure. In addition, the trier of fact's discretion is already limited by the range set forth in the operative statute. For these reasons, a number of courts have refused to apply the holdings of *Gore* [and related cases] . . . in the context of statutory damages. Other courts, while not expressly distinguishing *Gore* and its progeny, have nonetheless relied on a different line of cases—beginning with the Supreme Court case of *St. Louis*, [*Iron Mountain & Southern Railway Co.* v. *Williams*, 251 U.S. 63, 40 S. Ct. 71, 64 L. Ed. 139 (1919)]—to decide the constitutional question." (Footnotes omitted.) S. Larson & M. Friel, "The Legacy of Ratner v. Chemical Bank:[6] Aggregate

[6] See *Ratner* v. *Chemical Bank New York Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971).

Statutory Damages in the Class Action Context," 28 Class Action Reports (May-June 2007). We agree with this analysis and conclude that our consideration of the defendant's due process claim is guided by the United States Supreme Court's decision in *Williams*.

In *Williams*, the Arkansas legislature had enacted a statute "regulating rates for the transportation of passengers between points within the [s]tate, [which provided that] any railroad company that demands or collects a greater compensation than the statute prescribes is subjected 'for every such offense' to a penalty of 'not less than fifty dollars, nor more than three hundred dollars and costs of suit, including a reasonable attorney's fee,' and [which gave] the aggrieved passenger . . . a right to recover the same in a civil action." *St. Louis, Iron Mountain & Southern Railway Co.* v. *Williams*, supra, 251 U.S. 63–64. The court explained: "The provision assailed is essentially penal, because [it is] primarily intended to punish the carrier for taking more than the prescribed rate. . . . True, the penalty goes to the aggrieved passenger and not the [s]tate, and is to be enforced by a private and not a public suit. But this is not contrary to due process of law; for, as is said in *Missouri Pacific* [*Railway*] *Co.* v. *Humes*, 115 U.S. 512, 523, [6 S. Ct. 110, 29 L. Ed. 463 (1885)], 'the power of the [s]tate to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.' Nor does giving the penalty to the aggrieved passenger require that it be confined or proportioned to his loss or damages; for, as it is imposed as a punishment for the violation of a public law, the legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the [s]tate."

(Citations omitted.) *St. Louis, Iron Mountain & Southern Railway Co.* v. *Williams*, supra, 66.

The court further explained: "That [the due process] clause places a limitation upon the power of the [s]tates to prescribe penalties for violations of their laws has been fully recognized, but always with the express or tacit qualification that the [s]tates still possess a wide latitude of discretion in the matter, and that their enactments transcend the limitation only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." Id., 66–67.

As to the specific statutory penalty in *Williams*, the court explained: "It is commonly known that carriers are not prone to adhere uniformly to rates lawfully prescribed and it is necessary that deviation from such rates be discouraged and prohibited by adequate liabilities and penalties, and we regard the penalties prescribed as no more than reasonable and adequate to accomplish the purpose of the law and remedy the evil intended to be reached. . . . When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way. When it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable." (Citation omitted; internal quotation marks omitted.) Id., 67.

We are guided further by the more recent case of *Sony BMG Music Entertainment* v. *Tenenbaum*, 719 F.3d 67 (1st Cir. 2013), which also relied on *Williams* and found *Gore* inapplicable to a private claim for statutory damages. In *Tenenbaum*, the defendant had downloaded and distributed copyrighted music, and the plaintiff brought a civil suit against him for statutory damages,

pursuant to the Copyright Act, 17 U.S.C. § 101 et seq., and for injunctive relief. Id., 68–69. The jury awarded the plaintiff $22,500, which was 15 percent of the statutory maximum award, for each of the defendant's thirty violations, for a total award of $675,000. Id., 69. The trial court, in reliance on *Gore*, reduced the total award to $67,500 after concluding that the original award violated the defendant's right to due process of law. Id., 69. The United States Court of Appeals for the First Circuit reversed the judgment of the trial court, concluding that *Williams*, rather than *Gore*, applied to the facts of the case, and it remanded the matter to the trial court. Id. On remand, the trial court, relying on *Williams*, reinstated the original $675,000 jury award. Id., 69–70. On appeal from that new judgment, the First Circuit explained why *Williams* and not *Gore* applied to that case. Id., 70–71.

Specifically, the First Circuit explained: "*Gore* . . . address[ed] the related but distinct issue of when a jury's award of *punitive damages* is so excessive that it violates due process. See [*BMW of North America, Inc.* v.] *Gore*, [supra], 517 U.S. 574. In *Gore*, the [c]ourt, animated by the principle that due process requires that *civil defendants receive fair notice of the severity of the penalties their conduct might subject them to*, id., identified three 'guideposts' for a court's consideration of whether a punitive damage award is so excessive that it deprives a defendant of due process: (1) the degree of reprehensibility of the defendant's conduct, [id., 575–80], (2) the ratio of the punitive award to the actual or potential harm suffered by the plaintiff, [id., 580–83], and (3) the disparity between the punitive award issued by the jury and the civil or criminal penalties authorized in comparable cases, [id., 583–85].

"Here, the [D]istrict [C]ourt correctly chose to apply the *Williams* standard. By its own terms, *Williams* applies to awards of statutory damages, which the jury

awarded in this case, while *Gore* applies to awards of punitive damages, which the jury did not award. *Gore* did not overrule *Williams*, and the Supreme Court has not suggested that the *Gore* guideposts should extend to constitutional review of statutory damage awards. The concerns regarding fair notice to the parties of the range of possible punitive damage awards, which underpin *Gore*, are simply not present in a statutory damages case where the statute itself provides notice of the scope of the potential award. Moreover, *Gore*'s second and third guideposts cannot logically apply to an award of statutory damages under the Copyright Act. The second due process guidepost requires a comparison between the award and the harm to the plaintiff, but a plaintiff seeking statutory damages under the Copyright Act *need not prove actual damages*. *F.W. Woolworth Co.* v. *Contemporary Arts*, *Inc.*, 344 U.S. 228, 233, 73 S. Ct. 222, 97 L. Ed. 276 (1952). The third guidepost requires a comparison between the award and the authorized civil and criminal penalties in comparable cases. Because an award of statutory damages is by definition an authorized civil penalty, this guidepost would require a court to compare the award to itself, a nonsensical result. Therefore, we conclude, as have other courts, that the standard articulated in *Williams* governs the review of an award of statutory damages under the Copyright Act. See *Capitol Records*, *Inc.* v. *Thomas–Rasset*, 692 F.3d 899, 907 (8th Cir. 2012); *Zomba Enterprises*, *Inc.* v. *Panorama Records*, *Inc.*, 491 F.3d 574, 587 (6th Cir. 2007)." (Emphasis altered.) *Sony BMG Music Entertainment* v. *Tenenbaum*, supra, 719 F.3d 70–71.

In the present case, to determine whether the penalty prescribed against the defendant is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable, we must examine the purpose of statutory damages under § 49-8 (c). See *St. Louis*, *Iron Mountain & Southern Railway Co.* v.

Williams, supra, 251 U.S. 66–67; *Sony BMG Music Entertainment* v. *Tenenbaum*, supra, 719 F.3d 71.

As we explained in part III of this opinion, the legislative history of § 49-8 reveals that the purpose of the statute is to curb one of the abuses in the mortgage industry, namely, delays in providing timely releases of mortgages, which the legislature viewed as a serious problem. See *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 94 Conn. App. 604–605. The statute not only provides for damages for injury, but it also provides statutory damages meant to discourage wrongful conduct and to encourage mortgagees to provide timely releases. See *Sony BMG Music Entertainment* v. *Tenenbaum*, supra, 719 F.3d 71. In this case, the defendant received a payoff of the mortgage from the plaintiff, by overnight mail, along with a demand that specifically cited to and quoted the statutory damages provision of § 49-8 (c). Despite that demand, the defendant failed to provide the mandatory release of mortgage, and, nearly three years later, it faced the maximum statutory penalty of $5000, in addition to costs and reasonable attorney's fees. Furthermore, the defendant had full control of its statutory liability because the statutory damages are assessed on a weekly basis for each week of noncompliance. Unlike in *Gore*, in the present case, the defendant knew exactly what its exposure was and the simple step it needed to take to limit its liability.

Finally, as in *Tenenbaum*, the defendant here contends that the award violates its right to due process of law because the award is not tied to any actual damages suffered by the plaintiff. In rejecting such an argument in *Tenenbaum*, the First Circuit explained: "[T]his argument asks us to disregard the deterrent effect of statutory damages . . . . More importantly, the Supreme Court held in *Williams* that statutory damages are not to be measured this way: 'Nor does giving the penalty to the aggrieved [party] require that it be confined or proportioned to his loss or damages; for,

as it is imposed as a punishment for the violation of a public law, the [l]egislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state.' [*St. Louis*, *Iron Mountain & Southern Railway Co.* v. *Williams*, supra 251 U.S. 66]; see also [*Capitol Records*, *Inc.* v.] *Thomas-Rasset*, [supra, 692 F.3d 909–10] (rejecting, in a case with similar facts, the [D]istrict [C]ourt's conclusion that 'statutory damages must still bear some relation to actual damages')." (Emphasis omitted.) *Sony BMG Music Entertainment* v. *Tenenbaum*, supra, 719 F.3d 71–72. For the foregoing reasons, we conclude that the plaintiff's due process claim has no merit.

The judgment is affirmed.

In this opinion the other judges concurred.

JARED CHARLES *v.* COMMISSIONER OF CORRECTION
(AC 43643)

Elgo, Alexander and DiPentima, Js.

Syllabus

The petitioner, who had been convicted of various crimes in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming ineffective assistance of his trial counsel, H. He claimed that H failed to investigate the viability of self-defense as a defense strategy and that he was ineffective for failing to assert a claim of self-defense at trial. The habeas court denied each of the petitioner's claims of ineffective assistance, and the petitioner appealed to this court claiming that the habeas court improperly concluded that he failed to prove his claims. *Held*:

1. The petitioner could not prevail on his claim of ineffective assistance of counsel, the habeas court properly having determined that he failed to demonstrate that it was objectively unreasonable for his trial counsel to pursue a defense of third-party culpability instead of self-defense: after examining all of the evidence, H determined that a theory of third-party culpability was the strongest defense, concluded that the facts in the petitioner's signed statement were not consistent with self-defense, and testified at the habeas trial that he could not recall whether or not the petitioner had informed him that he had possessed a gun during the

altercation with the victim, and the habeas court had the sole ability to determine the credibility of the petitioner's testimony that he did in fact inform H of that information; moreover, the petitioner failed to produce evidence at the habeas trial that would have overcome the presumption that H's decision to pursue a defense of third-party culpability, rather than self-defense, was sound trial strategy in that neither his signed statement to the police nor his testimony at his criminal trial included facts that his counsel considered essential to a claim of self-defense, in that he did not admit to having a gun nor did he indicate that he feared for his life.

2. The habeas court's findings that H was unaware that the petitioner had a gun and had fired it in self-defense and that the petitioner admitted that he never informed H that he had a gun and shot it in self-defense were clearly erroneous, but amounted to harmless error, as there was ample evidence in the record to support the court's conclusion that H was not deficient in his investigation or in failing to raise a self-defense claim at trial: despite those erroneous findings, it did not undermine appellate confidence in the court's fact-finding process, as the petitioner failed to prove that he had informed H that he had a gun at the time of the shooting; moreover, even if the petitioner had informed H that he possessed a gun during the altercation, it would still have been reasonable for H to forgo further investigation into self-defense when examining all of the evidence, as the petitioner's signed statement did not include essential components of a self-defense claim, and the petitioner's counsel believed he could effectively undermine the state's case by attacking the credibility of its key witnesses at trial.

Argued April 20—officially released August 3, 2021

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson, J.*, rendered judgment denying the petition; thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Kara E. Moreau, with whom was *Richard A. Reeve*, for the appellant (petitioner).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

ALEXANDER, J. The petitioner, Jared Charles, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly concluded that he failed to prove ineffective assistance of counsel. The petitioner argues that his trial counsel was ineffective by failing to investigate and to assert a claim of self-defense and that the habeas court made clearly erroneous factual findings in its memorandum of decision. We affirm the judgment of the habeas court.

This court set forth the following facts in the petitioner's direct appeal. "In the late afternoon of September 25, 2004, the victim, Dennis Faniel, and his cousin, [Jayquan], were riding bicycles in a residential area on Deerfield Avenue in Hartford. The [petitioner], who was close friends with the victim, was driving in the area, and the victim signaled for him to stop. The [petitioner] parked his car a short distance from where the victim and [Jayquan] were then standing and exited his vehicle. While [Jayquan] remained with the bicycles at the end of a driveway, the [petitioner] and the victim began talking and walked up that driveway, toward the rear of a house. The victim demanded a cellular telephone that the victim's brother, then incarcerated, had entrusted to the [petitioner]. The victim's brother had instructed the [petitioner] to keep it away from the victim. The cellular telephone was valuable because it was used in the illegal drug business and contained the contact numbers of numerous customers. When the [petitioner] refused to give it to the victim, the two men began arguing, and the victim made a fist with his right hand as if preparing to hit the [petitioner]. At that point, [Jayquan] moved away from the bicycles. The [petitioner] fired one gunshot, and the victim was hit in the abdomen with a bullet from a nine millimeter semiautomatic firearm. He later died from his injuries.

"The [petitioner] fled the scene with a silver gun in his hand. [Jayquan] ran to the victim, who had fallen to the ground on his knees, and took the victim's .38 caliber revolver from him. He chased the [petitioner] and fired five gunshots at him. After he failed to hit the [petitioner], [Jayquan] threw the revolver in a trash can behind one of the neighborhood houses and went home. The [petitioner], while being pursued by [Jayquan], caught his gray shirt on a fence as he jumped over the fence. He managed to slide out of the shirt and left it behind. The police later retrieved the .38 caliber revolver, the gray shirt with cocaine in one of its pockets and a cellular telephone within the area traveled by [Jayquan] and the [petitioner]. The police did not find a nine millimeter weapon.

"During the investigation, the police interviewed a witness to the incident. Natasha Walker, a former girlfriend of the victim, was standing outside of her grandfather's house on Deerfield Avenue when she saw the victim and [Jayquan] riding up the street on their bicycles. She also saw the [petitioner], wearing a gray shirt, approach them when they left their bicycles at the end of the driveway. Because the [petitioner] and the victim walked to the rear of the yard, she did not see the shooting but she did hear the gunshot. She stated that [Jayquan] was still at the end of the driveway with the bicycles when the gun was fired. She then saw the [petitioner] run from behind the house with a gun in his right hand, and she heard an additional four or five gunshots shortly after the [petitioner] and [Jayquan] fled the scene." *State* v. *Charles*, 134 Conn. App. 242, 244–45, 39 A.3d 750, cert. denied, 304 Conn. 930, 42 A.3d 392 (2012).

The petitioner was convicted of murder in violation of General Statutes § 53a-54a, carrying a pistol without a permit in violation of General Statutes (Supp. 2004) § 29-35, criminal possession of a pistol in violation of General Statutes (Supp. 2004) § 53a-217c, and possession of narcotics in violation of General Statutes (Rev.

to 2003) § 21a-279 (a). Id., 243–44. This court affirmed the judgment of conviction rendered by the trial court. Id., 252.

On March 8, 2013, the self-represented petitioner filed a petition for a writ of habeas corpus. On April 1, 2019, with the assistance of counsel, the petitioner filed an amended petition containing two counts. In the first count, the petitioner alleged ineffective assistance of criminal trial counsel, Walter Hussey, for failing to investigate the viability of self-defense as a defense strategy. In the second count, the petitioner alleged that Hussey was ineffective for failing to assert a claim of self-defense at trial.

A trial on the habeas petition was held on May 23 and 30, 2019. On September 25, 2019, the habeas court issued a memorandum of decision denying each of the petitioner's claims of ineffective assistance of counsel. The court concluded that the petitioner had failed to establish that Hussey's performance was deficient and therefore did not address the issue of prejudice. See, e.g., *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The court determined that Hussey had fully investigated the petitioner's case prior to trial. The court found that there was no reasonable basis for Hussey to pursue a self-defense claim and that it was not "objectively unreasonable" for Hussey to focus on the defense of third-party culpability instead of a self-defense claim. Thereafter, the petitioner filed a petition for certification to appeal from the judgment denying his petition for a writ of habeas corpus. The habeas court granted the petition for certification to appeal. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the petitioner claims that Hussey provided ineffective assistance of counsel by failing to investigate and to assert a claim of self-defense. The respondent,

the Commissioner of Correction, counters that the habeas court properly concluded that the petitioner failed to establish his claims of ineffective assistance of criminal trial counsel. We agree with the respondent.

We first set forth the legal principles applicable to the petitioner's appeal. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . . Therefore, our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Kellman* v. *Commissioner of Correction*, 178 Conn. App. 63, 68, 174 A.3d 206 (2017).

A criminal defendant is entitled to effective assistance of counsel under both the United States constitution and the Connecticut constitution. *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677–78, 51 A.3d 948 (2012). "To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Although a petitioner can succeed only if he satisfies both prongs,

a reviewing court can find against the petitioner on either ground." (Internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, 198 Conn. App. 345, 352–53, 233 A.3d 1106, cert. denied, 335 Conn. 948, 238 A.3d 18 (2020).

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . . Nevertheless, [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . .

"Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. . . . At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Citation omit-

ted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 679–80.

I

The petitioner first claims that the court improperly concluded that he failed to prove that Hussey rendered ineffective assistance by failing to investigate a claim of self-defense. Specifically, the petitioner argues that Hussey had a duty to investigate a claim of self-defense based on the circumstances of his case and that the court improperly determined that this duty to investigate exists only when an attorney is informed of a claim of self-defense by the client.

The following additional facts are relevant to those claims. The petitioner, Hussey, and Brian Carlow, the petitioner's expert witness, testified at the habeas trial. Hussey explained that when retained by a criminal defendant, his approach was to get the discovery, share it with his client, and begin to develop a defense theory. During his investigation of the petitioner's case prior to trial, Hussey evaluated the evidence provided during discovery, went to the scene of the crime "many times" and reviewed the discovery material with the petitioner. Hussey testified that he believed the petitioner's written statement to the police to be true, which did indicate that the victim had a gun. Hussey explained, however, that other parts of this statement were inconsistent with a claim of self-defense because the petitioner never said that he had possessed a gun or that he feared for his life, and "those are big bricks that were missing" for a claim of self-defense.[1] Further, Hussey stated that he

[1] The defense of self-defense is codified in General Statutes § 53a-19. "As interpreted by our Supreme Court, § 53a-19 (a) provides that a person may justifiably use deadly physical force in self-defense only if he reasonably believes both that (1) his attacker is using or about to use deadly physical force against him, or is inflicting or about to inflict great bodily harm, and (2) that deadly physical force is necessary to repel such attack." (Emphasis omitted; footnote omitted; internal quotation marks omitted.) *Miller* v. *Commissioner of Correction*, 154 Conn. App. 78, 88–89, 105 A.3d 294 (2014), cert. denied, 315 Conn. 920, 107 A.3d 959 (2015). In analyzing whether deadly

believed the petitioner's written statement to the police constituted the truth, and that, "[a]s I sit here today, I still believe him."

In light of the petitioner's statement to the police, in addition to the evidence received through discovery, Hussey pursued a defense of third-party culpability, claiming that Jayquan, who was present at the time of the shooting, had accidentally shot the victim. Hussey testified that he believed the state's key witnesses, Jayquan and Walker, had "baggage" and that he could undermine their credibility at trial. Hussey explained that Jayquan "was one of the worst witnesses I've ever seen." Hussey's goal in undermining the credibility of the state's witnesses was to show that Jayquan's and Walker's versions of events were not true, and that Jayquan could have been the shooter, thereby creating reasonable doubt. Further, Jayquan stated in his signed statement that, after the victim had been shot, he had used the victim's gun to shoot at the petitioner as he was running away. Hussey was unable to locate his notes from the petitioner's case prior to the habeas trial. He could not recall whether he was told by the petitioner that the petitioner was armed with a gun during the confrontation with the victim. Hussey also could not recall talking to the petitioner about self-defense. He further explained, "[t]hat's not to say it didn't happen. It's not to say it happened. I just simply don't recall that."

At his criminal trial, the petitioner testified in a manner consistent with his signed statement, maintaining that he did not have a gun during the altercation with the victim and that he had not been the shooter. The

physical force was necessary, the jury must use a subjective-objective test. See *State* v. *O'Bryan*, 318 Conn. 621, 632, 123 A.3d 398 (2015). Section 53a-19 (b) (1) further provides in relevant part that "a person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety . . . by retreating . . . ."

petitioner further testified that he suspected Jayquan did have a gun.

At the habeas trial, the petitioner testified that he "[a]bsolutely" told Hussey that he possessed a nine millimeter firearm during the confrontation with the victim. He said he told Hussey: "[I] had a gun; and so I used it." The petitioner further stated that the victim was "very impulsive" and "very wild" and when the victim pulled a gun on him, he felt "cornered in" and "like my life was threatened." The petitioner stated that he had disclosed all of this information to Hussey. Further, the petitioner testified that his written statement to the police "wasn't completely true" and that he had told Hussey that some parts of the statement were not completely accurate. In addition, the petitioner stated that after receiving discovery in the case, he and Hussey discussed the defense of third-party culpability, and the petitioner did not question that defense. The petitioner further explained that after the conversation in which they discussed the theory of third-party culpability, he and Hussey did not discuss a claim of self-defense. When discussing what the petitioner's testimony would be at his criminal trial, the petitioner said Hussey told him to "repeat what I said in my statement."

Attorney Carlow testified as the petitioner's expert witness, and stated that, in his opinion, Hussey had not assessed the strengths and weaknesses of each potential defense in the petitioner's case. He testified that it is important for counsel to investigate, to elicit information from the client, and to develop a defense theory of the case. In Carlow's opinion, the evidence in the petitioner's case supported a claim of self-defense, and the petitioner's signed statement did not foreclose a self-defense claim. Carlow agreed that reasonably effective counsel can premise a theory of defense on attacking the credibility of state witnesses and that, in some cases, that would be "the best way to approach [the]

situation." Carlow opined that a defense theory premised on attacking the credibility of state witnesses in the petitioner's case was "problematic" because, although Jayquan "had a lot of baggage that [counsel] could clearly utilize," Walker did not.

The habeas court concluded that the petitioner failed to establish that Hussey rendered deficient performance, and found that it was not objectively unreasonable for Hussey to focus on the defense of third-party culpability instead of self-defense. The court stated that "[g]enerally, an attorney is entitled to rely on the information provided by their client in formulating a theory of defense . . . ." The court determined that Hussey had fully investigated the petitioner's case prior to trial and that, after the investigation, Hussey did not believe that a self-defense claim existed.

A

The petitioner first argues that the court improperly concluded that Hussey rendered adequate performance in his investigation of the petitioner's case. The following legal principles are relevant to our resolution of this issue. "Inasmuch as [c]onstitutionally adequate assistance of counsel includes competent pretrial investigation . . . [e]ffective assistance of counsel imposes an obligation [on] the attorney to investigate all surrounding circumstances of the case and to explore all avenues that may potentially lead to facts relevant to the defense of the case. . . . Nevertheless, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make

a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 680.

Although "[i]t is the duty of the [defense] lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case . . . the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." (Citations omitted; internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 33, 188 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019). "The reasonableness of counsel's actions may be determined or substantially influenced *by the* [*defendant's*] *own statements or actions*. Counsel's actions are usually based, quite properly, on informed strategic choices made by the [defendant] and on information supplied by the [defendant]. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." (Emphasis added; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 681.

In circumstances similar to the present case, this court has held that failure to investigate a claim of self-defense does not constitute ineffective assistance of counsel. In *McClam* v. *Commissioner of Correction*, 98 Conn. App. 432, 435, 909 A.2d 72 (2006), cert. denied, 281 Conn. 907, 916 A.2d 49 (2007), the petitioner asserted a claim of ineffective assistance of counsel, alleging, inter alia, that his trial counsel had failed to raise a self-defense claim. This court affirmed the determination of the habeas court that it was not unreasonable for trial counsel to decide not to assert a claim of self-defense because the petitioner had denied being the shooter to trial counsel and maintained this position in his testimony during his criminal trial. Id., 437.

In *State* v. *Silva*, 65 Conn. App. 234, 254–55, 783 A.2d 7, cert. denied, 258 Conn. 929, 783 A.2d 1031 (2001),[2] the defendant argued, inter alia, that his trial counsel was ineffective by failing to investigate and to pursue a defense of self-defense. This court agreed with the habeas court's conclusion that it was reasonable for defense counsel not to pursue a theory of self-defense because the defendant had insisted that he was not the shooter. Id., 259–60.

The facts of the present case are similar to those in *McClam* and *Silva*. After examining all of the evidence, Hussey determined that a theory of third-party culpability was the strongest defense. In reviewing the petitioner's signed statement to the police, Hussey concluded that the facts in this statement were not consistent with self-defense because the petitioner did not state that he had a gun or that he had feared for his life, both of which are essential components for a claim of self-

[2] *Silva* involved the resolution of two appeals by the defendant—a direct appeal from the judgment of conviction in the defendant's criminal proceeding and an appeal from the judgment of the habeas court reinstating the defendant's right to a direct appeal, but denying his request to vacate the judgment of conviction. See *State* v. *Silva*, supra, 65 Conn. App. 236–38.

defense. See General Statutes § 53a-19. "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 681. Further, Hussey testified at the habeas trial that he could not recall whether or not the petitioner had informed him he had possessed a gun during the altercation, and the habeas court had the sole ability to determine the credibility of the petitioner's testimony that he did in fact inform Hussey of this information. "The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Gonzalez* v. *Commissioner of Correction*, 145 Conn. App. 16, 21, 75 A.3d 705, cert. denied, 310 Conn. 932, 78 A.3d 858 (2013).

In his brief, the petitioner contends that the habeas court's ruling was premised on an assumption that self-defense needs to be investigated by counsel only if a client tells his lawyer a story that is consistent with self-defense. We disagree. The court determined that Hussey had fully investigated the petitioner's case and, after investigation, concluded that self-defense was not a viable defense theory. The court found that, after such investigation, Hussey determined that in light of the evidence and his belief that Jayquan lacked credibility, a defense of third-party culpability implicating Jayquan was the petitioner's best defense. We conclude that the court properly determined that Hussey's investigation had been reasonable.

B

The petitioner next claims that the habeas court improperly determined that Hussey was not deficient by failing to assert a claim of self-defense at his criminal trial. We do not agree.

The following legal principles are relevant to our resolution of this issue. "[A]s a general rule, a habeas petitioner will be able to demonstrate that trial counsel's decisions were objectively unreasonable only if there [was] no . . . tactical justification for the course taken." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 166 Conn. App. 95, 140, 140 A.3d 1087 (2016), aff'd, 330 Conn. 520, 198 A.3d 52 (2019). "It is axiomatic that decisions of trial strategy and tactics rest with the attorney. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Citations omitted; internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 627, 212 A.3d 678 (2019). "[T]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Internal quotation marks omitted.) Id., 637. The strong presumption that counsel's efforts are reasonable applies to both counsel's investigation and decisions regarding what defense to pursue at trial. See *Thompson* v. *Commissioner of Correction*, 131 Conn. App. 671, 698, 27 A.3d 86, cert. denied, 303 Conn. 902, 31 A.3d 1177 (2011); *Veal* v. *Warden*, 28 Conn. App. 425, 434, 611 A.2d 911, cert. denied, 224 Conn. 902, 615 A.2d 1046 (1992).

The petitioner failed to produce evidence at the habeas trial that would overcome the presumption that Hussey's decision to pursue a defense of third-party

culpability, rather than self-defense, was sound trial strategy. As noted previously, neither the petitioner's signed statement to the police nor his testimony at his criminal trial included facts that Hussey considered essential to a claim of self-defense. Specifically, the petitioner did not admit to having a gun nor did he indicate that he feared for his life. The court found that Hussey believed Jayquan lacked credibility and he believed he could effectively undermine the credibility of the state's witnesses during cross-examination to establish the third-party culpability defense.

Although Carlow testified that, in his opinion, a claim of self-defense was not foreclosed by the evidence in the petitioner's criminal trial, we note that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, supra, 332 Conn. 637. After reviewing the evidence with his client, Hussey determined that the best trial strategy was a claim of third-party culpability, and, although there may have been more than one possible defense, our position as a reviewing court is "to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Internal quotation marks omitted.) Id.

On our review of the record, we conclude that the habeas court properly determined that the petitioner failed to demonstrate that it was objectively unreasonable for Hussey to pursue a defense of third-party culpability instead of self-defense. Because we agree with the habeas court that the petitioner failed to establish the deficient performance prong, his claim of ineffective assistance of counsel must fail. See *Davis* v. *Commissioner of Correction*, supra, 198 Conn. App. 352–53.

II

We next address the petitioner's contention that the court improperly found that (1) Hussey was unaware

that the petitioner had a gun and had fired it in self-defense and (2) the petitioner admitted that he never informed Hussey that he had a gun and shot it in self-defense. In his brief, the respondent agrees that "the habeas court erroneously credited Hussey's purported testimony that he was unaware that the petitioner was armed with a gun" and also acknowledged that the petitioner testified that he had informed Hussey that he had shot the victim. Although we agree that these factual findings were clearly erroneous, we conclude that this error was harmless, as there was ample evidence in the record to support the court's conclusion that Hussey was not deficient in his investigation or in failing to raise a self-defense claim at trial.

In its memorandum of decision, the court credited Hussey's testimony that he was unaware the petitioner had a gun at the time of the shooting. Further, the court stated that the petitioner admitted in his testimony that "he either failed to inform his attorney, or actively misinformed him, of facts that could have been used to support a claim of self-defense . . . ."

We apply the clearly erroneous standard of review to the habeas court's factual findings. "[A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Collins* v. *Commissioner of Correction*, 202 Conn. App. 789, 812, 246 A.3d 1047, cert. denied, 336 Conn. 931, 248 A.3d 1 (2021). "[T]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *David P.* v. *Commissioner of Correction*, 167

Conn. App. 455, 470, 143 A.3d 1158, cert. denied, 323 Conn. 921, 150 A.3d 1150 (2016).

Although Hussey initially stated that the petitioner never told him he had a gun or shot it in self-defense, Hussey later clarified that he had no recollection as to whether the petitioner had informed him that he possessed a gun. As a result, the record does not support the finding that Hussey recalled that he was never told by the petitioner that he had possessed a gun. Therefore, the habeas court's finding that Hussey was unaware that the petitioner had a gun at the time of the shooting was clearly erroneous. Additionally, the petitioner testified that he had informed trial counsel that he had possessed a gun, used the gun, and felt "cornered in." As such, the court's finding that the petitioner admitted that he either failed to inform his attorney or actively misinformed him of facts that could have been used to support a claim of self-defense also was clearly erroneous.

These erroneous findings do not " 'undermine appellate confidence' " in the habeas court's fact-finding process, and we therefore conclude the error was harmless. *Autry* v. *Hosey*, 200 Conn. App. 795, 801, 239 A.3d 381 (2020). "[I]t is well established that a petitioner in a habeas proceeding cannot rely on mere conjecture or speculation to satisfy either the performance or prejudice prong [of *Strickland*] but must instead offer demonstrable evidence in support of his claim." (Internal quotation marks omitted.) *Martinez* v. *Commissioner of Correction*, 147 Conn. App. 307, 315–16, 82 A.3d 666 (2013), cert. denied, 311 Conn. 917, 85 A.3d 652 (2014). At the habeas trial, Hussey testified that he could not recall whether the petitioner told him he had possessed a gun, and the habeas court did not credit the petitioner's testimony that he informed Hussey of this fact. The court noted that the petitioner admitted that his statements to the police and his testimony at trial were "not entirely truthful . . . ." "The court, having had a firsthand vantage point from which to observe

the petitioner testify . . . and assess the truthfulness of his testimony, was not obligated to accept as true the petitioner's version of the facts . . . ." *Adkins* v. *Commissioner of Correction*, 185 Conn. App. 139, 175–76, 196 A.3d 1149, cert. denied, 330 Conn. 946, 196 A.3d 326 (2018). Thus, despite clearly erroneous factual findings, the petitioner failed to prove that he had informed Hussey that he had a gun at the time of the shooting. Moreover, even if we assume, arguendo, that the petitioner had informed trial counsel that he possessed a gun during the altercation, it would still be reasonable for Hussey to forgo further investigation into self-defense when examining all of the evidence. The petitioner's signed statement did not include essential components of a self-defense claim, and Hussey believed he could effectively undermine the state's case by attacking the credibility of the state's key witnesses at trial. By doing so, Hussey's goal was to create doubt as to the reliability of Jayquan's and Walker's testimony, thereby creating reasonable doubt and raising the inference that Jayquan was the shooter. There is ample evidence in the record, including the petitioner's statements to the police and his testimony at the criminal trial, to support the court's conclusion that the petitioner failed to sustain his burden of establishing his claims of ineffective assistance.

The judgment is affirmed.

In this opinion the other judges concurred.

EDWARD FRANTZEN *v.* DAVENPORT ELECTRIC ET AL.
(AC 43627)

Alvord, Prescott and Suarez, Js.

Syllabus

W Co., a law firm that had previously represented the claimant in proceedings before the Workers' Compensation Commission, appealed to this court from the decision of the Compensation Review Board, which vacated the decision of the Workers' Compensation Commissioner that divided

equally the attorney's fees between W Co. and V, an attorney who had also successfully represented the claimant in the matter before the commission. W Co. claimed on appeal to this court that the board improperly vacated the commissioner's ruling and remanded the case for a new evidentiary hearing on the ground that there was insufficient evidence in the record to support the commissioner's distribution of attorney's fees. *Held* that there was sufficient evidence in the record from which the commissioner reasonably could have based her ruling on attorney's fees and, accordingly, the board improperly vacated the commissioner's decision: the board incorrectly applied the appropriate legal standard to its review of the commissioner's decision by vacating her ruling on the basis of its speculation that her ruling could have rested on a more solid evidentiary foundation, thereby substituting its judgment for the conclusion of the commissioner; moreover, the board's decision was devoid of any analysis of the facts found by the commissioner, and the board improperly encroached on the commissioner's discretion without making any findings as to whether her conclusions were based on an incorrect application of the law or unreasonable inferences drawn from the facts found; furthermore, the commissioner's decision to divide the attorney's fees equally was made on the basis of the record and evidence presented at the hearing, the scheduling of which both parties were properly notified, and V failed to appear before the commissioner and presented no evidence in his favor.

Argued March 9—officially released August 3, 2021

Procedural History

Appeal from the decision by the Workers' Compensation Commissioner for the Seventh District ordering the equal division of certain attorney's fees between the claimant's counsel, brought to the Compensation Review Board, which vacated the commissioner's decision and remanded the case for further proceedings, and Wofsey, Rosen, Kweskin & Kuriansky, LLP, appealed to this court. *Reversed*; *judgment directed.*

Zachary J. Phillipps, with whom were *David M. Cohen*, and, on the brief, *Adam J. Blank*, for the appellant (Wofsey, Rosen, Kweskin & Kuriansky, LLP).

Andrew S. Knott, with whom, on the brief, was *Robert J. Santoro*, for the appellee (Enrico Vaccaro).

Opinion

PRESCOTT, J. In this fee dispute between successive counsel concerning their representations of a successful claimant before the Workers' Compensation Commission, the law firm of Wofsey, Rosen, Kweskin & Kuriansky, LLP (Wofsey Rosen) appeals from the decision of the Compensation Review Board (board) vacating a decision of the Workers' Compensation Commissioner (commissioner) to award 50 percent of the attorney's fees to Wofsey Rosen and the other 50 percent to Attorney Enrico Vaccaro.[1] On appeal, Wofsey Rosen claims that the board improperly vacated the commissioner's ruling and remanded the matter for a new evidentiary hearing on the ground that there was insufficient evidence in the record to support the fifty-fifty distribution of the attorney's fees.[2] We agree and,

[1] Although neither Wofsey Rosen nor Vaccaro was a party with respect to the workers' compensation claim itself, they were parties with respect to the fee dispute proceeding underlying the present appeal. See *Day* v. *Middletown*, 245 Conn. 437, 440–42, 716 A.2d 47 (1998) (because underlying compensation claim settled, leaving only matter of attorney's fees to be resolved, aggrieved firm entitled to appeal); see also *State* v. *Salmon*, 250 Conn. 147, 157, 735 A.2d 333 (1999) (explaining that, "in the context of appeals from the decisions of administrative agencies, we have construed the term 'party' more broadly than its ordinary, technical legal meaning").

[2] Wofsey Rosen also claims on appeal that the board improperly vacated the commissioner's ruling on the ground that the commissioner should have granted Vaccaro's implicit request for a continuance of the evidentiary hearing. It is not necessary to address the merits of this claim, however, because we disagree with its underlying premise. Specifically, the record demonstrates that the board did not rely on the commissioner's decision not to grant Vaccaro's request to postpone the hearing as a basis for reversal. To the contrary, the board specifically stated, "we are not persuaded that the commissioner's decision to proceed with the formal hearing of March 22, 2016, constituted error in and of itself. It is well settled that the decision to grant or deny a request for continuance lies well within a commissioner's discretion." Although the board later commented that the evidentiary record could have been improved had the commissioner granted the continuance, we construe the board's decision as having been based only on the perceived lack of sufficient evidence before the commissioner when it made its ruling regarding the attorney's fees, and not on the commissioner's decision to deny Vaccaro's implicit request for a continuance.

accordingly, reverse the board's decision and remand the case to the board with direction to affirm the decision of the commissioner.

The following facts and procedural history, as set forth in this court's decision in *Frantzen* v. *Davenport Electric*, 179 Conn. App. 846, 848–49, 181 A.3d 578, cert. denied, 328 Conn. 928, 182 A.3d 637 (2018) (*Frantzen I*), are relevant to our disposition of the present appeal. "Both Vaccaro and Wofsey Rosen represented Edward Frantzen, the claimant, in claims for compensation brought against his employer, Davenport Electric, for work-related injuries sustained in 1994, 1998, and 2003. Wofsey Rosen represented the claimant from March 18, 1998, to April 1, 2005. Attorney Allan Cane . . . represented the claimant from April 27, 2005, to July 13, 2007. Vaccaro represented the claimant from July 13, 2007, to May 8, 2014. On May 8, 2014, a stipulation was approved by Commissioner Charles F. Senich pursuant to which $850,000 was awarded to the claimant. The commissioner also approved attorney's fees of 20 percent, with instruction for Vaccaro to hold the amount of the fees in escrow until the fee dispute was resolved. On June 13, 2014, Vaccaro filed a brief that challenged the commission's subject matter jurisdiction over the fee dispute and attacked Wofsey Rosen's claim to any portion of the escrowed fees.

"On September 30, 2014, a hearing was held before Commissioner Michelle D. Truglia on, among other things, Vaccaro's challenge to the commission's subject matter jurisdiction. Vaccaro was given the opportunity to submit evidence of his fee arrangement with the claimant, along with a statement of time and charges attributable to this representation. Vaccaro submitted a copy of his fee agreement but did not provide any evidence of time or charges attributable to this representation. Wofsey Rosen, on the other hand, provided substantial evidence regarding its representation of the claimant. After finding that the commission had subject

matter jurisdiction over the fee dispute, the commissioner decided that, because of Vaccaro's failure to document his time and charges, it was impossible to determine the scope and value of his representation of the claimant, and ordered a [fifty-fifty] split of the escrowed attorney's fees between Vaccaro and Wofsey Rosen.

"Vaccaro then appealed from the decision to the board, which on February 24, 2016, affirmed the commissioner's decision as to subject matter jurisdiction but reversed as to the division of the fees, and remanded the matter to the commissioner for a full evidentiary hearing on the issue. Vaccaro thereafter appealed to this court." (Footnote omitted.) *Frantzen* v. *Davenport Electric*, supra, 179 Conn. App. 848–49. In *Frantzen I*, this court affirmed the decision of the board, holding that the commissioner had the authority to adjudicate the fee dispute between Wofsey Rosen and Vaccaro. See id., 853–55.

In accordance with the remand from the board, the commissioner scheduled a formal evidentiary hearing on attorney's fees (hearing). On February 29, 2016, notice of that hearing was sent to all parties, informing them that the hearing would be held on March 22, 2016. On March 16, 2016, six days before the hearing,[3] Vaccaro faxed a letter advising the commission that he could not attend the hearing because he was scheduled for trial in the Superior Court. The commissioner requested confirmation of the alleged conflict, but Vaccaro never responded to that request. During the six days leading up to the hearing, the commission made additional telephone calls to Vaccaro to notify him that his implicit request for a continuance of the hearing had not been granted. Vaccaro, however, never responded.

[3] In her decision, the commissioner stated that Vaccaro "waited until four days prior to the commencement of the formal proceedings to alert the commission to a purported conflict . . . ." See footnote 7 of this opinion. This discrepancy appears to be an error by the commissioner given the date on the fax, which is part of the record. This error was not raised to the board and it has no significance to our resolution of the claims before us.

On March 22, 2016, the hearing was held. Two attorneys, Judith Rosenberg and Adam Blank, appeared before the commissioner on behalf of Wofsey Rosen and submitted evidence to support its claim for attorney's fees, which included the claimant's fee agreement with Wofsey Rosen, contemporaneous time records, and testimony by Rosenberg regarding the professional services rendered to the claimant during Wofsey Rosen's period of representation. Wofsey Rosen entered into evidence an exhibit further detailing the work done for the claimant. Vaccaro did not appear, formally request a continuance, or otherwise communicate to the commissioner regarding his purported scheduling conflict with the hearing date.

On March 30, 2016, the commissioner issued her ruling, again awarding a fifty-fifty split of the $170,000 in attorney's fees on the basis of the entirety of the record before her, including the evidence presented at the March 22, 2016 hearing.[4] Vaccaro again appealed to the board, this time challenging the commissioner's denial of his request for a continuance and decision to proceed in his absence, and the commissioner's fifty-fifty division of the escrowed attorney's fees between Wofsey Rosen and Vaccaro.

On November 4, 2019, the board issued its decision vacating the commissioner's award and again remanding the matter back to the commissioner for a new hearing. The board concluded that the commissioner's denial of Vaccaro's request to postpone the hearing did not "[constitute] error in and of itself." The board stated,

[4] The commissioner's determination of how to divide the attorney's fees equitably between the attorneys was not made solely on the basis of her consideration of the evidence presented by Wofsey Rosen at the evidentiary hearing. The commissioner also had the entire underlying record available to her for review and, thus, was able to assess Wofsey Rosen's evidentiary submissions in the context of the legal work reasonably performed in this matter as reflected by the record as a whole.

however, that "the commissioner elected to issue her ruling solely on the basis of evidence accumulated during the March 22, 2016 hearing, and we are not persuaded that the evidence garnered at that time [constitutes] a sufficient basis for affirming the ruling. Had the commissioner chosen to continue the formal proceedings in order to allow [Vaccaro] the opportunity to appear at a later date and present his arguments regarding the proper allocation of the disputed fee, and to allow the parties to conduct cross-examination if they so chose, then the ruling would have rested on a more solid evidentiary foundation. This did not happen and, as a result, we are compelled to vacate the ruling and remand this matter for a trial de novo." This appeal followed. Additional facts will be set forth as necessary.

Wofsey Rosen claims that the board incorrectly concluded that there was insufficient evidence upon which to affirm the commissioner's March 30, 2016 ruling, in which she awarded 50 percent of the attorney's fees to Wofsey Rosen and the other 50 percent to Vaccaro. Wofsey Rosen argues that, in fact, there was sufficient evidence presented at the March 22, 2016 hearing to support the commissioner's distribution of attorney's fees. Specifically, Wofsey Rosen contends that the board's statements that it was "not persuaded that the evidence garnered at that time [constituted] a sufficient basis for affirming the ruling" and that "the ruling [could] have rested on a more solid evidentiary foundation" indicate that the board improperly retried the facts and substituted its own inferences for those of the commissioner, which is contrary to the appropriate legal standard applicable to the board's review of a commissioner's decision. Moreover, Wofsey Rosen argues that the board did not address with any particularity the alleged insufficiencies in the evidence or further explain its reasoning. Rather, according to Wofsey Rosen, the board's decision was based on mere specula-

tion that further proceedings would have provided "a more solid evidentiary foundation." For the reasons that follow, we agree with Wofsey Rosen that the board improperly vacated the decision of the commissioner on the basis of an allegedly insufficient evidentiary record.[5]

[5] In his appellate brief, in addition to responding to Wofsey Rosen's claims, Vaccaro makes three claims of his own. Specifically, he claims that the commissioner improperly failed (1) to recuse herself in this matter, (2) to stay the hearing until this court had rendered a final decision in *Frantzen I*, in which he had challenged the commissioner's authority to decide the fee dispute, and (3) to comply with the board's remand order to hold an evidentiary hearing because she reached her decision without Vaccaro having proffered any evidence. We note, as a preliminary matter, that to the extent that Vaccaro was aggrieved by the board's rejection of any claims raised before it, Vaccaro failed to file a cross appeal. See Practice Book § 61-8. Furthermore, he also failed to file a preliminary statement of issues properly raising these claims or any others as potential alternative grounds for affirmance. See Practice Book § 63-4 (a) (1). For those reasons, in addition to those that follow, we decline to review his claims.

First, with respect to the recusal claim, Vaccaro argued before the board that the commissioner should have disqualified herself. The board declined to review this claim in its November 4, 2019 decision because its "decision to remand this matter for a new trial renders this [o]pinion an inappropriate vehicle to conduct that discussion." Even if this claim were properly before us, we would decline to entertain the merits of Vaccaro's claim of recusal on appeal in light of the fact that Vaccaro never properly raised the issue of recusal to the commissioner. See *State* v. *$7379.54 United States Currency*, 80 Conn. App. 471, 472–73 n.2, 844 A.2d 220 (2003) (stating well settled rule that appellate courts ordinarily will decline to review on appeal claim that trier should have recused itself if no such request was made at trial); *Cummings* v. *Twin Tool Mfg. Co.*, 40 Conn. App. 36, 45–47, 668 A.2d 1346 (1996) (applying rule in workers' compensation appeal).

Second, Vaccaro argues for the first time before this court that the March 22, 2016 hearing should have been stayed because the question of the commissioner's subject matter jurisdiction was pending before this court. Our rules of practice, however, provide that "there shall be no automatic stay in actions concerning . . . any administrative appeal . . . . For purposes of this rule, administrative appeal means an appeal filed from a final judgment of the trial court or the Compensation Review Board rendered in an appeal from a decision of any officer, board, [or] commission . . . ." (Internal quotation marks omitted.) Practice Book § 61-11 (b). Accordingly, even if we were inclined to review the claim, it fails on its merits.

Finally, Vaccaro's third claim, to the extent that it is cognizable, is intertwined with our resolution of Wofsey Rosen's appeal and our rejection of

As a threshold matter, we first set forth the applicable standard of review. "The principles that govern our standard of review in workers' compensation appeals are well established. . . . The board sits as an appellate tribunal reviewing the decision of the commissioner. . . . [T]he review [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . [T]he power and duty of determining the facts rests on the commissioner . . . . [T]he commissioner is the sole arbiter of the weight of the evidence and the credibility of witnesses . . . . Where the subordinate facts allow for diverse inferences, the commissioner's selection of the inference to be drawn must stand unless it is based on an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . .

"This court's review of decisions of the board is similarly limited. . . . The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [W]e must interpret [the commissioner's finding] with the goal of sustaining that conclusion in light of all of the other supporting evidence. . . . Once the commissioner makes a factual finding, [we are] bound by that finding *if there is evidence in the record to support it*." (Emphasis added; internal quotation marks omitted.) *Story* v. *Woodbury*, 159 Conn. App. 631, 636–37, 124 A.3d 907 (2015). In the context of an administrative appeal, "the sufficiency of the evidence to support a finding . . . clearly presents a question of law" that "we examine . . . under the plenary standard of review." (Internal quotation marks omitted.) *Raymond* v. *Zoning Board of Appeals*, 76

Vaccaro's other claims, and, thus, it would serve no useful purpose for us to evaluate it independently of the claim raised by Wofsey Rosen.

Conn. App. 222, 256, 820 A.2d 275, cert. denied, 264 Conn. 906, 826 A.2d 177 (2003).

On the basis of our review of the record, we conclude that there is sufficient evidence in the record from which the commissioner reasonably could have based her ruling on attorney's fees and, accordingly, the board acted improperly in vacating the commissioner's decision. Although the board acknowledged that the "trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences," the board incorrectly applied that legal standard to its review of the commissioner's decision by vacating the commissioner's ruling on the basis of its speculation that the ruling could have "rested on a more solid evidentiary foundation." The board conceded that its review of the commissioner's decision " 'requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial [commissioner] could have reasonably concluded as it did.' " Despite this apparent understanding of the legal standard, the board improperly reversed the commissioner's ruling by substituting its own judgment for the conclusion of the commissioner.

The law does not require, as the board asserted in its decision, "a more solid evidentiary foundation" than that on which the commissioner relied. The law, instead, requires the board to determine whether there was evidence before the commissioner to support her factual findings, and whether the inferences drawn from the facts found were illegal or unreasonable. The board is required to hear the appeal on the basis of the record presented, not to retry the facts or to speculate about facts outside of the record that may have been proven. Moreover, although the board based its decision on an alleged insufficiency of the evidence, the board's decision was devoid of any analysis of the facts found by the commissioner. The board improperly encroached

on the commissioner's discretion without making any findings as to whether the commissioner's conclusions were based on an incorrect application of the law or unreasonable inferences drawn from the facts found.[6]

The commissioner's decision to divide the attorney's fees award evenly between the parties was made on the basis of the record as a whole as well as the evidence presented at the March 22, 2016 hearing, of which both parties were properly notified. At the hearing, Wofsey Rosen presented extensive evidence to support the firm's considerable work on the claimant's underlying workers' compensation claims, namely, the claimant's fee agreement with the firm, contemporaneous time records, correspondence, and testimony by Rosenberg regarding the professional services rendered to the claimant during Wofsey Rosen's period of representation. The commissioner drew reasonable inferences from the evidence before her, specifically that Wofsey Rosen "presented more than adequate justification" for an award of 50 percent of the attorney's fees and that "by virtue of [Vaccaro's] failure to attend the March 22, 2016 formal proceedings on remand, [Vaccaro] has presented no evidence that would warrant a greater percentage of the escrowed attorney's fees other than the 50 [percent] share previously awarded . . . ." As we have stated previously in this opinion, Vaccaro failed to appear before the commissioner and, accordingly,

[6] The procedural facts of the present case are similar in posture to those in *Six* v. *Thomas O'Connor & Co.*, 235 Conn. 790, 801–802, 669 A.2d 1214 (1996). In *Six*, our Supreme Court reversed a decision by the Compensation Review Board reversing a Workers' Compensation Commissioner's decision. Id. In considering whether the board improperly reversed the commissioner's decision, our Supreme Court looked to whether the commissioner's decision was based on an incorrect application of the law to the subordinate facts or on an inference illegally or unreasonably drawn from those facts. Id. The court concluded that the commissioner's decision was supported by facts in the record and reasonable inferences drawn from those facts and was based on a correct application of the law. Id. Accordingly, our Supreme Court held that it was improper for the board to have reversed the commissioner's decision. Id.

presented no evidence in his favor.[7] Despite the board's speculation that further proceedings would provide a more solid evidentiary foundation, Vaccaro has never offered any evidence substantiating his time spent and expenses incurred in his representation of the underlying claimant. Moreover, at oral argument before this court, when asked whether Vaccaro has ever produced a competent record regarding his time spent on the matter, counsel for Vaccaro conceded that he has not. On the basis of the evidence presented at the hearing, as well as the underlying record available to her, the commissioner concluded that a fifty-fifty split of the escrowed attorney's fees was appropriate.

Moreover, the commissioner's decision to split the attorney's fees equally was not based on an incorrect application of the law to the subordinate facts or on an inference illegally or unreasonably drawn from those facts. It was well within the commissioner's authority to award attorney's fees on the basis of the evidence presented at the hearing.[8] The commissioner was not obligated to hold any further evidentiary hearings, and

[7] In her March 30, 2016 ruling, the commissioner made the following conclusion: "Vaccaro was provided with statutory notice of the March 22, 2016 formal proceeding on remand from the Compensation Review Board nearly four weeks in advance of the scheduled hearing. Despite such advance notice, he waited until four days prior to the commencement of the formal proceedings to alert the commission to a purported conflict and, thereafter, failed and refused repeated requests from the presiding trial commissioner to substantiate his unavoidable conflict. Accordingly, there was no other conclusion to draw other than . . . Vaccaro had no legitimate conflict precluding him from attending the March 22, 2016 formal proceedings. It therefore follows that there was no justification to postpone the formal proceedings on remand before the commission." The board did not base its decision to vacate the commissioner's ruling on her conclusions regarding Vaccaro's failure to appear. Rather, the board stated that "we are not persuaded that the commissioner's decision to proceed with the formal hearing of March 22, 2016 constituted error in and of itself." Thus, the commissioner's conclusion that there was no justification to postpone the proceedings must stand, and, as such, the commissioner was well within her discretion to make a ruling on the basis of the evidence presented at the March 22, 2016 hearing.

[8] See *Frantzen* v. *Davenport Electric*, supra, 179 Conn. App. 855 (holding "that [General Statutes] § 31-327 (b) grants the commission the authority to adjudicate fee disputes between successive counsel concerning their representations of a claimant before the commission").

properly relied on the evidence presented by Wofsey Rosen to demonstrate what portion of the claimant's award that was previously set aside for attorney's fees should be awarded to it. Vaccaro was notified properly of his opportunity to present evidence to support his own claim to a portion of the escrowed attorney's fees, and failed to do so on his own accord. The board, and we in turn, cannot disturb the commissioner's conclusion as long as it is supported by the underlying facts. See, e.g., *Six* v. *Thomas O'Connor & Co.*, 235 Conn. 790, 801, 669 A.2d 1214 (1996). We conclude that, because there is sufficient evidence to support the commissioner's finding that Wofsey Rosen was entitled to 50 percent of the attorney's fees awarded as part of the workers' compensation settlement, the board improperly vacated and remanded the matter to the commissioner on the ground that the ruling could have "rested on a more solid evidentiary foundation." Therefore, it was improper for the board to reverse the commissioner's ruling and remand the case for a new hearing.

The decision of the Compensation Review Board is reversed and the case is remanded to the board with direction to affirm the decision of the Workers' Compensation Commissioner.

In this opinion the other judges concurred.

STACY HOLLOWAY *v.* LINDA CARVALHO ET AL.
(AC 43831)

Elgo, Moll and Sheldon, Js.

Syllabus

The plaintiff appealed to the trial court from the decree of the Probate Court admitting the decedent's will to probate. The decedent, the plaintiff's grandfather, had two children, L and the defendant. The decedent's wife had died. L died in 2010 and expressly disinherited the plaintiff, her daughter. After the death of L, the decedent and the defendant met with an attorney, B, to discuss what would happen to the decedent's estate

if the defendant also predeceased him. B advised the decedent that the plaintiff, as the only child of L, would inherit one half of the decedent's assets upon his death. He responded that he did not want the plaintiff to inherit any of his assets. B then drafted a new will for the decedent that reflected his express wish to disinherit the plaintiff. The will left all of the decedent's assets to the defendant and stated that the decedent intentionally made no provision for the plaintiff. After the decedent's death, the Probate Court admitted the decedent's will. Thereafter, the plaintiff appealed to the trial court, claiming, inter alia, that the will should not have been admitted to probate because the decedent was not of sound mind and was under the defendant's improper and undue influence. Following a trial, the trial court concluded that the Probate Court properly admitted the will to probate because the decedent had testamentary capacity to execute the will and was not under the undue influence of the defendant. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on her claim that the trial court improperly concluded that the decedent had testamentary capacity to execute the will; the defendant presented more than sufficient evidence that the decedent was of sound mind when he executed the will, and the court based its ruling on its well supported findings that, at the time the decedent executed the will, he was able to live independently with the assistance of family members, lacked serious brain injury that would deprive him of the ability to understand what he was doing when he executed the will, and he was well aware of what he was doing when he executed the will and had rational reasons for doing so, which was to change his previous will in order to disinherit the plaintiff because he wanted to ensure that she would not waste the assets she would otherwise inherit from him.

2. The trial court properly rejected the plaintiff's claim of undue influence: the burden of proof on the issue of undue influence generally rests with the person alleging it and, although it can be shifted in rare circumstances, the burden of disproving undue influence will not shift to a child of the testator, even where a confidential relationship appears to exist; moreover, the court's conclusion that there was no undue influence would not have changed even if the court had shifted the burden onto the defendant because the court's decision that there had been no undue influence was made under the clear and convincing standard, which is the same standard of proof that would have applied had the burden of proof formally been shifted to the defendant.

Argued March 16—officially released August 3, 2021

Procedural History

Appeal from the decree of the Probate Court for the district of Newington admitting to probate the will of Paul Pizzo, brought to the Superior Court in the judicial

district of New Britain and tried to the court, *Aurigemma*, *J.*; judgment affirming the Probate Court's decree, from which the plaintiff appealed to this court. *Affirmed.*

Joseph A. Hourihan, with whom was *William S. Shapiro*, for the appellant (plaintiff).

Linda L. Morkan, with whom was *Christopher J. Hug*, for the appellees (defendants).

Opinion

SHELDON, J. The plaintiff, Stacy Holloway, appeals from the judgment of the trial court, *Aurigemma*, *J.*, affirming the admission to probate of the will of her late grandfather, the decedent Paul Pizzo. The will was submitted to the Probate Court by the plaintiff's aunt, the defendant Linda Carvalho, who was the decedent's only surviving daughter, the executrix of his estate, and the principal beneficiary under the will.[1] On appeal, the plaintiff claims that the court erred in affirming the admission of the decedent's will to probate after improperly rejecting her claims (1) that the decedent lacked testamentary capacity to execute the will, and (2) that the defendant exerted undue influence on the decedent in connection with the will. We affirm the judgment of the trial court.

The following facts and procedural history, as found by the court and supported by the record, are relevant to this appeal. The decedent, who was born on November 21, 1916, was married to his wife, Lee Pizzo, until her death on February 4, 1994. Lee and the decedent had two children, Linda Carvalho, the defendant, and

[1] The defendants are Linda Carvalho, as executrix of the decedent's estate, and Linda Carvalho, individually, as the decedent's daughter and heir. We refer to Linda Carvalho as the defendant throughout this opinion without making a distinction between her individual or representative capacity, unless it is necessary to do so.

her older sister Lisa Holloway. Linda and her husband, John Carvalho, have two adult children, John Paul[2] and Michelle. Lisa, who died on June 18, 2010, had one child, the plaintiff. In her will, Lisa expressly disinherited the plaintiff, stating only: "I intentionally make no provision in this Will for my daughter . . . for reasons which are good and controlling to me."

At the time of Lisa's death, the decedent's operative will was the last will and testament that he had executed on February 4, 1987 (1987 will). In his 1987 will, the decedent had directed that, upon his death, all of his assets would be distributed to his wife, but if she did not survive him, then they would be divided evenly between his children.

Following Lisa's death, however, the decedent met with an attorney, Michael Bellobuono, to review the terms of his 1987 will after the defendant, who then held his power of attorney and served as his primary caretaker and financial advisor, raised concerns about what would happen to him and his estate if she too should predecease him.[3] The defendant drove the decedent to his initial meeting with Bellobuono and personally attended that meeting. During the meeting, Bellobuono advised the decedent that under his 1987 will, the plaintiff, as Lisa's only child, would inherit one half of his assets upon his death.[4] The decedent responded immediately to that advisement by telling Bellobuono that he did not want the plaintiff to inherit any of his

[2] We refer to the defendant's son as John Paul and refer to the defendant's husband as John Carvalho.

[3] The defendant was concerned because, although the decedent's 1987 will named the defendant as a successor executrix in the event of his wife's death, the 1987 will did not name an additional successor executor to serve in that capacity in the event that the defendant predeceased the decedent. The defendant set out to address her concern by having her daughter named as a successor executrix.

[4] The defendant was the only witness to testify about the substance of the meeting because Bellobuono was deceased at the time of trial.

assets. Bellobuono thereafter drafted a new will for the decedent to reflect his express wish to disinherit the plaintiff.

On December 14, 2010, the decedent had a second meeting with Bellobuono to review and execute the new will that Bellobuono had drafted for him. The defendant also drove the decedent to Bellobuono's office for this second meeting but did not attend or take part in the meeting. Instead, she remained in the lobby while the decedent met with Bellobuono to review and execute the new will (2010 will).[5]

The 2010 will provided that, upon the decedent's death, all of his assets would be distributed to the defendant "if she is then living," but if she did not survive him, they would be distributed to the defendant's living issue. The decedent explained in the will that he had "intentionally made no provision [in it] for the benefit of [his] granddaughter, Stacy Holloway, not because of lack of love or affection [for her] but because she [had] been adequately taken care of during her lifetime." The will further provided that the defendant would serve as executrix of the decedent's estate, but if she did not survive him, that her daughter Michelle would serve in that capacity. The decedent died of natural causes on September 5, 2017, at the age of 100.

The Newington Probate Court, *Randich, J.*, admitted the decedent's 2010 will to probate by a decree dated July 10, 2018. The plaintiff filed a de novo appeal in the Superior Court on July 30, 2018, contesting the admission of the 2010 will to probate. In her amended complaint dated August 16, 2018, the plaintiff alleged that the 2010 will should not have been admitted to probate because, when the decedent executed it, (1) he was not of sound mind, (2) he was suffering from an

[5] The plaintiff does not dispute that the 2010 will was duly executed under applicable Connecticut law.

insane delusion, and (3) he was under the defendant's improper and undue influence. The defendant denied each of the plaintiff's allegations, both in her individual capacity and in her capacity as executrix of the decedent's estate, in her answer dated August 27, 2018.

Thereafter, on September 20, 2019, the parties submitted an amended stipulation of facts to the court in anticipation of trial. The facts to which the parties stipulated included: (1) that the will complied with the formality requirements of due execution set forth in General Statutes § 45a-251, in that it was in writing, it had been signed by the decedent, and it was attested to by two witnesses, each of whom had signed it in the decedent's presence; (2) that the decedent was over eighteen years of age when he executed the will; and (3) for clarity, that the parties disputed whether, when the decedent executed the will in December, 2010, he was of sound mind or suffering from an insane delusion, and whether he was then acting under the undue influence of the defendant.

Trial took place on two days, October 17, 2019, and November 1, 2019. On the first day of trial, the court heard testimony from the plaintiff, the defendant, the defendant's son, John Paul, and Janice Olivieri, an internist who had treated the decedent for several years prior to his death. On the second day of trial, the court heard testimony from Kenneth Selig, a forensic psychiatrist whom the defendant had called as an expert witness.

Olivieri testified that she had treated the decedent from 2007 or 2008 through 2014.[6] She stated that the decedent had been diagnosed with dementia by another physician before he became her patient, and recalled that while he was under her care, she had observed that he had poor recall and at times did not know where he was. She further testified, based upon the decedent's

[6] Olivieri was also the plaintiff's work colleague.

medical records from 2008, that he had had "multiple infarcts" in the frontal lobe of his brain, which had left him with scar tissue that, in her opinion, would have caused him to have difficulty understanding a complicated legal document such as a will. On those bases, Olivieri concluded that the decedent lacked testamentary capacity to execute the challenged will on December 14, 2010.

Selig testified on the second day of trial that he had prepared for his testimony, inter alia, by reviewing the decedent's treatment records from Hartford Hospital for the period from January 24, 2008, through September 2, 2017, and from Hartford Healthcare for the period from March 27, 2012, through June 28, 2017. He further stated that, to help him determine whether the decedent had testamentary capacity to execute the 2010 will, he had reviewed a scientific paper on the stages of dementia, he had spoken to the defendant, and he had reviewed transcripts of the deposition testimony of each of the other trial witnesses. On the basis of what he had learned in this process, Selig concluded that the decedent was capable of executing a will on December 14, 2010, because most of the decedent's medical records indicated that he then was oriented to time, person, and place, and the overwhelming evidence established that the confused condition and slurred speech documented in his medical records from 2008, on which Olivieri had relied in her testimony, had resolved by December, 2010. Selig explained that he found support for his conclusions both in the decedent's pathology, as documented in the decedent's medical records, and in the decedent's day-to-day functioning in the relevant time frame, as observed by both parties and described in their testimony. Selig opined that the frontal lobe of the decedent's brain was not severely damaged because, as documented in reports of a 2008 CT scan and a 2016

MRI of the decedent's brain, he had had no more than two infarcts in that area. Selig asserted that, because there was not much damage to the decedent's frontal lobe, how he functioned on a daily basis at the time he executed the 2010 will weighed more heavily in assessing his testamentary capacity than any brain damage he previously had suffered. Selig thus concluded, in his professional opinion, that the decedent had testamentary capacity to execute the challenged will on December 14, 2010, because he lived alone on that date, he was frequently left alone by his caretakers in that time frame, and he remembered to take the medications that were apportioned for him by members of his family.

After the close of evidence at trial and posttrial briefing by the parties, the court affirmed the decision of the Probate Court to admit the will to probate after rejecting the plaintiff's claims that the decedent lacked testamentary capacity to execute the will and that he was under the undue influence of the defendant at the time of the will's execution. As to the plaintiff's claim of lack of testamentary capacity, the court found first, that the plaintiff had failed to produce sufficient evidence that the decedent lacked testamentary capacity—which it defined as "mind and memory sound enough to know and understand the business upon which [he] was engaged, that of the execution of a will, at the very time [he] executed it"—to overcome the decedent's "presumption of sanity" at that time, and thus the defendant could rely upon that unrebutted presumption to meet her statutory burden of proving that the decedent was "of sound mind" when he executed the 2010 will, and, second, that apart from the presumption of sanity, the combined evidence presented by the parties proved by clear and convincing evidence that the decedent had testamentary capacity when he executed the 2010 will. In support of these findings, the court relied specifically on the plaintiff's and the defendant's testimony that, in

December, 2010, the decedent was living on his own, that he then knew all the members of his family, took all the medications that his family members set out for him and competently engaged in grocery shopping with their assistance, and that in that time frame he frequented a gym, enjoyed socializing with others, and loved watching television, particularly "Judge Judy." As for the medical testimony concerning the decedent's testamentary capacity, the court expressly discounted Olivieri's opinion that the decedent lacked such capacity because he could not understand complicated legal documents, holding that a testator need not have the ability to understand complicated legal documents in order to have testamentary capacity to execute a valid will. Furthermore, it refused to credit Olivieri's purported recollection of the decedent's poor memory and occasional unawareness of his whereabouts when he was her patient because her own records of the decedent's care and treatment contradicted that testimony. Specifically, the court noted that Olivieri's records of the decedent's visits with her on several dates following the execution of the 2010 will indicated that he was doing remarkably well and was appropriately answering all of the questions that she put to him. In the end, the court agreed with Selig that the decedent was "capable of executing a will on December 14, 2010."

As for the plaintiff's claim of undue influence, she had asserted that, because the defendant was the person who held the decedent's power of attorney and served as his primary caregiver and financial manager when he executed the 2010 will and made her his primary beneficiary thereunder, she was in a position of trust and confidence vis-à-vis the decedent that imposed fiduciary duties to him upon her, and thus required her to prove by clear and convincing evidence that she had not taken advantage of their special relationship by exerting undue influence on him in connection with the

2010 will. The defendant disagreed, arguing that the burden was on the plaintiff, as the party contesting the will on the ground of undue influence, to prove by clear and convincing evidence that she had subjected the decedent to such undue influence.

The defendant based her argument on our Supreme Court's decision in *Lockwood* v. *Lockwood*, 80 Conn. 513, 69 A. 8 (1908), in which the court recognized that the burden of proof on a claim of undue influence does not shift to a party claiming an inheritance under a challenged will except in "one exception" in which the person believed to have exercised the undue influence was in a fiduciary relationship with the testator, the will favors the fiduciary, and the fiduciary is a stranger resulting in the complete elimination of the natural objects of the testator's bounty. See id., 522. In this case, claimed the defendant, she neither stood in such a relationship of trust and confidence vis-à-vis the decedent as to impose fiduciary duties upon her with respect to his will nor was she a stranger to him, for she was his daughter.

The court, citing *Lockwood*,[7] affirmed the decree of the Probate Court after finding by clear and convincing evidence that the defendant had not exerted any undue influence on the decedent in connection with the 2010 will. In support of that ruling, the court found that the evidence did not support a finding that the decedent's free agency and independence had been so overcome by the defendant's influence on him that the will was not a product of his own planning and desires. To the contrary, it found by clear and convincing evidence that the decedent had executed the new will in precise accordance with his own spontaneously expressed wish that his assets not be wasted after his death by leaving

[7] We note that the court used the wrong case title in its decision, *In re Lockwood* instead of *Lockwood* v. *Lockwood*, but used the correct citation. We consider the court's error to be a harmless scrivener's error that does not affect the correctness of its decision.

them to a granddaughter who had problems managing her money. The court thus found that the decedent not only knew what he was doing when he met with Bellobuono, which was to sign and execute a new will to disinherit the plaintiff, but he had a rational reason for so doing, which was to ensure that his assets would not be wasted by the plaintiff after his death. The court found that the latter conclusion was further supported by its consistency with the earlier decision of the plaintiff's mother to disinherit the plaintiff in her own will as well.

As a result of its finding that the decedent had not been under undue influence from the defendant when he executed the 2010 will, and of the high standard of proof by which it made that finding, the court further concluded that it did not need to formally determine which party bore the ultimate burden of proving or disproving undue influence in this case. The evidence establishing the absence of undue influence was sufficiently strong, the court concluded, that it would satisfy even the most demanding standard of proof under which either party could have been required to bear the burden of proving or disproving it.

Notwithstanding the latter conclusion, the court went on to address the plaintiff's claim that the burden of disproving undue influence should have been formally assigned to the defendant because she allegedly owed fiduciary duties to the decedent. The court rejected that claim, finding that the defendant did not stand in so close a relationship of trust and confidence with the decedent as to make her his fiduciary. In so ruling, the court applied the rule articulated in *Dunham* v. *Dunham*, 204 Conn. 303, 322, 528 A.2d 1123 (1987), in which our Supreme Court declared that "[a] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one

of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." This appeal followed. Additional facts will be set forth as necessary.

I

We first examine the plaintiff's claim that the court erred in affirming the admission of the decedent's 2010 will to probate over her objection that the defendant had failed to establish that the decedent had testamentary capacity at the time he executed the will.[8] The court ruled that the defendant had presented sufficient evidence of the decedent's testamentary capacity when he executed the will to raise a presumption of his sanity at that time, and, thus, without sufficient countervailing evidence from the plaintiff to overcome that presumption, the defendant met her statutory burden of proving that he was of sound mind at the time of execution, as required by General Statutes § 45a-250.[9] The plaintiff claims error in the court's ruling on the ground that the defendant presented no evidence that, at the time the decedent executed the 2010 will, he had full and specific knowledge of the nature and condition of his property, as she claims to be required by law to execute a valid will directing the final disposition of such property after his death. The defendant disagrees with the plaintiff's contention, arguing that under well established Connecticut law, as cited and properly relied on by the trial court, what is required to establish a testator's testamentary capacity is that, at the time he executed the will, he had sufficient mind and memory to know and understand the business in which he was engaged, to wit, executing a will. We agree with the defendant.

[8] In her brief on appeal, the plaintiff set forth her claims in a different order. For the sake of convenience, we discuss the plaintiff's claims in reverse order.

[9] General Statutes § 45a-250 provides: "Any person eighteen years of age or older, and of sound mind, may dispose of his estate by will."

The plaintiff's first claim of error presents a question of law; see *Bassford* v. *Bassford*, Superior Court, judicial district of Middlesex, Docket No. CV-15-6012903-S (March 24, 2016) (reprinted at 180 Conn. App. 335, 340, 183 A.3d 680), aff'd, 180 Conn. App. 331, 183 A.3d 680 (2018); as to which our standard of review is plenary. See *Barber* v. *Barber*, 193 Conn. App. 190, 221, 219 A.3d 378 (2019). Simply put, the question is whether proof of a testator's testamentary capacity to execute a valid will invariably requires proof that at the time of execution the testator had full and specific knowledge of the nature and condition of his property.

In support of her argument in the affirmative, the plaintiff relies on language in a jury instruction approved by our Supreme Court in *In re Probate Appeal of Turner*, 72 Conn. 305, 313, 44 A. 310 (1899) (*Turner*), which she claims establishes that an essential element of testamentary capacity is that the testator had full and specific knowledge of all of his assets at the time he executed the will. The instruction at issue in *Turner* provided that to establish testamentary capacity, "it was sufficient if the testatrix had such a mind and memory as would enable her to recollect and understand 'the nature and condition of her property, the persons who were or should be the natural objects of her bounty, and her relations to them, the manner in which she wished to distribute it among or withhold it from them, and the scope and bearing of the provisions of the will she was making.' " Id. The plaintiff contends that the first clause of this instruction—specifically, that "it was sufficient if the testatrix had such a mind and memory as would enable her to recollect and understand 'the nature and condition of her property' "; id.; expressly established an element of proof that was not satisfied in this case.

The defendant disagrees for two reasons, which we find persuasive. First, she rightly contends that the lan-

guage of the instruction approved in *Turner* cannot be read to require proof that when the testator executed the will, he had full and specific knowledge of the nature and condition of his property. Instead, the instruction focused on the general condition of the testator's mind and memory at the time he executed the will, more broadly requiring a finding that he then had the memory and mental ability to recollect and understand the matters listed in the instruction, all of which would logically be considered and taken into account by a rational person who knows that he was executing a will, and thereby directing the final disposition of his property after his death.

We also note that the plaintiff's interpretation of *Turner* is at odds with the prior decision of our Supreme Court, which rejected just such a claim as to the proof required to establish testamentary capacity. In *St. Leger's Appeal from Probate*, 34 Conn. 434, 438 (1867) (*St. Leger*) (preliminary statement of facts and procedural history), the court reviewed a will contestant's claim that the trial court had erred by failing to give a requested jury instruction requiring that the testator be proved to have "comprehend[ed] *perfectly* the condition of his property" in order to establish his testamentary capacity. (Emphasis added.) Addressing that argument, the court in *St. Leger* ruled that a testator must be found to have had "sufficient capacity to make a will if he understood the business in which he was engaged, and the elements of it, namely, if he *recollected* and understood, or in other words *comprehended*, the nature and condition of his property . . . ." (Emphasis added.) Id., 448–49. Proof of testamentary capacity thus requires proof of the testator's understanding of what he was doing when he executed the will and the elements of it, but it does not require proof that he then had precise comprehension of the nature and condition of each and every element of his property. See id., 449.

Second, the defendant looks to case law from the last century interpreting and applying the statute under which her burden of proving testamentary capacity arises, and rightly notes that there is no language in any such case that conditions a finding of testamentary capacity on proof that the testator had full and specific knowledge of the nature and extent of his property when he executed the will. To the contrary, such case law uniformly establishes, as the trial court ruled, that "§ 45a–250 provides: 'Any person eighteen years of age or older, and of sound mind, may dispose of his estate by will.' The burden of proof in disputes over testamentary capacity is on the party claiming under the will. . . .

"To make a valid will, the testatrix must have had mind and memory sound enough to know and understand the business upon which she was engaged, that of the execution of the will, at the very time she executed it. . . .

"Our law provides that it is a testator's capacity at the time of the will's execution that is relevant. The fundamental test of the testatrix's capacity to make a will is her condition of mind and memory at the very time when she executed the instrument. . . . While in determining the question as to the mental capacity of a testator evidence is received of his conduct and condition prior and subsequent to the point of time when it is executed, it is so admitted solely for such light as it may afford as to his capacity at that point of time and diminishes in weight as time lengthens in each direction from that point." (Citations omitted; internal quotation marks omitted.) *Bassford* v. *Bassford*, supra, Superior Court, Docket No. CV-15-6012903-S (reprinted at 180 Conn. App. 340–41); see also *Atchison* v. *Lewis*, 131 Conn. 218, 219–20, 38 A.2d 673 (1944) ("[t]he test of testamentary capacity stated in its simplest terms is that the testator must have mind and memory sound enough to enable him to know and understand the business upon which he is engaged, that is, the execution

of his will at the very time he executes it"); *Jackson* v. *Waller*, 126 Conn. 294, 301, 10 A.2d 763 (1940) (same); *Maroncelli* v. *Starkweather*, 104 Conn. 419, 424, 133 A. 209 (1926) (same); *Sturdevant's Appeal from Probate*, 71 Conn. 392, 399, 42 A. 70 (1899) (same). "While there is a presumption of sanity in the performance of legal acts, the party that presents a will still bears the burden of going forward with his proof, and only then does the burden shift to the opponents to prove incapacity." (Internal quotation marks omitted.) *Sanzo's Appeal from Probate*, 133 Conn. App. 42, 51, 35 A.3d 302 (2012).

On the basis of the foregoing analysis, we agree with the defendant that she was entitled to prevail on her claim that the decedent had testamentary capacity when he executed his 2010 will without specific proof that he then had full and specific knowledge of the property whose final disposition he was directing in the will. Even in the absence of such evidence, the defendant presented more than sufficient evidence not only to raise the presumption of the decedent's sanity, but also to satisfy her ultimate statutory burden of proving by a fair preponderance of the evidence that the decedent had such capacity in December, 2010. The court based its ruling on its well supported findings that the decedent was then able to live independently with the assistance of members of his family, that he lacked such serious brain injury as would deprive him of the ability to understand what he was doing when he executed the will, and, in fact, he was well aware of what he was doing when he executed the will and had rational reasons for so doing, which was to change his previous will and disinherit the plaintiff, in order to ensure that she would not waste the assets she otherwise would have inherited from him.[10]

[10] Despite the plaintiff's claim, there was evidence that the decedent had a general sense of what his property consisted of, because his concern was that the plaintiff would waste money because of her purported poor life choices, and his assets mainly consisted of cash assets.

Accordingly, we reject the plaintiff's first claim of error on appeal.

II

The plaintiff next claims that the court erred in affirming the admission of the decedent's 2010 will to probate after improperly rejecting her claim that the defendant had exerted undue influence upon the decedent in connection with the will. The court erred in so ruling, she claims, by failing to assign the burden of disproving her claim of undue influence to the defendant. The defendant responds to that argument in two ways. First, she contends, under the authority of *Lockwood* v. *Lockwood*, supra, 80 Conn. 522, that the burden of proof as to undue influence properly rests on the party contesting the will unless the case involves the "one exception" described in *Lockwood*, under which such a burden shift is appropriate. On that score, the defendant notes specifically that she and the decedent were members of the same family, between whom no suspicion of undue influence arises when one is favored in the other's will even when the one so favored occupied a position of trust and confidence vis-à-vis the one who favored her at the time he executed the will. Second, the defendant argues that, even if the court had improperly assigned the burden of disproving undue influence to her despite her familial relationship with the decedent, such a determination would not have made any difference in the court's resolution of that issue or its ultimate disposition of this case, because the court made its finding of no undue influence by clear and convincing evidence, which is the same standard under which that issue would have been decided had the burden of disproving it been formally assigned to her. Claiming that "the weight of the evidence introduced at trial [showed] that [the decedent] was in control both in the making of a new will, and in its contents and instructions," the defendant argues that the court's

finding of no undue influence was not clearly erroneous and must, therefore, be upheld. For the following reasons, we agree with the defendant that the court's rejection of the plaintiff's claim of undue influence was proper and must be affirmed.

"Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses." (Internal quotation marks omitted.) *Champagne* v. *Champagne*, 54 Conn. App. 321, 324, 734 A.2d 1048 (1999). "Ordinarily, the burden of proof on the issue of undue influence rests on the one alleging it . . . . In will contests, we recognize an exception to this principle when it appears that a stranger, holding toward the testator a relationship of trust and confidence, is a principal beneficiary under the will and that the natural objects of the testator's bounty are excluded. . . . The burden of proof, in such a situation, is shifted, and there is imposed upon the beneficiary the obligation of disproving, by [clear and convincing evidence], the exertion of undue influence by him. . . . We have said, however, that the law does not brand every legacy as prima facie fraudulent simply because the legatee enjoys the trust and confidence of the testator. . . . [I]t is only where the beneficiary is, or has acquired the position of, a religious, professional or business adviser, or a position closely analogous thereto, that the rule of public policy can be invoked which requires such a beneficiary to show that he has not abused his fiduciary obligation. . . . It has been stated frequently that the rule should not be extended beyond the limitations placed upon it in its recognition. . . . There is a marked distinction between the situation where the beneficiary is a stranger and the situation where [s]he is a child of the testator or grantor. . . .

When . . . a child is the beneficiary, the burden of proving the absence of undue influence does not shift to the child, even though it appears that a confidential relationship existed. . . . It is the child's privilege to anticipate some share of the parent's estate. He may use all fair and honest methods to secure his parent's confidence and obtain a share of his bounty. From such a relationship alone, the law will never presume confidence has been abused and undue influence exercised." (Citations omitted; internal quotation marks omitted.) *Berkowitz* v. *Berkowitz*, 147 Conn. 474, 476–78, 162 A.2d 709 (1960).

Under the foregoing authorities, the defendant is correct that the court did not err by not formally assigning to her the burden of disproving the plaintiff's claim of undue influence. Even if she had been found to occupy such a position of trust and confidence vis-à-vis the decedent when he executed the will as to make her his fiduciary, which the trial court expressly rejected, the burden of disproving that she exerted undue influence on the decedent could not have been assigned to her under the rule of *Lockwood* because she was his daughter.

Furthermore, even if the court had formally shifted the burden of proof to the defendant, that burden shift would have had no effect on the court's finding of no undue influence. Indeed, the court's decision that there had been no undue influence was made under the clear and convincing evidence standard, which is the same standard of proof that would have applied had the burden of proof formally shifted to the defendant. Accordingly, the court's alleged error did not contribute to its judgment against the plaintiff, and thus it affords the plaintiff no basis for reversing that judgment on appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ISRAEL SANTIAGO (AC 42234)

Alvord, Elgo and Alexander, Js.

Syllabus

Convicted of various crimes in connection with his actions toward two police officers when they attempted a stop of his motor vehicle, the defendant appealed to this court. The police officers, L and M, separately responded to an early morning call regarding a suspicious individual in a silver car who appeared to be attempting to break into vehicles in a residential neighborhood. On their arrival, the officers encountered the defendant driving a vehicle matching that description and followed him, each in their own marked cruiser, down a dead end road. Near the end of the road, the defendant turned his car around. After an unsuccessful attempt to make a vehicle stop, L angled his cruiser across the road to try to prevent the defendant from leaving the area. The defendant drove over the curb and around L's vehicle. M then engaged his lights and siren and similarly angled his cruiser across the road to try and block the defendant. The defendant hit M's cruiser while attempting to drive around it. Assuming that the crash had disabled the defendant's vehicle, both L and M exited their cruisers and ordered the defendant to shut off his vehicle. Instead, the defendant reversed quickly toward L, who had to kick off the side of the defendant's car to avoid being hit by it. The defendant again advanced his car toward M, who was then standing near the back of his vehicle. The defendant briefly stopped his car between the two officers. After unsuccessfully trying to open the defendant's car door, L used the butt of his gun to break open the driver's side window of the defendant's vehicle, in an attempt to grab him. The defendant again quickly reversed and L stumbled out of the car's path. M, believing that L had been hit, fired a single shot at the defendant's vehicle in an attempt to disable it. The defendant then drove around M's cruiser and continued approximately one quarter of a mile down the road before his vehicle broke down. The defendant exited the vehicle and ran into the woods. He was apprehended shortly thereafter. Various items, which had been reported as missing from the vehicles of area residents, were recovered from the defendant's car. Although the jury found the defendant not guilty of attempt to commit assault in the first degree with respect to his actions against L, he was convicted of one count of attempt to commit assault in the first degree with respect to his actions against M, two counts of attempt to commit assault of a peace officer with respect to his actions against L and M, respectively, and one count of engaging an officer in pursuit. On appeal, the defendant claimed that there was insufficient evidence to support his conviction of attempt to commit assault in the first degree and that the trial court

erred in accepting the jury's verdict of guilty of attempt to commit assault of a peace officer because that crime was not legally cognizable or, in the alternative, because the evidence was insufficient to support his conviction of both counts. *Held*:

1. The evidence was sufficient to support the defendant's conviction of attempt to commit assault in the first degree: there was ample evidence from which the jury reasonably could have found, by the cumulative impact of the evidence and the rational inferences permissibly drawn therefrom, that the defendant's intent was proven beyond a reasonable doubt, as the jury reasonably could have found that the defendant was aware of M's presence and location, that he intended to hit M with his car, that he had a motive to assault M, as the defendant's car had several stolen items in it that evening, many plainly visible, and that he did not mistakenly accelerate toward M.
2. The trial court did not err in accepting the jury's verdict of guilty of two counts of attempt to commit assault of a peace officer: the defendant's claim that the crime was not legally cognizable was unpreserved because he failed to raise it at trial; moreover, the claim failed under the third prong of *State* v. *Golding* (213 Conn. 233), because the defendant failed to establish that there was a constitutional violation, as this court had previously determined in *State* v. *Jones* (96 Conn. App. 634), that attempt to commit assault of a peace officer was a legally cognizable crime; furthermore, the defendant's claim that there was insufficient evidence of the requisite intent to support his conviction pertaining to his actions against M failed because the jury reasonably could have found that the defendant intended to cause serious physical injury to M, which would be sufficient to support a finding that the defendant acted with an intent to prevent M from performing his duties; additionally, the defendant abandoned his claim that there was insufficient evidence of the requisite intent to support his conviction pertaining to his actions against L because his briefing was devoid of any analysis to support his claim, merely incorporating his arguments set forth with respect to his challenge to his conviction of attempt to commit assault in the first degree, which related only to his actions against M, and, accordingly, this court declined to review the claim.

Argued February 17—officially released August 3, 2021

Procedural History

Substitute information charging the defendant with two counts each of the crimes of attempt to commit assault in the first degree and attempt to commit assault of a peace officer, and with one count of the crime of engaging an officer in pursuit, brought to the Superior Court in the judicial district of New Haven, geographical

area number twenty-three, and tried to the jury before *B. Fischer*, *J.*; verdict and judgment of guilty of one count of attempt to commit assault in the first degree, two counts of attempt to commit assault of a peace officer and one count of engaging an officer in pursuit, from which the defendant appealed to this court. *Affirmed.*

Megan L. Wade, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Karen Roberg*, assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Israel Santiago, appeals from the judgment of conviction, rendered after a jury trial, of one count of attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-59 (a) (1) and two counts of attempt to commit assault of a peace officer in violation of General Statutes §§ 53a-49 (a) (2) and 53a-167c (a) (1).[1] On appeal, the defendant claims that (1) the evidence was insufficient to support his conviction of attempt to commit assault in the first degree and (2) the crime of attempt to commit assault of a peace officer is not legally cognizable and, alternatively, the evidence was insufficient to support his conviction of both counts of attempt to commit assault of a peace officer. We affirm the judgment of the trial court.

[1] The defendant also was convicted of one count of engaging an officer in pursuit in violation of General Statutes § 14-223 (b). The defendant does not challenge his conviction of this offense on appeal.

The defendant also was charged with one count of attempt to commit assault in the first degree pertaining to his actions against Officer Corey Lemmons of the North Branford Police Department. The jury found him not guilty of that charge.

The following facts, which reasonably could have been found by the jury, and procedural history are relevant to this appeal. On the afternoon of November 8, 2014,[2] the defendant purchased a bottle of brandy and met his friend, Anthony Tuozzola,[3] to purchase and use heroin. Thereafter, the defendant and Tuozzola drove to Waterbury. Throughout the afternoon and evening, the two men continued to drink.[4] At around 10 o'clock in the evening, the defendant and Tuozzola drove to a bar in downtown New Haven. At around midnight, after he had consumed four or five alcoholic beverages at the bar, the defendant and Tuozzola drove to North Branford.[5] On the way, the defendant "took a wrong turn" and ended up stopping the car on the side of Seahill Road in North Branford.

A resident of Seahill Road, Christopher Hills, testified that, after the defendant and Tuozzola stopped their car on the side of the road,[6] he observed the defendant[7]

[2] The defendant ultimately was detained in the early hours of November 9, 2014.

[3] We note that Anthony Tuozzola's name is spelled inconsistently throughout the record. For purposes of clarity, we refer to him as Tuozzola.

[4] By the time the defendant and Tuozzola drove to Waterbury, the defendant had various intoxicating drugs in his system. At the start of his day, the defendant was provided methadone through a local program. In addition, the defendant took eight milligrams of prescribed Xanax. Although the defendant testified that he was "messed up that night," he also testified that he would generally ingest methadone, Xanax, and alcohol every day. He additionally testified that, in the hours leading up to his arrest, he had no issues driving to Waterbury, from Waterbury to New Haven, or from New Haven to North Branford.

[5] The defendant testified that they drove to North Branford to visit their friend.

[6] According to the defendant, he and Tuozzola stopped to urinate. The defendant testified that, after relieving themselves, he and Tuozzola returned to the car and drove away, only to find themselves at a dead end where they encountered two police cruisers.

[7] At trial, Hills was not asked to identify the person he saw in his driveway in the early morning hours of November 9, 2014; however, he did identify the silver car that later drove by his house as the vehicle driven by the person he saw in his driveway, and he stated that the person had entered the silver car via the driver's side door. Officers Christopher Miserendino

attempt to break into a car that was parked in his driveway. Specifically, Hills testified that, just after midnight, he heard a car park on the street outside his home and he went to his window to see what was happening. Hills observed a silver car parked on the road outside his house; he watched the defendant enter his driveway, approach his wife's car, which was parked in the driveway, and attempt to open the door to his wife's car. Thereafter, Hills called the police.

Officers Corey Lemmons and Christopher Miserendino of the North Branford Police Department responded separately to Hills' call. While Officer Lemmons drove through the neighborhood looking for the car that Hills described, Officer Miserendino responded to Hills' address at 410 Seahill Road.[8] On arriving, Officer Miserendino met Hills in the driveway; moments after he arrived, Hills alerted the officer that the silver car that he had observed earlier was driving by his residence on Seahill Road again. Officer Miserendino then returned to his cruiser to catch up to the silver car. Shortly thereafter, Officer Miserendino spotted Officer Lemmons' police cruiser following the silver car. The silver car headed down Seahill Road, toward a dead end, followed first by Officer Lemmons and then by Officer Miserendino. Shortly after Officer Miserendino spotted Officer Lemmons, Officer Lemmons engaged his police lights.[9] Just before the trio reached the dead end, the silver car began turning away from the dead end. Officer Lemmons attempted to make a vehicle stop, but he was

and Corey Lemmons identified the defendant as the person driving the silver car that night. Further, the defendant testified that he was driving the silver car at all times that night.

[8] Although Hills' address is 410 Seahill Road, his driveway opens onto Wilford Road, which, at that location, runs perpendicular to Seahill Road.

[9] Officer Miserendino testified that Officer Lemmons also had his siren on; however, Officer Lemmons testified that he did not turn his siren on until sometime later. Further, the defendant testified that the first car (Officer Lemmons' cruiser) did not have its lights on.

unsuccessful. In a further attempt to stop the silver car, Officer Lemmons turned his cruiser at an angle across the road, attempting to block the silver car's path. Instead of pulling over or stopping, the silver car "popped the curb" in front of Officer Lemmons' cruiser and went around the cruiser.

Seeing the silver car maneuver around Officer Lemmons' cruiser, Officer Miserendino engaged his lights and siren and angled his cruiser across both lanes of the road in another attempt to stop the silver car. Again, the silver car did not stop; rather, the driver attempted to drive around Officer Miserendino's cruiser, only to collide with the passenger side rear of the cruiser, causing damage. On observing the collision and assuming that both cars were disabled, Officer Lemmons exited his cruiser and ran up Seahill Road toward Officer Miserendino's cruiser and the silver car.[10]

Officer Miserendino similarly assumed that the collision disabled the silver car and would allow him to take the driver into custody. Officer Miserendino exited his cruiser, drew his firearm, and ordered the driver to shut off the silver car's engine and to show his hands. The defendant did not comply. At this point, Officer Miserendino was standing so that his cruiser was between him and the silver car and it was at this time when the officer first observed the driver of the silver car, who he later identified as the defendant, and his passenger. Officer Miserendino observed that the passenger looked scared and that the defendant seemed to have no expression at all.

Officer Miserendino repeated his orders for the defendant to shut off the silver car's engine and show his hands. Again, the defendant failed to comply with the

[10] Additionally, given the narrowness of the road, Officer Lemmons was having trouble turning around and determined that proceeding on foot would be better.

orders and, "without warning," the car began to reverse quickly toward the area where Officer Lemmons stood.[11] In order to avoid being hit, Officer Lemmons had to kick off the side of the silver car and push himself to safety.

Despite already attempting to escape around the rear of Officer Miserendino's cruiser, the defendant again proceeded to drive the silver car toward the rear of Officer Miserendino's cruiser, where Officer Miserendino stood.[12] At this point, Officer Miserendino's cruiser was no longer between Officer Miserendino and the silver car, and he had to evade the silver car in order to avoid being hit. Then, the silver car came to a stop and, for a moment, it remained somewhat stationary[13] between the two officers and the two police cruisers.

Because the defendant had continued to ignore all orders, Officer Lemmons attempted to open the driver's side door of the silver car to apprehend the defendant. The car door was locked, however, so Officer Lemmons instead used the butt of his service weapon to break open the driver's side window of the silver car. After Officer Lemmons broke the window, the vehicle "was moving a lot forward and backwards, which looked very . . . menacing and aggressive . . . ."[14] Officer Lemmons had intended to reach through the broken window and grab the defendant,[15] but the defendant

[11] Officer Lemmons testified that he did not think that the driver was aware of his presence behind the silver car.

[12] Officer Lemmons testified that the defendant seemed again to attempt to maneuver around Officer Miserendino's cruiser.

[13] Officer Miserendino testified that the car "came forward towards me . . . [and] reversed again and kind of, for a short amount of time, stayed stationary." Officer Lemmons testified that the silver car was "moving a little bit back and forth, back and forth . . . ."

[14] Officer Lemmons testified that, in retrospect, he thought the vehicle was moving that way because the defendant was trying not to stall the vehicle. The silver car was a standard transmission.

[15] Officer Lemmons testified that, after he broke the window of the silver car, he first observed the driver, who he later identified as the defendant.

quickly reversed the silver car, and Officer Lemmons had to evade its path, stumbling as he did so.

Officer Miserendino testified that, after seeing those events transpire, he thought that Officer Lemmons had been hit by the silver car and that he was in fear for both of their lives. Specifically, Officer Miserendino testified that he felt that the defendant was using the silver car as a weapon against himself and Officer Lemmons. Officer Miserendino fired a single shot from his service weapon at the silver car, with the intent to disable it. The shot, however, did not disable the vehicle, and the defendant proceeded to drive around the front of Officer Miserendino's cruiser and up Seahill Road.[16] After checking on Officer Lemmons, Officer Miserendino returned to his cruiser and attempted to catch up to the silver car. Officer Lemmons followed in pursuit.

The defendant drove about one-quarter of a mile down the road before the silver car broke down on the side of the road. The defendant then exited the silver car and ran into woods nearby. In order to locate the defendant, the officers requested K-9 services from the North Haven Police Department. Thereafter, with the assistance of Canine Officer Zeus and Officer James Brennan, law enforcement apprehended the defendant and he was taken into custody.

Detective Sergeant Sean Anderson responded to the location where the defendant had abandoned the silver car. Later that week, Detective Sergeant Anderson applied for and subsequently obtained a search and seizure warrant to inspect the inside of the silver car. Inside the vehicle, Detective Sergeant Anderson found

[16] The defendant's account of the interaction is quite different. He testified that when he initially went to drive around Officer Miserendino's cruiser, the officer hit the defendant's car with the cruiser and that, despite the collision, the defendant was able to drive around the cruiser and up Seahill Road. He testified that he "never reversed" the silver car and that he did not remember the window breaking, but he did remember hearing "gun shots [and] glass breaking . . . ."

a debit card with the name Maria Liguori, hotel room key cards, several sets of curtains, a pocket radar, a pink iPod, and a black leather case. A Rolex watch was also recovered.

Thereafter, Hills discovered that several items were missing from his wife's car and reported that these items had been in the vehicle the previous day. Specifically, he discovered that a pocket radar, a watch, and a black leather case were missing. Hills reported the missing items to the North Branford police. Similarly, Maria Gallicchio (formerly Maria Liguori), also a resident of North Branford, discovered that items were missing from her car. Specifically, she discovered that an iPod, her debit card, a hotel room key card, hotel vouchers, and several sets of curtains were missing and reported that all of these items had been in her car the day before. Gallicchio reported the missing items to the North Branford police. At trial, both Gallicchio and Hills identified the items seized from the silver car as the missing items that had been taken from their vehicles.

The defendant was charged with five counts by way of an amended long form information dated March 27, 2018. In the first and second counts, the defendant was charged with attempt to commit assault in the first degree in violation of §§ 53a-49 (a) (2) and 53a-59 (a) (1). Count one was related to his reversing the silver car toward Officer Lemmons and count two was related to his accelerating toward Officer Miserendino. In the third and fourth counts, the defendant was charged with attempt to commit assault of a peace officer in violation of §§ 53a-49 (a) (2) and 53a-167c (a) (1), relating to Officers Lemmons and Miserendino, respectively. In the fifth count, the defendant was charged with engaging an officer in pursuit in violation of General Statutes § 14-223 (b).

A trial was held on April 2 and 3, 2018. The state presented the testimony of Hills, Officer Miserendino,

Officer Ron Ferrucci, Gallicchio, Officer Lemmons, Detective Sergeant Anderson, Officer Brennan, Officer Pasquale Marino, Officer Joseph Venditto, and Officer Michael Doherty.[17] The defendant testified in his own defense. After the prosecution rested, the defendant moved for judgment of acquittal, which the trial court denied.[18]

The jury found the defendant not guilty of count one, attempt to commit assault in the first degree pertaining to his actions against Officer Lemmons, but it found the defendant guilty of counts two through five. Thereafter, the court sentenced the defendant to twenty years of incarceration, execution suspended after fifteen years, followed by five years of probation, for count two, five years of incarceration for counts three and four, and one year of incarceration for count five, to run concurrently. This appeal followed.

I

The defendant's first claim on appeal is that there was insufficient evidence to support his conviction of

[17] Officers Venditto and Doherty testified about an incident that occurred in Hamden on September 7, 2015, about one year after the incident at issue in the present case. At around six o'clock that evening, Officers Venditto and Doherty received a report of an erratic vehicle and then observed a vehicle that matched the description. Officer Venditto attempted a traffic stop and initially was successful; however, as soon as he began to exit his cruiser, the vehicle sped off. Officer Venditto, along with Officer Doherty who had arrived at the scene, then pursued the driver for some time. Near the end of the pursuit, the driver hit Officer Doherty's cruiser, disabling it. Assuming that the driver's vehicle was also disabled, Officer Doherty exited his cruiser. The vehicle, however, drove away before turning around and driving directly at Officer Doherty. Officer Doherty testified that he "believed [the driver] was traveling at [him] personally." Fearing for his safety, Officer Doherty fired three shots at the vehicle, which swerved away from the officer at the last moment. The driver eventually abandoned the vehicle and fled. He was apprehended and taken into custody shortly thereafter. Both Officer Venditto and Officer Doherty identified the defendant as the driver of the car involved in the September 7, 2015 incident.

[18] As to each count alleging criminal attempt, the defendant argued that, because of his intoxication, he could not form the specific intent required for the crime.

attempt to commit assault in the first degree pertaining to his actions against Officer Miserendino. Specifically, the defendant asserts that the evidence was insufficient to establish beyond a reasonable doubt that he possessed the necessary intent to be convicted of this crime. For the reasons that follow, the defendant cannot prevail on his sufficiency of the evidence claim.

Before addressing the defendant's first claim on appeal, we set forth the well established principles that guide our review. "[A] defendant who asserts an insufficiency of the evidence claim bears an arduous burden. . . . [F]or the purposes of sufficiency review . . . we review the sufficiency of the evidence as the case was tried . . . . [A] claim of insufficiency of the evidence must be tested by reviewing no less than, and no more than, the evidence introduced at trial. . . . In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict." (Internal quotation marks omitted.) *State* v. *Luciano*, 204 Conn. App. 388, 396, A.3d , cert. denied, 337 Conn. 903, A.3d (2021).

"In evaluating a claim of evidentiary insufficiency, we review the evidence and construe it as favorably as possible with a view toward sustaining the conviction, and then . . . determine whether, in light of the evidence, the trier of fact could reasonably have reached the conclusion it did reach. . . . A trier of fact is permitted to make reasonable conclusions by draw[ing] whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and

logical. . . . [These inferences, however] cannot be based on possibilities, surmise or conjecture. . . .

"We note that the [trier of fact] must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Josephs*, 328 Conn. 21, 35–36, 176 A.3d 542 (2018).

In order to sustain the defendant's conviction, the state must have presented evidence from which the jury reasonably could have found beyond a reasonable doubt that the defendant was guilty of attempt to commit assault in the first degree against Officer Miserendino. Pursuant to § 53a-49 (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 or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." Further, "[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 deadly weapon or a dangerous instrument . . . ." General Statutes § 53a-59 (a). "Accordingly, [a] conviction of attempt to commit assault in the first degree, in violation of §§ 53a-49 (a) (2) and 53a-59 (a) (1), requires proof of intentional conduct constituting a substantial step toward intentionally causing the victim

serious physical injury by means of a dangerous instrument." (Internal quotation marks omitted.) *State* v. *Andrews*, 114 Conn. App. 738, 744, 971 A.2d 63, cert. denied, 293 Conn. 901, 975 A.2d 1277 (2009).

General Statutes § 53a-3 (11) provides in relevant part that "[a] person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ." "Intent may be, and usually is, inferred from [a] defendant's verbal or physical conduct [as well as] the surrounding circumstances. . . . Nonetheless, [t]here is no distinction between circumstantial and direct evidence so far as probative force is concerned. . . . Moreover, [i]t is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . Finally, we underscore that intent [can] be formed instantaneously and [does] not require any specific period of time for thought or premeditation for its formation. . . . Intent is a question of fact, the determination of which should stand unless the conclusion drawn by the trier is an unreasonable one." (Citations omitted; internal quotation marks omitted.) *State* v. *Carter*, 317 Conn. 845, 856–57, 120 A.3d 1229 (2015).

Additionally, "[t]he [jury is] not bound to accept as true the defendant's claim of lack of intent or his explanation of why he lacked intent. . . . Intent may be, and usually is, inferred from the defendant's verbal or physical conduct. . . . Intent may also be inferred from the surrounding circumstances. . . . The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . . Intent may be gleaned from circumstantial evidence such as the type of weapon used, [and] the manner in which it was used . . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant

intended the natural consequences of his voluntary conduct." (Citation omitted; internal quotation marks omitted.) *State* v. *Andrews*, supra, 114 Conn. App. 744–45. Further "[t]he existence of an intent to escape does not necessarily negate the existence of an intent to cause serious physical injury when making the escape." Id., 746.

On appeal, the defendant argues that "[n]o evidence was presented to prove beyond a reasonable doubt that the defendant acted with the specific intent to cause serious physical injury to Officer Miserendino" and that, therefore, "the evidence was insufficient to sustain a conviction of [attempt to commit] assault in the first degree . . . ." The defendant asserts that "the evidence adduced at trial demonstrated that [he] did not intend to cause serious physical injury, but rather acted with the intent to flee from the police." We are not persuaded.

In support of his argument that his only intent was to evade the officers, the defendant relies on Officer Miserendino's testimony that the defendant's actions were "reckless" and "evasive" and argues that this testimony is dispositive on the question of intent. The relevant testimony comes from the following colloquy between Officer Miserendino and defense counsel:

"[Defense Counsel]: Why did you think your life was in danger?

"[Officer Miserendino]: Well, the reckless operation of a vehicle; it had already struck a police cruiser, it had reversed and almost ran over Officer Lemmons, we're yelling commands to continuously stop, the car is not stopping, the vehicle again, for the second time, almost strikes Officer Lemmons. The vehicle was being used as a weapon. . . .

"[Defense Counsel]: You just said that the vehicle was operating recklessly?

"[Officer Miserendino]: Yes.

"[Defense Counsel]: And it was going—recklessly was in the action of reversing and then moving forward?

"[Officer Miserendino]: I'm not sure what you're asking.

"[Defense Counsel]: Well, I mean, your testimony is that he strikes your vehicle, doesn't stop—or, I mean, doesn't continue going and just reverses, goes forward, reverses again and then eventually he gets around your cruiser?

"[Officer Miserendino]: Yeah.

"[Defense Counsel]: Okay. So, that action there, reversing and going forward that—that was reckless?

"[Officer Miserendino]: Striking a police vehicle that's trying to stop you, almost running over an officer, yes."

On the basis of this testimony, the defendant argues that the officer "did not believe the defendant's actions were to intentionally cause serious physical injury, but rather, to escape," and, therefore, the evidence is insufficient to support the conviction. The defendant relies on *Andrews*, in which this court found sufficient evidence of intent to support a conviction of attempt to commit assault in the first degree where a defendant drove toward an officer while trying to flee and the officer testified that he "believed that the defendant deliberately was trying to run him over." *State* v. *Andrews*, supra, 114 Conn. App. 744, 746. The defendant contends that, because, unlike in *Andrews*, Officer Miserendino "did not testify that he believed that the defendant was 'deliberately' trying to run him over," there is insufficient evidence to support his conviction. The defendant neglects to mention Officer Miserendino's testimony that he believed the defendant was using his car as a weapon to injure himself and Officer Lemmons. Thus, the defendant's argument is unavailing.

In the present case, there is ample evidence from which the jury reasonably could have concluded beyond a reasonable doubt that the defendant had the intent to inflict serious physical injury on Officer Miserendino.[19] First, the jury reasonably could have found that the defendant was aware of Officer Miserendino's presence and location. The defendant's actions at issue occurred after the defendant had collided with Officer Miserendino's cruiser, and, therefore, there was evidence to reasonably support a finding that the defendant knew the location of the cruiser. Further, Officer Miserendino testified that, moments earlier, he was close enough to the defendant to observe his facial expression and later identify him. Officer Miserendino did not move away from the cruiser. Additionally, both officers had their police lights activated, illuminating the scene, and both officers were shouting commands at the defendant throughout the incident. The jury reasonably could find that the defendant knew where Officer Miserendino was and that the defendant drove the silver car directly toward Officer Miserendino.

Second, the jury reasonably could have found that the defendant intended to hit Officer Miserendino with the silver car. Officer Lemmons testified that, earlier in the pursuit, the defendant attempted to drive around Officer Miserendino's cruiser, but he failed and collided with the passenger side rear of the cruiser. Thereafter, Officer Miserendino exited his cruiser and began shouting orders to the defendant from the driver's side rear of his cruiser. Officer Lemmons testified that "it appeared that [the defendant] was trying to go around [Officer Miserendino's cruiser] again" by proceeding along the

[19] During its closing argument, the state argued that the substantial step in relation to the defendant's attempt to injure Officer Miserendino was the second time that the defendant accelerated toward the officer—when Officer Miserendino was standing outside of his cruiser after the silver car had collided with it. Thus, our discussion of intent focuses on this specific moment.

same route that previously resulted in a collision with the passenger side rear of the cruiser. During this attempt, however, Officer Miserendino was now outside his cruiser and standing between his cruiser and the silver car driven by the defendant, and he had to evade the silver car in order to avoid being hit. Accordingly, the jury reasonably could have found that the defendant intended to hit Officer Miserendino.[20]

Third, the jury reasonably could have found that the defendant had a motive to assault Officer Miserendino. The state presented evidence to support a finding that the defendant had a motive to evade the officers by any means. Specifically, the state presented evidence that the silver car had several stolen items in it that evening, many of which were plainly visible.[21] The jury reasonably could have found, consistent with the state's closing arguments, that the defendant had a motive to evade the police by whatever means necessary, including by assaulting Officer Miserendino.

Fourth, the jury reasonably could have found that the defendant did not mistakenly accelerate toward Officer Miserendino. The state presented evidence that tends to demonstrate the defendant's lack of mistake in regard to his acceleration toward Officer Miserendino. Specifically, the state presented evidence of a subsequent encounter between the defendant and several

[20] In its brief, the state addressed Officer Lemmons' testimony that the defendant just seemed to be trying to get around Officer Miserendino's cruiser. The state offered several plausible ways the jury could have viewed this evidence: the jury could have determined that this opinion was due to Officer Lemmons' different perspective of the scene, it could have determined that the defendant formed the necessary intent after his initial attempt to get around the vehicle, or it could have decided to disregard Officer Lemmons' testimony on the fact. Further, the state noted the testimony regarding the September 7, 2015 incident; see footnote 17 of this opinion; bolstered the conclusion that the defendant had the requisite intent.

[21] Detective Sergeant Anderson, who searched the silver car, found the stolen items in the vehicle's center console, on the backseat, and on the floor of the backseat.

police officers on September 7, 2015. See footnote 17 of this opinion. This evidence provides a pattern of behavior that reasonably could support a conclusion by the jury that the defendant did not accelerate toward Officer Miserendino due to a mistake. See, e.g., Conn. Code Evid. § 4-5 (c) ("[e]vidence of other crimes, wrongs or acts . . . is admissible . . . to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony"); *State* v. *Collins*, 299 Conn. 567, 583, 10 A.3d 1005 (same), cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

In the present case, the jury reasonably could have found that the defendant's intent, as an element of the crime of attempt to commit assault in the first degree, was proven beyond a reasonable doubt by the cumulative impact of the evidence and the rational inferences permissibly drawn therefrom. Accordingly, the defendant cannot prevail on this claim.[22]

[22] The defendant also claims, in the alternative to his claim that attempt to commit assault of a peace officer is not a legally cognizable crime, that there was insufficient evidence of the requisite intent to support his conviction of attempt to commit assault of a peace officer as to his actions against Officer Miserendino. See part II of this opinion. In *State* v. *Jones*, 96 Conn. App. 634, 639, 902 A.2d 17, cert. denied, 280 Conn. 919, 908 A.2d 544 (2006), this court determined that "when coupled with the attempt statute, the intent required for the crime of attempted assault of a peace officer is the intent to prevent the officer from performing his duties." In part I of this opinion, we have concluded that, on the basis of the evidence presented and the rational inferences drawn therefrom, the jury reasonably could have found that the defendant intended to cause serious physical injury to Officer Miserendino. Because harming an officer would necessarily result in preventing that officer from performing his/her duties, we also conclude that this same evidence that is sufficient to support a finding that the defendant intended to harm Officer Miserendino reasonably could support a finding that the defendant acted with the intent to prevent Officer Miserendino from performing his duties. Accordingly, the defendant's claim that there is insufficient evidence of the requisite intent to support his conviction for attempt to commit assault of a peace officer as to his actions against Officer Miserendino fails.

II

The defendant's second claim on appeal is that the trial court erred in accepting the jury's verdict for the counts of attempt to commit assault of a peace officer because that crime is not legally cognizable. We conclude that the defendant's claim fails under the third prong of *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 780–81, 120 A.3d 1188 (2015). In the alternative, the defendant claims that the evidence was insufficient to support his conviction of two counts of attempt to commit assault of a peace officer.[23] For the reasons set forth in part I of this opinion, the defendant's challenge to his conviction of the count pertaining to his actions against Officer Miserendino fails. See footnote 22 of this opinion. With respect to the defendant's challenge to his conviction of the count pertaining to his actions against Officer Lemmons, we do not reach the merits of the claim.

A

We first turn to the claim that the crime of attempt to commit assault of a peace officer is not legally cognizable. The defendant seeks review of this unpreserved claim under *State* v. *Golding*, supra, 213 Conn. 233, as modified by *In re Yasiel R.*, supra, 317 Conn. 780–81. We conclude that the defendant's claim fails under the third prong of *Golding* because he has not established a constitutional violation.

The following procedural history is relevant to our resolution of this claim. This appeal was fully briefed on August 31, 2020. On August 20, 2020, the defendant filed a motion to transfer the appeal to our Supreme

[23] As previously mentioned in this opinion, the defendant was convicted of one count of attempt to commit assault of a peace officer pertaining to his actions against Officer Lemmons and one count pertaining to his actions against Officer Miserendino.

Court. In the motion to transfer, the defendant argued that transfer was warranted in order to resolve a tension between a Supreme Court case and an Appellate Court case. Specifically, the defendant asserted that *State* v. *Jones*, 96 Conn. App. 634, 902 A.2d 17, cert. denied, 280 Conn. 919, 908 A.2d 544 (2006), is inconsistent with Supreme Court precedent, namely, *State* v. *Almeda*, 189 Conn. 303, 455 A.2d 1326 (1983), and should be overruled. Although the defendant acknowledged that his claim is controlled by *Jones*, because that case can be overruled only by the Supreme Court or the Appellate Court sitting en banc, he requested transfer, claiming that *Jones* was incorrectly decided and should be overruled. Our Supreme Court denied the motion.

On December 4, 2020, the defendant filed a motion with this court requesting en banc consideration. Again, the defendant argued that *Jones* was incorrectly decided in light of *Almeda*, and should be overruled. This court denied the motion.

First, we must address whether this claim is reviewable. In his principal appellate brief, the defendant, for the first time, raises the question of whether the crime of attempt to commit assault of a peace officer is a legally cognizable crime. The defendant acknowledges that this claim was not raised at the trial level and, accordingly, is unpreserved. The defendant argues, however, that this claim is reviewable under the principles set forth in *State* v. *Golding*, supra, 213 Conn. 233.

Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (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.) Id., 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 780–81 (modifying third prong of *Golding*).

"[T]he third prong of *Golding* does not require that there be existing Connecticut precedent already recognizing a constitutional right. Instead, a party satisfies the third prong of *Golding* if he or she makes a showing sufficient to establish a constitutional violation. Requiring anything more would defeat the purpose of *Golding*, which, of course, is to permit a party to prevail on an unpreserved constitutional claim when, on appeal, the party can demonstrate a harmful constitutional deprivation." *In re Yasiel R.*, supra, 317 Conn. 780–81. "The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *State* v. *LaFontaine*, 128 Conn. App. 546, 550 n.3, 16 A.3d 1281 (2011).

Assuming, without deciding, that the defendant's claim is reviewable under the first two prongs of *Golding*, it fails the under the third prong. In *State* v. *Jones*, supra, 96 Conn. App. 640, this court determined that the crime of attempt to commit assault of a peace officer is legally cognizable. Because the defendant's argument with respect to prong three is predicated on his claim that attempt to commit assault of a peace officer is not a legally cognizable crime, and because this court in *Jones* previously determined that the crime *is* legally cognizable, there cannot be a clear constitutional violation for the purposes of *Golding*. In light of *Jones*, the defendant's claim fails under the third prong of *Golding*.[24]

[24] Because this court in *Jones* determined that the crime at issue is legally cognizable; *State* v. *Jones*, supra, 96 Conn. App. 640; we need not consider whether a nonlegally cognizable crime satisfies *Golding*'s requirement of a

B

The defendant claims, alternatively, that there was insufficient evidence of the requisite intent to support his conviction of attempt to commit assault of a peace officer pertaining to his actions against Officer Lemmons. We conclude that the defendant has abandoned this claim.

"It is well settled that claims on appeal must be adequately briefed . . . . Claims that are inadequately briefed generally are considered abandoned." (Citations omitted.) *Grimm* v. *Grimm*, 276 Conn. 377, 393, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006). "Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Ward* v. *Greene*, 267 Conn. 539, 546, 839 A.2d 1259 (2004). "The mere recital of . . . claims in a petition, without supporting oral or written argument, does not adequately place those claims before the court for its consideration." *Solek* v. *Commissioner of Correction*, 107 Conn. App. 473, 480–81, 946 A.2d 239, cert. denied, 289 Conn. 902, 957 A.2d 873 (2008).

The defendant's briefing is devoid of any analysis in support of his challenge to his conviction of attempt to commit assault of a peace officer pertaining to his actions against Officer Lemmons. In support of his claim, the defendant merely incorporated his arguments previously set forth with respect to his challenge to his

clear constitutional violation. In his principal appellate brief, the defendant urges us to overrule *Jones*, arguing that it was decided incorrectly. This panel does not reach the merits of the defendant's argument, as "[i]t is this court's policy that we cannot overrule a decision made by another panel of this court absent en banc consideration." (Internal quotation marks omitted.) *State* v. *Bischoff*, 189 Conn. App. 119, 123, 206 A.3d 253 (2019), aff'd, Conn. , A.3d (2021). Because we are not reviewing the present case en banc, we are bound by our decision in *Jones*.

conviction of attempt to commit assault in the first degree.[25] Those arguments, however, relate *only* to the defendant's actions against Officer Miserendino. Accordingly, the defendant provides no supporting factual argument or legal analysis that challenges his conviction pertaining to his actions against Officer Lemmons. For these reasons, we conclude that the defendant's claim is abandoned. We, therefore, decline to review it.

The judgment is affirmed.

In this opinion the other judges concurred.

TIM DUNN *v.* NORTHEAST HELICOPTERS FLIGHT SERVICES, L.L.C.
(AC 43594)

Prescott, Moll and Alexander, Js.

Syllabus

The plaintiff sought to recover damages for the allegedly wrongful termination of his employment by N Co., which operated a helicopter flight training school, claiming that J, the owner of N Co., in violation of statute (§ 31-73 (b)), had demanded 50 percent of future proceeds from a separate flight examination business the plaintiff sought to undertake as a condition of his continued at-will employment as N Co.'s chief flight instructor. The Federal Aviation Administration had approached the plaintiff about an open independent flight examiner position and the possibility of the plaintiff starting his own business as a certified FAA flight examiner. The plaintiff and J viewed the opportunity as a positive development for the plaintiff and for N Co. The plaintiff thereafter

[25] Specifically, the defendant argues that because there was insufficient evidence to prove his intent to cause serious physical injury to Officer Miserendino, "it logically follows that [he] necessarily was convicted of [attempt to commit] assault of police officers based on a theory of reckless or negligent actions . . . ." The defendant further maintains that, in light of his insistence that the jury must have convicted him of attempt to commit assault in the first degree on the basis of a theory of reckless or negligent actions, rather than on his specific intent to cause serious physical injury, "and because a defendant cannot attempt to commit an offense that requires an unintended result, the defendant's [conviction] of attempt to commit assault of a [peace] officer must be set aside."

approached J about a loan to cover the costs related to a training program the plaintiff had to attend to obtain FAA flight examiner certification. J expressed willingness to loan the plaintiff the money if the plaintiff would remit to N Co. any examination fees he would later receive, until the loan was paid off, and agree to share equally with N Co. all examination fees he would thereafter collect. The plaintiff did not respond to J's proposals and did not take a loan from J. The plaintiff later explained in a text message to R, J's wife and an employee of N Co., that he had paid the costs of the training program because he wanted to keep his employment with N Co. and his new flight examination business separate. R responded to the plaintiff, stating that J had said that he should clean out his desk and that he no longer worked for N Co. The trial court denied the plaintiff's motion for summary judgment and granted N Co.'s motion for summary judgment, concluding that the undisputed facts did not raise a genuine issue of material fact that N Co. violated the public policy underlying § 31-73 (b), which prohibits employers from demanding money from employees as a condition of continued employment. The court thereafter rendered judgment for N Co., and the plaintiff appealed to this court. *Held* that the trial court properly granted N Co.'s motion for summary judgment and denied the plaintiff's motion for summary judgment, as § 31-73 was inapplicable to the undisputed facts of the case and could not, as a matter of law, provide a basis for the plaintiff's wrongful termination action: although J's onetime proposal for a potential fee sharing relationship occurred in the context of an existing employer-employee relationship, it did not fall within the type of coercive behavior that § 31-73 forbids, as J's request or demand for money from the plaintiff could not reasonably be attributed to the plaintiff's employment relationship with N Co. but, rather, involved negotiations related to a separate, albeit related, future business venture between the parties, and, as the employment at will doctrine permits an employer to discharge an employee for any reason, including anger or displeasure that arises from an employee's refusal to participate in a future side business proposed by the employer, an employer that discharges an at-will employee on that basis has not violated § 31-73 or any clear public policy that should subject the employer to a claim of wrongful termination; moreover, § 31-73 limits the employment at will doctrine only by carving out an exception that prohibits an employer from coercing financial considerations from an employee or by conditioning future or continued employment on the employee's capitulation to the employee's demands, and, even if § 31-73 were applicable as a matter of law, the plaintiff failed to present evidence to raise a genuine issue of material fact that J had ever conditioned his continued employment on acceptance of the fee sharing offer or that there was an understanding to that effect, the temporal proximity between the plaintiff's rejection of J's proposal and the termination of the plaintiff's employment was insufficient to trigger the exception to

the employment at will doctrine pursuant to § 31-73, the plaintiff did not indicate whether he was interested in J's proposal at the time it was made, J never asked him again or sought any commitment or threatened retaliation, and, contrary to the plaintiff's assertion, a trier of fact could not reasonably infer from the termination of his employment alone that J had implicitly conditioned continued employment on the plaintiff's agreement with the fee sharing proposal, the plaintiff having failed to present any evidentiary basis from which to conclude that J ever actually used the prospect of renewed or continued employment as leverage to obtain a fee splitting agreement with him.

Argued January 19—officially released August 3, 2021

Procedural History

Action to recover damages for the alleged wrongful termination of the plaintiff's employment, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the defendant filed a counterclaim; thereafter, the defendant withdrew the counterclaim; subsequently, the trial court, *Farley*, *J.*, granted the defendant's motion for summary judgment as to the first count of the complaint, denied the plaintiff's motion for summary judgment on the complaint and the defendant's claim for setoff, and rendered judgment for the defendant; thereafter, the plaintiff withdrew the second count of the complaint and appealed to this court. *Affirmed.*

Megan L. Michaud, for the appellant (plaintiff).

Michael C. Harrington, for the appellee (defendant).

Opinion

PRESCOTT, J. In this civil action, the plaintiff, Tim Dunn, alleges wrongful termination of employment in violation of public policy. See *Sheets* v. *Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 474–77, 427 A.2d 385 (1980). The issue before us is whether the trial court improperly concluded that the plaintiff failed to demonstrate the existence of a genuine issue of material fact pertaining to whether, by terminating his at-will employment in

the manner alleged, the defendant, his former employer, Northeast Helicopters Flight Services, L.L.C., violated General Statutes § 31-73 (b) and the public policy underlying that statute, which prohibits employers from coercing an employee to refund wages or related sums of money to the employer, or from withholding wages due and owing to an employee, as a condition either to secure or to continue employment.[1] The plaintiff appeals from the summary judgment rendered in favor of the defendant.[2] Because we agree that there are no

[1] General Statutes § 31-73, titled "Refund of wages for furnishing employment," provides: "(a) When used in this section, 'refund of wages' means: (1) The return by an employee to his employer or to any agent of his employer of any sum of money actually paid or owed to the employee in return for services performed or (2) payment by the employer or his agent to an employee of wages at a rate less than that agreed to by the employee or by any authorized person or organization legally acting on his behalf.

"(b) No employer, contractor, subcontractor, foreman, superintendent or supervisor of labor, acting by himself or by his agent, shall, directly or indirectly, demand, request, receive or exact any refund of wages, fee, sum of money or contribution from any person, or deduct any part of the wages agreed to be paid, upon the representation or the understanding that such refund of wages, fee, sum of money, contribution or deduction is necessary to secure employment or continue in employment. No such person shall require, request or demand that any person agree to make payment of any refund of wages, fee, contribution or deduction from wages in order to obtain employment or continue in employment. A payment to any person of a smaller amount of wages than the wage set forth in any written wage agreement or the repayment of any part of any wages received, if such repayment is not made in the payment of a debt evidenced by an instrument in writing, shall be prima facie evidence of a violation of this section.

"(c) The provisions of this section shall not apply to any deductions from wages made in accordance with the provisions of any law, or of any rule or regulation made by any governmental agency.

"(d) Any person who violates any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days for the first offense, and, for each subsequent offense, shall be fined not more than five hundred dollars or imprisoned not more than six months or both."

[2] The parties each filed motions for summary judgment. The court granted the defendant's motion for summary judgment and denied the plaintiff's motion for summary judgment. Our review of the court's summary judgment rendered in favor of the defendant is dispositive of this appeal as to both motions. See footnote 7 of this opinion. Although the denial of a motion

genuine issues of material fact and that the defendant is entitled to judgment as a matter of law, we affirm the judgment of the court.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party on the prevailing motion for summary judgment, reveals the following facts and procedural history. The defendant is owned by John Boulette. It operates a helicopter flight training school in Ellington. The defendant hired the plaintiff in 2006 as a flight instructor. The defendant later promoted the plaintiff to chief flight instructor, and he held that position through October, 2017, at which time the defendant terminated his employment. The plaintiff did not have an employment contract with the defendant and, thus, was an at-will employee. See *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 697, 802 A.2d 731 (2002).

For a student pilot to become a certified helicopter pilot, that person must be certified by the Federal Aviation Administration (FAA) following an examination (exam). Although the defendant and the plaintiff were authorized to provide classroom and flight training to pilots in preparation for that exam, they were not licensed by the FAA to administer the exam. Without an FAA certified flight examiner on its staff, the defendant would make arrangements for an FAA examiner to come to the defendant's facility in Ellington to administer the exam to its students. As of 2017, the nearest certified flight examiner was located two hours away from the defendant's facilities, and students often had to wait weeks to schedule an exam.

Throughout his employment with the defendant, the plaintiff and Boulette had discussed the potential advan-

for summary judgment is not ordinarily a final judgment and, thus, not immediately appealable, "if parties file . . . motions for summary judgment and the court grants one and denies the other, this court has jurisdiction to consider both rulings on appeal." *Hannaford* v. *Mann*, 134 Conn. App. 265, 267 n.2, 38 A.3d 1239, cert. denied, 304 Conn. 929, 42 A.3d 391 (2012).

tages of having a certified flight examiner on staff.[3] In May, 2017, the FAA approached the plaintiff about an open independent flight examiner position and the possibility of the plaintiff starting his own business as an FAA examiner. The FAA indicated that the plaintiff would be a suitable candidate but that he would need to apply and to complete the required training. The plaintiff advised Boulette of the flight examiner position, and Boulette told him that "we should jump on the opportunity." The plaintiff and Boulette each viewed the plaintiff's opportunity to become a flight examiner as a positive development for both the plaintiff and the defendant.[4]

To obtain his FAA flight examiner certification, the plaintiff had to attend a training program in Oklahoma in late September, 2017. In August, 2017, the plaintiff approached Boulette about a loan to cover the costs of his travel to Oklahoma and other related expenses. Boulette stated his willingness to loan the plaintiff the money if the plaintiff agreed to remit to the defendant any exam fees he later would receive until the loan was

[3] As reflected in the record, in order to have an FAA flight examiner designated as an on-staff examiner as opposed to an independent examiner, the defendant, in addition to the individual examiner, would have been required to obtain examination authority from the FAA. The defendant never obtained such examination authority.

[4] The defendant's students would pay the defendant to rent a helicopter for the exam, but they would pay the FAA examiner directly for his or her services. If the defendant had a staff member who also was a certified examiner, it could capitalize on that fact as a marketing tool to attract more students and increase business. Further, by splitting the exam fee with the plaintiff, the defendant hoped to be able to refund that portion of the fee to its students. From the plaintiff's perspective, certification by the FAA as an examiner would mean an additional, independent stream of income in the form of exam fees, and his continued association with the defendant would provide him with access to student helicopter pilots interested in FAA certification. He would also generate additional fees by administering exams at other locations, just as other FAA examiners had done for years with respect to the defendant's students.

paid off. At that time, Boulette also proposed that, after the loan debt was satisfied, the plaintiff and the defendant should agree to share equally in all future examination fees collected by the plaintiff. The plaintiff did not respond to Boulette's proposals at that time either positively or negatively and never again spoke with Boulette directly about the proposed loan or fee sharing plan. Several weeks later, however, the plaintiff had a conversation with Boulette's wife, Rhonda Boulette, an employee of the defendant, and told her that he was not willing to share any fees from the examination business with the defendant. Rhonda Boulette's response was, "that is fine," and, "[d]on't worry about it."

Toward the end of September, 2017, the plaintiff attended the FAA training program. On October 16, 2017, after he had returned from the training program, he received a text message from Rhonda Boulette asking him why his expenses related to the FAA training had not shown up on the defendant's company credit card statement. He replied that he had paid the expenses himself because he wanted to keep his employment with the defendant and his new flight examination enterprise separate—his intention being to retain all exam fees for himself. Rhonda Boulette responded that John Boulette said that he should clean out his desk and that he no longer worked for the defendant. The plaintiff stated simply, "[w]ill do."[5]

[5] A copy of the text message chain, which the plaintiff submitted in support of his motion for summary judgment, reveals the following colloquy:

"[Rhonda Boulette]: Tim. I'm going through the credit cards and I see nothing from OK City. What's up? You didn't use our card?

"[The Plaintiff]: No, I paid for it all myself.

"[Rhonda Boulette]: Why? That should be a deduction for school expenses.

"[The Plaintiff]: When I originally asked John if he wanted to pay for the trip I told him I'd pay him back. Then he told me he wanted me to give him [one half of] my examiner money. I decided to just keep them separate and pay for it myself.

"[Rhonda Boulette]: Oh. John said clean out your desk you do not work for [the defendant] anymore.

"[The Plaintiff]: Will do."

Throughout his employment with the defendant, the plaintiff earned a weekly salary of $1000 plus an additional hourly rate of $25 for time spent flying, which amount varied from week to week. Following the termination of the plaintiff's employment, the defendant paid him his full hourly rate for all the flight training hours he had worked during his last week of employment. The defendant, however, did not pay him his $1000 base salary for that week. The defendant reasoned that it was not required to pay the plaintiff his final weekly salary because he had received a salary for the week that he had attended the FAA training program in September.

The plaintiff commenced the underlying action against the defendant in November, 2017. He filed the operative second amended complaint on February 21, 2018. Count one of that complaint asserted a cause of action for common-law wrongful discharge premised on the principles first established in *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, 179 Conn. 474–77 (recognizing common-law cause of action in tort for discharge of at-will employee if former employee able to prove "demonstrably improper reason for dismissal, a reason whose impropriety is derived from some important violation of public policy"). Specifically, the plaintiff claimed that the termination of his employment was unlawful because the defendant had demanded that he pay the defendant a sum of money—50 percent of any future proceeds resulting from the plaintiff's examination business—allegedly in violation of § 31-73 (b) and the public policy underlying that statute. Count two asserted a claim pursuant to General Statutes § 31-72[6]

[6] General Statutes § 31-72 provides in relevant part: "When any employer fails to pay an employee wages in accordance with the provisions of sections 31-71a to 31-71i, inclusive . . . such employee . . . shall recover, in a civil action, (1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law, the full amount of such wages or

for nonpayment of wages, which was based on the defendant's withholding of the plaintiff's base salary for his final week of employment.

The defendant thereafter filed a motion to strike count one of the complaint. It claimed that the facts alleged in the complaint failed to state a claim on which relief could be granted. In part, the defendant argued that the complaint contained no allegation that the defendant ever expressly conditioned the plaintiff's continued employment on remittance to the defendant of a share of future exam proceeds collected by the plaintiff, and that the plaintiff needed to allege and to prove that such a quid pro quo had occurred to establish a violation of § 31-73. In response to the motion to strike, the plaintiff argued, inter alia, that, although the defendant "did not specifically say it was a condition of [the] plaintiff's continued employment to pay 50 percent of the proceeds from his separate business, it can reasonably be inferred that this was a condition of [his] continued employment . . . ." Following argument, the court, *Sferrazza*, *J.*, issued a one sentence decision on June 19, 2018, denying the motion to strike. The court stated: "The factual allegations of the first count are sufficient, if proved, to support a cause of action for wrongful [discharge from] employment under the doctrine of *Sheets* v. *Teddy's Frosted Foods, Inc.*, [supra, 179 Conn. 471]."

On August 17, 2018, the defendant filed an answer to the complaint. The answer included special defenses, a two count counterclaim sounding in breach of contract and unjust enrichment, and a claim to a right of setoff that was based on the plaintiff's failure to repay in full a loan allegedly provided by the defendant to the plaintiff and his wife for a down payment on a home.

compensation, with costs and such reasonable attorney's fees as may be allowed by the court. . . ."

On March 1, 2019, the plaintiff filed a motion seeking summary judgment in his favor on both counts of the complaint, on the defendant's counterclaim, and on the claim of setoff. Together with the motion, the plaintiff filed a memorandum of law, to which he attached excerpts of deposition testimony by the plaintiff and the Boulettes; copies of text messages between the plaintiff and Rhonda Boulette; and a copy of the plaintiff's final pay stub from the defendant. According to the plaintiff, he was entitled to summary judgment because there were no material facts in dispute, and certain "admissions" contained in the deposition excerpts demonstrated that the plaintiff had established liability for both wrongful termination and failure to pay wages. Further, according to the plaintiff, both counts of the defendant's counterclaim and the claim of setoff were entirely frivolous and unsupported by any evidence.

The defendant, on March 7, 2019, filed a motion for summary judgment with respect to count one of the complaint only. It agreed that there were no issues of material fact in dispute but that judgment should be rendered in its favor as a matter of law. The defendant essentially argued that § 31-73 (b) is inapplicable with respect to the factual circumstances present and that it had a number of valid and permissible reasons for terminating the plaintiff's employment, including, but not limited to, the way in which he had chosen to handle the FAA examiner issue. The defendant also submitted additional portions of deposition testimony and other exhibits along with its memorandum of law in support of its motion for summary judgment.

On April 15, 2019, the defendant filed a memorandum of law in opposition to the plaintiff's motion for summary judgment. The following day, the defendant filed a withdrawal of the unjust enrichment count of its counterclaim. That same day, the plaintiff filed his memorandum of law in opposition to the defendant's motion for

summary judgment. On May 6, 2019, the day that the motions for summary judgment were calendared for oral argument, the defendant filed a withdrawal of the remaining breach of contract count of its counterclaim. During oral argument on the motions for summary judgment, the court, *Farley*, *J.*, clarified with the parties that all that remained in the action before the court following the withdrawal of both counts of the defendant's counterclaim were the two counts of the complaint and the defendant's claim of setoff.

After hearing argument on the motions for summary judgment, the court, on August 30, 2019, issued a memorandum of decision disposing of the motions. The court stated in part: "In this case, the court is asked to decide whether an employer's termination of an at-will employee, after the employee refused to share the future proceeds generated by the employee's proposed new business venture in a field related to the employer's business, violates . . . § 31-73 (b) and gives rise to a cause of action for wrongful termination based on a violation of public policy. Both parties have moved for summary judgment on count one of the [operative complaint] alleging wrongful termination, and both motions turn on this question. The court concludes that the undisputed facts, construed favorably to the plaintiff, do not establish a violation of § 31-73 (b), and, therefore, the plaintiff cannot pursue a wrongful termination claim.

"The plaintiff has also moved for summary judgment on the second count of the complaint, alleging nonpayment of wages, as well as the defendant's claim of setoff. Summary judgment on those claims is precluded, however, by the existence of genuine issues of material fact.

"The court denies the plaintiff's motion for summary judgment as to both counts [of the complaint] and the defendant's setoff claim, and grants the defendant's

motion for summary judgment as to count one [of the complaint]." This appeal followed.[7]

The plaintiff claims on appeal that, with respect to count one of the complaint alleging wrongful discharge in violation of public policy, the court improperly granted the defendant's motion for summary judgment and denied his own motion for summary judgment. The plaintiff argues that the court incorrectly determined that he had failed as a matter of law to establish a violation of § 31-73 (b) on the basis of the undisputed facts presented.[8] We are not persuaded.

[7] Because the court's decision disposed only of one of the two counts brought by the plaintiff against the defendant, the court's ruling on the motions for summary judgment was not an immediately appealable final judgment. See Practice Book § 61-4. The plaintiff filed a notice of intent to appeal on September 10, 2019, although such notice was unnecessary. See Practice Book § 61-5 (indicating that "use of the notice of intent to appeal is abolished in all instances except" to defer filing of appeal from judgment described in Practice Book §§ 61-2 and 61-3, neither of which was applicable to judgment rendered by court in present case). On November 8, 2019, however, the plaintiff withdrew count two of the complaint. Because all counts of the complaint were disposed of as a result of that withdrawal, the result was an appealable final judgment. See Practice Book § 61-2; *Sicaras* v. *Hartford*, 44 Conn. App. 771, 775, 692 A.2d 1290 ("[w]ithdrawals are analogous to final judgments"), cert. denied, 241 Conn. 916, 696 A.2d 340 (1997). The plaintiff timely filed the present appeal on November 12, 2019.

[8] The plaintiff further claims that the court improperly denied his motion for summary judgment with respect to the defendant's claim of entitlement to a setoff. We decline to review that claim in light of our disposition of this appeal. "The concept of setoff allows [parties] that owe each other money to apply their mutual debts against each other, thus avoiding the absurdity of making A pay B when B in fact owes A." (Internal quotation marks omitted.) *Mariculture Products Ltd.* v. *Certain Underwriters at Lloyd's of London*, 84 Conn. App. 688, 703, 854 A.2d 1100, cert. denied, 272 Conn. 905, 863 A.2d 698 (2004); see id. (explaining that defendant will plead right of setoff "either to reduce the plaintiff's recovery, or to defeat it altogether, and, as the case may be, to recover a judgment in his own favor for a balance" (internal quotation marks omitted)). Because we affirm the court's decision to render summary judgment in favor of the defendant on count one of the complaint and the plaintiff has withdrawn count two, there can be no monetary judgment for the plaintiff subject to the defendant's asserted right to a setoff. See 20 Am. Jur. 2d 271, Counterclaim, Recoupment, and Setoff § 8 (2021) ("setoff is not available when the plaintiff has no cause of action"). Furthermore, even if adjudication of the setoff claim were still possible despite our disposition of the plaintiff's claim on count one, the defendant has not raised on appeal any claim to a right to further adjudication

We begin with relevant legal principles, starting with the applicable standard of review. The standard that governs our review of a court's ruling on a motion for summary judgment is well settled. "Practice Book § [17-49] provides that summary 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. . . . 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. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Barbee* v. *Sysco Connecticut, LLC*, 156 Conn. App. 813, 817–18, 114 A.3d 944 (2015). Moreover, to the extent that our review requires us to engage in statutory construction, that presents a question of law over which

of the setoff by the court in the absence of a remand by this court for further proceedings on the complaint should the plaintiff prevail on appeal. Accordingly, because no such remand is ordered, we treat the setoff as abandoned. To the extent that the defendant believes it is entitled to satisfaction of a debt allegedly owed to it by the plaintiff, it may seek whatever legal remedies remain available to it in a separate action.

we also exercise plenary review. See, e.g., *Kayla M.* v. *Greene*, 163 Conn. App. 493, 499, 136 A.3d 1 (2016).[9]

We turn next to the law applicable to common-law wrongful discharge claims premised on the very narrow public policy exception to at-will employment first recognized in *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, 179 Conn. 471. "In Connecticut, an employer and employee have an at-will employment relationship in the absence of a contract to the contrary. Employment at will grants both parties the right to terminate the relationship for any reason, or no reason, at any time without fear of legal liability. Beginning in the late 1950s, however, courts began to carve out certain exceptions to the at-will employment doctrine, thereby giving rise to tort claims for wrongful discharge. Certain employer practices provoked public disfavor, and unlimited employer discretion to fire employees eventually yielded to a more limited rule. . . .

[9] "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . General Statutes § 1-2z directs this court to first consider the text of the statute and its relationship to other statutes to determine its meaning. If, after such consideration, the meaning is plain and unambiguous and does not yield absurd or unworkable results, we shall not consider extratextual evidence of the meaning of the statute. . . . Only if we determine that the statute is not plain and unambiguous or yields absurd or unworkable results may we consider extratextual evidence of its meaning such as the legislative history and circumstances surrounding its enactment . . . the legislative policy it was designed to implement . . . its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . We presume that the legislature did not intend to enact meaningless provisions. . . . [S]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . ." (Internal quotation marks omitted.) *Kayla M.* v. *Greene*, supra, 163 Conn. App. 499–500. "Moreover, when . . . a statute does not define a term, we may look to the dictionary to determine the commonly approved meaning of the term." *Board of Selectmen* v. *Freedom of Information Commission*, 294 Conn. 438, 449, 984 A.2d 748 (2010); see also General Statutes § 1-1 (a).

"Following that trend, [our Supreme Court], in *Sheets* v. *Teddy's Frosted Foods, Inc.*, [supra, 179 Conn. 471], sanctioned a common-law cause of action for wrongful discharge in situations in which the reason for the discharge involved impropriety derived from some important violation of public policy. . . . In doing so, [the court] recognized a public policy limitation on the traditional employment at-will doctrine in an effort to balance the competing interests of employers and employees. . . . In *Morris* v. *Hartford Courant Co.*, [200 Conn. 676, 513 A.2d 66 (1986)], [our Supreme Court] recognized the inherent vagueness of the concept of public policy and the difficulty encountered when attempting to define precisely the contours of the public policy exception. In evaluating claims, [reviewing courts] look to see whether the plaintiff has . . . alleged that his discharge *violated any explicit statutory or constitutional provision* . . . or whether he alleged that his dismissal contravened any judicially conceived notion of public policy." (Citations omitted; emphasis added; internal quotation marks omitted.) *Thibodeau* v. *Design Group One Architects, LLC*, supra, 260 Conn. 697–99.

"Although [our Supreme Court has] been willing to recognize, pursuant to *Sheets* and its progeny, a claim for wrongful termination in appropriate cases, [it] *repeatedly* ha[s] underscored [an] adherence to the principle that the public policy exception to the general rule allowing unfettered termination of an at-will employment relationship *is a narrow one* . . . . Consequently, [courts] have rejected claims of wrongful discharge that have not been predicated upon an employer's violation of *an important and clearly articulated* public policy." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 700–701; see also *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, 179 Conn. 477 (warning of difficulties inherent in "deciding

where and how to draw the line between claims that genuinely involve the mandates of public policy and are actionable, and ordinary disputes between employee and employer that are not," and cautioning courts that they should "not lightly intervene to impair the exercise of managerial discretion or to foment unwarranted litigation").[10]

In the present case, the plaintiff advances § 31-73 (b) as the statutory basis for the defendant's alleged public policy violation. Accordingly, we examine that statute and available precedent applying it to determine what, if any, important public policy it embodies and whether there exists a genuine issue of material fact as to whether the defendant's actions violated the statute. As previously noted, the text of § 31-73 (b) provides in relevant part that "[n]o employer . . . shall, directly or indirectly, demand, request, receive or exact any

[10] In *Thibodeau* v. *Design Group One Architects, LLC*, supra, 260 Conn. 691, our Supreme Court emphasized the limitations of the public policy exception, citing to a number of cases in which it previously had found "no statutorily based expression of public policy sufficient to warrant an exception to the at-will employment doctrine." Id., 701. For example, in *Burnham* v. *Karl & Gelb, P.C.*, 252 Conn. 153, 161, 745 A.2d 178 (2000), it had determined that the plaintiff failed to state a claim of common-law wrongful discharge because the allegations of retaliatory discharge failed to satisfy the requirements of the particular statute on which the claim was based. In *Daley* v. *Aetna Life & Casualty Co.*, 249 Conn. 766, 804, 734 A.2d 112 (1999), the court held that the plaintiff could not prevail on a claim that a public policy required all employers to provide working parents with flexible work schedules because such an accommodation was not statutorily mandated. In *Carbone* v. *Atlantic Richfield Co.*, 204 Conn. 460, 468–70, 528 A.2d 1137 (1987), our Supreme Court determined that an oil company employee whose employment was terminated because he failed to obtain accurate information regarding the pricing practices of the employer's competitors failed to allege facts necessary to support a claim that the termination of his employment violated any statutorily expressed public policy. Finally, in *Morris* v. *Hartford Courant Co.*, supra, 200 Conn. 680, the court held that no statutory provision obligated the plaintiff's employer, as a matter of public policy, to investigate the veracity of an accusation of criminal conduct that the employer had used as a basis for the termination of the plaintiff's employment.

refund of wages, fee, sum of money or contribution from any person, or deduct any part of the wages agreed to be paid, upon the representation or the understanding that such refund of wages, fee, sum of money, contribution or deduction is necessary to secure employment or continue in employment. No such [employer] shall require, request or demand that any person agree to make payment of any refund of wages, fee, contribution or deduction from wages in order to obtain employment or continue in employment. A payment to any person of a smaller amount of wages than the wage set forth in any written wage agreement or the repayment of any part of any wages received, if such repayment is not made in the payment of a debt evidenced by an instrument in writing, shall be prima facie evidence of a violation of this section." General Statutes § 31-73 (b). Subsection (d) of § 31-73 sets forth various criminal penalties that may be imposed on an employer who violates subsection (b), including incarceration and fines.

We are aware of only two appellate cases that previously have construed § 31-73 (b). See *Mytych* v. *May Dept. Stores Co.*, 260 Conn. 152, 165–66, 793 A.2d 1068 (2002); *Lockwood* v. *Professional Wheelchair Transportation, Inc.*, 37 Conn. App. 85, 654 A.2d 1252, cert. denied, 233 Conn. 902, 657 A.2d 641 (1995). We discuss each of these cases in turn.

In *Lockwood* v. *Professional Wheelchair Transportation, Inc.*, supra, 37 Conn. App. 85, this court reversed the judgment of the trial court, which had directed a verdict in favor of the defendant employer in an action brought by a former employee for wrongful discharge in violation of public policy. The plaintiff employee had been in a work-related accident that triggered coverage under the employer's insurance policy. The employee thereafter was suspended from work. The employer made repeated demands to the employee that he pay the employer $1000 to cover the deductible required

under the insurance policy and expressly conditioned the plaintiff's return to work on that payment, despite a ruling in small claims court that the employee was not legally liable for the insurance deductible. Id., 87–88. This court held that, "[a]t the close of evidence, sufficient facts existed to allow a jury to find that [the employee] was discharged from his employment . . . because he refused to pay the $1000. A finding of these facts by the jury would support the conclusion that [the employer discharged the employee] in violation of public policy as set forth in § 31-73." Id., 92.

In reaching that conclusion, this court construed the language of § 31-73 (b) as "clear and unambiguous," and stated that "[i]t prohibits an employer from demanding any sum of money from an individual as a requirement of employment or as a requirement for continued employment." Id. This court noted that the trial court mistakenly had "relied on two [a]ttorney [g]eneral [o]pinions [by] limiting the application of § 31-73 to preventing a . . . kick-back . . . system from being used to exact a payment from an employee to an employer in return for that employee's hiring. The trial court's interpretation of § 31-73 is not in accord with the clear language of the statute and therefore runs afoul of the well recognized rules of statutory construction adopted by our Supreme Court."[11] (Internal quotation

[11] Although recognizing the principle that an administrative agency charged with a statute's enforcement ordinarily is entitled to considerable deference regarding that statute's construction, this court noted that "the construction of a statute on an issue that has not previously been subjected to judicial scrutiny is a question of law on which an administrative ruling is not entitled to special deference." (Internal quotation marks omitted.) *Lockwood* v. *Professional Wheelchair Transportation, Inc.*, supra, 37 Conn. App. 93. Because, at the time of the *Lockwood* decision, § 31-73 had never been subject to judicial interpretation, we concluded that it was "within the authority of this court to construe the statute in a manner consistent with its language and purpose" if the "administrative interpretations lead to a result that is contrary to the language and purpose of the statute . . . ." Id. Although an opinion of the attorney general is always highly persuasive authority entitled to careful consideration by courts; see *Wiseman* v. *Arm-*

marks omitted.) Id. In other words, this court concluded that the trial court had construed the statute far too narrowly in directing a verdict for the employer.

In discussing whether § 31-73 contains "an important public policy," the court in *Lockwood* held: "Section 31-73 represents a clear public policy prohibiting an employer from *taking advantage of the employment relationship* by using the acquisition or continuation of employment as a mechanism for exacting sums of money from an employee. The statute is written in broad and sweeping language to prohibit such actions by an employer. The discharge of an employee for . . . refusing *to refund a portion of his wages* violates public policy as expressed in § 31-73." (Emphasis added.) Id., 94–95. Although nothing in *Lockwood* directly linked the deductible payment sought by the employer to any specific wages paid to the employee or to the withholding of any wages due, the court plainly construed any payment made by the plaintiff of the $1000 deductible as necessarily coming from wages attributable to his employment and, as a result, construed the employer's demand as a "refund [of] a portion of his wages," which was prohibited under the statute. Id., 95.

We now turn to *Mytych* v. *May Dept. Stores Co.*, supra, 260 Conn. 155–57, in which the issue before the court was whether an employer's practice of deducting from an employee salesperson's compensation the cost of returned merchandise violated § 31-73. The court held that it did not. Id., 166. The court reasoned that, although an employer cannot require an employee to *refund wages that have previously been earned* as a condition of continued employment, calculating wages in the manner described did not violate § 31-73 because

strong, 269 Conn. 802, 825, 850 A.2d 114 (2004); it is not at all clear from the text of § 31-73 that the Office of the Attorney General is the agency charged with the enforcement of the statute, including the power to seek the criminal sanctions provided for in subsection (d) of the statute.

the employee was aware of the practice when she was hired and in fact had agreed to the employer's making the deduction at issue. Id., 156–57, 166.

Our Supreme Court in *Mytych* discussed the legislative purpose underpinning § 31-73 (b). It stated that the statute was intended to be remedial in nature "to prevent the employer from taking advantage of the legal agreement that *exists between the employer and the employee*" and "to protect the sanctity of *the wages earned by an employee* pursuant to the agreement she or he has made with her or his employer." (Emphasis added.) Id., 160–61. Discussing this court's decision in *Lockwood*, the Supreme Court stated: "The Appellate Court properly concluded that the language of § 31-73 (b) was clear and unambiguous in that it prohibits an employer from demanding any . . . sum of money or contribution from any person . . . upon the representation or the understanding that such . . . sum of money . . . is necessary to secure employment or continue in employment." (Internal quotation marks omitted.) Id., 166.[12] With the following legal background in mind, we turn to our discussion of the present case.

[12] We note that, in 2007, the attorney general had occasion to release a formal legal opinion discussing, inter alia, whether an employer of a state legislator could enter into an agreement with the legislator-employee "permitting him to be paid his full salary, but requiring him to bear the cost of training and compensating a third party to perform his duties [for the employer] if he is absent from work due to legislative obligations." Opinions, Conn. Atty. Gen. No. 2007-033 (December 17, 2007) p. 1. The concern addressed by the attorney general in his opinion was whether requiring the legislator-employee "effectively to forfeit a portion of his wages constitutes a violation of [General Statutes] §§ 2-3a, 31-71e, or 31-73." Id.

The attorney general described § 31-73 as "prohibit[ing] an employer from requiring an employee to refund wages already paid in order to keep his job." Id., p. 4. After considering the decisions in *Lockwood* and *Mytych*, the attorney general stated that those cases make clear that the employer and legislator-employee could enter into a voluntary agreement establishing a formula for calculating the employee's future wages without violating § 31-73 as long as that voluntary agreement did not violate § 2-3a. Id., p. 5. Relevant to the present case, the attorney general seemed to recognize that negotiations between an employer and employee affecting future wages

We conclude that the court properly granted the defendant's motion for summary judgment and denied the plaintiff's motion. We reach this conclusion for principally two reasons. First, we agree with the main thrust of the defendant's argument, advanced in support of its motion for summary judgment and in opposition to the plaintiff's motion, that § 31-73 is inapplicable to the undisputed facts of this case and, thus, cannot as a matter of law provide the basis for a wrongful termination action.[13] Second, and alternatively, even if we were to deem § 31-73 applicable under the facts presented, we agree with the trial court and the defendant that the plaintiff has failed to present evidence to support his assertion that the defendant actually violated § 31-73 and, thus, the public policy underlying the statute.

We start with the plaintiff's failure to demonstrate that the prohibitions described in § 31-73 are implicated by the undisputed facts of the present case. As indicated by the trial court, the material facts surrounding the plaintiff's termination are not in dispute. Furthermore, it is unnecessary for purposes of summary judgment to consider the parties' dispute about whether the plaintiff's abrupt discharge was prompted entirely or only in part by his refusal to agree to share exam fees he would earn from his work as an FAA examiner.[14] The reason for

would not implicate § 31-73, which is concerned with wages already paid or earned and owing.

[13] For his part, the plaintiff claims that, not only does the statute apply as a matter of law, but that what he perceives as admissions in the depositions of the parties established a prima facie case of wrongful discharge that warranted the rendering of summary judgment in his favor. Because our resolution of the plaintiff's claim directed at the court's rendering of summary judgment in favor of the defendant is fully dispositive of the wrongful termination count, it is unnecessary to address the plaintiff's claim that the court improperly denied his motion for summary judgment on that same count.

[14] As stated by the trial court: "Despite [the defendant's] claim that other considerations motivated it to fire the plaintiff, there is evidence to support the plaintiff's claim that he was fired for refusing to share the examination fees, and the court, for purposes of summary judgment, must assume that [the defendant] fired the plaintiff for that reason."

this is because the dispositive threshold issue is whether the employer's attempts, coercive or otherwise, to get the plaintiff to agree to share in the exam fees—fees that constituted as yet unrealized proceeds of a business venture unrelated to any wages or other sums of money paid to the plaintiff by the defendant as part of their ongoing employment relationship—legally constituted an act that invaded the "sanctity of the wages earned by an employee . . . ." *Mytych* v. *May Dept. Stores Co.*, supra, 260 Conn. 161.

In other words, any request or demand of money made by the defendant in this case concerned funds that cannot reasonably be attributed to the existing employment relationship but, rather, involved negotiations related to a separate, albeit related, future business venture between the parties. The fact that such negotiation occurred in the context of an existing employer-employee relationship is not enough to bring such actions within the ambit of those that are prohibited by § 31-73. The plaintiff's argument that the defendant's onetime proposal of a potential fee sharing relationship falls within the type of coercive behavior that § 31-73 forbids is untenable. Rather, we agree with the trial court that the plaintiff advances an overly broad interpretation of § 31-73.[15]

[15] We also agree with the trial court's cogent analysis that "[the defendant] was not proposing a 'refund of wages' or anything analogous to that when it proposed the fee splitting arrangement. . . . [The defendant] undoubtedly considered the plaintiff's access to its customers a valuable asset to the plaintiff's proposed new business. [The defendant's] desire to be compensated for the value it would bring to the plaintiff's business should not be viewed, from a legal standpoint, as a prohibited attempt to recoup wages earned by the plaintiff through his work for [the defendant]. Such a broad interpretation of the statute's reference to 'a sum of money' would chill the discussion of any prospective new business arrangements between employers and employees. Employers would be deterred from engaging in such discussions with an employee by the prospect that it might result in nothing more than unlimited tenure for the employee. It does not appear to the court that the legislature meant to create such a disincentive to entrepreneurship by enacting the statute and providing that one who violates it is subject to a fine and/or imprisonment."

Pursuant to the at-will employment doctrine, an employer is permitted to discharge an employee *for any reason*. One such permissible reason might be displeasure arising from an employee's refusal to participate in a future side business proposed by the employer. The employee may reject the proposal, choosing to go into business alone and not share any potential earnings with his employer. Regardless, the employer is justified in discharging an at-will employee for any reason, including anger or resentment over an employee's refusal of a business proposal. That is what the undisputed facts, viewed in the light most favorable to the plaintiff, demonstrate happened in the present case. An employer who discharges an at-will employee wholly on the basis of what, on the surface, might be viewed as "sour grapes," has not violated § 31-73 or any clear public policy that should subject the employer to a claim of wrongful termination of employment.

The evidence offered by the plaintiff demonstrates that the defendant made a single request to have him enter into an agreement to share in the proceeds of a future business venture. The plaintiff was free to reject the offer, and the defendant, under the at-will employment doctrine, was free to terminate the plaintiff's employment for his decision. The public policy inherent in § 31-73 (b) places a limit on the at-will employment rule only by carving out an exception that prohibits an employer from coercing from an employee financial concessions related to wages by conditioning future employment or continued employment on the employee's capitulation to the employer's demands. As the trial court stated, "§ 31-73 (b) does not regulate an employer's reason for terminating an employee; it regulates the use of continued employment as leverage to extort a sum of money." We are aware of no court that has applied § 31-73 in the context of an employer's request to share an as-yet unrealized future sum of money. Because the record before the court established that § 31-

73 was inapplicable and was the sole legal basis underlying the wrongful discharge count, the trial court properly rendered summary judgment in favor of the defendant.

We now turn to our second, alternative rationale for upholding the trial court's summary judgment. We conclude that, even if § 31-73 arguably is applicable as a matter of law, the evidence submitted by the plaintiff in support of his own motion for summary judgment and in opposition to the defendant's motion fails to raise a genuine issue of material fact that the defendant ever conditioned the plaintiff's continued employment on his acceptance of the defendant's fee sharing offer, a necessary element in the plaintiff's wrongful termination action predicated on a violation of § 31-73. Furthermore, because the public policy exception to the at-will employment doctrine is unquestionably a narrow one, we are unconvinced that the inference that the plaintiff urges us to draw solely from the temporal proximity between his rejection of the defendant's proposal and the termination of his employment is sufficient to trigger the exception.

The language of § 31-73 (b), which our Supreme Court has determined to be clear and unambiguous, provides that a violation of § 31-73 (b) requires more than a demand of a sum of money; rather, such a demand must be made "upon the *representation* or the *understanding* that [payment] is necessary to secure employment or continue in employment." (Emphasis added.) General Statutes § 31-73 (b). The plaintiff failed to present evidence of either a representation by the defendant that his continued employment hinged on his acceptance of the defendant's offer or an understanding reached by the parties to that effect.

Black's Law Dictionary defines a "representation" as a "presentation of fact—either by words or by conduct—made to induce someone to act." Black's Law

Dictionary (11th Ed. 2019) p. 1556. We do not agree with the plaintiff that such a representation can be implied from the undisputed facts in the record presented. Although the defendant's proposal reasonably may be viewed as a demand or request for a sum of money, there was no contemporaneous conduct that could be construed as an express or implied "representation" made to the plaintiff that his continued employment depended on his agreement to the fee splitting proposal, nor was there evidence of other coercive conduct by the defendant. The plaintiff acknowledges that the defendant never expressly threatened him with the loss of his job if he refused the defendant's fee sharing proposal. According to the plaintiff, the defendant raised the possibility of a fee sharing arrangement only one time. The plaintiff did not indicate at that time whether he was interested in the defendant's proposal, and the defendant never asked him again, sought any commitment, or threatened retaliation of any kind. In fact, despite the plaintiff's failure to agree with the defendant's proposal when it was made, the plaintiff's employment was not terminated immediately but, rather, the plaintiff continued in the defendant's employ for weeks. Those facts fall far short of the actions taken by the defendant in *Lockwood*, in which the defendant made repeated and explicit demands that the plaintiff could not return to work unless he agreed to pay the defendant's insurance deductible. See *Lockwood* v. *Professional Wheelchair Transportation, Inc.*, supra, 37 Conn. App. 87–89.

Similarly, no evidence was submitted in the present case in conjunction with the motions for summary judgment that tended to demonstrate that the parties ever reached any mutual "understanding" that the plaintiff's agreement to the fee sharing arrangement was a condition of his continued employment. To the contrary, as noted by the trial court, the only evidence of an "understanding" between the parties was the statement by

Rhonda Boulette, who, in response to the plaintiff's having indicated his reluctance to agree to the proposal, stated, "that is fine. Don't worry about it."

The plaintiff suggests that a trier of fact reasonably could infer from the termination of his employment alone that the defendant had implicitly conditioned his continued employment on his agreement with the defendant's fee sharing proposal. We do not agree. As stated by the trial court, the plaintiff failed to present any evidentiary basis from which to conclude that the defendant "ever actually used the prospect of renewed or continued employment as leverage to achieve its objective of obtaining a fee splitting agreement with the plaintiff. It [simply] terminated him without further discussion of the issue." That decision, whether well thought out or reasonable, falls squarely within the type of managerial discretion by an employer that the Supreme Court in *Sheets* indicated did not warrant intervention by a court. See *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, 179 Conn. 477 (warning that "courts should not lightly intervene to impair the exercise of managerial discretion or to foment unwarranted litigation").

For the foregoing reasons, we agree with the trial court's conclusion that the facts of this case, construed in the light most favorable to the plaintiff, do not raise a genuine issue of material fact that the defendant committed a violation of § 31-73 (b) or the important public policy embodied therein. Without evidence of a violation of a statutorily derived important public policy, the plaintiff's common-law wrongful discharge claim fails as a matter of law. Accordingly, we conclude that the court properly granted the defendant's motion for summary judgment with respect to count one of the operative complaint and denied the plaintiff's motion for summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JIQUANE CHRIS COLLINS (AC 43030)

Bright, C. J., and Elgo and Clark, Js.

Syllabus

The defendant, who had been convicted of two counts of the crime of possession of narcotics with intent to sell, appealed to this court, claiming that the trial court improperly denied his motions for a mistrial and his motion to suppress evidence, including, inter alia, 121 bags of individually packaged crack cocaine, that was seized from his residence pursuant to a search warrant. At trial, the state offered the expert testimony of a police detective, P, who testified about the quantities of drugs usually found in the possession of people who sell drugs as opposed to people who only use drugs. Answering a hypothetical posed by the prosecutor, P testified that the possession of 121 bags of crack cocaine was consistent with someone who sold drugs. Following argument that this testimony went to the ultimate issue of the defendant's intent, the court denied defense counsel's motion for a mistrial. The state also offered the testimony of Y, a police sergeant, who testified that he knew where the defendant lived "from other situations" that involved the defendant. Defense counsel argued that Y's testimony improperly informed the jury that the defendant had prior involvement with the police but did not request a limiting or curative instruction following the court's denial of a motion for a mistrial. The defendant also argued that the search warrant for his apartment, the application for which had been based on the affidavit of P and another police detective, L, referencing in part two sales of narcotics by the defendant to a confidential informant, had been issued without probable cause. *Held*:

1. The trial court did not abuse its discretion in denying the defendant's motions for a mistrial.

   a. The trial court did not abuse its discretion in denying the defendant's motion for a mistrial after P's testimony, as P's response to the state's hypothetical questions did not amount to an opinion as to the ultimate issue of the defendant's intent to sell narcotics; pursuant to the opinion of our Supreme Court in *State* v. *Nash* (278 Conn. 620), the significance of the quantity of narcotics found on a suspect is a proper subject of expert testimony, and P's testimony concerned a hypothetical individual and not this defendant.

   b. The defendant could not prevail on his claim that the trial court abused its discretion in denying his motion for a mistrial based on Y's testimony; Y's statement mentioning "other situations" was vague and did not mention prior misconduct, police investigations or anything nefarious, and defense counsel, who specifically told the court that he did not want a curative instruction, could not opt for a mistrial instead.

2. The trial court properly denied the defendant's motion to suppress evidence, as probable cause existed to support the issuance of the search warrant for the defendant's apartment; P and L attested that they had heard multiple reports that the defendant had been selling narcotics out of his apartment, a confidential informant made two controlled purchases of narcotics from the defendant under police observation, and a reasonable inference could be made that the defendant brought narcotics from his apartment when he met with the confidential informant.

Argued April 5—officially released August 3, 2021

Procedural History

Substitute information charging the defendant with two counts of the crime of possession of narcotics with intent to sell, brought to the Superior Court in the judicial district of Middlesex, geographical area number nine, where the court, *Suarez, J.*, denied the defendant's motion to suppress certain evidence; thereafter, the matter was tried to the jury before *Suarez, J.*; subsequently, the court denied the defendant's motions for a mistrial; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Freeman J. Demirjian, certified legal intern, with whom was *James B. Streeto*, senior assistant public defender, for the appellant (defendant).

Brett R. Aiello, deputy assistant state's attorney, with whom, on the brief, were *Michael A. Gailor*, state's attorney, *Kevin M. Shay*, senior assistant state's attorney, and *Jacqueline M. Fitzgerald*, special deputy assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, C. J. The defendant, Jiquane Chris Collins, appeals from the judgment of conviction, rendered by the trial court in accordance with the jury's verdict, of two counts of possession of narcotics with intent to sell in violation of General Statutes (Rev. to 2017) § 21a-278 (b). On appeal, the defendant claims that the trial

court (1) improperly denied his motions for a mistrial following testimony on the ultimate issue of his intent and following testimony concerning alleged prior misconduct, and (2) erred in denying his motion to suppress evidence seized during the execution of a search warrant that had been issued without probable cause. We affirm the judgment of the trial court.

The following facts, which reasonably could have been found by the jury, and procedural history inform our review of the defendant's appellate claims. On October 10, 2017, following a narcotics investigation in which Middletown police officers twice observed the defendant sell crack cocaine to a confidential informant, the police officers applied for, and were granted, a search warrant for the defendant's Middletown apartment (apartment). Members of the narcotics unit of the Middletown Police Department executed the warrant on October 13, 2017. The police arrived outside the apartment between 6 and 6:30 p.m., where they conducted surveillance before knocking, at approximately 7:40 p.m., on the apartment door. After receiving no response to their knock, the police breached the door. The police observed a sparsely furnished and tidy apartment, and it appeared that no one other than the defendant lived there. The police detained the defendant, who had been in bed, without incident.

During their search of the apartment, the police found a large container on the kitchen table, which contained 121 bags of individually packaged crack cocaine and 14 glassine bags of heroin. The estimated street value of the crack cocaine and heroin totaled approximately $3110 and $140, respectively. The police also found many "tear bags"[1] behind an electrical outlet cover in

[1] Sergeant Frederick Dirga testified that tear bags are plastic sandwich bags used to package drugs for sale. He explained that individuals "involved in the narcotics trade will take drugs . . . put [them] into the bag, and . . . tear off the end of the bag . . . so they're able to tie [the bag] around the drugs, so [the drugs are] protected in plastic and easier to carry for sale. It doesn't break apart."

the defendant's bedroom, and they found a razor blade with a white substance on it that later was determined to be cocaine. In addition to seizing those items, the police also seized $1524 in cash, a laptop computer, a flat screen TV, jewelry, and mail addressed to the defendant.

The defendant, thereafter, was charged with two counts of possession of narcotics with intent to sell. Following a jury trial that resulted in guilty findings, the court rendered a judgment of conviction of both counts and imposed a total effective sentence of twelve years of incarceration, execution suspended after seven years, with three years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

On appeal, the defendant first claims that the trial court improperly denied his motions for a mistrial following testimony on the ultimate issue of his intent to sell narcotics and following testimony concerning alleged prior misconduct. After setting forth our standard of review of the trial court's decision to deny a motion for a mistrial, we will address each claim in turn.

"In our review of the denial of a motion for [a] mistrial, we have recognized the broad discretion that is vested in the trial court to decide whether an occurrence at trial has so prejudiced a party that he or she can no longer receive a fair trial. The decision of the trial court is therefore reversible on appeal only if there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Berrios*, 320 Conn. 265, 274, 129 A.3d 696 (2016). Furthermore, "[w]hile the remedy of a mistrial is permitted under the rules of practice, it is not favored. [A] mistrial should be granted only as a result of some occurrence upon the trial of such a character that it is apparent to the court that because of it a party cannot have a fair trial . . . and the whole

proceedings are vitiated. . . . If curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided. . . . On appeal, we hesitate to disturb a decision not to declare a mistrial. The trial judge is the arbiter of the many circumstances [that] may arise during the trial in which his function is to assure a fair and just outcome. . . . The trial court is better positioned than we are to evaluate in the first instance whether a certain occurrence is prejudicial to the defendant and, if so, what remedy is necessary to cure that prejudice." (Internal quotation marks omitted.) *State* v. *Ortiz*, 280 Conn. 686, 702, 911 A.2d 1055 (2006).

A

We first consider whether the court improperly denied the defendant's motion for a mistrial following the testimony of Detective Nathaniel Peck. The defendant alleges that Peck opined on the ultimate issue of whether the defendant *intended to sell* narcotics. The defendant argues that, during trial, he did not contest the fact that he possessed narcotics; the only issue in dispute was whether he intended to sell those narcotics. The defendant contends that Peck opined on the defendant's intent in this case when Peck testified that possession of 121 individually wrapped bags of crack cocaine would be consistent with someone who is selling narcotics, rather than someone who is using narcotics. The state argues that the defendant did not object to the state's question about the 121 individually wrapped bags of crack cocaine, that the question and the answer both were in compliance with our Code of Evidence, and that Peck answered a hypothetical question posed by the state about *any person*, not a question about *this defendant*. We conclude that the court did not abuse its discretion when it denied the defendant's motion for a mistrial on the basis of Peck's testimony.

The following additional facts and procedural history are necessary to our resolution of the defendant's claim. Prior to the start of evidence, the state declared its

intention to call an expert in the area of trafficking of narcotics. Specifically, on February 4, 2019, the state filed a motion in limine to permit expert testimony on the issue of whether the evidence it intended to present during its case-in-chief regarding the items seized at the apartment was consistent with mere drug usage or whether it was consistent with drug sales. In its motion, the state represented that "[t]he expert would not comment on this particular defendant's intent and indeed would not even be aware of the allegations surrounding this particular incident. Rather, such expert would testify relative as to the customs and trade practices of drug traffickers generally, which has been held by our Supreme Court to be proper . . . . Indeed, the expert who the state would present is not and has never been a member of the arresting agency in this case . . . ." (Citations omitted.) On February 25, 2019, the court granted the state's motion.

Before the start of evidence, however, the state notified the court of its intention to have Detective Peck testify as both a fact witness and its expert witness on the trafficking of narcotics. Although the defendant did not object to Peck testifying both as a fact and as an expert witness, he did object to Peck testifying to the ultimate issue of whether the defendant possessed the narcotics with the intent to sell. The trial court agreed.

As a fact witness, Peck testified about the execution of the search warrant on October 13, 2017, and what the police found at the apartment. Thereafter, the state laid a foundation to qualify Peck as an expert in the area of crack cocaine and heroin trafficking. When asked by the trial court, the defendant did not object to Peck's qualifications. As an expert witness, Peck testified about the items that crack cocaine and heroin dealers usually have in their homes, noting that dealers often have digital scales, customer lists, crack cocaine broken down into individual baggies, heroin broken down into

individual glassine bags, spoons, razor blades, and money. Peck then explained that in homes of users of cocaine and heroin, police would find glass tubes with burnt ends, copper wool, torn bags, crack pipes, burnt spoons, needles, cotton, Q-tips, and straws. Peck also explained how crack cocaine and heroin are ingested.

The state then asked Peck to opine about the quantities of drugs in the possession of drug dealers versus those in the possession of drug users. Specifically, the following colloquy took place between the prosecutor and Peck:

"[The Prosecutor]: And now I'm going to ask you a series of hypothetical questions that pertain to crack cocaine. So, based on your training and experience, if you found an individual in possession of 121 individually wrapped [baggies] consisting of crack cocaine, would that be consistent, based on your training, with someone who was selling or using?

"[Peck]: That's consistent, in my opinion, with someone [who] is selling crack cocaine.

"[The Prosecutor]: And how would you make that determination?

"[Peck]: By the sheer volume of the crack cocaine as—as one, in addition to the fact that it's individually wrapped. That is typically done for prepackaged for street level sales.

"[The Prosecutor]: And how would you determine whether items seized are for personal use versus for sale?

"[Peck]: You can determine that based on what else you find in the area, though the entire scene would have to be—to understand it, but you'd have to find devices used to smoke crack cocaine. If the person smoking it—that's really the only way to take it—you would find those items in the residence.

"[The Prosecutor]: Based on your training and experience, if someone is using crack cocaine, would they usually have large amounts of crack cocaine in reserve?

"[Peck]: No.

"[The Prosecutor]: And—and why is that, Detective?

"[Peck]: Typically, the addiction to crack cocaine is pretty overwhelming . . . . I haven't been in any residences . . . where individuals were inside using crack cocaine that weren't unkempt. You're going to find torn bags. You—you would see these things all—all throughout the residence. The sheer quantity of crack cocaine itself is astronomical to price to—to acquire that much. Individuals typically go out and buy what they need at the time.

"[The Prosecutor]: And so, this leads me to my question. If someone is a—a crack cocaine user, would they usually have large amounts of cash?

"[Peck]: Also, no. They would be spending what they had at the time to get high and then sorting out the next time they needed to get high by selling, trading, stealing, whatever—whatever they had to do to get more crack cocaine.

"[The Prosecutor]: I think you've already testified to this, but what . . . [is] the street value of crack cocaine [in] Middlesex County?

"[Peck]: It's sold at—the street value is $10 per 0.1 gram[s] of crack cocaine.

"[The Prosecutor]: So, if someone had 31.1 grams of crack cocaine, what would be the value of that crack?

"[Peck]: $3110.

"[The Prosecutor]: Now, I'm going to switch gears and ask you some hypothetical questions about heroin. Based on your training and experience, if you found an

individual in possession of fourteen glassines of heroin, would that be consistent with someone selling and—

"[Peck]: That could be either way.

"[The Prosecutor]: Would you please explain that?

"[Peck]: If an individual [is] involved in the use of heroin, fourteen bags is not an exceptional amount for a person to be using heroin. However, you would have items that you would see associated with that. It would be, again, if they're [intravenous] users, they would have needles, they would have cotton, [and] they would have spoons. If they're snorting it, typically they're using a device to ingest into [their] body. Again, rolled—rolled bills, rolled pieces of paper, straws. One without the other would say that it makes it clear that you're either involved in the sale or involved in the use.

"[The Prosecutor]: And based on your training and experience, if someone is a heroin user would they usually have a large reserve of heroin on them or with them?

"[Peck]: Not usually, no.

"[The Prosecutor]: And why is that?

"[Peck]: Again, similar to the—the crack cocaine [addiction], heroin is significantly overwhelming. The addiction to it is substantial. Individuals that are involved in using it are going to buy what they need for the time they need to get high, and, at the next time they need to get high, they're going to sort that out.

"[The Prosecutor]: And . . . Detective . . . what is the street value of heroin in Middlesex?

"[Peck]: Middlesex is approximately $10 per bag of heroin.

"[The Prosecutor]: So, if someone has fourteen bags of heroin, what would be the street value?

"[Peck]: Approximately $140."

The defendant did not object to this testimony, or ask that it be stricken from the record, or request that the court give a cautionary instruction to the jury. Immediately after the state concluded its examination of Peck, however, defense counsel asked that the court excuse the jury, which it did, and he then requested that the court declare a mistrial. The following colloquy occurred:

"[Defense Attorney]: Your Honor, at this time, I would move for [a] mistrial. Something of the fact that [the] state did bring up the issues. I understand it was in a hypothetical format, but [it] used the 121 bags and the 14 bags, more so on the crack cocaine, that was very—I think it was going almost to the ultimate issue based on this officer's testimony that it was his opinion and it was for sale. If—if the state had used a more—a safer approach in talking as [it] did with the—with the witness about what commonly is observed in the homes of users versus the home of—of dealers, certainly that was sufficient in order to establish that what was down in the apartment was more consistent with drug dealing than—than not drug dealing. But once the state went further and then asked specifically about the 121 bags and the 14 bags—the 14 glassine bags and the 121 bags of crack cocaine, it went beyond that and it went to the ultimate issue.

"The Court: All right. Well, you wish be heard on that?

"[The Prosecutor]: I don't think it went to the ultimate issue—issue, Your Honor. I said consistent with. I did not say whether or not it was his opinion whether or not the defendant was possessing it with intent to sell.

"The Court: Well, certainly, experts can give an opinion based on their training and expertise, and, also, they can give an opinion on hypotheticals. Hypotheticals have to, however, be based on—on some evidence that would be introduced. [The prosecutor] did use 121

bags of cocaine and 14 bags of heroin, but this witness gave an opinion based on his expertise. [The state] certainly has to follow up on the issue of the number of bags of heroin and—and crack cocaine. I don't think this witness' opinion has gone beyond that of just a—just a general opinion based on his expertise and training.

"[Defense Attorney]: Thank you, Your Honor.

"The Court: So, I'll—I'll deny the motion—the motion [for] a mistrial."

On appeal, the defendant argues: "The state, through its expert, made clear to the jury that the state's questions were referring to [the defendant] and the drugs in his apartment, not some hypothetical defendant. Peck's testimony left the jury with no other possible conclusion than [the defendant] had the intent to sell. [The defendant] was not convicted by a jury of his peers, but by his arresting officer. This constituted reversible error; the defendant's motion for mistrial was improperly denied." We disagree.

Section 7-2 of the Connecticut Code of Evidence provides: "A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue." Section 7-3 (a) of the Connecticut Code of Evidence provides: "Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue."

Pursuant to General Statutes § 54-86i, "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an

opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto, except that such expert witness may state his diagnosis of the mental state or condition of the defendant. The ultimate issue as to whether the defendant was criminally responsible for the crime charged is a matter for the trier of fact alone."

Finally, § 7-4 of the Connecticut Code of Evidence provides: "(a) Opinion testimony by experts. An expert may testify in the form of an opinion and give reasons therefor, provided sufficient facts are shown as the foundation for the expert's opinion.

"(b) Bases of opinion testimony by experts. The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. The facts relied on pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence.

"(c) Hypothetical questions. An expert may give an opinion in response to a hypothetical question provided that the hypothetical question: (1) presents the facts in such a manner that they bear a true and fair relationship to each other and to the evidence in the case; (2) is not worded so as to mislead or confuse the jury; and (3) is not so lacking in the essential facts as to be without value in the decision of the case. A hypothetical question need not contain all of the facts in evidence."

In the present case, Peck was presented both as a fact witness and as an expert, without objection. Peck was asked hypothetical questions by the state, to which the defendant did not object. Those questions did not refer to this particular defendant, but, rather, they referred generally to someone who sells narcotics, and

Peck was asked to opine, as a qualified expert, on whether a particular amount of narcotics was consistent with sales as opposed to usage. As our Supreme Court explained in *State* v. *Nash*, 278 Conn. 620, 651, 899 A.2d 1 (2006), "the significance of the quantity of narcotics found on a suspect is not within the common knowledge of the average juror and, therefore, is a proper subject of expert testimony." (Internal quotation marks omitted.) We conclude that *Nash* is directly on point.

In *Nash*, an expert witness had testified about "the practices of street level narcotics dealers, including whether possessing certain quantities of narcotics is consistent with the sale, rather than personal use, of the narcotics and how street level dealers sell narcotics and what type of packaging they generally use." Id., 649. Similar to the present case, the defendant in *Nash* then contended that the expert's testimony "was more prejudicial than probative because [he] essentially had offered an opinion on the sole disputed issue at trial—whether the defendant possessed the cocaine with the intent to sell." Id., 650–51. Our Supreme Court disagreed, stating that the defendant was unable to cite any Connecticut case that stood "for the proposition that the testimony improperly was admitted because it is within the average jurors' ability and common knowledge to determine whether a person possessing thirty-eight small bags of cocaine intends to sell the narcotics or buys it in bulk to keep it for personal consumption." Id., 652. Our Supreme Court concluded: "To the extent that [the expert] opined that, under a hypothetical set of facts similar to those at issue here, the conduct was more consistent with the sale of narcotics than the purchase of narcotics, we do not construe this testimony as an opinion as to the ultimate issue of fact." Id., 653.

Under the clear guidance of *Nash*, we conclude that Peck's response to the state's hypothetical questions did not amount to an opinion as to the ultimate issue

in the case, namely, the intent to sell narcotics. As was the case in *Nash*, the testimony in the present case concerned a hypothetical individual, not this particular defendant. Accordingly, the court did not abuse its discretion in denying the defendant's motion for a mistrial after Peck's testimony.

B

We next consider the defendant's claim that the court improperly denied his motion for a mistrial following the testimony of Sergeant George Yepes, which the defendant alleges contained a reference to prior misconduct by the defendant. He argues that the court specifically had prohibited the introduction of prior misconduct evidence in its ruling in limine. The state argues that the court properly ruled on the motion for a mistrial because Yepes' answer was responsive to defense counsel's question and, therefore, was invited. The state also argues that Yepes' testimony did not refer to prior misconduct. We agree with the state.

The following additional facts inform our review of this claim. The state had filed a motion to permit the introduction of prior misconduct evidence, which the defendant opposed. On the first day of evidence, the court ruled that such evidence was not admissible. Later that day, during cross-examination, the following colloquy occurred between defense counsel and Yepes:

"Q. Now, you're—you're familiar with—with the evidence that was seized from [the defendant's] apartment?

"A. Yes, sir.

"Q. And that included five tear bags from an outlet?

"A. From an outlet, sir, yes.

"Q. Before going into the apartment, did you have any knowledge how long [the defendant had] lived in that apartment?

"A. He was there for a while. I'm not sure exactly how long though.

"Q. You know that? That was part of your investigation to determine how long he lived there?

"A. I believe from other situations that involved him, yes."

Defense counsel immediately asked for the jury to be excused, and he requested that the court declare a mistrial. He argued that the answer was nonresponsive and that it informed the jury that the defendant had had prior involvement with the police. The court explained that it appeared that the question asked Yepes how he knew that the defendant lived at the apartment and that Yepes' answer was responsive to that question. The state argued that Yepes merely stated that he knew the defendant lived there "from other situations," but that Yepes did not give any type of details or indicate that it was from prior misconduct by the defendant. The trial court denied the motion, and defense counsel stated that he did not want the court to give a limiting or curative instruction. The court, however, instructed Yepes not to discuss prior arrests or convictions. It then recalled the jury. The defendant claims that the court abused its discretion in denying his motion for a mistrial. We are not persuaded.

"[A]s a general rule, evidence of a defendant's prior crimes or misconduct is not admissible. . . . The rationale of this rule is to guard against its use merely to show an evil disposition of an accused, and especially the predisposition to commit the crime with which he is now charged." (Internal quotation marks omitted.) *State* v. *Nash*, supra, 278 Conn. 658.

We, again, are guided by our Supreme Court's decision in *Nash*. See id., 656–60. In *Nash*, the trial court had granted a motion in limine to exclude prior misconduct evidence related to the defendant. Id., 655–56. During the state's direct examination of a police officer, the officer testified that he knew the defendant "from previous related police intervention in the area in the past." (Internal quotation marks omitted.) Id., 656. The defendant thereafter moved for a mistrial, arguing that this testimony was akin to the officer telling the jury that he knew the defendant from the defendant's prior criminal misconduct. Id., 656–57. Our Supreme Court concluded that the trial court had not abused its discretion in denying the motion for a mistrial because the officer's statement was "vague as to whether the defendant had engaged in any misconduct to prompt the police intervention . . . [and the] statement conceivably could have been a reference to a situation in which the defendant had been a victim, a witness or an innocent bystander." Id., 658. The court also stated that the officer's statement did "not reference explicitly a notorious criminal past." Id., 658–59. The court then noted that, even if the jury, arguably, could have interpreted the officer's statement to be a comment about the defendant's prior criminal conduct, the trial court had provided a curative instruction that would have cured any possible prejudice. Id., 659–60.

In the present case, Yepes' statement merely mentioned "other situations," which, as in *Nash*, could have referred to anything. Yepes did not mention prior misconduct, police investigations, or anything nefarious. As was the case in *Nash*, Yepes' statement that he was familiar with the defendant from "other situations" that involved him "conceivably could have been a reference to a situation in which the defendant had been a victim, a witness or an innocent bystander." *State* v. *Nash*, supra, 278 Conn. 658. Although the trial court in this

case did not give a curative instruction, defense counsel specifically told the court that he did not want such an instruction. "Defense counsel cannot opt for a mistrial instead of a curative instruction, as if the two were interchangeable. If defense counsel decides to move for [a] mistrial and altogether eschews the instruction, the trial court cannot be compelled by that decision to go further than it otherwise would." (Internal quotation marks omitted.) *State* v. *Coltherst*, 87 Conn. App. 93, 102, 864 A.2d 869, cert. denied, 273 Conn. 919, 871 A.2d 371 (2005). We conclude that the defendant has failed to establish that the court abused its discretion in denying his motion for a mistrial on the basis of Yepes' testimony.

II

The defendant also claims that the trial court abused its discretion in denying his motion to suppress evidence seized during the execution of the search warrant because the warrant had been issued without probable cause. The defendant argues that "the affidavit for [the search] warrant failed to state with particularity the probable cause to believe drugs or evidence of sales could be found at [the defendant's apartment]. The affidavit failed to establish a nexus between the items sought and the subject of the search. Finally, the affidavit was utterly devoid of factual bases for knowledge and credibility concerning the use of the [apartment], and therefore failed the 'totality of the circumstances test' of *Illinois* v. *Gates*, [462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)]." In response, the state argues that the trial court properly denied the defendant's motion to suppress after determining that the warrant application was supported by probable cause. We agree with the state.

The following additional facts inform our review of the defendant's claim. The defendant filed a motion to suppress the evidence that the police had seized during the execution of the search warrant for his apartment.

In his motion, he claimed, inter alia, that "the police lacked probable cause to enter the [apartment]."[2] In its memorandum in opposition to the defendant's motion to suppress, the state argued that the warrant application was supported by probable cause, that a judge properly had signed the warrant after determining that probable cause existed, and that any evidence seized from the apartment was admissible at trial. The state further argued that the defendant had failed to explain how or why the warrant lacked probable cause.

During the hearing on the motion to suppress, the defendant presented the testimony of Detectives Justin Lathrop and Peck, both of whom were affiants on the search warrant application. The defendant thereafter argued to the trial court that Lathrop and Peck had failed to "establish the credibility, the veracity, [and] the reliability of the confidential informant." He argued that the affidavit failed to provide information "about the confidential informant, his criminal history, whether . . . he has a pending case to establish whether . . . he has a motive to be dishonest or untruthful" and that it also failed to state whether the confidential informant knew the defendant. Finally, the defendant argued that, although "the officers did establish [during their testimony] that they had familiarity with [the defendant] and that . . . the confidential informant had previous dealings with [the defendant] prior to the controlled buys, the four corners of the warrant [do] not set forth that information, and, therefore, a neutral and detached [judge] would not have been able to verify that information just through the language of the affidavit, and, therefore, the affidavit was insufficient to establish

[2] In his motion to suppress, the defendant also claimed that the police had "made affirmative false and misleading representations in the search warrant to secure a probable cause finding against the defendant." The trial court rejected that claim, and the defendant on appeal has not claimed error in this regard.

probable cause." The state argued that the affidavit provided more than sufficient facts to establish probable cause. After setting forth the relevant allegations from the search warrant application, including the affidavit of Peck and Lathrop, the court issued an oral ruling in which it concluded that there had been "probable cause for the warrant." The court then denied the defendant's motion to suppress.

"The legal principles guiding our probable cause analysis are well established. Both the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution prohibit the issuance of a search warrant in the absence of probable cause. . . . Probable cause to search is established if there is probable cause to believe that (1) . . . the particular items sought to be seized are connected with criminal activity or will assist in a particular . . . conviction . . . and (2) . . . the items sought to be seized will be found in the place to be searched. . . . There is no uniform formula to determine probable cause—it is not readily, or even usefully, reduced to a neat set of legal rules—rather, it turns on the assessment of probabilities in particular factual contexts . . . . Probable cause requires less than proof by a preponderance of the evidence . . . . There need be 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 . . . . [T]he relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts. . . . The task of the issuing [judge] is simply to make a practical, [commonsense] decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. . . .

"In our review of whether there was probable cause to support the warrant, we may consider only the infor-

mation that was actually before the issuing judge . . . and the reasonable inferences to be drawn therefrom. . . . The judge is entitled to rely on his own common sense and the dictates of common experience, although the standard for determining probable cause is an objective one. . . . [B]ecause of our constitutional preference for a judicial determination of probable cause, and mindful of the fact that [r]easonable minds may disagree as to whether a particular [set of facts] establishes probable cause . . . we evaluate the information contained in the affidavit in the light most favorable to upholding the issuing judge's probable cause finding. . . . We review the issuance of a warrant with deference to the reasonable inferences that the issuing judge could have and did draw . . . and . . . uphold the validity of [the] warrant . . . [if] the affidavit at issue presented a substantial factual basis for the [judge's] conclusion that probable cause existed. . . . The fact that we might draw different reasonable inferences from the affidavit than the issuing judge does not alter our conclusion. On the contrary, we defer to the issuing judge's reasonable inferences, even when other inferences also might be reasonable, or when the issuing judge's probable cause finding is predicated on permissible, rather than necessary, inferences. . . . In a doubtful or marginal case . . . our constitutional preference for a judicial determination of probable cause leads us to afford deference to the [issuing judge's] determination." (Citations omitted; internal quotation marks omitted.) *State* v. *Sawyer*, 335 Conn. 29, 37–39, 225 A.3d 668 (2020).

We now must determine whether, on the basis of the totality of the circumstances described in the affidavit in support of the arrest warrant, and the reasonable inferences drawn therefrom, the trial court properly ruled that the issuing judge reasonably could have concluded that there was a substantial chance that the

defendant had drugs in his apartment. We conclude that the affidavit reasonably supports this conclusion and that, therefore, the trial court properly denied the defendant's motion to suppress.

Peck and Lathrop, being duly sworn, attested that they had probable cause to believe that the defendant had crack cocaine, cocaine, and related paraphernalia in his apartment. They provided an affidavit that contained the following relevant facts, which they stated they knew from their own personal observations and knowledge, as well as from other officers and official police reports and statements: "Since January of 2017, the [n]arcotics [u]nit has received multiple reports from [reliable confidential informants, informants, arrested persons, concerned citizens, anonymous callers and police officers] that [the defendant] . . . has been selling crack cocaine from both his [apartment] and throughout Middletown, CT. . . . A check of the [Department of Motor Vehicles] records, Middletown [P]olice [Department] records, and [the National Crime Information Center] shows [the defendant] as a resident of [the apartment]. . . . During the month of August, 2017, Detective Peck met with a confidential informant. . . . This informant has provided information concerning narcotic dealing in the past, which had been corroborated and found to be true and accurate. . . . Peck supplied the [confidential informant] with an amount of [n]arcotic [u]nit funds. The [confidential informant] was searched prior to being supplied with said funds . . . . Peck was present when the [confidential informant] contacted [the defendant] via his phone and arranged this purchase. [The defendant] advised the [confidential informant] to meet him at a specific prearranged meet location. Detective Peck followed the [confidential informant] directly to this location, and the [confidential informant] never stopped or met with anybody [else]. . . . Detective Lathrop . . . observed

[the defendant exit] the common door of his residence/apartment building. Detective Dirga observed [the defendant arrive] at the meet location and [meet] with the [confidential informant]. An exchange between the two took place . . . . Detectives Dirga and Lemieux followed the [confidential informant] from the area and observed as the [confidential informant] returned directly to the prearranged location to meet Detective Peck without stopping or meeting anyone [else]. [The defendant] also exited the area, and [he] returned to [his apartment]. . . . At the prearranged meet location the [confidential informant] turned over an amount of an off-white colored [rock like] substance suspected to be crack cocaine. . . . Detective Peck transported the suspected crack cocaine to [headquarters] and tested the suspected crack cocaine . . . which resulted in a positive reaction . . . .

"Within [forty-eight] hours of October 2, 2017, Detective Peck [again] supplied the [confidential informant] with an amount of [n]arcotic [u]nit funds. The [confidential informant] was searched prior to being supplied with said funds and was found to be free of any [moneys] or contraband. The [confidential informant] was instructed to contact [the defendant] and arrange the purchase of crack cocaine. . . . Detective Peck was present when the [confidential informant] contacted [the defendant] via his phone and arranged this purchase. [The defendant] advised the [confidential informant] to meet him at a specific prearranged [meeting] location. Detective Peck followed the [confidential informant] directly to this location and the [confidential informant] never stopped or met with anybody. Detective Lathrop . . . observed with a clear and unobstructed view, as [the defendant] exited the common door of his residence/apartment building. Sergeant Yepes observed [the defendant arrive] at the [meeting] . . . with the [confidential informant]. An exchange

between the two took place and the [confidential informant] exited the area. Detectives Dirga and Lemieux followed the [confidential informant] from the area and observed as the [confidential informant] returned directly to the prearranged location to meet Detective Peck without stopping or meeting anyone. [The defendant] also exited the area and returned to [his apartment]. . . . [The confidential informant] turned over an amount of an off-white colored [rock like] substance . . . which resulted in a positive reaction for the presumptive presence of crack cocaine."

Peck and Lathrop also averred that they knew "that individuals involved in the illegal possession of and sale of narcotics . . . receive at their residence . . . a large quantity of substance that they would cut into smaller quantities for sale to other persons." They further averred: "[A] [s]tate [p]olice [r]ecord [c]heck . . . revealed that [the defendant] has two previous arrests from [their] agency for [p]ossession of [n]arcotics ([two] counts), [s]ale of [n]arcotics, [p]ossession with [i]ntent to [s]ell, [and that] [t]hese cases are currently pending . . . . Based on the preceding information, [Peck and Lathrop averred that they] believe that [the defendant] is currently storing narcotics with the intent for further distribution within his residence . . . ." We conclude that this affidavit, under the totality of the circumstances, supported a finding of probable cause.

The defendant contends that the information in the affidavit provided an insufficient nexus to his apartment. Specifically, he argues: "This affidavit fails to establish the factual basis for the conclusion that [the defendant's] home was being used as [a] base of operations, and fails to remedy that defect with corroborating evidence." We disagree.

Peck and Lathrop averred that they had received multiple reports of the defendant selling narcotics out of his apartment. The police then used a confidential

informant, who previously had provided them with reliable information, to set up two controlled purchases from the defendant. Immediately before both purchases, the confidential informant telephoned the defendant, who was at his apartment. The confidential informant then went to the prearranged meeting location. The defendant left his apartment also to go to the prearranged meeting location, where the controlled buy took place, under police observation. The defendant thereafter returned to his apartment. Although the defendant argues that there was no nexus between the controlled buys and his apartment, a reasonable inference readily can be made that the defendant left his apartment with the drugs when he went to the prearranged meeting location. On the basis of the totality of the circumstances, including the reasonable inferences drawn from the facts set forth in the affidavit, we conclude that there was probable cause to support the issuance of the search warrant for the defendant's apartment, and that the trial court, therefore, properly denied the defendant's motion to suppress.

The judgment is affirmed.

In this opinion the other judges concurred.

KEVIN LEWIS MARSHALL *v.* COMMISSIONER OF CORRECTION
(AC 43693)

Elgo, Alexander and Sheldon, Js.

Syllabus

The petitioner, who had been convicted on a plea of guilty to the crime of burglary in the third degree, sought a writ of habeas corpus, claiming that the trial court had imposed an illegal sentence. The petitioner had been sentenced to two years and one day of incarceration and thirty-five months of special parole. The petitioner claimed that the imposition of a term of incarceration and a period of special parole constituted two distinct sentences for the same offense and, thus, violated his federal and state constitutional rights to be free from double jeopardy. The

habeas court, sua sponte, ordered a hearing as to why the petition should not be dismissed for lack of subject matter jurisdiction, pursuant to the relevant rule of practice (§ 23-29), on the ground that the petitioner failed to state a claim on which habeas relief could be granted, as this court concluded in *State* v. *Farrar* (186 Conn. App. 220) that the statutory framework explicitly authorized a defendant to be sentenced to a term of imprisonment followed by a period of special parole, provided that the combined term of the period of imprisonment and special parole did not exceed the statutory maximum for the crime for which the defendant was convicted. During the hearing, the petitioner's counsel argued that the petitioner would not begin his special parole until he completed a period of incarceration that was the result of a separate conviction and, therefore, the petitioner would serve more than the maximum sentence permitted for his conviction of burglary. The habeas court dismissed the petition and the petitioner, on the denial of his petition for certification to appeal, appealed. *Held* that the habeas court properly dismissed the habeas petition pursuant to § 23-29: although the petitioner claimed that the court should have permitted the filing of an amended habeas petition prior to rendering judgment, noting that the court set the filing deadline for an amended petition many months after the dismissal hearing, subject matter jurisdiction may be raised at any time and, once it was raised, the court was required to address and resolve it, the petition, as filed, limited the petitioner's claim to an illegal sentence that violated double jeopardy, and, although the representations made by habeas counsel at the hearing indicated the possibility of filing an amended petition to include, inter alia, claims of ineffective assistance of counsel, those representations did not have the effect of changing or enlarging the claim set forth in the petition that actually was before the habeas court, the petitioner did not claim that the combined period of imprisonment and special parole exceeded the statutory maximum for burglary in the third degree, and therefore the petitioner failed to allege an unconstitutional violation of his liberty and the court lacked subject jurisdiction; moreover, the habeas court did not abuse its discretion in denying the petition for certification to appeal the dismissal of the petition for a writ of habeas corpus.

Argued March 10—officially released August 3, 2021

Procedural History

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

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

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Michael Proto*, senior assistant state's attorney, for the appellee (respondent).

Opinion

ALEXANDER, J. The petitioner, Kevin Lewis Marshall, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly dismissed his habeas petition. We disagree, and, accordingly, dismiss the petitioner's appeal.

The following facts and procedural history are relevant to our discussion. The petitioner pleaded guilty to two counts of burglary in the third degree in violation of General Statutes § 53a-103. For each offense, the court imposed a sentence of two years and one day of incarceration and thirty-five months of special parole,[1] with the sentences to run concurrently.

In April, 2018, the self-represented petitioner commenced the present habeas action. He alleged that the court had imposed an illegal sentence. Specifically, he claimed that the imposition of a term of incarceration

[1] "Our Supreme Court has explained the difference between probation and special parole. Pursuant to [General Statutes] § 54-128 (c), when a defendant violates special parole, he is subject to incarceration only for a period equal to the unexpired portion of the period of special parole. Thus, for a violation that occurs on the final day of the defendant's special parole term, the defendant would be exposed to one day of incarceration. *Special parole, therefore, exposes a defendant to a decreasing period of incarceration as the term of special parole is served.*" (Emphasis in original; internal quotation marks omitted.) *State* v. *Battle*, 192 Conn. App. 128, 140–41, 217 A.3d 637 (2019), aff'd, Conn. , A.3d (2021).

and a period of special parole constituted two distinct sentences for the same offense and, thus, violated his federal and state constitutional rights to be free from double jeopardy.

On June 6, 2019, the habeas court, *Newson*, *J.*, issued an order, pursuant to Practice Book § 23-29, that a hearing to determine why the habeas petition should not be dismissed would be held within thirty days.[2] In this order, the court noted that the petitioner had alleged "that a sentence imposed which includes special parole violates double jeopardy, which the [Appellate] Court explicitly rejected in *State* v. *Farrar*, 186 Conn. App. 220, 221, 199 A.3d 97 (2018)." The next day, the habeas court issued a scheduling order, setting a November 8, 2021 deadline for the filing of an amended petition.

At the July 16, 2019 hearing, the habeas court iterated that the petitioner essentially claimed that a sentence that includes a term of incarceration and a period of special parole constitutes a double jeopardy violation, and that this court's decision in *State* v. *Farrar*, supra, 186 Conn. App. 220, foreclosed that claim. Attorney Michael Stonoha, who had been appointed to represent the petitioner, argued that the petitioner would not begin his special parole until he completed a period of incarceration that was the result of a separate conviction, and therefore the petitioner would serve well over the maximum sentence permitted for his conviction of burglary in the third degree. The court responded that, in the context of a motion to dismiss, it was limited to the "four corners" of the petition for a writ of habeas corpus. Counsel for the respondent, the Commissioner of Correction, argued that *State* v. *Farrar*, supra, 186

[2] See, e.g., *Boria* v. *Commissioner of Correction*, 186 Conn. App. 332, 353, 199 A.3d 1127 (2018) (*Bishop*, *J.*, concurring) (noting that prior to dismissal of habeas petition pursuant to Practice Book § 23-29, petitioner should be given notice of court's inclination to dismiss, sua sponte, and opportunity to be heard on whether dismissal is warranted), cert. granted, 335 Conn. 901, 225 A.3d 685 (2020).

Conn. App. 220, was controlling with respect to the claim alleged in the habeas petition and that he could not comment on any potential claims in the future. The petitioner's counsel further suggested the possibility of raising a claim of ineffective assistance of counsel.

After hearing further argument, the court dismissed the habeas petition, concluding that it failed to state a claim on which habeas relief could be granted. In the alternative, the court stated that it lacked jurisdiction because the allegation set forth in the habeas petition did not allege a constitutional violation. That same day, the petitioner filed a petition for certification to appeal the court's dismissal of his habeas petition. On July 17, 2019, the court denied the petition for certification to appeal. This appeal followed.

The petitioner first claims that the habeas court abused its discretion in denying his petition for certification to appeal the dismissal of his petition for a writ of habeas corpus. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . In determining whether there has been an abuse of

discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling . . . [and] [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. [In the absence of] such a showing by the petitioner, the judgment of the habeas court must be affirmed." (Citation omitted; internal quotation marks omitted.) *Wright* v. *Commissioner of Correction*, 201 Conn. App. 339, 344–45, 242 A.3d 756 (2020), cert. denied, 336 Conn. 905, 242 A.3d 1009 (2021); see also *Moore* v. *Commissioner of Correction*, Conn. , , A.3d (2021).

In order to determine whether the habeas court's denial of the petition for certification to appeal constituted an abuse of discretion, we must consider his substantive claim that the habeas court improperly dismissed his petition for a writ of habeas corpus pursuant to Practice Book § 23-29. See, e.g., *Wright* v. *Commissioner of Correction*, supra, 201 Conn. App. 345. Practice Book § 23-29 provides in relevant part: "The judicial authority may, *at any time*, *upon its own motion* or upon motion of the respondent, *dismiss the petition*, or any count thereof, if it determines that: (1) the court lacks jurisdiction; (2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted . . . ." (Emphasis added.) See also *Gilchrist* v. *Commissioner of Correction*, 334 Conn.

548, 554, 223 A.3d 368 (2020). Our Supreme Court has analogized Practice Book § 23-29 to Practice Book §§ 10-30 and 10-39. Id., 561; see also *Kobza* v. *Commissioner of Correction*, 204 Conn. App. 547, 556, A.3d (2021) (habeas corpus action, as variant of civil actions, is subject to ordinary rules of civil procedure unless superseded by more specific rules pertaining to habeas actions).

The habeas court dismissed the petition based on its determination that it lacked jurisdiction and that the petitioner failed to state a claim on which habeas corpus relief could be granted. At the outset, we note that a determination regarding the habeas court's subject matter jurisdiction presents a question of law, and therefore our review is plenary. *Byrd* v. *Commissioner of Correction*, 177 Conn. App. 71, 79, 171 A.3d 1103 (2017); *Petaway* v. *Commissioner of Correction*, 160 Conn. App. 727, 731, 125 A.3d 1053 (2015), appeal dismissed, 324 Conn. 912, 153 A.3d 1288 (2017); see also *Brewer* v. *Commissioner of Correction*, 162 Conn. App. 8, 13, 130 A.3d 882 (2015) (conclusions reached by habeas court in its decision to dismiss habeas petition are matters of law subject to plenary review, while challenges to factual findings are subject to clearly erroneous standard).

The jurisdiction of the habeas court is well established in our jurisprudence. "With respect to the habeas court's jurisdiction, [t]he scope of relief available through a petition for habeas corpus is limited. In order to invoke the trial court's subject matter jurisdiction in a habeas action, a petitioner must allege that he is illegally confined or has been deprived of his liberty. . . . In other words, a petitioner must allege an interest sufficient to give rise to habeas relief. . . . In order to . . . qualify as a constitutionally protected liberty [interest] . . . the interest must be one that is assured either by statute, judicial decree, or regulation." (Citations omit-

ted; internal quotation marks omitted.) *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 85, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018); see also *Byrd* v. *Commissioner of Correction*, supra, 177 Conn. App. 82.

The habeas court concluded that this court's decision in *State* v. *Farrar*, supra, 186 Conn. App. 220, foreclosed the sole claim set forth in the habeas petition filed by the petitioner; namely, that the court imposed an illegal sentence that violated double jeopardy. A brief review of that case, therefore, will facilitate our discussion. In *State* v. *Farrar*, supra, 221, the defendant appealed from the denial of his motion to correct an illegal sentence. The defendant had pleaded guilty to possession of a controlled substance with intent to sell and criminal possession of a firearm. Id., 222. The court imposed a total effective sentence of seven years of incarceration, followed by eight years of special parole. Id. Thereafter, the defendant challenged his sentence, arguing that a term of imprisonment followed by a period of special parole was not statutorily authorized and thus violated his constitutional right against double jeopardy. Id. The trial court denied the defendant's motion to correct an illegal sentence. Id.

On appeal, the defendant argued that special parole was not a definite term of imprisonment and, thus, was in violation of General Statutes § 53a-35a. Id. He claimed, therefore, "that the court illegally sentenced him to both a definite term of imprisonment and a period of special parole . . . ." Id., 222–23. In rejecting this claim, we determined that the controlling statutory framework "*explicitly* [*authorizes*] *a defendant to be sentenced to a term of imprisonment followed by a period of special parole, provided that the combined term of the period of imprisonment and special parole does not exceed the statutory maximum for the crime for which the defendant was convicted*." (Emphasis added.) Id., 223.

In his petition for a writ of habeas corpus, the petitioner claimed that his sentence was illegal because it included both a period of incarceration and special parole. He further argued that a definite sentence followed by special parole constituted two distinct sentences for the same offense and therefore violated double jeopardy. He did not claim, however, that the combined period of imprisonment and special parole exceeded the statutory maximum for burglary in the third degree. Thus, we agree with the habeas court's conclusion that, as a result of this court's decision in *State* v. *Farrar*, supra, 186 Conn. App. 220, the petitioner had failed to allege an unconstitutional violation of his liberty, and therefore it lacked subject matter jurisdiction.

In his appellate brief, the petitioner contends that the court should have considered the representations made by his habeas counsel enhancing the allegations contained in the habeas petition filed by the petitioner himself. Specifically, he directs us to the following statements made at the July 16, 2019 hearing: "I believe [the petitioner] has a colorable claim that, based on the special parole statute, that as soon as his maximum term of 731 days ended, he was to be automatically transferred to the Board of Pardons and Parole for a period of special parole and that he should be credited on that special parole while he is still incarcerated [on a separate conviction and sentence]." Habeas counsel also noted the possible existence of a colorable claim of ineffective assistance of counsel. As a result of habeas counsel's representations, the petitioner maintains that the court should have permitted the filing of an amended habeas petition prior to rendering a judgment of dismissal. In further support of this contention, the petitioner notes that the habeas court's scheduling order did not require the filing of an amended petition until November 8, 2021.

The petitioner's arguments, however, fail to account for several well established principles. First, the issue of subject matter jurisdiction may be raised at any time. "This court has often stated that the question of subject matter jurisdiction, because it addresses the basic competency of the court, can be raised by any of the parties, or by the court sua sponte, *at any time*." (Emphasis added; internal quotation marks omitted.) *Pentland* v. *Commissioner of Correction*, 200 Conn. App. 296, 302, 238 A.3d 778, cert. denied, 335 Conn. 973, 241 A.3d 129 (2020); see *Johnson* v. *Rell*, 119 Conn. App. 730, 736, 990 A.2d 354 (2010); see also Practice Book § 23-29 (1) (court may, at any time, dismiss habeas petition for lack of subject matter jurisdiction).

Second, the habeas petition filed by the petitioner limited his claim to an illegal sentence that violated double jeopardy. The representations of habeas counsel[3] made at the July 16, 2019 hearing indicated the possibility of filing an amended petition, but did not have the effect of changing or enlarging the claim set forth in the petition that actually was before the habeas court. See, e.g., *Nelson* v. *Commissioner of Correction*, 326 Conn. 772, 781, 167 A.3d 952 (2017) (habeas court properly declined to consider issues raised only in memorandum of law in opposition to motion to dismiss and not in habeas petition). "[I]t is the established policy of the Connecticut courts to be solicitous of pro se litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the pro se party. . . . *However*, [*t*]*he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he* [*or she*] *has*

[3] Counsel entered his appearance on October 31, 2018, approximately eight months before the court issued its notice pursuant to Practice Book § 23-29 and did not file an amended petition during that time period.

alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his [*or her*] *complaint. . . . While the habeas court has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations . . . it does not have the discretion to look beyond the pleadings . . . to decide claims not raised. . . .* In addition, while courts should not construe pleadings narrowly and technically, courts also cannot contort pleadings in such a way so as to strain the bounds of rational comprehension." (Citations omitted; emphasis added; internal quotation marks omitted.) *Stephenson* v. *Commissioner of Correction*, 203 Conn. App. 314, 325–26, 248 A.3d 34, cert. denied, 336 Conn. 944, 249 A.3d 737 (2021); see also *Kobza* v. *Commissioner of Correction*, supra, 204 Conn. App. 553.

Third, once the issue regarding the lack of subject matter jurisdiction is brought to the court's attention, the court must address and resolve it. This court has stated: "A possible absence of subject matter jurisdiction must be addressed and decided whenever the issue is raised. . . . It is axiomatic that once the issue of subject matter jurisdiction is raised, it must be *immediately* acted upon by the court. . . . Our Supreme Court has explained that once raised . . . the question [of subject matter jurisdiction] must be answered *before* the court may decide the case." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Igersheim* v. *Bezrutczyk*, 197 Conn. App. 412, 419, 231 A.3d 1276 (2020); see also *Federal Deposit Ins. Corp.* v. *Peabody, N.E., Inc.*, 239 Conn. 93, 99–100, 680 A.2d 1321 (1996); *Burton* v. *Connecticut Siting Council*, 161 Conn. App. 329, 347–48, 127 A.3d 1066 (2015), cert. denied, 320 Conn. 925, 133 A.3d 459 (2016).

For these reasons, we conclude that the court properly dismissed the habeas petition pursuant to Practice Book § 23-29 (1), despite the representations of habeas

counsel and the court's scheduling order. We also conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal the dismissal of the petition for a writ of habeas corpus.

The appeal is dismissed.

In this case the other judges concurred.

ALBERT BUEHLER *v.* TOWN OF NEWTOWN ET AL. (AC 43087)

Prescott, Elgo and DiPentima, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, the town of Newtown and various school employees, for personal injuries he sustained when he fell from a referee stand while officiating a public high school volleyball match. The defendants filed a motion for summary judgment, arguing that they had shown that their allegedly negligent actions were discretionary, and thus they enjoyed governmental immunity, and that the plaintiff did not fall within the identifiable person-imminent harm exception to the governmental immunity doctrine. The trial court granted the defendants' motion for summary judgment, finding that the plaintiff, a volleyball referee, was not legally compelled to be on school premises at the time of his injury, and, accordingly, he was not an identifiable person to whom the identifiable person-imminent harm exception applied. On the plaintiff's appeal to this court, *held* that the trial court properly determined that no genuine issue of material fact existed as to whether the plaintiff was an identifiable victim who fell within the identifiable person-imminent harm exception to the governmental immunity doctrine: the only identifiable class of foreseeable victims that our Supreme Court has recognized is that of schoolchildren attending public schools during school hours, and an assignment to officiate a volleyball game after school hours is nothing like the legal compulsion imposed by our statutes that require a child's attendance at school; moreover, the plaintiff conceded that he had the option to accept or to deny the refereeing assignment, which made his presence on the premises voluntary; furthermore, it would have been improper to extend the identifiable victim classification, particularly because the student athletes participating in the volleyball game over which the plaintiff officiated would not themselves enjoy such a designation under existing law, and there was no doctrinal justification for treating the plaintiff differently than the schoolchildren.

Argued March 4—officially released August 3, 2021

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendants' alleged negligence, brought to the Superior Court in the judicial district of Fairfield, where the court, *Welch*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Matthew D. Popilowski, with whom, on the brief, was *Richard J. Tropiano*, *Jr.*, for the appellant (plaintiff).

John A. Blazi, for the appellees (named defendant et al.).

Opinion

PRESCOTT, J. This is a premises liability action brought by the plaintiff, Albert Buehler, against the defendants, the town of Newtown (town), the Newtown Board of Education (board), and Gregg Simon, the former athletic director of Newtown High School, arising out of injuries he sustained after he fell from a referee stand while officiating a volleyball match at Newtown High School.[1] The plaintiff appeals from the summary judgment rendered by the trial court in favor of the

[1] The plaintiff named six defendants in this action: (1) the town; (2) the board; (3) Joseph V. Erardi, Jr., the former superintendent of Newtown public schools, and his agents; (4) Lorrie Rodrigue, the principal of Newtown High School, and her agents; (5) Simon and his agents; and (6) Tom Czaplinski, the coach of the Newtown High School girls volleyball team. In his objection to a joint motion for summary judgment filed by the defendants, the plaintiff stated that he did not object to the court rendering summary judgment as to his claims against Erardi, Rodrigue, and Czaplinski, as set forth in counts three, four, and six of the operative amended complaint. The plaintiff also consented to the court rendering summary judgment on the plaintiff's claims for indemnification against Erardi, Rodrigue, and Czaplinski. The trial court confirmed on the record that "the plaintiff ha[d] no objection" to summary judgment being entered as to all claims against Erardi, Rodrigue, and Czaplinski. Erardi, Rodrigue, and Czaplinski have not participated in this appeal. Accordingly, we refer to the participating defendants—the town, the board, and Simon—individually by name and collectively as the defendants.

defendants on the ground that they are entitled to governmental immunity. The plaintiff claims that the court improperly rendered summary judgment in favor of the defendants because there is a genuine issue of material fact as to whether the plaintiff was an identifiable victim under the identifiable person-imminent harm exception to governmental immunity. We disagree and, therefore, affirm the judgment of the court.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following relevant facts and procedural history. The plaintiff has worked as a volleyball referee for approximately forty years. The plaintiff received training and multiple national and state certifications in connection with his role as a referee. Further, the plaintiff was a member of the Connecticut Federation of Volleyball Officials. Although the position was part-time, the plaintiff frequently officiated matches on each day of a given week. The plaintiff regularly officiated college volleyball matches throughout the northeast, and high school volleyball matches in Connecticut and New York.

In order for its members to receive assignments for high school volleyball matches, the Connecticut Federation of Volleyball Officials utilized an online system called ArbiterSports. Referees, like the plaintiff, had access to ArbiterSports. Through the system, an assigner assigned referees to officiate specific matches, and the referees would receive notice of their match assignments via e-mail. The system assigned two referees to each match. A volleyball match properly could take place with one official, but such a situation was "unusual."[2] Under the rules of one of the governing

[2] In his deposition, the plaintiff was asked whether "a volleyball match [with] only one official" previously had taken place, and the plaintiff responded, "[s]ometimes." The plaintiff clarified that such a situation was "unusual," and offered that, if available officiating staff was limited, a match could take place with one referee.

agencies of high school volleyball, however, volleyball matches were not allowed to be played with no referee in attendance.

Upon receipt of notice of their match assignments, referees had the option to accept or reject the assignment. There was no rule that a referee must accept a referee assignment; however, referees generally needed to accept assignments if they wanted to continue receiving assignments in the future.

The plaintiff was assigned to officiate a girls volleyball match on September 25, 2015, at Newtown High School. The match was arranged to take place in the school gymnasium, and one of the two assigned referees was expected to stand on an officiating stand in the gymnasium for the duration of the match to provide the referee with an elevated vantage point. The officiating stand was covered in padding and secured using a pin. There was no written policy concerning how the officiating stand was to be set up prior to girls volleyball matches. The student athletes routinely set up the officiating stand and the volleyball net prior to the arrival of the referees at the direction of the volleyball coach and/or athletic director. To set up the officiating stand, students were instructed to separate the two side rails of the ladder, rest the platform on top of the ladder, and secure the stand by inserting an attached pin. Simon, who ultimately was responsible for equipment setup in the school gymnasium, supervised setup prior to the volleyball match at issue.

Prior to the varsity match, a junior varsity match took place, and the plaintiff served as one of the two referees. During the junior varsity match, the other referee stood on the officiating stand. The plaintiff, however, stood on the officiating stand during the varsity match. Prior to the commencement of the varsity match, the plaintiff assured himself that the officiating stand had proper

padding and was stable by "wiggl[ing] it . . . ." Subsequently, the plaintiff climbed onto the stand. Approximately one hour into the match, the officiating stand collapsed. The plaintiff fell approximately four to five feet and was injured.

In September, 2017, the plaintiff commenced this action, alleging that the defendants' negligent maintenance of the stand, failure to inspect and repair the stand, and failure to erect or maintain proper safeguards or warning signs, constituted a defective condition on the school premises that caused the injuries sustained by the plaintiff. The plaintiff further alleged that the defendants knew or, in the exercise of reasonable care, should have known about the defective stand.

In December, 2017, the defendants requested that the plaintiff revise several counts of his complaint to address, inter alia, the alleged basis of the town's and the board's liability. The defendants also requested that the plaintiff identify whether the individual defendants' actions were ministerial or discretionary.[3] In both requests, the defendants asserted that each defendant, either as a municipality or as an agent thereof, enjoyed qualified immunity from liability for the plaintiff's injuries.

The plaintiff filed a revised complaint on May 4, 2018, alleging, inter alia, that (1) the town and the board were liable to the plaintiff under General Statutes §§ 10-235,[4]

[3] The defendants also requested that the plaintiff revise his complaint to clarify whether the plaintiff was an employee or nonemployee of the town or board at the time of the alleged injury. The plaintiff revised its complaint to characterize himself as "an invitee, customer, patron, and/or guest" and to remove language that characterized him as an "employee" of the town or board.

[4] General Statutes § 10-235 (a) provides in relevant part: "Each board of education shall protect and save harmless any . . . employee thereof or any member of its supervisory or administrative staff . . . from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to . . . any person . . . provided

52-557n,[5] and 7-465;[6] and (2) the individual defendants were public officials whose conduct was likely to subject the plaintiff, an identifiable victim, to imminent harm. The defendants filed an answer to the revised complaint and special defenses. By way of special defenses, the defendants asserted that, because the actions that each defendant took were discretionary in nature, each defendant was immune from liability.[7]

On October 30, 2018, the defendants filed a motion for summary judgment as to all six counts of the revised

such . . . employee, at the time of the acts resulting in such injury . . . was acting in the discharge of his or her duties or within the scope of employment or under the direction of such board of education . . . ."

[5] General Statutes § 52-557n (a) provides in relevant part: "(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . . (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

[6] General Statutes § 7-465 (a) provides in relevant part: "Any town, city or borough, notwithstanding any inconsistent provision of law . . . shall pay on behalf of any employee of such municipality . . . all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for . . . physical damages to person . . . if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment, and if such occurrence, accident, physical injury or damage was not the result of any wilful or wanton act of such employee in the discharge of such duty. . . . Governmental immunity shall not be a defense in any action brought under this section. . . ."

[7] "A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the act being done. . . . In contrast, when an official has a general duty to perform a certain act, but there is no city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner, the duty is deemed discretionary." (Citations omitted; footnote omitted; internal quotation

complaint, asserting that there were no genuine issues of material fact in dispute and the defendants were entitled to judgment as a matter of law. In support of their motion, the defendants submitted a memorandum of law, several affidavits, and excerpts from the plaintiff's deposition transcript.[8] The defendants argued that they had shown through their submissions that their allegedly negligent actions were discretionary, and thus they enjoyed governmental immunity unless the plaintiff fell within the narrow identifiable person-imminent harm exception to governmental immunity recognized by our Supreme Court. The defendants further argued that the plaintiff was not an identifiable victim, because the plaintiff voluntarily attended the volleyball match at which he was injured.[9] The defendants asserted that, because there was no question of fact that the plaintiff did not fall within the narrow identifiable person-imminent harm exception, the plaintiff could not prevent the application of governmental immunity, and the trial court was required to grant summary judgment in their favor.

In response, the plaintiff objected to the defendants' motion for summary judgment[10] in December, 2018, and,

marks omitted.) *Northrup* v. *Witkowski*, 332 Conn. 158, 169–70, 210 A.3d 29 (2019).

[8] On February 25, 2019, the defendants submitted a substitute exhibit to be considered with their motion for summary judgment, which included additional pages of the plaintiff's deposition transcript that the defendants erroneously omitted from their memorandum in support of their motion for summary judgment.

[9] The defendants argued, in the alternative, that the plaintiff did not fall within the identifiable person-imminent harm exception because the harm he suffered was not sufficiently imminent. The defendants also argued that § 10-235 did not create a cause of action that a plaintiff could bring against the board. Rather, the defendants argued that the statute provided a medium through which employees or members of the board could receive indemnity from the board if a judgment were rendered against them.

[10] As previously mentioned, in his objection, the plaintiff stated that he did not object to summary judgment with respect to his claims against Erardi, Rodrigue, and Czaplinski, found in counts three, four, and six of the plaintiff's revised complaint respectively. See footnote one of this opinion.

in support, submitted excerpts from Simon's and Czaplinski's depositions as well as a copy of board policies concerning the qualifications and duties of the athletic director for the school. The plaintiff argued that genuine issues of material fact existed as to whether (1) the plaintiff was, in fact, an identifiable victim under the identifiable person-imminent harm exception to governmental immunity, (2) the plaintiff was subject to imminent harm under the identifiable person-imminent harm exception to governmental immunity, and (3) the remaining defendants' duties were ministerial, not discretionary. The remaining defendants reiterated their arguments in a reply to the plaintiff's objection.

On December 14, 2018, the plaintiff filed a request for leave to amend the revised complaint, which was granted on January 10, 2019, over the objection of the defendants. The plaintiff amended counts one, two, and five against the town, the board, and Simon, respectively, by removing certain language concerning reasonableness and adding references to the board policy concerning the qualifications and duties of the athletic director for the school. The defendants filed a supplemental motion for summary judgment, noting that no further argument was necessary because they had already addressed all relevant issues in their original motion for summary judgment. The trial court heard argument on the motion for summary judgment on February 25, 2019.

The trial court, *Welch*, *J.*, granted the defendants' motion for summary judgment. The trial court determined preliminarily that, because the defendants' actions were discretionary, rather than ministerial, they were immune from liability unless the plaintiff fell within the identifiable person-imminent harm exception to the governmental immunity doctrine. A party is an identifiable victim, the trial court explained, when that person is compelled to be somewhere, outside of limited circumstances. Thus, the trial court noted that the class of

identifiable persons to which the exception is generally applicable is usually limited to students attending public schools during regular school hours because they are legally compelled to be on the school premises. The trial court determined that the plaintiff, a volleyball referee, was not legally compelled to be on the school premises at the time of his injury. Instead, his presence on the premises was voluntary. Accordingly, he was not an identifiable person to whom the identifiable person-imminent harm exception applied.[11] This appeal followed.

On appeal, the plaintiff challenges the trial court's decision to grant summary judgment in favor of the town, the board, and Simon. The plaintiff claims that the trial court improperly determined that no genuine issue of material fact existed as to whether he was an identifiable victim and, accordingly, he fell within the identifiable person-imminent harm exception to the governmental immunity doctrine. We are not persuaded.

We begin by setting forth the applicable standard of review. "This court's standard of review for a motion for summary judgment is well established. Practice Book § [17-49] provides that summary 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. . . . The party seeking summary judgment

[11] The trial court also considered whether the town and the board were liable under §§ 10-235 and 7-465. The court determined that the defendants were entitled to summary judgment because § 10-235 did not provide the plaintiff with a cause of action against a board of education, and relief under § 7-465 was only available if governmental immunity did not bar recovery.

The plaintiff does not raise any claim on appeal regarding the trial court's conclusions that the defendants' actions were discretionary, rather than ministerial, or that § 10-235 did not provide for a cause of action against the board. Accordingly, these issues are not properly before us.

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. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Kusy* v. *Norwich*, 192 Conn. App. 171, 175–76, 217 A.3d 31, cert. denied, 333 Conn. 931, 218 A.3d 71 (2019).

"The law pertaining to municipal immunity is similarly well settled. [General Statutes §] 52-557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages. . . . One such circumstance is a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties. . . . [Section] 52-557n (a) (2) (B), however, explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions [that] require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Internal quotation marks omitted.) *Ventura* v. *East Haven*, 330 Conn. 613, 629, 199 A.3d 1 (2019). "Accordingly, a municipality is entitled to immunity for discretionary acts performed by municipal officers or employees . . . ." *Kusy* v. *Norwich*, supra, 192 Conn. App. 177.

"Municipal officials are immunized from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury." (Internal quotation marks omitted.) *Borelli* v. *Renaldi*, 336 Conn. 1, 10–11, 243 A.3d 1064 (2020).

Our Supreme Court "has recognized an exception to discretionary act immunity that allows for liability when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . This identifiable person-imminent harm exception has three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. . . . All three must be proven in order for the exception to apply. . . . [T]he ultimate determination of whether [governmental] immunity applies is ordinarily a question of law for the court . . . [unless] there are unresolved factual issues . . . properly left to the jury." (Citation omitted; internal quotation marks omitted.) *Martinez* v. *New Haven*, 328 Conn. 1, 8, 176 A.3d 531 (2018). "[Our Supreme Court has] stated previously that this exception to the general rule of governmental immunity for employees engaged in discretionary activities has received very limited recognition in this state." (Internal quotation marks omitted.) *Kusy* v. *Norwich*, supra, 192 Conn. App. 183. "The exception is applicable only in the clearest of cases." (Internal quotation marks omitted.) *Texidor* v. *Thibedeau*, 163

Conn. App. 847, 862, 137 A.3d 765, cert. denied, 321 Conn. 918, 136 A.3d 1276 (2016).

"An allegedly identifiable person must be identifiable as a potential victim of a specific imminent harm. . . . Although the identifiable person contemplated by the exception need not be a specific individual, the plaintiff must fall within a narrowly defined identified [class] of foreseeable victims." (Internal quotation marks omitted.) Id., 861–62. "[T]he question of whether a particular plaintiff comes within a cognizable class of foreseeable victims for purposes of this exception to qualified immunity is ultimately a question of policy for the courts, in that it is in effect a question of duty. . . . This involves a mixture of policy considerations and evolving expectations of a maturing society . . . . [T]his exception applies not only to identifiable individuals but also to narrowly defined identified classes of foreseeable victims. . . . Our [Supreme Court's] decisions underscore, however, that whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims." (Internal quotation marks omitted.) *Kusy* v. *Norwich*, supra, 192 Conn. App. 183; see also *Grady* v. *Somers*, 294 Conn. 324, 356, 984 A.2d 684 (2009) ("we have interpreted the identifiable person element narrowly as it pertains to an injured party's compulsion to be in the place at issue").

"Our courts have construed the compulsion to be somewhere requirement narrowly. . . . [T]his court [has previously] concluded that a plaintiff did not satisfy the requirement because [t]he plaintiff [did] not [cite] any statute, regulation or municipal ordinance that compelled her to drive her car on the stretch of [the] [s]treet where [an] accident occurred . . . [and] [did] not [show] that her decision to take [the] particular route was anything but a voluntary decision that was made

as a matter of convenience. . . . [O]ur Supreme Court [has] determined that a person is not an identifiable victim if he is not legally required to be somewhere and could have assigned someone else to go to the location to complete the task in his place. . . . In *Grady* [v. *Somers*, supra, 294 Conn. 355–56], the municipality did not provide refuse pickup service, and residents could either obtain a transfer station permit and discard their own refuse, or hire private trash haulers to come to their home. . . . Because the plaintiff . . . had the option of hiring an independent contractor to dispose of his refuse, the court did not classify him as an identifiable victim for injuries he sustained when he slipped on an ice patch at the transfer station." (Citations omitted; internal quotation marks omitted.) *Kusy* v. *Norwich*, supra, 192 Conn. App. 185–86 n.7.

Our Supreme Court has noted that "[t]he only identifiable class of foreseeable victims that [the court has] recognized . . . is that of schoolchildren attending public schools during school hours . . . ." (Internal quotation marks omitted.) Id., 183–84;[12] see, e.g., *Cotto* v. *Board of Education*, 294 Conn. 265, 267–68, 984 A.2d 58 (2009) (program director for summer youth program who slipped and fell on school premises was not considered identifiable class member); *Durrant* v. *Board of Education*, 284 Conn. 91, 107–108, 931 A.2d 859 (2007) (mother who slipped and fell picking up child from optional after school day care was not considered identifiable class member); *Prescott* v. *Meriden*, 273 Conn.

[12] In his appellate brief, the plaintiff relies on *Tryon* v. *North Branford*, 58 Conn. App. 702, 755 A.2d 317 (2000), to support his assertion that he is indeed an identifiable victim and that we must give weight to whether the plaintiff's harm "occurred within a limited temporal and geographical zone" in our analysis. As this court noted in *Kusy*, "*Tryon* . . . was decided [more than twenty] years ago, and our Supreme Court has more recently focused its analysis regarding whether a plaintiff is an identifiable victim on whether the plaintiff is compelled to be somewhere. See *St. Pierre* v. *Plainfield*, 326 Conn. [420, 436–37, 165 A.3d 148 (2017)]. The court has, therefore, not extended the classes of identifiable victims beyond schoolchildren who are

759, 761–62, 766, 873 A.2d 175 (2005) (parent who fell while voluntarily attending high school football game to watch child was not considered identifiable class member); *Costa* v. *Board of Education*, 175 Conn. App. 402, 409, 167 A.3d 1152 (student voluntarily attending school picnic who was injured while voluntarily playing basketball game was not considered identifiable class member), cert. denied, 327 Conn. 961, 172 A.3d 801 (2017). "Students attending public school during school hours are afforded this special designation as identifiable victims because they were intended to be the beneficiaries of particular duties of care imposed by law on school officials; they [are] legally required to attend school rather than being there voluntarily; their parents [are] thus statutorily required to relinquish their custody to those officials during those hours; and, as a matter of policy, they traditionally require special consideration in the face of dangerous conditions." (Internal quotation marks omitted.) *Kusy* v. *Norwich*, supra, 192 Conn. App. 184–85. Accordingly, this court has consistently held that students who are injured outside of school hours do not fall within the class of identifiable victims under the identifiable victim-imminent harm exception. See *Marvin* v. *Board of Education*, 191 Conn. App. 169, 184, 213 A.3d 1155 (2019) (student athlete injured in locker room after school hours was not considered identifiable class member); *Jahn* v. *Board of Education*, 152 Conn. App. 652, 668–69, 99 A.3d 1230 (2014) (student athlete injured during swim practice was not considered identifiable class member).

In *Kusy* v. *Norwich*, supra, 192 Conn. App. 185–87, this court determined that a plaintiff did not fall within the identifiable class of foreseeable victims to invoke the identifiable person-imminent harm exception, even when the plaintiff's existence on the premises was

statutorily required to attend school during school hours." *Kusy* v. *Norwich*, supra, 192 Conn. App. 186 n.8.

required by his employer to complete a work-related task. The plaintiff in *Kusy*, a deliveryman, delivered milk to a local middle school as part of his employment duties. Id., 173. On one morning, he notified his employer that he noticed snow and ice on the premises, but his employer "ordered him to complete the delivery." Id. The plaintiff slipped on the ice and fell on the premises. Id.

This court upheld the trial court's granting of summary judgment in favor of the defendants, the city, the board of education, and city employees. Id., 187. "[U]nlike schoolchildren, the plaintiff was not required by law to be on school grounds. A contractual duty to deliver milk at the school falls far short of the legal compulsion imposed by our statutes that require a child's attendance at school." Id., 185. Further, the plaintiff's employer could "meet its contractual obligation to deliver milk to the school by waiting or returning at a later time" after the ice had been removed from the premises. Id. Importantly, this court noted that "our courts have not treated other classes of individuals, apart from schoolchildren, who are present on school grounds during school hours as identifiable victims because there is always an aspect of voluntariness to their presence on school grounds. . . . [E]ven when schoolchildren are on school grounds, our courts have not classified them as identifiable victims if they are on school property as part of voluntary activities." (Citations omitted; footnote omitted.) Id., 186–87. Thus, this court determined that the plaintiff failed to raise a genuine issue of material fact as to whether the defendants were entitled to governmental immunity, and it "decline[d] to extend the classes of individuals who may be identifiable victims beyond the narrow confines of children who are statutorily compelled to be on school grounds during regular school hours." Id., 187.

In the present case, the plaintiff claims that he is an identifiable victim because he was compelled to be

on the premises at the time of his injury. The plaintiff claims that, as a sports official, he was compelled to be on the premises and, without his presence, the volleyball match would not be permitted to go forward.[13] Essentially, the plaintiff asks us to extend the identifiable victim classification to encompass a plaintiff who is present on municipal property to officiate a voluntary activity outside of school hours. We decline to do so for the following reasons.

Just as in *Kusy*, "unlike schoolchildren, the plaintiff [in this case] was not required by law to be on school grounds." Id., 185. An assignment to officiate a volleyball game after school hours is nothing like the legal compulsion imposed by our statutes that require a child's attendance at school. Id. Moreover, the plaintiff conceded that he had the option to accept or to deny the assignment. The plaintiff's presence on the premises, therefore, was voluntary. The possibility that, had he denied this, or other, officiating assignments, the plaintiff might have received fewer future assignments, does not render his presence on the premises involuntary, and certainly does not give rise to the same degree of legal compulsion necessary to fall within the immunity exception.

It would be improper for this court to extend the identifiable victim classification in this case, particularly because the student athletes participating in the

[13] The plaintiff claims that "two referees were required in order for the volleyball match to go forward and be officially sanctioned." Upon review of the record, even in the light most favorable to the plaintiff, we cannot come to the same conclusion. When asked in his deposition whether a volleyball match could proceed with "no referees," Czaplinski answered, "[t]he match would not go forward without an official." Simon, when asked in his deposition whether the high school governing agency could sanction a match as official without having *any* certified referee, answered, "[n]o," and explained that he could not "remember" whether the local league required two referees for a volleyball match to be held. Finally, the plaintiff admitted in his deposition:

"Q. Is there ever a volleyball match where there is only one official?

"A. Sometimes."

volleyball game over which the plaintiff officiated would not themselves enjoy such a designation under existing law. See, e.g., *Marvin* v. *Board of Education*, supra, 191 Conn. App. 180–184; *Jahn* v. *Board of Education*, supra, 152 Conn. App. 668–69. In other words, if one of the student athletes had fallen from the officiating stand and sustained injuries, the defendants would enjoy governmental immunity from a premises liability claim initiated by the student. There is no doctrinal justification for treating the plaintiff differently than the schoolchildren.[14]

The judgment is affirmed.

In this opinion the other judges concurred.

ROGER FENNER *v.* COMMISSIONER OF CORRECTION (AC 43267)

Elgo, Alexander and Devlin, Js.

Syllabus

The petitioner, who had been convicted in 2009 of the crimes of murder and risk of injury to a child, filed a petition for a writ of habeas corpus on October 6, 2017. Thereafter, pursuant to the applicable statute (§ 52-470 (c) and (e)), the respondent Commissioner of Correction filed a request for an order to show cause why the untimely petition should be permitted to proceed. The habeas court held an evidentiary hearing, during which the petitioner testified that he was not aware of any

[14] At least three members of our Supreme Court recently have observed that the court's application of the identifiable person-imminent harm exception, particularly with respect to the identifiable person prong of the exception, may be doctrinally flawed, unduly restrictive, and/or ripe for revisiting in an appropriate future case. See *Borelli* v. *Renaldi*, supra, 336 Conn. 35, 59–60 n.20 (*Robinson*, *C. J.*, concurring); id., 67 (*D'Auria*, *J.*, concurring); id., 67–113, 146–54 (*Ecker*, *J.*, dissenting). Nevertheless, this court is required to follow binding Supreme Court precedent unless and until our Supreme Court sees fit to alter it. See *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010) ("it is manifest to our hierarchical judicial system that [our Supreme Court] has the final say on matters of Connecticut law and that the Appellate Court and Superior Court are bound by [Supreme Court] precedent").

deadlines for filing habeas petitions and that, in late 2016, he became concerned about the adequacy of the legal assistance furnished by his defense counsel due to his son's representation that counsel had not contacted him prior to the petitioner's 2009 guilty plea. The habeas court dismissed the habeas petition as untimely, concluding that the petitioner failed to rebut the presumption that the delay in filing the petition was without good cause. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the petitioner could not prevail on his claim that the habeas court abused its discretion in denying his petition for certification to appeal because he established good cause for the untimely filing of his habeas petition, as neither of the petitioner's reasons was sufficient to satisfy his burden of demonstrating good cause for the delay: despite his testimony that he was unaware of the statutory deadlines for filing habeas petitions, the petitioner was presumed to know the law, and the habeas court did not find his claimed ignorance to be credible but, instead, found that he was aware that his habeas petition could have been filed in the eight years following his conviction; moreover, although the petitioner testified that, in late 2016, his son provided information as to the purported lack of communication between his son and defense counsel, he presented no explanation or evidence regarding his failure to act on that information by filing his habeas petition before the October 1, 2017 deadline; furthermore, because the petitioner failed to raise any claim of good cause based on mental health issues or medications at the show cause hearing or in his petition for certification to appeal, this court could not conclude that the habeas court abused its ample discretion on that ground.

Argued May 10—officially released August 3, 2021

Procedural History

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

Deren Manasevit, with whom, on the brief, was *David J. Reich*, for the appellant (petitioner).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Anne Mahoney*, state's attorney, and *Leah Hawley*, former senior assistant state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, Roger Fenner, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court abused its discretion in denying his petition for certification because he had good cause for the untimely filing of his petition for a writ of habeas corpus. We disagree and, accordingly, dismiss the appeal.

The relevant facts are not in dispute. In December, 2009, the petitioner pleaded guilty to one count each of murder in violation of General Statutes § 53a-54a and risk of injury to a child in violation of General Statutes (Rev. to 2007) § 53-21. The trial court rendered judgment in accordance with that plea and sentenced the petitioner to a total effective term of fifty years of incarceration. The petitioner did not file a direct appeal.

On October 6, 2017, the petitioner filed a petition for a writ of habeas corpus.[1] The record indicates that no further action transpired until December 28, 2018, when the respondent, the Commissioner of Correction, filed a request with the habeas court pursuant to General Statutes § 52-470 (c) and (e) for an order directing the petitioner to show cause why his untimely petition should be permitted to proceed. The court held an evidentiary hearing on that request on March 15, 2019.

The only evidence presented at that hearing was the testimony of the petitioner,[2] who testified that, prior to his arrest, he had been living with his son.[3] The petitioner further testified that his arrest and subsequent

[1] The petitioner filed his petition for a writ of habeas corpus in a self-represented capacity. On January 9, 2018, Kirschbaum Law Group, LLC, filed an appearance on behalf of the petitioner.

[2] The respondent chose not to cross-examine the petitioner or to present any other evidence at the show cause hearing.

[3] In his petition for a writ of habeas corpus, the petitioner averred that his arrest occurred on January 12, 2007.

conviction angered his son, with whom he thereafter was estranged for several years. In late 2016, the petitioner reconnected with his son. When his son informed the petitioner that he never had been contacted by the petitioner's criminal trial attorney, the petitioner grew concerned that he had not been "told the truth about what went on" in his criminal prosecution. Although he conceded that he previously lacked an adequate ground to file a petition for a writ of habeas corpus, the petitioner testified that he now believed that he had "grounds to file" such a petition in light of his son's representation that he had not been contacted by defense counsel. The petitioner further testified that he was not aware of any deadlines to file a habeas corpus action and stated that, had he been so aware, he "definitely would have" filed one.

After the petitioner concluded his testimony, the court heard argument from both parties. At that time, the petitioner's habeas counsel reiterated that it was the petitioner's "contact in late 2016" with his son that "really induced" him to file the habeas petition, stating that the "piece of information that he received [from his son] was very pivotal in his mind . . . ." The respondent's counsel argued: "The petition was late. It was received by the court after the [statutory] deadline. [The petitioner] has not shown any newly discovered evidence. He is presumed to know the law whether he was aware of the statutory deadline or not. . . . [The petitioner] has failed to rebut [the] presumption of delay. He has not shown good cause."

In its subsequent memorandum of decision, the court stated in relevant part: "The only issue disputed by the parties is whether the petitioner can establish good cause for not having filed his petition [in a timely manner]. . . . The vague reasons provided by the petitioner—that his son was angry with him following his conviction, and that they did not have contact until

2016, and that he has since learned information from his son that he had not been interviewed by defense counsel and that counsel may otherwise not have told him the truth about what happened during his criminal case—are insufficient to establish good cause for his having failed to file a habeas petition prior to the October 1, 2017 deadline. Also, the petitioner admitted during his testimony that he had considered filing a habeas [petition] previously, but [he] did not do so. This establishes that he was aware that a petition could have been filed in the eight years subsequent to his conviction, but did not do so." (Footnote omitted; internal quotation marks omitted.) The court thus concluded that the petitioner had failed to rebut the presumption of delay codified in § 52-470 (c) and dismissed the petition for a writ of habeas corpus. The petitioner then filed a petition for certification to appeal, which the court denied, and this appeal followed.

On appeal, the petitioner claims that the court improperly denied his petition for certification to appeal because he had established good cause for the untimely filing of his petition for a writ of habeas corpus. We disagree.

The standard of review that governs such claims is well established. "Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be

reversed on its merits." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Crespo* v. *Commissioner of Correction*, 292 Conn. 804, 811, 975 A.2d 42 (2009).

Convicted criminals in this state are not afforded unlimited opportunity to challenge the propriety of their convictions or confinement. Our General Assembly enacted § 52-470 for the purpose of "ensuring expedient resolution of habeas cases." *Kelsey* v. *Commissioner of Correction*, 329 Conn. 711, 717, 189 A.3d 578 (2018); cf. *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 566–67, 153 A.3d 1233 (2017) (noting that 2012 amendments to § 52-470 were "intended to supplement that statute's efficacy in averting frivolous habeas petitions and appeals"). Subsections (c), (d) and (e) of that statute "provide mechanisms for dismissing untimely petitions." *Kelsey* v. *Commissioner of Correction*, supra, 717. Relevant to this appeal is § 52-470 (c), which provides in relevant part: "[T]here shall be a rebuttable presumption that the filing of a petition challenging a judgment of conviction has been delayed without good cause if such petition is filed after the later of the following: (1) Five years after the date on which the judgment of conviction is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; [or] (2) October 1, 2017 . . . ." It is undisputed that the petitioner's judgment of conviction was rendered on December 11, 2009, that he did not seek appellate review, and that he did not file his petition for a writ of habeas corpus until after October 1, 2017. That petition therefore was untimely, implicating the rebuttable presumption of delay mandated by § 52-470 (c).

Section § 52-470 (e) provides in relevant part: "In a case in which the rebuttable presumption of delay under subsection (c) . . . of this section applies, the court, upon the request of the respondent, shall issue an order

to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) . . . of this section." As this court has observed, "good cause has been defined as a substantial reason amounting in law to a legal excuse for failing to perform an act required by law . . . ." (Internal quotation marks omitted.) *Langston* v. *Commissioner of Correction*, 185 Conn. App. 528, 532, 197 A.3d 1034, appeal dismissed, 335 Conn. 1, 225 A.3d 282 (2020).

At the March 15, 2019 show cause hearing, the petitioner bore the burden of demonstrating good cause for his failure to file his petition for a writ of habeas corpus in a timely manner. The only evidence that he submitted at that hearing was his testimony that (1) he was unaware of any deadlines for filing such petitions and (2) in late 2016, he became concerned about the adequacy of the legal assistance furnished by his defense counsel due to his son's representation that counsel had not contacted his son prior to the petitioner's 2009 guilty plea. Neither suffices to establish good cause.

With respect to the former, it is well established that "[e]veryone is presumed to know the law . . . . Thus, the [petitioner] is charged with knowledge of the law." (Internal quotation marks omitted.) *Coleman* v. *Commissioner of Correction*, 202 Conn. App. 563, 576, 246 A.3d 54, cert. denied, 336 Conn. 922, 246 A.3d 2 (2021).

As our Supreme Court has long recognized, "[t]he familiar legal maxims, that everyone is presumed to know the law, and that ignorance of the law excuses no one, are founded upon public policy and in necessity, and the idea [underlying] them is that one's acts must be considered as having been done with knowledge of the law, for otherwise its evasion would be facilitated and the courts burdened with collateral inquiries into the content of [people's] minds. . . . This rule of public policy has been repeatedly applied by [our Supreme Court]." (Citation omitted.) *Atlas Realty Corp.* v. *House*, 123 Conn. 94, 101, 192 A. 564 (1937). Furthermore, the habeas court did not find the petitioner's claimed ignorance of the statutory deadline to be credible, as was its exclusive prerogative; see *Bowens* v. *Commissioner of Correction*, 333 Conn. 502, 523, 217 A.3d 609 (2019); and instead found that the petitioner "was aware that a petition could have been filed in the eight years subsequent to his conviction . . . ." The petitioner has not challenged the propriety of that factual finding in this appeal.

With respect to his claim regarding the purported lack of communication between his son and his defense counsel, the petitioner offered no explanation or evidence regarding his failure to act on that information in a timely manner. Although the petitioner testified at the show cause hearing that his son provided that information to him "towards the latter" part of 2016, it is undisputed that he had until October 1, 2017, to commence this habeas action and failed to do so. Because the petitioner presented no evidence whatsoever regarding his failure to file his habeas petition in those intervening months, the court properly concluded that he had failed to establish good cause.

The petitioner nonetheless argues that an alternative basis for a finding of good cause exists—namely, the existence of "mental health issues" and the allegation

that he "had recently been put on medications around the time he filed his habeas petition." No such claim ever was asserted by the petitioner at the show cause hearing, nor was any supporting evidence presented. Moreover, the petitioner failed to raise that claim in his petition for certification to appeal. This case thus resembles *Tutson* v. *Commissioner of Correction*, 144 Conn. App. 203, 72 A.3d 1162, cert. denied, 310 Conn. 928, 78 A.3d 145 (2013), in which this court stated: "The record does not reflect that before the habeas court the petitioner raised the present claim . . . prior to rendering its decision. More importantly, the petitioner did not raise the present claim in his petition for certification to appeal. . . . Because the petitioner did not raise the claim when asking the court to rule on his petition for certification to appeal, we cannot conclude that the court abused its discretion on that ground. . . . [A] petitioner cannot demonstrate that the habeas court abused its discretion in denying a petition for certification to appeal if the issue that the petitioner later raises on appeal was never presented to, or decided by, the habeas court. . . . Under such circumstances, a review of the petitioner's claims would amount to an ambuscade of the [habeas] judge. . . . Because the petitioner failed to raise this claim in his petition for certification to appeal or in his application for waiver of fees, costs and expenses and appointment of counsel on appeal, we decline to afford it review." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 216–17; see also *Banks* v. *Commissioner of Correction*, 205 Conn. App. 337, 342, A.3d (2021) ("[i]t is well established that a petitioner cannot demonstrate that a habeas court abused its discretion in denying a petition for certification to appeal on the basis of claims that were not raised distinctly before the habeas court at the time that it considered the petition for certification to appeal").

That precedent compels a similar conclusion here. Because the petitioner failed to raise any claim of good

cause based on mental health issues or medications at the show cause hearing or in his petition for certification to appeal, we cannot conclude that the court abused its ample discretion on that ground. The court, therefore, properly denied the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

BARRY GRAHAM *v.* COMMISSIONER OF TRANSPORTATION (AC 43919)

Bright, C. J., and Clark and Bear, Js.

Syllabus

The plaintiff sought to recover damages from the defendant Commissioner of Transportation pursuant to the state defective highway statute (§ 13a-144), for injuries that he sustained as a result of a motor vehicle accident that occurred on a bridge over a public highway. The plaintiff alleged that the accident was caused by black ice on the bridge, which he claimed constituted a highway defect. Before the plaintiff's accident, the state police had informed the Department of Transportation of another ice related accident on the bridge. The plaintiff's accident occurred before the arrival of the department's crew. The case was tried to a jury and, after three days of deliberations, the jury attempted to return a plaintiff's verdict while also answering "no" to an interrogatory that asked the jury whether it found that the defendant had a reasonable amount of time to remedy the defect before the plaintiff's accident. After the trial court returned the jury to continue its deliberations, the jury returned with a defendant's verdict, maintaining its "no" answer to the interrogatory. The trial court accepted the verdict, denied the plaintiff's motion to set aside the verdict, and this appeal followed. *Held*:

1. The plaintiff could not prevail on his claim that the trial court abused its discretion by refusing to accept the jury's initial verdict and by returning the jury to continue its deliberations to rectify an inconsistency in its verdict: the jury found, in its answer to the interrogatory, that the defendant did not have a reasonable amount of time to remedy the defect, and, accordingly, the defendant could not be liable to the plaintiff and the trial court correctly concluded that the initial verdict in favor of the plaintiff was inconsistent with its response to the interrogatory; moreover, this court did not consider the plaintiff's claims that the interrogatory was confusing and suffered from inartful wording because he did not timely object to the inclusion of or to the text of the interrogatory before it was submitted to the jury.

2. This court declined to review the plaintiff's claim that the trial court erred with respect to the instruction that it gave to the jury before returning the jury to continue its deliberations because that claim was not properly preserved: although the plaintiff's counsel argued that the particular language of the supplemental charge, namely, its lack of a specific reference to the challenged interrogatory, constituted an abuse of discretion, the plaintiff's counsel did not object to the court's instruction prior to the jury's return with a defendant's verdict, and the general comments of the plaintiff's counsel were neither timely nor sufficient to preserve the issue for review by this court; moreover, even if counsel's statements could have been perceived as an objection to the court's supplemental instruction, they were not timely when they were made for the first time after the jury returned from its deliberations and the court accepted its verdict.

Argued May 18—officially released August 3, 2021

Procedural History

Action to recover damages for personal injuries sustained as a result of alleged highway defects, and for other relief, brought to the Superior Court in the judicial district of New London, where Ethan Raymond Graham, administrator of the estate of Barry Graham, was substituted as the plaintiff; thereafter, the case was tried to the jury before *Calmar*, *J.*; verdict for the defendant; subsequently, the court, *Calmar*, *J.*, denied the substitute plaintiff's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the substitute plaintiff appealed to this court. *Affirmed.*

Ralph J. Monaco, with whom, on the brief, was *Eric J. Garofano*, for the appellant (substitute plaintiff).

Paul T. Nowosadko, with whom was *Lorinda S. Coon*, for the appellee (defendant).

Opinion

BEAR, J. The substitute plaintiff, Ethan Raymond Graham, the administrator of the estate of the plaintiff, Barry Graham,[1] appeals from the judgment of the trial

[1] On April 8, 2019, Ethan Raymond Graham was substituted as the plaintiff in his capacity as the administrator of the plaintiff's estate following the plaintiff's death on March 8, 2018. In this opinion, we refer to Ethan Raymond Graham as the substitute plaintiff and to Barry Graham as the plaintiff.

court denying his motion to set aside a jury verdict in favor of the defendant, the Commissioner of Transportation, after the jury found the defendant not liable for the plaintiff's motor vehicle accident and resulting injuries under the defective highway statute, General Statutes § 13a-144.[2] On appeal, the substitute plaintiff claims that the trial court (1) abused its discretion by refusing to accept the jury's initial verdict, and by returning the jury to continue its deliberations to rectify an inconsistency in its verdict, and (2) erred with respect to the instruction that it gave to the jury prior to returning the jury to continue its deliberations. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our consideration of the substitute plaintiff's claims on appeal. This matter arose out of a motor vehicle accident that occurred on December 12, 2011, on the Gold Star Memorial Bridge (bridge) on Interstate 95 over the Thames River between New London and Groton. The plaintiff brought this action against the defendant pursuant to § 13a-144, the "defective highway statute," alleging that his accident was caused by black ice, which constituted a highway defect. The defendant filed a motion for summary judgment claiming, among other things, a lack of notice of the icy spot on the bridge that caused the plaintiff's accident and that, even if notice of the icy condition of the bridge existed, the plaintiff's accident occurred before there was a reasonable amount of time to respond to and remedy that condition. It was undisputed that another ice related car accident had occurred on the bridge earlier that day, at 5:40 a.m., and that the state police had notified the

[2] General Statutes § 13a-144 provides in relevant part: "Any person injured in person or property through the neglect or default of the state or any of its employees by means of any defective highway . . . which it is the duty of the Commissioner of Transportation to keep in repair . . . may bring a civil action to recover damages sustained thereby against the commissioner in the Superior Court. . . ."

Department of Transportation (department) at 5:49 a.m. of the icy conditions on the bridge.

The defendant submitted affidavits describing the prompt activation of the department's after-hours call out protocol and the activities of the department's crew in traveling from their homes to a department garage in Waterford, loading a truck with salt, and driving to the bridge. The plaintiff's accident occurred at 6:38 a.m., before the arrival of the department's crew. The trial court granted the defendant's motion for summary judgment, concluding that, even if the defendant had constructive notice of the icy conditions of the bridge on the basis of the earlier accident, the department's response time was reasonable as a matter of law.

On appeal, this court reversed the trial court's granting of the defendant's motion for summary judgment, concluding that there were genuine issues of material fact with respect to the reasonableness of the defendant's response after he received notice of the defect, and that this "multifactorial determination" should be made by a jury. See *Graham* v. *Commissioner of Transportation*, 168 Conn. App. 570, 586, 148 A.3d 1147 (2016), rev'd in part on other grounds, 330 Conn. 400, 195 A.3d 664 (2018). Our Supreme Court granted the defendant's petition for certification to appeal in part, focusing on a sovereign immunity issue that is not relevant to the present appeal. See *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 403 n.2, 195 A.3d 664 (2018). Our Supreme Court remanded the case for trial, noting that "the sole factual issue remaining . . . [was] the reasonableness of the commissioner's response to the highway defect *after* receiving notice from the state police." (Emphasis in original.) Id., 427.

Because the plaintiff died during the pendency of that appeal, following the remand, the administrator of the plaintiff's estate was substituted as the plaintiff.

The case was tried to a jury in November, 2019, and the defendant maintained at trial that the department's crew acted reasonably and did not have time to travel to the bridge prior to the plaintiff's accident. The defendant submitted proposed jury interrogatories to the substitute plaintiff's counsel, who "reviewed the interrogatories and made a change unrelated to the present controversy." Interrogatory number four, which is central to this appeal, provided: "Do you find that the defendant had a reasonable time to remedy the specific defect after [he] knew of it prior to the plaintiff's accident?"

After three days of deliberations, the jury attempted to return a plaintiff's verdict while also answering "no" to interrogatory number four (initial verdict).[3] The court thereafter stated: "Ladies and gentlemen of the jury, it is apparent to me, from a review of the jury interrogatories and verdict form that you have submitted, that you've made a mistake. Specifically, I'm returning you to the jury deliberation room to reconsider your verdict in light of the jury interrogatories and to correct that mistake. If you need portions of the evidence or charge reread to assist you, please provide me with a note in accordance with the procedures I've previously described. I think at this stage that's all I'll say. And if you need further guidance, you can advise me accordingly." There was no contemporaneous objection to the court's instruction. The jury returned a few minutes later with a defendant's verdict, maintaining its "no" answer to interrogatory number four. The court accepted the verdict. The substitute plaintiff thereafter filed a motion to set aside the verdict, which the court denied. This appeal followed.

[3] The parties disagree with respect to whether the so-called initial verdict was technically a verdict, because it was not accepted by the court. We, however, for convenience, refer to the jury's attempt to return a plaintiff's verdict, while answering "no" to interrogatory number four, as the initial verdict, although it was not accepted by the court.

I

The substitute plaintiff claims that the trial court abused its discretion by refusing to accept the initial verdict and by returning the jury to its deliberations to rectify the inconsistency in that verdict. Specifically, the substitute plaintiff argues that the initial verdict was "supported by the answers to interrogatories [one, two, three, five, and six],[4] taken in combination with the presumption that the jury followed the jury charge," and that, because interrogatory number four "contains language that is markedly different than the jury charge," therefore "[t]he negative answer to [interrogatory number four] does not defeat the plaintiff's verdict." (Footnote added.) Additionally, the substitute plaintiff argues that "there was extensive evidence of prior accidents on the bridge covered with ice to allow the jury to make a fact specific determination that the [department's] response time was not reasonable." We are not persuaded.

We begin with our standard of review. "The proper appellate standard of review when considering the action of a trial court in granting or denying a motion to set aside a verdict is the abuse of discretion standard. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be

[4] The interrogatories, and the jury's answers to them, were: "1. Do you find that the Gold Star Memorial Bridge northbound at the location of the alleged accident was reasonably safe for the reasonably prudent traveler at the time of [the plaintiff's] accident? No. 2. Do you find that the ice on the bridge was such that it 'would necessarily obstruct or hinder one in the use of the road for purposes of traveling thereon?' Yes. 3. Do you find that before the plaintiff's accident the defendant actually knew of the specific defect which the plaintiff alleges caused his accident? Yes. 4. Do you find that the defendant had a reasonable time to remedy the specific defect after [he] knew of it prior to the plaintiff's accident? No. 5. Do you find that the plaintiff was in the exercise of due care at the time of the accident? Yes. 6. Do you find that the alleged highway defect was the only substantial factor causing the plaintiff's claimed injuries? Yes."

given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done. . . . [T]he role of the trial court on a motion to set aside the jury's verdict is not to sit as [an additional] juror . . . but, rather, to decide whether, viewing the evidence in the light most favorable to the prevailing party, the jury could reasonably have reached the verdict that it did. . . . In reviewing the action of the trial court in denying [or granting a motion] . . . to set aside the verdict, our primary concern is to determine whether the court abused its discretion . . . ." (Internal quotation marks omitted.) *Rendahl* v. *Peluso*, 173 Conn. App. 66, 94–95, 162 A.3d 1 (2017).

Additionally, this court stated in *Rendahl* that, "[p]ursuant to General Statutes § 52-223, [t]he court may, if it judges the jury has mistaken the evidence in the action and has brought in a verdict contrary to the evidence, or has brought in a verdict contrary to the direction of the court in a matter of law, return them to a second consideration, and for the same reason may return them to a third consideration. The jury shall not be returned for further consideration after a third consideration. See also Practice Book § 16-17. . . .

"A trial court may decline to accept a verdict and return the jury to continue its deliberations when the verdict form or accompanying interrogatories, if any: are legally inconsistent; e.g., *Bilodeau* v. *Bristol*, 38 Conn. App. 447, 455, 661 A.2d 1049 ([w]here answers to interrogatories are inconsistent, trial court has duty to attempt to harmonize the answers), cert. denied, 235 Conn. 906, 665 A.2d 899 (1995); contain incomplete findings as to the essential elements of a cause of action or fail to completely dispose of an essential issue; e.g., *Tisdale* v. *Riverside Cemetery Assn.*, 78 Conn. App. 250, 258–60, 826 A.2d 232, cert. denied, 266 Conn. 909, 832 A.2d 74 (2003); or are so ambiguous that the verdict

cannot be said to contain an intelligible finding . . . .'' (Internal quotation marks omitted.) *Rendahl* v. *Peluso*, supra, 173 Conn. App. 95–96; see also *Kregos* v. *Stone*, 88 Conn. App. 459, 470, 872 A.2d 901 (''[a] verdict that is inconsistent or ambiguous should be set aside''), cert. denied, 275 Conn. 901, 882 A.2d 672 (2005).

In the present case, interrogatory number four asked the jury to determine whether the defendant had a reasonable amount of time to remedy the specific defect of an icy road surface after he became aware of the defect prior to the plaintiff's accident. The jury found that he did not have a reasonable time to remedy the highway defect. Because the jury found that he did *not* have a reasonable amount of time to remedy the defect after receiving notice of the icy condition of the bridge, the defendant could not be liable to the plaintiff. See *Graham* v. *Commissioner of Transportation*, supra, 168 Conn. App. 584–85. Thus, the trial court correctly concluded that the initial verdict of the jury in favor of the plaintiff was inconsistent with the jury's response to interrogatory number four. The court's decision not to accept the inconsistent verdict but to return the jury for further deliberations was not an abuse of discretion.

The substitute plaintiff attempts to avoid this result by focusing on the difference in language between interrogatory number four, ''[d]o you find that the [defendant] had a reasonable time to remedy the specific defect after [he] knew of it prior to the plaintiff's accident,'' and the language of the jury charge, whether the defendant ''failed to remedy the defect within a reasonable time when considering all the circumstances.'' In the substitute plaintiff's view, ''considering all the circumstances'' is a significant enough variation from the language of interrogatory number four that a negative answer to interrogatory number four would not defeat a plaintiff's verdict. In other words, the substitute plaintiff would have us ignore interrogatory number four on the ground that it does not exactly mirror

the jury charge and hold, instead, that all of the elements of the plaintiff's highway defect claim had been proven on the basis of the other interrogatories.

The substitute plaintiff, however, did not timely object either to the inclusion of or to the text of interrogatory number four before it was submitted with the other interrogatories to the jury. Prior to the filing of the defendant's proposed interrogatories with the court, the substitute plaintiff's counsel had the opportunity to review them and did, in fact, suggest a change to be made to one of those interrogatories, other than interrogatory number four. On appeal, the substitute plaintiff claims for the first time that interrogatory number four was "confus[ing]," suffered from "inartful wording," and erroneously "combine[d] the issue of 'reasonable time' with the analysis of causation"—defects that he now claims are severe enough to warrant overturning the jury's subsequent defendant's verdict. In light of the failure of the substitute plaintiff's counsel to timely object to the inclusion or to the wording of interrogatory number four during trial, we will not consider those claims on appeal. See *Mokonnen* v. *Pro Park, Inc.*, 113 Conn. App. 765, 770–71, 982 A.2d 916 (2009) ("We may presume from the plaintiff's repeated failure to object to the interrogatories that he agreed to their content and their submission to the jury. . . . The plaintiff's claimed error was never distinctly raised at trial, and, accordingly, it was not preserved for appeal." (Citation omitted.)).

"It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial. . . . [O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at

trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party. . . . [S]ee . . . Practice Book § 60-5 (court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial)." (Citation omitted; internal quotation marks omitted.) *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 454–55, 219 A.2d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020).

II

The substitute plaintiff next claims that "after the trial court declined to accept the [initial verdict], it erroneously instructed the jury by failing to express the court's concern regarding one answer to [the] jury interrogatories." The substitute plaintiff argues that it was an abuse of discretion for the trial court to instruct the jury that it believed the jury had " 'made a mistake,' " without any "specific instruction about the court's concern regarding [interrogatory number four]," and that the court's instruction "left the jury confused and without guidance pertaining to the court's concern." The substitute plaintiff claims that, in light of the court's instruction, the jury was left with "only . . . two options: plaintiff's verdict or defendant's verdict. After the court told [the jury] that [it] made a mistake, the jury returned the only other option, a defendant's verdict." We conclude that this claim was not properly preserved, and, thus, we decline to review it.

The following additional facts are necessary for an understanding of the substitute plaintiff's claim. After the jury returned its initial verdict, the court instructed the jury regarding its mistake and returned the jury to its deliberations to rectify it. The substitute plaintiff's counsel did not object to the court's instruction prior to the jury's return with a defendant's verdict. Thereafter, the substitute plaintiff's counsel stated: "I'm very

concerned that, you know, within the course of ten minutes they've gone from a plaintiff's verdict and now have turned around and—you know, because the court sent them back, my concern is that they're very confused—they thought you didn't like that verdict; you thought that was the wrong verdict. And I know that's not what the court intended to do, but I fear that these people are—you know, thought that, okay, we came out with a plaintiff's verdict, judge didn't like it, sent us back, said, you know, rethink it; and so now we've come out with a defendant's verdict and the judge accepted that and we're all done.

"So I think what we have here, Your Honor, is a confused jury. We've been at this now for—they've been at it for three days. As long as the case [was] tried they've been deliberating. And I don't think it's fair to accept the verdict, Your Honor, in this state. It's clear to me that, you know, they—I mean, they obviously thought that there should be an award of damages: they filled out that form; they were thoughtful in filling it out; it's not for what I asked for—it's for significantly less than what I asked for—but nevertheless, they filled it out. And so I think, you know, we have here a jury that returned a plaintiff's verdict; you didn't accept it; you sent them back; and they said, okay, here's a defendant's verdict. There are only two options.

"So I'm concerned that, you know, we have a jury here that really is very confused about the law, and I don't think it's fair, Your Honor, to accept the verdict based on the obvious confusion that has been manifested by the course of events over the last few minutes."

The substitute plaintiff argues that those comments of counsel "represent an explicit objection to the supplemental charge." We disagree. The comments of the substitute plaintiff's counsel following the defendant's verdict state, with respect to the supplemental charge,

that "the court sent them back," and that the judge "didn't like [the initial verdict], sent us back, said, you know, rethink it . . . ." On appeal, the substitute plaintiff now argues that the particular language of the supplemental charge, namely, its lack of a specific reference to interrogatory number four, constituted an abuse of discretion. The general comments of the substitute plaintiff's counsel, however, were neither timely nor sufficient to preserve this issue for our review.

"[T]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court [and the opposing party] on reasonable notice of that very same claim." (Internal quotation marks omitted.) *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, supra, 193 Conn. App. 455.

The substitute plaintiff's counsel did not object to the court's supplemental instruction after it was given, and counsel's general comments following the jury's final verdict did not articulate with sufficient clarity an objection to the precise language of that supplemental instruction. Even if counsel's statements could be perceived as an objection to the court's supplemental instruction, they were not timely when they were made for the first time after the jury returned from its deliberations and the court accepted its verdict.[5] Therefore, we

[5] The substitute plaintiff suggested in his reply brief and his counsel suggested in his oral argument before this court that there was insufficient time for him to raise an objection to the court's supplemental instruction when it returned the jury for further deliberations because of how quickly the jury returned with its final verdict. We disagree. It would have taken the substitute plaintiff's counsel a mere moment to voice an objection, ask the court to tell the jury to suspend deliberations while he considered his options, or ask that the court not have the jury return its final verdict until he decided if he wanted to request a further instruction from the court. In fact, before the jury returned its final verdict, the defendant's counsel objected "to the jury being sent out again" and asked for a directed verdict. Clearly, the substitute plaintiff's counsel could have raised any issues he had at the same time.

decline to review this claim because it was not properly preserved. See *Szekeres* v. *Szekeres*, 126 Conn. App. 829, 847 n.7, 16 A.3d 713 (Because the plaintiffs "did not take exception to the court's instructions to the jury and did not object to the verdict form and interrogatories, their claims are unpreserved. Accordingly, we decline to review them."), cert. denied, 300 Conn. 939, 17 A3d 475 (2011), and cert. denied, 300 Conn. 940, 17 A.3d 475 (2011).

The judgment is affirmed.

In this opinion the other judges concurred.

U.S. BANK, NATIONAL ASSOCIATION, TRUSTEE *v.* CHRISTOPHER M. FITZPATRICK ET AL.
(AC 44143)

Bright, C. J., and Cradle and Bishop, Js.

Syllabus

The plaintiff, as trustee, sought to foreclose a mortgage on certain real property owned by the defendant F. The trial court granted the plaintiff's motion for summary judgment as to liability only and rendered a judgment of foreclosure by sale, from which F appealed to this court, which affirmed the judgment of the trial court and remanded the case to that court to set a new sale date. The trial court ordered a new sale date and waived newspaper advertisements. The committee filed a motion to approve the sale and the trial court rendered judgment approving the sale and deed, from which F appealed to this court. Thereafter, the court granted the plaintiff's motion to terminate the appellate stay and, although F objected to the motion, he did not file a motion for review of the trial court's order granting that motion. *Held* that F's appeal was moot and, accordingly, the appeal was dismissed; because F failed to seek review of the court's order terminating the appellate stay, the judicial sale became final, and title vested in the plaintiff and F's right of redemption was extinguished.

Argued May 11—officially released August 3, 2021

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Truglia*, *J.*, granted the plaintiff's motion for summary judgment as to liability; thereafter, the court, *Hon. Alfred J. Jennings*, *Jr.*, judge trial referee, rendered judgment of foreclosure by sale, from which the named defendant appealed to this court, *DiPentima*, *C. J.*, and *Alvord* and *Eveleigh*, *Js.*, which affirmed the trial court's judgment and remanded the case for the purpose of setting a new sale date; subsequently, the court, *Spader*, *J.*, ordered foreclosure by sale and waived newspaper advertisements; thereafter, the court, *Spader*, *J.*, granted the plaintiff's motion to approve the sale and committee deed, from which the named defendant appealed to this court; subsequently, the court, *Spader*, *J.*, granted the plaintiff's motion to terminate the appellate stay. *Appeal dismissed.*

Ryan P. Driscoll, for the appellant (named defendant).

Jeffrey M. Knickerbocker, for the appellee (plaintiff).

Opinion

PER CURIAM. In this foreclosure action, the defendant Christopher M. Fitzpatrick[1] appeals from the judgment of the trial court approving the sale of the mortgaged property, on the motion of the committee of sale (committee), following the court's rendering of a judgment of foreclosure by sale in favor of the plaintiff mortgagee, U.S. Bank, National Association, as Trustee for MASTR 2007-2. On appeal, the defendant argues that his objection to the motion for approval of committee sale, which was based on a lack of newspaper advertisements, should have been sustained. The plaintiff

[1] In its complaint, the plaintiff also named the Department of Revenue Services and the Internal Revenue Service as defendants, but these govern-

argues that this appeal is moot because the defendant failed to seek review of the court's termination of the appellate stay and, thus, title to the subject property has vested in the plaintiff. We agree with the plaintiff that this court can provide no practical relief on appeal, and, therefore, we dismiss the appeal as moot.

The following facts and procedural history are relevant to this appeal. In May, 2016, the plaintiff commenced this action against the defendant to foreclose a mortgage on property he owned in Stratford. The plaintiff filed a motion for summary judgment as to liability on December 22, 2017, which the court subsequently granted. The court then rendered a judgment of foreclosure by sale on March 22, 2018, from which the defendant appealed to this court. This court affirmed the foreclosure judgment and remanded the case for the purpose of setting a new sale date. *U.S. Bank, National Assn.* v. *Fitzpatrick*, 190 Conn. App. 773, 794, 212 A.3d 732, cert. denied, 333 Conn. 916, 217 A.3d 1 (2019).

On December 30, 2019, in accordance with this court's opinion, the trial court ordered a foreclosure by sale with a sale date of February 22, 2020, and waived newspaper advertisements. The defendant did not object to that order.[2] The court determined that the fair market value of the property was $610,000, which was confirmed by an appraisal. The committee received only one bid, from the plaintiff, to purchase the property for $433,500. On February 24, 2020, the committee filed a

mental entities are not participating in this appeal. We, therefore, refer in this opinion to Christopher M. Fitzpatrick as the defendant.

[2] The listing was posted on the Judicial Branch website. The court later explained in its memorandum of decision on the plaintiff's motion to terminate the appellate stay that "the defendant did not object to the court's order not requiring *newspaper* advertising when the order was issued and, in reality, newspaper advertisements are not the place where serious potential foreclosure purchasers learn of foreclosure sales. The Judicial Branch has developed a 'foreclosure listings' website where all foreclosure sales are advertised. This property was so listed." (Emphasis in original.)

motion to approve the sale. The defendant objected to that motion, arguing that the lack of newspaper advertisements had prejudiced him. On June 3, 2020, the court entered an order overruling the defendant's objection and rendered judgment approving the sale and deed, from which the defendant appealed to this court.

Subsequently, the plaintiff moved to terminate the appellate stay, arguing that the appeal was without merit. On September 16, 2020, the court granted the plaintiff's motion to terminate the appellate stay, explaining that "[t]he court believes that it is unlikely that the defendant will prevail on appeal."[3] The defendant objected to the plaintiff's motion to terminate the appellate stay but failed to seek review by this court of the trial court's order granting the motion. This appeal followed.

The defendant's principal argument is that the court erred by granting the committee's motion to approve the sale without any newspaper advertisements. This issue is moot. Because title has vested in the plaintiff and the defendant's rights in the property have thus been terminated, this court can provide no practical relief to the defendant.

The question of mootness implicates our subject matter jurisdiction. "It is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pen-

[3] The plaintiff first filed a motion to terminate the stay on July 6, 2020, pursuant to Practice Book § 61-11 (g), which the court denied without prejudice. The plaintiff then filed another motion to terminate the stay pursuant to Practice Book § 61-11 (d) and (e), which the court granted after a hearing.

dency of the appeal." (Internal quotation marks omitted.) *Ocwen Federal Bank, FSB* v. *Charles*, 95 Conn. App. 315, 325, 898 A.2d 197, cert. denied, 279 Conn. 909, 902 A.2d 1069 (2006). "When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . Mootness implicates this court's subject matter jurisdiction, raising a question of law over which we exercise plenary review." (Citation omitted; internal quotation marks omitted.) *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 679–80, 899 A.2d 586 (2006).

A brief review of the basic legal principles regarding mortgages and foreclosures by sale informs our conclusion. "Connecticut follows the title theory of mortgages, which provides that on the execution of a mortgage on real property, the mortgagee holds legal title and the mortgagor holds equitable title to the property. . . . As the holder of equitable title, also called the equity of redemption, the mortgagor has the right to redeem the legal title on the performance of certain conditions contained within the mortgage instrument. . . . The mortgagor continues to be regarded as the owner of the property during the term of the mortgage. . . . The equity of redemption gives the mortgagor the right to redeem the legal title previously conveyed by performing whatever conditions are specified in the mortgage, the most important of which is usually the payment of money. . . . Generally, foreclosure means to cut off the equity of redemption, the equitable owner's right to redeem the property." (Citations omitted; internal quotation marks omitted.) *Ocwen Federal Bank, FSB* v. *Charles*, supra, 95 Conn. App. 322–23. "Simply put, once title has vested absolutely in the mortgagee, the mortgagor's interest in the property is extinguished and cannot be revived by a reviewing court." Id., 324.

"In a foreclosure by sale, a mortgagor may exercise his rights of redemption until such time as the judicial authority approves the foreclosure sale. The [judicial] sale is not absolute until confirmed. The order of confirmation gives the judicial sanction of the court, and when made it relates back to the time of the sale . . . . Generally, once a court has approved the foreclosure sale and the applicable appeal period has elapsed, the mortgagor's right of redemption is extinguished and the court's jurisdiction to modify that judgment ends. . . . *Accordingly, after the sale is approved and the relevant appeals periods have expired, any action by the mortgagor to redeem should be dismissed as moot.*" (Citations omitted; emphasis altered; internal quotation marks omitted.) *Wells Fargo Bank of Minnesota, N.A.* v. *Morgan*, 98 Conn. App. 72, 79–80, 909 A.2d 526 (2006).

The defendant filed a timely appeal of the court's order granting the motion to approve the sale, but he failed to file a motion for review of the order terminating the appellate stay. "Practice Book § 61-14 provides that the sole remedy for review of a court's granting of a motion to terminate a stay of execution is to file a motion for review.[4] Under this section, the court's order granting the motion to terminate the stay is stayed for ten days from the issuance of the order to permit a party to file a motion for review. The [defendant], therefore, had ten days from the court's . . . ruling in which to file a motion for review." (Footnote in original.) *Lucas* v. *Deutsche Bank National Trust Co.*, 103 Conn. App. 762, 767–68, 931 A.2d 378, cert. denied, 284 Conn. 934, 935 A.2d 151 (2007).

[4] "Practice Book § 61-14 provides in relevant part: 'The sole remedy of any party desiring the court to review an order concerning a stay of execution shall be by motion for review under Section 66-6. Execution of an order of the court terminating a stay of execution shall be stayed for ten days from the issuance of notice of the order, and if a motion for review is filed within that period, the order shall be stayed pending decision of the motion, unless the court having appellate jurisdiction rules otherwise. . . .' " *Lucas* v. *Deutsche Bank National Trust Co.*, 103 Conn. App. 762, 767 n.7, 931 A.2d 378, cert. denied, 284 Conn. 934, 935 A.2d 151 (2007).

Because the defendant failed to file a motion for review, the judicial sale became final. The defendant's right of redemption was extinguished as soon as the ten day period expired.[5] Thus, title passed to the plaintiff on June 5, 2020, when the committee filed the deed of sale with the court. Accordingly, this appeal is moot, and we therefore do not reach the defendant's arguments on their merits.

The appeal is dismissed.

CHIEF DISCIPLINARY COUNSEL *v.* JOSEPH ELDER (AC 43733)

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

Syllabus

The defendant attorney appealed to this court from the judgment of the trial court reprimanding him for violations of the rules of practice and the Rules of Professional Conduct in connection with misconduct involving his IOLTA account. The plaintiff, the Chief Disciplinary Counsel, filed a presentment alleging the misconduct after a reviewing committee of the Statewide Grievance Committee found that there was probable cause that the defendant had violated various provisions of the Rules of Professional Conduct and the rules of practice. The trial court denied the defendant's motion to dismiss the presentment complaint on the grounds that it was untimely because the reviewing committee took more than ninety days to render its final written decision, in contravention of the applicable statute (§ 51-90g (c)) and rule of practice (§ 2-35 (i)), and because the reviewing committee had considered allegations of misconduct beyond the scope of its probable cause determination. *Held*:

1. The trial court did not err when it refused to dismiss the presentment complaint due to the reviewing committee's failure to issue a final written decision within ninety days of its determination of probable cause; the failure of the reviewing committee to abide by the time frames established in § 51-90g (c) and Practice Book § 2-35 (i) did not divest

[5] *Our Supreme Court recently opined that in "rare and exceptional cases" equitable claims may still be made after title has passed in a foreclosure matter. U.S. Bank National Assn.* v. *Rothermel*, Conn. , A.3d (2021). We do not view the holding in *Rothermel* as applicable to the factual and procedural history of this case as the underlying circumstances are neither rare nor exceptional.

the trial court of subject matter jurisdiction over the disciplinary action, as § 51-90g (c) and Practice Book § 2-35 (m) provide that the reviewing committee's untimeliness did not require dismissal of the presentment complaint.

2. The trial court did nor err when it refused to dismiss the presentment complaint because the reviewing committee considered allegations outside the scope of its probable cause determination; the applicable rule of practice (§ 2-35 (d) (1)) expressly provides that the disciplinary counsel may add additional allegations of misconduct before the reviewing committee holds a hearing on the alleged misconduct.

Argued May 25—officially released August 3, 2021

Procedural History

Presentment by the plaintiff for alleged professional misconduct by the defendant, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Sheridan, J.*; judgment reprimanding the defendant, from which the defendant appealed to this court. *Affirmed.*

Joseph S. Elder, self-represented, the appellant (defendant).

Leanne M. Larson, first assistant chief disciplinary counsel, for the appellee (plaintiff).

Opinion

BRIGHT, C. J. The defendant attorney, Joseph Elder, appeals from the judgment of the trial court reprimanding him for violations of the rules of practice and the Rules of Professional Conduct. Specifically, the defendant claims that the court erred in not dismissing the presentment complaint against him because the reviewing committee (1) did not abide by the time frames set forth in General Statutes § 51-90g (c) and Practice Book § 2-35 (i), and (2) improperly considered allegations of misconduct that were filed by the plaintiff, the Chief Disciplinary Counsel, after the reviewing committee had made a probable cause determination. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On November 14, 2014, the Statewide Grievance Committee received an overdraft notice from Webster Bank stating that an interest on lawyers' trust account (IOLTA) account in the defendant's name had posted two transactions for which the account had insufficient funds. The Statewide Grievance Committee then mailed a letter to the defendant, requesting an explanation for the overdraft. The defendant explained that the overdraft had resulted from an attempt to transfer funds *from* his PayPal account *to* his Webster Bank account.[1] After learning that the defendant's IOLTA account was linked to a PayPal account, the Statewide Grievance Committee requested more information about the accounts. The defendant failed to comply with this request, and the overdraft matter was referred to the plaintiff, who filed a grievance on April 22, 2015.

On July 8, 2015, the assigned reviewing committee found probable cause that the defendant had violated Practice Book § 2-27.[2] Thereafter, the plaintiff filed additional allegations of misconduct against the defendant, asserting that he also had violated rules 1.15 (b), (c), (j), and (k) (3), and 8.1 (2) of the Rules of Professional Conduct.[3] On November 3, 2015, the reviewing commit-

[1] The defendant had "intended to fund a $608 PayPal transaction with his credit card, but did not specifically indicate that, and therefore the funds were withdrawn from the bank account linked to the PayPal account, namely the Webster Bank IOLTA account . . . ."

[2] Practice Book § 2-27 (a) provides: "Consistent with the requirement of Rule 1.15 of the Rules of Professional Conduct, each lawyer or law firm shall maintain, separate from the lawyer's or the firm's personal funds, one or more accounts accurately reflecting the status of funds handled by the lawyer or firm as fiduciary or attorney, and shall not use such funds for any unauthorized purpose."

[3] Rule 1.15 (b) of the Rules of Professional Conduct provides in relevant part: "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated . . . ."

tee held a hearing on the grievance, and then issued a decision directing that a presentment complaint be filed against the defendant in Superior Court. That presentment complaint was later dismissed and the matter was remanded for a new hearing before the reviewing

Rule 1.15 (c) of the Rules of Professional Conduct provides: "A lawyer may deposit the lawyer's own funds in a client trust account for the sole purposes of paying bank service charges on that account or obtaining a waiver of fees and service charges on the account, but only in an amount necessary for those purposes."

Rule 1.15 (j) of the Rules of Professional Conduct provides in relevant part: "A lawyer who practices in this jurisdiction shall maintain current financial records as provided in this Rule and shall retain the following records for a period of seven years after termination of the representation:

(1) receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee and purpose of each disbursement;

(2) ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed . . .

(5) copies of bills for legal fees and expenses rendered to clients . . .

(7) the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, prenumbered canceled checks, and substitute checks provided by a financial institution;

(8) records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn and the date and the time the transfer was completed; [and]

(9) copies of monthly trial balances and at least quarterly reconciliations of the client trust accounts maintained by the lawyer . . . ."

Rule 1.15 (k) of the Rules of Professional Conduct provides in relevant part: "With respect to client trust accounts required by this Rule . . . (3) withdrawals shall be made only by check payable to a named payee or by authorized electronic transfer and not to cash."

Rule 8.1 of the Rules of Professional Conduct provides in relevant part: "An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not . . . (2) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority . . . ."

committee.[4] After a second hearing on February 8, 2017, at which the defendant failed to appear, the reviewing committee again issued a decision directing that a presentment complaint be filed. The plaintiff filed a presentment complaint in the Superior Court on September 28, 2017, alleging that the defendant violated rules 1.15 (b), (c), (j), and (k) (3), and 8.1 (2) of the Rules of Professional Conduct and Practice Book § 2-27.

On May 8, 2018, the defendant filed a motion to dismiss the presentment complaint, claiming that the reviewing committee had (1) failed to comply with the applicable time limits and (2) improperly considered allegations of misconduct that were beyond the scope of its probable cause determination. The trial court denied the motion, finding that (1) any untimeliness did not deprive the court of subject matter jurisdiction and (2) the defendant's factual allegations were not "grounds for dismissing the presentment complaint . . . ." Following a series of motions to continue,[5] on August 7, 2019, the trial court held a hearing on the presentment complaint. Also on August 7, 2019, the defendant filed a second motion to dismiss, alleging the same claims from his 2018 motion and adding a claim of laches. The trial court denied that motion, finding that the defendant did not have a valid laches claim because he had consented to most of the delays in the proceedings. After the hearing on the presentment complaint, the court issued a memorandum of decision finding that the defendant had violated rules 1.15 (b),

[4] Shortly after the November 3, 2015 hearing, the defendant filed a motion to dismiss the presentment complaint because the hearing had been held despite his motion for a continuance. The trial court, *Robaina*, *J.*, found that the denial of the defendant's request for a continuance had been unwarranted and granted the defendant's motion to dismiss.

[5] Between June 9, 2017, and August 7, 2019, the parties filed at least seven motions for continuances. The defendant consented to all but one of the plaintiff's motions. For the single motion to which the defendant did not consent, he simply failed to respond. One of the motions for a continuance was filed by the defendant.

(c), (j), (k) (3), and 8.1 (2) of the Rules of Professional Conduct, and Practice Book § 2-27. As a sanction, the court issued a reprimand with the condition that the plaintiff audit "any IOLTA account currently registered to the defendant . . . for a period of one year . . . ." This appeal followed.

I

The defendant first contends that the trial court erred in not dismissing the presentment complaint as untimely because the reviewing committee took more than ninety days to render its final written decision, in contravention of General Statutes § 51-90g (c) and Practice Book § 2-35 (i). We are not persuaded.

We first set forth the applicable standard of review. Because this claim presents a question of law, namely, whether a reviewing committee's failure to comply with the applicable time frames requires dismissal of a presentment complaint, our review is plenary. See *Bojila* v. *Shramko*, 80 Conn. App. 508, 512, 836 A.2d 1207 (2003).

Section 51-90g (c) provides in relevant part: "The subcommittee shall conclude any hearing or hearings and shall render its proposed decision not later than ninety days from the date the panel's determination of probable cause or no probable cause was filed with the State-Wide Grievance Committee. . . ." Similarly, Practice Book § 2-35 (i) provides in relevant part, "[w]ithin ninety days of the date the grievance panel filed its [probable cause] determination . . . the reviewing committee shall render a final written decision . . . ." Practice Book § 2-35 (m), however, expressly states that "[t]he failure of a reviewing committee to complete its action on a [disciplinary] complaint within the period of time provided in this section shall not be cause for dismissal of the complaint." See also *Doe* v. *Statewide Grievance Committee*, 240 Conn. 671, 672–73, 680 and n.10, 694 A.2d 1218 (1997) (temporal requirements of General Statutes (Rev. to 1993) § 51-90g (g) and Practice Book (1997) § 27J (i) (now § 2-35

(i)),[6] were discretionary, not mandatory, and failure to comply with those time limits did not deprive trial court of subject matter jurisdiction over attorney disciplinary proceedings). Accordingly, we conclude that the failure of a reviewing committee to abide by the time frames established in § 51-90g (c) and Practice Book § 2-35 (i) does not divest the trial court of subject matter jurisdiction over a disciplinary action. See id.; see also Practice Book § 2-35 (m). Thus, the untimeliness of the defendant's disciplinary proceedings does not require dismissal of the presentment complaint, and the trial court did not err when it refused to dismiss the action.[7]

[6] General Statutes (Rev. to 1993) § 51-90g and Practice Book (1997) § 27J (i) both establish a four month time limit for resolving an attorney disciplinary proceeding following the filing of a determination of probable cause or no probable cause.

[7] In his principal brief, the defendant makes a passing reference to the doctrine of laches, stating: "A process designed to conclude in an expeditious manner languished. The doctrine of laches suggests itself as the appropriate sanction." Notably, however, he fails to discuss the trial court's denial of his August 7, 2019 motion to dismiss in which he raised laches as a basis to dismiss the presentment complaint. In denying the motion to dismiss, the trial court rejected the defendant's laches claim because he largely had consented to the delays in the proceedings. To the extent that the defendant is renewing his laches claim on appeal, we conclude that the trial court properly found that there was no inexcusable delay that prejudiced the defendant because, as the court noted, the defendant largely agreed to the continuances that led to any delay. See *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 92, 103, 144 A.3d 530 (2016) (for defense of laches to apply, there must have been inexcusable delay that prejudiced party).

In addition, the defendant's argument that his presentment complaint should have been dismissed because the untimeliness of the disciplinary proceedings prejudiced him by preventing him from applying for reinstatement to the bar after an unrelated suspension is unpersuasive. In *Doe*, our Supreme Court held that claims of prejudice related to an attorney's delayed reinstatement do not go to a trial court's subject matter jurisdiction and thus do not provide a basis for dismissal. *Doe* v. *Statewide Grievance Committee*, supra, 240 Conn. 685 n.11. Instead, allegations of prejudice are properly considered by the court "as part of its oversight responsibilities." Id. Although the trial court did not specifically address this delay, we see no basis to conclude that the defendant was prejudiced by it. As previously explained, the defendant consented to nearly all of the delays in the proceedings and caused many of these delays himself. See footnotes 4 and 5. The defendant also has not challenged the sanction at issue in this proceeding.

II

The defendant next claims that the trial court erred in not dismissing the presentment complaint because the reviewing committee considered allegations outside the scope of the committee's probable cause determination. We disagree.

This claim also presents a question of law, specifically, whether a reviewing committee can consider additional allegations of misconduct after it has already made a probable cause determination, over which our review is plenary.[8] See *Bojila* v. *Shramko*, supra, 80 Conn. App. 512.

Practice Book § 2-35 (d) (1) provides in relevant part that "[d]isciplinary counsel may add additional allegations of misconduct to the grievance panel's determination that probable cause exists in the following circumstances . . . [p]rior to the hearing before the . . . reviewing committee, disciplinary counsel may add additional allegations of misconduct from the record of the grievance complaint or its investigation of the complaint." This is what happened in the present case.

Lastly, the defendant is no longer barred from practicing law and has not been barred from doing so since our Supreme Court vacated his suspension on May 25, 2017. See *Disciplinary Counsel* v. *Elder*, 325 Conn. 378, 393, 159 A.3d 220 (2017). Given all of this, we cannot conclude that the defendant was prejudiced by the untimeliness of the disciplinary proceedings. We also conclude that the defendant's claim that the delay in the proceedings was attributable to racial prejudice is speculative and thus does not provide a reason to dismiss the presentment complaint.

[8] The plaintiff argues that we should not consider the defendant's second claim because it was not preserved for appeal. We disagree. The defendant's second claim was raised in the proceedings in the trial court, specifically in his motions to dismiss, and the trial court ruled on this claim when, in its June 9, 2018 order, it stated that the defendant's objections "to the facts and circumstances surrounding the findings and recommendations of the [reviewing committee] . . . are not grounds for dismissing the presentment complaint . . . ." Thus, this claim was properly preserved. See Practice Book § 60-5 (this court "shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial").

After the reviewing committee determined that there was probable cause to find that the defendant had violated Practice Book § 2-27, *but before* the reviewing committee held a hearing on the alleged misconduct, the plaintiff filed additional allegations of misconduct against the defendant. That is expressly allowed by Practice Book § 2-35 (d) (1).[9] Consequently, the reviewing committee's consideration of additional allegations of misconduct against the defendant does not constitute a basis for dismissing the presentment complaint.

The judgment is affirmed.

In this opinion the other judges concurred.

REGIONAL SCHOOL DISTRICT 8 *v.* M & S PAVING AND SEALING, INC.
(AC 43549)

Elgo, Cradle and Clark, Js.

Syllabus

The plaintiff school district sought to recover damages from the defendant for breach of contract relating to the defendant's allegedly defective work in repairing a set of concrete stairs on the plaintiff's campus. Following the defendant's completion of its contract, the concrete of the stairs experienced significant cracking, and the plaintiff was required to hire a separate contractor, R Co., to replace the stairs. The stairs replaced by R Co. also complied with applicable building code regulations, which the stairs repaired by the defendant had not. The trial court found that the plaintiff could not prevail on its breach of contract claim on the basis of the building code violations, as the contract did not call for compliance with the code, but that the defendant did breach the

[9] The defendant argues that his presentment complaint should have been dismissed under Practice Book § 2-35 (d) (2) because that provision bars the addition of new allegations of misconduct unless good cause can be shown and the defendant consents. Section 2-35 (d) (2), however, applies only when the plaintiff seeks to add allegations of misconduct *after* a disciplinary hearing has begun. As previously noted, the additional allegations in the present case were filed *before* the reviewing committee held its hearing. Thus, § 2-35 (d) (2) is irrelevant.

contract on the basis of its unworkmanlike performance in the construction of the stairs. The court rendered judgment for the plaintiff and awarded damages, and the defendant appealed to this court. *Held*:

1. The trial court did not err in concluding that the defendant breached the contract by virtue of its unworkmanlike performance: this case fell within the recognized exception to the general rule requiring expert testimony in cases alleging a breach of the implied duty to perform in a workmanlike manner, as the court did not require expert testimony to conclude that the cracks in the concrete were caused by the defendant's defective work, there was evidence presented showing that there were plain and obvious defects in the concrete, the defendant was the only party responsible for replacing the stairs, including the choice and installation of the concrete, cracks began to appear less than six months after the work was completed, the cracks were significant in degree, and the defendant presented no evidence that the cracks were caused by some significant impact; moreover, the defendant's claim that the cracking could have been caused by a snowplow or other significant impact was speculative, unsupported by admissible evidence, and inconsistent with the evidence of cracking that continued to occur throughout the winter and after the defendant had performed repair work.
2. The defendant could not prevail on its claim that the trial court improperly calculated damages because the plaintiff failed to prove that the defendant's breach of contract required the stairs to be replaced instead of repaired; the trial court's conclusion that the cracking in the concrete required the stairs to be replaced was not clearly erroneous, as the court's finding that both the cracking concrete and the code violations independently required the stairs to be replaced was supported by evidence in the record, which showed that there was substantial cracking in the concrete, which was not resolved by the defendant's subsequent repair work, and the defendant conceded that it was liable for any damages stemming specifically from defects in the concrete.

Argued April 15—officially released August 3, 2021

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the matter was tried to the court, *Hon. Samuel J. Sferrazza*, judge trial referee; judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed*.

Keith Yagaloff, for the appellant (defendant).

Robert J. O'Brien, for the appellee (plaintiff).

Opinion

CLARK, J. The defendant, M & S Paving and Sealing, Inc., appeals from the judgment of the trial court rendered in favor of the plaintiff, Regional School District 8, following a trial to the court on the plaintiff's breach of contract claim for defective work. On appeal, the defendant claims that the trial court (1) erred when it found, in the absence of expert testimony, that the defendant's work proximately caused the alleged defects, and (2) improperly calculated the amount of damages awarded to the plaintiff. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. In July, 2014, the plaintiff, a regional school district consisting of RHAM High School and RHAM Middle School in Hebron, issued a request for proposals to repair various areas on its campus. The defendant submitted a proposal to replace, among other things, an outdoor stairway connecting a lower parking lot to the main entrance of the middle school. The plaintiff selected the defendant's proposal to replace the stairway and the parties agreed on a price of $9000 for the work. The bid form provided that the "[s]tair railings shall be salvaged, where possible, and securely reattached with a sleeve."

The defendant completed the work prior to the commencement of the school year in September, 2014. The plaintiff paid the defendant for the work in October, 2014. On January 22, 2015, Robert J. Siminski, the then superintendent of schools, observed what he described as "substantial cracking" in the concrete stairs. The plaintiff's then interim director of facilities, Michael Schlehofer, took photographs of the cracks and forwarded them to the defendant. Schlehofer later testified that the cracking was so substantial that the stairs had to be closed for safety purposes. On January 31, 2015, without a request from the plaintiff, the defendant sent

a welder to the school to perform work on a section of the stairs where the railing attached to the concrete. When the defendant later sent the plaintiff an invoice for the welding, the plaintiff responded that it had not authorized that work.[1] The defendant did not attend to the damaged concrete itself until after the plaintiff provided notice on May 4, 2015, that it would not contract with the defendant for further work to be performed on the campus until the problem with the stairs was resolved. On or about May 8, 2015, without notifying the plaintiff, the defendant sent its employees to repair the stairs. The plaintiff, however, was not satisfied with the repairs. Schlehofer testified that subsequent to January, 2015, additional cracks continued to appear in the stairs, even after the defendant attempted to repair the stairs in May, 2015.

During the summer of 2015, a photograph of the premises appeared in a newspaper article, prompting Joseph Summers, a building official and zoning enforcement officer for the town of Hebron, to inspect the stairs. Summers sent a memo to Siminski on August 10, 2015, notifying him that certain sections of the stairway did not comply with the State Building Code (code). In his letter, Summers informed Siminski that the height of the stair risers and the size of the stair treads were not uniform and exceeded the respective variances permitted by the code. Summers also observed that the height of the handrail was not uniform and varied by several inches along the stair, also in violation of the code.

On September 2, 2015, counsel for the plaintiff wrote to Steven Fradianni, part owner of the defendant, informing him that the stairs had not been repaired satisfactorily. The plaintiff contacted Rockfall Company, LLC (Rockfall), the designated on call contractor for Hebron,

[1] The plaintiff did not pay the bill, and the defendant did not pursue the charge further.

through the Capital Region Organization of Governments, a regional state cooperative, for an estimate of the cost of repair. The plaintiff, meanwhile, continued to reach out to the defendant. The parties scheduled a meeting for December 4, 2015, between Schlehofer, Siminski, and the defendant's vice president, Joseph Fradianni, Jr., which Fradianni failed to attend. Thereafter, the plaintiff hired Rockfall to repair the stairs. Rockfall replaced the stairs in the summer of 2016 and also performed additional work on the surrounding sidewalk area, for a total cost of $34,789.02. The work performed by Rockfall complied with the code.

The plaintiff commenced an action for breach of contract against the defendant in March, 2017. In its complaint, the plaintiff alleged that it had solicited and accepted a bid from the defendant to perform concrete replacement and repair work on the stairs. The defendant, however, allegedly performed the work in a defective and unworkmanlike manner that necessitated later correction and replacement. Specifically, the plaintiff alleged that the work did not comply with applicable code requirements regarding risers, treads, and handrails and that the concrete the defendant used cracked and deteriorated excessively. The plaintiff also alleged that the defendant had failed to correct the cracks in the stairs although the plaintiff repeatedly asked it to do so. The defendant denied the material allegations concerning breach of contract.[2]

[2] The defendant alleged four special defenses: (1) it had performed the work in accordance with the terms of the contract that required it to replace the stairs and sidewalk and salvage and reattach the railings; (2) the work was performed in a workmanlike manner consistent with the agreed upon contract; (3) the plaintiff's remedies were limited to the contract's express terms; and (4) the terms of the agreement required the defendant to reuse the existing stair railings, which required the defendant to replace stairs using the dimensions of the original stairs, and the plaintiff could not impose additional conditions on the defendant after having inspected, accepted, and paid for the work. The plaintiff denied all four special defenses.

The court conducted a courtside trial on September 12, 13 and 17, 2019. The plaintiff called Schlehofer, Summers, and Henry Racki, Jr., a management representative of Rockfall, to testify. At trial, the plaintiff introduced into evidence photographs taken by Schlehofer of the cracks in the concrete, as well as written communications between the parties and the relevant bid documents and purchase orders. Racki testified that when he inspected the premises in the summer of 2016 before Rockfall began its work, he observed "a lot of shaling and cracking in the concrete."[3] Summers, who had been disclosed as an expert witness on the subject of the code, testified concerning the code violations that he observed. The plaintiff did not offer any expert testimony as to why the concrete cracked.

The defendant disclosed Joseph Fradianni, Jr., as an expert witness on the nature of the work the defendant performed, but he did not testify. Instead, Steven Fradianni, the defendant's co-owner, testified that the defendant performed all of the work itself, using concrete that it had purchased from a supplier.[4] He also testified about how one might design the stairway to conform the dimensions to the sloping sidewalk. Steven Fradianni speculated that the railing had been dented by some form of impact, which the defendant argued may have been a snowplow. The plaintiff objected, and Fradianni admitted that he had not personally observed the site and that his testimony was based entirely on information obtained from others.

Following the close of evidence, the court issued an eleven page memorandum of decision, addressing the alleged code violations and other defects in the stairs. The court made the following factual findings. The defendant agreed to replace a set of concrete stairs for

[3] Racki explained that shaling occurs when "the concrete breaks up and rocks that were underneath or in the concrete come out and are kind of spread over the top of the concrete."

[4] Steven Fradianni testified as a lay witness only.

$9000 and completed the work prior to the start of the school year in September, 2014, for which it was paid on October 2, 2014. On the morning of January 22, 2015, Siminski observed "substantial cracking in the concrete of the second step up from the lower sidewalk." After photographing the cracking, Schlehofer contacted the defendant. The defendant, for "reasons that the admissible evidence failed to disclose," sent a welder to repair part of the metal railing. The defendant informed the plaintiff that it would wait until the weather was sufficiently warm for concrete repairs. Schlehofer erected barriers to prevent use of the stairs in the meantime. Photographs Schlehofer forwarded to the defendant in April, 2015, showed "long, deep, and obvious fissuring of a portion of the tread and riser forming the second step from the bottom of the stairs." The defendant performed concrete repairs in May, 2015, but "the plaintiff was very dissatisfied with the result, which it found unsightly, and new lines of fracturing were appearing elsewhere on the stairs." A subsequent inspection of the stairs by Summers revealed that the stairs did not comply with the code and that the stairs had to be replaced. The plaintiff contracted with Rockfall to replace the stairs at a price of $30,235.20, and to replace the upper sidewalk for $4553.82.

The court also found that the defendant substantially complied "with the terms of the contract despite the fact that the dimensions of the steps slightly exceeded the [permissible] code standards for tread depth and riser height." The court noted that the parties' agreement called for the defendant to reuse the existing railings, which placed constraints on the configuration of the stairs, and that the contract called only for a replacement and not a redesign. The court also noted that the contract did not require express "compliance with all code standards to the letter," and that there were no issues until Siminski observed cracks in the stairs in January, 2015.

Thus, the court found that the defendant had completed the work in full and that the plaintiff had delivered payment after inspecting the stairs and expressing satisfaction with the work. The court concluded that the defendant proved its fourth special defense; see footnote 2 of this opinion; "which can fairly be read, in part, to embrace the concepts of acquiescence or ratification with respect to these code violations." The court thus determined that the plaintiff did not prevail on its breach of contract claim on the basis of the code violations.

The court next turned to the issue of the cracked stairs. It found that "[s]erious cracking of concrete within six months of formation leads the court to infer unworkmanlike performance unless the fragility of the product can be attributed to some outside force." The court rejected the defendant's argument that a snowplow might have struck the stairway, on the basis of its finding that (a) neither party had offered expert testimony as to why the concrete stairs had developed cracks so soon after installation, and (b) the defendant offered no admissible evidence regarding a possible snowplow impact. As a result, the court found that the stairs cracked due to the defendant's unworkmanlike performance. It also found that the stairs continued to crack following the defendant's repair in May, 2015. The court thus concluded that the defendant breached the contract.

Having found the defendant liable for breach of contract, the court turned to damages. The court found that the defects required the stairs to be removed and replaced,[5] and calculated the amount the plaintiff

[5] The court found that "it was necessary for the plaintiff to have the faulty stairs constructed by the defendant demolished and removed, given the cracking concrete problem *as well as* the fact that the dimensions of the risers, treads, and railings violated the [code]." (Emphasis added.)We interpret the court's finding to mean that the court found that the defective concrete *and* the code violations were each independent and sufficient justifications for replacing rather than just repairing the stairs.

should recoup for the additional work.[6] The court noted that some of the new work done by Rockfall was outside of the scope of the contract between the plaintiff and the defendant. Specifically, Rockfall reconstructed the upper sidewalk area, which the defendant had not contracted to do, and as a result of doing so, Rockfall had the additional benefit of building the stairs and upper sidewalk anew together. The defendant, by contrast, had to conform the stairs to the existing slope of the sidewalk. Rockfall also had the flexibility of installing new railings and adding an additional step to the stairs. The court found that the plaintiff paid Rockfall $34,789.02 for all of its work. From that sum, the court deducted $4553.82, which the plaintiff paid to reconstruct the upper sidewalk, $1500 paid to a professional engineer, $3550.39 for the installation of new railings, and the sums of $943.60 and $257.47 for several unexplained charges in the Rockfall contract. Accordingly, the court awarded the plaintiff $23,983 in damages and rendered judgment thereon. This appeal followed.

On appeal, the defendant claims that the court incorrectly found that it breached the contract. The defendant also claims the court improperly calculated damages. We disagree.

We first set forth the general rule regarding the review of breach of contract claims. "The determination of whether a contract has been materially breached is a question of fact that is subject to the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Although a finding of

[6] At trial, the plaintiff placed into evidence the purchase orders it executed with Rockfall.

breach of contract is subject to the clearly erroneous standard of review, whether the court chose the correct legal standard to initially analyze the alleged breach is a question of law subject to plenary review." (Citation omitted; internal quotation marks omitted.) *Western Dermatology Consultants, P.C.* v. *VitalWorks, Inc.*, 146 Conn. App. 169, 180, 78 A.3d 167 (2013), aff'd, 322 Conn. 541, 153 A.3d 574 (2016).

With respect to the defendant's claim that expert testimony was required in order for the plaintiff to prevail on its breach of contract claim, "as a general matter, [whether] expert testimony is required to support a particular type of claim [is] a question of law that we review de novo." *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 171 Conn. App. 61, 110, 156 A.3d 539 (2017), aff'd, 333 Conn. 343, 216 A.3d 629 (2019). Once we resolve the question of whether expert testimony is required, we review for clear error the question of whether the trial court drew a reasonable inference. See *State* v. *Ray*, 290 Conn. 602, 631 n.17, 966 A.2d 148 (2009). On the issue of damages, "[t]he trial court has broad discretion . . . and its decision will not be overturned unless it is clearly erroneous." *O & G Industries, Inc.* v. *All Phase Enterprises, Inc.*, 112 Conn. App. 511, 528, 963 A.2d 676 (2009).

I

The defendant claims that the trial court improperly found that the defendant's unworkmanlike performance proximately caused the concrete to crack. First, the defendant argues that expert testimony was required to prove that the cracks in the concrete were proximately caused by the defendant's defective work. Second, it claims that, even if expert testimony was not required, the court drew an unreasonable inference as to the cause of the cracking. We disagree.

"[E]xpert testimony . . . serves to assist lay people, such as members of the jury and the presiding judge,

to understand the applicable standard of care and to evaluate the defendant's actions in light of that standard. . . . Expert testimony is required when the question involved goes beyond the field of the ordinary knowledge and experience of judges or jurors." (Internal quotation marks omitted.) *Osborn* v. *Waterbury*, 333 Conn. 816, 826, 220 A.3d 1 (2019). "When a topic requiring special experience of an expert forms a main issue in the case, the evidence on that issue must contain expert testimony or it will not suffice. . . . In cases involving claims of professional negligence . . . expert testimony is essential to establish both the standard of skill and care applicable and that the defendant failed to conform to the standard, as these matters are outside the knowledge of the jury." (Citations omitted; internal quotation marks omitted.) *Matyas* v. *Minck*, 37 Conn. App. 321, 326–27, 655 A.2d 1155 (1995). Expert testimony is not required, however, if "the negligence is so gross as to be clear to a layperson." *Osborn* v. *Waterbury*, supra, 827.

"[T]he exception to the general rule that requires that expert testimony be used to prove professional negligence . . . provides that expert testimony may be dispensed with when there is such gross want of care or skill as to afford, of itself, an almost conclusive inference of negligence."[7] (Internal quotation marks omitted.) *Matyas* v. *Minck*, supra, 37 Conn. App. 328. Whether an expert is required in such a case will depend on the facts of each case and the level of technical complexity at issue. See, e.g., *Cackowski* v. *Jack A. Halprin, Inc.*, 133 Conn. 631, 635–36, 53 A.2d 649 (1947) (expert testimony is not essential where negligent work of

[7] As with a professional negligence case, a breach of contract case alleging a violation of the implied duty to perform in a workmanlike manner also generally requires expert testimony, unless it falls within a recognized exception to that rule. See *Matyas* v. *Minck*, supra, 37 Conn. App. 329 (requiring expert testimony to prove breach of standard of care in contract action).

builders did not present "an intricate engineering problem" and jury could use common knowledge to find negligence).

We conclude that the present case falls within the recognized exception to the general rule requiring expert testimony in cases alleging professional negligence or a breach of the implied duty to perform in a workmanlike manner. See *Matyas* v. *Minck*, supra, 37 Conn. App. 328. The court in this case found that there was sufficient evidence demonstrating that the work was performed in an unworkmanlike manner. For the reasons that follow, it did not need expert testimony to reach that conclusion.

The facts before the court demonstrated that the defendant contracted with the plaintiff to replace a set of concrete stairs for long-term use. The defendant was the only party responsible for replacing the stairs, including the choice and installation of the concrete. The defendant performed the work in August, 2014, and cracks began to appear as early as January 22, 2015, less than six months after the work was completed. Multiple witnesses testified about the extent of the cracking. The court found that the cracking was significant in degree,[8] describing the photographic evidence as depicting "long, deep, and obvious fissuring of a portion of the tread and riser . . . ." The court also found that, due to the cracking, the stairs had to be blocked off for safety purposes. Schlehofer also testified that cracking continued to appear "throughout the winter." On the basis of that evidence, and in the absence of any evidence supporting the defendant's claim that the cracks were caused by some sort of significant impact, expert testimony was not required for the court to determine whether the defendant breached the contract by failing to perform in a workmanlike manner.

[8] The court found that the concrete developed "significant fracturing" and "serious cracking."

The defendant argues that the court could not infer unworkmanlike performance from the appearance of cracking within six months, because "five months in a construction case . . . is . . . not so short as to permit a res ipsa style proof of [a] breach [of contract] on no other ground than the mere existence of harm to property." That claim, however, mischaracterizes the court's decision, which was based on the entirety of the evidence presented at trial.

The defendant also cites a number of cases in support of his claim that the plaintiff was required to present expert testimony in this case. In *D'Esopo & Co.* v. *Bleiler*, 13 Conn. App. 621, 625–26, 538 A.2d 719 (1988), for instance, a builder claimed that he did not negligently install a subfloor because he built it to conform to specifications provided by the homeowners, which ultimately caused floor tiles to crack. This court concluded that in the absence of expert testimony demonstrating that the quality of the work itself, rather than the defective specifications, caused the cracks, the fact finder could not have inferred that the builder had performed negligently. Id. Similarly, in *Empire Paving, Inc. v. Staddle Brook Development, Inc.*, Superior Court, judicial district of New Haven, Docket No. 381732 (January 28, 1998), two parties had performed work on a public road. In the absence of expert testimony, the court concluded it was not clear whether later developing cracks that required the road to be torn up and replaced were caused by the plaintiff's flawed paving work or the road base on which the pavement was laid down.

In *Matyas* v. *Minck*, supra, 37 Conn. App. 328–29, another case on which the defendant relies, the jury was asked to review technically complex design specifications to assess whether a septic system was constructed negligently. The plaintiffs in that case introduced exhibits consisting of a lot subdivision map and

a septic system design. Id., 328. They contended that "the jury was qualified to read maps and drawings . . . ." Id. This court disagreed, noting that "the maps and drawings [in question] are technical documents. The process of understanding an engineered design is complex." Id., 329.

In each of these cases, expert testimony was required either because the fact finder was asked to assess complex technical issues or to determine which one of several parties, if any, was responsible for the cause of defects. In this case, the court did not need to resolve such issues. The evidence overwhelmingly demonstrated plain and obvious defects in the concrete. Severe cracking appeared very shortly after the stairs were completed and continued to worsen even after the defendant attempted repairs. No technically complex design specifications were at issue, and the defendant alone built the stairs. There was no need for the court to consider whether any other party was at fault. Under these circumstances, the court did not need expert testimony to find that the defendant breached the contract.

The defendant also makes the related claim that, even if no expert testimony was required, the court's inference was unreasonable because it failed to take into account the possibility that the cracking may have been caused by a snowplow or some other significant impact. Alluding to the speculative nature of the claim, the court aptly noted that the defendant "presented no admissible evidence to support that hypothesis."[9] On the contrary,

[9] The defendant argues that the court failed to consider Steven Fradianni's testimony that he believed a dent in the railing indicated it had been struck. As previously noted, however, Fradianni admitted that he lacked personal knowledge of the damage and could only testify about what he allegedly heard from others.

The defendant also argues that the fact that a welder performed work on the stairway handrail on January 31, 2015, supports its claim that an impact to the handrail caused the cracking. The court found that the plaintiff did not authorize this work and that it was not clear why a welder had been sent to perform work on the handrail.

cracking continued to occur throughout the winter and the period in which the defendant performed repair work, which is inconsistent with the defendant's sudden impact theory.[10] On the basis of the record before us, we conclude the court reasonably inferred that the defendant breached the contract by virtue of its unworkmanlike performance.

II

The defendant next claims that the trial court improperly calculated damages because the plaintiff failed to prove that the defendant's breach of contract required the faulty stairs to be replaced instead of repaired. We disagree.

"In reviewing a trial court's award of compensatory damages, we have stated that [t]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . Mathematical exactitude in the proof of damages is often impossible, but the plaintiff must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate." (Citations omitted; internal quotation marks omitted.) *Bhatia* v. *Debek*, 287 Conn. 397, 418–19, 948 A.2d 1009 (2008). "It is axiomatic that the sum of damages awarded as compensation in a breach of contract action should place the injured party in the same position as he would have been in had the contract been performed." (Internal quotation marks omitted.) *FCM Group, Inc.* v. *Miller*, 300 Conn. 774, 804, 17 A.3d 40 (2011).

The defendant's sole argument in its briefs to this court is that the concrete stairs could have been repaired and that the only reason they were replaced

[10] The defendant argues that the plaintiff's use of salt may have caused damage to the steps because the concrete later installed by Rockfall experienced salt damage, necessitating further repairs. The defendant presented no evidence, however, concerning the plaintiff's use of salt in early 2015 or the nature of the damage Rockfall repaired.

was to bring them into compliance with the code. It asserts that "the court should not have awarded costs for the replacement of the stairs because the cracked concrete—[the defendant's] only source of liability—was not the reason for [the plaintiff's] decision to procure replacement of the stairs. The reason why the stairs were replaced was for the alleged code violations, and [the defendant] was found by the court to be free from liability for those violations."

This argument fails because the court found that replacement of the stairs was necessary to resolve the cracking issue alone and that simply repairing them would not have sufficed. The court found that "it was *necessary* for the plaintiff to have the faulty stairs . . . demolished and removed, given the cracking concrete problem *as well as* . . . the dimensions . . . ." (Emphasis added.) We interpret the court's finding to mean that both the faulty concrete and the code violations independently necessitated replacement. See footnote 5 of this opinion. That finding is supported by the record. The record shows that there was substantial cracking in the concrete, which the court described as "serious" and "long, deep, and obvious." See footnote 8 of this opinion. The court found that, even after the defendant performed repair work on May 8, 2015, "new lines of fracturing were appearing" mere days later. Schlehofer also testified that the defendant's repair work did not fix all of the cracks. The defendant did not refute this evidence.[11] We, therefore, conclude that it was not clearly erroneous for the trial court to find that the cracking alone required the stairs to be replaced.

[11] The only support the defendant provides for its claim that the plaintiff could have had the stairs repaired is Racki's testimony that, in 2016, Rockfall was in the process of fixing salt damage in the new concrete it installed with a special polymer solution. We will not speculate as to the relevance of these repairs to the damage at issue in this case. See footnote 10 of this opinion.

The defendant concedes in its brief that it would be liable for any damages stemming specifically from the defects in the concrete. The plaintiff presented sufficient evidence of the cost of replacement. Accordingly, the defendant was liable in damages for the expenses the plaintiff incurred to replace the stairs.[12]

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DAYVON WILLIAMS (AC 42612)

Prescott, Moll and Suarez, Js.

Syllabus

Convicted of the crime of sexual assault in the second degree after a trial to the court, the defendant appealed to this court, claiming that the trial court deprived him of his constitutional right to the assistance of counsel by allowing him to represent himself and thereafter abused its discretion by failing to order a competency hearing or to appoint counsel for him. The defendant had been represented by three public defenders during pretrial proceedings before two different trial judges in the several months prior to trial, when he sought to dismiss the public defenders and to represent himself. After the defendant rejected the state's offer of a plea agreement, the court canvassed him regarding his request to represent himself, and found that he knowingly, intelligently and voluntarily waived his right to counsel and was qualified to represent himself. None of the public defenders at any time during those proceedings expressed concerns to the court about the defendant's competence to stand trial or indicated that he suffered from a mental illness or incapacitation. *Held*:

1. The trial court did not abuse its discretion in determining that the defendant was competent to represent himself and that he made a knowing, voluntary and intelligent waiver of his right to counsel:

[12] On appeal, the defendant challenges, and has briefed, only the court's finding that it was necessary to replace the stairs. It does *not* challenge, and did not brief, any other issues concerning the damages award. Consequently, we need not address any separate, abandoned claims concerning the court's calculation of damages. See *Katsetos* v. *Nolan*, 170 Conn. 637, 641, 368 A.2d 172 (1976) (claims not briefed are considered abandoned).

a. The record supported the court's finding that the defendant was competent to waive his right to counsel and to represent himself, as he had expressed his desire to represent himself on two occasions before different judges prior to being allowed to represent himself, he was consistently able to articulate logical reasons for that desire, his responses to the court during its canvass of him showed that he comprehended the disadvantages and dangers of representing himself, and he indicated that he understood the elements of the crime with which he was charged and the range of penalties associated with a conviction.

b. Contrary to the defendant's contentions, the court's canvass of him provided sufficient information to determine whether he knowingly, voluntarily and intelligently waived his right to counsel, as the record was devoid of facts that should have given rise to any specific concerns in the court's mind: the court determined that the defendant had the intelligence and capacity to appreciate the consequences of his decision to represent himself, it made him aware of the penalties to which he was exposed and the great dangers in self-representation, such as making self-incriminating statements at trial, and its questions demonstrated that he understood that he would be responsible for filing motions, legal research, selecting a jury, and complying with the rules of evidence and criminal procedure; moreover, although the court did not explicitly advise the defendant of the statutory maximum and mandatory minimum sentences he faced, his statements to the court and discussions with the state regarding the plea offer sufficiently demonstrated that he was aware of the prison time to which he was exposed if convicted, and, contrary to his unsupported assertion, the court was not required to advise him that he would need to register as a sex offender if he were convicted or to ask him or his counsel if he had any mental health issues; furthermore, the defendant's education level and lack of experience as a self-represented litigant did not necessarily mean that his election to represent himself was not intelligently made, as his responses to the court about his educational background, whether he had a history of representing himself and his awareness of the requirements of self-representation suggested that he understood those obligations.

2. The defendant could not prevail on his unpreserved claim that, because his postcanvass conduct constituted substantial evidence of mental impairment, the trial court abused its discretion by failing to order a competency hearing or to appoint counsel for him after it granted his request to represent himself: the record reflected that the defendant interacted intelligently with the court, as he advanced arguments in support of his defense and actively participated in the trial, at no point after its canvass of him did the court express concerns about his competence, his actions after the state rested its case demonstrated a basic understanding of the judicial process and a trial strategy for creating reasonable doubt about the veracity of the allegations against him, and, even if some of his arguments at trial were not well grounded in the law and his representation lacked the hallmarks of an attorney skilled

in the practice of law, the defendant showed that he had a rational understanding of the proceedings by challenging the sufficiency of the evidence that was before the court.

Argued January 7—officially released August 3, 2021

Procedural History

Substitute information charging the defendant with the crime of sexual assault in the second degree, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Blawie*, *J.*; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Jennifer B. Smith, for the appellant (defendant).

Samantha Oden, deputy assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, and *Michelle Manning*, senior assistant state's attorney, for the appellee (state).

Opinion

SUAREZ, J. The defendant, Dayvon Williams, appeals from the judgment of conviction, rendered after a trial to the court, of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (3). On appeal, the defendant claims that the court (1) deprived him of his constitutional right to the assistance of counsel by allowing him to represent himself, and (2) abused its discretion by failing, sua sponte, to order a competency hearing or to appoint counsel for him after it granted his request to represent himself. We disagree and, accordingly, affirm the judgment of the trial court.

The following procedural history is relevant to this appeal. On May 24, 2018, the state filed a long form information charging the defendant with second degree sexual assault in violation of § 53a-71 (a) (3) related to

his alleged conduct involving a female victim[1] in Norwalk on May 6, 2017. The defendant was represented by three public defenders throughout the pretrial proceedings. Attorney Barry Butler first represented the defendant at a hearing on August 31, 2017, in which it was determined that the defendant qualified for public defender assistance. The court, *White*, *J.*, appointed the Office of the Public Defender to represent the defendant, and, on September 1, 2017, Attorney Howard Ehring filed an appearance on his behalf.

On October 3, 2017, the defendant filed two motions to dismiss Butler and Ehring from his case. On the same day, he filed an application and writ of habeas corpus ad testificandum to "regain [his] extradition rights . . . ."[2] On October 11, 2017, the defendant, accompanied by Ehring, appeared before the court, *Blawie*, *J.* Ehring informed the court that the defendant had called the state's attorney's office and expressed his intention to terminate public defender services and represent himself. The court asked the defendant if he wanted to represent himself. The defendant responded: "[T]hat's what it's looking like because [Ehring] has a problem with communication, and I feel like I can speak up for myself." The court began to canvass the defendant and stated that, if he represented himself, he would be held to the same standards as a lawyer. The court explained that, if he so requested, it would be willing to appoint standby counsel who could provide the defendant with assistance. The court then asked the defendant if he understood the elements of the offense with which he was charged, which led to a discussion about whether the defendant previously had a chance to review the arrest warrant.

[1] In accordance with our policy of protecting the privacy interests of the victims of sexual assault, we decline to identify the victim. See General Statutes § 54-86e.

[2] The record reflects that, on July 28, 2017, the defendant was arrested in New York, where he resided, and charged with second degree sexual

The court did not finish its canvass of the defendant and instead began discussing the defendant's motion to regain his extradition rights. Before the hearing ended, the court "urge[d]" the defendant "to try to collaborate with Attorney Ehring." The defendant reiterated that he was having difficulty communicating with Ehring and stated that he had the same issues with Butler. The court responded that "the right to counsel does not include the right to counsel of your choice" and that it was "not yet making a finding of self-representation."

On November 13, 2017, the court, *Blawie*, *J.*, held a hearing and again discussed the issue of whether to terminate the public defender services and to allow the defendant to represent himself. The defendant argued that his motion to dismiss Ehring should be granted on the grounds that Ehring did not review his case with him and failed to investigate information that he had provided to Ehring. The defendant expressed frustration with the length of time he had been detained, stating: "I was arrested July 28 [2017]; I've been sitting here three months with nothing being said to me about my case." The court again started to canvass the defendant and informed him of the risks of self-representation. The court stated: "[W]hen you're indigent, you're entitled to the Office of Public Defender's services, but appointment of counsel does not mean appointment of counsel of your choice. You have two very capable lawyers in this office; they're both qualified to handle this matter . . . ." The court reminded the defendant that it would appoint standby counsel upon his request but that having standby counsel was "far different . . . from having representation in a full capacity . . . ." The court noted that Ehring had represented hundreds of people in the defendant's position over the course

assault. He then waived procedures incidental to extradition proceedings and was extradited to Connecticut on August 16, 2017.

of thirty-two years as a public defender and that he had the defendant's "best interest in mind . . . ." The court, however, did not finish its canvass at this time. Instead, at the end of the hearing, the court directed a judicial marshal to bring the defendant to a conference room in the courthouse so that he could speak privately with Ehring.

On December 13, 2017, the defendant appeared before the court, *White*, *J.*, with Attorney Benjamin Aponte from the Office of the Public Defender. The state represented that the defendant had filed motions to remove Ehring from his case and noted that, during previous hearings at which these motions were heard, the court "did not get through the entire canvass." The state then requested that the court ask the defendant if he still wanted to represent himself and, if so, to canvass him. The following exchange occurred between the court and the defendant:

"The Court: Okay. Mr. Williams, do you want to represent yourself?

"The Defendant: At a point in time, I felt like I had to speak up for myself and represent myself. Recently, Attorney Aponte actually came—came and visited me in Bridgeport Correctional Center. He ha[s] taken the initiative to do that, so I will like to go forward with Aponte, if I can.

"The Court: I'm going to take what you said as a no, that you don't want to represent yourself now. Am I—is that correct?

"The Defendant: Yes."

The court continued the hearing with Aponte as counsel for the defendant.

On February 2, 2018, the state made an offer to resolve the case through a plea agreement in exchange for a sentence of ten years of incarceration, suspended

after four years, followed by fifteen years of probation. The defendant rejected this offer. On the same date, the defendant appeared before the court, *White*, *J.*, to address his decision to reject the offer. The court asked the defendant if he "had enough time to speak to [his] attorney about the offer . . . ." The defendant responded, "no." The court, the defendant, Aponte, and the prosecutor then engaged in the following colloquy:

"The Court: Okay. We'll pass it and talk to your lawyer.

"[The Defendant]: Excuse me, I would like to speak on the record. May I address the court, please?

"The Court: It's not a good idea, you might say something to hurt your own case and—

"[The Defendant]: Not at all—sorry, Your Honor.

"The Court: Okay. If you want to say something, I'll listen, but it's really not a good idea.

"[The Defendant]: Honorable Judge White, I am the defendant, and I don't feel as if I'm being treated fairly in this matter here. It's been an ongoing case for nine months now. It's been—information on my—against me for nine months now. I've been in the state of Connecticut for six months, going on a complete seven, because I was arrested in New York City, and I've been held in my city jail for nineteen days, to be exact. And since I've been here in the state of Connecticut, I have [had] more than enough time to speak with lawyers, but they never showed up to speak to me, so I feel like I'm being treated unfairly. My eighth amendment[3] right is being violated once again. I previously dismissed Ehring, who's sitting over there to the left of me. And I feel like I need to initiate pro se and be given a law

[3] We presume the defendant meant that his rights under the sixth amendment to the United States constitution were being violated.

library or something to exercise my rights from here on because—

"The Court: Sir, are you telling me you want to represent yourself?

"[The Defendant]: I'm gonna have to—I'm going to have to.

"The Court: No, you don't have to. You can't afford counsel, and you have counsel provided for you, so it's not true that, that—

"[The Defendant]: Yes, I want to initiate pro se.

"The Court: Okay. How far did you go in school?

"[The Defendant]: G.E.D. equivalency of a high school diploma.

"The Court: Okay. Have you ever represented yourself in a criminal case before?

"[The Defendant]: No, I haven't. I'd be willing to do so.

"The Court: Do you understand the elements of the offense that you're charged with?

"[The Defendant]: Yes.

"The Court: Do you understand the range of penalties?

"[The Defendant]: Yes.

"The Court: Do you understand that you're going to have to file motions on your own?

"[The Defendant]: Yes.

"The Court: Do you understand that you're gonna have to do legal research on your own?

"[The Defendant]: Yes, and speaking of which, I filed two speedy trial motions—

"The Court: Let me—sir, let me finish asking questions and then—

"[The Defendant]: I'm sorry.

"The Court: —I'll give you a chance to speak further.

"[The Defendant]: Yes, Your Honor.

"The Court: Do you understand that—I take it you've elected to have a jury trial, is that right?

"[The Defendant]: At this moment, I have to speak—I'm undecided at this moment.

"The Court: Well, I'm gonna assume that you're going to have a jury trial instead of a court trial. If you have a jury trial, you're gonna have to pick the jury on your own, you're going to have to make proper motions; you understand that?

"[The Defendant]: Understood.

"The Court: And whoever the trial judge is will probably give you some leeway, but you're going to have to comply with the rules of evidence; do you understand that?

"[The Defendant]: Yes.

"The Court: And the rules of procedure and filing any proper motions, so you understand all that?

"[The Defendant]: Yes.

"The Court: And do you understand that there are great dangers in self-representation?

"[The Defendant]: Yes.

"The Court: Okay. I just want to make sure you understand and just tell you that, if you try the case yourself, you might ask questions or make comments that are incriminating in nature, or it might put you in a bad light, and you're gonna talk, and you're gonna be stuck with what you have to say. And it's really not a good idea, in most instances, for people to represent themselves. I think it was Abraham Lincoln who said that a

lawyer who represents himself has a fool for a client; somebody said that.

"[The Defendant]: I'm familiar.

"The Court: There's a lot of wisdom in that. Do you understand what I'm telling you?

"[The Defendant]: I'm familiar.

"The Court: Okay. And you—obviously, you understand that, if you can't afford counsel, I would provide one for you at no cost to you. You understand that?

"[The Defendant]: Yes. At any moment?

"The Court: And you have a—

"[The Defendant]: If I—

"The Court: Listen to me.

"[The Defendant]: —choose to give up my status—

"The Court: Please listen to me and let me finish. So, you understand that you have a constitutional right to be represented by counsel and you want to give up that right and represent yourself, is that correct? Is it?

"[The Defendant]: Yes.

"The Court: Is there anybody forcing you or threatening you to do this?

"[The Defendant]: No.

"The Court: Do you want to look at me, sir? So, you're doing what you're doing voluntarily and of your own free will?

"[The Defendant]: Yes.

"The Court: Mr. Aponte, do I need to ask him anything else?

"[Attorney] Aponte: No, Your Honor, thank you.

"The Court: State, do I need to ask him anything else?

"[The Prosecutor]: No, Your Honor.

"The Court: All right. I'm gonna make a finding that [the defendant] is knowingly, intelligent[ly], and voluntarily waiving his right to counsel, and he's qualified to represent himself. And I am removing a public defender at this point; at some later point, if it's appropriate, I may ask the public defender to step in as standby counsel; it's discretionary with the court. That would just mean that you'd have one of the public defenders, probably—

"[The Prosecutor]: Judge, I—

"The Court: —Mr. Aponte, there to answer any questions you might have, but Mr. Williams, please pay attention. It's gonna be up to you to fully represent yourself. The public defender doesn't have any more responsibility with this case.

"[The Defendant]: Understand—

"The Court: Do you understand what I just told you?

"[The Defendant]: Yes." (Footnote added.)

The court then advised the defendant about the mandatory minimum sentence for the crime with which he was charged. The following exchange occurred between the court and the defendant:

"The Court: I should add, before the state's attorney goes on, there's a mandatory minimum—

"[The Defendant]: Ten years.

"The Court: Well, no not a mandatory minimum—

"[The Defendant]: I mean, nine months, I'm sorry.

"The Court: Yes. A mandatory minimum of nine months sentence.

"[The Defendant]: Nine months, ten—okay."

On June 5, 2018, the date on which jury selection was to begin, the defendant waived his right to a jury trial and elected a court trial. The court, *Blawie*, *J.*, canvassed the defendant and found that he had knowingly, voluntarily, and intelligently waived his right to a jury trial. On June 18, 2018, a trial was held before the court, *Blawie*, *J.* After the state rested, the defendant orally moved for a judgment of acquittal on the ground that the evidence was insufficient to support a guilty verdict. The court denied the motion. The defendant then rested without presenting evidence. On June 19, 2018, the court found the defendant guilty of second degree sexual assault in violation of § 53a-71 (a) (3). On October 1, 2018, the court sentenced the defendant to ten years of incarceration, execution suspended after six years, and twenty years of probation. As part of the special conditions of probation, the court ordered the defendant to register as a sex offender for a period of ten years pursuant to General Statutes § 54-252. This appeal followed.

Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court deprived him of his constitutional right to the assistance of counsel by allowing him to represent himself. We disagree.

In this claim, the defendant raises three distinct arguments. First, he argues that he was not competent to waive his right to counsel. Second, he argues that he was not competent to represent himself.[4] Third, he

[4] In support of this argument, the defendant primarily points to his conduct after the February 2, 2018 canvass that, he asserts, should have alerted the court that he was not competent to waive his right to counsel. Because the court's decision could have been informed only by what was known to it at the time that it ruled on the defendant's request to represent himself, we will consider only the defendant's conduct prior to the court's decision to allow the defendant to represent himself.

argues that he did not knowingly, voluntarily, and intelligently waive his right to counsel.

We begin by setting forth the legal principles governing this claim. "The sixth amendment to the United States constitution provides: 'In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.' This right is made applicable to state criminal prosecutions through the fourteenth amendment's due process clause. See, e.g., *Gideon* v. *Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). Embedded within the sixth amendment right to assistance of counsel is the defendant's right to elect to represent himself, when such election is voluntary and intelligent. See, e.g., *Faretta* v. *California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

"We have long recognized this important right. See, e.g., *State* v. *Flanagan*, 293 Conn. 406, 418, 978 A.2d 64 (2009); *State* v. *Brown*, 256 Conn. 291, 302, 772 A.2d 1107, cert. denied, 534 U.S. 1068, 122 S. Ct. 670, 151 L. Ed. 2d 584 (2001). We have also observed, however, that '[t]he right to counsel and the right to self-representation present mutually exclusive alternatives.' . . . *State* v. *Flanagan*, supra, 418. Although both rights are constitutionally protected, a defendant must choose between the two. Id. We require a defendant to clearly and unequivocally assert his right to self-representation because the right, unlike the right to the assistance of counsel, protects interests other than providing a fair trial, such as the defendant's interest in personal autonomy. *State* v. *Jones*, 281 Conn. 613, 648, 916 A.2d 17, cert. denied, 552 U.S. 868, 128 S. Ct. 164, 169 L. Ed. 2d 112 (2007). 'Put another way, a defendant properly exercises his right to self-representation by knowingly and intelligently waiving his right to representation by counsel.' . . . *State* v. *Flanagan*, supra, 418.

"Once the right has been invoked, the trial court *must* canvass the defendant to determine if the defendant's invocation of the right, and simultaneous waiver of his right to the assistance of counsel, is voluntary and intelligent. See, e.g., *State* v. *Pires*, 310 Conn. 222, 231, 77 A.3d 87 (2013). The United States Supreme Court has explained: '[I]n order competently and intelligently to choose self-representation, [a defendant] should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.' . . . *Faretta* v. *California*, supra, 422 U.S. 835. That court further explained that a record that affirmatively shows that the defendant is 'literate, competent, and understanding, and that he [is] voluntarily exercising his informed free will' is sufficient to support a finding that the defendant voluntarily and intelligently invoked his right. Id. Practice Book § 44-3[5] serves to guide our trial courts in making this inquiry. *State* v. *Flanagan*, supra, [293 Conn. 419]. Nevertheless, '[b]ecause the . . . inquiry [under Practice Book § 44-3] simultaneously triggers the constitutional right of a defendant to represent himself and enables the waiver of the constitutional right of a defendant to counsel, the provision of § [44-3] cannot be construed to require anything more than is constitutionally mandated.' . . . Id. Thus, the

[5] "Practice Book § 44-3 provides: 'A defendant shall be permitted to waive the right to counsel and shall be permitted to represent himself or herself at any stage of the proceedings, either prior to or following the appointment of counsel. A waiver will be accepted only after the judicial authority makes a thorough inquiry and is satisfied that the defendant: (1) Has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when so entitled; (2) Possesses the intelligence and capacity to appreciate the consequences of the decision to represent oneself; (3) Comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case; and (4) Has been made aware of the dangers and disadvantages of self-representation.' " *State* v. *Braswell*, 318 Conn. 815, 828–29 n.4, 123 A.3d 835 (2015).

court need not question a defendant regarding all of the Practice Book § 44-3 factors. *State* v. *T.R.D.*, 286 Conn. 191, 204, 942 A.2d 1000 (2008). Instead, the analysis under that rule of practice is designed to help the court answer two questions: '[W]hether a criminal defendant is minimally competent to make the decision to waive counsel, and . . . whether the defendant actually made that decision in a knowing, voluntary and intelligent fashion.' . . . *State* v. *D'Antonio*, 274 Conn. 658, 712, 877 A.2d 696 (2005). To date, courts have recognized four instances in which a court may deny a defendant's timely request to represent himself. A defendant's request may be denied when a court finds that the defendant is not competent to represent himself; see, e.g., *Indiana* v. *Edwards*, 554 U.S. 164, 174, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008); or that he has not knowingly and intelligently waived his right to the assistance of counsel. See, e.g., *Faretta* v. *California*, supra, 835. A court can also deny such request because it was made for dilatory or manipulative purposes; e.g., *State* v. *Jordan*, 305 Conn. 1, 22, 44 A.3d 794 (2012); see also *United States* v. *Mackovich*, 209 F.3d 1227, 1238 (10th Cir.), cert. denied, 531 U.S. 905, 121 S. Ct. 248, 148 L. Ed. 2d 179 (2000); or because the defendant's behavior is disruptive or obstructive. See, e.g., *Faretta* v. *California*, supra, 834 n.46; *State* v. *Jones*, supra, [281 Conn. 648]." (Emphasis in original; footnote in original.) *State* v. *Braswell*, 318 Conn. 815, 827–29, 123 A.3d 835 (2015).

"A defendant is presumed to be competent [to stand trial]." General Statutes § 54-56d (b). However, our Supreme Court, relying on *Indiana* v. *Edwards*, supra, 554 U.S. 164, has held that, "when a trial court is presented with a mentally ill or mentally incapacitated defendant who, having been found competent to stand trial, elects to represent himself, the trial court also

must ascertain whether the defendant is, in fact, competent to conduct the trial proceedings without the assistance of counsel." *State* v. *Connor*, 292 Conn. 483, 527–28, 973 A.2d 627 (2009) (*Connor I*).[6] In *Connor I*, the court "conclude[d] . . . in the exercise of [its] supervisory authority over the administration of justice, that a defendant, although competent to stand trial, may not be competent to represent himself at that trial due to mental illness or mental incapacity." Id., 506. Therefore, "upon a finding that a mentally ill or mentally incapacitated defendant is competent to stand trial and to waive his right to counsel at that trial . . . trial court[s] must make another determination, that is, whether the defendant also is competent to conduct the trial proceedings without counsel." Id., 518–19. The issue "is not whether

[6] During the pendency of the direct appeal in *Connor I*, the United States Supreme Court held in *Indiana* v. *Edwards*, supra, 554 U.S. 177–78, that a defendant who is competent to stand trial nevertheless may lack the competency to represent himself. In light of *Edwards*, our Supreme Court in *Connor I* remanded the case to the trial court for additional competency proceedings. *State* v. *Connor*, supra, 292 Conn. 528. During the proceedings on remand, the trial court determined that the defendant was competent to represent himself at his criminal trial, and the defendant appealed, challenging the competency determination. See *State* v. *Connor*, 152 Conn. App. 780, 100 A.3d 877 (2014) (*Connor II*), rev'd, 321 Conn. 350, 138 A.3d 265 (2016). In *Connor II*, this court reversed the trial court's judgment on the ground that the competency hearing was procedurally flawed and directed the trial court to grant the defendant a new criminal trial. Id., 810, 817. The state appealed from this court's decision, and our Supreme Court later concluded that this court erred in reversing the judgment and ordering a new trial because this court had, sua sponte, raised the issue of the procedural adequacy of the remand hearing without giving the parties an adequate opportunity to be heard on this issue. *State* v. *Connor*, 321 Conn. 350, 354, 138 A.3d 265 (2016) (*Connor III*). In *Connor III*, our Supreme Court remanded the case to this court to consider the defendant's claim that "the trial court abused its discretion when it erroneously concluded that the [defendant] was competent to represent himself at [his criminal] trial despite his mental illness or mental incapacity." (Internal quotation marks omitted.) Id., 360; see also *State* v. *Connor*, 170 Conn. App. 615, 620, 155 A.3d 289, cert. granted, 325 Conn. 920, 163 A.3d 619 (2017) (appeal withdrawn January 5, 2018). This court concluded that "the trial court did not abuse its discretion in determining that the defendant had been competent to represent himself at his criminal trial." *State* v. *Connor*, supra, 170 Conn. App. 631.

the defendant lack[s] the technical legal skill or knowledge to conduct the trial proceedings effectively without counsel. . . . Rather, the determination of his competence or lack thereof must be predicated solely on his ability to carry out the *basic tasks* needed to present his own defense without the help of counsel . . . notwithstanding any mental incapacity or impairment serious enough to call that ability into question." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 529–30. "The United States Supreme Court has stated the basic tasks needed to present [one's] own defense include organiz[ing] [a] defense, making motions, arguing points of law, participating in voir dire, questioning witnesses, and addressing the court and jury . . . ." (Internal quotation marks omitted.) *State* v. *Connor*, 170 Conn. App. 615, 622, 155 A.3d 289, cert. granted, 325 Conn. 920, 163 A.3d 619 (2017) (appeal withdrawn January 5, 2018).

With these principles in mind, we now consider whether the court erred in allowing the defendant to represent himself. We review a trial court's decision regarding a defendant's request to proceed as a self-represented litigant under the abuse of discretion standard of review. See, e.g., *State* v. *Braswell*, supra, 318 Conn. 830. "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Citations omitted; internal

quotation marks omitted.) *State* v. *Connor*, supra, 170 Conn. App. 621.

A

We first address two portions of the defendant's claim that are legally and factually interrelated. First, the defendant argues that he was not competent to waive his right to counsel. Second, the defendant argues that he was not competent to represent himself. Because a substantially similar analysis governs both claims, we address these arguments simultaneously. With respect to these arguments, the defendant asserts that the court did not adequately consider the heightened requirements articulated in *Edwards* and mandated by our Supreme Court in *Connor I*. The defendant points to several occurrences that took place prior to the February 2, 2018 canvass during which his behavior demonstrated that he might have had a mental impairment. He asserts that he was "disruptive, repeatedly interrupted the court, sometimes refused to respond to the court's questions, referred to himself in the third person . . . showed signs of memory loss and confusion, had difficulty following the court's instructions, and was unable to perform basic tasks that were necessary to his defense . . . ." He also argues that he was "unable to organize his defense and focus on relevant law pertaining to the sexual assault charge." We disagree.

First, we note that the defendant was represented by three different public defenders over the course of several months prior to the February 2, 2018 canvass. He expressed his desire to represent himself on two separate occasions before a different judge prior to this canvass. His various attorneys never expressed concerns to the court about the defendant's competency to stand trial, thereby requiring an evaluation pursuant to § 54-56d, nor did they indicate to the court that he suffered from a mental illness or incapacitation.[7]

[7] The defendant requests that this court take judicial notice of the results of a competency evaluation that was conducted in connection with an

Second, we are not persuaded that the precanvass conduct on which the defendant relies should have alerted the court to concerns about his competency to waive his right to counsel or to represent himself.[8] Our review of the record reveals that the defendant was consistently able to articulate logical reasons for his desire to represent himself. Specifically, he was unhappy with the representation he received from his public defenders, and he indicated that they did not visit him frequently, did not review his case with him, and failed to investigate information that might have helped his case. His responses to the court's questions at the pretrial hearings show that he comprehended the disadvantages and dangers of representing himself, and he indicated that he understood the elements of the crime with which he was charged and the range of penalties associated with a conviction.

In support of this claim, the defendant relies heavily on *State* v. *Connor*, supra, 292 Conn. 483. *Connor I*, however, is easily distinguishable from the present case. In *Connor I*, the court repeatedly was made aware of the possibility that the defendant suffered from a significant mental health problem, possibly related to his having suffered a stroke prior to the time of his criminal trial. Id., 489–504. In *Connor I*, defense counsel, the state, and the defendant himself alerted the court to the fact that the defendant's competence to stand trial and to

incident in Virginia, which led to his being arrested there in 2009. This information is not part of the trial court record, as it was not presented to the trial court at any time. Accordingly, we do not consider this evaluation.

[8] This court has recognized that "[t]he trial judge is in a particularly advantageous position to observe a defendant's conduct during a trial and has a unique opportunity to assess a defendant's competency. A trial court's opinion, therefore, of the competency of a defendant is highly significant. . . . Indeed . . . a trial judge who presides over a defendant's . . . trial will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant." (Citation omitted; internal quotation marks omitted.) *State* v. *Connor*, supra, 170 Conn. App. 629.

waive his right to counsel was a significant issue to be decided at trial.[9] Id. In the absence of evidence of such nature in the present case, we conclude that the record supports a finding that the defendant was competent to waive his right to counsel and that he was competent to represent himself at trial. Accordingly, these portions of the defendant's claim are unpersuasive.

B

We next address the defendant's claim that the court abused its discretion in determining that his waiver of the right to counsel was knowing, voluntary, and intelligent because the court "failed to comply with the federal constitutional standard and Practice Book § 44-3's requirement to conduct a 'thorough inquiry' into whether the defendant was truly knowingly, voluntarily, and intelligently waiving his right to counsel." We disagree with the defendant's claim.

In this claim concerning the adequacy of the court's canvass, the defendant raises three main arguments, namely, that the court did not make him aware of the "risks and disadvantages" of self-representation, did not make him aware of the penalties to which he was exposed, and failed to elicit whether he possessed "the intelligence and capacity" to appreciate the consequences of his decision to represent himself.[10]

[9] In *Connor I*, the defendant's behavior caused the prosecutor to state that, under the circumstances, the court "ha[d] . . . no choice but to order" a competency evaluation. (Internal quotation marks omitted.) *State* v. *Connor*, supra, 292 Conn. 490. For example, at a hearing in which the defendant requested that the court discharge his public defender, he stated that "the left side of [his] brain [was] not working as it should . . . ." (Internal quotation marks omitted.) Id. After the court ordered a competency evaluation, the evaluation team was unable to conduct its assessment of the defendant because he refused to cooperate with the team. Id., 491. Additionally, there were times when he did not speak or otherwise participate in court proceedings. Id., 501.

[10] The defendant also argues that the court, during its canvass, should have asked him or his counsel whether he had any documented or perceived mental health issues. He does not, however, cite authority stating that a court is required to make this inquiry during its canvass, nor are we aware of any such authority. Therefore, we conclude that this aspect of the claim lacks merit.

We note that a defendant "does not possess a constitutional right to a specifically formulated canvass . . . ." (Internal quotation marks omitted.) *State* v. *Diaz*, 274 Conn. 818, 831, 878 A.2d 1078 (2005). Instead, "[h]is constitutional right is not violated as long as the court's canvass, whatever its form, is sufficient to establish that the defendant's waiver was voluntary and knowing." (Internal quotation marks omitted.) Id.

With respect to the defendant's claim concerning the risks and disadvantages of self-representation, our previous recitation of the procedural history of this case reflects that the defendant expressed his desire to represent himself at two hearings prior to February 2, 2018, during which proceedings the court, *Blawie*, *J.*, twice attempted to canvass him and advised him about the risks of self-representation. On February 2, 2018, the court, *White*, *J.*, canvassed the defendant. The court asked questions that were sufficient to demonstrate that the defendant knew what was expected of him if he chose to represent himself. The court asked if the defendant understood that he would be responsible for filing motions, conducting legal research, selecting a jury, and complying with the rules of evidence and criminal procedure. The court advised him that there are great dangers in self-representation, such as making self-incriminating statements at trial.[11] We are not persuaded that the court failed to advise the defendant about the dangers and disadvantages of self-representation.

The defendant next argues that the court failed to advise him of the range of penalties that he would face

[11] We note that the court, *Blawie*, *J.*, also advised the defendant: "[T]he danger of self-representation is that you're at a disadvantage. And you would not be able to make the same objections to evidence to preserve the record for purposes of appeal, to understand the strength and weaknesses of the prosecutor's case. Because a competent trained attorney has the skill and training to defend and protect your rights, to assess the issues, and to understand the appropriate way to proceed."

upon conviction, as is required by *State* v. *Diaz*, supra, 274 Conn. 828, and *State* v. *T.R.D.*, supra, 286 Conn. 206. The defendant asserts that the court should have specifically told him during its canvass that he would face a maximum sentence of ten years of imprisonment if convicted.[12] In response to this argument, the state points to the fact that it met with the defendant on February 2, 2018, to discuss a plea offer, and that the defendant attended a hearing on the same date to discuss his rejection of that offer. The state acknowledges that, at this hearing, the court did not inform the defendant during the canvass about the potential exposure should he be convicted of second degree sexual assault. Nevertheless, the state argues that this error was harmless because, "[f]rom this offer, which was put on the record, the trial court reasonably could infer that the defendant had a meaningful appreciation of his potential punishment." We agree with the state.

In *Diaz*, the defendant waived his right to counsel after being canvassed by the trial court pursuant to Practice Book § 44-3. *State* v. *Diaz*, supra, 274 Conn. 828. During its canvass, the court referred only to the charges pending against the defendant as "very substantial" and to his cases as "big prison time cases . . . ." (Internal quotation marks omitted.) Id., 832. The defendant represented himself at trial, and a jury found him guilty of all counts as charged. Id., 827. On appeal, the defendant's primary claim was that his waiver of counsel was not knowing, voluntary, and intelligent "by virtue of the trial court's failure to inform him of the range of possible penalties that he would face upon conviction." Id., 828. Our Supreme Court agreed and concluded that the defendant was entitled to a new trial. Id., 828, 834. The

[12] The crime of second degree sexual assault under § 53a-71 (a) (3), as a class C felony, carries with it a maximum sentence of ten years of incarceration, with a mandatory minimum of nine months of incarceration. See General Statutes §§ 53a-35a (7) and 53a-71 (b).

court stated that the trial court's comments "provided no real guidance to the defendant with respect to the actual prison time to which he was exposed." Id., 832.

In *T.R.D.*, a defendant claimed that "his waiver of counsel could not be found [to have been] knowing and intelligent in the absence of anything in the record demonstrating that the defendant knew the possible term of incarceration . . . ." *State* v. *T.R.D.*, supra, 286 Conn. 198. The state conceded "that the court never specifically advised the defendant of the range of possible penalties he faced upon conviction." Id., 202. Our Supreme Court concluded that "there is simply no evidence present in the record from which we could infer that the defendant had any meaningful appreciation of the period of incarceration he faced if convicted of the charges he faced." Id., 206. Accordingly, the court granted the defendant a new trial. Id.

In the present case, however, the record reflects that the defendant had a meaningful appreciation of the possible penalties he faced if convicted after trial. At the February 2, 2018 hearing, the state informed the court that its plea offer was "[t]en [years of incarceration] suspended after four [years], fifteen years probation . . . ." The defendant rejected that offer and elected to represent himself at trial. During the required canvass, the court asked the defendant if he understood the "range of penalties," and he said that he did understand the range of penalties. Immediately after its canvass, the court informed the defendant that there was a mandatory minimum sentence. Before the court could state the length of the minimum, the defendant interjected and said, "[t]en years." After the court informed him that he was mistaken, the defendant said, "I mean, nine months, I'm sorry." The court confirmed that the defendant was correct, to which he responded, "[n]ine months, ten—okay." Thus, even though the court did not explicitly advise the defendant of the statutory maximum sentence and the mandatory minimum sentence,

the defendant's statements to the court, along with his discussions with the state regarding his plea offer that took place immediately prior to the canvass, sufficiently demonstrate that he was aware of the actual prison time to which he was exposed if convicted.

Additionally, the defendant asserts that, pursuant to *State* v. *Davenport*, 127 Conn. App. 760, 15 A.3d 1154, cert. denied, 301 Conn. 917, 21 A.3d 464 (2011), the court was required to advise him that he would need to register as a sex offender if convicted but failed to do so. The defendant misconstrues *Davenport*. In *Davenport*, this court held that, when a criminal defendant is required to register as a sex offender pursuant to General Statutes § 54-251 (a),[13] "prior to accepting the defendant's [guilty] plea, the court [is] required to both inform him that an entry of a finding of guilty after accepting his plea would subject him to the sex offender registry requirements and determine that he fully understood those consequences of his plea." Id., 766. In the present case, there is no such statutory requirement, as the defendant was not attempting to plead guilty. Rather, he was being canvassed with respect to his decision to represent himself.

Finally, we address the argument that the court failed in its canvass to elicit whether he possessed "the intelligence and capacity" to appreciate the consequences of self-representation. The defendant asserts that the court had an obligation to determine whether he was "familiar with Connecticut's procedural and evidentiary rules." The defendant also suggests that the court was required to ask him if he "had any mental health issues

[13] General Statutes § 54-251 (a) provides in relevant part: "Prior to accepting a plea of guilty or nolo contendere from a person with respect to a criminal offense against a victim who is a minor or a nonviolent sexual offense, the court shall (1) inform the person that the entry of a finding of guilty after acceptance of the plea will subject the person to the registration requirements of this section, and (2) determine that the person fully understands the consequences of the plea. . . ."

or ask his counsel whether they perceived the defendant to have mental health issues."

The defendant does not draw our attention to any legal requirement for these specific inquiries to have been made as part of the court's canvass, and we are not aware of any such requirement in our jurisprudence. We are persuaded that the court aptly inquired as to whether the defendant understood the types of responsibilities and dangers that flowed from his desire to represent himself, and that the defendant's responses to the court's inquiries reflected that he possessed the intelligence and capacity to appreciate the consequences of self-representation. The court inquired about the defendant's educational background, to which the defendant replied that he had obtained a "G.E.D. equivalency of a high school diploma." Also, the court asked the defendant if he had a prior of history representing himself, to which the defendant replied that he did not but that he nonetheless was willing to represent himself. The court inquired if the defendant was aware of the fact that self-representation would require him to select a jury, to comply with the rules of evidence, to follow proper procedures, to file "proper motions," and to conduct research. The defendant's responses to these inquiries did not suggest confusion or uncertainty but that he understood these obligations.

As we explained in part I A of this opinion, the record is devoid of any facts that should have given rise to any specific concerns in the court's mind about the defendant's capacity to waive his right to counsel and to represent himself. The defendant now asserts, without any reference to authority, that he had a "low education level" and, combined with his lack of a history of self-representation, his responses "showed [that] he did not possess the intelligence and capacity to appreciate the consequences of the decision to represent himself." Our review of the entire canvass reflects that it provided

the court with sufficient information to determine whether the defendant knowingly, voluntarily, and intelligently waived his right to counsel, and we are not persuaded that any further inquiries were required.

We likewise reject the defendant's suggestion that his education level and lack of experience as a self-represented litigant necessarily meant his election to represent himself was not intelligently made. His responses to the court's inquiries expressed his general understanding of the duties and risks that flowed from his election, and a willingness to perform all of the tasks required of him at trial. To accept the defendant's present argument would tend to undermine the weighty principle that "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation . . . ." *Faretta* v. *California*, supra, 422 U.S. 835. Moreover, the type of inquiry into the defendant's technical knowledge of law and practice on which the defendant relies is unwarranted, for a defendant's "technical legal knowledge . . . [is] not relevant to an assessment of his knowing exercise of the right to defend himself." Id., 836.

Practice Book § 44-3 is designed to help courts determine "[w]hether a criminal defendant is minimally competent to make the decision to waive counsel, and . . . whether the defendant actually made that decision in a knowing, voluntary and intelligent fashion." (Internal quotation marks omitted.) *State* v. *Braswell*, supra, 318 Conn. 829. After reviewing the transcript of the court's canvass concerning self-representation, we conclude that the court did not abuse its discretion in allowing the defendant to represent himself, or in determining that he made a knowing, voluntary, and intelligent waiver of his right to counsel.

II

The defendant next claims that the court abused its discretion by failing, sua sponte, to order a competency

hearing or to appoint counsel for him after it granted his request to represent himself.[14] We disagree.

The defendant did not raise this issue at trial and seeks review of this unpreserved claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (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. . . . The first two *Golding* requirements involve whether the claim is reviewable, and the second two involve whether there was constitutional error requiring a new trial." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 466–67, 10 A.3d 942 (2011).

The defendant has met the first two *Golding* requirements in that the record is adequate to permit review and that his claim is of constitutional magnitude. We conclude, however, that the defendant's claim does not satisfy the third prong of *Golding* because the constitu-

[14] The defendant does not indicate whether this claim relates to his competence to stand trial, his competence to waive his right to counsel, or his competence to represent himself. In the section of his appellate brief devoted to this claim, the defendant argues that "[t]he record from [his] pretrial hearings showed substantial evidence of [his] mental impairment and established that he would not be able to assist in his own defense." Accordingly, we interpret this claim to be about the defendant's competence to stand trial pursuant to § 54-56d, which provides in relevant part: "For the purposes of this section, a defendant is not competent if the defendant is unable to understand the proceedings against him . . . or *to assist in his or her own defense*." (Emphasis added.) General Statutes § 54-56d (a).

tional violation alleged by the defendant does not exist and, therefore, he was not deprived of a fair trial.[15]

"At the outset, we set forth the relevant standard of review and legal principles that guide our resolution of the issue. We review the court's determination of competency under an abuse of discretion standard. . . . In determining whether the trial court [has] abused its discretion, this court must make every reasonable presumption in favor of [the correctness of] its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did. . . .

"The conviction of an accused person who is not legally competent to stand trial violates the due process of law guaranteed by the state and federal constitutions. . . . This rule imposes a constitutional obligation, [on the trial court], to undertake an independent judicial inquiry, in appropriate circumstances, into a defendant's competency to stand trial . . . . [Section] 54-56d (a) codified this constitutional mandate, providing

[15] In his brief to this court, the defendant also argues that the trial court committed plain error by failing to order a competency evaluation. "[T]he plain error doctrine . . . has been codified at Practice Book § 60-5, which provides in relevant part that [t]he court may reverse or modify the decision of the trial court if it determines . . . that the decision is . . . erroneous in law. . . . The plain error doctrine is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . The plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) *Houghtaling* v. *Commissioner of Correction*, 203 Conn. App. 246, 281–82, 248 A.3d 4 (2021). For the reasons set forth in our *Golding* analysis, we do not agree that the defendant has demonstrated that plain error exists.

in relevant part: 'A defendant shall not be tried, convicted or sentenced while the defendant is not competent. . . . [A] defendant is not competent if the defendant is unable to understand the proceedings against him or her or to assist in his or her own defense.'

"This statutory definition mirrors the federal competency standard enunciated in *Dusky* v. *United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (per curiam). According to *Dusky*, the test for competency must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him. . . . Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial. . . . Thus, in appropriate circumstances, a trial court must, sua sponte, make a further inquiry into a defendant's competence to ensure that he is competent to plead guilty. . . . A court is required to conduct such an inquiry whenever [the court becomes aware of] substantial evidence of mental impairment. . . . Substantial evidence is a term of art. Evidence encompasses all information properly before the court, whether it is in the form of testimony or exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the court. Evidence is substantial if it raises a reasonable doubt about the defendant's competency . . . .

"Nonetheless, § 54-56d (b) presumes that a defendant is competent, and [t]he standard governing the determination of competency to stand trial is a relatively low one and . . . mental illness or reduced mental capacity does not alone provide a basis for concluding that a defendant is not competent to stand trial. . . . An

accused may be suffering from a mental illness and nonetheless be able to understand the charges against him and to assist in his own defense . . . .'' (Citations omitted; internal quotation marks omitted.) *State* v. *Paulino*, 127 Conn. App. 51, 61–63, 12 A.3d 628 (2011).

In the present case, the defendant claims that his conduct after the court's February 2, 2018 canvass constituted substantial evidence of mental impairment. Thus, he argues, the trial court had a duty ''to either order a competency evaluation or appoint counsel for [him].''

In *State* v. *Paulino*, supra, 127 Conn. App. 51, a criminal defendant waived his right to counsel and claimed on appeal that the trial court should have, sua sponte, during the trial, ordered a competency evaluation. Id., 52, 56. The defendant pointed to behavior on his part, during the trial proceedings, that he argued constituted substantial evidence of mental impairment. Id., 65. For example, ''he responded 'God told me so,' when asked by the court why he was electing a court trial rather than a jury trial,'' and ''expressed a desire to 'contact the whole world' about his case . . . .'' Id. In disposing of the defendant's claim, this court noted that it was ''unaware . . . of evidence that was before the court that would have indicated that the defendant suffered from *any* known or apparent mental disease or defect, much less one that would have impacted his ability to understand the charges against him and assist in his defense.'' (Emphasis in original.) Id., 63–64. Additionally, this court stated that ''the trial judge is in a particularly advantageous position to observe a defendant's conduct during a trial and has a unique opportunity to assess a defendant's competency. A trial court's opinion, therefore, of the competency of a defendant is highly significant. . . . As such, the trial court was entitled to rely on its own observations of the defendant's responses during the canvassing, in light of his demeanor, tone, attitude and other expressive characteristics. . . .

The trial court was in the best position to assess whether the defendant behaved rationally at that time." (Citation omitted; internal quotation marks omitted.) Id., 64–65. The trial court "offered no indication that it thought that the defendant was incompetent to stand trial." Id., 64.

As in *Paulino*, the defendant in the present case points to several instances after the trial court's February 2, 2018 canvass in which he contends that his conduct showed "substantial evidence of [his] mental impairment and established that he would not be able to assist in his own defense." Additionally, the defendant argues that his conduct during the criminal trial gave rise to a duty on the part of the court to order a competency evaluation or to appoint counsel for him. He argues that he filed "nonsensical, incoherent motions, contesting the trial court's jurisdiction over him and relying on the articles of the [Uniform Commercial Code],"[16] "referred to himself in the third person, filed special limited appearances on his behalf,[17] was disruptive, frequently interrupted the trial court, and had difficulty staying focused." (Footnote added.) He asserts that, during the trial, he asked few questions on cross-examination, did not object to any of the state's questions during the direct examination of the victim, did not present any evidence in support of his defense, and elected not to testify. Additionally, the defendant argues that his "refusal to cooperate with his attorneys . . . showed that he could not conform his behavior and brings into question his comprehension of the judicial process."

[16] The defendant filed a motion to dismiss in which he argued that the court did not have jurisdiction over him. The court denied this motion. At trial, after the state had rested, the defendant renewed his previous motion to dismiss, arguing that "[c]riminal codes and statutes do not apply to human beings."

[17] At the beginning of the trial, the defendant stated that he was "making a special appearance on behalf of the defendant, who is right here."

The state, on the other hand, accurately draws our attention to several instances during the trial in which the defendant meaningfully participated in his defense. For example, when the state offered into evidence photographs of the house where the sexual assault took place, the defendant objected on relevance grounds. While cross-examining the victim, he "attempted to challenge the victim's credibility by questioning her regarding the delay in her disclosure to the police and whether she had been intoxicated at the time of the incident."[18] Through his cross-examination of his cousin, Michael Harris, and the defendant's brother, Kaynon Williams,[19] the defendant demonstrated that neither of them had actually witnessed the alleged assault.[20]

The state notes that, after the defendant renewed his motion to dismiss for lack of jurisdiction, he moved for a judgment of acquittal in which he argued that the evidence that the state presented was insufficient to convict him. The defendant stated that "there were plenty of inconsistent statements, phrases, that were used by the alleged witnesses and victim. There's no

[18] The state presented evidence that the assault occurred at the home of the defendant's cousin, Michael Harris. The victim testified that she fell asleep at about 5:35 a.m. on the morning of May 6, 2017, and that the assault occurred shortly thereafter. Detective David Hudyama of the Norwalk Police Department testified that, on the night of May 8, 2017, the victim, Harris, and Harris' sister went to the police station and reported the assault. Additionally, the state presented evidence that the victim had arrived at Harris' house at approximately 2 a.m. on May 6, 2017, and consumed alcohol throughout the night and smoked marijuana.

[19] Kaynon Williams, the defendant's brother, testified at the trial.

[20] The state presented evidence that the defendant and the victim were alone in Harris' bedroom when the assault occurred. The victim testified that, immediately following the assault, she went downstairs into a room where Harris, Kaynon Williams, and two other individuals were located, and told Harris that she needed to speak with him. She then testified that she and Harris went into the basement of the home, but before she could tell Harris what had occurred, the defendant walked into the basement. Harris testified that he forced the defendant to leave his home. The victim testified that she told Harris about the assault after the defendant left Harris' home.

physical evidence, no DNA, no clothing evidence, no witnesses saw anything.'' The defendant further contended that the victim could have been ''mental[ly] impaired'' at the time of the alleged assault because she testified that she was ''tipsy'' from drinking alcohol and smoking marijuana. Moreover, the state notes that, ''[d]uring closing arguments, the defendant argued that there was insufficient evidence to convict him because the state's case was dependent upon the victim's testimony, the victim had been intoxicated, and the rest of the evidence was circumstantial.''

We are not convinced that the defendant's behavior after the February 2, 2018 canvass should have prompted the court, sua sponte, to order a competency hearing. At no point after the canvass did the court express concerns about the defendant's competency.[21] Furthermore, the defendant's actions after the state had rested its case demonstrate that he had a basic understanding of the judicial process and a trial strategy for creating reasonable doubt about the veracity of the allegations against him. Even if some of his arguments were not well grounded in the law, and his representation lacked the hallmarks of an attorney skilled in the practice of law, he showed that he had a rational understanding of the proceedings by challenging the sufficiency of the evidence that was before the court. In short, the record reflects that the defendant interacted intelligently with the court, advanced arguments in support of his defense, and actively participated in the trial.

We conclude, therefore, that the court did not abuse its discretion in not ordering, sua sponte, a competency hearing. Accordingly, the defendant has failed to demonstrate that a constitutional violation exists and that it deprived him of a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.

[21] See footnote 8 of this opinion.